

# THE INEVITABLE IRRELEVANCE OF AFFIRMATIVE ACTION JURISPRUDENCE

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## INTRODUCTION

*Fisher v. University of Texas*<sup>1</sup> presents an Equal Protection challenge to the University of Texas' race-preference admissions policy. In this article, I am proceeding on the assumption that, in its decision, the Court will not abolish affirmative action programs wholesale, if it addresses the merits of Abigail Fisher's challenge. Considering the present makeup of the Court following *Fisher*, colleges, universities, and graduate schools will remain free to pursue the Court's previously announced goal of admitting

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1. *Fisher v. Univ. of Tex.* at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

individual students who, as a group, present a critical mass of diverse viewpoints.<sup>2</sup> To meet this goal, those institutions that take race into account in the admissions process must create programs that are narrowly tailored to achieve the compelling governmental interest in what has come to be considered viewpoint diversity, an assurance of otherwise underrepresented voices in the classroom.<sup>3</sup>

In many instances, accepting students who will bring a differing viewpoint to the classroom is contrary to the current trend among colleges and universities to pursue favorable national recognition from various news outlets, most notably *U.S. News & World Report*.<sup>4</sup> The problem lies with consideration of underrepresented students, who generally apply to colleges and universities with academic test scores that are not competitive with their majority peers.<sup>5</sup> The disparity between minority and majority applicant test scores means that admitting a significant number of minority students would result in a potential decrease in a school's mean standardized test scores for entering students, numbers that factor significantly into a school's national rank. For the most part, institutions of higher education have become so consumed with the goal of achieving the highest possible ranking that they are uninterested in constructing constitutionally permissible race-preference admissions programs, even in light of the Court's continued guidance on the matter.

Although the Court has considered the constitutionality of race-preference admission policies on only two occasions,<sup>6</sup> the law concerning the matter is fairly clear. Justice Powell, in the 1978 case of *University of California v. Bakke*,<sup>7</sup> charted a new course for programs that were originally designed to remedy the present effects of past discrimination, presenting them instead as programs that benefit everyone in the classroom, by ensuring a diversity of viewpoints.<sup>8</sup> And as recently as 2003, the Court reaffirmed its conclusion that there is a compelling governmental interest in ensuring viewpoint diversity in the classroom.<sup>9</sup> Institutions, therefore, can construct policies that are narrowly tailored to meet that interest.

In the one instance in which the Court upheld race-preference programs, *Grutter v. Bollinger*,<sup>10</sup> the Court held that a policy that provided for

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2. See *Grutter v. Bollinger*, 539 U.S. 306, 315–17 (2003).

3. See *id.*

4. See *infra* notes 344–346 and accompanying text.

5. See *infra* notes 347–350 and accompanying text.

6. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter*, 539 U.S. 306, and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (decided the same day as *Grutter*).

7. *Bakke*, 438 U.S. 265.

8. *Id.* at 312–14 (citations omitted) (A college or university may consider race as one of a host of other factors in achieving a learning environment open to “speculation, experiment, and creation.”).

9. *Grutter*, 539 U.S. at 328 (2003) (“Today, we hold that the [University of Michigan] Law School has a compelling interest in attaining a diverse student body.”).

10. *Grutter*, 539 U.S. 306.

individual review of applicants' diverse qualities, including race, as a means to ensure diverse voices, was sufficiently flexible and narrow enough to withstand judicial scrutiny.<sup>11</sup>

Following *Grutter*, the University of Texas (UT) adopted an admissions policy that considered a host of soft factors, including race, for those Texas residents who were not otherwise admitted by virtue of graduating in the top 10% of their Texas high school class.<sup>12</sup> Abigail Fisher, the plaintiff in the case, was rejected under both points and consequently sued the school.<sup>13</sup> Her case has made its way to the Supreme Court for consideration.<sup>14</sup>

Based on the existing precedent, the Court can decide the *Fisher* case in any of three ways. First, the Court could avail itself of the opportunity presented by *Fisher* to expand the constitutional permissiveness of considering race as a factor in admissions decisions.<sup>15</sup> Given that four of the eight justices deciding this case<sup>16</sup> have made clear their strong opposition to the use of race in this context, this scenario is highly unlikely.<sup>17</sup> At the other end of the spectrum, the Court could find that there is no longer a compelling governmental interest in the use of race in the admissions process, thereby causing the sun to set on affirmative action admissions policies much sooner than Justice O'Connor predicted in her majority opinion in *Grutter*.<sup>18</sup> This is an equally unlikely scenario because four of the Justices have already confirmed their commitment to the compelling governmental interest in using race-preference policies to achieve viewpoint diversity.<sup>19</sup> The most likely outcome is that the Court will rule very narrowly, striking down the UT program as not being narrowly tailored, while leaving intact the Court's previously articulated

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11. *Id.* at 337–39 (citations omitted).

12. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224, 227–28 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

13. *Id.* at 217.

14. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

15. *See infra* Part III.B (discussing socioeconomic status as an alternative approach to traditional affirmative action admissions standards).

16. Justice Kagan has recused herself from the decision because she was Solicitor General when the Obama administration filed a brief with the lower courts siding with the University of Texas. Jess Bravin, *Justices to Revisit Race Issue*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/article/SB10001424052970203358704577237112218477648.html>.

17. *See infra* Part II.D (evaluating the probable outcome of *Fisher*, based on Supreme Court Justices' decisions in similar cases on race-preference admissions policies).

18. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in student body diversity] approved today.”).

19. *See infra* Part II.D (discussing why, in deciding *Fisher*, Justices Ginsburg, Breyer, Kennedy, and Sotomayor are likely to uphold the Court's compelling governmental interest in viewpoint diversity).

finding of a compelling governmental interest in diversity education.<sup>20</sup>

Thus, colleges and universities will remain free to construct some type of race-preference admissions policy in an effort to ensure diversity among their classes. Despite the Court's commitment to upholding the narrow use of race in the admissions process, however, most institutions will be unable or, more likely, unwilling to construct constitutionally permissible race-preference admissions programs. The problem lies with the egos and the budgets of the administrators of today's colleges and universities. The current quest in academia to climb in the rankings promotes a meritocratic system in which many African-Americans and Hispanics, who, studies confirm, perform less well on standardized tests than whites or Asian-Americans, cannot compete.<sup>21</sup> Colleges and universities concerned with reporting high academic test scores do not admit more than a small number of students who apply with weaker academic scores, despite their personal achievement or other indicia of academic success.<sup>22</sup> Moreover, institutions faced with an unprecedented number of applicants cannot commit to a holistic individualized review because doing so would be extremely costly and time-consuming.<sup>23</sup>

Sadly, the current trend in post-secondary education to race to the top of the rankings combined with the increase in applications at most academic institutions is diametrically opposed to constructing a flexible, individualized, and therefore, constitutionally permissible race-preference program. Ensuring elite status by admitting students with the highest standardized test scores yields a racially homogenous entering class.<sup>24</sup> The need for efficiency mandates that colleges and universities define a standardized test cutoff point for admission to their school, thereby decreasing the number of students whom the school must consider. Despite some reports to the contrary, school admissions boards remain unwilling or uninterested in removing themselves from the ratings game.<sup>25</sup> For this reason, regardless of how the Court decides, *Fisher* will ultimately be inconsequential to school admissions decision-making and, therefore, will do little more than highlight the growing irrelevance of affirmative action jurisprudence.

This article proceeds in three parts. In Part I of this article, I provide a

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20. See *infra* notes 296–300 and accompanying text.

21. See THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf> (reporting much lower mean Scholastic Aptitude Test (SAT) scores for African-American and Hispanic students than for white students, across critical reading, math, and writing components of the SAT).

22. See Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 489–91 (2007).

23. *Id.* at 503.

24. See *id.* at 508.

25. *Id.*

narrative of affirmative action jurisprudence in higher education, with a particular focus on the meaning of viewpoint diversity in higher education.<sup>26</sup> This section tracks the definitional shift in preference policies from their original design as remedial and compensatory programs for those suffering the effects of educational discrimination to interest convergence programs, which assure equal benefits irrespective of race. In Part II, I explore the circumstances giving rise to *Fisher*, including an overview of the lower court decisions. This section presents a discussion of the likely outcome of the *Fisher* case based on past rulings by members of the current Court and predicts that the Court will decide *Fisher* on very narrow grounds.<sup>27</sup> In Part III, I explore the underpinnings of the post-secondary education admissions process. This section explores the contemporary goals of most institutions' admissions, including their moral sense of providing a compensatory education to groups that previously experienced academic disadvantage, the nature of elitism in education fueled in large part by *U.S. News & World Report*,<sup>28</sup> and the goal of colleges and universities to admit the most qualified students in the wake of an ever growing volume of applicants. This section concludes that colleges and universities, for both financial and egotistical reasons, are more concerned with their academic reputation than with Constitutional limitations on their admissions policies, and as a result, for the most part, colleges and universities will continue to try to use race as a plus, regardless of any future Supreme Court edict.

#### I. AFFIRMATIVE ACTION ADMISSIONS POLICY JURISPRUDENCE

The Supreme Court has expressed little opinion on race-preference admissions policies in higher education. In fact, over the past forty years, the Court has taken up the matter only twice.<sup>29</sup> These cases, coupled with the executive mandate for affirmative action and cases outside the higher education context, set the precedential stage for the Court's decision in *Fisher*. In this section, I provide a historical overview of the executive and judicial decisions that will inform the Court's decision in *Fisher*.

##### A. The Civil Rights Movement

The term "affirmative action" first appeared in a 1961 executive order

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26. See *infra* notes 69–70 and accompanying text (discussing viewpoint diversity).

27. See *infra* notes 246–286 and accompanying text (discussing indicia of each member of the Court's opinion on affirmative action and the likely outcome).

28. See *Rankings*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/rankings> (last visited Sept. 1, 2012) (Annually, *U.S. News & World Report* ranks undergraduate and graduate institutions in the country.).

29. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Note that *Grutter* and *Gratz v. Bollinger* were decided on the same day, making the tally really three cases, were decided on the same day, making the tally really three cases.

issued by President John F. Kennedy; it required government contractors to “take affirmative action to ensure” that individuals are employed and treated equally without regard to race, creed, color, or national origin.<sup>30</sup> Four years later, and one year after Congress adopted the Civil Rights Act of 1964,<sup>31</sup> President Lyndon B. Johnson issued Executive Order 11,246, which required federal contractors to “take affirmative action” to hire without regard to race, religion, or national origin.<sup>32</sup> Executive Order 11,246, when read with the Civil Rights Act, was meant to guarantee that companies doing business with the government took active steps toward recruiting, hiring, and retaining members of underrepresented minority classes, which had historically been denied access to jobs at a rate equal to their majority counterparts.

Under Executive Order 11,246, most entities doing business with the government, or receiving government funding, must develop a written affirmative action compliance program and must further demonstrate proof that they are complying with their programs.<sup>33</sup> Following the issuance of Executive Order 11,246 and the series of compliance rules that were enacted in response to its adoption, “affirmative action plans” became the loosely used terminology for any program or methodology designed to enhance racial, ethnic, and, eventually, female representation in business and government entities.<sup>34</sup>

For the ten years following the moment when affirmative action came into being, affirmative action plans and programs primarily concerned themselves with commercial entities.<sup>35</sup> Executive Order 11,246 was equally applicable to colleges and universities receiving federal funding, yet little attention was paid to the educational sector, thereby directing attention primarily on affirmative action plans to improve diversity in hiring and employment.<sup>36</sup> Title VI of the Civil Rights Act of 1964, however, prohibited race or national origin discrimination by any program or activity receiving federal financial assistance, including colleges and universities, thereby setting the groundwork for affirmative action admissions plans.<sup>37</sup> In 1973, the Department of Health, Education, and Welfare, interpreting Title VI for the first time, used affirmative action

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30. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

32. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965) (amended to include gender in 1968).

33. See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 613–14 (1998) (footnotes omitted) (historical analysis of affirmative action beginning in the 1700’s and continuing to the mixed success of modern affirmative action programs).

34. See *id.* (footnotes omitted).

35. *Id.* at 618 (footnote omitted).

36. *Id.* at 618–19 (footnotes omitted).

37. *Id.* at 619 (footnotes omitted).

language when it amended its regulations.<sup>38</sup> According to the regulation, educational institutions found to have had past discrimination were required to create an affirmative action plan.<sup>39</sup> Those educational institutions at which the government had not found instances of discrimination were encouraged to create affirmative action plans.<sup>40</sup> By the mid-1970s, institutions of higher education had embraced the notion of employing affirmative action admissions programs, which was the name given to aspects of admissions plans that considered race as a factor in the admissions process.<sup>41</sup>

Both educational and commercial affirmative action plans were met with significant opposition.<sup>42</sup> Affirmative action was seen as a zero-sum game.<sup>43</sup> Ensuring the rights of one person meant necessarily disqualifying the rights of another for the same jobs or place in an entering class. Not surprisingly, governmental efforts to grant access to those to whom such access was previously denied based on the color of their skin quickly became an issue of constitutional scrutiny.

#### B. University of California v. Bakke

*University of California v. Bakke*<sup>44</sup> was the first affirmative action challenge to a race-based admissions policy that the Supreme Court

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38. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 n.12, 418 n.22 (1978); see also 45 C.F.R. § 80.3(b)(6)(ii) (2012) (“Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”).

39. 45 C.F.R. § 80.3(b)(6)(i) (“In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.”).

40. *Id.* § 80.3(b)(6)(ii). (“Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”).

41. *Challenging Race Sensitive Admission Policies: A Summary of Important Rulings*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/race/summary.html> (last visited Sept. 1, 2012).

42. See *id.* (discussing several successful legal challenges to affirmative action admissions policies); Cedric Herring & Loren Henderson, *From Affirmative Action to Diversity: Toward a Critical Diversity Perspective*, 38 *CRITICAL SOC.* 629, 631 (2011).

43. See *Challenging Race Sensitive Admission Policies*, *supra* note 41 (noting that many opponents of affirmative action admissions policies thought of affirmative action as reverse discrimination).

44. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see generally Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 *J.C. & U.L.* 895 (1996) (discussing the *Bakke* decision within the article’s analysis of the legal limits on a law schools’ adoption of diversity admissions policies).

considered on the merits.<sup>45</sup> Allan Bakke, a white male, unsuccessfully applied for admission to the University of California at Davis (Davis) Medical School in 1973 and in 1974.<sup>46</sup> At the time when Bakke applied to the Medical School, Davis had employed an affirmative action admissions policy that divided applicants into two groups, minority and majority.<sup>47</sup> The school set aside a certain number of seats for minority members, who could be admitted even if their undergraduate grade point averages (GPAs) and Medical College Admission Tests (MCATs) were lower than those of the applicants rejected from the majority pool.<sup>48</sup> Davis rejected Bakke's application in both 1973 and 1974, even though the school accepted minority applicants with lower test scores.<sup>49</sup> Following the second rejection, Bakke sued Davis and the Regents of the University of California in state court,<sup>50</sup> arguing that the Davis admissions policy violated the Equal Protection Clause,<sup>51</sup> the California Constitution,<sup>52</sup> and Title VI of the Civil Rights Act of 1964 (Title VI).<sup>53</sup>

The case made its way to the Supreme Court, which considered both the Equal Protection claim and the Title VI claim.<sup>54</sup> The Court first considered the proper level of scrutiny for reviewing the challenge.<sup>55</sup> A majority of the Court concluded that because the Davis program considered race, it was subject to the strictest of scrutiny and would only pass constitutional muster if it were "precisely tailored to serve a compelling governmental

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45. See Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of "Race" in the Post-Bakke Era*, 72 ALB. L. REV. 863, 866 (2009).

46. *Bakke*, 438 U.S. at 276.

47. *Id.* at 274–76. Under a special admissions program, applicants could indicate on their medical school applications whether they wished to be considered as "economically and/or educationally disadvantaged". *Id.* at 274. To fall into such a "minority group", applicants could select one of the following categories: "Blacks", "Chicanos", "Asians", or "American Indians"; "White" or "Caucasian" was not an option. *Id.* (citation omitted). From 1971–1974, only ethnic minority students obtained admission under the special program, even though disadvantaged white students also applied to the special program. *Id.* at 275–76.

48. *Id.* at 275, 277 n.7.

49. *Id.* at 276–77 (footnote omitted).

50. *Id.* at 277 (footnote omitted).

51. U.S. CONST. amend. XIV, § 1, reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

52. CAL. CONST. art. I, § 7(b), reads: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

53. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006), reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

54. *Bakke*, 438 U.S. at 281.

55. *Id.* at 287–91.



interest.”<sup>56</sup>

The Court was sharply divided on the constitutionality of the Davis program.<sup>57</sup> Justice Powell announced the judgment of the Court in an opinion that no other Justice joined.<sup>58</sup> Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist concurred in finding that the program was unlawful, but based their conclusion that the program violated of Title VI.<sup>59</sup> These five Justices made up the majority necessary to invalidate the Davis program.

Justice Powell held invalidated the Davis Program invalid, because, in his opinion, the program violated the Equal Protection Clause.<sup>60</sup> He thought that the Davis policy of setting aside a certain number of seats was tantamount to a quota and therefore in violation of the Constitution.<sup>61</sup> In his opinion, however, the Constitution does permit some permissible uses of race in admissions decisions to institutions of higher education.<sup>62</sup> Specifically, Justice Powell found “a compelling interest in ameliorating or eliminating, where feasible, the disabling effects of identified discrimination.”<sup>63</sup>

Justice Powell paid particular attention to the benefits that both minorities and the non-minority would experience from learning in a classroom filled with diverse voices.<sup>64</sup> According to Powell, encouraging diversity in the student population is a compelling interest that is sometimes permissible, even if such action results in unequal treatment.<sup>65</sup> The majority student would greatly benefit, and his or her educational training would be enhanced, by having the opportunity to learn, study, and discuss academic information with students from diverse backgrounds.<sup>66</sup> A

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56. *Id.* at 291, 299. Justice Powell also wrote that in “order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.” *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973) (footnotes omitted)). See also *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

57. *Bakke*, 438 U.S. at 266–67.

58. *Id.* at 267.

59. See *id.* at 408–22 (showing that Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist did not reach the constitutional question because they concluded that the program in *Bakke* violated Title VI).

60. *Id.* at 289.

61. *Id.* at 307; see also 311–14 (stating specific goals or quotas are always impermissible to achieve diversity or to dismantle past discrimination.).

62. *Id.* at 315 (“Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”).

63. *Id.* at 325.

64. *Id.* at 307.

65. *Id.* at 307.

66. *Id.*

diverse student body contributing to a “robust exchange of ideas” is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.<sup>67</sup> The Constitution does not bar admission policies from introducing race as a factor in the selection process.

Justices Brennan, White, Blackmun, and Marshall dissented from the conclusion of the majority but agreed with Justice Powell that race-based programs are sometimes permissible.<sup>68</sup> The four Justices endorsed most of Justice Powell’s opinion.<sup>69</sup> Consequently, following *Bakke*, later Courts embraced two principles that stemmed from Justice Powell’s opinion. First, benefits of viewpoint diversity could be considered advantageously in the admissions process, and second, any affirmative action admissions policy would be upheld only if it were “precisely tailored to serve a compelling governmental interest.”<sup>70</sup> This language became the basis of the strict scrutiny test applied to affirmative action programs. A state or state agency meets the strict scrutiny test when it demonstrates a compelling governmental interest and shows that the program or policy developed by the agency was narrowly tailored to help meet that compelling governmental interest.<sup>71</sup>

Justice Powell’s opinion shifted the focus of affirmative action admissions policies from remedial and compensatory programs aimed at ameliorating present effects of past discrimination to a more neutrally principled concept. Powell re-envisioned the race-based admissions programs as offering enhanced learning experiences for all.<sup>72</sup> The original intent of affirmative action admissions programs, to provide opportunities for those who suffered from educational discrimination in the past,<sup>73</sup> meant favoring one group over the other.<sup>74</sup> But defining the advantage of race-preference admissions in terms of a benefit to all, the programs became more palatable to the majority, who otherwise perceived themselves to be hurt by a program that benefited other groups at their expense.<sup>75</sup>

Many viewed Justice Powell’s shift of affirmative action admissions policies from a concept designed to eradicate present effects of past discrimination to one that benefits both whites and blacks equally as the genesis of “interest convergence,” a theory proposed by Derrick Bell that

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67. *Id.* at 311–13. Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 313.

68. *Id.* at 325 (Brennan, J., concurring).

69. *Id.* at 324 (Brennan, J., concurring).

70. *Id.* at 300.

71. *Id.* at 313.

72. *See generally, id.* at 300–25.

73. *See supra* Part I.A (outlining the development of affirmative action admissions programs).

74. *Bakke*, 438 U.S. at 297.

75. *Id.* at 300–25.

white people would support racial justice only to the extent that it benefits them.<sup>76</sup> Justice Powell's advocacy of viewpoint diversity reframed race-preference admissions policies in terms of the benefits that majority students would reap from a school's assurance that otherwise underrepresented minorities would be present in the classroom. His interest-convergence logic seemed to make the notion of race-preference admissions policies seemingly more palatable to majority applicants, many of whom could view race-preference admissions policies as being valuable to them.<sup>77</sup>

Post-*Bakke*, the Court embraced Justice Powell's interest convergence theory of race-preference admissions policies. Consequently, the Court evaluated the race-preference challenges in terms of the policies' benefit to majority and minority applicants. This newfound track veered the Court from the original course set by President Johnson to use race-preference policies as a means of remedying the present effects of past discrimination.<sup>78</sup> Thus from *Bakke* forward, colleges and universities could consider race a "plus" if, in so doing, they created what Jeremiah Chin termed a moral "mixtape" for the classroom.<sup>79</sup> In other words, through careful selection of the voices that students heard in the classroom, an educational experience could be created that is greater than the sum of each of its individual parts.<sup>80</sup>

The Court heard its next affirmative action admissions policy cases twenty-five years after deciding *Bakke*. In the interim, several circuit courts took up challenges to affirmative action admission policies,<sup>81</sup> and the Court also defined the constitutional parameters of affirmative action cases in the workplace.<sup>82</sup> But the lower court cases were not binding

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76. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

77. See, e.g., *id.* at 532–33 ("Many white parents recognize a value in integrated schooling for their children [such as in magnet schools] but they quite properly view integration as merely one component of an effective education.").

78. See, e.g., Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965).

79. Jeremiah Chin, Comment, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 369–70 (2012) (discussing post-racial rhetoric—in other words, a "mixtape"—and the lack of discourse on the persistence of racism, even decades after the Civil Rights Movement).

80. *Id.* at 396.

81. *Smith v. Univ. of Wash. Law. Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Justice Powell's opinion in *Bakke* authorizes a "properly designed and operated race-conscious admission program"); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (concluding that Justice Powell's opinion in *Bakke* was not binding on the Fifth Circuit); *Johnson v. Bd. of Regents of Univ. of Ga.*, 106 F. Supp. 2d 1362, 1368 (S.D. Ga. 2000) (holding that Justice Powell's opinion in *Bakke* regarding a compelling governmental interest in student diversity "is not binding..although ...it is persuasive).

82. See e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (reviewing

nationwide, and the affirmative action challenges in the commercial context, other than affirming the rational test, were distinguishable.<sup>83</sup> Consequently, the Court's opinion in the twin cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*<sup>84</sup> were the first post-*Bakke* cases to further shape race-preference admissions policies.

### C. Post-Bakke Decisions

In *Grutter* and *Gratz*, the Court considered the constitutionality of affirmative action admissions programs at the University of Michigan School of Law ("Law School")<sup>85</sup> and the University of Michigan College of Literature, Science, and Arts ("LSA"),<sup>86</sup> respectively. The Supreme Court heard the cases separately and issued opinions to the two cases on the same day.<sup>87</sup>

LSA based its admissions policy on a 150-point scale.<sup>88</sup> The admissions office assigned points based on several factors including high school grade point average, standardized test scores, high school curriculum, and underrepresented racial or ethnic background.<sup>89</sup> Students from an underrepresented racial or ethnic background were automatically assigned twenty points,<sup>90</sup> a potentially significant advantage over students not from

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federal agency contract clause providing financial incentive to hire certified disadvantaged businesses); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (reviewing city policy requiring that at least thirty percent of any city construction contract be subcontracted to "Minority Business Enterprises"); *United States v. Paradise*, 480 U.S. 149 (1987) (reviewing district court order requiring that fifty percent of promotions to certain ranks within the Alabama Department of Public Safety be given to qualified black candidates); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (reviewing provision in teacher contract which resulted in non-minority teachers with greater seniority being laid off before minority teachers with lesser seniority); *see generally*, Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court Should Adopt a Compelling Governmental Interest Test for Race-Preference Student Assignment Plans*, 56 U. Kan. L. Rev 277 (2008).

83. *See supra* note 81.

84. 539 U.S. 244 (2003).

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

86. *Gratz*, 539 U.S. 244.

87. *Grutter* and *Gratz* were both decided on June 23, 2003.

88. *Id.* at 255.

89. *Id.*

90. *Id.* LSA's admissions point system also assigned points based on additional factors, including alumni relationship, personal essay, and demonstrated leadership qualities. *Id.* The twenty points automatically assigned to students from an underrepresented racial or ethnic background could have given those applicants a significant advantage because applicants with a score of over 100 automatically received admission to LSA. *Id.* at 277 (O'Connor, J., concurring).

Plaintiffs in *Gratz* challenged LSA's admissions policy under Sections 1981, 1983, and 2000d of the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 2000d (2000), and the Equal Protection Clause of the Fourteenth Amendment, alleging that LSA improperly used race as a factor in determining admissions. *Gratz*, 539 U.S. at 252 (majority opinion) (citation omitted). Under one variation of the admissions policy, the school used a

an underrepresented racial or ethnic background.

The Law School admissions program called for the enrollment of a “critical mass of underrepresented minority students” as a means of creating a diverse student body.<sup>91</sup> Under the written policy, those reviewing applications for admission were encouraged to consider factors including recommendations, quality of the undergraduate institution, essays, course selection, and whether the applicant had a perspective or experience that would contribute to a diverse student body.<sup>92</sup>

As per *Bakke* and the ensuing affirmative action cases that the Court considered in the context of the workplace,<sup>93</sup> the Supreme Court reviewed the Law School and LSA policies, respectively, under the strict scrutiny test because the plaintiffs in each case challenged the affirmative action admissions policies as violating of the Equal Protection Clause.<sup>94</sup> In both *Grutter* and *Gratz*, the Court swiftly accepted as binding Justice Powell’s majority opinion in *Bakke*, finding a compelling governmental interest in achieving a diverse entering class.<sup>95</sup> The Court reached different conclusions as to whether the admissions policies were narrowly tailored, choosing to uphold the Law School admissions policy and to invalidate the LSA policy.<sup>96</sup> Read together, the cases suggest that institutions of higher education remain free to consider race as one factor among several factors in the admissions policy so long as the consideration is individualized.<sup>97</sup>

A majority of the Court struck down the LSA program, finding that it was overly broad.<sup>98</sup> According to Chief Justice Rehnquist, who wrote the majority opinion in *Gratz*, the LSA point-allocation policy, which awarded twenty points to underrepresented minorities, “ensures that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional.<sup>99</sup>

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150-point scale to rate applicants. *Id.* at 294. Applicants were assigned points based on race. *Id.* at 294–95. The district court upheld the program, and plaintiffs appealed to the Supreme Court. *Id.* at 258–60. See also Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 655–56 (2005) (discussing the LSA policy).

91. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

92. *Id.* at 315. The district court struck down the Law School policy finding that it did not survive the strict scrutiny test. The Sixth Circuit reversed. *Id.* at 321.

93. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995) (reviewing allegations of workplace discrimination allocating federal government contracts); *United States v. Paradise*, 480 U.S. 149, 163 (1987) (reviewing allegations of workplace discrimination of government workers).

94. *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

95. *Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 325.

96. *Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 325.

97. *Gratz*, 539 U.S. at 269; *Grutter*, 539 U.S. at 309–10.

98. *Gratz*, 539 U.S. at 269.

99. *Id.* at 273 n.20 (citing *Id.* at 279 (O’Connor, J., concurring)).

The Court upheld the law school program challenged in *Grutter*.<sup>100</sup> According to Justice O'Connor, who wrote the majority opinion, when viewed in the context of education,<sup>101</sup> the use of race-preference policies is not objectionable so long as these policies are flexible in a non-mechanical way.<sup>102</sup> Unlike LSA's policy, which assigned points to an applicant based on membership in a minority class, the Law School's policy required admissions officials to evaluate each applicant based on all of the information available in the file, including a personal statement, letters of recommendation, . . . an essay describing [how] the applicant will contribute to the life and diversity of the Law School. . . ., and the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score . . . .<sup>103</sup>

The policy was constitutionally permissible because it did not "define diversity 'solely in terms of racial and ethnic status'" and did not "restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process."<sup>104</sup> The Law School's policy did, however, "reaffirm the Law School's . . . commitment" to diversity, with "'special reference to the inclusion'" of African-American, Hispanic, and Native-American students, who otherwise "'might not be represented in [the] student body in meaningful numbers.'" By enrolling a 'critical mass' of [underrepresented] minority students, the [policy sought] to 'ensur[e] [the students'] ability to . . . contribut[e]" to the Law School's character and to the legal profession.<sup>105</sup>

Justice O'Connor ended her opinion with an expressed hope of eventual termination of this and all other race-based admissions policies.<sup>106</sup>

*Grutter* remains the most recent case to consider race-based admissions plans at the post-secondary school level. Following *Grutter* and *Gratz*, institutions like the University of Texas devised programs that were holistic in scope and that considered race as a factor among many when assembling an entering class.<sup>107</sup> *Grutter* seemed to grant the status of race a kind of

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100. *Grutter*, 539 U.S. at 310.

101. *Id.* at 327 (holding that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" because "[n]ot 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 governmental decision-maker for the use of race in that particular context.").

102. *Id.*, at 333–34.

103. *Id.* at 315.

104. *Id.* at 316.

105. *Id.* (citations omitted).

106. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

107. See *infra* notes 133–48 and accompanying text. The University of Texas adopted its plan before *Grutter*, but expanded its program to include a holistic review for those denied admission under the Top Ten Percent plan. See *infra* notes 119–20.

benefit status, similar to that announced by Justice Powell in the *Bakke* decision, at least to the extent that race was relevant to a particular institution's goal of accepting a critical mass of diverse voices. *Grutter* left in its wake a clear signal to colleges and universities that Justice Powell's understanding of the permissibility of race-sensitive admissions policies as part of an effort to obtain a diverse student body was still the law.

Following *Grutter*, the Court took up one other education-rooted affirmative action case. *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>108</sup> concerned two cases from different K-12 school districts that challenged school districting plans. In one case, parents from Jefferson County, Kentucky, challenged a school assignment plan that the School Board adopted as a means to maintain racial equality in the school in response to a previously issued desegregation order.<sup>109</sup> In Seattle, Washington, parents challenged a plan that used race as one of four tiebreakers to decide who can attend an oversubscribed district school.<sup>110</sup> In both instances, the school plans were designed to ensure racial diversity and equal access to the county's best colleges and universities. The Court heard these cases together.

A narrow majority of the Court voted to invalidate each plan.<sup>111</sup> Chief Justice Roberts delivered the majority opinion with respect to several of the issues presented by the case and a plurality opinion with respect to others of those issues.<sup>112</sup> Justice Kennedy was the swing vote, concurring with the judgment but agreeing with only part of the plurality's reasoning.<sup>113</sup> Justices Breyer, Ginsburg, Stevens, and Souter dissented.<sup>114</sup> The entire Court was in agreement that any educational-assignment program that uses race must be narrowly tailored to meet a compelling governmental interest.<sup>115</sup> The majority view distinguished *Bakke*, *Grutter*, and *Gratz*.<sup>116</sup> Justice Roberts acknowledged that what "was upheld in *Grutter* was consideration of 'a far broader array of qualifications and characteristics of

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

109. *Id.* at 716–18 (summarizing the facts of the Kentucky case) (citations omitted).

110. *Id.* at 711–15 (summarizing the facts of the Seattle case) (citations omitted).

111. *Id.* at 707 (5–4 decision) (Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts in Parts I, II, III–A, and III–C of the Court's opinion. Justices Scalia, Thomas, and Alito also joined the Chief Justice in Parts III–B and IV.).

112. *Id.*

113. *See id.* at 782–98 (Kennedy, J. concurring in part and concurring in the judgment).

114. *See id.* at 798–803 (Stevens, J., dissenting); *Id.* at 803–76 (Breyer, J., dissenting) (joined by Justices Ginsberg, Stevens, and Souter).

115. *Id.* at 720 (citation omitted) (plurality opinion); *Id.* at 783 (citation omitted) (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 803 (Breyer, J., dissenting).

116. *Id.* at 722–25 (plurality opinion).

which racial or ethnic origin is but a single, though important, element.”<sup>117</sup> Justices Alito, Scalia, and Thomas all agreed with Justice Robert’s conclusion that the only time it would find the use of race justified would be when the governmental entities defending the policy could establish proof of *de jure* segregation.<sup>118</sup> Given the lack of any such proof, five Justices concluded that the use of the racial classifications was not justified.<sup>119</sup>

Justice Kennedy joined the plurality’s judgment but sharply disagreed with its conclusion that such policies could never pass muster or could do so under only very limited circumstances.<sup>120</sup> His concurrence, therefore, was the fifth vote, the other four being Justices Breyer, Ginsberg, Stevens, and Souter, for holding that instances in which race-preference school-assignment plans were constitutionally permissible absent *de jure* segregation.<sup>121</sup> Justice Kennedy argued that viewpoint diversity and greater assurance that institutions not revert to educational segregation are compelling governmental interest.<sup>122</sup>

The *Parents Involved* majority agreed with Justice O’Connor that context matters when considering equal protection challenges.<sup>123</sup> Within the context of race-preference admissions policies, the Court will demand strict scrutiny review.<sup>124</sup> Thus an admissions policy will be upheld if it is narrowly tailored to meet the compelling governmental interest in assuring viewpoint diversity.<sup>125</sup> It is this standard against which the Supreme Court will evaluate *Fisher v. Texas*.<sup>126</sup>

## II. FISHER V. TEXAS

On April 7, 2008, attorneys filed suit on behalf of Abigail Fisher and Rachel Michalewicz against the University of Texas for violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>127</sup> Edward Blum, the sole proprietor of the Washington, D.C., legal defense fund Project for

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117. *Id.* at 722 (quoting *Grutter*, 539 U.S. at 325).

118. *Id.* at 749 (Roberts, C.J., plurality opinion).

119. *Id.* at 750 (finding no danger of re-segregation in either the Louisville or Seattle case).

120. *Id.* at 783, 787–88.

121. *Id.* at 820–21 (Breyer, J., dissenting) (“A court finding of *de jure* segregation cannot be the crucial variable.”).

122. *Id.* at 783, 787–88.

123. *Id.* at 725 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003)).

124. *Id.* at 720 (citation omitted).

125. *Id.* at 705.

126. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

127. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 1–2, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).



Fair Representation, motivated the case.<sup>128</sup> Blum put lawyers in touch with Fisher as a means to challenge, and hopefully end, what he calls reverse discrimination.<sup>129</sup> His actions were somewhat successful in that he initiated a Supreme Court challenge to race-preference admissions policies.<sup>130</sup>

Given the narrow ruling of *Grutter*, there seemed little reason for the Supreme Court to grant certiorari on *Fisher*, except for purposes of prohibiting any consideration of race in admissions decisions.<sup>131</sup> However, an evaluation of decisions rendered by Justices currently sitting on the bench suggests that an insufficient number will vote to abolish race-preference admissions policies wholesale.<sup>132</sup> In this section, I consider the legal landscape of the *Fisher* case and provide reasoned support for why the Court is unlikely to end affirmative action in higher education. Specifically, I first provide a narrative of the *Fisher* case to date, including a description of the UT policy and a brief discussion of both the district and the circuit court decisions. I then discuss arguments advanced in briefs submitted by opponents of affirmative action admission programs. Next, I consider opinions of various judges as they relate to the use of race in the admissions policy. Finally, I conclude with a prediction that the Court will uphold the compelling governmental interest in viewpoint diversity but will invalidate the UT policy on the grounds that it is not narrowly tailored to meet that need.

#### A. The University of Texas Race-Preference Admissions Policy

Following *Grutter* and *Gratz*, admissions officials at the University of Texas carefully constructed a race-based admissions plan that they believed was in compliance with Supreme Court precedent.<sup>133</sup> The UT application process is comprehensive and complicated. Applicants are initially divided into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students.<sup>134</sup> Students compete for admission against others

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128. Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, (Feb. 23, 2012), available at <http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all>.

129. *Id.* (With respect to Blum's involvement in the case, the *New York Times* noted that it "crown[ed] a two-decade-long devotion to disputing race-based laws.").

130. *Id.*

131. Robert Barnes, *Supreme Court Agrees to Reconsider Use of Race in College Admission Decisions*, WASH. POST (Feb. 21, 2012), available at [http://www.washingtonpost.com/supreme-court-agrees-to-reconsider-use-of-race-in-college-admission-decisions/2010/07/28/gIQA2viJRR\\_story.html](http://www.washingtonpost.com/supreme-court-agrees-to-reconsider-use-of-race-in-college-admission-decisions/2010/07/28/gIQA2viJRR_story.html).

132. See *infra* Part II.D (evaluating the probable outcome of *Fisher*, based on Supreme Court Justices' decisions in similar cases on race-preference admissions policies).

133. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218 (5th Cir. 2011), cert. granted, 132 U.S. 1536 (2012).

134. *Id.*

in their respective pool.<sup>135</sup> Admission for students in the second and third groups is based solely on academic and personal achievement.<sup>136</sup> The UT Office of Admissions devised a more comprehensive and complicated admissions process for in-state residents.<sup>137</sup> The first prong of the admissions process is known as the Top Ten Percent Law, which the Texas legislature adopted in 1997.<sup>138</sup> According to the Top Ten Percent Law, Texas resident-applicants who are in the top ten percent of their high school class are guaranteed admission to UT.<sup>139</sup> The Top Ten Percent prong of the two-tiered program yields the “vast majority” of admitted students.<sup>140</sup> This prong of the admissions program gives no consideration to race, ethnicity, income level, or life experience.<sup>141</sup>

Because the Top Ten Percent Law does not yield an entire class, the admissions committee considers the remaining Texas-resident pool based on academic and personal achievement indices.<sup>142</sup> The Academic Index is a “mechanical formula that predicts freshman GPA using standardized test scores and high school grade point rank.”<sup>143</sup> If students are further considered, the admissions officer looks at the applicant’s Personal Achievement index, which is a number based on a student’s personal achievement score and an evaluation of each of a student’s two personal essays.<sup>144</sup> The personal achievement score, which is given slightly greater weight than the student essays, “is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index.”<sup>145</sup> The admissions staff assigns the score by considering a host of factors, including demonstrated leadership, awards and honors, work experience, a “special circumstances” element that may reflect an applicant’s socioeconomic status or his or her high school, and the applicant’s race.<sup>146</sup> None of the personal achievement criteria, including race, are considered in a vacuum or are given extra attention; rather, they are part of the review that admissions readers conduct for each

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135. *Id.* at 227.

136. *Id.* (footnote omitted).

137. *See id.* (describing admissions process for Texas applicants).

138. *Id.* at 224.

139. Tamar Lewin, *At the University of Texas, Admissions as a Mystery*, N.Y. TIMES (Apr. 1, 2012), available at <http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html>.

140. *Fisher*, 631 F.3d at 227 (eighty-one percent of UT’s 2008 entering class was admitted under the Top Ten Percent Law).

141. *Id.* at 224 (a Texas applicant’s ranking in high school is the sole determinative factor for admission to any Texas state university, under the Top Ten Percent Law).

142. *Id.* at 227.

143. *Id.* (footnote omitted).

144. *Id.* at 227–28 (footnote omitted).

145. *Id.* at 228.

146. *Id.* (footnote omitted).

application.<sup>147</sup> Students are admitted or further considered based on their academic index.<sup>148</sup>

### B. The Lower Court Decisions

Abigail Fisher and Rachel Michalewicz applied to UT and in the winter of 2008 were denied admission to its fall entering class.<sup>149</sup> In April of that same year, Fisher and Michalewicz brought suit, requesting a preliminary injunction that would require UT to reevaluate their applications without considering race as a factor.<sup>150</sup> The plaintiffs alleged that the UT admissions policies violated their right to Equal Protection under the Fourteenth Amendment and 42 U.S.C. Sections 1981, 1983, and 2000(d).<sup>151</sup>

The Fifth Circuit considered the case against the backdrop of not only *Grutter* and *Gratz* but also *Hopwood v. Texas*,<sup>152</sup> a 1996 federal challenge to the University of Texas Law School's race-preference program.<sup>153</sup> In 1993, Cheryl Hopwood, a white single mother with a handicapped child applied to the University of Texas School of Law.<sup>154</sup> Hopwood was denied admission while the school admitted several black and Hispanic students with lower Law School Admissions Test (LSAT) scores and GPAs than Hopwood presented.<sup>155</sup> Hopwood brought an action in district court challenging the Texas plan under the Equal Protection Clause.<sup>156</sup> Judge Sam Sparks heard the case at the district level.<sup>157</sup> He concluded that based on the *Bakke* precedent, the UT law school could continue to consider race a "plus" in the admissions process.<sup>158</sup> Hopwood appealed.<sup>159</sup> Judge Smith writing for the Fifth Circuit reversed this decision.<sup>160</sup> The court concluded that Justice Powell's opinion in *Bakke* spoke for himself alone on the

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147. *Id.* (footnote omitted).

148. *Id.* at 229 (footnote omitted) ("Without a sufficiently high [Academic Index] and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.").

149. *Id.* at 217.

150. Complaint for Declaratory, Injunctive, and Other Relief at 112, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

151. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009) [hereinafter *Fisher I*], *aff'd* 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

152. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) [hereinafter *Hopwood II*].

153. *Hopwood v. Texas*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) [hereinafter *Hopwood I*], *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

154. *Id.* at 564.

155. *Id.* at 580.

156. *Id.* at 553.

157. *Id.*

158. *Id.* at 577.

159. *Hopwood II*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

160. *Id.* at 935.

diversity issue and, as a result, was not binding on the court.<sup>161</sup> Following the decision, UT could no longer consider race in the admissions process, and the Texas legislature adopted the Top Ten Percent Law.<sup>162</sup> UT appealed to the Supreme Court, which denied certiorari.<sup>163</sup> Thus, the somewhat controversial *Hopwood* decision informed race-preference admissions policies in the Fifth Circuit until the Court ruled in *Grutter* that race could be a factor in the admissions process.<sup>164</sup> It was *Grutter*, therefore, and not *Hopwood*, that served as precedent for the district and circuit courts.

In *Fisher*, Judge Sparks once again was charged with hearing and ultimately passing judgment on the constitutionality of the UT race-preference program.<sup>165</sup> As in *Hopwood*, Judge Sparks favored the university's policy.<sup>166</sup> He denied the plaintiffs' motion for a preliminary injunction and concluded that given the quality of their applications, they could not demonstrate a likelihood of success on the merits.<sup>167</sup> Furthermore, the court found that the plaintiffs failed to establish a substantial likelihood that UT's use of race in undergraduate admissions unlawfully discriminated in violation of the Fourteenth Amendment of the U.S. Constitution.<sup>168</sup>

Following the court's denial of the motion for preliminary injunction, the parties agreed to a bifurcated trial, allowing the court to separately consider the issues of liability and remedy.<sup>169</sup> As to liability, Judge Sparks measured the UT program against the Supreme Court's strict scrutiny standard.<sup>170</sup> Judge Sparks found that the UT decision to consider race as just one factor in the admissions process was supported by the compelling governmental interest in the *Grutter* Court's sanctioned goal of achieving a critical mass of minority students.<sup>171</sup> In addition, the manner in which UT considered race was narrowly tailored to meet that compelling

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161. *Id.* at 944.

162. *Tribpedia: Top Ten Percent Rule*, TEX. TRIB., available at <http://www.texastribune.org/texas-education/top-ten-percent-rule/about/> (last visited Nov. 26, 2012).

163. *Hopwood v. Texas*, 518 U.S. 1033 (1996) [hereinafter *Hopwood III*] (denying certiorari).

164. *Grutter v. Bollinger*, 539 U.S. 306, 315–17 (2003) (citing *Bakke*, 438 U.S. at 317 (1978) (Powell, J., concurring)).

165. *Fisher I*, 645 F. Supp. 2d 587, 589 (W.D. Tex. 2009), *aff'd* 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

166. *Fisher I*, 645 F. Supp. 2d 587.

167. *Id.*

168. *Id.* at 613.

169. *Id.* at 590.

170. *Id.* at 599–600.

171. *Id.* at 604.

governmental interest because race was only one of seven “special circumstances” that, together with the personal essays, made up an applicant’s personal index.<sup>172</sup> The Court denied the plaintiffs’ motion for summary judgment.<sup>173</sup> The plaintiffs appealed to the Fifth Circuit.<sup>174</sup> Judge Higginbotham delivered the opinion of the Court.<sup>175</sup>

Judge Higginbotham set out the precedent on which the Court would rely.<sup>176</sup> Citing *Bakke*, *Grutter*, and *Gratz* as controlling, he wrote that the Fifth Circuit would apply the Supreme Court’s mandate of strict scrutiny.<sup>177</sup> Thus, it would only uphold the UT policy if it found that it supported a compelling governmental interest and that the program was narrowly tailored to meet that interest.<sup>178</sup> Reiterating the lessons learned from *Grutter* and *Gratz*, Judge Higginbotham wrote: “A race-conscious admissions program is constitutional only if it holistic, flexible and individualized.”<sup>179</sup>

The opinion overturned *Hopwood* to the extent that it considered Justice Powell’s separate opinion in *Bakke* binding.<sup>180</sup> Citing *Bakke*, Judge Higginbotham held that diversity in education is a compelling interest because it is essential to the quality of higher education that a university be able to pursue the atmosphere of speculation, excitement, and creation that is promoted by a diverse student body, he said.<sup>181</sup> Student body diversity better prepares students as professionals.<sup>182</sup> The opinion, however, seemed to go beyond adopting Justice Powell’s holding that there is a compelling governmental interest in viewpoint diversity; the court held that “a university’s educational judgment in developing diversity policies is due deference.”<sup>183</sup> The court seemed to reduce the burden of showing a compelling governmental interest with this deference to institutional judgment.

On the second prong of the compelling governmental interest test, the court held that narrow tailoring requires that the use of any racial classifications fit a compelling goal so closely as to remove the possibility

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172. *Id.* at 608.

173. *Id.* at 614. Note that by this point the second plaintiff dropped from the suit.

174. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) [hereinafter *Fisher II*], *cert. granted*, 132 S.Ct. 1536 (2012).

175. *Id.*

176. *Id.*

177. *Id.* at 231.

178. *Id.* at 220.

179. *Id.* at 221.

180. *Id.*

181. *Id.* at 230–31.

182. *See generally id.* at 232–35.

183. *Id.* at 231 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)) (“The Law School’s educational judgment ... is one to which we defer .... Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

that the motive for classification was illegitimate racial stereotype.<sup>184</sup> A university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races and does not define an applicant by race; there can be no quota system or fixed number of bonus points allotted for race.<sup>185</sup>

The court found that the UT program was narrowly tailored because race was only one of the elements combined in its Personal Achievement Index score.<sup>186</sup> Moreover, the committee never considered race, or any other personal variable, individually.<sup>187</sup> The court also weighed the program against the twenty-five-year sunset hope that Justice O'Connor expressed in *Grutter* and found that, although it does not have an end point, the UT practice of revisiting the need for its policy annually satisfied the court.<sup>188</sup>

The real issue for the appellants, Fisher and Michalewicz, however, was not whether the UT race-conscious program was constitutionally acceptable, but rather, whether UT the second tier of its admissions program at all.<sup>189</sup> The appellants maintained that the UT Top Ten Percent Law was sufficient to achieve a critical mass of diverse students on UT's campus.<sup>190</sup> The thrust of their argument was that given the UT application of the Top Ten Percent Law, the school was overextending its right to use racial preference by double-dipping into a second tier of applicants, whose race or ethnicity could be a considered during UT's admissions process.<sup>191</sup>

The Court rejected the appellants' argument. Citing a 2002 UT study that found that 79% of the University's 5631 classes had zero or one African-American students, and 30% had zero or one Hispanic students, the Fifth Circuit concluded that "the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies."<sup>192</sup> The court acknowledged that the Top Ten Percent Law contributed to an increase in overall minority enrollment; however, the court found that "those minority students remain[ed] clustered in certain programs, severely limiting the beneficial effects of educational diversity."<sup>193</sup> The court

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184. *Id.*

185. *Id.* at 221.

186. *Id.* at 223–24.

187. *Id.* at 224.

188. *Id.* at 222.

189. *Fisher II*, 645 F. Supp. 2d 587, 607. (W.D.Tex. 2009).

190. *Id.* at 259.

191. *See*, Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment at 4-5, *Fisher v. Univ. of Tex. at Austin* (W.D. Tex. 2009) (No. 1:08-CV-00263-SS), 2009 WL 5055457. "The core dispute ... is Plaintiff's claim that UT Austin does not need [the second tier of its admissions] policy to achieve diversity [because] the Top 10% law already achieves a critical mass of underrepresented minorities." *Id.* at 5.

192. *Fisher II*, 631 F.3d at 2.42.

193. *Id.* at 253–254.

concluded that with the Top Ten Percent Law and the *Grutter*-like plan, UT effectively ensured the type of educational diversity that was constitutionally permissible and compelling.<sup>194</sup> For this reason, the court upheld the UT policy and affirmed the lower court's decision.<sup>195</sup>

In a special concurrence, Judge Garza called the decision “a faithful, if unfortunate, application” of *Grutter*, which he opined was a “digression in the course of constitutional law.”<sup>196</sup> Judge Garza took issue with what he described as the *Grutter* Court's abandonment of strict scrutiny.<sup>197</sup> Consequently, he wrote that he “await[s] the Court's return to constitutional . . . principles.”<sup>198</sup>

The decision was contentious in the Fifth Circuit, in part because of Judge Higginbotham's conclusion that *Bakke* was binding on it.<sup>199</sup> Following the decision, one member of the court requested that the court poll a majority of the bench.<sup>200</sup> “[A] majority of the judges who [were] in regular active service and not disqualified [from the case] [for] having voted in favor” of the decision denied the petition for a rehearing *en banc*.<sup>201</sup> In February 2012, the Supreme Court granted certiorari.<sup>202</sup>

### C. Briefs in Support of Fisher

When the Supreme Court granted certiorari on *Fisher*, did it do so for the purpose of banning the future use of race in any post-secondary educational admissions process? A review of Fisher's own brief and those of supporting *amici* indicates more concern with the consideration of race generally than with the UT program. Those briefs seem to focus more on policy reasons as support for ending affirmative action in higher education.<sup>203</sup>

Three themes emerge in the briefs supporting Fisher. First, *Grutter* was a very narrow exception to an otherwise comprehensive ban on race

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194. *Id.* at 254.

195. *Id.* at 247–254.

196. *Id.* at 247 (Garza, J., concurring).

197. *Id.* at 247–264 (Garza, J., concurring).

198. *Id.* at 266–67.

199. *Id.* at 238.

200. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) [hereinafter *Fisher III*] (denying rehearing *en banc*).

201. *Id.*

202. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

203. *See, e.g.*, Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950270; Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

discriminations and that the UT policy goes beyond the limits articulated in *Grutter*.<sup>204</sup> Second, race-preference programs yield an “academic mismatch” that actually harms the intended beneficiaries more than they help them.<sup>205</sup> Finally, institutions, in part guided by the courts, have lost sight of the initial intent of affirmative action policies—to provide remedial benefits to those who felt the effects of educational discrimination—and by basing their programs on race and ethnicity, colleges and universities now provide programs that often benefit individuals who no longer suffer any educational harm.<sup>206</sup>

Lawyers representing Fisher and Michalewicz, petitioners to the Supreme Court, and those who favor their position posit two alternative legal theories that support their cause. The narrow argument is that the Fifth Circuit misread *Grutter* and substituted due deference for compelling governmental interest. The broader argument is that the Court should, through *Fisher*, avail itself of the opportunity to reverse *Grutter* to the extent that it contravenes equal protection laws.<sup>207</sup>

The lower court ruled incorrectly, the argument goes, because it unconstitutionally expanded the school’s role in determining when the use of race is permissible in admitting students to a public university. The law is well settled that race-preference programs must be subject to the most exacting scrutiny.<sup>208</sup> Relying heavily on challenges to affirmative action programs in the workplace, the petitioners cited the Court’s commitment to ensuring that the use of race is for a legitimate purpose.<sup>209</sup> Thus, “more

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204. See, e.g., Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950270; Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

205. See, e.g., Brief of Amici Curiae for the Asian American Legal Foundation and the Judicial Education Project as Amici Curiae in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961250; Brief of Amici Curiae for Richard Sender and Stuart Taylor in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2011 WL 5015112.

206. See, e.g., Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S.Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae California Association of Scholars, Connecticut Association of Scholars, Center for Constitutional Jurisprudence, Reason Foundation, Individual Rights Foundation, and American Civil Rights Foundation in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S.Ct. 1536 (2012) (No. 11-345), 2012 WL 1950267; Brief of Amici Curiae of Mountain States Legal Foundation in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950269.

207. See, e.g., Brief for Petitioner at 53, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.

208. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978).

209. See, e.g., Brief for Petitioner at 33, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.



than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification.”<sup>210</sup> The *Fisher* court’s finding that deference is due to the “educational judgment [of the university] in developing diversity policies” abrogates the strict scrutiny that an equal protection challenge demands.<sup>211</sup> Extending this argument further, the petitioners and others argue that, at best, *Grutter* is the limit of permissible race preference and *Fisher* pushed the limit beyond *Grutter*, which was intended as a narrow exception to the ban on race discrimination.<sup>212</sup>

The broader argument for abolishing affirmative action favors the Court using *Fisher* as a means to reconsider *Grutter*. The petitioner’s brief fails to put forth a separate argument to support its assertion, writing only that “*Grutter* should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment’s guarantee of equal protection.”<sup>213</sup>

On the policy side, several amicus briefs argue that race-preference affirmative action programs are detrimental to the population that the programs seek to benefit. The most dominant theme in this argument is the idea of academic mismatch, highlighted most clearly in the brief submitted by Stuart Taylor and Richard Sander, in support of the petitioners’ argument.<sup>214</sup> According to the academic mismatch theory, granting some students an advantage over others in the admission process because of their race results in admitting them to colleges and universities for which they are not academically prepared.<sup>215</sup> Consequently, those students do not perform as well in class as regularly admitted students do, resulting in a less rigorous course load and ultimately to an inferior quality of work as compared to those admitted with higher test scores.<sup>216</sup> In its brief, the

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210. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Drew S. Days, III, Fullilove*, 96 YALE L.J. 453, 485 (1987)).

211. *Fisher II*, 631 F.3d at 231.

212. See e.g., Brief for Petitioner at 52, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11–345), 2012 WL 1882759.

213. Petition for a Writ of Certiorari at 35, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11–345) 2011 WL 4352286 (citation omitted).

214. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 133, at 21. The report was based in large part on Sander’s work on academic mismatch in the law school settings. In elite law schools, 51.6% of African-American law students had first year GPAs in the bottom 10% of their class as opposed to 5.6% of white students. Sander found that these results were almost entirely because of affirmative action. If African-American students with the same credentials were attending the mid-tier institutions, instead of the elite ones with affirmative action policies, they would be doing well. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427 (2004).

215. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 214 at 6. See also Sander, *supra* note 214 (analyzing affirmative action in law school context).

216. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 214, at 6.

United States Commission on Civil Rights, an independent commission of the federal government that is said by some to have a conservative bias, argued that the lower grades resulting from academic mismatch leads to lower self-confidence and is therefore contrary to the best interests of minority students.<sup>217</sup>

Almost every brief submitted in support of the academic mismatch theory cited statistics to support their argument. Most common among the briefs were the findings of a University of California study completed after implementation of Proposition 209, in 1996, the state initiative that prohibited state government institutions from considering, race, sex, or ethnicity in public education (also in employment and contracting).<sup>218</sup> The 2011 study considered African-American and Hispanic students enrolled in California state colleges and universities.<sup>219</sup> At that time, admissions offers made by the University of California at Berkeley (Berkeley) to African-Americans, Hispanics, and Native Americans went from 23.1% to 10.4%.<sup>220</sup> Instead, less highly ranked institutions, such as the University of California at San Diego (UCSD) and the University of California Los Angeles (UCLA) accepted the students who did not receive acceptance offers from Berkeley.<sup>221</sup> The study suggested that the academic performance of African-American students enrolled in these less elite institutions improved dramatically.<sup>222</sup> According to the study, which looked closely at graduation rates among the UC campuses, minority students were more likely to graduate from academic institutions that matched students based on their pre-college academic preparedness.<sup>223</sup> These findings supported the authors' conclusion that, "Proposition 209 led to a more efficient [academic] sorting of minority students."<sup>224</sup>

The final argument in favor of abolishing affirmative action comes not

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217. Brief of Amici Curiae of Gail Herot, Peter Kirsanow & Todd Gaziano, Members of the United States Commission on Civil Rights in Support of Petitioner, *supra* note 214, at 18-19.

218. *Cal Freshman Admissions for Fall 2008*, UNIV. OF CAL., <http://www.ucop.edu/news/factsheets/fall2008adm.html>; *see also* Peter Arcidiacono, Esteban Aucejo, Patrick Coate & V. Joseph Hotz, *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, (March 2012) (unpublished article) ([https://www.princeton.edu/economics/seminar-schedule-by-prog/applied\\_micros-s12/Prop\\_209\\_Paper\\_03-31-12.pdf](https://www.princeton.edu/economics/seminar-schedule-by-prog/applied_micros-s12/Prop_209_Paper_03-31-12.pdf)). "With regard to the first one—did better student-campus matching on academic preparation account for the net effect Prop 209 had on minority graduation rates—the answer is: "yes somewhat." *Id.* at 31.

219. Arcidiacono, *supra* note 218 at 1.

220. *Final Summary of Freshman Applications, Admissions and Enrollment, Fall 1989-2011*, Univ. of Cal., 2, 5 (2012), [http://www.ucop.edu/news/factsheets/2011/Flow\\_FROSH\\_CA\\_11.pdf](http://www.ucop.edu/news/factsheets/2011/Flow_FROSH_CA_11.pdf)

221. Arcidiacono, *supra* note 218.

222. *Id.* at 3.

<sup>223</sup> *Id.* at 2, 33.

<sup>224</sup> *Id.* at 3.

from the amicus brief but from Chief Justice Rehnquist's opinion in *Gratz*.<sup>225</sup> Citing Justice Powell's *Bakke* opinion, Chief Justice Rehnquist explained the concern in focusing purely on race in the admissions process:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black child who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. . . . If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.<sup>226</sup>

Chief Justice Rehnquist used this hypothetical to illustrate the potential for race-preference policies to grant benefits to those who might not have suffered the ills of a poor education.<sup>227</sup> Many anti-affirmative actionists subscribe to this theory and claim that in today's post-racist world, many black students can compete with their white counterparts, and consequently, they should not be at an advantage.<sup>228</sup> Conversely, many white students suffer from poverty and poor access to education, yet under race-preference policies, they are not entitled to admissions preference.<sup>229</sup> Indeed, Cheryl Hopwood was an out-of-work, single mother of three children, one of whom was severely handicapped at the time that Hopwood applied to UT's law school.<sup>230</sup> Her status, opponents of race-preference admissions policies are quick to point out, did not qualify her for special consideration or any type of "plus."<sup>231</sup>

Some argue that the past half-century of societal changes should also give pause to those who favor the original intent of race-preference policies.<sup>232</sup> The increase in biracial marriage had diluted the need to grant preferential treatment based on race.<sup>233</sup> Interracial marriage, and consequently the number of interracial children, has risen dramatically over

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225. *Gratz v. Bollinger*, 539 U.S. 244, 272–73 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

226. *Id.* (citing *Bakke* 438 U.S. at 324).

227. *Id.* (citing *Bakke* 438 U.S. at 324).

228. *Gratz*, 539 U.S. at 273.

229. *Id.*

230. Leslie Y. Garfield, *Hopwood v. Texas: Strict in Theory or Fatal in Fact*, 34 SAN DIEGO L. REV. 497, 499 n.11 (1997).

231. *Id.* at 499, 505.

232. See, e.g., Kevin Brown, *Should Black Immigrants be Favored over Hispanics and Black Multiracials in the Admissions Process of Selective Higher Education Programs?*, 54 HOW. L. J. 255 (2011) (arguing that black immigrants should not be favored).

233. *Id.* at 272, n.79.

the past fifty years.<sup>234</sup> The Court's decision striking down miscegenation statutes and a general increase in tolerance toward diversity have yielded a population that is quite different from the polarizing racial divide of the pre-Civil Rights Era.<sup>235</sup>

Much has been made of the interracial issue, most notably by Kevin Brown, who argues that a problem with race-based affirmative action comes with the way in which applicants self-identify.<sup>236</sup> According to Brown, the policies help all people who identify themselves as black, while some of those people may be biracial, such as President Obama, and brought up by a white family.<sup>237</sup> These students, therefore, have not faced the stereotypical discrimination of blacks in America.<sup>238</sup> Others could be recent immigrants from areas of the Caribbean and have not come from families who experienced racial discrimination in that country.<sup>239</sup> Biracial children and children of immigrants, it is argued, do not experience the disadvantages of poor black children who are the product of generations of poverty and discrimination stemming from slavery.<sup>240</sup> Because of this difference, Brown maintains that race-based affirmative action does not focus on helping the most deserving.<sup>241</sup>

Opponents of race-preference admissions policies have provided the Court with several arguments upon which the Court can rely. First, they urge the Court to adopt Petitioners' brief and to find that Judge Higginbotham improperly granted deference to UT.<sup>242</sup> Alternatively, they argue that the Court can adopt the argument of some amicus briefs that, based on statistical findings that race-preference admissions policies are detrimental to those whom they intend to benefit, there is no longer a compelling governmental interest in using race as one way to achieve viewpoint diversity.<sup>243</sup> Finally, the Court can adopt the argument

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234. *Id.* at 289.

235. Wendy Wang, *The Rise of Intermarriage*, PEW RESEARCH CENTER (Feb. 16, 2012), <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/5/#chapter-4-public-attitudes-on-intermarriage>; Jeffrey Passel, Gretchen Livingston & D'Vera Cohn, *Explaining Why Minority Births Now Outnumber White Births*, PEW RESEARCH CENTER (May 17, 2012), <http://www.pewsocialtrends.org/2012/05/17/explaining-why-minority-births-now-outnumber-white-births/>.

236. *See* Brown, *supra* note 232, at 267.

237. *Id.* at 263, 267, n.412.

238. *Id.* at 267.

239. *Id.*

240. *Id.*

241. *Id.*

242. *See, e.g.*, Brief for Petitioner at 47, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.242.

243. *See, e.g.*, Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner at 7, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

advocated by other amicus briefs that race-preference policies are irrelevant because a population of today's post-Civil Rights Era blacks does not necessarily reflect the type of student contemplated when these policies were first put in place.<sup>244</sup>

#### D. Probable Outcome of Supreme Court Review

The lower court decisions in the *Fisher* case present the Court with several options: the Court can uphold UT's policy and reaffirm *Grutter*; alternatively, the Court can uphold the use of race-preference policies based on a reaffirmation of a compelling governmental interest in viewpoint diversity but strike down the UT policy for its failure to be narrowly tailored; the Court can dismiss the petition for certiorari in *Fisher* as improvidently granted; the Court can strike down Judge Higginbotham's findings and limit its decision to reversing and remanding the Fifth Circuit decision; the Court can use *Fisher* as an opportunity to reverse *Grutter* and rule that the use of race is prohibited in admissions considerations.

Given the Supreme Court's current composition, it is unlikely that the Court will uphold the lower court decision in *Fisher* and find the UT admissions policy constitutional. The bigger question is, in striking down *Fisher*, how far the Justices will go to dismantle the use of race-preference policies. Eight justices will hear the case because Justice Kagan has recused herself from the case.<sup>245</sup> In light of these Justices' opinions and writings, the most likely scenario is that while the Court will strike down the UT policy, it will probably retain the idea that there is a compelling governmental interest in viewpoint diversity, thereby leaving colleges and universities free to enact future programs.

Justice Ginsburg will most certainly vote in favor of the UT policy. Ginsburg is the only member of the current Court who voted to uphold both LSA and the Law School's admissions policy when they were before the Court in 2003.<sup>246</sup> In *Grutter*, Justice Ginsburg wrote that "some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated."<sup>247</sup> Until then, according to Justice Ginsburg, the compelling governmental interest in ensuring access to education to all remains in full stead.<sup>248</sup> The state of education has not changed significantly enough to encourage Justice

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244. *Id.* at 24.

245. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (*granting cert.*).

246. *See Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring), and *Gratz v. Bollinger*, 539 U.S. 244, 291 (2003) (Ginsburg, J. dissenting).

247. *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring).

248. *Id.* at 345.

Ginsburg to retreat from her stance,<sup>249</sup> and for this reason, she is likely to approve the UT policy.

Justices Breyer and Kennedy have expressed a commitment to viewpoint diversity as a compelling governmental interest.<sup>250</sup> Justice Breyer's separate opinion in *Gratz* makes clear that he, like Justice O'Connor, might have upheld the LSA policy if it had considered various diverse qualifications of each applicant, including race, on a case-by-case basis.<sup>251</sup> He held that there is a compelling governmental interest in an effort to help create citizens better prepared to know, understand, and work with people of all races and backgrounds, thereby furthering the kind of democratic government that our Constitution foresees.<sup>252</sup>

Justice Kennedy has repeatedly endorsed the compelling governmental interest in viewpoint diversity.<sup>253</sup> Justice Rehnquist's majority opinion in *Gratz*, while striking down the LSA policy, conceded that there is a compelling governmental interest in viewpoint diversity.<sup>254</sup> Justice Kennedy reaffirmed his commitment to viewpoint diversity in *Parents Involved* when he wrote that the "highest aspirations [for an integrated educational system] are yet unfulfilled."<sup>255</sup> His dissent in *Grutter* makes it clear that he would uphold race-conscious admissions as part of a strategy for achieving viewpoint-diversity as a compelling governmental interest: "Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task . . . ."<sup>256</sup>

But Justice Kennedy stated that the use of race to ensure diversity can

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249. *Id.* at 348 (Ginsburg J., concurring); see also Gary Orfield and Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, THE CIVIL RIGHTS PROJECT (Aug. 2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>; see also Emily Richmond, *Schools Are More Segregated Today than During the Late 1960s*, THE ATLANTIC (June 11, 2012), <http://www.theatlantic.com/national/archive/2012/06/schools-are-more-segregated-today-than-during-the-late-1960s/258348/>.

250. *Gratz*, 539 U.S. at 270; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007).

251. *Gratz*, 539 U.S. at 278 (2003) (O'Connor, J., concurring).

252. *Id.* at 270.

253. Justice Kennedy joined the majority in *Gratz* and filed a dissenting opinion in *Grutter*.

254. Compare *Grutter*, 539 U.S. at 378–84, with *Gratz*, 539 U.S. at 245. "Petitioners further argue that 'diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.' But for the reasons set forth today in *Grutter v. Bollinger*, ante, the Court has rejected these arguments of petitioners." *Gratz*, 539 U.S. at 268 (internal citations omitted).

255. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring).

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

be sustained only if a school has empirical evidence to support its need.<sup>257</sup> In Justice Kennedy's opinion, the *Grutter* majority confused deference to a university's definition of its educational objective with deference to the implementation of this goal.<sup>258</sup> In the context of university admissions, he said, the objective of racial diversity can be accepted based on empirical data.<sup>259</sup> In *Grutter*, however, the law school did not demonstrate that it lacked the diversity to justify its plan and, thus, its race-conscious policy was not narrowly tailored.<sup>260</sup> In his dissent, Justice Kennedy also voiced concerns that the majority abandoned the strict scrutiny and granted too much deference to the University of Michigan.<sup>261</sup> In his view, the majority in *Grutter* was flawed because it did not properly apply the strict scrutiny test.<sup>262</sup>

The opinions of Justices Roberts, Scalia, and Thomas seem more antithetical to the constitutional use of race as one consideration in the admissions process. Public perception of Justice Scalia is that he would be constitutionally critical of anything short of a pure meritocratic admissions policy.<sup>263</sup> Justice Scalia's position must be evaluated based on his dissent in *Grutter* because he did not offer independent opinions in either *Gratz* or *Parents Involved*. In *Grutter*, Justice Scalia agreed with the majority, who acknowledged the compelling governmental interest in viewpoint diversity.<sup>264</sup> His issue was with how the Court went about finding what type of program would support that compelling governmental interest.<sup>265</sup> According to Justice Scalia, the concern was more with setting a high academic bar so as to meet a particular level of educational elitism, which, due to the disproportionate performance of minorities on admissions-related exams, necessitated giving minorities some kind of admissions boost to guarantee their representation on the campus.<sup>266</sup> In his writings as a professor at the University of Chicago, Justice Scalia wrote that he strongly favored what might be termed "affirmative action programs" to help the poor or disadvantaged.<sup>267</sup>

Justice Thomas also seems more concerned with the way in which colleges and universities go about trying to admit a diverse student body.

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257. *Id.* at 388.

258. *Id.* at 387.

259. *Id.* at 388.

260. *Id.* at 391.

261. *Id.* at 394.

262. *Id.* at 389.

263. See Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L. Q. 147, 156 (1979) ("I am, in short, opposed to racial affirmative action for reasons of both principle and practicality").

264. See *Grutter*, 539 U.S. at 343.

265. *Id.* at 347–48. (Scalia, J. concurring).

266. *Id.* at 350 (Thomas, J., dissenting).

267. See, e.g., Scalia, *supra* note 263, at 156.

In *Grutter*, he agreed with the majority opinion so far as it prohibits the use of race as a blanket criterion for admissions, signaling that he would not uphold a race-preference policy that gave blanket consideration to candidates based on membership in a particular racial or ethnic group.<sup>268</sup> Justice Thomas went beyond his colleagues in *Gratz*, in which he did find a compelling governmental interest in diversity, but added that “a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.”<sup>269</sup>

Chief Justice Roberts was not on the Court when *Grutter* or *Gratz* were decided but wrote the opinion in *Parents Involved*, an opinion which signaled an acceptance, if not an endorsement, of viewpoint diversity.<sup>270</sup> Despite the Court’s finding that the school assignment plans violated the Equal Protection clause, Chief Justice Roberts, joined by Justices Alito, Scalia, Thomas, and Kennedy reaffirmed the Court’s recognition of a compelling governmental interest in diversity in the context of higher education.<sup>271</sup> In Roberts’ model, viewpoint diversity arguably expanded beyond race and “encompass[es] ‘all factors that may contribute to student body diversity.’”<sup>272</sup>

There is little that can be gleaned from Justice Alito on the bench because he did not participate in either *Grutter* or *Gratz*. Justice Alito joined Chief Justice Roberts in the *Parents Involved* decision but did not offer a concurrence.<sup>273</sup> Alito has, however, weighed in on the matter in other contexts. As Solicitor General during the Reagan administration, for example, Justice Alito submitted a brief in *Wygant v. Jackson Board of Education*,<sup>274</sup> arguing that affirmative action was not justified by the lone fact that minorities were underrepresented.<sup>275</sup>

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268. *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting).

269. *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

270. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 707 (2007).

271. *Id.* at 708, 722.

272. *Id.* at 722 (citing *Grutter*, 539 U.S. at 337). The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” We described the various types of diversity that the law school sought:

“[The law school’s] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. . . . To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.”

*Id.* at 733.

273. *See id.* at 707.

274. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

275. *See* Brief for the United States Amicus Curiae Supporting Petitioners at 5, *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986) (No. 84-1340), 1985 WL



Justice Sotomayor has not yet voted on any race-preference admissions cases. She has, however, provided insight into her opinions through comments and speeches that she has made regarding the issue of affirmative action.<sup>276</sup> According to Sotomayor, the use of race in university admissions is constitutional as set forth in the Court's opinion in *Grutter*.<sup>277</sup> Proudly referring to herself as an "affirmative action baby," Justice Sotomayor has said that we cannot achieve quality without providing some advantage to those not properly schooled in gaming the college admissions system.<sup>278</sup> Sotomayor's comments before the Senate Judiciary Committee, who approved her nomination to the Supreme Court, also shed some light on her pro-affirmative action stance.<sup>279</sup> The Committee questioned Sotomayor on her position<sup>280</sup> concerning *Ricci v. DeStefano*,<sup>281</sup> a case brought by a white firefighter who, despite his dyslexia, received a higher score than a minority peer on a promotion exam but was passed over for promotion.<sup>282</sup> Sotomayor expressed support for New Haven's desire to prevent disparate impact of the New Haven Firefighters' entrance exam by adopting race-conscious measures designed to benefit racial minorities.<sup>283</sup>

In rendering its decision in *Fisher*, the Court is likely to pass on the issue of strict scrutiny first. Based on their writings, Justices Ginsburg, Breyer, Kennedy, and Sotomayor are all likely to uphold the Court's compelling governmental interest in viewpoint diversity. Although Chief Justice Roberts has shown no inclination to rule with these four Justices, his recent opinion in *National Federation of Independent Businesses v. Sebelius*<sup>284</sup> indicates that he may become more liberal in his constitutional interpretation.<sup>285</sup> Regardless of whether Roberts agrees, when a Court

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276. See, e.g., Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 478–79 (2012).

277. *Id.* at 478–79.

[I]n a speech at Kansas State University, Justice Sotomayor stated, in connection with affirmative action, that the United States still has 'structural problems in the society that have to be addressed before we reach full equality . . . . We can't live in a society where the poorest children are the poorest educated.'

*Id.* at 479.

278. See *id.*

279. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing on S. 503 Before the S. Comm. on the Judiciary*, 111th Cong. (2009).

280. See, e.g., *id.* at 64–65 (questioning Justice Sotomayor on *Ricci v. DeStefano*).

281. 557 U.S. 557 (2009).

282. *Id.* at 562–63, 567–68.

283. See Leyland Ware, *Ricci v. DeStefano: Smoke, Fire and Racial Resentment*, 8 RUTGERS J.L. & PUB. POL'Y 1 (2011) (a group of white and Hispanic firefighters received the highest scores on two civil service examinations and claimed that the City of New Haven, Connecticut, discriminated against them because of race.).

284. 132 S. Ct. 2566 (2012).

285. See *id.* at 2608 (upholding the individual mandate of the Affordable Care Act

splits 4–4 on an issue, the previous precedent remains the law. Thus, the result following *Fisher* will be that there remains, under the law, a compelling governmental interest in viewpoint diversity.<sup>286</sup>

If a majority of the Court concludes that there is a compelling governmental interest, it will turn its attention to whether UT demonstrated that its plan was narrowly tailored to meet that interest. Judge Higginbotham suggested that the University was in the best position to decide whether its policy was the most narrowly tailored, thereby granting it “due deference” with respect to the issue.<sup>287</sup> Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Scalia may well take issue with Judge Higginbotham, thereby agreeing with *Fisher* that the circuit court decision abandons strict scrutiny in favor of due deference. Justice Breyer may agree. In so doing, the Court can reverse the Fifth Circuit’s *Fisher* decision while leaving the compelling governmental interest in diversity education intact.

In addition to finding that Judge Higginbotham did not provide the appropriate level of scrutiny, the Court may conclude that UT’s program is not narrowly tailored. *Fisher* argues that it was unconstitutional to “overlay” race preference policies on top of the Texas Top Ten Percent program.<sup>288</sup> According to her, the Texas Top Ten Percent Law is a race-neutral way to ensure that there is diversity in its classroom.<sup>289</sup> Given the use of the Texas Top Ten Percent Law, UT cannot also use the race-preference policy that it put in place for those who were not admitted under the Top Ten Percent Law. The issue for the Court is less about whether UT can layer its program and more about the way in which UT conducted its layering.

To meet the criteria set forth in *Grutter* and *Gratz*, UT must first demonstrate that its use of race preferences is flexible and non-mechanical.<sup>290</sup> Those in favor of upholding the UT policy will find comfort in the fact that the policy is non-mechanical.<sup>291</sup> Justice Breyer, in joining Justice O’Connor’s concurrence in *Gratz*, rejected the LSA policy because it automatically assigned points and, therefore, “unlike the law school . . . , [did] not provide for a meaningful individualized review of applicants.”<sup>292</sup> UT’s Personal Achievement Index is similarly non-

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of 2010 as a valid exercise of Congress’s taxing power).

286. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment)).

287. *Fisher II*, 631 F.3d at 231.

288. *Id.* at 243.

289. *Id.* at 242 n.156.

290. *Id.* at 221; *Grutter*, 539 U.S. at 334.

291. See *Fisher II*, 631 F.3d. at 227.

292. *Gratz v. Bollinger*, 539 U.S. 244, 276–277 (2003) (O’Connor, J., concurring).

mechanical in that it also provides for individual review.<sup>293</sup> Admissions officers review a host of what it terms special circumstance sub-factors, including race,<sup>294</sup> holistically to “develop an applicant’s Personal Achievement Index.”<sup>295</sup> The school’s policy of applicant by applicant consideration of any special sub-factors with which the applicant presents closely reflects the individual, non-mechanical review of *Grutter*, and for that reason, Justices Breyer, Ginsburg, and Sotomayor may well find that UT meets these criteria.

A positive vote from three Justices on the issue of whether the UT policy is narrowly tailored will still result in the invalidation of the UT policy. Even if one or more Justices are likely to find that the program is non-mechanical, most will find that it suffers from inflexibility. According to the *Grutter* majority, a flexible program is one that is not fixed on admitting a certain number of minority students.<sup>296</sup> What made the *Grutter* program attractive to the Court was that the school was willing to review the program often, through the admissions season.<sup>297</sup> But to Justice Kennedy, even the continual review of the number of students admitted to UT to contribute to a diverse voice was inadequate.<sup>298</sup> In his mind, obtaining a critical mass is tantamount to setting a goal, and therefore, regardless of individual review, race has to become an impermissibly important factor to achieve the “critical mass” that the University may deem necessary.<sup>299</sup> In *Grutter*, Justice Kennedy also demanded empirical proof from the law school that it needed the program before he would pass the narrowly tailored prong.<sup>300</sup>

A majority of the Court hearing this case is unlikely to retreat from its previously articulated finding that there is a compelling governmental interest in viewpoint diversity.<sup>301</sup> The majority is, however, likely to strike down the decision of the lower court for deferring to the UT policy under the narrowly tailored prong of the strict scrutiny test. The Court may

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293. *Fisher II*, 631 F.3d at 228.

294. Defendant’s Brief in Opposition, *Fisher v. Univ. of Tex. at Austin* (U.S. 2011) 2011 WL 6146835 at 5. UT added to UT, race was added to the list of the schools “special circumstance” sub factors, following *Grutter*. *Id.* at 6.

295. Following *Grutter*, UT launched an extensive review to determine whether its admissions policies adequately served its broad interest in diversity. UT commissioned a thorough study to evaluate diversity throughout the University, in various departments and colleges and within individual classrooms. The university consulted with legal scholars to interpret *Gutter* and with students, faculty members and a leading expert on holistic review to evaluate whether UT was attaining the educational benefits on diversity. *Id.*

296. *Grutter*, 539 U.S. at 335.

297. *Id.* at 342–43.

298. *Id.* at 394 (Kennedy, J., dissenting).

299. *Id.* at 389, 392.

300. *Id.* at 388.

301. *Id.* at 315–17.

further rule that the UT policy was not narrowly tailored, thereby prohibiting the school's use of the challenged program. For this reason, following *Fisher*, institutions may remain free to consider race in the admissions process, if only in a limited way.

### III. THE INEVITABLE IRRELEVANCE OF AFFIRMATIVE ACTION JURISPRUDENCE

To some of those following affirmative action disputes, the Court's decision to grant certiorari in *Fisher*<sup>302</sup> signaled the end of affirmative action. With Chief Justice Roberts at the helm, they thought that the Court would eliminate an institution's ability to use race as a variable in admissions decisions. Closer scrutiny of past decisions, however, reveals that although the UT policy is unlikely to survive the present challenge, the Court will not slam the door on the consideration of race in admissions decisions.<sup>303</sup>

Following *Fisher*, colleges and universities may be likely to remain free to consider race in the admissions process, if only in a limited way. Thus, the issue becomes how the *Fisher* decision, by upholding the compelling governmental interest in viewpoint diversity, might inform colleges and universities as they proceed to develop new race-preference admissions policies. The likely answer to this question is: not very much.

In theory, *Fisher*, particularly as it will be read with *Grutter* and *Gratz*, could provide a workable framework for institutions that want to ensure a diverse entering class. This framework would require individual review of every applicant and a decreased reliance on a purely meritocratic admissions process. But today's academic climate holds little value for colleges and universities, particularly elite academic institutions that choose to structure their respective admissions processes in a constitutionally workable manner.

One reading of affirmative action jurisprudence is that institutions interested in adopting constitutionally permissible admissions programs can shift the focus from race-based admissions policies to socioeconomic-based admissions plans.<sup>304</sup> Alternatively, colleges and universities can abandon their meritocratic admissions plans in favor of individual review that values all factors equally, rendering unnecessary the "plus" factor of meritocratic admissions policies.<sup>305</sup>

Colleges and universities, however, are unlikely to adopt either of these solutions. Some scholars argue that adopting a socioeconomic admissions program may not yield the critical-mass-type of racial diversity that is

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302. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

303. *See, e.g., Grutter*, 539 U.S. at 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003) (laying out the standard for constitutional use of race in admissions).

304. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

305. *See id.* at 317.

arguably essential to viewpoint diversity.<sup>306</sup> Abandoning meritocratic admissions policies is antithetical to the modern institutional goal of retaining, or obtaining, nationally recognized “elite” status.

Indeed, over the past few decades, both applicants and post-secondary institutions have placed an unhealthy emphasis on national rankings.<sup>307</sup> Media outlets, such as *U.S. News & World Report*, have taken to ranking institutions on a host of factors, placing heavy reliance on the mean grade

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306. See Deborah Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729 (2011). See Tung Yin, *A Carboic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (observing that in any particular socioeconomic strata of law school applicants, “whites swamp [[minority applicants]] in numbers, so their greater diversity gets lost in the broader pool”); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 494–98, 492–94 (1997) (providing statistical support for the conclusion that a socioeconomic based affirmative action admissions policy would yield a less diverse class than a race-based affirmative action admissions policy); Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 645 (2011) (providing statistical support for his conclusion that institutions favor admitting law students based on race rather than socioeconomic status, despite presenting with similar LSAT scores); and Yin, *supra*, at 235 (noting that the beneficiaries of class-based affirmative action “are likely to be overwhelmingly white”); see also Malamud, *supra*, at 731 (arguing that elite law schools would be unlikely to alter their middling socioeconomic status enrollments). Given the heavy reliance that *U.S. News & World Report* places on an applicant’s Scholastic Aptitude Test (SAT) score, colleges and universities will look to admit those students who perform best on the SAT. See Richard Perez-Peña & Daniel E. Slotnick, *Gaming the College Rankings*, N.Y. TIMES, Feb. 1, 2012, at A14, available at <http://www.nytimes.com/2012/02/01/education/gaming-the-college-rankingscollegerankings.html>. Among those test takers who had a reported family income of \$0–\$20,000 per year, the mean test score for white test takers was significantly higher than that of minority test takers:

	Critical Reading	Mathematics	Writing
White	433	461	428
African-American	399	402	391
Hispanic	416	411	411

THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf> (identifying SAT test takers by ethnicity and income level). While the number of test takers at or below poverty level was comparable for those identifying themselves as African-American or Caucasian, the number of students from families reporting higher incomes was not.

307. Richard Perez-Peña & Daniel E. Slotnick, *Gaming the College Rankings*, N.Y. Times, Feb. 1, 2012, at A14, available at <http://www.nytimes.com/2012/02/01/education/gaming-the-college-rankingscollegerankings.html> (citing numerous examples of college misconduct directed at advancing in college rankings, including 1) Iona College, admitting that employees had lied for years about, among other things, test scores, graduation rates, and freshman retention rates, as well as 2) Claremont McKenna College, whose Vice President & Dean of Admissions inflated average SAT scores provided to *U.S. News & World Report* for years); See also *infra* note 344 and accompanying text (discussing the focus of admissions offices on climbing the *U.S. News & World Report* rankings).

point average and standardized test scores of the entering class.<sup>308</sup> Unfortunately, the wide-spread goal among a majority of colleges, universities, and graduate schools to “rise in the rankings” is antithetical to admitting students with noncompetitive Scholastic Aptitude Test (SAT) scores; due to the racial gap between mean test scores on the SAT, many of the students denied admission in this way will be minority students.<sup>309</sup>

The academic admissions process, when measured against the current trend to seek national recognition for academic elite status, reveals the inconsequential nature of race-preference affirmative action admission policies. In this section, I demonstrate why institutions will continue to adopt race-preference admissions policies as a complement to their meritocratic process. I first highlight the nature of the academic admissions process. I then consider a constitutional alternative that will likely be available to colleges and universities following the *Fisher* decision. Finally, I conclude by explaining why, given the rise in the importance of reputational surveys, any decision by the Court regarding race-preference admissions policies will not have much impact on how colleges and universities choose which students to admit.

#### A. The Nature of the Admissions Process

The need for preference admissions policies stems from the meritocratic nature of post-secondary institutions’ admission programs. Colleges and universities place the greater weight of their admissions policies on objective factors, such as standardized test scores and GPAs.<sup>310</sup> The reason

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308. Robert Morse, Methodology: Undergraduate Criteria and Weights, U.S. News & World Report, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012.308>.

309. See Daniel Koretz, The Impact of Score Differences on the Admissions of Minority Students: An Illustration, 1 Nat’l Bd. on Educ. Testing & Pub. Pol’y 5 (2002) (discussing the difference found on tests of academic achievement between non-Asian minority and majority students); *The Widening Racial Scoring Gap on the SAT College Admissions Test*, J. BLACKS HIGHER EDUC., [http://www.jbhe.com/features/49\\_college\\_admissions-test.html](http://www.jbhe.com/features/49_college_admissions-test.html) (last visited Oct. 31, 2012) (providing statistical support for the conclusion that African-American and Hispanic students lag in SAT scores behind majority students).

310. GEORGE H. HANFORD, LIFE WITH SAT: ASSESSING OUR YOUNG PEOPLE AND OUR TIMES 90 (1991) (According to former College Board President George Hanford, “the SAT served as the most widely used and possibly the most important single talent search device the country had.”); William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 135 (2002) (calling the SAT the “gatekeeper of higher education”) (citation omitted); Rachel Moran, *Sorting and Reforming: High Stakes Testing in Public Schools*, 34 AKRON L. REV. 107, 110 (2000) (observing that SATs have become “a fixture of the college application process”); see Theodore M. Shaw, *Comments of Theodore M. Shaw*, 30 COLUM. HUM. RTS. L. REV. 489, 492 (SUMMER 1999) (“[W]e have increasingly become a society run as a testocracy where . . . opportunit[y] . . . depends, in large part, on . . .

for placing such emphasis on these objective scores is twofold. First, given the sheer number of applicants, threshold GPAs and SATs gave an arbitrary cutoff point below which colleges and universities did not have to consider students, thereby shrinking the reviewable applicant pool.<sup>311</sup> Second, the use of standardized and objective factors supports the meritorious nature of admissions.<sup>312</sup> Those who worked hard received the right to study in a school with the most academically achieving students.

Unfortunately, this system gave rise to two negative phenomena. First, and the reason for affirmative action programs in the first place, is that meritocratic programs favor those from elite secondary schools and those who had access extra tutoring and coaching.<sup>313</sup> This phenomenon created a schism between those who had better access and those who did not.<sup>314</sup> Most often those with the least access to advantageous training were minorities.<sup>315</sup> African-American students who grew up in a world shaped more by *Plessey v. Ferguson*<sup>316</sup> than by *Brown v. Board of Education*<sup>317</sup> could not present the objective achievement-based measures necessary to compete with their “majority” peers.<sup>318</sup> The problem had its roots in pre-Civil Rights Era racism at the K-12 grade level.<sup>319</sup> Colleges, universities, and graduate schools, however, quickly assumed the moral and ethical need to provide equal access at the post-secondary school level.<sup>320</sup>

Unfortunately, educational improvements toward more equal education at the K-12 level and the post-secondary level have not achieved the goals set by Civil Rights Era educational reformers. Justice Ginsburg observed in *Grutter* that, as of the beginning of this century, “many minority students [continue to] encounter markedly inadequate and unequal education opportunities.”<sup>321</sup> In 2006, the average African-American score on the combined math and verbal portions of the SAT test was 863.<sup>322</sup> The mean

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. how [well] one performs on standardized tests.”).

311. See, e.g., Kidder & Rosner at 205 (citing Florida’s use of a 1270 SAT cutoff score for a scholarship program).

312. *Id.* at 142.

313. See THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf>.

314. See *id.*

315. See Walter R. Allen, *Black Students in U.S. Higher Education: Toward Improved Access, Adjustment, and Achievement*, 20 URB. REV. 165, 184–85 (1988).

316. 163 U.S. 537 (1896).

317. 347 U.S. 483 (1954).

318. See Allen, *supra* note 315.

319. *Id.* at 185.

320. *Id.* at 165.

321. *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring).

322. *A Large Black-White Scoring Gap Persists on the SATs*, J. BLACKS IN HIGHER EDUC., <http://www.jbhe.com/features/53SAT.html> (last visited Oct. 31, 2012).

score for whites on the combined math and verbal SAT was 1063, approximately 17% higher.<sup>323</sup> Hispanics similarly lagged behind.<sup>324</sup> Today, Wayne Camara, the College Board's vice president for research and development, attributed the gaps between black and Hispanic students and whites and Asians to access to education.<sup>325</sup> A study in the *Journal of Blacks in Higher Education* attributed sharp differences in family income as a major factor for these results.<sup>326</sup> Consequently, African-Americans and other minority groups are unable to compete when applying to colleges and universities whose admissions processes are largely based on a meritocratic system.

### B. A Constitutional Manner of Achieving Diversity

With regard to race-preference admissions policies, the Court has laid out, with sufficient clarity, what is and is not acceptable for purposes of complying with the U.S. Constitution. The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>327</sup> Individuals and groups bring challenges under the Equal Protection Clause, claiming that members of a class, of which they are a part, are receiving unequal treatment from a federal or state law. In evaluating these laws, the Court will subject them to a level of scrutiny depending on the type of group at which the laws take aim.

Laws differentiating individuals based on immutable traits such as race

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323. *Id.* The article also states:

Not only are African-American scores on the SAT far below the scores of whites and Asian Americans, but they also trail the scores of every other major ethnic group in the United States including students of Puerto-Rican and Mexican backgrounds. In fact, few people realize that Native American and Alaska Native students on average score 118 points higher than the average score of black students. On average, Asian American students score 225 points, or 19%, higher than African-Americans.

*Id.* at 1.

324. Victor Manuel Ramos, *SATs: Hispanics Scoring Better, but Lag in College Admissions Tests*, ORLANDO SENTINEL (Aug. 26, 2009, 5:55 AM), [http://blogs.orlandosentinel.com/news\\_hispanicaffairs/2009/08/sat-scores-hispanics-doing-better-but-still-behind-in-college-admission-tests.html](http://blogs.orlandosentinel.com/news_hispanicaffairs/2009/08/sat-scores-hispanics-doing-better-but-still-behind-in-college-admission-tests.html).

325. Tamar Lewin, *Average Scores Slip on SAT*, N.Y. TIMES, Sept. 15, 2011, at A20, available at <http://www.nytimes.com/2011/09/15/education/15sat.html>.

326. *Scoring Gap*, *supra* note 323:

In 2006, 24 percent of all black SAT test takers were from families with annual incomes below \$20,000. Only 4 percent of white test takers were from families with incomes below \$20,000. At the other extreme, 8 percent of all black test takers were from families with incomes of more than \$100,000. The comparable figure for white test takers was 31 percent.

*Id.* at 1.

327. U.S. CONST. amend. XIV, § 1.



or national origin are subject to elevated judicial scrutiny.<sup>328</sup> Laws that do not implicate a suspect or quasi-suspect class, are subject to the rational basis test, the most deferential form of judicial scrutiny.<sup>329</sup> Under rational basis review, the burden is on the challenger to show that the policy is not rationally related to a legitimate state interest.<sup>330</sup> The rational basis standard of review does not require a court to take into account the actual purposes behind the legislation.<sup>331</sup> Any conceivable purpose would suffice. Under-inclusiveness or over-inclusiveness are not fatal under rational basis review.<sup>332</sup>

A regulation based on race triggers strict scrutiny.<sup>333</sup> Programs that differentiate based on socioeconomic status, however, may only trigger the rational basis test.<sup>334</sup> Thus, defining a socioeconomic class-based admissions program is significantly more likely to pass constitutional muster than is a race-based admissions policy. Studies support the need for students from low income or poverty level homes to receive a “plus” in the admissions decision because these students are less likely to achieve the same academic success as their more financially fit counterparts.<sup>335</sup> Thus, a

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328. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995) (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of *equal protection*.”) (emphasis added).

329. *See Romer v. Evans*, 517 U.S. 620, 640 n.1 (stating that that rational basis test—the “normal test for compliance with the Equal Protection Clause—is the governing standard.”).

330. *See, e.g., New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). A group of former and current employees of the New York City Transit Authority filed a suit challenging the Transit Authority’s rule disallowing any employees from partaking in methadone treatment. The regulation did not fail equal protection merely because it is over-inclusive. The fact that the reach of the rule includes persons who did not exhibit the trait the Authority was seeking to exclude—unemployability due to narcotic use—did not make the regulation unconstitutional.

331. *See, e.g., U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980). A retired railroad worker filed suit challenging the Railroad Retirement Act of 1974, legislation that made the plaintiffs ineligible for certain retirement benefits granted to other workers, on the ground that the statute made a distinction disallowed by equal protection. The Court found that once there is any plausible reason, that explanation is enough to withstand rational basis review. Any conceivable legislative purpose is sufficient under rational basis.

332. *See, e.g., Ry. Express Agency v. People of State of N.Y.*, 336 U.S. 106 (1949). A national delivery company sought to challenge a New York City traffic regulation which prohibited advertisements on the side of vehicles, claiming that the regulation was in violation of equal protection because it did not apply to delivery vehicles that advertised the delivery service itself. The Court held under-inclusiveness is not fatal under rational basis.

333. *See supra* notes 70–71.

334. *See supra* notes 328–332.

335. *See* THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf>.

school employing a socioeconomic plan could successfully argue that its use of socioeconomic classifications is rationally related to a legitimate state interest.

Class-based admissions policies would yield diverse classes.<sup>336</sup> Admitting students whose family income falls at or below the poverty level would assure a viewpoint that is not otherwise heard in many elite classrooms.<sup>337</sup> There is a legitimate, even compelling, interest in achieving diversity in education.<sup>338</sup> Class-based admissions policies are race-neutral alternatives to diversifying student bodies.<sup>339</sup> Socioeconomic-based policies, rather than race-based policies, would therefore achieve the goal of diversity in education without necessarily having to pass the strict scrutiny review.

Despite the seeming logic in switching from race-based admissions policies to class-based policies, institutions have been reluctant to embrace the concept.<sup>340</sup> Both the UT and Michigan plans provided admissions officials with the opportunity to consider socioeconomic status as well as race in their admissions decisions.<sup>341</sup> Yet, despite a clear directive from a majority of the bench to only consider race in the narrowest of circumstances, colleges and universities continue to include it as a factor in their decision-making process.<sup>342</sup> Retooling admissions decisions to a class-based policy would provide a different type of diversity, one that institutions are not yet prepared to embrace. Despite decades of precedent,

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336. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

337. *Id.*

338. *Id.* at 314.

339. *Fisher II*, 631 F.3d 213, 242 n.156, 243 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

340. The notion of shifting from race-based admissions policies to socioeconomic-based admissions policies has been advocated for decades. See, e.g., Richard Fallon, *Affirmative Action Based on Economic Disadvantage*, 43 *UCLA L. REV.* 1913 (1996) (advocating a shift from race-based preferences to socioeconomic preferences); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 *CALIF. L. REV.* 1037 (1996); see also Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 *IOWA L. REV.* 1549 (2011) (acknowledging efforts to ensure socioeconomic diversity). One reason for schools' reluctance is historical in nature. During the neophyte post-Civil Rights Era in which *Bakke* was decided, underrepresentation in colleges and universities was equated with race. Furthermore, at that time, individuals applying to graduate schools, like the medical school at the center of the *Bakke* controversy, had spent their primary and secondary education in racially segregated schools, which, after the mid-1960s, were universally recognized as sub-par. See Allen, *supra* note 318, at 185.

341. See *Fisher II*, 631 F.3d at 228; *Gratz v. Bollinger*, 539 U.S. 244, 256–57 (2003).

342. Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 645 (2011) (providing statistical support for his conclusion that schools favor admitting law students based on race rather than socioeconomic status, despite presenting with similar LSAT scores).

colleges, universities, and graduate schools are unwilling to shift from a race-based policy to a class-based policy.<sup>343</sup> Consequently, race-based admissions policies following *Fisher* will continue to meet with equal protection challenges.

### C. Why *Fisher* is Irrelevant

It is a poorly kept secret that admissions offices in today's post-secondary institutions tailor their decisions to climbing the rankings of *U.S. News & World Report*.<sup>344</sup> Because *U.S. News* places heavy emphasis on objective scores such as GPAs and standardized tests, institutions work hard to admit those with the most competitive objective admissions criteria.<sup>345</sup> African-American and Hispanic students perform less well on standardized tests such as the SAT.<sup>346</sup> Consequently, opportunity costs of

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343. *Id.*

344. See Elise Amendola, *Editorial: Colleges Fail Students When They Game Rankings*, USA TODAY (Sept. 7, 2012, 12:09 AM), <http://www.usatoday.com/news/opinion/story/2012-09-05/college-rankings-US-news/57614840/1> ("Emory [University] officials misrepresented enrollees' SAT and ACT scores, and in some years their high school standing, in reports to the U.S. Education Department and to publications that rank colleges, including *U.S. News & World Report*."); Kenneth Anderson, *LSAC Study on Law Schools Gaming Resources for US News Rankings*, THE VOLOKH CONSPIRACY (Dec. 3, 2009, 11:31 AM), <http://www.volokh.com/2009/12/03/lvac-study-on-law-school-gaming-resources-for-us-news-rankings> (summarizing an LSAC study regarding law schools redistributing resources to increase their respective rankings in *U.S. News & World Report* and noting the increase in merit scholarships intended to improve the statistical profile of incoming classes); Elie Mystal, *Another Law School Caught in a Lie*, ABOVE THE LAW (Sept. 12, 2011, 1:40 PM), <http://abovethelaw.com/2011/09/another-law-school-caught-in-a-lie> (citing an example in which a University of Illinois College of Law administrator reported inflated grade point averages and LSAT scores); Justin Pope, *Colleges May Obsess Over Rankings, But Students Don't Care*, HUFFINGTON POST (Feb. 5, 2012, 12:50 PM), [http://www.huffingtonpost.com/2012/02/05/colleges-may-obsess-over\\_n\\_1256365.html](http://www.huffingtonpost.com/2012/02/05/colleges-may-obsess-over_n_1256365.html) (explaining the significant role of rankings, such as *U.S. News & World Report*, on college administrators, with one college, Baylor University, offering financial rewards to already admitted students to retake the SAT exam as a ploy to boost the average score it could report.); Elie Mystal, *Villanova Law 'Knowingly Reported' Inaccurate Information to the ABA*, ABOVE THE LAW (Feb. 4, 2011, 3:34 PM), <http://abovethelaw.com/2011/02/villanova-law-school-knowingly-reported-inaccurate-information-to-the-aba>; see also Perez-Pena & Slotnick, *supra* note 307.

345. See, e.g., Lani Gunieier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144–45 (2003) (discussing the emphasis that colleges and universities place on *U.S. News & World Report*); Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1080 (2009) (citation omitted) ("[C]olleges and universities need high average SAT scores to place well in the college-rankings systems like *U.S. News & World Report*'s 'America's Best Colleges.'").

346. 2012 COLLEGE-BOUND SENIORS 2012, *supra* note 21 (reporting the mean SAT for African-Americans as 428, 428, 417).

rejecting a meritocratic admissions in policies of colleges and universities in favor of a more viewpoint diverse class-based system are very large.<sup>347</sup>

Indeed, standardized tests figure largely into the problem. Introduced in 1926, the SAT<sup>348</sup> was designed to assess a student's preparedness for college.<sup>349</sup> Institutions combined the SAT score<sup>350</sup> with a student's GPA to establish an easy base line for admissions.<sup>351</sup> Many admissions offices settle on a score, below which they are unwilling to consider applicants.<sup>352</sup> Institutions, particularly elite institutions, strive for a high mean score for entering students because it will reflect favorably on their academic reputation.<sup>353</sup>

The problem is that the SAT presents a bias against students who come from poor educational backgrounds.<sup>354</sup> One study revealed close to a 400-

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	Critical Reading	Mathematics	Writing
African American	428	428	417
Hispanic	448	462	442
White	527	536	515

*Id.*

347. Thomas J. Epenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 303 (2005).

348. IDA LAWRENCE, GRETCHEN W. RIGOL, THOMAS VAN ESSEN & CAROL A. JACKSON, THE COLLEGE BOARD, RESEARCH REPORT NO. 2002-7: A HISTORICAL PERSPECTIVE ON THE SAT: 1926–2001, 1 (2002).

349. *A Brief History of the SAT*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/where/history.html> (last visited Nov. 1, 2012).

350. Note: Many colleges and universities settle on the ACT too. *Test Prep: Choosing the ACT or SAT*, PETERSON'S, <http://www.petersons.com/college-search/test-prep-act-sat.aspx> (last visited Nov. 1, 2012).

351. William C. Kidder & Jay Rosner, *How the SAT Creates "Built in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 13, 207–08 (2002).

352. *Id.* at 135, 170.

353. See, e.g., Perez-Pena & Slotnick, *supra* note 308 (reporting instances of manipulation at institutions including Iona College, Baylor University, and Claremont McKenna).

354. See Derrick Bell, *Diversity's Distraction*, 103 COLUM L. REV. 1622, 1630–31 (2003) (citing studies that demonstrate admissions tests "measure quite accurately the incomes of the applicants' parents"); William C. Kidder & Jay Rosner, *How the SAT Creates "Built in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 13, 156 n.73 (2002) (observing the SAT demands knowledge of "white upper-middle class social norms") (citation omitted). An example of bias on the exam includes the following question:

RUNNER:MARATHON

(A) envoy:embassy

(B) martyr:massacre

(C) oarsman:regatta \*the correct answer\*

(D) referee:tournament

(E) horse:stable

point disparity between students from homes with incomes less than \$20,000 per year and students from homes with incomes of over \$200,000 per year.<sup>355</sup> The reason for this disparity is that like other vestiges of racism, economic disparity generally falls across racial lines.<sup>356</sup>

During the early days of affirmative action admission policies, the notion of race as a consideration in the admissions process mattered because students with low test scores could not compete for seats in an otherwise meritocratic admissions process.<sup>357</sup> The problem was exacerbated with the introduction of *U.S. News & World Report* rankings for colleges, universities, and graduate schools.

*U.S. News & World Report* rankings first appeared in the early 1980s and have since become extremely influential.<sup>358</sup> The rankings are based on the average standardized test score of entering students, the mean GPA of entering students, and five other factors.<sup>359</sup> All data are submitted to *U.S. News & World Report* by institutions interested in participating in the rankings.<sup>360</sup> And while many colleges and universities abhor the *U.S. News & World Report* rankings,<sup>361</sup> they all participate.<sup>362</sup> Institutions see the

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Only 22% of those from low income families chose the proper answer (c) as opposed to 53% of those from more affluent homes. Critics cite an unfamiliarity among low income households with words like regatta as the reason for a disparate result of the answer. See generally SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS (Joseph Soares ed., Teachers College Press 2012) (highlighting the class bias of the SAT); Leslie Yalof Garfield, *The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Action Admissions Programs is Detrimental to the Cause*, 27 PACE L. REV. 15, 23 (2006) (discussing the above as an example of a culturally biased SAT question).

355. See THE COLLEGE BOARD, 2011 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2011), available at [http://professionals.collegeboard.com/profdownload/cbs2011\\_total\\_group\\_report.pdf](http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf) (showing a 398 point differential between students from homes with incomes less than \$20,000 per year and students from homes with incomes of over \$200,000 per year). See also THE COLLEGE BOARD, 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf> (showing a 392-point differential).

356. Bell, *supra* note 355, at 1631.

357. Allen, *supra* note 318.

358. *U.S. News History*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/usnews/usinfo/history.htm> (last visited Nov. 28, 2012).

359. Robert Morse, *Methodology: Undergraduate Criteria and Weights*, U.S. NEWS & WORLD REPORT, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012>.

360. *Id.*

361. Margot E. Young, *Making and Breaking Rank: Some Thoughts on Recent Canadian Law School Surveys*, 20 WINDSOR Y.B. ACCESS JUST. 311, 327 (2001) (reporting that “a letter signed by 150 [U.S.] law deans was sent to *U.S. News* protesting the survey”).

362. Johnson, *infra* note 366, at 311–12.

rankings as a way to maintain or enhance their academic reputation.

Admitting students with lower SAT scores undermined the ranking system.<sup>363</sup> Despite a general desire to admit a diverse class, the concern over falling in the rankings due to a lower mean SAT score for its entering class arguably fuels continued emphasis on the SAT.<sup>364</sup> Institutions have raised concern over the dilemma of rankings and their effect on admissions decisions.<sup>365</sup>

Over the past few decades, law schools seem to have been most vocal about problem of rankings as they are associated with the LSAT. Dean Alex Johnson wrote, “*U.S. News* ranking[s] use[] [the] median score in evaluating law schools in a way that exacerbates the very small differences between the median scores of schools, . . . [t]hus . . . forc[ing] law schools to increase their median LSAT score[s] in order to raise [the] rank[ings], disproportionately affecting those who score lower on the test.”<sup>366</sup>

School officials do not want to acknowledge the quagmire in which the admissions process is stuck. Justice Scalia, in his *Grutter* dissent, however, was willing to so do.<sup>367</sup> Scalia supported Justice Thomas’ “central point” that the Michigan need for race-preference programs was based on “Michigan’s interest in maintaining a prestigious law school whose normal admissions standards disproportionately exclude blacks and other

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363. Robert Morse, *Methodology: Undergraduate Criteria and Weights*, U.S. NEWS & WORLD REPORT, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012>.

364. Many institutions have been accused of pandering to *U.S. News* or, worse, “fudging numbers” to game the system. See Perez-Pena & Slotnick, *supra* note 308 (reporting instances of manipulation at institutions including Iona College, Baylor University, and Claremont McKenna); Brian Z. Tamanaha, *Law Schools Fudge Numbers, Disregard Ethics to Increase Their Rankings*, THE DAILY BEAST (June 7, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/06/17/law-schools-fudge-numbers-disregard-ethics-to-increase-their-ranking.html> (describing the perspective of the former interim Dean of St. John’s Law School); Debra Cassens Weiss, *US News to Law Deans: Please Don’t Fudge Your Numbers*, ABA J, (Mar. 11, 2011, 11:40 AM), [http://www.abajournal.com/news/article/us\\_news\\_to\\_law\\_deans\\_please\\_dont\\_fudge\\_your\\_numbers](http://www.abajournal.com/news/article/us_news_to_law_deans_please_dont_fudge_your_numbers) (reporting on *U.S. News & World Report’s* acknowledgement that schools manipulate statistics).

365. Alex M. Johnson, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006). Note: 150 schools signed a petition to abolish rankings.

366. *Id.* at 313–14. Law schools’, and indeed all schools’, reliance on the median number has significant impact on admissions decisions, particularly at less elite academic institutions. The median number is that number above which and below which half the class is ranked. For those competing in the *U.S. News & World Report* process, the number of accepted students with standardized test scores above their desired median dictates the number of students that the school is willing to admit with standardized test scores below the desired median. See *id.* at 353.

367. *Grutter v. Bolinger*, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part).

minorities.”<sup>368</sup> This observation was that schools make a choice to be elite, and demonstrates that the problem of pandering to the rankings had made its way to the highest court.

Large elite academic institutions cannot have it both ways.<sup>369</sup> These colleges and universities seek to report a high academic average for those entering its gates.<sup>370</sup> The disproportionate performance between minority students and non-minority students<sup>371</sup> yields a student body that is more homogenous than institutions desire. Thus, to assure viewpoint diversity, institutions create race-preference policies that allow them to give a “plus” to those who have not performed in a way that would keep the colleges and universities’ standardized test scores or GPAs at an ideal level for purposes of reporting to those who rank the school.<sup>372</sup>

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368. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part. (“The Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status”); *Id.* at 355–56 (Thomas, J., concurring in part and dissenting in part).

369. Claims challenging policies on Equal Protection grounds have brought against schools ranked in the upper tiers of *U.S. News & World Report*. See *Best Law Schools*, U.S. NEWS & WORLD REPORT (2012), available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Nov. 1, 2012); *National University Rankings*, U.S. NEWS & WORLD REPORT (2012), available at <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities> (last visited Nov. 1, 2012) (for example, the University of Michigan at Ann Arbor ranked twenty-ninth nationally, University of Michigan School of Law School ranked tenth among U.S. law schools, University of Texas at Austin ranked forty-sixth among national universities).

370. Perez-Pena & Slotnick, *supra* note 308.

371. See COLLEGE-BOUND SENIORS 2012, *supra* note 347.

372. See *Plessey v. Ferguson* through U.S. CONST. Amend. XIV, *supra* notes 316–327. Justice Scalia, during oral arguments for *Fisher v. Texas*, alluded to this practice questioning African-American and Hispanic applicants from privileged backgrounds might deserve a preference. Transcript of Oral Argument at 58–62, *Fisher v. Texas*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (No. 11-345), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-345.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf).

A 2010 Pew Research Center study entitled, *Minorities and the Recession-Era College Enrollment Boom*, found that “Minority college students are concentrated at two-year colleges and less-than-two-year institutions in comparison with their white peers (National Center for Education Statistics, 2010b) [and that] among undergraduates at four-year colleges and universities, minority undergraduates on average enroll at the less academically selective institutions compared with white undergraduates. The concentration of minority students at the less elite institutions provides further support for the proposition that elite intuitions are not accepting minority students with the same frequency as those schools with less impressive rankings. See, MINORITY AND THE RECESSION-ERA COLLEGE ENROLLMENT BOOM 6 (June 2010) available at <http://www.pewsocialtrends.org/files/2010/11/757-college-enrollment.pdf> (citing Sigal, Alon and Marta Tienda, “Assessing the “Mismatch” Hypothesis: Differentials in College Graduation Rates by Institutional Selectivity,” *SOCIOLOGY OF EDUCATION*, Vol. 78, No. 4 (October 2005).

Institutions interested in the twin goals of assuring a diverse classroom and achieving a high rank in the *U.S. News & World Report* rankings are incentivized to select minority students with the highest SATs and undergraduate GPAs (UGPAs).<sup>373</sup> This practice of “gaming the rankings”<sup>374</sup> tends to yield selection of, say, an African-American student from an elite private high school, who has shared all of the benefits and experiences of her non-minority peers, over a student from a low-income family presenting with a less stellar SAT score and UGPA.<sup>375</sup> Consequently, the voice that the former applicant contributes to the classroom may not be of a view that is much different than that of a majority of her new classmates.<sup>376</sup>

Ideally, colleges and universities would disregard *U.S. News & World Report* and select students whose attributes, which combine objective test scores and demonstrated uniqueness, best reflect the institutions’ academic missions. A normative shift away from *U.S. News & World Report*, however, would not relieve colleges and universities of constitutional restraint. State funded post-secondary school admissions programs remain limited to the doctrinal confines of *Bakke*, *Gratz*, and *Grutter* and what is likely to follow with *Fisher*.<sup>377</sup> A school interested in considering race in the admissions decision would still be charged with making individualized decisions about each applicant.<sup>378</sup> The current trend of commoditizing SATs and UGPAs, however, might fall by the wayside in favor of colleges and universities assuring a real sense that the diverse voices they choose to admit are ones that might not otherwise make it to the classroom.

To the extent that viewpoint diversity means assembling a critical mass representing a variety of viewpoints,<sup>379</sup> race and socioeconomic status should remain relevant in the admissions process. A post-secondary school

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373. See *supra* notes 307–309.

374. Perez-Pena & Slotnick, *supra* note 308.

375. See NAT’L ASS’N NATIONAL ASSOCIATION FOR COLL. ADMISSION COUNSELING, 2010 STATE OF COLL. ADMISSIONS 18 (2010), available at <http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/SoCA2010.pdf>. The 2010 report for the National Association for College Admissions Counseling reports that for 2009, 86.5% of colleges attribute grades in college-preparation courses as the most important factor in admissions decisions. 57.8% report the SAT or ACT as the most important factor in admissions decisions.

376. See Transcript of Oral Argument, *supra* note 372 at 58–60. Justice Alito raised this very concern during the *Fisher* oral arguments when he asked whether African-American and Hispanic Applicants from privileged backgrounds deserve a preference. *Id.*

377. See generally *supra* Parts I.B, I.C, II.B, and II.C (discussing affirmative action policy jurisprudence in *Regents of the Univ. of Cal. v. Bakke* and later decisions, and the treatment of *Fisher v. Univ. of Tex. at Austin* in the lower courts and in briefs to the Supreme Court).

378. See *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

379. See *id.* at 315–16.



may consider race as one of several factors in its admissions process so long as it makes individualized holistic decisions about applicants.<sup>380</sup> Unfortunately, it is quite costly for colleges and universities to consider applicants individually; they must assemble a cadre of admissions officials available to annually review thousands of applications.<sup>381</sup>

To paraphrase Justice Scalia in the *Fisher* oral arguments, it takes a lot of people to assure racial diversity.<sup>382</sup> But it is the Constitution, and not the cost, that should limit a school's ability to create viewpoint diversity in its classrooms. Colleges and universities ideally should undertake the expensive review necessary to ensure that students with the kind of diverse voices that a classroom might otherwise lack are offered admission to their institutions.

The best constitutional route to assure meaningful viewpoint diversity would be for academic institutions to abolish their meritocratic admissions policies in favor of a holistic review of each applicant. Doing so, however, is likely to yield decreased mean GPAs or standardized test scores. Sadly, it seems that today's post-secondary institutions are not willing to compromise their academic elite status. For this reason, *Fisher* is likely to provide little contribution to affirmative action jurisprudence other than yet another example of what colleges and universities cannot do when creating race-preference admissions policies.

#### CONCLUSION

In the coming months the Supreme Court is likely to issue an opinion of little consequence. In *Fisher v. Texas*, the Court will most probably strike down the UT race-preference admissions plan but will not prohibit the consideration of race in any admissions process. The *Fisher* decision, therefore, will do little more than provide colleges, universities, and graduate schools with another example of an impermissible admissions program.

Colleges and universities are likely to ignore any broad message that *Fisher* may send to them. The decision to strike down the UT plan, like the decisions in *Grutter* and *Gratz* before it, will not encourage schools to rethink the meritocratic admissions plans that themselves create the kind of racial imbalances that lead to race-based admissions policies. The

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380. *Id.* at 337.

381. For example, the University of Michigan received 29,965 applications for admission for the 2009–2010 academic year. See Joseph Lichterman, 'U' Officials: This Year's Application Numbers Up, MICH. DAILY, Apr. 11, 2010, available at <http://www.michigandaily.com/content/u-officials-say-number-applicants-has-increased>. In 2010, the University of Texas received 31,000 applications. Bill Powers, *Message by President Bill Powers: The Challenge of Admission to UT*, UNIV. OF TEX. AT AUSTIN (Feb. 26, 2010), available at <http://blogs.utexas.edu/towertalk/2010/02/26/the-challenge-of-admission-to-ut>.

382. See Transcript of Oral Argument, *supra* note 372, at 58.

paramount desire among a significant number of colleges, universities, and graduate schools today to rise in the rankings will continue to trump judicial decisions that encourage schools to retool their admissions policies in a more holistic way. That desire is the primary reason for the growing irrelevance of affirmative action jurisprudence.

