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## Defending the Constitutionality of Race-Conscious University Admissions

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### Introduction

For the last several decades, affirmative action in higher education—and specifically the use of race-conscious policies in university admissions<sup>1</sup>—has been one of the most charged legal and political issues in America. Several states, including California, Washington, Florida, Arizona, Nebraska, Oklahoma, and New Hampshire, have enacted state laws prohibiting race-conscious policies.<sup>2</sup> Although the U.S. Supreme Court has heard many cases related to race-conscious university admissions,<sup>3</sup> the legal debates continue. In its October 2015 term, the Court will again consider *Fisher v. University of Texas at Austin*,<sup>4</sup> just two years after initially hearing the case.

The Supreme Court has thus far ruled that race-conscious university admissions policies are constitutional if they meet certain requirements. But for the past four decades, with each case it has considered, the Court has made those requirements more stringent. The Court's 1978 decision in *Regents of the University of California v. Bakke* was its first major statement on the issue; and its subsequent rulings in *Gratz v. Bollinger* (2003), *Grutter v. Bollinger* (2003), and *Fisher v. University of Texas at Austin* (I) (2013) elaborated on the constitutional doctrine. In *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary* (2014),<sup>5</sup>

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<sup>1</sup>This issue brief mostly refers to “race-conscious university admissions” rather than “affirmative action,” because the latter technically defines a broad range of policies beyond admissions and beyond the realm of education, even though in common parlance it is often used more specifically as a synonym for race-conscious university admissions. Nevertheless, this issue brief does use “affirmative action” in that more specific manner when citing to sources. Also “university” in the context of this issue brief refers to all institutions of higher education with selective admissions, not just those which technically meet the definition of a university.

<sup>2</sup> See *Affirmative Action: State Action*, NAT'L CONF. OF ST. LEGIS. (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>.

<sup>3</sup> *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Texas v. Lesage*, 528 U.S. 18 (1999); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher* (I)]. The Court did not rule on the merits in *Defunis* and *Lesage*, and it also remanded *Fisher* (I) to the Fifth Circuit, eventually leading to *Fisher* (II).

<sup>4</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015) (Mem.) [hereinafter *Fisher* (II)].

<sup>5</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary* (BAMN), 134 S. Ct. 1623 (2014).

the Court ruled that states can enact bans on race-conscious policies, but *Schutte* did not consider the merits of these policies. Now, *Fisher* (II) will further consider the constitutionality of race-conscious admissions policies.

The basic constitutional question around race-conscious university admissions is relatively simple. Under the Equal Protection Clause of the Fourteenth Amendment, can a university consider an applicant's race when making selective admissions decisions? For a university to use race as part of its admissions process, it must meet the strict scrutiny test. Its race-conscious admissions policy must fulfill a compelling state interest, and the policy must be narrowly tailored to meet that interest. Nevertheless, the nuances of strict scrutiny—as applied to race-conscious university admissions—have become quite complicated and contentious. Given the politically charged nature of race in America, universities, policymakers, and advocates need to understand constitutional doctrine and how it both intersects with and diverges from the political debates on affirmative action.

## I. Overview of the Current Legal Doctrine on Race-Conscious University Admissions

The Supreme Court has repeatedly ruled that the educational benefits of student body diversity are a compelling state interest which can justify universities' use of race in admissions, as long as these universities meet particular narrow tailoring requirements.<sup>6</sup> The Court has also given deference to universities' expertise in defining how their own educational missions comport with the diversity rationale,<sup>7</sup> but *Fisher* (I) clearly states that universities receive “no deference” on narrow tailoring.<sup>8</sup> Universities thus bear the burden of showing that use of race in admissions is necessary to achieve their compelling interest in diversity.

### A. Compelling State Interest – The Diversity Rationale

Justice Powell's concurring opinion in *Bakke* first articulated that diversity is a compelling state interest.<sup>9</sup> Nevertheless, *Bakke* was a plurality ruling, with no majority opinion and no other Justice joining Justice Powell's opinion. As such, the diversity rationale remained controversial as a constitutional matter until 2003, when the Court heard the two University of Michigan cases: *Gratz v. Bollinger* and *Grutter v. Bollinger*.<sup>10</sup> In *Grutter*, Justice O'Connor authored a 5-4 majority opinion affirming diversity as a compelling interest and elaborating on its contours. *Grutter* upheld the University of Michigan Law School's admissions policy—a holistic admissions plan that considered

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<sup>6</sup> *Bakke*, 438 U.S. at 311-12 (Powell, J., concurring); *Fisher* (I), 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 325).

<sup>7</sup> *Fisher* (I), 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 328–30.)

<sup>8</sup> *Id.* at 2420.

<sup>9</sup> See *Bakke*, *supra* note 6.

<sup>10</sup> Prior to *Gratz* and *Grutter*, the Fifth Circuit declined to follow Justice Powell's view in *Bakke*. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. 306 (stating “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”). In response to *Hopwood*, the Texas state legislature passed the Top Ten Percent Law, which was signed by then Governor George W. Bush. TEX. EDUC. CODE ANN. § 51.803 (1997) (guaranteeing admission to UT to top students (originally top 10 percent of each graduating class) in all Texas public high schools.). This law later became the basis for the *Fisher* litigation, and it has since been amended several times to limit the number of students automatically admitted to UT. TEX. EDUC. CODE ANN. § 51.803(a-1) (2015).

race in a discretionary and flexible manner, as one factor in the individualized review of applicants. Simultaneously, in *Gratz*, the Court struck down Michigan’s undergraduate admissions policy for the College of Literature, Science, and Arts on narrow tailoring grounds. That policy used a mechanical point system which automatically awarded 20 points on a 110 point scale to all minority applicants.<sup>11</sup>

*Grutter* set the unequivocal precedent for diversity as a compelling state interest. In *Fisher* (I), a case against the University of Texas at Austin (UT), the Court again affirmed the diversity rationale, even as it remanded the case to the Fifth Circuit. *Fisher* (I) stated that “[a] court may give some deference to a university’s ‘judgment that such diversity is essential to its educational mission,’ provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision.”<sup>12</sup> However, the Court also held that universities receive “no deference” on narrow tailoring,<sup>13</sup> and it ordered the Fifth Circuit to conduct a more stringent review of whether UT needs to use race to achieve its compelling interest in diversity.

### I. Societal Benefits of Diversity

Justice O’Connor’s majority opinion in *Grutter* remains the most comprehensive authority on the educational benefits of diversity as a compelling interest. On a broad, societal level, *Grutter* notes that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>14</sup> Justice O’Connor’s opinion also referenced national security, civic participation, and representative leadership as macro-level reasons why diversity in universities’ student bodies is a compelling interest. She cited several expert reports and studies to support this conclusion.<sup>15</sup>

Here, the particular importance of diversity in educational settings echoes prior civil rights decisions. In its opinion in *Sweatt v. Painter*, the Court noted the importance of “interplay of ideas and the exchange of views” to legal education.<sup>16</sup> *Brown v. Board of Education* then stated that education is “the very foundation of good citizenship” and “a principal instrument” in teaching cultural values and facilitating social adjustment.<sup>17</sup> Diversity adds significantly to that interplay and exchange, thus preparing future citizens and leaders to succeed in a global world.

### 2. Classroom and Campus Benefits of Diversity

*Grutter* also highlighted micro-level aspects of the diversity rationale: the educational benefits of diversity on campus and in the classroom. Justice O’Connor notes that these benefits include

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<sup>11</sup> See *Gratz*, 539 U.S. at 277-78. In the context of university admissions, this Issue Brief uses the term “minority” to refer specifically to groups which are commonly underrepresented at institutions of higher education. Typically, this includes African Americans, Latina/os, and Native Americans—and these groups are the primary referents here. Nevertheless, some Asian American sub-groups are also underrepresented at many universities, and in other contexts, Asian Americans face disadvantages similar to other minority groups.

<sup>12</sup> *Fisher* (I), 133 S. Ct. at 2413-14.

<sup>13</sup> *Id.* at 2420.

<sup>14</sup> *Grutter*, 539 U.S. at 330.

<sup>15</sup> *Id.* at 330-32.

<sup>16</sup> *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

<sup>17</sup> *Brown v. Board of Educ. of Topeka, Kan.*, 347 U.S. 483, 493 (1954).

facilitating “cross-racial understanding” and “break[ing] down racial stereotypes.”<sup>18</sup> Her opinion also refers to the diversity-related goal of enrolling a “critical mass” of underrepresented minority students. *Grutter* poses two general definitions of “critical mass”: (1) “[N]umbers such that underrepresented minority students do not feel isolated or like spokespersons for their race”; and (2) Presence of “a variety of viewpoints among minority students” such that “racial stereotypes lose their force.”<sup>19</sup>

Under either definition, critical mass is difficult to measure—especially since *Bakke* precluded any numerical target or set-aside for minority students.<sup>20</sup> In the *Fisher* (I) oral argument at the Supreme Court, neither Plaintiff Fisher nor UT could give a specific definition of critical mass.<sup>21</sup> Plaintiff’s counsel stated that it was UT’s burden to define critical mass,<sup>22</sup> while UT only referred to numbers such that minority students do not feel “like spokespersons for their race.”<sup>23</sup> The Court’s opinion in *Fisher* (I) did not provide any further guidance and focused on the “educational benefits of diversity” rather than critical mass per se.<sup>24</sup> Nevertheless, critical mass was still a component of the argument on remand,<sup>25</sup> and it may well play a role when the Supreme Court hears *Fisher* (II).

## B. Narrow Tailoring Requirements

*Bakke*, *Grutter*, *Gratz*, and *Fisher* (I) also articulated the narrow tailoring requirements for race-conscious admissions policies. A narrowly tailored race-conscious admissions policy must not have numerical targets or quotas for any minority groups.<sup>26</sup> It cannot automatically award points based on an applicant’s race and cannot consider the applicant’s race in an inflexible, non-discretionary manner.<sup>27</sup> Rather, when considering an applicant’s race, the admissions policy must do so in a flexible manner through individualized review,<sup>28</sup> and race cannot be the predominant factor in admissions decisions. Race must be considered alongside other diversity factors,<sup>29</sup> and a race-conscious admissions policy must not unduly burden members of any racial group.<sup>30</sup> Universities must adequately explore race-neutral alternatives to replace their race-conscious admissions policies, inquiring whether those race-neutral alternatives can attain the same educational benefits of

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<sup>18</sup> *Grutter*, 539 U.S. at 330.

<sup>19</sup> *Id.* at 319–20.

<sup>20</sup> *Bakke*, 438 U.S. at 316 (Powell, J., concurring); see also *Fisher* (I), 133 S. Ct at 2418.

<sup>21</sup> Vinay Harpalani, *Fisher’s Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57 (2013).

<sup>22</sup> Transcript of Oral Argument at 16–17, *Fisher* (I) (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).

<sup>23</sup> *Id.* at 47.

<sup>24</sup> Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 787 (2015) [hereinafter *Broadly Compelling*].

<sup>25</sup> *Id.*; see also *Fisher* (II), 758 F.3d at 654–57.

<sup>26</sup> *Grutter*, 539 U.S. at 334.

<sup>27</sup> See *Gratz*, 539 U.S. at 270–72.

<sup>28</sup> *Grutter*, 539 U.S. at 336–37.

<sup>29</sup> *Id.* at 337.

<sup>30</sup> *Id.* at 341 (O’Connor, J., dissenting) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990)).

diversity.<sup>31</sup> Additionally, universities must eventually phase out the use of race as an admissions factor and conduct periodic reviews to ascertain if using race is still necessary.<sup>32</sup>

### I. Flexible, Individualized Consideration of Race

Flexible, individualized consideration of race, through individualized review of each applicant, is the hallmark feature of a constitutional race-conscious admissions policy. It is the main feature that distinguished the *Grutter* plan from those struck down in *Bakke* and *Gratz*. The Supreme Court has repeatedly stated that numerical set-asides and quotas for admission by racial group are unconstitutional, because such programs negate individualized consideration of race and insulate minority applicants from competition with non-minorities. Similarly, the Court found the rigid point system in *Gratz* to be unconstitutional because it automatically rewarded all minority applicants in exactly the same manner.

All of the Supreme Court's rulings on race-conscious admissions policies thus underscore the importance of individualized consideration. It is not at play in the *Fisher* litigation, as Plaintiff Fisher conceded that UT's admissions policy was a *Grutter*-type plan and questioned only the need for such a plan in the wake of race-neutral alternatives.

### 2. Race-Neutral Alternatives

The requirement to consider race-neutral alternatives is the main controversy in the *Fisher* litigation. But what does it mean for a university to adequately explore race-neutral alternatives to attain diversity, and what exactly is an adequate race-neutral alternative? *Fisher* (I) addressed the former question, while *Fisher* (II) may shed more light on the latter.

*Grutter* held that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative[,]” but that it does “require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>33</sup> *Fisher* (I) affirmed the first part of this statement and elaborated on the latter: “[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice” to produce the educational benefits of diversity.<sup>34</sup> In *Fisher* (I), the Supreme Court found that the Fifth Circuit had not applied strict scrutiny when affirming UT's admissions policy. It remanded the case to determine whether Texas's Top Ten Percent Law, which grants automatic admission to UT for top Texas public high school students, was a race-neutral alternative that produced adequate diversity. On remand, the Fifth Circuit conducted a more stringent review and concluded again that UT had met its burden, by demonstrating that it needs a race-conscious admissions policy, in addition to the Top Ten Percent plan, to achieve its compelling interest in diversity.<sup>35</sup>

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<sup>31</sup> *Grutter* 539 U.S. at 339.

<sup>32</sup> *Id.* at 342.

<sup>33</sup> *Id.* at 339.

<sup>34</sup> *Fisher* (I), 133 S.Ct. at 2420.

<sup>35</sup> *Fisher* (II), 758 F.3d at 659–60.

*Grutter* held that lottery admissions systems or lowered academic standards across the board were not adequate race-neutral alternatives, because these would require universities to change their missions and decrease their student selectivity.<sup>36</sup> Ironically, *Grutter* also stated that percentage plans which grant automatic admission, such as UT's Top Ten Percent Law, were not adequate alternatives because they would not work for graduate and professional schools.<sup>37</sup> *Grutter* noted that such plans preclude individualized review for all diversity factors—but it is possible that *Fisher* (II) will abrogate this and find percentage plans to be adequate race-neutral alternatives for public undergraduate admissions, at least in some instances.<sup>38</sup>

There are other challenges that come up in the consideration of race-neutral alternatives. It is difficult enough to measure the educational benefits of diversity—much less to tie particular benefits to race-neutral or race-conscious admissions processes. If a university bears the burden of doing so, then it seems that a court could always strike down a race-conscious admissions policy simply because the university did not adequately demonstrate this link. Universities will need to be vigilant in devising measures, gathering data, and conducting studies to assess the nexus between educational benefits and race-conscious policies.

## II. Notable Issues for *Fisher* (II)

In *Fisher* (II), the Supreme Court will consider a number of issues that were left open in *Fisher* (I), when it remanded the case rather than making a ruling on the merits. This time, the Court is likely to rule on the merits. The basic question in *Fisher* (II) remains the same: Can UT use race as part of its supplemental holistic admissions policy, in addition to the Top Ten Percent plan that it employs to admit the vast majority (approximately 80 percent) of its incoming class? Plaintiff Abigail Fisher contends that the Top Ten Percent Law itself admits a “critical mass” of underrepresented minority students, so UT does not need to use a race-conscious policy for students admitted through the supplemental holistic plan. UT, on the other hand, contends that it has not achieved sufficient diversity with the Top Ten Percent plan alone.

The issues in *Fisher* (II) will touch on the compelling interest and narrow tailoring prongs of strict scrutiny. The Court will likely consider whether qualitative diversity (diversity within racial groups) is part of the compelling interest articulated in *Grutter*, whether the end point of race-conscious admissions can be defined in terms of critical mass, and whether it is problematic that the Top Ten Percent Law relies on racial isolation in Texas public schools to generate diversity.

### A. Qualitative Diversity (Diversity Within Racial Groups)

*Fisher* (II) will differ from its predecessor, as the Court delves deeper into the merits and UT changes its strategy in defending its race-conscious policy. In the initial *Fisher* litigation, UT's primary argument focused on *quantitative* diversity: numbers of minority students in particular types of classes. UT contended that it had not attained a “critical mass” because a large percentage of its

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<sup>36</sup> See *Grutter*, 539 U.S. at 309.

<sup>37</sup> See *id.* at 340.

<sup>38</sup> Vinay Harpalani, *Fisher v. Texas, the Remix*, SCOTUS NOW (July 18, 2015), <http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix/>.

seminar courses—where more classroom discussion actually takes place—had few or no Black, Latina/o, or Asian American students. Conversely, *Fisher* (II) will focus more on *qualitative* diversity: how UT’s race-conscious policy contributes to diversity *within* racial groups and the educational benefits of such within-group diversity.<sup>39</sup>

UT did briefly raise its within-group diversity argument in *Fisher* (I) at the Supreme Court (not in the lower courts), but the *Fisher* (I) opinion did not consider the issue. On remand, however, diversity within racial groups became a much more central part of UT’s argument. UT focused on how Black and Latina/o students admitted under its supplemental holistic policy were qualitatively different from the Black and Latina/o students admitted under the Top Ten Percent Law. Plaintiff Fisher countered that UT has not established that its supplemental holistic policy actually contributes to diversity within racial groups, or that such within-group diversity has educational benefits unattainable via the students admitted under the Top Ten Percent Law.<sup>40</sup>

### I. Deference on Defining the Compelling Interest

The Supreme Court heard some of the arguments on qualitative diversity in *Fisher* (I), but this time it will likely rule on them. The baseline issue here is the standard of review, and in accordance with its *Grutter* and *Fisher* (I) precedents, the Court should defer to UT on defining its diversity-related educational goals, such as the benefits of qualitative diversity. Such benefits are part of a university’s compelling interest in diversity: its educational goals and mission. In *Fisher* (I), Justice Kennedy’s majority opinion stated: “A court may give some deference to a university’s ‘judgment that such diversity is essential to its educational mission,’ provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision.”<sup>41</sup> Qualitative diversity is on its face more than just racial balancing, as the whole point is to achieve diversity within racial groups rather than particular numbers or percentages of each racial group. Additionally, there are clear reasoned, principled explanations for seeking qualitative diversity, in terms of its educational benefits: it serves to break down racial stereotypes and to reduce racial isolation.

### 2. Educational Benefits of Qualitative Diversity

Justice Powell’s concurrence in *Bakke*, which first judicially articulated the diversity rationale, noted the importance of qualitative diversity in the context of selective admissions—focusing on how a university might seek diversity within racial groups in each admitted class:

“[An] 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 who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had

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<sup>39</sup> See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 528-30 (2012) [hereinafter *Diversity Within Racial Groups*]; Devon Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013); Elise Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781 (2015).

<sup>40</sup> Plaintiff-Appellant’s Supplemental Reply Brief at 23, *Fisher* (II), 758 U.S. 633 (2014) (No. 09-50822).

<sup>41</sup> *Fisher* (I), 133 S. Ct. at 2313–14.

demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa.”<sup>42</sup>

*Grutter* later directly articulated the educational benefits of diversity within racial groups. Justice O’Connor’s majority opinion stated that “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”<sup>43</sup>

Both *Grutter* and *Fisher* noted the breakdown of racial stereotypes as one of the key educational benefits of diversity,<sup>44</sup> and *Grutter* also notes that having a “variety of viewpoints”—different perspectives and experiences among minority students—helps to attain this important goal. One common stereotype of Black and Latina/o students is that they all attend highly-segregated schools in impoverished neighborhoods. Most Black and Latina/o students admitted under the Top Ten Percent Law did attend such schools.<sup>45</sup> In the *Fisher* litigation, UT argues that students admitted via its race-conscious policy have different experiences and perspectives, because many of them attended predominantly White schools in more affluent areas. Thus, UT asserts that its race-conscious policy helps to break down racial stereotypes, allowing UT to fulfill its compelling interest in the educational benefits of diversity.<sup>46</sup>

Solicitor General Donald Verrilli, arguing for the United States in support of UT’s race-conscious admissions policy, added to this point at the *Fisher* (I) oral argument. He noted that:

“[U]niversities . . . are looking . . . to make individualized decisions about applicants who will directly further the education mission . . . [f]or example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has . . . mastered classical Greek.”<sup>47</sup>

This argument ties together the compelling interest (breaking down racial stereotypes) and narrow tailoring (flexible, individualized consideration of race) prongs of *Grutter* and *Fisher* (I)—highlighting the internal consistency of qualitative diversity as a constitutionally viable goal. Moreover, there is no race-neutral alternative that allows universities to identify African American fencers or other individuals who explicitly defy racial stereotypes. By definition, any admissions policy that seeks specifically to do so will have to consider race. Thus, qualitative diversity can also speak to the inadequacy of race-neutral alternatives.

Plaintiff *Fisher* countered UT’s arguments about qualitative diversity by arguing that assumptions about diversity within racial groups are themselves rooted in racial stereotypes and violate the spirit

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<sup>42</sup> See *Bakke*, 438 U.S. at 321 n.55 (Powell, J., concurring).

<sup>43</sup> *Grutter*, 539 U.S. at 319–20.

<sup>44</sup> See *id.*; *Fisher* (I), 133 S. Ct. at 2418.

<sup>45</sup> See Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587, 615 (2003).

<sup>46</sup> *Diversity Within Racial Groups*, *supra* note 39, at 513.

<sup>47</sup> Transcript of Oral Argument, *supra* note 22, at 60.

of the Equal Protection Clause.<sup>48</sup> However, given that both *Grutter* and *Fisher* (I) noted the breakdown of racial stereotypes as part of the compelling interest in diversity, the Court appears to acknowledge that such stereotypes exist and should be addressed. And the only way to address racial stereotypes is to acknowledge their content and attempt to counter it.

There is another potential argument for qualitative diversity as part of *Grutter*'s compelling interest—one that UT has not yet employed in *Fisher* litigation, but which is relevant and could be helpful. At the *Fisher* (I) oral argument, Justice Alito characterized UT's race-conscious admissions policy as a preference for minority students from privileged backgrounds,<sup>49</sup> but this critique is repudiated if the presence of these privileged students supports and enhances the college experience of their less privileged peers.<sup>50</sup> By having a mix of minority students from higher and lower socioeconomic backgrounds, the experience of the former, who have often attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust socially to elite, predominantly White universities and feel less isolated on those campuses. In this way, minority students who have experience navigating elite educational environments may serve as social supports for their less privileged peers. Moreover, student peers are present at social events and in residence halls late at night, when other university services may not be readily available. Universities should consider gathering data and conducting studies to determine if such intragroup social support is occurring, and then use this information to defend their pursuit of qualitative diversity through race-conscious admissions.

### 3. Qualitative Diversity and Narrow Tailoring

There are two aspects of narrow tailoring that are related to qualitative diversity. First, as alluded to earlier, the pursuit of diversity within racial groups supports the logic of *Grutter*'s narrow tailoring principles. *Grutter* mandates that race-conscious admissions policies utilize flexible, individualized review rather than conferring the same, automatic benefit to all minority group members. Unlike a racial quota, numerical goal/range, or a *Gratz*-type point system, a constitutional race-conscious policy cannot involve merely identifying an applicant's race and mechanically using that information. Rather, a *Grutter* holistic admissions plan considers race in conjunction with other diversity factors—and thus facilitates qualitative diversity in the admissions process.

Second, however, it is important to note that *Fisher* (I) gives no deference to universities on narrow tailoring. Even if qualitative diversity is a part of the compelling interest and consistent with *Grutter*'s narrow tailoring principles, UT still has the burden of showing that its race-conscious admissions policy actually yields diversity within racial groups. Taking this approach, UT would have to show that its race-conscious policy makes a “unique contribution to diversity” by leading to admission of Black and Latina/o students with different experiences and perspectives than those admitted via the Top Ten Percent Law.

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<sup>48</sup> Plaintiff-Appellant's Supplemental Brief at 29, *Fisher* (II), 758 F.3d 633 (5th Cir. 2014) (No. 09-50822).

<sup>49</sup> Transcript of Oral Argument, *supra* note 22, at 58–59.

<sup>50</sup> *Broadly Compelling*, *supra* note 24, at 822; *see also* Harpalani, *Diversity Within Racial Groups*, *supra* note 39, at 494-95.

Plaintiff Fisher argues that UT has not demonstrated this, and that UT’s race-conscious policy actually works against the asserted interest because it considers socioeconomic status (SES) as an admissions factor along with race.<sup>51</sup> UT may be able to counter that even low SES students who have attended affluent, predominantly White schools—by receiving scholarships to private schools for example—have had different experiences than students admitted under the Top Ten Percent Law. In fact, such non-Top Ten Percent low SES admittees have specifically gained experience navigating elite, predominantly White institutions and thus may be especially poised to serve as social supports for their Top Ten Percent admittee peers, with whom they share a low SES background. Additionally, a unique contribution to diversity need not be predicated solely on SES: geographic or cultural diversity within racial groups could also yield different experiences and perspectives.

The Supreme Court—citing its *Fisher* (I) precedent—will probably require UT to demonstrate specifically that its race-conscious policy leads to admission of Black and Latina/o students who are qualitatively different from those admitted under the Top Ten Percent Law. Whether or not UT can do so in *Fisher* (II), universities should prepare to do this in the future.

## B. End Point of Race-Conscious Admissions

According to *Grutter*, narrow tailoring requires that “race-conscious admissions policies must be limited in time.”<sup>52</sup> The Court has never explicitly required universities to articulate an end point when they will no longer use race in the admissions process, and to have a plan for reaching that end point. Justice O’Connor’s majority opinion included the aspirational statement that 25 years after *Grutter* (in 2028), race-conscious university admissions policies would no longer be necessary,<sup>53</sup> but she later stated that this was not intended as a binding limit.<sup>54</sup> Nevertheless, the end point of race-conscious admissions policies came up in the *Fisher* (I) oral argument,<sup>55</sup> and may well also be an issue in *Fisher* (II).

### I. Critical Mass: A Problematic End Point

In *Fisher* (II), the Court will likely revisit the issue of “critical mass”—a dilemma which took center stage in the *Fisher* (I) oral argument, but which the Court did not address in its *Fisher* (I) opinion. During the oral argument, Chief Justice Roberts questioned UT’s counsel on the “logical end point” of UT’s race-conscious admissions policy. UT’s response was that it would look to surveys indicating whether minority students felt isolated or “like spokespersons for their race”—harking back to one of the definitions of critical mass—to determine if race-conscious admissions policies are still necessary. This is a problematic answer: if race-conscious policies were necessary to obtain a

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<sup>51</sup> Pet. for Writ of Cert. at 24-25, *Fisher* (II), 135 S. Ct. 2888 (2015) (No. 14-981).

<sup>52</sup> *Grutter*, 539 U.S. at 342.

<sup>53</sup> *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.”).

<sup>54</sup> Sandra Day O’Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58 (David L. Featherman et al. eds., 2010) (“[T]hat 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028.”).

<sup>55</sup> Transcript of Oral Argument, *supra* note 22, at 47, 80.

critical mass, it follows logically that such a critical mass would dissipate if UT stopped using them, and minority students would once again feel isolated.<sup>56</sup> Universities must *maintain* critical mass, not simply *attain* it.<sup>57</sup>

Because diversity-related goals are difficult to measure and also affected by malleable factors such as campus environment and social and political context, they do not work well as stopping points for race-conscious admissions. Instead of relying on critical mass as part of the end point, UT can argue that it should only be considered part of the goal—the compelling interest—and not part of the narrow tailoring test. Rather than critical mass, the most logical end point for race-conscious admissions policies would go to the underlying reason that such policies are needed: disparities between minority and non-minority applicants on academic criteria such as grades and standardized test scores.

## 2. Elimination of Academic Disparities as the Logical End Point

While diversity and its educational benefits are the compelling interest that justify use of race in the university admissions process, the need to use race in order to achieve this compelling interest derives mostly from racial disparities on academic criteria such as grades and standardized test scores. In fact, most universities would like to have more racially diverse classes, but such academic disparities preclude them from doing so. Other considerations—such as ensuring race does not become a predominant factor in admissions, maintaining particular grade and standardized test score profiles to preserve their academic reputations, or believing that students with lower grades and test scores would not be academically successful—limit universities’ race-conscious admissions policies before they enroll the critical mass that they desire.<sup>58</sup>

In spite of their vast ideological differences, both Justice Ginsburg and Justice Thomas agreed in their respective *Grutter* opinions that race-conscious admissions policies would be necessary as long as there were significant racial disparities on academic criteria.<sup>59</sup> Justice O’Connor also subtly acknowledged this in her *Grutter* majority opinion.<sup>60</sup> The “logical end point” of race-conscious university admissions would occur when significant racial disparities on academic admissions criteria no longer exist, because at that point, universities could achieve sufficient diversity without using race. Of course, eliminating these disparities will require much more progress towards educational equity and racial equity in American society.

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<sup>56</sup> For references and a fuller discussion, see *Broadly Compelling*, *supra* note 24, at 784-85. The prospect of different campus social dynamics for different groups also complicates the notion of critical mass. For example, the *Fisher* litigation has not considered how UT’s race-conscious admissions policy impacts Native American student enrollment. *Diversity Within Racial Groups*, *supra* note 39, at 514-15, 524.

<sup>57</sup> *Broadly Compelling*, *supra* note 24, at 785; see also Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE L. 75, 110 (2012).

<sup>58</sup> *Broadly Compelling*, *supra* note 24, at 809-12.

<sup>59</sup> For citations and discussion, see *id.* at 811-12 n.236.

<sup>60</sup> For citations and discussion, see *id.* at 811.

### 3. Can Race be Too Small of an Admissions Factor?

Related to the end point debate is Plaintiff Fisher’s claim that race had “an infinitesimal impact” on UT admissions—too small to be constitutional because it did not contribute enough to the educational benefits of diversity. The Plaintiffs argued that UT could not identify any students for whom race actually made a difference in the admissions decision.<sup>61</sup> Similarly, in his *Fisher* remand dissent, Judge Garza contended that “[i]f race is indeed without discernible impact, the University cannot carry its burden of proving that race-conscious holistic review is necessary to achieving . . . diversity.”<sup>62</sup> Throughout the *Fisher* litigation, there has been an unresolved dispute about whether UT’s race-conscious policy actually led to the admission of any minority students who would not have been admitted absent the use of race. Regardless, however, there are flaws with the contention that race can be too small of an admissions factor.

First, *Grutter* does not state that a race-conscious policy can be too small to be constitutional, and it actually implies the opposite. Under *Grutter*, universities should gradually phase out race-conscious policies and use race-neutral alternatives “as they develop.”<sup>63</sup> Justice O’Connor and the *Grutter* majority implicitly acknowledged that ending the use of race in admissions would entail an incremental process. A logical consequence of this is that at some point, a university’s use of race will be very small but still be constitutional. This also informs the end point debate, as universities cannot end race-conscious policies all at once, when some magic critical mass is obtained. Rather, they will reach the end point gradually, through elimination of racial disparities on academic criteria, and through experimentation with race-neutral alternatives.<sup>64</sup>

Second, *Grutter* contemplated that admission of small numbers of applicants who defy racial stereotypes would facilitate the educational benefits of diversity, and Solicitor General Verrilli also articulated this stance at the *Fisher* (I) oral argument. A small number of minority students can meaningfully impact diversity on campus. They may form student organizations and sponsor events related to diversity, or they may increase representation in majors and programs where minority students are especially underrepresented. In fact, the whole point of a holistic admissions policy with individualized review is to identify applicants who will have a significant individual impact on the educational benefits of diversity.<sup>65</sup>

Third, even if courts read the diversity rationale more narrowly, there are other practical problems with Plaintiff Fisher’s contention that a race-conscious admissions policy can have too small of an impact. Absent a university’s admission that it uses race or some other conclusive evidence, it is the impact of race that ultimately must be detected to enforce any proscription on the use of race. If the

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<sup>61</sup> For full citations and discussion, see *Broadly Compelling*, *supra* note 24, at 796-97. See also *Fisher* (I), 556 F. Supp. 2d 603, 608 (W.D. Tex. 2008).

<sup>62</sup> *Fisher* (II), 758 F.3d at 672 (Garza, J., dissenting).

<sup>63</sup> *Grutter*, 539 U.S. at 342 (2003).

<sup>64</sup> For citations and discussion, see *Broadly Compelling*, *supra* note 24, at 797-98.

<sup>65</sup> For citations and discussion, see *Diversity Within Racial Groups*, *supra* note 39, at 532-33.

impact is too small to be detected, then there can be no enforcement of such a proscription: it makes no sense to “smoke out” statistically negligible use of race.<sup>66</sup>

### C. Reliance On Racial Isolation To Achieve Diversity

In addition to the central issues of dispute noted above, there is an inherent values conflict in the *Fisher* litigation—the problem of predicating campus diversity on school segregation. This values conflict is particularly germane for Justice Kennedy, whose vote will likely be outcome determinative for *Fisher* (II). In *Grutter*, when the Supreme Court unequivocally recognized the educational benefits of diversity as a compelling interest, Justice Kennedy also affirmed the diversity rationale—even as he dissented from the majority.<sup>67</sup> He restated this affirmance in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>68</sup> where his concurrence also noted that “[a] compelling interest exists in avoiding racial isolation,”<sup>69</sup>—a notion that would presumably be joined by four other Justices. Justice Kennedy also authored the *Fisher* (I) majority opinion, which once again upheld the diversity rationale.<sup>70</sup> And this past summer, Justice Kennedy joined the liberal Justices in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*—a 5-4 opinion authored by Justice Kennedy which upheld disparate-impact liability under the Fair Housing Act,<sup>71</sup> surprising many observers and showing his sympathy for reducing racial isolation and segregation.

If in *Fisher* (II), the Court precludes UT from using race-conscious admissions, it would essentially be saying that the Top Ten Percent Law—a policy that increases minority representation only because of racial isolation in Texas public high schools<sup>72</sup>—prevents UT from using race to pursue the educational benefits of diversity. This would be an ironic and unfortunate result, predicating diversity in higher education on racial segregation in K-12 schooling. It is also one aspect of a larger contradiction in America: the desire for an anti-essentialist, colorblind society without the will to tangibly address the rampant racial inequalities that exist in this country. Race-conscious admissions policies in higher education are just one small manifestation of this dilemma, in an era where racial segregation in K-12 schooling has actually been increasing for the past 25 years. *Fisher* (II) will again highlight this values conflict in Justice Kennedy’s own jurisprudence.

### III. Future Considerations for Defending Race-Conscious Admissions

The U.S. Supreme Court has repeatedly found that diversity is a compelling state interest to justify race-conscious admissions policies, and Justice Kennedy has approved of the diversity rationale thrice.<sup>73</sup> It is unlikely that *Fisher* (II) will overturn this precedent. Nevertheless, the Court could strike down UT’s race-conscious policy on narrow grounds and open the door for future lawsuits—

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<sup>66</sup> See *Broadly Compelling*, *supra* note 24, at 798-807.

<sup>67</sup> *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

<sup>68</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (Kennedy, J., concurring).

<sup>69</sup> *Id.* at 797 (Kennedy, J., concurring).

<sup>70</sup> *Fisher* (I), 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 325).

<sup>71</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's Project Inc.*, 135 S. Ct. 2507 (2015).

<sup>72</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting); Shea, *supra* note 45, at 615.

<sup>73</sup> See *supra* notes 67-68, 70.

placing even more pressure on universities to justify and defend their race-conscious admissions policies.

As such, universities should find ways to be proactive in defending their race-conscious admissions policies. This may include collecting and analyzing data on the educational benefits of qualitative diversity, including the different perspectives and the intragroup social support that it yields. Universities should also employ novel strategies to document the educational benefits of diversity on campus. Additionally, universities, policymakers, and advocates should continue to participate in the broader social and political discourse on race-conscious admissions policies, which can affect both the constitutional debate and public opinion on this charged issue.

### A. Race-Conscious Campus Spaces and the Diversity Rationale

Legal and academic discourse on the benefits of diversity has focused on the presence of a critical mass of minority students in predominantly White settings. However, the most racially diverse environments on many college campuses are actually places where White students may not be a numerical majority or plurality on a regular basis: “race-conscious campus spaces.” These are “physical campus locations or campus initiatives and activities that focus on racial identity, whether for a specified racial group or in a more general sense (i.e., a campus lecture or film series on race).” Examples of race-conscious campus spaces are ethnic studies departments and programs, campus cultural centers, residence halls devoted to the study and experiences of a particular racial/ethnic group, and particular events that highlight the experiences and concerns of a given racial or ethnic group. Practically all universities have one or more such race-conscious events, activities, and programs already in existence. And these spaces are salient but largely unexplored venues for the educational benefits of diversity articulated in *Grutter* and *Fisher*.

#### I. Limitations of the Focus on Classroom Diversity

In *Fisher* (I), UT’s defense largely focused on data showing minority underrepresentation in classes—important data without a doubt, but limited in many ways. While minority representation itself can help break down racial stereotypes, it may be difficult to tie classroom diversity numbers to the tangible educational benefits of diversity espoused by the Supreme Court. Even small, discussion-oriented classes, such as the ones noted by UT in its Supreme Court brief, may not always focus on cross-racial understanding or bring out different perspectives related to race.

Also, if universities focus simply on classroom diversity, opponents of race-conscious admissions can argue that their interest in diversity is superficial and geared towards appearances. In his *Grutter* dissent, Justice Thomas critiqued the majority’s reasoning by characterizing it in such terms: “Classroom aesthetics yield[] educational benefits, [race-conscious] admissions policies are required to achieve [racial diversity], and therefore the policies are required to achieve the educational benefits.”<sup>74</sup>

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<sup>74</sup> *Grutter*, 539 U.S. at 355 (Thomas, J., dissenting). Justice Thomas generally questions the link between racially diverse student bodies and any purported educational benefits. *Id.* at 355–57.

Given the continuing need to defend race-conscious admissions policies, universities should seek to demonstrate that their efforts towards diversity go beyond numbers in classrooms—and they may be able to do so by documenting the educational benefits of racial diversity not only in classrooms, but also in other campus venues. UT did mention campus diversity in *Fisher*, but it did not go beyond overall numbers of different minority groups and general references to educational benefits and student isolation. A more refined and in-depth approach may be necessary, and race-conscious campus spaces provide valuable ground for tangibly documenting the educational benefits of diversity.

## 2. Educational Benefits of Diversity in Race-Conscious Campus Spaces

Although race-conscious campus spaces have existed on campuses for several decades,<sup>75</sup> they have not been a significant part of the discourse on the educational benefits of diversity. This is probably because the conventional, erroneous notion of such spaces is that they simply cater to specific groups and promote “institutionalized separatism.”<sup>76</sup> For example, Justice Scalia has contended that universities may “talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on . . . campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”<sup>77</sup> Justice Scalia’s view is off-base. Race-conscious campus spaces do not exclude individuals on the basis of race—to do so would almost certainly be unconstitutional. These spaces are quite welcoming to students of all backgrounds, including interested White students. In fact, race-conscious campus spaces have now become the most racially diverse environments on college campuses.

For example, in the W.E.B. Du Bois College House, University of Pennsylvania’s residence hall devoted to African American studies, “46 percent of . . . residents report a racial identity other than African American.”<sup>78</sup> The Du Bois College House website states:

“As the African American theme-based house, and in adhering to its original mission, most of the programs and events in Du Bois College House are based upon the history and culture of people of the African Diaspora. However, in recognizing the range of diversity within the House’s population, we must also acknowledge, not only its role as a microcosm of the Greater American society, but the House’s role in preparing our residents for the greater global world. Du Bois College House is one of the most diverse college houses on Penn’s campus, and often refers to itself as “the U.N. at UPenn!” This means that the entire

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<sup>75</sup> See generally WAYNE GLASKER, BLACK STUDENTS IN THE IVORY TOWER: AFRICAN AMERICAN STUDENT ACTIVISM AT THE UNIVERSITY OF PENNSYLVANIA, 1967-1990 (Univ. of Mass. Press ed., 2002).

<sup>76</sup> See ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 104 (W. W. Norton & Co. ed., 1992); see also Glasker, *supra* note 75, at 115-46.

<sup>77</sup> *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part).

<sup>78</sup> Rachel E. Ryan, *Turmoil and Transformation: Du Bois House Turns 40*, PA. GAZETTE, Mar.-Apr. 2013, at 23-24.

staff works hard to ensure that our programming is just as diverse as the population, and that it meets the needs of all residents.”<sup>79</sup>

Not only are race-conscious campus spaces quite racially diverse, but they also often focus directly on race-related dialogue and cultural exchange—thus directly facilitating the educational benefits noted in *Grutter* and *Fisher*. The Du Bois College House website notes different events and activities that occur at Du Bois, many of which involve issues related to racial identity and equality, and also celebration of different cultural heritages.<sup>80</sup> The discussions at these events, in conjunction with the diverse student population in Du Bois, epitomizes *Grutter* and *Fisher*’s values of promoting cross-racial interaction and “lessening of racial isolation and stereotypes.”<sup>81</sup>

In fact, this view of race-conscious campus spaces itself counters stereotypes of minority students—the mistaken perceptions of tribalism and separatism noted above. Academic and social discourse has historically treated Black-themed residence halls and similar environments as promoting “self-segregation” among groups of minority students. In reality, however, cross-racial interactions and conversations involving race actually occur much more frequently in race-conscious campus spaces than they do in the typical classroom, or in any predominantly White setting. Indeed, such interactions and conversations are the very mission of many race-conscious spaces.<sup>82</sup>

In addition to facilitating the educational benefits of diversity for students of all backgrounds, spaces such as the W.E.B. Du Bois College House also serve another aspect of the compelling interest in diversity: they inherently help minority students feel less isolated. They are some of the few environments on campus where particular groups of minority students might actually be in a numerical majority, and they function as social support centers for minority students.<sup>83</sup> Universities already recognize this function: it was the reason for creating these spaces in the first place.

The link between race-conscious campus spaces and admissions is also fairly clear. There must be a critical mass of minority students for these spaces to be viable and to generate the relevant educational benefits. Of course, by itself, emphasis on race-conscious campus spaces is not enough to defend the constitutionality of race-conscious admissions. Nevertheless, it does provide promising and largely unexplored ground for tangible demonstration of the educational benefits of diversity. Universities should systematically document activities and interactions in these spaces—including diversity of students who attend events—as part of defending their admissions policies.

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<sup>79</sup> W.E.B. DU BOIS COLLEGE HOUSE, <http://dubois.house.upenn.edu/frontpage> (last visited Mar. 7, 2015); see also Ernest Owens et al., *Appreciating Du Bois as a Loving Home*, DAILY PENNSYLVANIAN (Oct. 15, 2012, 1:14 AM), <http://www.thedp.com/article/2012/10/du-bois-house-council-appreciating-du-bois-as-a-loving-home>.

<sup>80</sup> W.E.B. DU BOIS COLLEGE HOUSE, <http://dubois.house.upenn.edu/frontpage> (last visited Mar. 7, 2015).

<sup>81</sup> *Grutter*, 539 U.S. at 333; *Fisher* (I), 133 S. Ct. at 2418.

<sup>82</sup> Some of these spaces, like the Greenfield Intercultural Center at Penn, focus specifically on bringing together different groups of minority students, including Black, Latina/o, Asian American, and Native American students. See *Campus & Community: Greenfield Intercultural Center*, UNIV. OF PA., <http://www.vpul.upenn.edu/gic/> (last visited Mar. 7, 2015).

<sup>83</sup> For further discussion and additional references, see *Broadly Compelling*, *supra* note 24, at 828-29.

## B. “Mismatch” Theory And Deference

Another area of controversy with respect to race-conscious admissions policies is the “mismatch” theory posited by Professor Richard Sander of UCLA School of Law. Mismatch theory contends that, because race-conscious policies allow the acceptance of minority students with lower average grades and standardized test scores than those of accepted non-minority students, admitted minority students often cannot compete adequately with their non-minority counterparts. This results in a “mismatch”—whereby minority students attain poorer outcomes at universities and after graduation.<sup>84</sup>

There have been several critiques of mismatch theory,<sup>85</sup> and a full discussion of it is beyond the scope here. Nevertheless, two points are noteworthy. First, while it could have implications for university policy and decision-making, mismatch theory should not have any impact on the constitutionality of race-conscious admissions. Decisions about the academic credentials of students are part of a university’s mission and should be entitled to deference under *Grutter* and *Fisher* (I).<sup>86</sup> Student selection is one of “four essential freedoms” of universities defined by Justice Frankfurter in *Sweezy v. New Hampshire* (1957).<sup>87</sup> Universities, not courts, possess the relevant expertise on academic credentials and other admissions factors, and they admit students and design their missions based on their expertise.

Second, mismatch theory relies excessively on standardized test scores as indicators of academic outcomes. Universities should continue to review the utility of using standardized tests and consider alternative admissions criteria. The National Association for College Admission Counseling (NACAC) has opined that there may be “more colleges and universities that could make appropriate admission decisions without requiring standardized admission tests such as the ACT and SAT.”<sup>88</sup> There have been pointed critiques that discuss racial biases in standardized testing,<sup>89</sup> and universities should consider the implications of these. Many have already made standardized test scores an optional feature of the application process,<sup>90</sup> and others should consider doing so.

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<sup>84</sup> See RICHARD H. SANDER & STUART TAYLOR, *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (Basic Books ed., 2012).

<sup>85</sup> See, e.g., William Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEXAS L. REV. 895 (2014); Stacy L. Hawkins, *Mismatched or Counted Out? How Mismatch Theory is Incomplete, What’s Missing, and Why it Matters*, 17 U. PA. J. CONST. L. 869 (2015).

<sup>86</sup> See *supra* notes 7 & 12 and accompanying text.

<sup>87</sup> *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring).

<sup>88</sup> *Report of the Commission on the Use of Standardized Tests in Undergraduate Admission*, NAT’L ASS’N FOR COLL. ADMISSION COUNSELING 7 (Sept. 2008),

[http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/TestingComission\\_FinalReport.pdf](http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/TestingComission_FinalReport.pdf)

<sup>89</sup> See, e.g., 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 (2002).

<sup>90</sup> *More Colleges Embrace Test-Optional Admissions*, FAIR TEST, <http://www.fairtest.org/more-colleges-embrace-test-optional-admissions> (last visited Oct. 3, 2015).

### C. Discrimination Against Asian Americans In University Admissions

One other ongoing controversy that complicates the political dynamics of university admissions is discrimination against Asian Americans. In her book, *The Retreat From Race: Asian-American Admissions and Racial Politics*, Professor Dana Takagi describes how beginning in the 1980s, Asian Americans accused elite universities of discriminating against them.<sup>91</sup> The U.S. Department of Education Office of Civil Rights investigated whether several elite universities—including Harvard and UCLA—had violated Title VI of the Civil Rights Act of 1964.<sup>92</sup> Professor Takagi notes that while the initial concern was that Asian American applicants had to have higher grades and standardized test scores than White applicants to be admitted, conservative activists crafted an attack on race-conscious admissions policies from this controversy—contending that these policies discriminated against Asian Americans. Others have also written about this issue, and most recently a group of Asian American students filed lawsuits against Harvard University and the University of North Carolina at Chapel Hill (UNC),<sup>93</sup> claiming that race-conscious admissions policies continue to discriminate against Asian Americans.

Two points are of particular interest here. First, it is essential to make sure that Asian American interests are not pitted against Black and Latina/o interests in the context of university admissions. The gap in academic criteria between Asian American and White admittees is a separate issue from the gap between those groups and Black and Latina/o admittees. Universities can explain the latter gap by their use of race-conscious admissions policies to pursue diversity: it is well known that universities use such policies for this purpose and admit to doing so. While the constitutionality of these policies is debatable, there is no secret about their use.

On the other hand, there is no acknowledged explanation for the gap between Asian American and White admitted students. Professor Thomas Espenshade and Alexandria Walton Radford report that compared to White applicants, Asian American applicants on average must score 140 points higher on the SAT and 3.4 points on the ACT in order to gain admission at elite private and public universities.<sup>94</sup> Universities do not admit to employing race-conscious policies to favor White applicants over Asian Americans; indeed, doing so would constitute overt racial discrimination and xenophobia. Universities bear the burden of articulating a principled, reasonable explanation for the gap in academic credentials between admitted White and Asian American students. If they cannot do so, universities should be required to eliminate this gap. However, this is a separate matter from

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<sup>91</sup> DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (Rutgers Univ. Press ed., 1998).

<sup>92</sup> *Id.* at 161-66.

<sup>93</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-CV-14176 (D. Mass. filed Nov. 17, 2014); *Students for Fair Admissions, Inc., v. Univ. of N.C.*, No. 1:14-CV-00954 (M.D.N.C. filed Nov. 17, 2014). See generally *Project on Fair Representation Announces Lawsuits Challenging Admissions Policies at Harvard Univ. and Univ. of North Carolina-Chapel Hill*, <https://studentsforfairadmissions.org/project-on-fair-representation-announces-lawsuits-challenging-admissions-policies-at-harvard-univ-and-univ-of-north-carolina-chapel-hill/> (last visited Oct. 3, 2015).

<sup>94</sup> THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* 92 (Princeton Univ. Press ed., 2009); see also *id.* at 93 (noting that “an Asian candidate with a 1250 SAT score would be just as likely to be admitted at a private [National Study of College Experience] institution as a white student with an SAT score of 1110, other things being the same.”).

race-conscious admissions policies designed to facilitate the admission of Black and Latina/o applicants. Courts, policymakers, and advocates should not confuse affirmative action with “negative action” against Asian Americans.<sup>95</sup>

Second, policymakers and advocates should be weary of uncritically accepting the “model minority” stereotype of Asian Americans—the idea that Asian Americans have superior cultural values which lead to academic success.<sup>96</sup> The fact is that first and second generation immigrants of all ethnic backgrounds tend to be higher achievers than the rest of the population. Certain segments of the Asian American population also benefited from the occupational preferences of the Immigration Act of 1965, which preferred educated professionals in science and technology, such as engineers, scientists, physicians, and computer programmers.<sup>97</sup> This skewed the overall socioeconomic profile of Asian American immigrants and led to their observed educational successes. However, the occupational preferences were later curtailed, and many recent Asian American immigrants do not enjoy the socioeconomic advantages of their predecessors.<sup>98</sup>

The economic and educational profile of Asian Americans as a whole is complicated, but it is important to underscore a familiar theme: diversity within racial groups. Some Asian American groups are underrepresented at universities and considered to be so for affirmative action programs at some institutions. Thus, the issue of Asian Americans and university admissions is complex, and oversimplified assertions must be avoided. Most importantly, advocates should insure that the interests of Asian Americans are not pitted against those of African Americans and Latina/os—as is happening with the recent lawsuits against Harvard and UNC.<sup>99</sup>

## Conclusion

Race-conscious admissions policies continue to be a highly charged constitutional and political issue. Universities need to be aware of the subtleties of the legal doctrine on these policies and also devise novel, innovative strategies to defend their race-conscious policies. These strategies might include not only the admissions process itself, but also the design and documentation of the educational benefits of diversity, which can be linked to student body diversity.

Additionally, policymakers and advocates should continue to understand the various political dimensions associated with race-conscious university admissions policies. Beyond the Supreme Court’s pronouncements, several states have enacted bans on such policies through popular referenda or executive or legislative action.<sup>100</sup> However, due to spirited activism and political

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<sup>95</sup> Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1 (1996); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Americans are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605 (2006).

<sup>96</sup> See Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. OF AM. L. 77, 139-40 (2013/14).

<sup>97</sup> *Id.* at 141-42.

<sup>98</sup> *Id.* at 142-43.

<sup>99</sup> See *supra* note 93 and accompanying text.

<sup>100</sup> See *Affirmative Action: State Action*, *supra* note 2.

organizing, one such referendum was defeated in Colorado in 2008.<sup>101</sup> It is imperative that those who advocate for diversity and race-conscious admissions remain politically involved and motivated, as the struggle to defend these important initiatives will continue for the foreseeable future.

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<sup>101</sup> Colorado voters rejected a similar ban in 2008. Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, USA TODAY (Nov. 7, 2008, 7:35 PM), [http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800\\_x.htm](http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800_x.htm).

## About The Author

Vinay Harpalani is an Associate Professor of Law at Savannah Law School, where he teaches constitutional law, civil procedure, and employment discrimination. Professor Harpalani earned his J.D. (2009) from NYU School of Law and his Ph.D. (2005) from the University of Pennsylvania. His areas of expertise include race-conscious university admissions, campus diversity initiatives in higher education, Critical Race Theory, and racial identity and classification. Professor Harpalani's scholarship has been published in many law reviews, including the New York University Law Review, University of Pennsylvania Journal of Constitutional Law, Seton Hall Law Review, New York University Annual Survey of Law, and the Seattle University Law Review. He has been a Distinguished Speaker (on race-conscious university admissions) for the Illinois Attorney General's Office and has been invited to speak at several law schools, including Yale, NYU, Penn, Duke, and UCLA. Previously, Professor Harpalani was Visiting Assistant Professor of Law at Chicago-Kent College of Law (2012-14), where he taught legal writing and Critical Theory; the Korematsu Teaching Fellow at Seattle University School of Law (2010-12), where he taught seminar courses in education law and constitutional law; the Derrick Bell Fellow at NYU School of Law (2009-10), where he co-taught constitutional law courses with the late Professor Derrick Bell; and lecturer at the University of Pennsylvania (2005-06), where he taught courses on race, education, and psychology.

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