

## CASENOTE

### “IF THE PLAINTIFFS ARE RIGHT, *GRUTTER* IS WRONG”: WHY *FISHER V. UNIVERSITY OF TEXAS* PRESENTS AN OPPORTUNITY FOR THE SUPREME COURT TO OVERTURN A FLAWED DECISION

#### I. INTRODUCTION

The constitutionality of affirmative action in America’s public higher education institutions (“HEIs”) gained prominence in the late 1970s with the Supreme Court’s decision in *Regents of the University of California v. Bakke*.<sup>1</sup> The *Bakke* decision was less than clear, but it provided the framework in which HEIs formulated their admission policies regarding the use of race.<sup>2</sup> Nevertheless, the law regarding affirmative action remained unsettled, and the circuits remained split.<sup>3</sup>

Twenty-five years later, the Supreme Court decided *Grutter v. Bollinger*.<sup>4</sup> Prior to *Grutter*, the *Bakke* decision was ambiguous

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1. 438 U.S. 265 (1978). Even prior to *Bakke*, however, the Court addressed the issue of an HEI that denied students their equal protection rights because of race. See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that “the Fourteenth Amendment precludes differences in treatment by the state based upon race,” and that “[students of a particular race] must receive the same treatment at the hands of the state as students of other races”).

2. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (“Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.”); *Gratz v. Bollinger*, 539 U.S. 244, 257 (2003) (relying on Justice Powell’s opinion in *Bakke*).

3. Compare *Wessmann v. Gittens*, 160 F.3d 790, 808–09 (1st Cir. 1998) (striking down a race-based admissions program as unconstitutional), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (upholding the constitutionality of a race-based admissions program).

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

and subject to criticisms from many angles,<sup>5</sup> but *Grutter* clarified *Bakke* and outlined precisely how HEIs could avoid constitutional infirmity in their use of race-based admissions by proclaiming “diversity” as the end of such policies.<sup>6</sup> Immediately following *Grutter*, HEIs hurriedly reformulated their admission policies to comport with the decision and take advantage of the newly solidified ruling,<sup>7</sup> which provided HEIs with an “end-around” the Constitution’s Equal Protection Clause.<sup>8</sup>

Although twenty-five years elapsed between the *Bakke* and *Grutter* decisions, the Court reexamined the issue of diversity, in the context of public school districting in 2007 with *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>9</sup> In that case, the plaintiffs challenged a school district’s student assignment plan that relied on race to determine which public schools certain children could attend.<sup>10</sup> Rather than overturning *Grutter*, Chief Justice Roberts’s opinion distinguished it from *Parents Involved*.<sup>11</sup> In so doing, *Parents Involved* took the initial step toward isolating *Grutter* to a narrow set of facts.<sup>12</sup> Chief Jus-

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5. See, e.g., Mark T. Terrell, Note, *Bucking Grutter: Why Critical Mass Should Be Thrown Off the Affirmative-Action Horse*, 16 TEX. J. C.L. & C.R. 233, 240 (2011) (citations omitted).

6. See Ann Mallatt Killenbeck, *Bakke, with Teeth? The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1, 43–44 (2009) (noting that the *Grutter* decision “provided the foundations for a holding that the student body diversity is a compelling constitutional interest”).

7. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345) (“As articulated in [its] 2004 Proposal, [the University of Texas at Austin’s (“UT”)] underlying interest in its decision to consider race as one of the factors in its admissions process closely mirrors the justification provided for the Michigan Law School’s use of race and approved by the Supreme Court [in *Grutter*].”); see also *id.* at 603 n.8 (“UT’s policy is explicitly and admittedly based on the [Michigan] Law School’s policy and the *Grutter* case.”).

8. A plain reading of the Equal Protection Clause reveals no exceptions in the law’s text. See U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The Supreme Court, however, has rejected the Amendment’s clarity and simplicity and instead has read certain exceptions into the law. See generally PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 99–145 (2003) (discussing *Bakke* and subsequent cases).

9. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11 (2007).

10. *Id.* at 709–10.

11. *Id.* at 723.

12. See *id.* at 722–23. (“The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group . . . . In the present cases, by contrast . . . race, for some students, is determinative standing alone.”) (citation omitted).

tice Roberts emphasized Justice O'Connor's sunset provision from *Grutter*,<sup>13</sup> in which she wrote, "[Twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>14</sup> In contrast, Justice Thomas's concurrence pointed out that racial classifications have "no logical stopping point" and threaten to become "ageless."<sup>15</sup> Indeed, the evidence suggests Justice Thomas was correct, as more HEIs than ever now employ racial preferences in admissions.<sup>16</sup> Despite narrowing *Grutter*, the *Parents Involved* Court did not go so far as to overturn it, and *Grutter* survived.

Although *Grutter* clarified *Bakke* and provided guidance to HEIs, its reasoning and holding were constitutionally unsound. This has resulted in race-based admission policies in the nation's HEIs that violate the Equal Protection Clause.<sup>17</sup> Until now, challenges to these unconstitutional policies have failed to reach the Supreme Court.<sup>18</sup> However, in 2008 two plaintiffs filed a motion challenging the constitutionality of the University of Texas at Austin's ("UT") admission policy.<sup>19</sup> Although the district court and the Fifth Circuit both ruled against the motion,<sup>20</sup> the plaintiffs filed a petition for writ of certiorari,<sup>21</sup> which the Supreme Court granted on February 21, 2012.<sup>22</sup> The *Fisher* case fulfills Article

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13. *Id.* at 731 (citation omitted) (discussing the circuit court's attention to Justice O'Connor's provision).

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

15. *Parents Involved*, 551 U.S. at 760 (Thomas, J., concurring) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)).

16. See Robert VerBruggen, *Racial Preferences by the Numbers*, NAT'L REV. ONLINE (Nov. 30, 2009, 4:00 AM), <http://www.nationalreview.com/articles/228682/racial-preferences-numbers/robert-verbruggen> ("Few schools outright deny using the preferences.").

17. The University of Texas at Austin, for example, employs a race-based admission policy. See *Proposal to Consider Race and Ethnicity in Admissions*, The University of Texas at Austin (June 25, 2004), available at <http://www.utexas.edu/student/admissions/about/notices.html> [hereinafter *June 2004 Proposal*].

18. See, e.g., *Doe v. Kamehameha Sch.*, 470 F.3d 827 (9th Cir. 2006), *cert. dismissed*, 550 U.S. 931 (2007).

19. See Motion for Preliminary Injunction at 9–10, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 2008 WL 7318505, *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

20. See *Fisher*, 631 F.3d at 247; *Fisher*, 645 F. Supp. 2d at 613.

21. Petition for Writ of Certiorari, *Fisher*, 631 F.3d 213 (No. 11-345) (U.S. Feb. 2012), 2011 WL 4352286.

22. *Fisher*, 565 U.S. \_\_\_\_ (2012) (No. 11-345) (order granting petition for grant of certiorari).

III's "case or controversy" requirement<sup>23</sup> providing the Court with the opportunity to overturn *Grutter's* incorrect holding.<sup>24</sup>

One important step in overturning *Grutter* will require the Court to retreat from the nearly complete deference it grants to HEIs in the design of their admission policies.<sup>25</sup> Although the Court is hesitant to do this, overwhelming social data undermine the notion of the educational benefits that flow from diversity.<sup>26</sup> Part II of this note serves two background purposes: first, to highlight the empirical evidence contradicting the educational benefits theory, and, second, to track the use of race in UT's admissions from *Bakke* through the present.

Because it implicates race, UT's current admission policy is subject to strict scrutiny—the Court's most arduous level of review.<sup>27</sup> There are two prongs to strict scrutiny analysis: a compelling governmental interest and narrow tailoring.<sup>28</sup> Part III of this note discusses diversity in higher education as a compelling governmental interest. Empirical evidence reveals the *Grutter* Court incorrectly solidified diversity as a compelling interest for racial classifications and made it far too easy for HEIs to achieve their social goals while disregarding the Constitution. *Fisher* presents the Court with an opportunity to overturn the holding, thereby restoring the protection guaranteed by the Fourteenth Amendment.

The second prong of strict scrutiny requires the Court to decide whether UT's policy is narrowly tailored to achieve diversity in

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23. U.S. CONST. art. III, § 2.

24. See Hans A. von Spakovsky, *The University of Texas and Racial Preferences*, NAT'L REV. ONLINE (Sept. 19, 2011, 4:00 AM) <http://www.nationalreview.com/articles/277519/university-texas-and-racial-preferences-hans-von-spakovsky/> (noting first, that the *Grutter* decision was "misguided," and second, that, with regards to *Fisher*, "[o]pponents of discrimination have good reason to hope that the Court could . . . put[] an end to state-sanctioned discrimination once and for all").

25. *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (citation omitted).

26. See Brief of Amici Curiae of Gail Heriot et al. in Support of Petitioner, at 4–9, *Fisher*, 631 F.3d 213 (No. 11-345), 2011 WL 5007903 [hereinafter Heriot Brief].

27. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.")

28. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) ("There are two prongs to this examination. First, any racial classification must be justified by a compelling governmental interest . . . . Second, the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal." (citations omitted) (internal quotation marks omitted)).

education.<sup>29</sup> Part IV of this note argues that the admission policy in question is not narrowly tailored because the Texas Top Ten Percent Law (“Ten Percent Law”) achieves substantially the same diversity results as the suspect racial classifications. Moreover, UT concedes that its policy is indistinguishable from the affirmative action policy upheld in *Grutter*.<sup>30</sup> If there is no argument as to distinguishability, then the survival of the *Grutter* policy in American law depends upon the constitutionality of the UT policy. Therefore, if the Court strikes down the UT policy, it must necessarily overturn *Grutter*.

## II. BACKGROUND AND CONTEXT

Contrary to the beliefs of many affirmative action advocates, evidence suggests that race-based preferences in higher education negatively affect minority groups. Studies have found that entering credentials (SAT/ACT scores, high school GPA, etc.) matter, and that the vast majority of students perform in the range their entering credentials suggest.<sup>31</sup> Thus, when HEIs accept minority students with below-average credentials, those students generally remain at the bottom of their graduating class.<sup>32</sup> The problem is exacerbated by the cascade effect: when top-tier HEIs relax standards to admit more minorities, HEIs on every rung below them follow suit.<sup>33</sup> This results in minority students attending schools where they disproportionately perform near the bottom of the class and perhaps have a less beneficial educational experi-

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29. However, if diversity in education cannot satisfy the first prong of strict scrutiny (as this note suggests), then any analysis of the “narrowly tailored” prong is unnecessary and impossible, as the latter depends upon the former. *See id.* (citation omitted).

30. *Fisher v. Univ. of Tex. of Austin*, 645 F. Supp. 2d 587, 603 n.8., (W.D. Tex. 2009) *aff’d*, 681 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

31. *See* Todd Gaziano, Commissioner, United States Commission on Civil Rights, *The Growing Evidence That College Preferences Harm Minority Students*, FOUNDRY (Dec. 14, 2011, 9:28 AM), <http://blog.heritage.org/2011/12/14/the-growing-evidence-that-college-preferences-harm-minority-students/> (“Those who have long supported discriminatory preferences face a real dilemma when data show that most who are admitted with SAT scores 150 points or more below a school’s mean perform, sadly, pretty much as expected.”).

32. *See* WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 72 (1998) (“[C]ollege grades [for affirmative action beneficiaries] present a . . . sobering picture . . . . The grades earned by black students at the [most elite schools] often reflect their struggles to succeed academically in highly competitive academic settings.”).

33. *See* Heriot Brief, *supra* note 26.

ence than they would at less competitive schools.<sup>34</sup> Section A highlights social data contradicting UT's claim that its race-based admission policy produces educational benefits.

Despite this evidence, UT, like many other HEIs, has committed to using race as an admissions factor.<sup>35</sup> Since 1978, with the exception of a nine-year period between 1996 and 2005, the color of an applicant's skin has played a role in determining whether or not UT admits the applicant.<sup>36</sup> Since then, UT has simply modified its policy to comport with various court decisions.<sup>37</sup> Section B tracks the use of race in UT's admissions process from the *Bakke* decision through the present.

### A. *Empirical Evidence*<sup>38</sup>

Any argument opposing the legitimacy of diversity as a constitutional exception to the Equal Protection Clause's categorical prohibition on racial discrimination necessitates an examination of the empirical evidence undergirding such an exception.<sup>39</sup> A quick glance at many of the affirmative action cases reveals numerical calculations, percentages, charts, tables, and graphs manifesting the Court's reliance on statistics and other data to formulate its opinions in these cases.<sup>40</sup> However, one must apply

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34. See *infra* notes 57–58 and accompanying text.

35. See *June 2004 Proposal*, *supra* note 17.

36. See *infra* Part II.B.

37. See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 603 n.8 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert. granted* 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

38. This part of the note attempts neither to comprehensively discuss all the statistical data in this area of the law nor to argue for or against affirmative action as a policy matter. Rather, the aim of this limited discussion of research and data is merely to provide a contextual frame for the subsequent constitutional discussion by substantiating a general correlation between students whose race is a factor in admission and their potential academic and career performances.

39. Despite unanimous agreement on this point, the *Grutter* decision highlights the Justices' disagreement as to whom the Court should trust to find and analyze data with regard to affirmative action policies and their effects. Compare *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."), with *id.* at 388 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.").

40. See, e.g., *Grutter*, 539 U.S. at 383–84 (Rehnquist, C.J., dissenting).

the appropriate weight to the various numbers frequently cited by proponents and opponents of affirmative action.

One example of a statistic often cited by supporters of affirmative action is the increase in minority representation in HEIs that employ such admission policies.<sup>41</sup> The increase is particularly irrelevant. When HEIs give admission preferences to persons of a certain race, the expectation of any result other than an increase in the race's representation would be confounded. Besides being obvious on its face, the argument of increased minority enrollment incorrectly assumes that diversity itself is the end of affirmative action.<sup>42</sup> It is not.<sup>43</sup> Rather, achieving beneficial societal and economic effects of diversity in higher education is the end of race-based preferences.<sup>44</sup> In a report arguing in favor of affirmative action in HEIs, the United States Commission on Civil Rights (the "USCCR") affirmed this point:

Historically, the Commission has found that achieving diversity in the classrooms of this nation's colleges and universities is a compelling—indeed essential—social, economic, and educational goal. With a growing percentage of minorities making up the working population, *the nation's economic vitality will depend on how well minority youth are educated.*<sup>45</sup>

Because the ultimate goal of granting racial preferences to minorities is to increase their contributions to the nation's society and economy (rather than merely attending an HEI), the following

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41. See, e.g., Amicus Brief of the Black Student Alliance at UT & the NAACP Legal Defense & Educ. Fund, Inc. in Support of Appellees at 17, *Fisher*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50823), 2010 WL 2624791 (emphasizing that an additional 435 African American students were admitted to UT in the year in which the school adopted the race-conscious policy), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

42. See, e.g., Kenneth L. Marcus, *Diversity & Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163, 167 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/39/LRColl2008n39Marcus.pdf> ("[I]ncreasing racial or ethnic representation is not a sufficiently compelling interest to justify the use of racial preferences.").

43. Cf. *Grutter*, 539 U.S. at 329–30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race . . . . Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.'" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978))).

44. *Id.* (quoting *Bakke*, 438 U.S. at 307).

45. U.S. COMM'N ON CIVIL RIGHTS, THE COMMISSION, AFFIRMATIVE ACTION, AND CURRENT CHALLENGES FACING EQUAL OPPORTUNITY IN EDUCATION (2003) (emphasis added), available at <http://www.usccr.gov/aaction/ccraa.htm>.

sections discuss how affirmative action affects minorities in prestigious career fields.<sup>46</sup>

### 1. Minorities in Science and Engineering

As three commissioners on the USCCR point out in their amicus brief to the Court, “It should surprise no one that those who fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them in the bottom of their college class.”<sup>47</sup> Science and engineering degrees and careers require rigorous academic training. Because of the arduous requirements, high demand exists for students entering the science and engineering fields.<sup>48</sup> Indeed, it is important that minorities fill a substantial number of these positions.<sup>49</sup> Unfortunately, the modern means of achieving this goal—namely, affirmative action—have been largely unsuccessful.

Empirical studies suggest that students whose entering credentials put them in the middle or top of their class are more likely to succeed in science and engineering careers than otherwise identical students whose credentials put them in the bottom of their class.<sup>50</sup> The studies sought to identify why minority stu-

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46. This section follows the structure of, and relies heavily on, the amicus brief of three commissioners of the USCCR. See Heriot Brief, *supra* note 26. The reason for this is that the Court apparently relies heavily on the parties’ amici for evidentiary justification for the supposed educational benefits that flow from diversity. See *Grutter*, 539 U.S. at 328 (“The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.”).

47. Heriot Brief, *supra* note 26, at 9.

48. Motoko Rich, *The Rising Value of a Science Degree*, N.Y. TIMES (Oct. 20, 2012), <http://economix.blogs.nytimes.com/2011/10/20/the-rising-value-of-a-science-degree/>.

49. DONNA J. NELSON & CHRISTOPHER N. BRAMMER, A NATIONAL ANALYSIS OF MINORITIES IN SCIENCE AND ENGINEERING FACULTIES AT RESEARCH UNIVERSITIES 2 (2d ed. 2010), available at [http://www.faculty-staff.ou.edu/N/Donna.J.Nelson-1/diversity/Faculty\\_Tables\\_FY07/07Report.pdf](http://www.faculty-staff.ou.edu/N/Donna.J.Nelson-1/diversity/Faculty_Tables_FY07/07Report.pdf) (“Underrepresented minorities are projected to constitute almost 32% of the American population by 2020, outnumbering White males (30.1%). Therefore, proactive steps should be taken now in order to insure the proportionate inclusion of such a large part of the U.S. population in science and engineering. . . .”) (quoting Dr. Donna J. Nelson, Associate Professor, University of Oklahoma) (citation omitted).

50. See Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?* (July 2009) (unpublished manuscript), available at <http://www.seaphe.org/pdf/sciencemismatch.pdf> (investigating the possible explanation of black and Hispanic underrepresentation in science); cf. Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. IN HIGHER EDUC. 681, 695, 699 (1996); Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. IN HIGHER EDUC. 353, 358, 371 (2004).

dents fail to manifest a noted substantial initial interest in pursuing science careers.<sup>51</sup> Professor Roger Elliott’s study concluded that “preadmission variables accounted for a significant fraction of the variance in persistence decisions, while *ethnicity did not*.”<sup>52</sup> Professor Richard Sander’s study includes the following data on University of Michigan students who began their college careers enrolled at the College of Arts and Sciences:<sup>53</sup>

Outcome	Race	Index Range of Students as a Weighted Index of SAT Scores and High School GPAs		
		Less than 660	660–819	820 or above
Graduation in four years	Black	21%	50%	73%
	White	35%	52%	70%
Final major is in science or engineering	Black	5%	23%	43%
	White	4%	16%	33%

The data highlight the higher attrition rate for science and engineering degrees for both black and white students whose SAT scores and GPAs were relatively low.<sup>54</sup> Therefore, minority students are not helped in contributing to the science and engineering fields by HEIs’ admission policies (especially the most selective ones) that compensate for less competitive entering credentials with race.

## 2. Minorities in Academia

Similar to the problem of too few minorities in science and engineering, minorities also comprise only a small percentage of

51. See *supra* note 50 and accompanying text. For discussion on Professor Elliott’s study, see U.S. COMM’N ON CIVIL RIGHTS, THE EDUCATIONAL EFFECTIVENESS OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 2 (2010).

52. Elliott, *supra* note 50, at 695 (emphasis added).

53. Sander & Bolus, *supra* note 50, at 7 tbl. 4.

54. See *id.* at 7 (“Whether one considers concentration in the sciences and engineering, or graduation rates, entering credentials have a dramatic effect upon outcomes.”); see also Elliott, *supra* note 50, at 702 (calculating that a student with an SAT score of 580 “who wants to be in science will be three or four times more likely to persist at [the least competitive schools] than at [the most competitive schools]”).

full-time professors at the country's research universities.<sup>55</sup> Also similar is the reason why minorities seldomly pursue careers as professors in academia. A 2003 study seeking to understand why more minorities are not attracted to academic careers found that "[t]he prime reason given by minority students was *lower undergraduate grades*."<sup>56</sup> Tethered to this was the conclusion that lower undergraduate grades are the result of students' admission to schools at which their credentials are below average.

Because of affirmative action . . . African Americans . . . are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools . . . where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class.<sup>57</sup>

Cole and Barber further state,

African American students at the elite schools . . . get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools . . . . Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.<sup>58</sup>

As one review of the report writes, "There can be no significant improvement in black faculty representation unless and until there is a progressively larger number of black college students who go on to graduate school."<sup>59</sup> In order to make it to graduate school, however, minority students must earn better undergraduate grades. Unfortunately, as long as affirmative action policies

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55. OFFICE OF PLANNING & INSTITUTIONAL ASSESSMENT, PENN STATE UNIV. ASSOCIATE PROFESSORS: TIME IN RANK 2 (2007) (citation omitted), available at [http://www.psu.edu/president/pia/planning\\_research/reports/assoc\\_prof\\_time\\_in\\_rank\\_07.pdf](http://www.psu.edu/president/pia/planning_research/reports/assoc_prof_time_in_rank_07.pdf) ("In 2005, minority faculty members represented 12% of full-time instructional professors at all degree-granting institutions in the nation.").

56. John H. Bunzel, *Elusive Quest to Boost Minorities in Academia*, S. F. CHRON., Mar. 6, 2005, at C3, (emphasis added) (citing STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 100–07 (2003)).

57. COLE & BARBER, *supra* note 56, at 124 (citations omitted).

58. *Id.* at 212.

59. Bunzel, *supra* note 56.

permit minorities to enroll at HEIs where they will likely remain near the bottom of their class, the number of minorities in academia will remain inadequate.

### 3. Minorities in Law

Law, like other prestigious career fields, suffers from low minority representation.<sup>60</sup> “The statistics are shocking . . . . Given all the attention paid to affirmative action, one might imagine that the legal profession would have made more progress.”<sup>61</sup> But it has not. And the reason is the counterproductive effects of race-based preferences in the nation’s law schools.

In 2004, Professor Sander published a study answering the following question: Does affirmative action in American law schools clearly help black students more than it hurts them?<sup>62</sup> The study concluded that the benefit of increasing the number of black students in the nation’s top law schools is far outweighed by the harmful effects endured by beneficiaries of racial preferences.<sup>63</sup>

As previously demonstrated, minorities admitted to schools where they have below-average credentials generally perform near the bottom of their class.<sup>64</sup> Professor Sander’s study showed that over half of black law students had first-year GPAs in the bottom 10% of their class, as opposed to only 5.6% of white students.<sup>65</sup> More-over, 19.3% of enrolled blacks failed to graduate from law school compared to 8.2% of whites.<sup>66</sup> Most important is the failure to pass the bar exam on the first attempt of 71% of blacks with low academic credentials compared to 52% of white students with identical credentials.<sup>67</sup> Finally, only 45% of all black law students who began law school in 1991 graduated from

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60. See Edward Iwata, *Legal Industry Still Lacking in Minorities*, USA TODAY, Sept. 9, 2004, at 3B (citation omitted) (noting that fewer than ten percent of the nation’s attorneys are minorities).

61. *Id.* (quoting Elizabeth Chambliss, Law Professor, New York University School of Law).

62. See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 478 (2004).

63. See *id.* at 478–81.

64. See *supra* Part II.A.2.

65. See Sander, *supra* note 62 at 427 tbl. 5.1; see also Heriot Brief, *supra* note 26, at 16.

66. See Sander, *supra* note 62, at 437 tbl. 5.5.

67. See *id.* at 446 tbl. 6.2.

law school, took the bar, and passed on their first attempt.<sup>68</sup> The rate for white students was more than 78%.<sup>69</sup>

Drawing on Professor Sander's research, several USCCR commissioners concluded the following in their amicus brief to the Court:

[I]f law schools were to use race-neutral admission policies, fewer African-American law students would be admitted to law schools. But since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out. In the end, more would pass the bar on their first try and more would eventually pass the bar than under current admissions practices.<sup>70</sup>

Therefore, race-based preferences allow African American students to enroll in law schools where they often have less competitive entering credentials, receive correspondingly low grades, fail to pass the bar on their first attempt, and, consequently, struggle in their legal careers.

In light of this evidence, it is difficult to understand why UT continues to allow race to compensate for low entering credentials in its admission policy. The following section discusses UT's race-based admission policy, and its evolution since *Bakke*.

### B. *Evolution of UT's Race-Based Admission Policy*

Over the years, affirmative action in Texas higher education has taken three forms. Prior to 1996, with the splintered *Bakke* decision looming, UT used race as an express factor in admissions.<sup>71</sup> A crucial turning point in UT's race-based admissions came when the Fifth Circuit decided *Hopwood v. Texas* in 1996.<sup>72</sup> The *Hopwood* court struck down UT Law School's admission policy, which gave "substantial racial preferences" to minority applicants.<sup>73</sup> In response to the decision, the Texas legislature enacted

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68. *Id.* at 454.

69. *Id.*

70. Heriot Brief, *supra* note 26, at 19–20 (citation omitted).

71. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 222–23 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

72. See *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

73. See *Hopwood*, 78 F.3d at 934.

the Ten Percent Law.<sup>74</sup> In 2003, *Grutter* abrogated *Hopwood*, and UT again altered its admissions to fit the framework of the Supreme Court's decision.<sup>75</sup>

### 1. Pre-*Hopwood* Policy (1978–1996)

Relying on a fractured and unhelpful *Bakke* decision, UT used two metrics in admissions between the years of 1978 and 1996: the Academic Index (“AI”) and race.<sup>76</sup> The AI is still in use today and is not contentious. It is a computation based on the applicant's high school class rank, standardized test scores, and high school curriculum.<sup>77</sup> Prior to *Hopwood*, UT was unabashed about its race-conscious admissions process<sup>78</sup> because courts had not decided the constitutionality of such a practice.<sup>79</sup> In 1996, however, the Fifth Circuit held that UT Law School “may *not* use race as a factor in deciding which applicants to admit in order to achieve a diverse student body.”<sup>80</sup> Moreover, the *Hopwood* court called the use of race in admissions with the goal of achieving diversity a “constitutional infirmity.”<sup>81</sup>

### 2. Post-*Hopwood* Policy (1996–2003)

In response to the *Hopwood* decision, the Texas legislature enacted the Ten Percent Law in 1997.<sup>82</sup> The Ten Percent Law was designed as a race-neutral means of achieving diversity at UT while maintaining meritocratic admissions.<sup>83</sup> The Ten Percent

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74. TEX. EDUC. CODE ANN. § 51.303 (West 2006); *see also Fisher*, 631 F.3d at 224.

75. *See Fisher*, 631 F.3d at 225 (“In August 2003, the [UT] Board of Regents authorized the institutions within the [UT] system to examine whether to consider an applicant's race and ethnicity in admissions in accordance with the standards enunciated in *Grutter*.”) (internal quotation marks omitted).

76. *See id.* at 222.

77. *See id.*

78. *See id.* at 223 (“[I]t is undisputed that race was considered directly and was often a controlling factor in admission.”) (citation omitted).

79. *See id.* at 222 (“There were then no clear legal limits on a university's use of race in admissions. The Supreme Court decided *Bakke* in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty.”).

80. *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (emphasis added).

81. *Id.*

82. TEX. EDUC. CODE ANN. § 51.803 (West 2006); *see Fisher*, 631 F.3d at 224.

83. *Cf. Fisher*, 631 F.3d at 224 (“The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose.”).

Law requires Texas's public universities to "admit an applicant for admission . . . if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class."<sup>84</sup> The law has not been challenged and remains in effect,<sup>85</sup> although it is currently supplemented by the controversial *Grutter*-style policy.<sup>86</sup>

### 3. Post-*Grutter* Policy (2003–Present)

As the *Fisher* court noted, "*Hopwood*'s prohibitions [against using race as a factor in admissions] ended . . . with the Supreme Court's 2003 decision in *Grutter*."<sup>87</sup> The *Grutter* Court held that "the Equal Protection Clause does not prohibit [a] narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."<sup>88</sup> After the decision, UT's Board of Regents commissioned two studies, which concluded that the school lacked a critical mass of underrepresented minorities and insufficient minority representation in the classroom blocked the presence of the full benefits of diversity.<sup>89</sup> The year-long studies resulted in UT's adoption of an admission policy, beginning with the 2005 admission cycle, in which UT incorporated race as one of multiple factors in its admission decisions.<sup>90</sup>

The admission policy as it currently exists allots ninety percent of all available undergraduate seats to Texas residents.<sup>91</sup> Students admitted under the Ten Percent Law fill the majority of these seats.<sup>92</sup> After admitting those students, UT fills the remain-

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84. Tex. EDUC. CODE ANN. § 51.803(a).

85. See *Fisher*, 631 F.3d at 224.

86. See *supra* notes 74–75 and accompanying text.

87. *Fisher*, 631 F.3d at 224–25.

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

89. See *Fisher*, 631 F.3d at 225. According to UT's *June 2004 Proposal*, the "full benefits of diversity" include "break[ing] down stereotypes, promot[ing] cross-racial understanding, and prepar[ing] students for an increasingly diverse workplace and society." *Id.* (internal quotation marks omitted) (citing *June 2004 Proposal*, *supra* note 17).

90. See *id.* at 226, 230.

91. *Id.* at 227. The other two categories of applicants, which account for the remaining ten percent of available seats, are domestic non-Texas residents and international students. See *id.* Because the *Fisher* plaintiffs are Texas residents, the admissions processes for these other two categories require no discussion. *Id.*

92. See *id.* (noting, for example, that in 2008, "81% of the entering class was admitted under the Ten Percent Law," leaving only nine percent of all available seats for Texas residents not admitted under the Ten Percent Law).

ing seats on the basis of the AI and the Personal Achievement Index (“PAI”).<sup>93</sup> Some applicants have high enough AI scores to gain admission without consideration of their PAI scores.<sup>94</sup> However, applications of students with low AI scores receive a final review that takes into account PAI scores.<sup>95</sup>

The PAI is composed of the average score of two essays and a personal achievement score.<sup>96</sup> Like the AI, the quantitative essay score is merit-based and noncontroversial. The personal achievement score, on the other hand, involves the holistic review of a number of qualitative factors including the applicant’s leadership qualities, work experience, socioeconomic status, and race.<sup>97</sup> The Fifth Circuit emphasizes that race—like all other elements of the personal achievement score—is not considered alone.<sup>98</sup> At the same time, however, the Fifth Circuit admits the district court was correct in asserting that race “is undisputedly a meaningful factor that can make a difference in the evaluation of a student’s application.”<sup>99</sup> The current policy led to the district court’s observation that it “has difficulty imagining an admissions policy that

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93. *See id.*

94. *See id.* Again, the AI is a non-controversial aspect of the admission policy because it simply ranks applicants based on their merits. *See id.* (describing the AI as a “mechanical formula that predicts freshman GPA using standardized test scores and high school class rank”).

95. *See id.*

96. *See id.* at 227–28. However, the personal achievement score (which is the constitutionally suspect part of the PAI) receives one-third more weight than the average essay score, as evidenced by the PAI formula:  $PAI = ((personal\ achievement\ score * 4) + (average\ essay\ score * 3)) \div 7$ . *See id.* at 228 n.80.

97. *Id.* at 228 (citation omitted). Judge Higginbotham’s characterization of the purpose of the personal achievement score is interesting: “This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their [AI].” *Id.* Judge Higginbotham toes—but does not cross—the line of admitting that the personal achievement score rejects meritocracy as the sole criterion of admission, even though the use of non-merit-based qualities is the personal achievement score’s *raison d’être*. Also interesting in this respect is the desire of certain defenders of affirmative action to eliminate all meritocratic metrics in the admissions process. *See, e.g.*, DEFEND AFFIRMATIVE ACTION PARTY, <http://www.umich.edu/~daap/> (click on “Program”) (last visited May 1, 2012) (advocating for the elimination of “the SAT, ACT, and other biased and discriminatory standardized tests in the [University of Michigan] admissions processes”).

98. *See Fisher*, 631 F.3d at 230 (noting “[r]ace—like all other elements of UT’s holistic review—is not considered alone”); *see also id.* at 228 (“None of the elements of the personal achievement score—including race—are considered individually . . .”).

99. *Id.* at 230.

could more closely resemble the Michigan Law School's admissions policy upheld and approved by the Supreme Court in *Grutter*.<sup>100</sup>

### III. DIVERSITY AS A COMPELLING INTEREST

One purpose of the judicially created strict scrutiny test is to distinguish between "ordinary" rights and liberties, which the government may regulate with little justification, and "preferred" or fundamental rights, which are entitled to greater protection against government interference.<sup>101</sup> One such fundamental right, embodied in the Equal Protection Clause of the Fourteenth Amendment, provides equal protection of the laws to every individual, regardless of the individual's race.<sup>102</sup> Accordingly, "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."<sup>103</sup> Because race-based classifications trigger strict scrutiny, they can only be upheld when justified by a "compelling governmental interest."<sup>104</sup> The following sections introduce examples of compelling interests, emphasize the tenuousness of Justice Powell's *Bakke* opinion, discuss the various opinions in *Grutter*, and argue that allowing diversity as a compelling interest has neutered strict scrutiny's first prong.

#### A. *Instances of Compelling Interests*

The threshold for proving a compelling interest is so high it has led many to believe that strict scrutiny is "strict in theory, but fatal in fact."<sup>105</sup> However, the Court has identified several compel-

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100. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 612 (W.D. Tex. 2009), *aff'd*, 631 F.3d 312 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

101. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1285 (2007) ("The modern strict scrutiny test arose as advice to implement . . . the Supreme Court's solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or 'preferred' liberties entitled to more stringent judicial protection.").

102. *See* U.S. CONST. amend. XIV, § 1.

103. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

104. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (citation omitted) (holding that both federal and state racial classifications "must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

105. *See* Fallon, *supra* note 101, at 1304. *But see Grutter v. Bollinger*, 539 U.S. 306, 326

ling interests that can (or could) provide constitutionally sufficient justification for race- or ethnicity-based classifications. In *Korematsu v. United States*, the Court held that national security was a sufficient justification for the federal government to detain and exclude Japanese-Americans from certain areas on the West Coast.<sup>106</sup> Following *Brown v. Board of Education*, the Court, in a number of cases, held that remedying past discrimination is a governmental interest compelling enough to justify racial classifications.<sup>107</sup> The compelling interest implicated in *Fisher*—diversity in higher education—found its origins in *Bakke*<sup>108</sup> and its solidification in *Grutter*.<sup>109</sup> However, the *Grutter* Court was wrong to solidify diversity as a compelling governmental interest within the context of Equal Protection jurisprudence.

### B. *Bakke and Powellian Diversity*

In 1974, Allan Bakke filed suit challenging the admission policy of the University of California at Davis Medical School (“UC”), which set aside sixteen of 100 total seats exclusively for minority applicants.<sup>110</sup> Although the Court ultimately struck down the policy, the case produced six separate and diverging opinions.<sup>111</sup> Justice Powell’s plurality opinion announcing the judgment of the Court was anything but clear or conclusive.

None of the other Justices concurred with the part of Justice Powell’s opinion containing the most significant implications for future race-based admissions—namely, that “the State has a sub-

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(2003) (holding that “[s]trict scrutiny is *not* strict in theory, but fatal in fact”) (emphasis added) (citation omitted) (internal quotation marks omitted).

106. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944). Although the Court has not explicitly overturned *Korematsu*, it has since recognized only two compelling interests for using racial classifications: remedying the effects of past discrimination and diversity. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722 (2007).

107. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968); *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

108. See Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 444 (2011) (“[T]he *Bakke* opinion sparked the diversity fire, for before *Bakke*, the notion that diversity could be a compelling governmental interest was never suggested.”).

109. See Killenbeck, *supra* note 6, at 27 (recognizing *Grutter* as the first instance in which the Court held “clearly and unequivocally” that diversity is a compelling interest).

110. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275–78 (1978).

111. See *id.* at 265, 324, 379, 387, 402, 408.

stantial interest that legitimately may be served by a properly devised admissions program involving the . . . consideration of race and ethnic origin.”<sup>112</sup> In *Diversity: The Invention of a Concept*, Peter Wood, President of the National Association of Scholars,<sup>113</sup> made the following observation:

Powell’s *Bakke* opinion, however, lifted diversity out of obscurity and gave it the respectability of seeming law . . . . The happenstance that none of his Supreme Court colleagues joined Powell in extolling diversity tends to be overlooked, and those who are now committed to promoting the idea are perhaps reluctant to remember that the widely cited legal foundation for pursuing diversity in schools and colleges rests on one man’s unsupported opinion.<sup>114</sup>

The lack of a diversity argument in UC’s Petition for Writ of Certiorari also indicates that diversity as a compelling interest was a purely Powellian invention.<sup>115</sup> Further, in its subsequent brief to the Court, the petitioner relied on *Brown*’s “goal of educational opportunity unimpaired by the effects of racial discrimination,” but *not* diversity, to justify its race-based admissions.<sup>116</sup>

### C. *The Grutter Opinions*

Contrary to *Bakke*, the respondents in *Grutter* used the singular justification of diversity in defending their race-based admission policy against constitutional challenges.<sup>117</sup> In *Grutter*, Justice O’Connor acknowledged *Bakke*’s ambiguity and set out to clarify whether Powellian diversity was indeed controlling by “resolv[ing] the disagreement among the Courts of Appeals on a question of national importance.”<sup>118</sup> Justice O’Connor began her

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112. *Id.* at 320.

113. *NAS Staff & Boards*, NAT’L ASS’N OF SCHOLARS, [http://www.nas.org/about/staff\\_boards](http://www.nas.org/about/staff_boards) (last visited May 1, 2012).

114. WOOD, *supra* note 8, at 113 (emphasis omitted).

115. See Thompson & Schiff, *supra* note 108, at 445 (citing WOOD, *supra* note 8, at 106) (“The diversity argument does not appear in the section of the UC petition giving reasons why the Supreme Court should hear the case.”) (emphasis omitted).

116. See Brief for Petitioner at 17, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189474.

117. See *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003) (“[R]espondents assert only one justification for their use of race in the admissions process: obtaining the educational benefits that flow from a diverse student body.”) (internal quotation marks omitted).

118. *Id.* at 322. The “question of national importance” was “[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.” *Id.* Despite Justice O’Connor’s noted ambiguity with regards to *Bakke*, respondents unreservedly refer to *Bakke*—specifically Powell’s diversity—as “settled precedent.” Brief for Respondents at 12, *Grutter*, 539 U.S. 306 (No. 02-

discussion of the issue on the defensive by stating, “[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”<sup>119</sup> However, Justice O’Connor did not willingly accept the converse—that the Court may not simply invent a compelling interest when it wants.

Justice O’Connor moved away from the clearest interpretation of the Equal Protection Clause, which makes zero exceptions for racial classifications,<sup>120</sup> and instead actively interpreted the clause to allow HEIs to pursue the socio-political goal of increasing minority representation at elite institutions.<sup>121</sup> Supreme Court precedent forthrightly rejects governmental classifications “motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>122</sup> In light of this precedent, Justice O’Connor affords far too much deference to Michigan Law School’s contention that its sole goal was obtaining “the educational benefits that flow from student body diversity.”<sup>123</sup> Justice O’Connor hardly challenged the supposition that such “benefits” even exist. Quoting *Bakke*, she wrote,

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.”<sup>124</sup>

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241), 2003 WL 402236.

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

120. *Cf. Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) (“Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s [*Grutter* decision] seems perversely designed to prolong the controversy and the litigation.”).

121. *Id.* at 343 (majority opinion). Interestingly, the Court has interpreted the Equal Protection Clause in the higher education context differently depending on the social goal the Court hoped to achieve. *Compare* *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1958) (holding that “the Fourteenth Amendment precludes differences in treatment by the state based upon race” in order to secure equal protection rights for a black student), *with Grutter*, 539 U.S. at 343 (holding that “the Equal Protection Clause does *not* prohibit the . . . use of race in admissions” in order to increase the diversity at HEIs) (emphasis added).

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

123. *See* Brief for Respondents, *supra* note 118, at 14.

124. *Grutter*, 539 U.S. at 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 205 at 318–19) (1978)).

Part II of this note presents “a showing to the contrary.”<sup>125</sup> With such evidence staring the Court in its face in *Fisher*, the Court should refrain from simply deferring to UT.

In his *Grutter* dissent, Justice Scalia takes an overt shot at the majority opinion and its acceptance of Michigan Law School’s stated interest in the educational benefits of diversity by declaring that the university’s “mystical . . . justification for its discrimination by race challenges even the most gullible mind.”<sup>126</sup> Justice Thomas also criticized the majority along the same lines: “[T]he Constitution [does not] countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”<sup>127</sup> By taking Michigan Law School at its word and ignoring a plethora of statistical evidence contradicting the concept of the “benefits” of diversity, the *Grutter* majority allowed Michigan Law School to maintain its elite status, while also increasing minority enrollment by admitting students who, except for their race or ethnicity, would not otherwise gain admission. Although on its face this seems the perfect solution, Justice Thomas correctly points out that “[r]acial discrimination is *not* a permissible solution to the self-inflicted wounds of [an] elitist admissions policy.”<sup>128</sup>

#### D. *Diversity in Fisher*

From the beginning of the *Fisher* litigation, UT has relied on diversity as a compelling state interest in defending its admission policy against the plaintiffs’ challenge.<sup>129</sup> UT’s reliance on diversity shows how *Grutter* completely changed the process for satisfying the compelling governmental interest requirement of strict scrutiny. HEIs are now able to blow through strict scrutiny’s first prong simply by invoking the supposed educational benefits of di-

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125. See *supra* Part II. More importantly, the USCCR’s amicus brief to the Court presents such evidence, and the Court relies heavily on amicus support in this regard. See *supra* note 43.

126. *Grutter*, 539 U.S. at 346–47 (Scalia, J., concurring in part and dissenting in part).

127. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

128. *Id.* (emphasis added). Michigan Law School’s own expert testified that isolating race as an admissions factor accounted for an increase in minority enrollment of more than three-fold. See *id.* at 320 (majority opinion).

129. See Brief in Opposition to Motion for Preliminary Injunction at 15, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, (W.D. Tex. May 5, 2008) (No. 1:08-CV-00263-SS), 2008 WL 7318506.

iversity in education.<sup>130</sup> *Grutter* also set the precedent for courts to give almost complete deference to HEIs' claims that such "benefits" in fact do flow from increased minority enrollment.<sup>131</sup> This proposition is no longer questioned, but rather assumed, despite vast evidence to the contrary.<sup>132</sup> In *Fisher*, UT offered almost no evidence that diversity actually produces the benefits that make it a compelling interest because it knows it does not need to do so.<sup>133</sup> Instead, it merely cites figures showing increased minority enrollment as a result of affirmative action, which falsely assumes that diversity itself is the end.<sup>134</sup>

When the Court decides *Fisher*, it will have the opportunity to right its wrong in *Grutter* by reversing the notion that diversity justifies governmental racial classifications. It will have the opportunity to give more deference to the language of the Equal Protection Clause and less to UT's conclusory statement that its racial preferences fit within it.<sup>135</sup> By so doing, the Court will once again give teeth to strict scrutiny's first prong in the context of higher education.

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130. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 603–04 (W.D. Tex. 2009) (rejecting plaintiffs' argument that UT's policy is untethered to any educational benefits because the Supreme Court "recognized in *Grutter* that '[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer'") (citation omitted). The *Fisher* court goes on to say that it "fail[ed] to see how UT's determination is improper or renders its consideration of race unconstitutional" because "*Grutter* explicitly authorizes universities to exercise its discretion" in how they use race. *Id.* at 606.

131. See *supra* note 123 and accompanying text.

132. One of the main supposed benefits of diversity is cross-racial understanding. See *Grutter*, 539 U.S. at 330. However, under race-based admission policies, the number of whites remains constant while the number of minorities increases. Therefore, it is not the minorities who are gaining the benefit of better understanding whites. Instead, the opposite is true. All the "benefits" of cross-racial understanding go to whites who supposedly now are better able to understand people of different ethnic backgrounds. See, e.g., Joshua M. Levine, *Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 478 (2006) (noting that under Justice Powell's rationale, "[d]iversity wins because whites benefit") (emphasis added). It is difficult to imagine a more patronizing system for minorities. HEIs tell minority applicants they were not good enough to gain admission based on standards of merit. But, the HEIs will admit them anyway so whites can observe their behavior and gain a "better understanding" of them.

133. See *supra* note 130 and accompanying text.

134. See discussion *supra* Part II.A.

135. See *supra* note 127 and accompanying text.

## IV. NARROW TAILORING

Assuming *arguendo* that diversity in education is indeed a compelling governmental interest on which UT may rely, its race-based admission policy still fails to satisfy strict scrutiny's narrow tailoring prong. "[S]tate legislation that expressly distinguishes among citizens because of their race . . . [must] be *narrowly tailored* to further a compelling governmental interest."<sup>136</sup> Section A explains why the UT policy is not the least restrictive means of achieving diversity and argues that the Court should strike down the policy on narrow tailoring grounds. Section B argues that because the UT policy so closely resembles Michigan Law School's policy from *Grutter*, if one is not narrowly tailored, neither is the other.

A. *Least Restrictive Means*

UT's policy fails on narrow tailoring grounds because it is not the least restrictive means of achieving diversity.<sup>137</sup> In strict scrutiny analysis, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."<sup>138</sup> However, narrow tailoring analysis with regards to the least restrictive means is not clear-cut.<sup>139</sup> UT is not required to take burdensome steps in testing every possible race-neutral alternative to affirmative action, but UT must seriously consider using race-neutral alternatives that work "about as well."<sup>140</sup> The Ten Percent Law works "about as well" as (if not better than)

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136. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (emphasis added) (citations omitted). As the quote demonstrates, there must first be a compelling governmental interest before the Court can undertake narrow tailoring analysis. Therefore, this part of the note assumes that those reading it disagree with Part III. *See supra* note 29.

137. *See Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) ("The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences . . . must be only a 'last resort' option.").

138. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

139. *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) ("Narrow tailoring does *not* require exhaustion of every conceivable race-neutral alternative . . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives . . . .") (emphasis added).

140. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (internal citation omitted).

UT's race-conscious admission policy<sup>141</sup> and places no burden on UT because it is already in place and institutionalized.

Pre-*Hopwood*, before there were clear legal limits on the use of race in admissions, UT used race as one of two metrics.<sup>142</sup> In 1993, this unfettered, direct use of race resulted in an entering class that included 238 African American students (4.5% of the overall class) and 832 Hispanic students (15.6% of the overall class).<sup>143</sup> These figures can be understood as nothing short of UT's ideal number, or "critical mass," of African American and Hispanic students because at that point the courts had not restricted UT's use of race.

After the *Hopwood* court struck down UT's race-based admission policy in 1996, UT adopted the Ten Percent Law. Under the Ten Percent Law, the 2004 entering class (the last class before *Grutter* took effect) included 309 African American students (4.5% of the overall class) and 1149 Hispanic students (16.9% of the overall class).<sup>144</sup> Additionally, the Ten Percent Law accounted for the admission of 77% of enrolled African American students and 78% of enrolled Hispanic students.<sup>145</sup> Thus, the Ten Percent Law, which relies on merit as opposed to racial classifications and is entirely compatible with the Equal Protection Clause, resulted in slightly *increased* minority enrollment when compared to the unfettered use of race.

None other than the UT president himself, Dr. Larry Faulkner, lauded the Ten Percent Law and its effects on diversity enrollment:

[T]he Top 10 Percent Law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to

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141. The majority in *Grutter* rejected the argument made for percentage plans as a race-neutral alternative. That rejection, however, was based on the fact that percentage plans do not work specifically for graduate and professional schools (as opposed to undergraduate institutions like UT). See *Grutter*, 539 U.S. at 340. Additionally, the majority held that a percentage plan would force the law school to abandon its academic selectivity. *Id.* However, state legislatures reserve the right to balance state universities' academic selectivity with educational policy goals. The Court's rejection of legislatively adopted percentage plans as a policy matter infringes on this right.

142. See *supra* Part II.B.

143. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 233 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

144. See *id.* at 224.

145. *Id.*

those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admission policies. And minority students earned higher grade point averages last year than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping us to create a more representative student body and enroll students who perform well academically.<sup>146</sup>

Dr. Faulkner's statement and the pre- and post-*Hopwood* figures demonstrate that UT can achieve sufficient (if not ideal) levels of minority enrollment without the use of "inherently suspect" racial classifications.<sup>147</sup> Therefore, UT's personal achievement score, which accounts for applicants' race and scores some races higher than others,<sup>148</sup> is not the least restrictive means available of achieving diversity as required by narrow tailoring.<sup>149</sup>

The Court should strike down UT's race-based policy because it does not satisfy the second prong of strict scrutiny. At the same time, UT insists that its policy directly resembles the policy from *Grutter*.<sup>150</sup> Therefore, striking down the policy from *Fisher* necessarily requires overturning *Grutter*, and the Court should do both.

### B. Possible Approaches to UT's Policy

The defendant, the district court, and the Fifth Circuit majority in *Fisher* all extolled the similarities between UT's use of race in admissions and Michigan Law School's use of race in admissions.<sup>151</sup> For those eager to uphold UT's policy and racial preferences generally, this appears, at least on the surface, to be the best approach (otherwise, presumably, UT would have argued something different). However, "doubling down" on *Grutter* is a high-risk, high-reward strategy that could backfire depending on

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146. Larry R. Faulkner, *The "Top 10 Percent Law" Is Working for Texas*, U. OF TEXAS AT AUSTIN (Oct. 19, 2000), [http://www.utexas.edu/president/past/faulkner/speeches/ten\\_percent\\_101900.pdf](http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.pdf) (indicating these remarks appeared as a guest editorial in multiple Texas newspapers).

147. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) ("Government action dividing us by race is inherently suspect.").

148. *See supra* note 97 and accompanying text.

149. *See supra* note 139 and accompanying text.

150. *See infra* note 154 and accompanying text.

151. *See supra* note 7 and accompanying text.

how the Court analyzes UT's policy. The Court can approach its analysis of UT's policy in several ways.

First, it can uphold the policy on grounds that it was constructed exactly on the *Grutter* model, and, because the *Grutter* decision is binding, UT's policy must be constitutional and narrowly tailored. This approach would reaffirm *Grutter* and further define the hoops through which HEIs can jump to ensure their racial preferences will be upheld. This would be the high-reward approach from the perspective of UT and other HEIs because it not only upholds UT's policy, but it also strengthens the case for racial preferences in education generally.

Second, the Court could take a middle ground approach to *Fisher*. If it is able to distinguish UT's policy from the policy at issue in *Grutter*,<sup>152</sup> it could decouple the two cases and reaffirm *Grutter* while striking down the *Fisher* policy. This approach would be detrimental to UT, but not necessarily to other proponents of racial preferences. It would have minimal effect on the jurisprudence in this area, although it might confine *Grutter*'s holding to a limited extent. This will likely appear to the Court to be the most temperate approach and, therefore, the most attractive. However, only the following approach is constitutional.

The Court should not decouple the UT and *Grutter* policies. It should take UT at its word when it so strongly argues that "UT Austin's admissions program is *precisely* the type of system expressly upheld in *Grutter*."<sup>153</sup> Then it should strike down the policy, effectively overturning *Grutter*. This is the risk UT assumed in emphasizing the similarities between its policy and the *Grutter* policy.<sup>154</sup> UT's insistence that the Court recognize these similarities could, and should, lead to the dismantling of race-based admissions policies.

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152. See Thompson & Schiff, *supra* note 108, at 471–77 (describing "two obvious avenues where the Supreme Court can distinguish *Grutter* from *Fisher*").

153. Brief in Opposition, *supra* note 129, at 16.

154. *Id.* In fact, it acknowledged this risk when it said, "If the Plaintiffs are right, *Grutter* is wrong." *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 612 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

## V. CONCLUSION

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>155</sup> Chief Justice Roberts’s simple but poignant words reflect his simple but precise interpretation of the Equal Protection Clause, which makes no exception for permitting governmental classifications of Americans based on race. In contrast, Justice O’Connor, in her *Grutter* opinion, finds an exception to the Clause allowing racial preferences. The Court’s holding in *Grutter* persists today and forms the legal foundation for affirmative action in the nation’s HEIs. That foundation, however, is rooted in the concocted and erroneous notion that diversity is a compelling state interest, sufficient to satisfy strict scrutiny’s first prong. Modern data suggest that racial preferences in education are counterproductive and do not produce the benefits upon which the diversity theory relies.<sup>156</sup>

*Fisher* has recently catapulted the constitutionality of affirmative action to the forefront of the nation’s legal debate. The case is significant because of its similarities to *Grutter*. Not only does UT justify its racial preferences by invoking diversity, but it also poses its own admission policy as the identical reflection of the policy upheld in *Grutter*. In so doing, UT hopes to convince the Court to reaffirm *Grutter* and uphold the UT policy on narrow tailoring grounds. The UT policy is not narrowly tailored, however, as evidence suggests that other available means achieve the same diversity goals.

In his special concurrence to the Fifth Circuit’s majority opinion, Judge Garza begins with the following:

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in *Grutter*, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not.<sup>157</sup>

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155. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

156. *See supra* Part II.A.3; *see also Sander, supra* note 62, at 481–82.

157. *Fisher*, 631 F.3d at 247 (Garza, J., specially concurring).

Judge Garza's dissent demonstrates that *Fisher* is about much more than striking down one university's admission policy. *Fisher* presents the Court with an opportunity to either reinforce *Grutter* or overturn it while recognizing the constitutional infirmity of affirmative action. As the Texas Solicitor General rightly summarized, "If the Plaintiffs are right, *Grutter* is wrong."<sup>158</sup> The Court should strike down UT's race-based admission policy and overturn *Grutter*. If it does not, pernicious, counterproductive, and unconstitutional racial preferences could become even more entrenched in American jurisprudence and persist for years to come.

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158. *Fisher*, 645 F. Supp. 2d at 612.

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