

DIVISIVE DIVERSITY AT THE UNIVERSITY OF  
TEXAS: AN OPPORTUNITY FOR THE SUPREME  
COURT TO OVERTURN ITS FLAWED DECISION IN  
*GRUTTER*

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## I. INTRODUCTION

In *Grutter v. Bollinger*,<sup>1</sup> the Supreme Court identified a compelling interest in diversity in higher education. By so doing, the Court sanctioned a new vehicle for universities endeavoring to use race as a (determinative) criterion in university admissions.<sup>2</sup> Recently, the Fifth Circuit Court of Appeals heard a challenge to the University of Texas at Austin's (University) admission policy challenging that University's use of race in selecting its students.<sup>3</sup> In *Fisher v. University of Texas at Austin*, the Fifth Circuit held that the University's use of race in selecting its students, which closely mirrored the system held constitutional in *Grutter*, was also constitutional.<sup>4</sup>

*Fisher* has piqued the interest of the legal community. The University, the largest and (arguably) most prestigious public school in Texas,<sup>5</sup> has vigorously defended its decision to use racial classifications for selecting its students.<sup>6</sup> The plaintiffs, two white female applicants who were denied admission,<sup>7</sup> have been represented by nationally-recognized attorneys out of Washington, D.C.<sup>8</sup> Moreover, at this intermediate appellate stage, numerous amicus briefs were filed supporting both sides from national sources, including

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1. 539 U.S. 306, 343 (2003).

2. However, at the same time the Court decided *Grutter*, it also decided a companion case, which dealt with the University of Michigan's undergraduate admissions program. *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Gratz* is important to keep in mind as we lay the framework for the Supreme Court's decision in *Grutter*, as a majority of the *Gratz* Court found the undergraduate admissions policy unconstitutional. Because *Gratz* was decided solely on narrow tailoring grounds, the opinion did not endorse a compelling interest in diversity in undergraduate education. *Id.* at 275. This point is explored more fully in Part III.B.

3. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

4. *Id.* at 247.

5. See *National University Rankings*, U.S. NEWS & WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/spp+50> (2011) (ranking the University of Texas at Austin forty-fifth among all universities in the country and the best public university in Texas).

6. Brief of Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

7. *Fisher*, 631 F.3d at 217.

8. *Id.* at 215.

the Asian American Legal Foundation,<sup>9</sup> National Association of Scholars,<sup>10</sup> Center for Equal Opportunity,<sup>11</sup> and Pacific Legal Foundation<sup>12</sup> in support of the plaintiffs, and the NAACP,<sup>13</sup> Black Student Alliance,<sup>14</sup> American Association of State Colleges and Universities,<sup>15</sup> and the Asian American Institute<sup>16</sup> in support of the University (to name a few). Further, in a highly unusual move at the circuit stage, even the Obama Administration filed an amicus brief supporting the University.<sup>17</sup>

The implication of such a wide interest in the case is self-evident. Both proponents of racial classifications in university admissions, as well as opponents, view *Fisher* as having the potential seriously to affect the ability of universities to use race in admissions. While the plaintiffs are seeking review from an *en banc* panel of the Fifth Circuit at present,<sup>18</sup> a petition for writ of certiorari to the Supreme Court is likely to follow.

Given the national interest in *Fisher*, this article will lay forth the constitutional issues at stake. Part I provides a history of Supreme Court precedent on racial classifications, focusing on the birth of diversity in constitutional law in *Bakke*,<sup>19</sup> and culminating with the elevation of diversity's status to a compelling governmental interest in *Grutter*.

9. Brief of Amicus Curiae the Asian American Legal Foundation in Support of Reversal, *Fisher*, 631 F.3d 213 (No. 09-50822).

10. Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Plaintiffs and Appellants and Reversal, *Fisher*, 631 F.3d 213 (No. 09-50822).

11. *Id.*

12. *Id.*

13. Amicus Brief of the Black Student Alliance at the University of Texas at Austin and the NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

14. *Id.*

15. Brief Amicus Curiae of American Council of Education et al., *Fisher*, 631 F.3d 213 (No. 09-50822).

16. Brief of Amici Curiae Asian Pacific American Legal Center et al. in Support of Appellees and in Affirmance of the District Court Judgment, *Fisher*, 631 F.3d 213 (No. 09-50822).

17. Brief for the United States as Amicus Curiae Supporting Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

18. Petition for Rehearing En Banc Filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer-Michalewicz, *Fisher*, 631 F.3d 213 (No. 09-50822).

19. Regents of Cal. v. Bakke, 438 U.S. 265 (1978).

Part II explains *Fisher* in detail, including the three separate opinions this highly contentious case produced. Part III shows the various ways *Fisher* can be constitutionally distinguished from *Grutter*, thereby demonstrating how the Supreme Court can overrule the *Fisher* Court without overturning *Grutter*. Part IV, however, advocates for a summary reversal of *Grutter* based on two serious constitutional implications of the *Grutter* Court's holding.

## II. THE RISE OF DIVERSITY AS A COMPELLING INTEREST

Diversity as a compelling interest has a brief, singular appearance in the holdings of the Supreme Court.<sup>20</sup> A proper understanding of the *Grutter* Court's compelling interest holding begins by looking at what did and did not amount to a compelling interest before *Grutter*. Before a court can begin to apply *Grutter* prospectively, it must first take a retrospective look at how *Grutter* arrived at its conclusion and what that conclusion means.

### A. Regarding National Security and Past Discrimination

Amidst anti-Japanese sentiment, a World War Two Supreme Court was confronted with an extreme case of governmental discrimination in *Korematsu v. United States*.<sup>21</sup> In *Korematsu*, the Supreme Court held that national security was a compelling government interest that allowed the United States government to exclude all persons of Japanese ancestry from military zones on the West Coast.<sup>22</sup> While *Korematsu* today is rightly ridiculed for justifying internment of Japanese-Americans based on hysteria and xenophobia, the case remains noteworthy as the first Supreme Court decision to apply strict scrutiny under the Equal Protection Clause to racial classifications.<sup>23</sup> At the outset the Court noted that "all legal restrictions which curtail the civil rights of a single racial group are

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

21. 323 U.S. 214 (1944).

22. *Id.* at 223.

23. *Id.* at 216.

immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”<sup>24</sup> Despite the rigid scrutiny, the Supreme Court found the national security interests to be sufficiently compelling to uphold the program.<sup>25</sup>

Although *Korematsu* laid the foundation for strict scrutiny analysis of racial classifications, the Supreme Court did not apply it to all race-implicated Equal Protection cases immediately.<sup>26</sup> By the 1960s, however, the Supreme Court began routinely striking down racially discriminatory statutes under strict scrutiny analysis.<sup>27</sup> Around this time the Supreme Court also upheld racial classifications designed for remedial purposes. These remedial cases are the first to find a governmental interest sufficiently compelling to permit race-based classifications with reasoning that today’s Court might accept.<sup>28</sup> In a number of school desegregation cases following *Brown v. Board of Education*, the Supreme Court consistently found racial classifications to be constitutional when employed to remedy

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24. *Id.*

25. The Court stated,

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

*Id.* at 219–20.

26. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (holding that segregated schools violate the Equal Protection Clause because of the social and psychological harms caused by segregation in education); Rachel C. Grunberger, Note, *Johnson v. California: Setting a Constitutional Trap for Prison Officials*, 65 MD. L. REV. 271, 276 (2006) (discussing *Korematsu* and the application of strict scrutiny to racial classifications).

27. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8–9 (1967) (striking down law banning interracial marriage); Grunberger, *supra* note 26, at 276–77 (discussing the 60s Court’s application of strict scrutiny to racial classifications).

28. Technically, *Korematsu* is the first case to find an interest sufficiently compelling to justify race-based classifications—namely, national security. However, as will be discussed shortly, the *Adarand* Court’s statements on *Korematsu* bring into strong question whether that reasoning could command a majority of the Court today. See *infra* Part II.C (discussing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

past intentional discrimination.<sup>29</sup> In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court distilled its reasoning behind the school desegregation cases that authorized race-based remedies in order to remedy past discrimination:

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.<sup>30</sup>

By the 1970s, overt discriminatory race-based policies became less common, and soon the Supreme Court's attention turned to affirmative action, or race-preference policies. In *DeFunis v. Odegaard*, the Supreme Court was presented with a challenge to the University of Washington School of Law's race-based affirmative action policy.<sup>31</sup> Although ultimately decided on mootness grounds, *DeFunis* is interesting in that the University of Washington never argued that its program could withstand strict scrutiny under the rationale of "diversity."<sup>32</sup> Indeed, "the term 'diversity' does not appear at all in the record of the case."<sup>33</sup>

Not until *Bakke* did the Supreme Court determine whether the government had a compelling interest in racial classifications outside of remedying past discrimination.<sup>34</sup> Before *Bakke*, only state policies designed to remedy the effects of past discrimination were sufficiently compelling to deny an individual's right to equal protection. Indeed, many governmental entities that began race preference programs

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

30. *Swann*, 402 U.S. at 28. See generally *Green*, 391 U.S. 430. But see Elizabeth S. Anderson, *Constitutionalizing and Defining Racial Equality: Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 15 (2004) (arguing that "[t]he ideal of the school desegregation cases is that racial integration is a positive good").

31. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

32. *Id.*

33. PETER W. WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 111 (2003).

34. *Regents of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

could not justify those programs under a theory that they were remedying the effects of past intentional discrimination.

### B. Bakke and the Invention of Diversity

Books and articles have been written analyzing *Regents of the University of California v. Bakke*, and it remains one of the most highly debated Supreme Court decisions.<sup>35</sup> For good reason too, as the Court's decision produced six separate opinions that often go in complete opposite directions.<sup>36</sup> Interesting for our purposes is that the *Bakke* opinion sparked the diversity fire, for before *Bakke*, the notion that diversity could be a compelling governmental interest was never suggested.

In short, *Bakke* presented the Court with a then-typical race-preferences program, whereby the Medical School of the University of California at Davis guaranteed admission to students from certain minority groups.<sup>37</sup> Allan Bakke was a white male (a disfavored race) who was twice denied admission to the Medical School.<sup>38</sup> Because the Medical School was only opened in 1968, the preferential program could not be justified on the grounds that it was needed to remedy past discrimination.<sup>39</sup> Thus, if the program were to survive strict scrutiny, a new rationale would have to be developed.<sup>40</sup>

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35. See HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* (2000); SUSAN BANFIELD, *THE BAKKE CASE: QUOTAS IN COLLEGE ADMISSIONS* (1998); TIM MCNEESE, *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE: AMERICAN EDUCATION AND AFFIRMATIVE ACTION* (2006); Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005); Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463 (2005).

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

37. *Id.* at 369.

38. *Id.* at 276.

39. *Id.* at 371 (Brennan, J., concurring in part and dissenting in part).

40. The standard of review to apply to the Medical School's use of racial classification did not command a majority of the court. Although Justices Powell and White argued that strict scrutiny applied, *id.* at 287 (plurality opinion), Justices Brennan, Marshall, and Blackmun argued that "racial classifications designed to further remedial purposes must serve important governmental

Interestingly, the University did not rely on diversity to uphold its race-conscious program. The University's petition for certiorari "frame[d] the university's racial preferences as primarily an effort to realize 'the goal of educational opportunity unimpaired by the effects of racial discrimination.'"<sup>41</sup> The issues raised in the briefing by both sides were more concerned with test scores and other statistical disputes. "The *diversity* argument does not appear in the section of the UC petition giving reasons why the Supreme Court should hear the case."<sup>42</sup>

Nevertheless, it was the University's passing references to diversity that convinced Justice Powell, and only Justice Powell, that racial classification may be permitted when narrowly tailored to further the compelling interest of diversity. "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."<sup>43</sup> None of the other justices agreed. However, the four Justices that would have upheld the University's quota agreed with statements in Justice Powell's opinion that "some use[] of race in university admissions are permissible."<sup>44</sup> Therefore, those four justices argued that they had five votes sufficient to "revers[e] the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future."<sup>45</sup>

Justice Powell's *Bakke* opinion is unquestionably the starting point for examining diversity as a compelling state interest:

Without *Bakke*, the *diversity* argument—the conceit that ethnic and racial diversity are *educationally* constructive—might have languished along with the labor theory of value

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objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (Brennan, J., concurring in part and dissenting in part) (citations omitted). Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart argued that Title VI could resolve the case, so ruling on the standard of review was inappropriate. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part).

41. WOOD, *supra* note 33, at 104.

42. *Id.* at 106.

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

44. *Id.* at 326 (Brennan, J., concurring in part and dissenting in part).

45. *Id.*

and a thousand other bits of leftist rhetoric that never caught on. 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>46</sup>

Although Justice Powell certainly wrote that "diversity is compelling," he was the only one who subscribed to that position.<sup>47</sup> Only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission and (2) some amorphous consideration of race is allowable under the Constitution.<sup>48</sup> Most notably, as a result of the severely split court, Justice Powell's arguments in support of using diversity as a compelling state interest were his alone.

### C. *The Bakke Aftermath—Diversity Lays Low*

In the years following *Bakke* but before *Grutter*, the Supreme Court heard a number of Equal Protection cases where those suing were not members of a preferred class.<sup>49</sup> In that 25-year span, the Supreme Court had many opportunities to introduce diversity as a compelling state interest, but never did.

Soon after *Bakke*, the Court took up *Fullilove v. Klutznick*, which involved a 10% minority set-aside program for certain federal contracts.<sup>50</sup> The Court recognized that "[t]he history of governmental tolerance of practices using racial or ethnic criteria . . . must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications."<sup>51</sup> While the *Fullilove* Court

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46. WOOD, *supra* note 33, at 113.

47. *Bakke*, 438 U.S. at 315.

48. *Id.* at 271–72.

49. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

50. 448 U.S. 448 (1980).

51. *Id.* at 486–87.

was once again deeply divided, it held that race-conscious measures could be used to remedy past discrimination.<sup>52</sup> Interestingly, Justice Powell, although joining the majority opinion, wrote separately in *Fullilove* to note that the racial classifications, despite being permissible in this narrow instance, nevertheless, like all racial classifications, must be subjected to the most rigorous judicial scrutiny to survive.<sup>53</sup>

This point would eventually be adopted by a clear majority of the Supreme Court in *Adarand*.<sup>54</sup> Following Justice Powell's lead, the *Adarand* Court "ma[de] explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest."<sup>55</sup> *Adarand* is also noteworthy to our discussion because of its harsh criticism of *Korematsu*.<sup>56</sup> National security might appear to be the most compelling of governmental interests, but the *Adarand* Court did not think it justified governmental racial classifications.<sup>57</sup> It therefore concluded that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."<sup>58</sup> As one commentator notes, "[t]he fact that such an important and vital interest, national security, was retroactively determined to be insufficient to justify the use of racial classifications in the *Korematsu* situation demonstrates just how stringent judicial review under strict scrutiny was meant to be."<sup>59</sup>

Thus, pre-*Grutter*, remedying past discrimination was the lone constitutionally recognizable rationale for the

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52. See *id.* at 481 (upholding a statute that remedially addressed past racial discrimination).

53. *Id.* at 496 (Powell, J., concurring).

54. *Adarand*, 515 U.S. 200.

55. *Id.* at 235.

56. *Id.* at 236.

57. See *id.* (finding that security is an inadequate motivation for Japanese internment camps).

58. *Id.*

59. Brandon M. Carey, Note, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and how the Supreme Court has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 OKLA. CITY U. L. REV. 329, 345 (2005).

government's use of a racial classification.<sup>60</sup> Not surprisingly, then, race-preference programs almost universally failed strict scrutiny analysis. "Only once between its 1945 inception in *Korematsu* and its application in *Grutter* has an affirmative-action program survived both prongs of the strict scrutiny analysis."<sup>61</sup>

In 1989, a plurality of the Supreme Court went further, holding that remedying past discrimination remains the *only* means by which the government can use racial classifications. Justice O'Connor (who would write the *Grutter* opinion), joined by Chief Justice Rehnquist and Justices White and Kennedy, argued that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>62</sup> Further still, Justice Scalia concurring in the judgment, argued that racial classifications must be restricted even more narrowly:

At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . ."<sup>63</sup>

Whereas remedying past discrimination remains a compelling governmental interest, two post-*Bakke* / pre-*Grutter* cases help clarify what is not a compelling

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60. In *Korematsu*, the Supreme Court found national security to be a compelling government interest. However, as noted above, the *Adarand* Court's statements on *Korematsu*, bring into strong question whether that reasoning could command a majority of the Court today.

61. Libby Huskey, Case Note, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* *Grutter v. Bollinger*, 123 *S. Ct.* 2325 (2003), 4 WYO. L. REV. 439, 470 (2004); see also *United States v. Paradise*, 480 U.S. 149, 165–66 (1987) (upholding a race-conscious remedy designed to "remedy the present effect of past discrimination"); Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523, 540–41 (1997) (discussing cases upholding race-conscious policies under the compelling interest of remedying the effects of past discrimination).

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

63. *Id.* at 521 (Scalia, J., concurring) (citations omitted).

governmental interest. In *Palmore v. Sidoti*, the Supreme Court was faced with a Florida decision that allowed the state to remove a child from the custody of its mother because she was married to a man of a different race.<sup>64</sup> The father argued that the bi-racial household would subject the child to social stigmatization, and therefore it was in the best interest of the child to be with him.<sup>65</sup> The Court recognized that while “granting custody based on the best interests of the child is indisputably a *substantial* governmental interest[,]” that “cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”<sup>66</sup>

Perhaps most informative on the pre-*Grutter* Court’s understanding of what constitutes a compelling interest justifying race-based classifications is the decision in *Wygant*.<sup>67</sup> That case dealt with a school board program that prevented members of certain minority groups from being laid off.<sup>68</sup> As there was no history of past discrimination, the school board defended its policies on the grounds that its procedures were “an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren.”<sup>69</sup> The *Wygant* Court rejected this asserted non-remedial interest as an unconstitutional “attempt to alleviate the effects of societal discrimination.”<sup>70</sup> Further, the Court held that it was “too amorphous a basis for imposing a racia[l] classifi[cation].”<sup>71</sup> Additionally, because the role model theory was not tied to remedying past discrimination, it “ha[d] no logical stopping point”<sup>72</sup> such that racial classifications based on it would be “ageless in

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64. 466 U.S. 429 (1984).

65. *Id.* at 431.

66. *Id.* at 433–34 (emphasis added).

67. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1980).

68. *Id.*

69. *Id.* at 272.

70. *Id.* at 274.

71. *Id.* at 276.

72. *Id.* at 275.

their reach into the past, and timeless in their ability to affect the future.”<sup>73</sup>

Interestingly, the dissent in *Wygant* recognized the similarities between the “role model” theory and diversity. “[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land.”<sup>74</sup> Justice Stevens’ dissent is noteworthy because he dissented from an opinion that rejected the diversity rationale (albeit in *secondary* education).

Before *Grutter*, therefore, remedying past discrimination was the sole basis on which government could create a racial classification. As this case history demonstrates, the Constitution countenances racial classifications only in the most limited circumstances. A “role model theory,” societal discrimination, child custody, or even (arguably) national security is an insufficient reason to use racial classifications. “The decision in *Grutter* to classify diversity in higher education as a compelling state interest seems quite weak when one considers all of the state interests that have not been classified as compelling.”<sup>75</sup> *Grutter* is undeniably a unique case in that the Supreme Court found a second compelling interest that allows the government to employ racial classifications.

#### D. Diversity Obtains Constitutional Sanction—*Grutter v. Bollinger*

*Grutter* concerned a challenge to the race-conscious admissions program<sup>76</sup> of the University of Michigan Law

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73. *Id.* at 276.

74. *Id.* at 315 (Stevens J., dissenting).

75. Carey, *supra* note 59, at 350.

76. *Id.* at 311. The Supreme Court considered this case in conjunction with a parallel challenge to the University’s race-conscious admissions program for its undergraduate schools in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

School, a top-rated institution.<sup>77</sup> Although the law school's admissions plan focused generally on an applicant's GPA and LSAT scores, exceedingly high scores on those markers would not guarantee admission. Conversely, exceedingly low scores would not necessarily preclude admission, because the law school employed a number of so-called "soft variables" to achieve a "diverse" student body.<sup>78</sup> The law school's understanding of diversity included more factors than just race, although its plan made clear that the law school had made a special commitment to racial diversity, which would be obtained by admitting "critical masses" of historically underrepresented minorities.<sup>79</sup>

In 1996, Barbara Grutter, a nonminority Michigan resident with fairly good GPA and LSAT scores,<sup>80</sup> unsuccessfully applied for admission to the law school and thereafter brought suit to challenge the constitutionality of the law school's race-conscious admissions plan. The district court conducted a bench trial during which several experts and law school officials testified.<sup>81</sup> Ultimately, the district court enjoined the plan on the grounds that diversity is not a compelling interest and that, even if it were, it could be achieved through a race-neutral admissions policy.<sup>82</sup> The Court of Appeals for the Sixth Circuit, sitting *en banc*,

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77. *Grutter v. Bollinger*, 539 U.S. 306, 312 (2003) (noting the school's status as an elite institution, which plays an important role in the majority's narrow-tailoring analysis).

78. *See id.* at 315.

79. *See id.* at 316.

80. *See id.* (noting that Ms. Grutter had a 3.8 GPA and an LSAT score of 161).

81. Among those who testified was the former director of admissions, who testified that the admissions staff was not told to admit a certain percentage of minorities, although the director would be given daily reports to keep a running total on the numbers of minorities offered admission. *Id.* at 318. The then-current director of admissions also testified, stating her view that critical mass meant "meaningful representation" of minority students—*i.e.*, enough minority students such that minorities would not feel reluctant to participate in class discussion and would not feel isolated. *Id.* The law school dean testified, however, that in at least some cases the race of an applicant determined whether the applicant was admitted. *Id.* at 319. A law school professor testified that achieving a "critical mass" of minority students was important because it would teach nonminority students that minorities have a variety of viewpoints. *Id.* at 319–20. A statistical expert for the plaintiff testified that the law school's "plus-factor" for race could at times be significant. *See id.* at 320.

82. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001).

reversed, holding that diversity is a compelling interest and that the law school had no other workable race-neutral alternatives.<sup>83</sup>

### 1. Adopting the Powell *Bakke* Framework

The *Grutter* majority opinion, authored by Justice O'Connor, begins with an analysis of *Bakke*.<sup>84</sup> Justice O'Connor adopted Justice Powell's opinion for guidance in resolving *Grutter*.<sup>85</sup> She noted that Justice Powell had approved of using race in admissions only for the attainment of a diverse student body, but that a university's belief in the value of diversity was entitled to First Amendment solicitude and deference from the Court.<sup>86</sup> Again drawing on Justice Powell's opinion, Justice O'Connor emphasized that racial diversity *per se* cannot be the goal; rather, diversity as a legitimate compelling interest must be broader than merely racial or ethnic diversity.<sup>87</sup>

83. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc).

84. *Grutter*, 539 U.S. 306, 312–14 (2003).

85. *Id.* at 325. Justice O'Connor observed that the lower courts have long been confused as to which *Bakke* opinion controls. She avoided that issue by simply declaring that the holding of *Bakke* is that race and ethnicity can play some role in the admissions process. The debate on *Bakke* has revolved around how to apply the test articulated in *Marks v. United States*. Cf. Damien M. Schiff, *When Marks Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum*, ENGAGE, 119–24 (Feb. 2008) (discussing application of the *Marks* test to *Rapanos v. United States*, a split decision concerning the scope of the Clean Water Act).

86. *Grutter*, 539 U.S. at 324, 329. It is more than a little curious that the Court would afford deference to a University's determination that a given interest is compelling. After all, strict scrutiny by its nature implies a searching review that is opposed to deference. See *id.* at 394 (Kennedy, J., dissenting) (arguing that "[d]eference is antithetical to strict scrutiny, not consistent with it"). Moreover, it is not clear what the First Amendment would have to do with such deference. The Court has afforded First Amendment protection to state university professors to protect their free speech rights, but it makes little sense to afford such deference when (1) speech is not at issue and (2) affording deference might result in the violation of someone else's constitutional liberties (e.g., Ms. Grutter's equal protection rights) rather than merely a limitation on governmental power. Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 469, 479 (2004).

87. *Grutter*, 539 U.S. at 324–25. But see Bloom, *supra* note 86, at 472. Bloom writes:

[T]he Court's failure to reiterate why broad-based diversity is important leaves the impression that it viewed it as nothing more than a fig leaf to cover an aggressive use of racial preferences. As far as the reader can tell from the Court's opinion, the educational benefits that result in a

## 2. The Compelling Interest

Having set forth the newly adopted Powell framework, Justice O'Connor then articulated the majority's guiding principle: "not every decision influenced by race is equally objectionable."<sup>88</sup> She then acknowledged the law school's purported compelling interest: "the educational benefits that flow from a diverse student body."<sup>89</sup> To achieve that end, outright racial balancing such as is entailed with quotas would not be allowed, but a university could use race to achieve "critical masses" of underrepresented minorities.<sup>90</sup>

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compelling state interest flow all but exclusively from racial as opposed to viewpoint-oriented diversity.

Bloom, *supra* note 86, at 472; *see also* Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 11 (2004) ("In recent years, universities have sought to justify racial preferences by the alleged contribution of racial diversity to the education of those admitted under the normal standards. Those arguments are insincere: the universities are interested in race, not diversity of views or backgrounds.")

88. *Grutter*, 539 U.S. at 327. Justice O'Connor's statement is remarkable given that many commentators believed that, after Justice O'Connor's majority opinion in *Adarand*, all racial classifications—even so-called "benign" classifications—would be subject to the most exacting of judicial scrutiny. *See, e.g.*, Stephen C. Minnich, Comment, 46 CASE W. RES. L. REV. 279, 286 (1995); L. Darnell Weeden, *Yo, Hopwood, Saying No to Race-Based Affirmative Action Is the Right Thing to Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 553 (1996–1997); Russell N. Watterson, Jr., Note, *Adarand Constructors v. Peña: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 B.Y.U. L. REV. 301, 301 n.3 (observing that *Adarand* requires strict scrutiny even for benign racial classifications); *cf.* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Evidently, with *Grutter*, the Court rejected that absolutist position for one in which the "strictness" of the scrutiny is based on contextual factors. *See* Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 DRAKE L. REV. 683, 690–91 (2003).

89. *Grutter*, 539 U.S. at 328. Justice Thomas, in dissent, observed that the real compelling interest was not those educational benefits attributable to having a diverse student body but rather obtaining those benefits in an *elite* institution, or simply achieving a diverse student body—an "aesthetic"—regardless of its benefits. *See id.* at 354–56 (Thomas, J., concurring in part and dissenting in part); *cf.* Bloom, *supra* note 86, at 483 ("[F]or a Court made up of nine Justices, not to mention the law clerks who are all graduates of elite, selective law schools, requiring a law school to sacrifice any of its hard-earned status is all but unthinkable.")

90. *Grutter*, 539 U.S. at 329–30. It unclear how the use of race to achieve "critical mass" is different from the use of race in quota systems, at least in those quota systems where slots are provisionally set aside for minorities. *See* Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650 (2006) ("Unfortunately, 'critical mass' seems impossible to define concretely without resort to any poisonous 'quota.'"). A critical mass must

Justice O'Connor then embarked on an extended discussion of various educational benefits alleged to flow from a diverse student body, relying heavily on a number of amicus briefs to show that such benefits extend beyond the classroom to the workplace, politics, and the military.<sup>91</sup>

### 3. Narrow Tailoring

Justice O'Connor next reemphasized from her *Bakke* discussion that race cannot be used as a blunt instrument, such that *Bakke*-style quotas, as well as *Gratz*-style point systems, are impermissible.<sup>92</sup> She also underscored that applicants must be understood as individuals and that race may only be used as one among many factors in a "holistic" review.<sup>93</sup> Race may be used as part of a "good faith" effort to

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function as either an absolute number or a percentage. In practice it is probably both. For example, if a critical mass of black students is five percent of the total student population, but the population is only 10 students, then necessarily critical mass will be based on absolute numbers, for one cannot have half of a student. In either case, critical mass is not achieved until a certain number is reached. That is essentially the same process as with a quota. To be sure, the process by which a minority is admitted as part of a quota or as part of a critical mass may differ (i.e., a minority need not be otherwise qualified for admission under a quota system but may have to make such a showing in a system using critical mass), but the end result is the same: numbers drive the use of race in admissions. *See id.* at 650–51.

91. *Grutter*, 539 U.S. at 330–33. Justice O'Connor's reliance on diversity benefits outside campus complicates her analysis. It is one thing to hold that diversity is important to the learning environment, or to dispelling stereotypes among students. On these issues, a school's assessment of the importance of those benefits would make a plausible claim to deference. But the analysis changes considerably when looking at *post-graduation* benefits; after all, nothing that happens to minorities after graduation will directly help the learning experience of any student still in school. Moreover, there is no reason to defer to a school's assessment of the *non-pedagogical* benefits of diversity. *Cf. Lizotte, supra* note 90 ("Minority representation in the military is not an educational benefit."); Bloom, *supra* note 86, at 508 ("Perhaps the greatest constitutional drawback to the recognition of creating an educated group of potential minority leaders as a compelling interest is that it does not seem to require the same individualized and competitive evaluation process as the Powell diversity process does."). At the same time, to defer, as the *Grutter* majority does, to the empirical views of amici on what constitutes a compelling interest may be fraught with error. *See Alexander & Schwarzschild, supra* note 87, at 5 n.9 (suggesting that the "endorsement of racial affirmative action by corporate America should carry little or no weight").

92. *Grutter*, 539 U.S. at 334. Forbidding point systems may have the unintended consequence of encouraging arbitrariness, *see Brest, supra* note 88, at 691, or of making the cost of "race as a plus factor" admissions programs prohibitive, *see Bloom, supra* note 86, at 498–99. As noted at the outset, *Gratz* was decided solely on narrow tailoring grounds and is tangentially relevant to the discussion of diversity as a compelling interest. *See supra* note 2; *infra* Part III.B.

93. *Grutter*, 539 U.S. at 334.

achieve a permissible goal, and “some attention to numbers” is not the equivalent of a quota system.<sup>94</sup> Hence, the law school’s keeping track of the race of admittees was permissible because the value given to race remained constant throughout the admissions process.<sup>95</sup> Justice O’Connor warned that race cannot become the defining feature of an application, and that no bonus points can be awarded because of race.<sup>96</sup> But she emphasized that, under the law school’s program, all students admitted have been found to be qualified to succeed.<sup>97</sup> Justice O’Connor also observed that the law school’s program gave serious consideration to other non-race factors when determining educational diversity.<sup>98</sup>

Justice O’Connor admitted that whenever race is used in admissions plans, it will result in some students who, but for race, would (or would not) have been admitted.<sup>99</sup> But she rejected the contention that the law school had other race-neutral means available to it to achieve critical masses of minority students. Specifically, Justice O’Connor rejected the contention that the law school could have achieved critical masses by lowering its academic admissions standards. She noted that doing so would prevent the law

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94. *Id.* at 335.

95. *Id.* at 336. It is true that paying attention to numbers is not the same as a rigid quota system, but the results are largely the same: the race of an applicant becomes significant not just because of whom the person is, but also because of *how many* of that person’s race are in the admissions pool and are accepted. Both systems promote racialism, “which is not the same thing as racism . . . but has a built-in tendency to promote racism” by promoting the “message . . . that the races are different from one another,” and once “differences are magnified, antagonisms tend to magnify as well.” Alexander & Schwarzschild, *supra* note 87, at 7.

96. *Grutter*, 539 U.S. at 337. The law school’s program, unlike the undergraduate school’s program, did not allocate points to an applicant based on race. But that distinction seems immaterial to the Court’s stated concern that race not become a defining feature of an application. Even when race is used as a “plus” factor, that necessarily means that, at least for some students, the “plus” will make the difference between admission and rejection in the same way that racial “bonus points” would.

97. *Id.* at 337–38; *cf.* Alexander & Schwarzschild, *supra* note 87, at 9 (“The fact is that those admitted to college or graduate school through racial preferences are in general less qualified—not necessarily unqualified (whatever that means), but less qualified—to do college and postgraduate work than those admitted without preferences.”).

98. *Grutter*, 539 U.S. at 337–38.

99. *Id.* at 339.

school from maintaining its elite status, and that the narrow tailoring component of strict scrutiny only required the law school to investigate alternatives that worked “about as well.”<sup>100</sup> Justice O’Connor also declined the invitation from the United States as amicus to require the law school to use a percentage plan (like Texas’s Top Ten Percent Law), reasoning that such plans would not be a good fit for graduate (as opposed to undergraduate) institutions.<sup>101</sup>

#### 4. Endpoint

Justice O’Connor concluded her opinion with a discussion of when the law school’s race-conscious admissions policy would end. She noted that all such race-based programs must have an endpoint, but that it would be unfair to require the law school to articulate a hard-and-fast deadline

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100. *Id.* The majority does not explain how the law school can have a compelling interest in a diverse *elite* student body, as opposed to merely a diverse student body. See Bloom, *supra* note 86, at 483. Bloom criticizes the majority opinion:

[T]his fails to explain why Michigan’s elite status is treated as part of the landscape immune from alteration, especially given that Michigan clearly made a deliberate choice in designing its admissions program to preserve its elite admissions policy—knowing full well that this would make it harder, if not impossible, to achieve a racially diverse student body without employing significant racial preferences.

*Id.* None of the on-campus benefits articulated by the law school as purportedly flowing from a diverse student body depends upon that body’s aggregate academic qualifications. The lack of an analytic bridge between preserving the benefits of a race-influenced diversity and the need to maintain an “elite” school status is important because the “about as well” narrow tailoring standard refers to result, not to unwanted side-effects. That standard, articulated in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1980), comes from a law review article in which the author interprets strict scrutiny’s narrow tailoring requirement as mandating that a court determine whether race-neutral means are available that would advance the same compelling interest “about as well and at tolerable administrative expense.” Kent Greenwalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 579 (1975). The full context of the “about as well” quote is revealing because it makes clear that the externalities of race-neutral options only factor into the strict scrutiny analysis in terms of the budgetary wherewithal of the governmental actor. Thus, in the context of *Grutter*, it should not have mattered that the law school would have had to sacrifice its elite status to achieve its diversity goal race-neutrally because there was no showing that a race-neutral policy would have been cost-prohibitive. Using a race-neutral and academic-lite admissions policy probably does produce about as good a result as the law school’s race-conscious policy. Cf. Brest, *supra* note 88, at 691 n.27 (“It is worth noting that many law schools can achieve considerable diversity in respects other than race just by admitting by the numbers.”).

101. *Grutter*, 539 U.S. at 340.

given the vagaries of critical mass and diversity.<sup>102</sup> Justice O'Connor observed that it had been about twenty-five years since Justice Powell's authorization of the use of diversity and race in university admissions, that minority test scores and admission rates had improved, thus, it would be reasonable to expect that the law school's race-conscious program would become unnecessary in the next twenty-five years.<sup>103</sup>

### III. *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

Having set forth the new rules of the game in race-conscious admission practices enunciated in *Grutter*, a discussion of the University of Texas's experimentation with race and diversity in admissions is warranted. These decisions by the University would lead ultimately to the Fifth Circuit's decision in *Fisher*.

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102. *Id.* at 342.

103. *Id.* at 343. Justice Ginsburg, joined by Justice Breyer, concurred largely to note that the majority opinion's 25-year sunset provision was more a hope or aspiration than a legally significant due date. *See id.* at 345–36 (Ginsburg, J., concurring). The majority opinion also drew four dissenting opinions. The Chief Justice dissented largely on the grounds that, in his view, the law school's admissions policy in practice operated as a crude quota. *See id.* at 385 (Rehnquist, C.J., dissenting). Specifically, the Chief Justice drew attention to the fact that what constituted a critical mass for one minority group never approximated what constituted a critical mass for other minority groups. *See id.* at 380–82; *see also* Bloom, *supra* note 86, at 481. Bloom states,

If the point of critical mass was to admit a sufficient number of underrepresented minorities to encourage uninhibited expression, it is unclear why the critical mass for African-American students was so much larger than that for Hispanic or Native American students, or why as few as three Native American students constituted a critical mass.

Bloom, *supra* note 86, at 481. Justice Kennedy dissented largely on the grounds that the Court was not applying a sufficiently exacting standard of review and that the law school's use of race was constitutionally too heavy-handed. *Grutter*, 539 U.S. at 392–393 (Kennedy, J., dissenting). Justice Scalia and Justice Thomas dissented to contest the notion that diversity can be a compelling interest, *see id.* at 347–48 (Scalia, J., dissenting); *id.* at 356–61 (Thomas, J., dissenting), and that the law school had available race-neutral alternatives, *see id.* at 361–67 (Thomas, J., dissenting).

A. *From Racial Classification to Race-Neutrality to Racial Classifications*

Prior to 1996, the University of Texas at Austin employed two criteria for student admission. The first, used to this day, is called the Academic Index. The Index rates a student's academic achievement according to her grade point average, SAT scores, and similar data.<sup>104</sup> The University's use of the second criterion—race—ended in 1996 when the Fifth Circuit ruled in *Hopwood v. Texas* that race-conscious admission policies are unconstitutional.<sup>105</sup> In response to *Hopwood*, the University developed a new race-neutral admission criterion termed the Personal Achievement Index, to be used in conjunction with the Academic Index.<sup>106</sup> The clear purpose of the Personal Achievement Index was to increase minority enrollment without using explicitly race-conscious means; indeed, “many of the [Personal Achievement Index] factors disproportionately affected minority applicants.”<sup>107</sup>

In 1997, the Texas Legislature responded to *Hopwood* by enacting the Top Ten Percent Law, which mandates that the top 10% of students graduating from each public high school be guaranteed admission to the University.<sup>108</sup> (In 2010, the Texas Legislature amended the law to cap the number of guaranteed admissions to the University of Texas at Austin to 75% of the spots reserved to Texas residents).<sup>109</sup> Although the Law is facially race-neutral, “underrepresented minorities were its announced target and their admission a large, if not primary, purpose.”<sup>110</sup>

The admissions process changed again following the Supreme Court's decision in *Grutter*. *Grutter* effectively overruled *Hopwood* and spurred the University to reexamine its admission process. In response, the University

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104. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 222 (5th Cir. 2011).

105. *Hopwood v. Texas*, 78 F.3d 932, 934–35 (5th Cir. 1996).

106. *Fisher*, 631 F.3d at 223.

107. *Id.*

108. TEX. EDUC. CODE ANN. § 51.803 (1997).

109. *Id.* § 51.803(a-1) (2010).

110. *Fisher*, 631 F.3d at 224.

commissioned two studies to determine whether, consistent with *Grutter*, the University had obtained a “critical mass” of minority students through the Top Ten Percent Law.<sup>111</sup> The first study reviewed minority presence in classes of a “participatory size”—*i.e.*, between 5 and 24 students—and concluded that 90% of these classes had 1 or 0 African-American students, 46% had 1 or 0 Asian-American students, and 43% had 1 or 0 Mexican-American students.<sup>112</sup>

The University’s second study was based on students’ impressions of diversity on campus. “Minority students reported feeling isolated, and a majority of all students felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur.”<sup>113</sup> Relying on these studies, the University concluded that it “had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity.”<sup>114</sup> The University accordingly adopted a new admissions policy under which race would be one factor to be considered in admissions.<sup>115</sup> In the years after the University’s adoption of the new policy, minority representation has increased markedly, although “it can be difficult to attribute increases in minority enrollment to any one initiative,” particularly given that “demographics have shifted in Texas,” such that “increases in minority enrollment likely in part reflect the increased presence of minorities statewide.”<sup>116</sup>

### B. *Pursuing Diversity at the University of Texas at Austin*

The University contended that the interest it sought to advance through its post-*Grutter* admissions policy is the same interest that the Supreme Court approved in *Grutter*

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111. *Id.* at 224–25.

112. *Id.* “A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students.” *Id.* at 225.

113. *Id.* at 225 (internal quotation marks omitted).

114. *Id.* at 226.

115. *Id.*

116. *Id.*

itself—namely, the purported “compelling interest in obtaining the educational benefits of diversity.”<sup>117</sup> Specifically, that interest would encompass the “attempt to promote cross-racial understanding, break down racial stereotypes, enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as spokespersons for their race.”<sup>118</sup> Moreover, that interest, per the University, could only be achieved through a “critical mass of underrepresented minorities . . . to further its compelling interest in securing the educational benefits of a diverse student body.”<sup>119</sup>

In order to achieve this asserted interest, the application process divides applicants into three pools: Texas residents, domestic non-Texas residents, and international students. Applicants compete for admission only among other applicants in the same pool. Admission decisions for the latter two categories are based solely on a combination of the Academic and Personal Achievement Indices.<sup>120</sup> In contrast, for the first category, applicants are subjected to the Top Ten Percent Law. Those applicants who do not gain admission under the Law are then reviewed according to the two Indices.<sup>121</sup> A few applicants’ Academic Index scores are high enough by themselves to justify admission, and a few are low enough to be presumptively denied.<sup>122</sup>

The Personal Achievement Index is based on scores from two essays and a third score, called the “personal achievement score,” based on the applicant’s entire file.<sup>123</sup> Each set of scores is graded from 1 to 6, although the personal achievement score is weighted slightly higher than the essay scores.<sup>124</sup> That weighted score takes into account a

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117. *Id.* at 230.

118. *Id.* at 230 (internal quotation marks omitted).

119. *Id.* at 230–31 (internal quotation marks omitted).

120. *Id.* at 227.

121. *Id.*

122. *Id.*

123. *Id.* at 227–28.

124. *Id.* at 228.

“special circumstances” component “that may reflect the socioeconomic status of the applicant and his or her high school, the applicant’s family status and family responsibilities, the applicant’s standardized test score compared to the average of her high school, and—beginning in 2004—the applicant’s race.”<sup>125</sup>

### C. *The Fisher Litigation*

Texas residents Abigail Fisher and Rachel Michalewicz brought suit to challenge the University’s denial of their admission to the Fall 2008 class at the University of Texas at Austin.<sup>126</sup> They alleged that the University’s denial violated their rights against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment,<sup>127</sup> and sought equitable relief as well as damages.<sup>128</sup> The district court ruled in the University’s favor, and the plaintiffs appealed.

The Fifth Circuit panel affirmed the district court in three opinions. Judge Higginbotham wrote for all three members of the panel. His opinion’s analysis is divided into four main parts; the first concerning the standard of review and the level of deference (if any) the University merited;<sup>129</sup> the second concerning whether the University’s admissions policy standing alone is unconstitutional;<sup>130</sup> the third concerning whether the University’s policy, in combination with the Top Ten Percent Law, is unconstitutional;<sup>131</sup> and the fourth whether the University’s policy was necessary to achieve a “critical mass” (properly understood) of minority students.<sup>132</sup> Judge King concurred to note that she did not join in the lead opinion to the extent that it called into question the constitutionality of the Top Ten Percent Law.<sup>133</sup>

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125. *Id.*

126. *Id.*

127. U.S. CONST. amend. XIV, § 1.

128. *Fisher*, 631 F.3d at 217.

129. *See id.* at 231–34.

130. *See id.* at 234–39.

131. *See id.* at 238–42.

132. *See id.* at 242–46.

133. *Id.* at 247 (King, J., concurring specially).

Judge Garza wrote an extensive concurrence expressing the view that *Grutter* was wrongly decided.<sup>134</sup>

### 1. The Higginbotham Opinion

#### a. Deference

All sides agreed that the University's admissions policy was to be reviewed under strict scrutiny and would require a showing of narrow tailoring.<sup>135</sup> But the parties disagreed over whether and to what extent the University's determinations regarding the lack of a critical mass and how to achieve that critical mass were entitled to judicial deference.<sup>136</sup> Judge Higginbotham looked to *Grutter* for the answer. He noted that deference to the University was justified on two grounds: that its admissions policy was the result of expert educational decision-making; and that the policy emerged from an academic environment entitled to First Amendment solicitude.<sup>137</sup> Judge Higginbotham specifically rejected the plaintiffs' argument that deference was only merited for the University's determination that educational diversity is a compelling interest.<sup>138</sup> He also concluded that *Grutter* requires that a court's "narrow-tailoring inquiry . . . [be] undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."<sup>139</sup>

Judge Higginbotham rejected the plaintiffs' reliance on a series of Supreme Court cases dealing with race and public employment, culminating in *Ricci v. DeStefano*.<sup>140</sup> The plaintiffs had argued that these cases instituted a new

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134. *Id.* at 247–66 (Garza, J., concurring specially).

135. *Id.* at 231 (lead opinion); Brief of Plaintiffs-Appellants Abigail Noel Fisher and Rachel Multer-Michalewicz at 20–21, *Fisher*, 631 F.3d 213 (No. 09-50822); Brief of Appellees at 23–27, *Fisher*, 631 F.3d 213, (No. 09-50822).

136. Brief of Plaintiffs-Appellants Abigail Noel Fisher and Rachel Multer-Michalewicz at 20–21, *Fisher*, 631 F.3d 213 (No. 09-50822); Brief of Appellees at 23–26, *Fisher*, 631 F.3d 213, (No. 09-50822).

137. *Fisher*, 631 F.3d at 231.

138. *Id.* at 232.

139. *Id.*

140. *Id.* (citing *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)).

standard of narrow tailoring to the effect that the government must establish a “strong basis in evidence” for the need for racial classifications.<sup>141</sup> Judge Higginbotham found the analogy to *Ricci* and its predecessors unconvincing, because those cases’ “high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration.”<sup>142</sup> The University’s system, however, approaches race differently, for it looks to race as just one non-determinative factor, and analyzes individuals as individuals; these differences from the public employment cases “steer[] university admissions away from a quota system.”<sup>143</sup> Thus, “courts must afford a measure of deference to the university’s good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.”<sup>144</sup>

#### b. *Racial Balancing*

Judge Higginbotham began his analysis of the racial balancing issue by noting that the University, in designing its new policy, clearly wanted to avoid a quota system.<sup>145</sup> He emphasized that, whereas a quota presupposes some fixed goal, a *Grutter*-style diversity goal demands just a good-faith effort to reach a range established by the goal.<sup>146</sup> Moreover, the University’s admission policies do not produce a result that is demographically consistent with Texas’s general racial make-up, which, per Judge Higginbotham, supported

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141. *Id.* (internal quotation marks omitted).

142. *Id.* at 233.

143. *Id.*

144. *Id.* Judge Higginbotham also rejected the plaintiffs’ reliance on *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), because there the school district “pursued racial balancing and defined students based on racial group classifications, not on individual circumstances” as the University purportedly does. *Fisher*, 631 F.3d at 234.

145. *Fisher*, 631 F.3d at 234–35.

146. *Id.* at 235.

the conclusion that the University's admission policy is not a quota system.<sup>147</sup>

The plaintiffs also contended that the University's motive was race-based because the University had relied on demographic data to establish the ranges of its diversity goals.<sup>148</sup> Judge Higginbotham rejected that argument as well, reasoning that reference to demographic data is appropriate to establish some connection between the community at large and the diversity goals that are to be aimed at with the admissions process.<sup>149</sup> After all, the surest way to determine which minorities are underrepresented (and thus which are needed to reach a critical mass) is to consult demographics.<sup>150</sup> Thus, if the University's mission is to produce people who can fulfill "the future leadership needs of Texas," then it is appropriate for the University's diversity goals to correspond, to some reasonable degree, to Texas's racial diversity.<sup>151</sup>

The plaintiffs also contended that, regardless of the plan's design or how it arrived at the specific diversity goals, the admissions policy was still unconstitutional because it strove for a critical mass more than "encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated."<sup>152</sup> Relying on *Grutter*, Judge Higginbotham acknowledged that critical mass must be understood with reference to a university's particular diversity goals and that those goals may appropriately extend beyond the "narrow 'pedagogical concept'" of critical mass advanced by the plaintiffs.<sup>153</sup> He therefore found no problem with the University's focus on certain minority groups who were the "most significantly underrepresented on its campus."<sup>154</sup>

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147. *Id.*

148. *Id.* at 236.

149. *Id.* at 236–37.

150. *See id.*

151. *Fisher*, 631 F.3d at 237.

152. *Id.* at 238.

153. *Id.* at 238.

154. *Id.* at 238.

*c. Top Ten Percent Law*

The plaintiffs contended that the Top Ten Percent Law was an adequate and racially neutral way for the University to achieve its diversity goals.<sup>155</sup> Consequently, the plaintiffs argued that the University's race-based admissions policy was necessarily *not* narrowly tailored.<sup>156</sup> Judge Higginbotham rejected the argument, reasoning that the Law and other "percentage plans" are not a constitutionally required alternative to race-based plans.<sup>157</sup> He relied on *Grutter's* conclusion that such percentage plans do not afford the individualized flexibility that universities need to achieve a diversity that begins, but does not end, with race.<sup>158</sup> And he reemphasized that "the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it."<sup>159</sup>

The court's discussion of the Top Ten Percent Law, however, must be taken in context. Judge Higginbotham did not say that the constitutionality of the Top Ten Percent Law is doubtful.<sup>160</sup> Rather, Judge Higginbotham stated that a university would have a difficult time achieving *Grutter*-style diversity (which is *not* constitutionally mandated) using a percentage plan like the Law, largely because it does not operate at an individual level and therefore cannot produce the supposedly fine-tuned, multi-faceted diversity that *Grutter* endorsed and the University wants to achieve.<sup>161</sup> In that vein, Judge Higginbotham underscored that the Law focuses on geographic diversity, which in his view "crowds out other types of diversity that would be considered under a *Grutter*-like plan."<sup>162</sup>

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155. *Id.* at 239.

156. Brief for Appellants at 23, *Fisher*, 631 F.3d 213 (No. 09-50822).

157. *Fisher*, 631 F.3d at 239.

158. *Id.*

159. *Id.* at 240.

160. Judge King (and perhaps Judge Garza) specifically declined to join in addressing the law's constitutionality because no party had briefed the issue. *Id.* at 247.

161. *Id.* at 240.

162. *Id.*

Judge Higginbotham noted two additional policy-based criticisms of the Law. First, following Justice Ginsberg's dissent in *Gratz v. Bollinger*,<sup>163</sup> he observed that percentage plans give parents an incentive to keep their children in underperforming schools, and students a reason to take easy classes to protect their GPAs.<sup>164</sup> Second, Judge Higginbotham noted that the Law creates very intense competition for the 10% of slots left after the Law's operation, such that on average those students admitted by virtue of their Academic and Personal Achievement Indices have higher average SAT scores than those admitted under the Law. That result purportedly hurts "minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools."<sup>165</sup> Thus, Judge Higginbotham concluded that the Top Ten Percent Law was "a blunt tool for securing the educational benefits that diversity is intended to achieve," and hence the University was not constitutionally mandated to use it instead of a race-conscious program to achieve such *Grutter*-style diversity.<sup>166</sup>

#### d. *Critical Mass*

The plaintiffs argued that, because the Top Ten Percent Law already substantially increased the number of minorities at the University, it placed the University's race-conscious program beyond *Grutter*'s protective ambit.<sup>167</sup> Judge Higginbotham agreed to a point, conceding that the Law's "substantial effect on aggregate minority enrollment at the University . . . places at risk [the University's] race-conscious admissions policies."<sup>168</sup> Nevertheless, Judge Higginbotham rejected the plaintiffs' proposed percentage-based levels of minority participation that would establish a critical mass, reasoning that they were grounded in the

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163. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

164. *Fisher*, 631 F.3d at 241.

165. *Id.*

166. *Id.* at 242.

167. Brief for Appellants, *supra* note 156, at 23–26.

168. *Fisher*, 632 F.3d at 243.

incorrect notion of critical mass as being just that number of students necessary to achieve representation in class discussions and to avoid feelings of isolation.<sup>169</sup> He also rejected the plaintiffs' contention that the Law achieves critical mass because minority enrollment now exceeds minority enrollment before *Hopwood*, when the University last used race-conscious admission policies.<sup>170</sup> Judge Higginbotham found that argument unconvincing, both because it assumed without proof that pre-*Hopwood* minority numbers were at critical mass levels, and because pre-*Hopwood* numbers would not reflect demographic changes in Texas since that time.<sup>171</sup> Judge Higginbotham again underscored that, because *Grutter*-style diversity is not simply a function of racial diversity, *Grutter*-style diversity cannot be achieved by "any fixed numerical guideposts."<sup>172</sup>

Finally, the plaintiffs advanced a "good enough" argument: although the Top Ten Percent Law may not have achieved a perfect "critical mass," the University's race-conscious addition to that Law made only marginal improvements to minority enrollment and could not justify the use of race in light of the Law's "good enough" results.<sup>173</sup> Judge Higginbotham rejected that argument too, relying on Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* for the proposition that a race-conscious plan aimed at achieving *Grutter*-style diversity would be justified "even for the small gains" sought by the University.<sup>174</sup>

## 2. The King Special Concurrence

Judge King concurred specially to note that no party had challenged the Top Ten Percent Law; therefore, she would

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169. *Id.*

170. *Id.* at 244.

171. *Id.* He also observed that the University enrolled fewer minorities in 2004 than in pre-*Hopwood* 1989. *Id.*

172. *Id.* at 244–45.

173. *Fisher*, 632 F.3d at 239.

174. *Id.* at 246 (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring)).

not join in the lead opinion “insofar as it addresses . . . the validity or the wisdom of the Top Ten Percent Law.”<sup>175</sup> Judge King apparently was laboring under a misapprehension as to the nature of the lead opinion’s discussion of the Top Ten Percent Law. As noted above, that discussion was not intended to cast doubt on the constitutionality of using race-neutral means to achieving a race-conscious goal.<sup>176</sup> Rather, the discussion’s criticisms of the Top Ten Percent Law were intended to establish that the Top Ten Percent Law, and percentage plans generally, are not capable of achieving a *Grutter*-style diversity.<sup>177</sup> As a consequence, the narrow tailoring requirement of strict scrutiny does not demand that the University use such a percentage plan in lieu of a race-conscious plan. To be sure, the lead opinion does discuss whether the Top Ten Percent Law, *in combination with* the University’s race conscious plan, is unconstitutional, but that discussion does not imply that the Top Ten Percent Law, standing alone, raises constitutional concerns.<sup>178</sup>

### 3. The Garza Special Concurrence

Judge Garza also authored a special concurrence, agreeing fully with the lead opinion to the extent that it faithfully applied *Grutter* to the University’s admission policy, but also arguing that *Grutter* was wrongly decided and that the Supreme Court should revisit the use of race in university admissions.<sup>179</sup> Judge Garza advanced several criticisms of *Grutter*. First, he chastised the Court for replacing the traditional “least restrictive means” interpretation of narrow tailoring with “a regime that encourages opacity and is incapable of meaningful judicial review [because] [c]ourts now simply assume . . . that university administrators have acted in good faith in pursuing racial diversity.”<sup>180</sup> Relatedly,

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175. *Id.* at 247 (King, J., concurring specially).

176. *See supra* Part III.C.1.

177. *Fisher*, 631 F.3d at 241–42.

178. *See id.* at 242.

179. *Id.* at 247–48 (Garza, J., concurring specially).

180. *Id.* at 249.

Judge Garza criticized *Grutter* for relieving universities of the “require[ment] to use the *most effective* race-neutral means,” such that, assuming good faith, universities “are free to pursue less effective alternatives that serve the [diversity] interest ‘about as well.’”<sup>181</sup>

Judge Garza also took aim at *Grutter*’s conclusion that incorporating race into a holistic analysis cured any concerns about the use of quotas.

If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.<sup>182</sup>

In Judge Garza’s view, the use of catch phrases like “individualized consideration” and “holistic review” simply obscure the unchanging fact that race is used in essentially the same way as it is in more blunt quota systems.<sup>183</sup> Even worse, *Grutter*’s prohibition against the quantification of race or ethnicity prevents courts from providing any meaningful review, because courts cannot determine whether race or ethnicity functions as just a plus factor or instead as a but-for cause of admission.<sup>184</sup>

Judge Garza also took issue with *Grutter*’s malleable concept of diversity, which would allow universities to continue to claim a need for race in admissions even if aggregate minority enrollment could be increased substantially through race-neutral means, so long as “these minority students were disproportionately bunched in a small number of classes or majors.”<sup>185</sup> Indeed, such a standardless understanding of critical mass would allow

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181. *Id.* at 250–51 (citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

182. *Id.* at 252.

183. *Id.*

184. *Id.* at 252–53.

185. *Id.* at 253.

educators to use race until “the elusive critical mass had finally been attained . . . [by] major-by-major and classroom-by-classroom.”<sup>186</sup>

Judge Garza also criticized *Grutter*’s conclusion that educational diversity, in which race plays some ill-defined role, constitutes a compelling state interest. He noted that there is no sound way to measure any of the purported benefits flowing from educational diversity. “*Grutter* permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against.”<sup>187</sup> Moreover, *Grutter* erroneously assumes that increasing racial diversity will increase viewpoint diversity.<sup>188</sup> But that assumption runs right up against the ultimate remedial purpose of the Equal Protection Clause: to prevent government from treating people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe.

*Grutter* sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.<sup>189</sup>

Judge Garza lambasted *Grutter* for its shift from “emphasis on diversity in educational *inputs* with a new emphasis on diversity in educational *outputs*”; in other words, from focusing just on the supposed value of diversity in the classroom to the supposed value of diversity in the workplace and in civic life, as well.<sup>190</sup>

Judge Garza concluded his critique of *Grutter* with a review of the decision’s effectiveness criterion. Just how successful must a race-based program be at increasing diversity to be constitutionally justified? In Judge Garza’s

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186. *Id.* at 254.

187. *Id.* at 255–56.

188. *Id.* at 256.

189. *Id.*

190. *Id.* at 258.

view, the standard should be whether the race-based program “meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass.”<sup>191</sup> After an exhaustive review of the data in the record, Judge Garza concluded that “the University of Texas’s use of race has had an infinitesimal impact on critical mass in the student body as a whole” and thus “the University’s use of race can be neither compelling nor narrowly tailored.”<sup>192</sup> That conclusion follows because, if the impact on racial balance is minimal, then necessarily the University’s race-based admissions program will have “no discernable educational impact.”<sup>193</sup> Judge Garza ended his concurrence with reaffirmation of the principle that “the Constitution prohibits all forms of government-sponsored racial discrimination,” such that the University’s race-based program could never be justified if “the Court[] [was to] return to constitutional first principles.”<sup>194</sup>

#### IV. REGARDING *FISHER*’S PURPORTED STRICT ADHERENCE TO *GRUTTER*

Quoting the Texas Solicitor General, the district court in *Fisher* argued that “[i]f the Plaintiffs are right, *Grutter* is wrong.”<sup>195</sup> The court of appeals agreed. While the *Fisher* decision produced three separate opinions, all judges were in agreement that the University of Texas had remained faithful to the diversity interest sanctioned by the Supreme Court in *Grutter*.<sup>196</sup> However, *Grutter*’s expansion of what is allowable as a compelling governmental interest remains the lone Supreme Court opinion sanctioning diversity’s unique status. Given that the Supreme Court remains hesitant to expand the diversity compelling interest into secondary education, it is prudent to review two obvious

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191. *Id.* at 260.

192. *Id.* at 263.

193. *Id.*

194. *Id.* at 266.

195. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 612 (W.D. Tex. 2009).

196. *See supra* Part II.C.

avenues where the Supreme Court can distinguish *Grutter* from *Fisher*.

A. *Race-Neutral Measures are Sufficient*

As noted above, in the intervening years between *Hopwood* and *Grutter*, the University of Texas at Austin had adopted a wholly race-neutral means of achieving its purported compelling interest in diversity.<sup>197</sup> To this end, “[w]hen the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class[.]”<sup>198</sup> This percentage was appreciably higher than the percentage of minority enrollment required in *Grutter* and was achieved wholly through race-neutral means.<sup>199</sup> Moreover, this number was higher than the race-conscious means secured for the University before *Hopwood*.<sup>200</sup>

To survive a constitutional challenge to a race-conscious admissions policy, the University has to demonstrate that its program is narrowly-tailored. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicit racial preferences . . . must be only a ‘last resort’ option.”<sup>201</sup> In the context of preferential treatment towards high school students, Justice Kennedy recently observed that “measures other than differential treatment based on racial typing of individuals first must be exhausted.”<sup>202</sup> Interestingly, it was Justice Powell, the father of diversity, who first introduced the requirement that race-neutral means be exhausted

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197. See *supra* Part II.C.1.c (discussing the Top Ten Percent Law).

198. *Fisher*, 631 F.3d at 243.

199. *Id.* at 243–44 (“African-Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law school’s applicant pool during the examined time period.”).

200. *Id.* at 244.

201. *Hayes v. N. St. L. Enforce. Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993).

202. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring); see also *Rothe Dev. Corp. v. U.S. Dep’t of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) (stating that “[e]ven where there is a compelling interest supported by a strong basis in evidence,” the court must consider “the efficacy of alternative, race-neutral remedies”); *Western States Paving Co., Inc. v. Wash. State Dep’t of Transp.*, 407 F.3d 983 (9th Cir. 2005) (noting that narrow tailoring under the Equal Protection Clause requires “serious, good faith consideration of workable race-neutral alternatives”) (citations omitted).

before resorting to race-conscious means.<sup>203</sup> In *Wygant*, Justice Powell observed that narrow tailoring requires “intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.”<sup>204</sup>

Seen in this light, the University’s history with race-neutral alternatives provides a constitutionally significant contrast to the law school in *Grutter*. Not only has the University adopted a “race-first” policy towards admissions since *Grutter*, but it also has a very successful history of increasing the raw numbers of minorities through race-neutral means since *Hopwood*.<sup>205</sup> To the extent that the compelling interest in diversity can be achieved through increased minority enrollment, the University’s race-neutral plan has been a demonstrable success.<sup>206</sup>

More to the point, however, is that the University has failed to demonstrate its race-conscious measures are any more successful in attaining the “educational benefits that flow from a diverse student body.”<sup>207</sup> Accordingly, the measure of success of the University’s race-conscious means “should be its ability to achieve those educational benefits.”<sup>208</sup> Yet, the dispute in *Fisher* concerned whether a “critical mass” was achieved, not whether the race-conscious measures resulted in educational benefits.<sup>209</sup> But this approach is backwards and ignores the actual compelling

203. Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163, 164 (2008).

204. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (quoting Kent Greenwalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–579 (1975)); see also Marcus, *supra* note 203, at n.6.

205. See generally, U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004).

206. Compare Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333–34 (2000) (discussing university efforts to increase the minority representation on campus), with Marcus, *supra* note 203, at 167 (“[I]ncreasing racial or ethnic representation is not a sufficiently compelling interest to justify the use of racial preferences.”).

207. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

208. Marcus, *supra* note 203, at 168.

209. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 242–46 (5th Cir. 2011).

interest identified by the Supreme Court in *Grutter*. “In other words, to pass court scrutiny, institutions must seriously consider whether the same level of educational attainment believed to be available through the inclusion of racial and ethnic criteria in a multi-factored diversity approach can also be achieved through nonracial means.”<sup>210</sup>

Admittedly, it is highly questionable to what extent a public institution could actually demonstrate educational benefits flowing from race-conscious admissions policies.<sup>211</sup> But the failure of the University in *Fisher* even to attempt to justify its race-conscious policies on “educationally beneficial” grounds, could lead the Supreme Court to distinguish *Fisher* from *Grutter*. Whereas *Grutter* laid the compelling interest framework, the Supreme Court left it for the lower courts to hammer out the details. Resorting to race-conscious means without any evidence that race-neutral means are any *less* effective in achieving the educational benefits from a diverse student body should be constitutionally significant.

#### B. Undergraduate Admissions at the University of Texas

As the *Grutter* Court rightly observed, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>212</sup> The circumstances that led the *Grutter* Court to find a compelling interest in “attaining a diverse student body” are unique.<sup>213</sup> Central to the finding of diversity as a compelling interest in *Grutter* was the fact that a law school was asserting the interest.<sup>214</sup> Furthermore, “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.”<sup>215</sup> Thus, the deference the

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210. *Marcus*, *supra* note 203, at 168.

211. *See id.* at 168–70 (discussing problems with quantifying diversity’s educational benefits).

212. *Grutter*, 539 U.S. at 327.

213. *Id.* at 328.

214. *Id.* (“Today, we hold that the *Law school* has a compelling interest in attaining a diverse student body.” (emphasis added)).

215. *Id.* at 329 (emphasis added).

Supreme Court afforded in *Grutter* was unique to the law school environment. In contrast, the University in *Fisher* argued that its interest is compelling “[b]ecause the University’s educational mission includes the goal of producing future educational, cultural, business, and sociopolitical leaders.”<sup>216</sup>

But such a justification is no different from any public institution’s, and iteration of goals that amount to nothing more than a desire to “produce . . . leaders” is no different from those of a kindergarten. Law schools, the *Grutter* Court reasoned, are extraordinary institutions “represent[ing] the training ground for a large number of our Nation’s leaders.”<sup>217</sup> In fact, the Court went further noting that “highly selective law schools” (including the University of Michigan) are unique in that they account for “25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”<sup>218</sup>

This emphasis placed on highly selective law schools was not dicta; it was central to the *Grutter* Court’s finding of a compelling interest. “Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>219</sup> Thus, while the *Grutter* Court found a compelling interest, it was a very narrow one indeed. When viewed in context, as the *Grutter* Court repeatedly cautions, the compelling interest in diversity, under the *Grutter* rationale, is only compelling for highly selective law schools.

Insofar as there is a compelling interest in diversity, in any form, *Grutter* remains the lone Supreme Court decision to which proponents of diversity can cite. In *Parents*

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216. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009).

217. *Grutter*, 539 U.S. at 332.

218. *Id.*

219. *Id.* at 332–33.

*Involved in Community Schools*, a plurality of the Court flatly rejected extending the compelling interest in *Grutter* to K-12 education.<sup>220</sup> Furthermore, a majority of the Court recognized that the facts in *Grutter* gave rise to a unique compelling interest, and that outside of that context, government would be restrained from finding diversity, in any form, a compelling state interest.<sup>221</sup> Thus, the *Parents Involved* Court provides a clear warning to lower courts that extend *Grutter*: the *Grutter* holding was narrow, and all race-based classifications in support of diversity must be put in their proper context.

The unique compelling interest found by the *Grutter* court is unlikely to be found by the Supreme Court again. Of the top-12 ranked law schools, only three are public institutions that must heed the requirements of the Equal Protection Clause.<sup>222</sup> Moreover, two of those three public institutions, the University of California at Berkeley and the University of Michigan, now are prohibited from considering race in admissions under their respective state constitutions.<sup>223</sup> Thus, not only are the requirements for the compelling interest in *Grutter* unlikely ever to be met again, but even the institution at issue in *Grutter*, the University of Michigan Law School, no longer uses race in its admissions process.

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220. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723–24 (2007).

221. *Id.* at 725 (“The Court in *Grutter* expressly articulated key limitations . . . noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools.”).

222. The three public institutions ranked in the top 12 are the University of California at Berkeley, the University of Michigan, and the University of Virginia. See *Best Law schools, Rankings*, U.S. NEWS & WORLD REPORT (2009), available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> (last visited Dec. 20, 2009). It should be noted, however, that even private universities must follow Title VI of the Civil Rights Act. 42 U.S.C. §2000(d) (2006) (stating that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program receiving Federal financial assistance” and thereby extending Title VI to private universities that receive any federal benefits, such as offering students federal loans or grants); see also *Title VI, Title IX and the Private University*, 78 MICH. L. REV. 608 (1980).

223. CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26.

Put simply: context matters. “[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”<sup>224</sup> The unique blend of facts and circumstances in *Grutter* gave rise to a limited compelling interest. Out of context, that compelling interest can appear broad, as the Fifth Circuit found in *Fisher*, but in context, as the Supreme Court placed it in *Parents Involved*, it is clear that *Grutter* provides a narrow compelling interest unlikely to reappear.

V. REVISITING *GRUTTER*—TWO ADDITIONAL REASONS THE SUPREME COURT SHOULD OVERTURN *FISHER* BY OVERTURNING *GRUTTER*

Since the day it was decided, Justice O’Connor’s *Grutter* opinion has been under attack.<sup>225</sup> Indeed, Chief Justice Rehnquist,<sup>226</sup> along with Justices Kennedy,<sup>227</sup> Scalia,<sup>228</sup> and Thomas<sup>229</sup> all filed dissenting opinions in *Grutter*. Moreover, in *Fisher*, Judge Garza laid forth numerous reasons why *Grutter* was wrongly decided,<sup>230</sup> going so far as to write that *Grutter*, “strays from fundamental principles of constitutional law” as well as that “*Grutter* represents a digression in the course of constitutional law,” and to disparage the Supreme Court for choosing an “erroneous path . . . [that] detour[s] from constitutional first principles.”<sup>231</sup> If the Supreme Court is to take up *Fisher* the words from these learned justices and judges are sure to be revisited, and readers interested in *Fisher* would be wise to look first to them to understand the serious constitutional

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224. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

225. See Roger Clegg, *Grutter @ 1*, THE NATIONAL REVIEW (June 23, 2004), <http://www.nationalreview.com/articles/211246/i-grutter-i-1/roger-clegg>.

226. *Grutter*, 539 U.S. at 378–87 (Rehnquist, C.J., dissenting).

227. *Id.* at 387–95 (Kennedy, J., dissenting).

228. *Id.* at 346–49 (Scalia, J., dissenting).

229. *Id.* at 349–78 (Thomas, J., dissenting).

230. See *supra* Part II.C.3.

231. *Fisher v. The Univ. of Tex. at Austin*, 631 F.3d at 213, 247 (5th Cir. 2011) (Garza, J., concurring specially).

concerns raised by the Court's *Grutter* holding. However, it is important to emphasize two particularly pernicious problems that are caused by the Court's holding in *Grutter*: (1) the extraordinary deference the Court afforded despite strict scrutiny review; and (2) the sanctioning of racial stereotyping.

#### A. *Affording Deference under Strict Scrutiny*

Strict scrutiny review for race-based classifications has been around since *Korematsu*. There, the Court noted that, "all legal restrictions which curtail the civil rights of a single racial group ... must [be] subject[ed] ... to the most rigid scrutiny."<sup>232</sup> And, for the past 75 years, the Court has steadfastly applied strict scrutiny to racial classifications, because "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another [*Korematsu*] occurring in the future."<sup>233</sup> But *Grutter*'s sanctioning of deference under strict scrutiny lessens the burden for a state actor attempting to justify racial preferences, thus leaving open the possibility of many constitutional mistakes in the future.

Prior to *Grutter*, decisions of the Supreme Court made clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>234</sup> All racial classifications by government are "inherently suspect"<sup>235</sup> and "presumptively invalid."<sup>236</sup> Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions.<sup>237</sup>

[Where the government proposes to ensure participation of some specified percentage of] a particular group merely because of its race or ethnic origin, such a preferential

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232. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

233. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

234. *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

235. *Id.* at 223 (citation omitted).

236. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

237. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 495 (1989).

purpose must be rejected . . . as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.<sup>238</sup>

All governmental action based on explicit racial classifications is subject to strict scrutiny to ensure that the personal right to equal protection has not been infringed.<sup>239</sup> Thus, before resorting to a race-conscious measure, the government must “identify [the] discrimination [to be remedied], public or private, with some specificity,” and must have a “strong basis in evidence” upon which to “conclu[de] that remedial action [is] necessary.”<sup>240</sup>

Strict scrutiny applies regardless of whether a law is “benign” or “remedial,”<sup>241</sup> regardless of the race of those burdened or benefited by a particular classification,<sup>242</sup> and regardless of whether the law may be said to benefit and burden the races equally.<sup>243</sup> Simply put, it makes no difference whether the governmental program has hard quotas, soft quotas, goals, or timetables. It will result in “individuals being granted a preference because of their race.”<sup>244</sup> A constitutional injury occurs whenever the government treats a person differently because of his or her race.<sup>245</sup>

When a governmental scheme uses a racial classification, the action is not entitled to the presumption of constitutionality which normally accompanies governmental acts.<sup>246</sup> “A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists,” and “blind judicial deference to legislative or executive pronouncements of

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238. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

239. *Adarand*, 515 U.S. at 227.

240. *Croson*, 488 U.S. at 500, 504 (citation omitted).

241. *Adarand*, 515 U.S. at 226 (citation omitted).

242. *Croson*, 488 U.S. at 494.

243. *Shaw v. Reno*, 509 U.S. 630, 651 (1993).

244. *Lutheran Church—Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998).

245. *Adarand*, 515 U.S. at 211, 229–30.

246. *Croson*, 488 U.S. at 500.

necessity has no place in equal protection analysis.”<sup>247</sup> A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification.<sup>248</sup> In order to justify a racial classification, the government ““must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is “necessary . . . to the accomplishment” of its purpose or the safeguarding of its interest.”<sup>249</sup> It requires governmental specificity and precision,<sup>250</sup> and demands a strong basis in evidence that race-based remedial action is necessary.<sup>251</sup> Absent a prior determination of necessity, supported by convincing evidence, the governmental entity will be unable narrowly to tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified.<sup>252</sup>

*Grutter* upends this hornbook constitutional law by according extraordinary deference to the determination by officials of the University of Michigan Law School that genuine diversity is essential to its educational mission.<sup>253</sup> In other words, the creation of a compelling interest in diversity is based on the *ipse dixit* of the University that it is a compelling interest.

Further, political bodies, like the Board of Regents of the University of Texas System are not insulated from the temptation of racial politics. Racial politics is not only helping one’s own race, it uses race to curry votes.<sup>254</sup> In *Croson*, the Supreme Court invalidated an elected city council’s voluntary race-based preference program, fearing that it was adopted for the purpose of “racial politics,” a concept that applies similarly to local school boards.<sup>255</sup> The Supreme Court demanded that any government entity

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247. *Id.* at 500–01.

248. *Reno*, 509 U.S. at 643–44.

249. *Regents of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (citations omitted).

250. *Croson*, 488 U.S. at 504.

251. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

252. *Croson*, 488 U.S. at 510.

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

254. TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 122 (2004).

255. *Grutter*, 539 U.S. at 492, 510.

seeking to classify by race must point to specific identified instances of past or present discrimination.

[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate “a piece of the action” for its members.<sup>256</sup>

Accordingly, race-based decisions made by political groups in the political process are suspect. The Supreme Court held:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.<sup>257</sup>

The *Grutter* Court’s deference to the law school is also explicitly contrary to *Wygant*. In *Wygant*, the Supreme Court did not defer to a local school board’s judgment with respect to the purported benefits of a racially mixed teaching staff. There, the Court found unconstitutional a collective bargaining agreement between a school board and a teacher’s union that favored certain minority races. The school board defended the agreement on the grounds that minority teachers provided “role models” for minority students and that a racially diverse faculty would improve the education of all students.<sup>258</sup> The Supreme Court held that the use of race violated the Equal Protection Clause

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256. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 510–11 (1989).

257. *Id.* at 493.

258. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 274–76 (1986).

and rejected an asserted interest in “providing minority role models for [a public school system’s] minority students, as an attempt to alleviate the effects of societal discrimination.”<sup>259</sup> That interest was found to be “too amorphous a basis for imposing a racial[] classifi[cation].”<sup>260</sup>

Similarly to *Wygant*, courts should not defer to a political body with respect to an educational policy that uses race to discriminate against students in admissions. Indeed, in *Wessmann v. Gittens*, the First Circuit explicitly rejected the argument that courts should “defer[] to school officials’ determinations anent the racial and ethnic composition of the student body.”<sup>261</sup> The *Wessmann* Court said that “the School Committee’s citation to *Brown* is self-defeating, for the *Brown* Court made it abundantly clear that constitutional principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies.”<sup>262</sup>

Deference to a political body is inconsistent with the holdings of the Supreme Court in *Adarand*, *Croson*, and *Wygant*. Because public universities are political bodies, they may “be greatly tempted to use race for political advantage if permitted to do so.”<sup>263</sup> Any watering down of equal protection review will effectively assure that race will always be relevant in American life, and that the “ultimate goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”<sup>264</sup>

### B. Sanctioning Racial Stereotyping

An axiom of equal protection jurisprudence is that the Equal Protection Clause protects “persons, not groups.”<sup>265</sup> “It follows from that principle that all governmental action

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259. *Id.* at 274.

260. *Id.* at 276.

261. 160 F.3d 790, 797 n.3 (1st Cir. 1998).

262. *Id.*

263. CAMPBELL, *supra* note 254, at 125.

264. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 495 (1989) (citations omitted).

265. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”<sup>266</sup> The Fourteenth Amendment’s intent is to ensure that all persons will be treated as individuals, not “simply components of a racial . . . class.”<sup>267</sup> “Race-based assignments ‘embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.’”<sup>268</sup>

In *Grutter*, the law school’s admissions policy classified students according to broad racial categories of “African-American” or “Hispanic” or “Asian.”<sup>269</sup> The law school, therefore, falls prey to the criticism of the *Miller* and *Adarand* Courts by treating individuals as a product of their race. Under the *Grutter* Court’s concept of diversity, individuals within these groups are treated as the embodiment of their group identities. But these broad categories are unjustifiable, insofar as there is nothing intrinsic in these categories that assures a commonality of experience.<sup>270</sup>

In light of these broad racial categories, it is clear that the law school is acting contrary to its stated purpose to “break down racial stereotypes.”<sup>271</sup> Accordingly, the law school’s true interest is achieving *racial* diversity. It employs race classifications, but attempts to justify them through the *nonsequitur* of lessening racial stereotypes.

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266. *Id.*

267. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

268. *Id.* at 912.

269. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

270. See WOOD, *supra* note 33, at 25 (“The term ‘Hispanic’ clearly doesn’t describe common social background; it doesn’t designate a common language; and it doesn’t, for that matter, describe gross physical appearance.”). The same can be said of the term “Asian,” which, to name a few examples, includes individuals of Japanese, Vietnamese, or Chinese descent.

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

The point is to smooth over the introduction of [race preferences] to college admissions by rhetorically assimilating them to a more wholesome tradition of seeking out students with many different talents and backgrounds. Being of a certain race, however, is not a talent and not clearly a background either, as it indicates nothing definite about a person's character or experience.<sup>272</sup>

By glossing over this important distinction, the *Grutter* Court ignores the true intent of the law school. Its interest is solely in achieving a diversity of race—a racial balance—something both the *Grutter* and *Parents Involved* Courts decried as “patently unconstitutional.”<sup>273</sup>

Moreover, by sanctioning a lumping of individuals into these broad racial categories, the *Grutter* Court permits universities to dehumanize the individual students. It perpetuates group-based stereotypes, doubling back on one of the greatest achievements of the Civil Rights Movement—laying bare the perniciousness of stereotyping.<sup>274</sup> This is the greatest failure of the argument in *Grutter*: “it validates and reinforces the dehumanizing habit of judging people by stereotypes.”<sup>275</sup> The *Croson* Court warned lower courts against this very problem; “[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.”<sup>276</sup>

Nevertheless, it is a group-right concept of diversity; a concept that lumps together widely different cultures and individuals under one banner; a concept that perpetuates stereotyping; a concept that dehumanizes the very individuals it is designed to aid; and, a concept that the law school used to substantiate its infringement of Barbara Grutter's *individual* right of equal protection. But this

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272. WOOD, *supra* note 33, at 119 n.

273. See *Grutter*, 539 U.S. at 330; *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007).

274. WOOD, *supra* note 33, at 43.

275. *Id.* at 135.

276. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493–94 (1989) (quoting *Regents of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

group-right diversity concept contravenes the very premise of the Constitution:

Diversity might well be understood as an attempt to reverse the founders' efforts to check the growth and powers of factions in American society. Diversity, in effect, enshrines certain kinds of factionalism as a universal good . . . . Diversity raised to the level of counterconstitutional [sic] principle promises to free people from the pseudo-liberty of individualism and to restore to them the primacy of their *group* identities . . . . Real equality, according to [diversity proponents], consists of parity among groups, and to achieve it, social goods must be measured out in ethnic quotas, purveyed by group preferences, or otherwise filtered according to the will of social factions.<sup>277</sup>

By labeling students as either “Hispanic” or “African-American” and according preferences in relation to these broad group identities, the law school in *Grutter* rejects the individuality of its students. “Once we allocate political rights by group identity, the assignment of group identity becomes the crucial determinant of everything else for the individual . . . .”<sup>278</sup> Such a result cannot be countenanced under the United States Constitution designed to thwart precisely the dangers the law school promoted as its goals.

To put it bluntly, the diversity policy endorsed by *Grutter* is unconstitutional. It adopts the counter-constitutional principle of promoting group rights over individual rights. Following *Grutter*, universities must lump students together with little or no common background and then expect them to abide by their group identities so that universities can achieve “diversity.” But these schools have no interest in achieving “intellectual diversity”; rather, they just want “racial diversity.” In promoting racial diversity, the universities dehumanize and stereotype the very students they attempt to protect. Because racial balancing clearly has been prohibited by the Supreme Court, the government actors call racial balancing, “diversity.” But their actions lay their true intent bare. It is racial balancing by a different

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277. WOOD, *supra* note 33, at 14 (emphasis omitted).

278. *Id.* at 43.

name. Racial balancing should not be countenanced under the constitutional demands of strict scrutiny and the Constitution's promise of a legally colorblind society.

## VI. CONCLUSION

The sad truth is that the United States has a sordid history when it comes to dealing with issues involving race. From *Dred Scott v. Sandford*, to *Plessy v. Ferguson*, to *Korematsu v. United States*, the Supreme Court has all too often been at the forefront of this ugly history.<sup>279</sup> Yet, the Supreme Court has also righted each one of those wrongs. In the *Slaughterhouse Cases*, the Supreme Court recognized that the Fourteenth Amendment overturned *Dred Scott* by making all persons born in the United States citizens (and not chattels).<sup>280</sup> In *Brown v. Board of Education*, the Supreme Court overturned *Plessy* by holding that separate is inherently unequal.<sup>281</sup> And in *Adarand Constructors v. Peña*, the Supreme Court affirmed that strict scrutiny must be rigorously applied so mistakes like *Korematsu* do not happen again.<sup>282</sup>

*Grutter v. Bollinger* should also be recognized as one of the Supreme Court's mistakes. By deferring to the law school's diversity interest, *Grutter* sanctioned a lesser standard of review than strict scrutiny, thereby allowing universities to employ pernicious racial classifications that treat individuals as a by-product of their race. The wrong embodied by governmental racial classifications cannot be underemphasized. Instead of treating individuals as *individuals*, which the Equal Protection Clause requires, racial classifications demean, dehumanize, and stereotype individuals into meaningless skin-color-only groups.

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279. See *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that internment of Japanese Americans during World War II was constitutional under the Equal Protection Clause); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding governmental laws requiring racial segregation because they are separate but equal); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that Congress had no authority to prohibit slavery in the federal territories and holding that slaves were not citizens of the United States).

280. 83 U.S. 36, 73 (1873).

281. 347 U.S. 483, 495 (1954).

282. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

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Fortunately, the Supreme Court may soon have the opportunity to right the wrong created by *Grutter*. When *Fisher v. University of Texas at Austin* comes before the Court on a petition for certiorari, the Supreme Court should accept it. Granted, *Fisher* can be constitutionally distinguished from *Grutter*, thereby allowing the Court to reaffirm principles of strict scrutiny without explicitly overturning a decision rendered less than ten years ago. But, *Grutter* should be overturned. *Fisher* provides the Court with an opportunity to right this constitutional wrong.