NOTE

THE CURIOUS CASE OF *FISHER II* & THE VANISHING DIVERSITY INTEREST

STEPHANIE JACKSON†

I. INTRODUCTION

Whether race-conscious admissions policies remain constitutional in institutions of higher education ("IHE") depends solely on the Supreme Court's decision in *Grutter v. Bollinger*[1] remaining good law. Justice O'Connor's majority opinion in *Grutter* stated that the Court "expects that [twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[2] Yet, as of June 29, 2015—well before Justice O'Connor's 2028 predicted end date for race conscious admissions considerations as part of the "slow march toward idea of color-blind society"[3]—the Court has demonstrated it is ready to take on affirmative action again—for the last time—by granting certiorari to *Fisher v. University of Texas at Austin* ("*Fisher II*").[4]

When the Court granted certiorari to hear *Fisher* the first time ("*Fisher I*"), the Court vacated the United States Court of Appeals for the Fifth Circuit's judgment and remanded the case so

† Stephanie A. Jackson is a second-year student at Wake Forest University School of Law with a B.A. in English Literature from Miami University (OH) and a M.A. in Higher Education and Student Affairs from New York University Steinhardt School of Culture, Education, and Human Development. She would like to express her deepest gratitude to Professor Christine Bischoff for her mentorship and guidance in pursuing this topic, the *Journal*'s Board of Editors and Staff members for their hard work and dedication, and especially to her family for their unconditional love and support.

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

2. *Id.* at 342.

3. Fisher v. Univ. of Tex., 631 F.3d 213, 231 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013), *aff'd*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

4. Fisher v. Univ. of Tex. (*Fisher II*), 135 S. Ct. 2888, 2888 (2015).

that the admissions process could be considered under the correct standard of strict scrutiny, which would reach beyond the good faith standard previously articulated in *Grutter*.[5] The Fifth Circuit thus re-reviewed the case under the Court's articulated strict scrutiny standard and affirmed its earlier judgment in favor of the University of Texas at Austin ("UT") admissions policy.[6] The petitioners again appealed the Fifth Circuit's judgment, and now the case is again before the Supreme Court.[7] This unusual back and forth begs the question: Why did the Court grant certiorari a second time after the Fifth Circuit determined in *Fisher II* that UT's admissions policy survived strict scrutiny review?

Coincidentally, shortly after the Court's decision to vacate and remand *Fisher I*, Edward Blum—the millionaire funding Abigail Fisher's case against UT and whose Project on Fair Representation legal team recently upended the Voting Rights Act of 1965 in 2013[8]—filed equal protection suits against both the University of North Carolina at Chapel Hill ("UNC") and Harvard University for their holistic admissions policies, which were applauded by the Court in *Grutter*.[9] Moreover, Harvard's holistic admissions policy and its use of race as but one factor established the blueprint for constitutionally permissible race-conscious admissions policies,[10] including the policy at issue in *Fisher I*.[11] Thus, the Court's forthcoming decision in *Fisher II* will have far-reaching effects, articulating the new law on affirmative action as it relates to race-conscious admissions policies in IHEs across the nation. Yet, by granting certiorari to *Fisher II*, the Court undercuts

5. Fisher v. Univ. of Tex. (*Fisher I*), 133 S. Ct. 2411, 2421–22 (2013); *see Grutter*, 539 U.S. at 329.

6. *Fisher*, 758 F.3d at 637.

7. *Fisher II*, 135 S. Ct. at 2888; Petition for Writ of Certiorari, Fisher v. Univ. of Tex., 758 F.3d 633 (5th Cir. 2014) (No. 14-981).

8. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (holding that section four of the Voting Rights Act is unconstitutional, and the formula can no longer be used as a basis for subjecting jurisdictions to preclearance).

9. Grutter v. Bollinger, 539 U.S. 306, 337 (2003); Joan Biskupic, *A Litigious Activist's Latest Cause: Ending Affirmative Action at Harvard*, REUTERS (June 8, 2015, 2:45 PM), http://www.reuters.com/investigates/special-report/usa-harvard-discrimination; *Our Cases*, PROJECT ON FAIR REPRESENTATION, https://www.projectonfairrepresentation.org/cases (last visited Mar. 1, 2016).

10. *Fisher I*, 133 S. Ct. at 1243 (Ginsburg, J., dissenting); Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 609 (W.D. Tex. 2009), *aff'd*, Fisher v. Univ. of Tex., 631 F.3d 213, 231 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

11. *Fisher*, 758 F.3d at 646.

the judicial competence articulated in precedent cases on the issue[12] and the ruling of the Fifth Circuit that affirmed its previous judgment.[13] After successfully gutting key provisions of the Voting Rights Act—ending almost fifty years of election law oversight protecting access to the polls and particularly impacting racial minorities—with *Fisher II*, Blum aims to dismantle yet another civil-rights era triumph—affirmative action—which protects access to IHEs.

This note argues that the standard of review established by the three landmark Supreme Court decisions involving racial classifications in IHEs—*Regents of University of California v. Bakke*,[14] *Gratz v. Bollinger*,[15] and *Grutter*[16]—strike the correct balance between the Fourteenth Amendment's Equal Protection Clause ("EPC") and an IHE's freedom to establish and articulate its academic mission protected under the First Amendment. As such, the Court's remand of *Fisher I* and subsequent grant of certiorari to hear *Fisher II* simply reflects judicial activism and personal policy preferences related to racial politics, which is at odds with the very purpose of strict scrutiny under the EPC.

II. *FISHER'S* PROCEDURAL BACKGROUND

In 2008, Abigail Fisher, a Texas resident who fell outside of the top ten percent of her high school class, was rejected from UT for undergraduate admission.[17] Fisher partnered with Blum's Project on Fair Representation and filed suit against UT in 2009 in the Western District of Texas.[18] She was joined by Rachel Michalewicz, another white, female Texas resident who also did not make her high school's top ten percent, and was also rejected

12. *See generally id.* at 640–41 (describing the unclear language used by the Supreme Court in its remand order and whether there was an intent for the district court to first address an error in the case and what that error may be), *cert. granted*, 135 S. Ct. 2888 (2015).

13. *Id.* at 637.

14. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

15. Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

16. Grutter v. Bollinger, 539 U.S. 306, 345 (2003).

17. Nicole Hannah-Jones, *A Colorblind Constitution: What Abigail Fisher's Affirmative Action Case is Really About*, PROPUBLICA, http://www. propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r (last updated June 29, 2015).

18. *Id.*; Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

by UT.[19] The plaintiffs contend the "admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*"[20]

The district court held a hearing on the parties' motions for summary judgment regarding liability, specifically on the issue of whether UT's admissions policies and practices violate the EPC of the Fourteenth Amendment.[21] Fisher's lawyers asked the court to "hold that UT Austin's consideration of race in undergraduate admissions decisions is unconstitutional."[22] The district court denied the plaintiffs' motion for summary judgment and granted UT's motion for summary judgment because the record failed to establish a substantial likelihood that UT's use of race in undergraduate admissions unlawfully discriminated on the basis of race in violation of equal protection rights.[23] The district court reasoned UT's race-conscious admissions policy was very similar to, and was allegedly modeled after, the Harvard plan that Justice Powell referenced in *Bakke* and the Court subsequently upheld in *Grutter*.[24] Moreover, the district court held the record was insufficient to permit the court to define "critical mass" or to establish whether the Texas Top Ten Percent Plan met or exceeded the critical mass necessary to achieve the compelling interest in obtaining a diverse student body.[25]

On September 14, 2009, Plaintiffs filed an appeal with the Fifth Circuit.[26] On January 18, 2011, the Fifth Circuit affirmed the district court decision, with Judge Higgenbotham delivering the

19. Second Amended Complaint at 4, *Fisher*, 645 F. Supp. 2d 587 (No. 1:08-cv-00263-SS).

20. Complaint at 2, Fisher v. Univ. of Tex., 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS) .

21. *Fisher*, 645 F. Supp. 2d at 590.

22. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 2, *Fisher*, 645 F. Supp. 2d 587 (No. 1:08-cv-00263-SS).

23. *Fisher*, 645 F. Supp. 2d at 613.

24. *Id.*; Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978)).

25. *Fisher*, 645 F. Supp. 2d at 607.

26. Notice of Appeal, Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).

opinion, finding that the admissions procedures that UT adopted were narrowly tailored and even, in some respects, superior to the *Grutter* plan because UT "does not keep a running tally of underrepresented minority representation during the admissions process."[27] Thus, the Fifth Circuit was satisfied that UT's decision to reintroduce a race-conscious admissions policy was adequately supported by the "serious, good faith consideration" required by *Grutter*.[28]

In June 2011, the Fifth Circuit reached a per curium decision not to re-hear the petition en banc.[29] However, Chief Judge Jones dissented, asserting that reasonable minds may differ on the extent of deference owed to IHEs in the wake of *Grutter* and the "*Fisher* panel's effective abandonment of judicial strict scrutiny in favor of 'deference' at every step of strict scrutiny review contradicts *Grutter* and *Parents Involved*."[30] In February 2012, the Supreme Court granted certiorari to *Fisher I*.[31] Justice Kagan recused herself from the decision due to her earlier work on affirmative action in higher education cases.[32] Justice Kennedy wrote the opinion of the Court—a 7-1 decision—that vacated the Fifth Circuit's decision and remanded the case so that the admissions process could be considered and judged under a "correct" strict scrutiny analysis.[33] The Court thus agreed with Chief Judge Jones's dissenting opinion that the Fifth Circuit's expressions of the controlling standard were at odds with *Grutter*'s command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny.[34] Specifically, the Court stated, "*Grutter* did not hold good faith would forgive an *impermissible* consideration of race."[35] Further, the Court concluded, "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in

27. *Fisher*, 631 F.3d at 247 (King, Garza, JJ., specially concurring).

28. *Id.*

29. Fisher v. Univ. of Tex., 644 F.3d 301, 303 (5th Cir. 2011) (per curiam).

30. *Id.* at 307–08 (Jones, C.J., dissenting); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

31. Fisher v. Univ. of Tex., 132 S. Ct. 1536, 1536 (2012).

32. *Fisher I*, 133 S. Ct. 2411, 2422 (2013).

33. *Id.* at 2415.

34. *Compare id.*, *with Fisher*, 644 F.3d at 303 (Jones, C.J., dissenting).

35. *Fisher I*, 133 S. Ct. at 2421 (emphasis added).

a permissible way without a court giving close analysis to the evidence of how the process works in practice."[36] And, moreover, the "higher education dynamic" did not change the "narrow tailoring analysis of strict scrutiny applicable in other contexts."[37] Altogether, the Court determined that the lower courts "confined strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications."[38]

After remand, in July 2014, the Fifth Circuit affirmed summary judgment for UT, reasoning that UT's holistic review of applicants for admission, which included race as but one factor, was sufficiently narrowly tailored to the IHE's compelling interest in achieving racial diversity because after implementing race-neutral alternatives, the holistic review program was a necessary component of UT's plan of admitting most of its students on class rank alone from de facto segregated high schools.[39] Judge Garza dissented, arguing that the Supreme Court's decision in *Fisher I* vacated and clarified the long standing strict scrutiny standard as it applied to cases involving racial classifications in IHE admissions policies so that "[n]ow, reviewing courts cannot defer to a state actor's argument that its consideration of race is narrowly tailored to achieve its diversity goals."[40] Judge Garza concluded that UT must define its goal of achieving a critical mass of minority enrollment in order for a reviewing court to determine if its race conscious admissions policy is narrowly tailored.[41]

Leading to *Fisher I* and *Fisher II*, *Grutter* upheld race-based discrimination in college admissions in 2003,[42] but only for the current generation of students as such policies "must be limited in time."[43] The call for timely racial remediation has been dictated by EPC constraints on voluntary affirmative action plans.[44] Though the Justices may disagree about whether *Grutter*'s holding is

36. *Id.*

37. *Id.*

38. *Id.*

39. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 654, 659 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

40. *Id.* at 661–62 (Garza, J., dissenting).

41. *Id.*

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

43. *Id.* at 342.

44. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting); *cf.* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); Richmond v. J.A. Croson Co., 488 U.S. 468, 510 (1989) (plurality opinion).

consistent with principles of equal protection in prescribing a diverse student body as a compelling interest in IHEs,[45] the parties in *Fisher I* did not ask the Supreme Court to revisit that aspect of the holding.[46] Thus, with *Fisher II* headed before the Supreme Court again, the only issue is whether the Fifth Circuit's new approval of use of race in IHE admissions policies satisfies the Court's precedent rulings on equal protection, including the Court's *Fisher I* decision in 2013.[47]

III. THE INHERENT PROBLEM WITH STRICT SCRUTINY IN HIGHER EDUCATION ADMISSIONS POLICIES

After the Civil War, the Fourteenth Amendment was drafted to ensure the privileges and immunities granted to emancipated slaves by the Thirteenth Amendment.[48] The EPC of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[49] As a result, a profoundly important aspect of the judiciary's role is "to protect discrete and insular minorities from majoritarian prejudice or indifference,"[50] which it did by elevating minorities to a suspect class and warranting a "searching judicial inquiry" into the justification for race-based measures—by strict scrutiny.[51] These historical facts, allowing both a legal cause of action and remedy for racial minorities under the EPC, led Justice Powell to assert that "some maintain that these concerns are not implicated when the 'white majority' places burdens upon itself."[52] Indeed, in terms of constitutionally permissible voluntary affirmative action plans, the Court has been unwilling to hold

45. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013), *cert. granted*, 135 S. Ct. 2888 (2015).

46. *Id.* at 2424.

47. Vinay Harpalani, Fisher v. Texas, *the Remix*, ISCOTUSNOW (July 18, 2015), http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix.

48. *J.A. Croson Co.*, 488 U.S. at 490.

49. U.S. CONST. amend. XIV, § 1.

50. *J.A. Croson Co.*, 488 U.S. at 495 (citing United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938)).

51. *Id.* at 492; *cf.* Johnson v. California, 543 U.S. 499, 511–12 (2005) ("[S]earching judicial review . . . is necessary to guard against invidious discrimination."); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.").

52. *J.A. Croson Co.*, 488 U.S. at 495.

outright that the very basis for reviewing race-based measures under strict scrutiny is to prevent racial minorities from being shut out of the political and educational systems.[53]

The Court found an IHE's use of race to "attain[] a diverse student body" survived strict scrutiny in *Bakke* and re-affirmed this principle in *Grutter*.[54] Yet, the Court expressly found that "an interest in 'reducing the historic deficit of traditionally disfavored minorities in [certain graduate] schools'" and, by extension, job opportunities for minorities in those related professions, was insufficient, declaring it "an unlawful interest in racial balancing."[55] Also rejected was "an interest in remedying societal discrimination," revealing the Court's evolved particular political posture on racial classifications.[56]

Thus, in the time since the enactment of the Civil War Amendments, though it retains the power to define the meaning of racial difference and classification,[57] the Court has grown increasingly hostile towards continued use of the EPC for the perceived purpose of remedial redistribution of resources.[58] The Court, in fact, "rejected an interest in remedying societal

53. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (stating that the Court has never approved racial classifications aiding persons "perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations"); *see, e.g.*, Teamsters v. United States, 431 U.S. 324, 367–76 (1977) ("To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination."); United Jewish Orgs. v. Carey, 430 U.S. 144, 155–56 (1976) (rejecting the plaintiff's arguments that the New York Legislature violated the Fourteenth and Fifteenth Amendments "by deliberately revising its reapportionment plan along racial lines"); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution.").

54. Grutter v. Bollinger, 539 U.S. 306, 324 (2003); *Bakke*, 438 U.S. at 311.

55. *Grutter*, 539 U.S. at 323 (quoting *Bakke*, 438 U.S. at 306).

56. *Id.* at 323–24.

57. *See generally* Nixon v. Condon, 286 U.S. 73 (1932) (finding prejudice against discrete and insular minorities may be a special condition, tending to seriously curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry); Nixon v. Herndon, 273 U.S. 536 (1927).

58. *See generally* Shaw v. Reno, 509 U.S. 630 (1993) (remedial governmental action for facially neutral policies requires the plaintiff to prove discriminatory intent); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

discrimination because such measures would risk placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are *thought* to have suffered.'"[59] In effect, the Court uses its authority to grant and enforce race-based measures from the perspective of the white majority—expressed by the language in Justice Powell's opinion as the "innocent" third party—and not from the perspective of racial minorities who the Court also stands to protect.[60]

A. The University's First Amendment Right to Due Deference

In terms of the EPC framework in IHE admissions policies, the Court re-articulated in *Fisher I*, "[t]he academic mission of a university is 'a special concern of the First Amendment'" because an IHE operates as a business and must have the freedom to design an academic mission that it feels will provide students with the best learning outcomes.[61] This freedom extends to the decision about who will be admitted to study, as "[t]he freedom of [an IHE] to make its own judgments includes the selection of its student body."[62] Thus, even though education is not a fundamental right recognized by the Constitution, the First Amendment guarantees extend to protect academic freedom and the judgment of an IHE's decision makers.[63]

It therefore follows that an educational mission that includes attaining a diverse student body is a constitutionally permissible goal for an IHE.[64] Justice Frankfurter summarized academic freedom stating, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation,

59. *Grutter*, 539 U.S. at 323–24 (emphasis added) (quoting *Bakke*, 438 U.S. at 310).

60. *Id.* at 324.

61. *Fisher I*, 133 S. Ct. 2411, 2418 (2013) (quoting *Bakke*, 438 U.S. at 312), *cert. granted*, 135 S. Ct. 2888 (2015).

62. *Bakke*, 438 U.S. at 312.

63. *See* U.S. CONST. amend I; *see also* Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (holding that the community has a legitimate, compelling interest in "the choice of adherence to a suitable curriculum for the benefit of our young citizens;" thus, it is generally permissible and appropriate for local boards to make educational decisions based upon their personal social, political, and moral views).

64. *Bakke*, 438 U.S. at 311–12.

experiment and creation."[65] Additionally, the "four essential freedoms" of a university include: (1) "to determine for itself on academic grounds who may teach;" (2) "what may be taught;" (3) "how it shall be taught;" and (4) "who may be admitted to study."[66] Thus, the Court in *Bakke* "invoke[d] the countervailing constitutional interest of the First Amendment," articulating the first principle of the EPC framework in considering race-conscious IHE admissions policies.[67] Consequently, the Court *must* view the IHE "as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."[68] Furthermore, the Court posited in *Bakke* that this importance may be even more critical at the undergraduate, as opposed to graduate, level of education.[69]

After *Bakke*, the majority in *Grutter* re-articulated the EPC framework related to admissions procedures at IHEs. Here, the Court recognized that diversity was critical to "three distinct educational objectives:" (1) classroom discussion benefits from the varied perspectives derived from students with different backgrounds; (2) increased job readiness due to earlier exposure to the "diverse people, cultures, ideas, and viewpoints" in the student body, which is also reflected in the professional environment; and (3) promotion of a "shared national identity" important in sustaining a healthy democracy.[70] Given these recognized educational objectives, the Court asserted that the University of Michigan Law School's judgment to use a racial classification in its admissions policies to achieve the diversity it deemed "essential to its educational mission" was not only permissible, but one to which the Court must defer.[71] Moreover, the Court expressly stated that its "holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[72] As

65. *Id.* at 313.

66. *Id.* at 312.

67. *Id.* at 312–13.

68. *Id.* at 313.

69. *Id.* at 312–13.

70. Fisher v. Univ. of Tex., 758 F.3d 633,643 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

71. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

72. *Id.*

such, the Court's judicial review only scrutinizes the IHE's decision-making process to ensure its judgment to adopt a race-conscious admissions policy followed from the IHE's good faith consideration.[73]

Actual proof of these diversity benefits aside,[74] the Court in *Fisher I* reaffirmed the *Grutter* diversity interest objectives and only left to the Fifth Circuit in *Fisher II* the task of determining whether "the admissions process meets strict scrutiny in its implementation," in other words, whether UT's race-conscious admissions policy is sufficiently narrowly tailored.[75] However, at the same time, the Court ignored any presumption of good faith afforded to UT to determine its own special educational concerns triggered by the First Amendment.[76] By erasing the First Amendment constitutional concerns, the Court overturned a key component of the landmark cases on affirmative action in higher education.

B. Applying Strict Scrutiny to a Narrowly Tailored Admissions Policy

It is worth analyzing Justice Kennedy's jurisprudence on racial classifications and how it relates to admissions policies since he wrote the Court's opinion in *Fisher I*, and as such, he will likely write the majority opinion in *Fisher II*. In Justice Kennedy's dissenting opinion in *Grutter*,[77] he agreed with Justice Powell's

73. *Id.* at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and 'good faith' on the part of [an IHE' is 'presumed' absent 'a showing to the contrary.").

74. *Compare* Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996) (holding that diversity is not a compelling state interest), *with* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("[T]he Fourteenth Amendment permits [IHE] admissions programs considering race for other than remedial purposes, and educational diversity is a compelling governmental interest meeting strict scrutiny related to race-conscious measures.").

75. *Fisher*, 758 F.3d at 644.

76. *See id.* at 659.

77. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *but see id.* at 344–47 (Ginsburg, J., joined by Breyer, J., concurring) (expressing that (1) race-conscious programs require a logical end point in accord with the international understanding of the office of affirmative action, as reflected in the International Convention on the Elimination of All Forms of Racial Discrimination, as ratified by the U.S. in 1994; (2) one can hope, but not firmly predict when, over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will end the need for affirmative action; and (3) the case at hand does not (a) require the court to revisit the question whether all governmental

majority opinion in *Bakke* permitting the consideration of race as one factor in admissions policies grounded in the First Amendment's acknowledgment of an IHE's freedom to conceptualize its own educational mission.[78] Strict scrutiny is the agreed upon test for a race-conscious admissions program.[79] However, Justice Kennedy joined Chief Justice Rehnquist's *Grutter* dissent in full, explaining that he was not persuaded that the University of Michigan Law School's policy was sufficiently narrowly tailored to pass strict scrutiny.[80] So, even though Justice Kennedy stated he did not have a problem with the use of empirical data as an objective measure of racial diversity in the IHE context, he admitted that he believed discourse on the sensitive topic of racial preferences will ultimately become rancorous.[81] He concluded that race-conscious policy determinations, if left to the states, could potentially "destroy confidence in the Constitution and in the idea of equality."[82] Despite this admission, in terms of his stated rationale as to why the courts—instead of IHEs—should determine whether the method deployed to meet the stated diversity goal survives strict scrutiny review, Justice Kennedy simply noted that the University of Michigan Law School's narrowly tailored race-conscious admissions policy amounted to an unconstitutional balancing test because critical mass is a line drawn on the basis of race and ethnic status, which risks compromising individual assessment.[83] Justice Kennedy explains the University of Michigan Law School failed to prove that it did not use race in an unconstitutional way

---

classifications by race, whether designed to benefit or to burden a historically disadvantaged group, ought to be subject to the same standard of judicial review, or (b) necessitate reconsideration whether interests other than student-body diversity ranked as sufficiently important to justify a race-conscious government program); *see also id.* at 378–86 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting) (expressing the view that (1) the law school's means were not narrowly tailored to the interest the school asserted, as the school's race-conscious program, rather than bearing any relation to the attainment of a critical mass of underrepresented minority students, was a naked effort to achieve racial balancing, and (2) the program failed strict scrutiny because the program was devoid of any reasonably precise time limit on the school's use of race in admissions).

78. *Id.* at 387 (Kennedy, J., dissenting); *Bakke*, 438 U.S. at 289–291, 312–314.

79. *See Grutter*, 539 U.S. at 387, 391 (Kennedy, J., dissenting).

80. *Id.* at 379 (Rehnquist, J., dissenting).

81. *Id.* at 388 (Kennedy, J., dissenting).

82. *Id.*

83. *Id.* at 389.

by producing a "convincing explanation" or showing it took "adequate steps to ensure individual assessment."[84]

In a more recent affirmative action case, *Schuette v. Coalition to Defend Affirmative Action*, Justice Kennedy wrote the majority opinion, which determined that an amendment to Michigan's Constitution, Proposal 2—approved and enacted by the state's voters—was valid under the United States Constitution, allowing Michigan voters to decide to ban race-conscious admissions policies.[85] Justice Kennedy distinguished *Schuette* from the landmark affirmative action cases and *Fisher I* because the principle that race-conscious admissions policies were permissible—provided that certain conditions were met—was not being challenged or disturbed.[86] Instead, the Court was considering "whether, and in what manner, voters in the [s]tates may choose to prohibit" governmental race-conscious admissions policies.[87] Citing "serious First Amendment implications" related to democracy and public debate,[88] Justice Kennedy asserted that decisions determining not how but who may resolve racial preferences should be left to the state's voters.[89] Justice Kennedy noted that IHEs in other states, such as "[u]niversities in California, Florida, and Washington," had since prohibited race-conscious admissions policies and had begun experimenting with varying alternative race-neutral approaches.[90] By implication, Justice Kennedy thus recognized a federal structure that allows "innovation and experimentation" with complex policy questions, enabling "greater citizen 'involvement in democratic processes.'"[91]

In sum, Justice Kennedy ultimately agreed with *Bakke* that the democratic principles of the First Amendment extend to the state's voters to determine the wisdom and practicality of race-conscious admissions policies in IHEs.[92] He also permitted deference to IHEs, allowing them to define their respective diversity goals and thereby justifying a constitutionally permissible

84. *Id.* at 391.
85. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014).
86. *Id.* at 1630.
87. *Id.*
88. *Id.* at 1637.
89. *Id.* at 1638.
90. *Id.* at 1630 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).
91. *Id.* at 1630 (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).
92. *See id.* at 1630–31.

race-conscious admissions policy.[93] But in *Fisher I*, he stopped short of supporting this same deference for the IHE's method based on strict scrutiny precedent that falls outside of the higher education context,[94] which does not align with his reasoning in his dissent in *Grutter*.[95] Strict scrutiny review of the landmark cases, including *Fisher I*, simply requires an IHE to demonstrate with clarity that its interest in a diverse student body "is both constitutionally permissible and substantial, and that its use of the classification is *necessary*" to accomplish this goal.[96] However, according to Justice Kennedy's majority opinion in *Fisher I*, UT must clearly define critical mass and articulate this diversity goal in an objective manner on remand.[97] And as before, to meet this re-articulated strict scrutiny standard, the Court prohibits metrics reducing the policy to a cover for a quota system,[98] as well as numbers that reflect impermissible racial balancing.[99] Yet, when the Fifth Circuit held that UT met this burden in *Fisher II*, the Court again granted certiorari.[100] Nevertheless, Justice Kennedy may not be persuaded by any narrowly tailored and least restrictive measure that UT puts forth because, as he previously stated, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[101] Justice Kennedy thus accepted plaintiff Fisher's assertion that based on UT's numerical minority enrollment alone, she was in fact injured by the race-conscious admissions policy and rejected the precedent EPC framework specific to the higher education context.[102]

---

93. *Id.* at 1630.

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

95. *Compare id.* ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."), *with Schuette*, 134 S. Ct. at 1638 ("Democracy does not presume that some subjects are either too divisive or too profound for public debate.").

96. *Fisher I*, 133 S. Ct. 2411, 2418 (2013) (emphasis added), *cert. granted*, 135 S. Ct. 2888 (2015).

97. Fisher v. Univ. of Tex., 758 F.3d 633, 661–62 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

98. *See Fisher I*, 133 S. Ct. at 2418.

99. *Grutter*, 539 U.S. at 383 (Rehnquist, C.J., dissenting).

100. *Fisher II*, 135 S. Ct. 2888, 2888 (2015).

101. Richmond v. J.A. Croson Co., 488 U.S. 497, 500 (1989) (plurality opinion).

102. *See Fisher I*, 133 S. Ct. at 2421; *Grutter*, 539 U.S. at 339–40; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978).

C. Context Matters

Justice Kennedy's majority opinion in *Fisher I* brings forth his dissent in *Grutter* and begins to chip away at the role of context in relation to the Court's strict scrutiny precedent in race-conscious admissions policies.[103] Indeed, the Court has already recognized two circumstances where a "compelling interest in the educational benefits of diversity can justify racial preferences in university admissions."[104] The first instance is in the protection of national security.[105] The second is "in remedying past discrimination for which [the government] is responsible."[106] As such, the Court recognizes that "[c]ontext matters."[107] When a court reviews race-based governmental action under the EPC, it must consider relevant differences in facts and circumstances and use strict scrutiny merely as a framework for carefully examining the importance and sincerity of the reasons advanced by the decision-maker for the use of race in that particular context.[108] Certainly, this is the "fundamental purpose" of strict scrutiny review.[109]

On remand, UT faced the challenge of proving the race-conscious admissions policy yielded a critical mass, which was broadly defined in *Grutter* as diversity by "reference to the educational benefits that diversity is designed to produce."[110] Nevertheless, Justice O'Connor purposefully left room in *Grutter* for the IHE's educational judgment grounded in the First Amendment by stating that "universities occupy a special niche in our constitutional tradition," while she distinguished this permissible measure from outright racial balancing and impermissible quotas.[111] To that end, the question arises whether

103. *Fisher I*, 133 S. Ct. at 2421 ("The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts.").

104. *Id.* at 2422 (Scalia, J., concurring).

105. *Id.* at 2423 (Thomas, J., concurring); Korematsu v. United States, 323 U.S. 214, 217 (1949).

106. *Fisher I*, 133 S. Ct. at 2423.

107. Fisher v. Univ. of Tex., 758 F.3d 633, 659 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

108. *See Grutter*, 539 U.S. at 327; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (strict scrutiny is not "strict in theory, but fatal in fact").

109. *See Grutter*, 539 U.S. at 327.

110. *Id.* at 330.

111. *See id.* at 329.

the Court adequately considered in *Fisher I* or will adequately give weight in *Fisher II* the extensive facts and circumstances submitted on the record that lead to UT's holistic admissions policy.[112]

Turning to the circumstances in Texas, following the 1997 *Hopwood v. Texas* case,[113] UT was unable to achieve its diversity goal deemed essential to its educational mission by considering race as even but one of many factors in its general admissions policy.[114] The resulting decrease in African-American and Hispanic enrollment was significant,[115] leading the Texas legislature to institute the Top Ten Percent Plan adopted by UT in addition to other facially race-neutral efforts like targeted scholarship programs and recruitment efforts that are still in place today.[116]

As a result, applicants from Texas are further filtered into two subcategories: (1) "Texas residents in the top ten percent of their high school class" who are automatically granted admission into UT and who represent approximately eighty-eight percent of the seats allotted to in-state students in 2008; and (2) Texas residents falling outside of the top ten percent.[117] Therefore, the admissions policy at issue only applies to the small number of applicants remaining after applicants in the top ten percent are sent offers.[118] For this second subcategory, UT employs a holistic admissions process where students compete based on their Academic[119] and Personal Achievement Indices.[120] UT argues that

---

112. *See generally* Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) ("It remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."), *vacated and remanded*, 133 S. Ct. 2411 (2013); *see also Fisher II*, 135 S. Ct. 2888, 2888 (2015).

113. *See generally* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. at 322 (holding diversity in education was not a compelling government interest, as interpreted by the Texas Attorney General, to prohibit use of race as a factor in any Texas IHE).

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

115. *Id.* at 244.

116. *Id.* at 223; *see Admissions Decisions*, U. TEX. AUSTIN, http://admissions.utexas.edu/apply/decisions (last visited Mar. 1, 2016).

117. *Fisher*, 631 F.3d at 227.

118. *Id.* (noting that, in 2008, only 1216 available offers of admission remained after application of the Top Ten Percent Plan).

119. *Fisher*, 631 F.3d at 227. "The Academic Index [('AI')] is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank. Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough to be considered presumptively denied." *Id.*; *see also*

"[g]iven the test score gaps between minority and non-minority applicants," if race was not considered in UT's admissions policy, the offers extended to this group of students would be nearly exclusively white.[121] Therefore, because of the limited impact of the admissions program on minority admissions, the record in *Fisher I* demonstrates exactly why it needs to "[target] students of all races that meet both the competitive academic bar of admissions and have unique qualities that complement the contributions of students" who are admitted under the Top Ten Percent Plan.[122] "Narrow tailoring does not require the exhaustion of every race neutral alternative, but rather serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[123] Accordingly, the Fifth Circuit was persuaded in *Fisher I*, and again in *Fisher II*, that the structure of UT's admissions policy—which included racially-neutral alternatives prior to implementing a race-conscious holistic review program—clearly provided the requisite evidence that the use of race was both necessary and constitutional according to strict scrutiny judicial review.

Moreover, the Court must consider the impact of de facto segregation on the diversity gained from Top Ten Percent Plan given the "fundamental weaknesses" in the Texas secondary education system.[124] While the Top Ten Percent Plan boosts minority enrollment in IHEs by skimming from the top of Texas high schools, it does so against the backdrop of increasing re-

---

Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009), *aff'd*, Fisher v. Univ. of Tex., 631 F.3d 213, 231 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

120. *Fisher*, 631 F.3d at 227–28. "The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file." *Id.* at 228. This personal achievement score includes the following factors not assessed by the Academic Index: "demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a 'special circumstances' element that may reflect the socioeconomic status of the applicant," her high school and her standardized test score relative to her high school average, her "family status and family responsibilities . . . and—beginning in 2004—the applicant's race." *Id.*; *see also Fisher*, 645 F. Supp. at 591.

121. Fisher v. Univ. of Tex., 758 F.3d 633, 647 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

122. *Id.*

123. *Id.* at 649.

124. *Id.* at 650–51.

segregation, where the bulk of minority students graduate from majority-minority high schools that are under-funded and under-resourced.[125] As such, UT's holistic program was designed to supplement the rigid numerical system implemented by the Top Ten Percent Plan, which overlooks the contributions to student body diversity beyond race. The Court prohibited a narrow use of racial numbers or quotas requiring an objective analysis of the individual, which is what UT's holistic review program ensures by refusing to designate a number to indicate critical mass, and instead looks beyond a racial minority head count. This holistic review allows the IHE to consider a broader range of students, including students who may fall outside of their well-performing high school's top ten percent, but excel in unique ways and will enrich the student body diversity valued in UT's educational mission.[126]

Though de facto segregation is not a governmental action subject to affirmative remedial efforts under the Fourteenth Amendment, Justice Kennedy himself has stated in *Parents Involved in Community Schools v. Seattle School District Number 1*:

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.[127]

Further, Justice Kennedy acknowledged use of "a more nuanced, individual evaluation of school needs and student

125. *Id.* at 651 (explaining that "[o]ver half of Hispanic public school students and 40 [percent] of black public school students attend school with a 90–100 [percent] minority enrollment"); Gary Orfield, John Kucsera & Genevieve Siegel-Hawly, *E Pluribus . . . Separation: A Deepening Double Segregation for More Students*, CIVIL RIGHTS PROJECT 46, 50 (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integr ation-and-diver sity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-morestudents /orfield_epluribus_revised_omplete_2012.pdf.

126. *Fisher*, 758 F.3d at 653.

127. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007).

characteristics that might include race as a component" if necessary.[128] Though UT's race-neutral efforts helped to at least correct the significant decreases in the critical mass of minority enrollment caused by *Hopwood*, its holistic review program for the reminder of available seats is critical in achieving the multi-dimensional diversity goal envisioned by *Bakke* and is indistinguishable from the permissible University of Michigan Law School admissions program in *Grutter*.[129] Hence, in accepting the unfortunate reality that de facto racial segregation severely limits the effectiveness of race-neutral policies, UT's admissions program still provides clear evidence that its race-conscious admissions efforts reject a definition of critical mass based on numbers of minority enrollment alone, and instead looks to the potential skills and qualities of the individual where race is but one factor.

IV. CONCLUSION

The First Amendment protects the state and its decision-makers' ability and freedom, in accordance with the Constitution, to determine its educational mission, which includes recruiting and admitting a diverse student body to state IHEs. Echoing *Hopwood*, the Court concluded in *Schuette* that voters can and should be allowed to determine the use of racial preferences as one factor in the state's IHE admissions policies.[130] Yet, instead of determining who decides such use, the Court in *Fisher II* will effectively determine how the debate about race-conscious admissions policies will be resolved. Where racial minorities are already marginalized from the political process, thereby warranting strict scrutiny protection, the Court, by further removing this decision from the good faith deference of IHEs regardless of any progress through "the active lab of experimentation"—embraced by Justice Kennedy's majority opinion in *Schuette*[131]—will merely continue to enforce the economic and political status quo.

Justice Kennedy keenly noted Justice Harlan's statement that "[o]ur Constitution is color-blind" was justified specifically

128. *Id.* at 790.

129. *Fisher*, 758 F.3d at 645.

130. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1635 (2014).

131. *Fisher*, 758 F.3d at 651 (citing *Schuette*, 134 S. Ct. at 1642 (Scalia, J., concurring)).

within the context of his dissent in *Plessy v. Ferguson*.[132] Yet, Justice Kennedy further explained, "in the real world . . . it cannot be a universal constitutional principle."[133] Therefore, race-neutral policies should not be the ultimate goal instituted by the government. Consistent with precedent on the issue, state IHEs should be granted due deference, as protected under the First Amendment, to continue to determine their respective permissible diversity goals, which clearly meet strict scrutiny judicial review outlined in *Fisher I* and were further analyzed by the Fifth Circuit in *Fisher II*. It is this balance between the voter's ability to determine use of a permissible racial consideration and the trusted educational judgment of an IHE to design a permissible race-conscious admissions policy that reinforces—not destroys—American confidence in the Constitution and in the idea of equality.

132. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

133. *Parents Involved*, 551 U.S. at 788.