Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After *Fisher*

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ABSTRACT

This Article argues that Fisher v. Texas does not spell doom for race-conscious admissions policies, in spite of its call for universities to seriously examine whether race-neutral alternatives can attain the educational benefits of diversity. The Article analyzes the internal tension in the Supreme Court's doctrine on race-conscious admissions: on the one hand, the Court has called for universities to seriously consider race-neutral alternatives, but on the other hand, it has defined the educational benefits of diversity very broadly and granted deference to universities in defining their educational missions. Unlike constitutionally-approved remedial rationales for affirmative action, the diversity interest has no logical endpoint or ceiling: diversity will continue to be important for the foreseeable future, and there is no intuitive upper limit to its benefits. Moreover, the educational benefits of diversity explicitly noted in Fisher and Grutter v. Bollinger, such as lessening of racial stereotypes and mitigating feelings of isolation among minority students, require direct attention to race.

Additionally, this Article contends that the Court's narrow tailoring principles for race-conscious policies relate directly to the diversity interest: the holistic admissions process upheld in Grutter v. Bollinger facilitates individualized review and nuanced consideration of race, which help to lessen racial stereotypes and which cannot be replaced adequately by race-neutral alternatives. Further, this Article illustrates that a holistic admissions process with individualized review cannot be entirely race-neutral, and that universities already place a de facto limit on their use of race in admissions, through their own academic selectivity. As a result, this Article contends that universities have not reached their desired level of racial diversity and related educational benefits, and the Supreme Court's call to curb race-conscious policies runs counter to its own articulation of the educational benefits of diversity.

Finally, this Article discusses two relatively novel ways that universities can continue to defend their race-conscious admissions policies by linking them to race-conscious educational goals. Employing the deference Fisher gives them in defining their educational missions, universities can: (1) Emphasize the educational benefits of diversity within racial groups and intragroup support among minority students; and (2) highlight the educational benefits of diversity that occur within race-conscious campus spaces, such as ethnic studies departments, cultural centers, and residence halls devoted to African American experiences, in addition to benefits of classroom diversity. More broadly, this Article calls upon universities to embrace race-consciousness—not only in their admissions policies but also in their educational missions. By illustrating that their educational missions have race-conscious goals, universities can more readily illustrate how their race-conscious admissions policies and programs are tangibly related to the educational benefits of diversity.

INTRODUCTION

With its ruling in *Fisher v. Texas*,[1] the U.S. Supreme Court indicated that it wants to see an end to race-conscious admissions policies in higher education. Although the *Fisher* majority opinion did not strike down the University of Texas at Austin (UT) admissions plan, seven Justices[2] agreed to remand the case for more stringent review of whether UT really needs to use a race-conscious policy, in addition to the "race-neutral" Top Ten Percent Law,[3] to garner the

[1] 133 S. Ct. 2411 (2013).

[2] Of course, there are differing views among the individual Justices. In past cases, Justices Samuel Alito, Antonin Scalia, Clarence Thomas, and Chief Justice John Roberts have indicated their disdain for race-conscious admissions policies. *See* Parents Involved in Cmty. Schools v. Seattle School District No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.") Justices Scalia and Thomas dissented when the Court upheld race-conscious admissions policies in *Grutter v. Bollinger*, 539 U.S. 306, 346, 349 (2003) (Scalia, Thomas, J.J., dissenting) (contending that diversity in education is not a compelling state interest and it is unconstitutional for universities to use race-conscious admissions policies). Both also wrote separate concurrences in *Fisher* suggesting that they would overrule *Grutter*, but that question was not posed to them in *Fisher*. *Fisher*, 133 S. Ct. at 2422 (Scalia, Thomas J.J., concurring). Justice Anthony Kennedy, who wrote the *Fisher* majority opinion, also dissented in *Grutter*, although he did not categorically preclude the use of race-conscious admissions policies in his dissent. *Grutter*, 539 U.S. at 392–93 ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny."). Justices Stephen Breyer and Ruth Bader Ginsburg voted to uphold race-conscious admissions in *Grutter*. *Id.* at 306. Justice Ginsburg also dissented in *Fisher*, on grounds that UT's use of race in admissions had already passed strict scrutiny on the lower courts' initial review. *Fisher*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting). Justice Sonia Sotomayor's dissent in *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary*, 134 S. Ct. 1623, 1651 (2014) suggests her broad support for race-conscious admissions policies. *See id.* at 1682 (Sotomayor, J., dissenting) ("[The Supreme Court] has recognized that diversity in education is paramount . . . [w]ith good reason."). Justice Elena Kagan recused herself from both *Fisher* and *Schuette* because of her role in the cases as Solicitor General, when they were being considered in the lower courts.

[3] TEX. EDUC. CODE ANN. § 51.803 (1997). The Top Ten Percent Law guarantees admissions to UT to the top students (originally top 10 percent of each graduating class) in all Texas public high schools. The law was passed by the Texas legislature in response to *Hopwood v. Texas*. *Hopwood*, 78 F.3d 932 (5th Cir. 1996) (holding that UT could not use race as an admissions factor), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that universities could use race as a plus factor in admissions). In 2011, the Top Ten Percent Law was amended to limit guaranteed admission at UT to 75 percent of the seats designated for Texas residents. *See* TEX. EDUC. CODE ANN. § 51.803(a-1) (2010). This limit begins with admissions to the entering class of Fall 2011 and continues until the entering class of Fall 2015. *See* Fisher v. Texas, 631 F.3d 213,

educational benefits of diversity. The majority opinion stated that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice[,]"[4] and that "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . .'at tolerable administrative expense."'[5]

While it did not curb university's use of race per se, *Fisher*'s preference for race-neutral alternatives illustrates the Court's overall antipathy towards race-conscious admissions. The *Fisher* majority emphasized that "[n]arrow tailoring . . . requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."[6]

224 n.56 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

This Article assumes, as the *Fisher* litigation did, that the Top Ten Percent Law is "race neutral"—meaning that there is no direct and explicit consideration of race in the decision-making process. *See also* Eboni S. Nelson, *What Price* Grutter*? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 8 (2005) (arguing that "in order to be considered race-neutral, it is only necessary that [programs] do not allow applicants to be classified and/or selected based on their race or ethnicity"); Reva Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 675 (2015) (noting that the Top Ten Percent Plan "pursue[s] a race-conscious goal of promoting equal opportunity" but "does not classify individuals by race" and thus does not "trigger[] strict scrutiny"). *See also id.* at 673–74 (noting that in *Fisher*, Supreme Court Justices could not possibly have "overlooked the race- conscious aims of the [Top Ten] percent program[,]" but that "[n]o Justice raised questions about the [plan's] constitutionality[.]"). *But see* Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) ("Calling . . . 10% or 20% plans 'race-neutral' seems to me disingenuous, for they 'unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.'"); *Id.* at 298 (Souter, J., dissenting) ("'[P]ercentage plans' are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it."); *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) ("[O]nly an ostrich could regard the supposedly neutral alternatives [referring to Texas's Top Ten Percent Law] as race unconscious . . . . [T]he vaunted alternatives suffer from 'the disadvantage of deliberate obfuscation.'") (quoting *Gratz*, 539 U.S. at 298) (Souter, J., dissenting). *See also Fisher*, 631 F.3d at 242 n.156, *rev'd*, 133 S. Ct. 2411 (2013) ("A court considering the constitutionality of the [Top Ten Percent Law] would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); *cf.* Brief for Social Scientists Glenn C. Loury et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306, 2003 WL 402129, at *2, *9–10 (noting that 'it is not clear that [percentage] plans are actually race-neutral' and that some *amici* counsel in *Grutter* 'have signaled interest in moving on after this case to challenge these aspects of the Texas program.').").

[4] *Fisher*, 133 S. Ct. at 2420.

[5] *Id.*

[6] *Id.*

This Article, however, argues that *Fisher* does not spell doom for race-conscious admissions. While many commentators predicted that *Fisher* would end race-conscious admissions policies,[7] it actually provided the "best realistic outcome for proponents" of these policies, given the current composition of the Supreme Court.[8] In fact, after the Supreme Court's ruling, the Fifth Circuit upheld UT's race-conscious admissions policy on remand,[9] and then denied the *Fisher* Plaintiffs'[10] request for a hearing en banc.[11] Also, the Supreme Court's more recent opinion in *Schuette v. Coalition to Defend Affirmative Action*[12] did not affect *Fisher*, even though it was a loss for proponents of race-conscious admissions. In *Schuette*, the Court reversed the Sixth Circuit and upheld state constitutional bans on race-conscious policies;[13]

[7] *See* Elise Boddie, *Commentary on* Fisher*: In With a Bang, Out With a Fizzle*, SCOTUSBLOG (June 24, 2013, 11:05 PM), http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/ ("[T]he many months of commentary from pundits sounding the death knell on affirmative action in higher education after oral argument in *Fisher*" and that "[f]orecasting the death of race-conscious policies has become a spectator sport.").

[8] Vinay Harpalani, *Affirmative Action Survives—For Now*, IIT CHICAGO-KENT FACULTY BLOG (June 24, 2013), http://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/. *But see* Eboni Nelson, *Reading Between the Blurred Lines of* Fisher v. University of Texas, 48 VAL. U. L. REV. 519, 521 (2014) (arguing that for proponents of race-conscious admissions policies, post-*Fisher* "optimism may be misplaced"). Additionally, Professors Mario Barnes and Angela Onwuachi-Willig, along with Dean Erwin Chemerinsky, critique the U.S. Supreme Court's overall approach to equal protection, using *Fisher* as an example. *See generally* Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272 (2015).

[9] Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014), *en banc denied,* 771 F.3d 274 (5th Cir. 2014).

[10] For simplicity's sake, this Article will refer to the parties who initiated the *Fisher* litigation as the *Fisher* "Plaintiffs," although the various *Fisher* opinions sometimes refer to them as "Appellants" or "Plaintiffs-Appellants." The Plaintiffs were also the "Petitioner" at the Supreme Court (where Abigail Noel Fisher was the only remaining Plaintiff). *See* Brief for Petitioner, Fisher v. Texas, 133 S. Ct. 2411 (No. 11-345) at 2. For purposes of this Article, all of these terms are interchangeable.

[11] Denial of Petition for Rehearing En Banc, Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014) at 2, *available at* http://www.utexas.edu/vp/irla/Documents/11.12.14.Denial.of.Petition.for.Rehearing.En.Banc.pdf. Ten of fifteen Fifth Circuit judges voted against the rehearing. *Id.* Judge Emilio Garza, joined by four other judges, dissented from the denial. *Id.* at 3. Abigail Fisher has also filed a petition for a writ of certiorari to the U.S. Supreme Court, which is pending at this time. Petition for Writ of Certiorari, Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014), *available at* http://www.utexas.edu/vp/irla/Documents/2.10.15.Petition.for.Writ.of.Certiorari.pdf.

[12] Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary, 134 S. Ct. 1623 (2014).

[13] *Id.*

however, in doing so, Justice Anthony Kennedy's controlling opinion made clear that *Schuette* was "not about the constitutionality or the merits [] of race-conscious admissions policies in higher education . . . [or] permissib[ility]"[14] of such policies, but rather about whether the courts should ultimately decide this issue.[15]

Although a majority of Justices would like to see an end to race-conscious admissions policies, the rulings in *Fisher* and *Schuette* suggest that Justice Kennedy, along with Chief Justice Roberts and Justice Alito, would prefer lower courts and political process to accomplish this end, rather than a Supreme Court decision.[16] After these two rulings, universities are permitted to use race-conscious admissions, subject to popular referenda,[17] legislative[18] or executive[19] action, and university administrative decisions.[20] Any of these extrajudicial vehicles can

[14] *Id.*

[15] *Id.*

[16] Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary, 134 S. Ct. 1623, slip op. at 18 (2014) (noting that *Schuette* "is not about how the debate about race preferences should be resolved . . . [i]t is about who may resolve it."). It is noteworthy that Chief Justice Roberts and Justice Alito joined Justice Kennedy's *Schuette* opinion, and also that neither of them wrote separately in *Fisher*—as Justices Scalia and Thomas did to express greater disdain for *Grutter*. *See* Fisher v. Texas, 133 S. Ct. 2411, 2422 (2013) (Scalia, Thomas, J.J., dissenting). There is little doubt that Chief Justice Roberts and Justice Alito, and also Justice Kennedy, would like to end to race-conscious admissions policies. *See supra* note 2. However, their recent jurisprudence suggests that none of them want the Court to deliver a sweeping mandate for universities to do so, perhaps preferring to let lower courts and political actors erode the use of race gradually. *See* Vinay Harpalani, *The Double-Consciousness of Race-Consciousness and the Bermuda Triangle of University Admissions*, 17 U. PA. J. CONST. L. 835, 847–50 (2015) (discussing interplay of law and politics on future of race-conscious admissions policies).

[17] California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012) have all passed state constitutional amendments, through referenda, that proscribe race-conscious admissions policies. *See Affirmative Action: State Action*, NCSL (Apr. 2014), http://www.ncsl.org/research/education/affirmative-action-state-action.aspx. Colorado voters rejected a similar ban in 2008. Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, USA TODAY (Nov. 7, 2008, 7:35 PM), http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800_x.htm ("By 51 percent to 49 percent, Coloradans rejected a proposed constitutional ban on considering race or gender in state hiring, contracting and college admissions.").

[18] New Hampshire's state legislature passed law curbing race-conscious policies, effective in 2012. H.R. 0623 (N.H. 2011).

[19] Florida Governor Jeb Bush eliminated race-conscious policies by executive order in 1999. Florida Exec. Order No. 99-281 (1999).

[20] The University of Georgia and Texas A&M University elected not to reinstate race-conscious admissions policies after lower court rulings ruled their policies unconstitutional, even though *Grutter* abrogated those lower court rulings. *See* Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, at 4 (2012), http://tcf.org/assets/downloads/tcf-abaa.pdf. Also,

eliminate the use of race-conscious policies at the state or local level, but absent such political actions, *Fisher* still allows use of race in admissions, and it governs how universities must implement race-conscious admissions policies to comply with the Equal Protection Clause.

Moreover, even as *Fisher* guides lower courts to stringently review whether universities need to use race, the Supreme Court has broadly defined the educational benefits of diversity—the compelling interest that justifies race-conscious admissions policies. Some of the educational benefits articulated by *Fisher* inherently incorporate a level of race-consciousness, such as "lessening of racial isolation and stereotypes,"[21] "promot[ing] cross-racial understanding,"[22] and "enabl[ing] [students] to better understand persons of different races."[23] Also, *Grutter* and *Fisher*'s compelling interest in diversity (the "diversity interest") goes hand in hand with the Court's narrow tailoring principles—its endorsement of the race-conscious holistic admissions policy[24] upheld in *Grutter*, in contrast with its rejection of

prior to the passage of Proposition 209 in California in 1996, the Regents of the University of California passed two resolutions, Standing Policy 1 (SP1) and Standing Policy 2 (SP2), to eliminate race-conscious admissions policies in 1995. However, this ban did not go into effect until 1998, after Proposition 209 itself had passed. *See Appendix D: Legal Landscape*, BERKELEY.EDU, http://diversity. berkeley.edu/appendix-d-legal-landscape (last visited Apr. 1, 2015).

[21] *Fisher*, 133 S. Ct. at 2418. Of course, *Fisher* recapitulated much of the holding in *Grutter*. *See also* Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (holding that "substantial, important, and laudable educational benefits that diversity is designed to produce, include cross-racial understanding and the breaking down of racial stereotypes."); *Id.* at 319 (noting that "critical mass" entails "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.'").

[22] *Grutter*, 539 U.S. at 330 ("[T]he educational benefits that diversity is designed to produce . . . are substantial [and include] promot[ing] 'cross-racial understanding,' . . . break[ing] down racial stereotypes, and 'enabl[ing] [students] to better understand persons of different races.").

[23] *Id.*

[24] This Article defines a "holistic" admissions policy as one where various factors, from academic achievement to extracurricular activities related to race, are subjectively considered together and weighed by admissions reviewers to make admissions decisions. This can be contrasted with an admissions system which gives fixed weights to those various factors and applies objective, mechanical formulas to determine who should be admitted. *Compare Grutter*, 539 U.S. at 306 (2003) (upholding University of Michigan Law School admissions policy, which used race as a flexible, individualized plus factor, as part of a holistic admissions process) *with* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down University of Michigan undergraduate admissions policy for College of Literature, Science, and the Arts, which used a mechanical point system that automatically awarded 20 points (on a 150 point scale) to all self-identifying underrepresented minority applicants). For further description of how holistic admissions processes work, see Scott Jaschik, *How They Really Get In*,

the race-conscious mechanical point system struck down in *Gratz v. Bollinger*.[25] The holistic admissions plan upheld in *Grutter* facilitates the race-conscious educational benefits articulated by the Court,[26] in a manner not readily replicable by race-neutral alternatives.[27]

The Supreme Court has reaffirmed this diversity interest in several cases now, and Justice Anthony Kennedy—the Court's current swing vote—has articulated his support for diversity as a compelling interest in various majority, concurring, and dissenting opinions.[28] Additionally, in *Bakke*, *Grutter*, and *Fisher*, the Court also gave deference to universities in defining their own educational missions to incorporate the compelling interest in diversity.[29] This deference, in

INSIDE HIGHER ED (Apr. 9, 2012), https://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions; Rachel Rubin, *Who Gets In and Why? An Examination of Admissions to America's Most Selective Colleges and Universities*, 2 INT'L EDUC. RES. 1 (2014), http://www.todayscience.org/IER/article/ier.v2i2p01.pdf.

[25] *Id.* *See also Fisher*, 133 S. Ct. at 2416 ("In *Grutter*, the Court upheld the use of race as one of many 'plus factors' in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.").

[26] *See* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 494–95 (2012) (explaining how *Grutter*'s compelling interest in diversity is related to its narrow tailoring principles).

[27] *See infra* Part II.B.

[28] *See Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) ("The [*Bakke* concurring] opinion by Justice Powell, in my view, states the correct rule for resolving [*Grutter*] . . . Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission . . . . Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task . . . ."); *Id.* at 392–93 (Kennedy, J., concurring) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity . . ."); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."); *Fisher*, 133 S. Ct. at 2418 (2013) ("The attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes . . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. . . . In *Grutter*, the Court reaffirmed [Justice Powell's] conclusion that obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'") (internal citation ommitted).

[29] *Fisher*, 133 S. Ct. at 2419 ("[A] university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'") (quoting

conjunction with the specific educational benefits of diversity espoused by the Court, allows universities to define and implement their educational missions in a manner that facilitates defense of race-conscious admissions. They can take advantage of the broadly-defined compelling interest in diversity and narrowly tailor their race-conscious policies and programs to various aspects of this diversity interest. *Fisher* requires universities to do so, and this Article argues that universities can meet this requirement if they embrace race-consciousness more broadly in their educational missions.[30]

Part I focuses on the broadly-defined compelling interest in diversity upheld in *Grutter* and reinforced in *Fisher*. This Part argues that unlike remedial rationales for race-conscious policies, the compelling interest in diversity has no inherent time limit and no inherent ceiling. It further argues that the notion of "critical mass" of minority students—accepted as a "limit" by both parties in *Fisher*[31]—cannot adequately serve this role: the Supreme Court did not even try to apply "critical mass" as a limiting principle in *Fisher*. This Part also contends that *Grutter* and *Fisher*'s articulation of the diversity interest can readily justify race-consciousness in admissions and in university activities: it includes educational benefits such as "lessening of racial . . . stereotypes";[32] "promot[ing] cross-racial understanding";[33] "enabl[ing] [students] to better understand persons of different races";[34] and also policies and programs designed to ameliorate

Grutter, 539 U.S. at 328); *see also infra* Part III.A (discussing First Amendment basis for deference to universities in Justice Lewis Powell's *Bakke* opinion).

[30] The goal of this Article is to aid universities in defending race-conscious admissions policies in light of *Fisher*. This Article does not attempt to resolve the tension in Supreme Court's doctrine between the broad diversity interest and the call for race-neutrality. This tension is likely a result of compromises between various Justices on the Court, in conjunction with the Court's need to maintain institutional legitimacy. *See supra* note 2; Boddie, *supra* note 7 ("*Fisher* may suggest that the Court has become concerned about its institutional legitimacy and, therefore, is now wary of issuing sweeping decisions that depart radically from precedent.").

[31] The parties in *Fisher* agreed that "critical mass" was a conceptual limit on race-conscious admissions; they disagreed on whether UT had reached that limit with the Top Ten Percent Law alone. *See infra* Part I.B.2.

[32] *Fisher*, 133 S. Ct. at 2418. *See also Grutter*, 539 U.S. at 308 (holding that "substantial, important, and laudable educational benefits that diversity is designed to produce, include cross-racial understanding and the breaking down of racial stereotypes.").

[33] *Grutter*, 539 U.S. at 330 ("[T]he educational benefits that diversity is designed to produce . . . are substantial [and include] promot[ing] 'cross-racial understanding,' . . . break[ing] down racial stereotypes, and 'enabl[ing] [students] to better understand persons of different races'").

[34] *Id.*

minority students' feelings of isolation and tokenism.[35]

Part II illustrates how *Grutter* and *Fisher*'s narrow tailoring principles relate to the compelling interest in diversity. It argues that features of holistic admissions, such as individualized review and nuanced consideration of race, facilitate the diversity interest and necessitate race-consciousness to do so. Further, this Part illustrates that a holistic admissions policy with individualized review cannot be entirely race-neutral. It also contends that elite universities already place a de facto limit on their use of race in admissions, through their own academic selectivity. This de facto limit already precludes elite universities from attaining levels of racial diversity and related educational benefits which they may desire. For all of these reasons, *Fisher*'s call for stringent review of race-conscious admissions policies need not lead to their demise.

Part III illustrates how universities can use the broadly-defined compelling interest in diversity, facilitated by narrowly-tailored policies, to defend race-conscious admissions and highlight educational benefits that necessitate such policies. This Part first reviews the Supreme Court's deference to universities in defining their educational missions. It then focuses on two novel ways that universities can bring not only diversity, but race-consciousness itself in their educational missions: (1) emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and (2) highlighting the educational benefits of diversity and support for minority students that occur within race-conscious campus spaces,[36] such as residence halls devoted to African American experiences. These race-conscious goals underscore the need for race-conscious admissions policies to attain the educational benefits of diversity.

The Conclusion reiterates these points and also calls upon universities to embrace race-consciousness more broadly. Future defense of race-conscious admissions will require that universities be assertive about the importance of race, not only in their admissions processes, but also in their educational missions and activities in everyday campus life.

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[35] *Id.* at 319 (noting that minority students should not "feel isolated or like spokespersons for their race").

[36] This Article operationally defines a "race-conscious campus space" as a physical campus location or campus initiative or activity that focuses on racial identity, whether for a specified racial group or in a more general sense (i.e., a campus lecture or film series on race).

I. BROAD SCOPE OF THE COMPELLING INTEREST IN DIVERSITY

The Supreme Court has adopted a broad notion of the compelling interest in diversity,[37] allowing universities to incorporate race-consciousness in their educational missions in various ways. The Court has given deference to universities in defining their educational missions, while specifically noting educational goals that directly implicated race: lessening racial stereotypes, facilitating cross-racial dialogue, and mitigating feelings of isolation and tokenism among minority students.[38] These are all important undertakings that facilitate the educational benefits of diversity, and there is no reason to believe their importance will diminish in the foreseeable future.

A. Educational Benefits of Diversity: What are the Limits?

"Super-precedent"[39] is how Professor Mark Kende describes Justice Lewis Powell's concurring opinion in *Regents of the University of California v. Bakke*,[40] which first articulated and endorsed the compelling interest in diversity in 1978. Professor Kende notes that Justice Powell's *Bakke* opinion "has shown stunning vitality given its original fragility."[41] Although no other Justice joined Justice Powell in

[37] Justice Clarence Thomas noted this in his *Grutter* dissent, where he states that the "compelling state interest . . . [in diversity] . . . is actually broader than might appear at first glance."). *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting).

[38] *See supra* notes 21–23.

[39] Mark Kende, *Is* Bakke *Now a 'Super-Precedent' and Does It Matter? The U.S. Supreme Court's Updated Constitutional Approach to Affirmative Action in* Fisher, 16 U. PA. J. CONST. L. HEIGHT. SCRUTINY 15, 16–17 (2013), *available at* https://www.law.upenn.edu/live/files/2626-kendefinal-16upajconstlonline15.pdf (defining super precedent as a "doctrinal, or decisional foundation for subsequent lines of judicial decision . . . that take[s] on a special status . . . as [a] landmark opinion, so encrusted and deeply embedded in constitutional law that [it] . . . become[s] practically immune to reconsideration and reversal.") (quoting Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006)).

[40] 438 U.S. 265, 311–12 (1978) (Powell, J., concurring) ("[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."). Justice Powell stated that while racial set-asides were unconstitutional, race could be used as an individual "plus" factor for applicants, in order to achieve the compelling interest of attaining the educational benefits of diversity. *Id.* at 317 ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file . . . [and] . . . does not insulate the individual from comparison with all other candidates for the available seats."). Justice Powell cited Harvard College's admissions program as a model for a constitutionally permissible race-conscious policy. *Id.* at 316 ("Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups . . . [but] [i]n Harvard College admissions the Committee has not set target-quotas for the number of blacks . . . .").

[41] Kende, *supra* note 39, at 18.

Bakke, his opinion set the framework for implementing and evaluating race-conscious admissions policies—particularly the educational benefits of diversity that constitutionally justify such policies.[42]

Twenty-five years after *Bakke*, Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger* both affirmed and provided the most elaborate discussion of the diversity interest in Supreme Court jurisprudence.[43] Professor Devon Carbado identifies eight benefits of diversity that Justice O'Connor espouses in her *Grutter* majority opinion: diversity serves to "[1] promote speech and the robust exchange of ideas . . . [2] effectuate the inclusion of underrepresented students . . . [3] change the character of the school . . . [4] disrupt and negate racial stereotypes . . . [5] facilitate racial cooperation and understanding . . . [6] create pathways to leadership . . . [7] ensure democratic legitimacy . . . [and] . . . [8] prevent racial isolation and alienation[.]"[44] *Grutter*'s articulation of the diversity interest, which was affirmed in *Fisher*,[45] shows how the educational benefits of diversity for society are long-term, occur at the societal and campus/classroom levels, and are tied to race in a nuanced manner.

These benefits—now thrice adopted by the Supreme Court as a compelling interest[46]—have no obvious or intuitive end point. At the Supreme Court oral argument in *Fisher*, Chief Justice Roberts pressed UT counsel Gregory Garre on the "logical end point" of race-conscious

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[42] *Id.* at 18 ("Hundreds of educational institutions, workplaces, and lower courts have adopted programs modeled on [Justice Powell's *Bakke*] opinion.").

[43] *See supra* notes 33–35. Of course, there are also many social science studies and reports that examine the educational benefits of diversity. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); Expert Witness Report of Patricia Y. Gurin, at 12, Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-75321), 1998 WL 35140040, reprinted in 5 MICH. J. RACE & L. 363 (1999); Patricia Gurin, Biren A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. OF SOC. ISSUES 17 (2004); Brief for Am. Educ. Research Ass'n et al. as Amicus Curiae Supporting Respondents, Fisher v. Texas, 133 S. Ct. 2411 (No. 11-345).

[44] Devon Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1145–46 (2013). For a broader discussion of diversity, as distinguished from remedial justifications for affirmative action, see Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE L. 75 (2012).

[45] *See supra* notes 28–29.

[46] *See supra* notes 28–29, 33–35, 40.

admissions,[47] but Mr. Garre did not have an adequate answer.[48] Neither the oral argument nor the *Fisher* opinion itself, shed light on any such "logical end point."[49]

There are two different ways[50] to think about a potential limit on the compelling interest in diversity that would serve as such a "logical end point." First, there could be time in the future when diversity is no longer a compelling interest, such that using race in admissions is not constitutionally justified. This would constitute a temporal endpoint for the diversity interest itself. Second, there could be a particular level of the educational benefits of diversity which, if attainable by race-neutral means, would also constitutionally proscribe use of race. This would be a "ceiling" on diversity interest—or at least on the amount of diversity benefits compelling enough to justify use of race-conscious admissions policies.

The first of these—a temporal end point for the diversity interest—seems unlikely. If diversity is a compelling interest now, it would probably be even more so in the future, as American society becomes more diverse and the global economy becomes more prominent. Given the Supreme Court's repeated affirmation of the diversity interest, a time limit for diversity's educational benefits does not follow from either socio-historical trends or legal precedent.[51]

The second potential limit—a "ceiling"—was the basis of the Plaintiffs' claim in *Fisher*: they contended that UT had attained a "critical mass" of minority students by race-neutral means and thus did not need to use race-conscious admissions to attain the educational benefits of diversity.[52] Not surprisingly, this issue came up during the

[47] Transcript of Oral Argument, at 47, Fisher v. Texas, 133 S. Ct. 2411 (2013) (No. 11-345). *See also* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) ("[R]ace-conscious admissions policies must be limited in time. . . . [A]ll governmental use of race must have a logical end point.").

[48] Mr. Garre only offered that such an end point would occur when "underrepresented minorities . . . do not feel like spokespersons for their race, . . . [where] an environment where cross-racial understanding is promoted, . . .[and] educational benefits of diversity are realized[.]" Transcript of Oral Argument, *supra* note 47, at 49. Given that race-conscious admissions policies would be in place to help attain these goals (whenever in the future they might be attained), Mr. Garre's response did not address how a university would maintain these educational benefits of diversity without race-conscious policies at any time in the future.

[49] *See infra* Part I.B.2; Vinay Harpalani, Fisher*'s Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57, 58–66 (2013).

[50] *See* Harpalani, *supra* note 26, at 503 n.172.

[51] Of course, a change in Supreme Court composition could affect the diversity interest, but it would require the Court to overturn several of its relatively recent opinions. *See supra* notes 28–29, 33–35, 40.

[52] *See infra* Part I.B.

Supreme Court oral argument in *Fisher*, when Chief Justice Roberts intensely questioned Mr. Garre about "critical mass" and the "logical end point" of UT's race-conscious admissions policy.[53] Nevertheless, the Supreme Court's *Fisher* opinion did not rely on "critical mass" or provide further guidance on a limit to the diversity interest. Under the *Grutter/Fisher* diversity framework, it would be exceedingly difficult to define one.

1. Temporal End Point?: "Ageless into the Future"

At the societal level, Justice O'Connor noted student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[54] Justice O'Connor also highlighted the importance of student diversity for success in an "increasingly global marketplace[,]"[55] and for the military to assure American's national security interests.[56] The *Grutter* majority thus concluded that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[57]

All of these reasons to pursue diversity and its educational benefits will be valid into the foreseeable future: they will probably become even more important as America becomes a more diverse society. The compelling interest in diversity is different from other compelling state interests such as national security emergencies,[58] because diversity is not inherently limited in time and scope—the compelling interest does not end once the emergency passes. Prior to *Grutter*, in *Wygant v.*

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[53] *See supra* notes 47–49.

[54] Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting Brief for American Educational Research Association et al. as Amici Curiae 3).

[55] *Id.* at 308 ("[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

[56] *Id.* at 331 ("[H]igh-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.").

[57] *Id.* at 332. *See also* Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J., concurring) ("[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."). *See also* Carbado, *supra* note 44, at 1145–46 (listing societal and campus/classroom benefits of diversity in Justice O'Connor's *Grutter* majority opinion).

[58] Fisher v. Texas, 133 S. Ct. 2311, 2423 (2013) (Thomas, J., concurring) ("[T]he Court [has] recognized that protecting national security may satisfy [the] exacting standard [of strict scrutiny].") (citing Korematsu v. U.S., 323 U.S. 214, 217–18 (1944)).

Jackson Board of Education[59] and *City of Richmond v. J.A. Croson Co.*,[60] the Supreme Court struck down race-conscious policies that were rooted in broad, remedial rationales rather than diversity. The *Croson* Court limited remedial rationales to "the 'focused' goal of remedying "wrongs worked by specific instances of racial discrimination."[61] It rejected "the remedying of the effects of 'societal discrimination,'"[62] as a compelling interest, because societal discrimination constituted "an amorphous concept of injury that may be ageless in its reach into the past."[63] The Court's distinction here was tied directly to the termination of the remedy: it is much easier to determine the "logical end point"[64] of a focused remedy for specific instances of discrimination than it is for a broad remedy of societal discrimination.

However, when upholding and defining the compelling interest in diversity, the *Grutter* majority did not follow this reasoning. Just as societal discrimination "may be ageless in its reach into the past,"[65] diversity is ageless in its reach into the future.[66] Justice O'Connor's *Grutter* opinion did state that as part of its narrow tailoring requirement, "all race-conscious admissions programs have a termination point."[67] However, as Professor Ronald Krotoszynski notes:

> We should expect that at some discrete time in the future efforts to remediate past discrimination, unlike diversity programs, will have some natural stopping point: when the contemporary effects of the past discrimination have been completely negated, when the contemporary effects of the past discrimination are so attenuated that nothing is left to remediate, or some combination of the two. On the other

[59] 476 U.S. 267 (1986).

[60] 488 U.S. 469 (1989).

[61] *Id.* at 497–98 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 308–09 (1978) (Powell, J., concurring)).

[62] *Id.* at 498 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 308–09 (1978) (Powell, J., concurring)).

[63] *Id.*

[64] *See supra* note 49.

[65] *Bakke*, 438 U.S. at 307.

[66] The Supreme Court also missed this point in its analysis of *Parents Involved*. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729 (2007) ("[W]orking backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent."). Here, the Court does not acknowledge the fact that even if the "level of diversity" could be identified and measured reliably and consistently, there is no logical end point when it can necessarily be achieved without race-conscious measures.

[67] Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (citing *Croson*, 488 U.S. at 510).

> hand, diversity programs should in theory be relevant so long as we believe that pluralism is relevant to the excellence and success . . .[68]

Unlike remediation for past government discrimination, the diversity interest has not been limited in scope by Supreme Court doctrine. In fact, *Grutter* and *Fisher* give deference to universities in defining their educational missions[69]—thus allowing them to espouse a broad notion of the educational benefits of diversity.

In a similar vein, Professor Stacy Hawkins contrasts remedial and aspirational aims initiatives and critiques *Grutter* for its "use of a remedial fit test for the aspirational diversity interest . . .":[70]

> [U]nlike a remedial goal, which once achieved cannot justify continued use of race-conscious measures, the diversity interest may in fact entail both achieving and maintaining diversity. . . . It is both logical and reasonable to presume that remedies entail finite goals. It is less logical and not altogether clear that the aspirational goals of diversity are as finite or circumscribed.[71]

The narrow tailoring requirement of strict scrutiny must be interpreted in a context-specific manner,[72] and a broader compelling interest such as diversity necessitates "broader" narrow tailoring principles. It is difficult to fashion or even conceive of a time-limited remedy for the diversity interest. In spite of its pressing desire to end

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[68] Ronald J. Krotoszynski, *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907, 936–37 (2010). ("If diversity is generally a good thing and, in any case, often demonstrably correlates positively to enhanced results, there should not be any need to sunset diversity programs . . . . Does anyone think that learning in an all-white, all-male college or university will ever be superior to learning in a comprehensively integrated environment? . . . If one viewed the law school's program in *Grutter*, at least with respect to race, as either remedial in nature or as a dual effort at both diversity and remediation, a sunset requirement would make perfect sense. After all, once a governmental entity has remediated the present effects of past discrimination, there would be no need for further remedial efforts. What we see, then, is that the Supreme Court itself tends to revert into a remedial mindset even when, in theory, discussing a diversity program."). *Id.* at 935–36.

[69] Fisher v. Texas, 133 S. Ct. 2411, 2419 (2013) ("[A] university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'") (quoting *Grutter*, 539 U.S. at 328).

[70] Hawkins, *supra* note 44, at 108.

[71] *Id.* at 110.

[72] *See Grutter*, 539 U.S. at 333–34 ("[T]he contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. LAW REV. 517, 518 ("[T]he narrow tailoring requirement has always had multiple dimensions.").

race-conscious policies, the Supreme Court has not resolved this incongruity in its own doctrine.[73] Nevertheless, universities can draw upon the broad diversity interest to defend their continued use of race-conscious admissions policies.[74]

2. Ceiling: How Much Diversity is Enough?

In addition to lacking an intuitive time limit, the compelling interest in diversity also lacks an intuitive "ceiling"—a limit on amount of diversity for which race-conscious policies are allowable.[75] Professor Ian Ayres and Sydney Foster argue that narrow tailoring should allow only the "minimum necessary preference" based on race to attain the educational benefits of diversity,[76] but even they acknowledge that "[i]t is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action."[77] There is no obvious point at which greater diversity no longer yields additional benefits.

In theory, it may be possible to define a diversity ceiling by reference to a diminishing returns principle. As I argue in one of my prior articles, "given the time and space constraints, students cannot experience all perspectives and educational opportunities that might be available in classrooms and on campuses more generally."[78] After a

[73] Hawkins, *supra* note 44, at 107 (critiquing *Grutter* for "reflexive reliance on . . . traditional remedial analysis[,] . . . [and] . . . [s]uccumbing to . . . analytic trap . . . [of] appl[ying] the narrow tailoring standard developed in . . . the context of remedial affirmative action cases to . . . [the] . . . diversity interest"). There are different ways to resolve this doctrinal inconsistency. One could take the view, as Justice Thomas does, that for these reasons, diversity should not be a compelling interest. *Fisher*, 133 S. Ct. at 2423–24 (Thomas, J., concurring) ("*Grutter* was a radical departure from our strict-scrutiny precedents. . . . [T]here is nothing 'pressing' or 'necessary' about obtaining whatever educational benefits may flow from racial diversity."). Conversely, one could take the view that the Court should recognize that the compelling interest that justifies race-conscious admissions policies is not just diversity, but also partly remediation. *See* Krotoszynski, *supra* note 68, at 936–37. Under this view, the end point for race-conscious admissions policies would be elimination of the academic disparities that necessitate them. *See infra* Part II.D.2. Finally, one could offer a narrow tailoring test that specifically fits the diversity interest rather than remedial justifications; *See* Hawkins, *supra* note 44, at 111 (arguing that "Justice Powell's opinion in Bakke offers a useful model of the strict scrutiny analysis well-suited to the interest in diversity."). This Article does not suggest a specific doctrinal resolution: rather, it aims to guide universities in defending their race-conscious admissions policies given all of the inconsistencies in the current doctrine.

[74] *See infra* Part III.

[75] *See* Harpalani, *supra* note 26, at 503 n.172.

[76] Ayres & Foster, *supra* note 72, at 576.

[77] *Id.* at 583.

[78] Harpalani, *supra* note 26, at 527.

certain level, the costs typically associated with race-conscious admissions policies—"stigmatic harm" of using race,[79] the constitutional burden on non-minority applicants,[80] or the purported harm to minority students (i.e., "mismatch" theory)[81]—might outweigh any additional educational benefits of diversity.[82]

But the determination of this point would be largely arbitrary, contingent on subjective value judgments about the relative costs and benefits of attaining diversity at a particular institution.[83] Given the deference that *Grutter* and *Fisher* grant to universities in defining their educational missions, it is difficult to see how courts could fashion a judicially manageable standard to assess the costs and benefits of diversity across cases.

Of course, courts could try to set other artificial limits on the diversity interest that are more readily assessable. However, *Bakke* and *Grutter* both ruled that the most consistent and reliable method to

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[79] *See id.* at 487–89 ("In the Supreme Court's recent race jurisprudence, stigmatic harm can be understood as the [constitutional] harm that occurs when a government policy reinforces racial stereotypes."). This is different from specific, tangible harm to any individual; *see also Croson*, 488 U.S. 469, 493–94 (1989) ("Classifications based on race carry a danger of stigmatic harm . . . . [T[hey may . . . promote notions of racial inferiority and lead to a politics of racial hostility[.]"); *cf.* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about . . . . Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values . . . . [Such] harm is not concrete to particular individuals . . . [but] lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values.").

[80] *See* Grutter v. Bollinger, 539 U.S. 306, 341 (2003) ("To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'") (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting); *see also* Ayres & Foster, *supra* note 72, at 558 (discussing Grutter's "no-undue-burden requirement."); Harpalani, *supra* note 26, at 528–29 (discussing "undue burden" as a potential limiting principle on race-conscious admissions.).

[81] *See* RICHARD H. SANDER & STUART TAYLOR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012). For critiques of mismatch theory, see William Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEXAS L. REV. 895 (2014) (critiquing Sander & Taylor, *supra* note 81); Stacy L. Hawkins, *Mismatched Or Counted Out? How Mismatch Theory Is Incomplete, What's Missing, and Why It Matters*, 17 U. PA. J. CONST. L. 869 (2015).

[82] Harpalani, *supra* note 26, at 527.

[83] Professors Ayres and Foster do recommend such a cost-benefit analysis, but even they "recognize that the cost and benefit quanta are difficult to compare." Ayres & Foster, *supra* note 72, at 580.

measure diversity, proportional representation of minority students relative to some external locality, is "patently unconstitutional"—as is any numerical target for minority enrollment.[84] The one standard that courts could most consistently apply in judicial review is precisely the standard that the Supreme Court does not want them to apply.[85]

For this reason, the concept of a "critical mass" of minority students took center stage in the *Fisher* litigation—as a potential "ceiling" and limiting principle for race-conscious admissions. The parties agreed on "critical mass" as a standard: they argued about whether UT had enrolled a "critical mass" of minority students with the Top Ten Percent Law alone. Nevertheless, *Fisher* itself demonstrated that "critical mass" has not been defined precisely enough to work effectively as a limiting principle for race-conscious admissions policies.

B. Critical Mass Conundrum

The idea of a "critical mass" of minority students derives from the *Grutter* litigation and opinion. The *Grutter* majority elaborated on Justice Powell's articulation of the diversity interest—in a manner that implicates the nuanced benefits of race-consciousness on campus and in the classroom. In his *Bakke* concurrence, Justice Powell focused on race as one of many important student characteristics, stating that the compelling interest is "not an interest in simple ethnic diversity . . . [but rather] . . . encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[86] *Grutter*'s articulation of diversity interest incorporated this nuance, by introducing the concept of a "critical mass" of minority students—an idea that has generated much

[84] Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but 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."). *Id.*; *Grutter*, 539 U.S. at 329–30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' . . . That would amount to outright racial balancing, which is patently unconstitutional.").

[85] For a general explanation of why the Supreme Court has ruled proportional representation and numerical goals to be unconstitutional, see Harpalani, *supra* note 26, at 485–95.

[86] *Bakke*, 438 U.S. at 315 (Powell, J., concurring). This language was quoted twice in Fisher v. Texas, 133 S. Ct. 2411, 2418 (2013).

discussion and confusion.[87] "Critical mass" was supposed to be more nuanced than a numerical target, but at least in *Fisher*, it proved to be much more elusive as well.

1. "Critical Mass" and the Compelling Interest in Diversity

In articulating the meaning of "critical mass," Justice O'Connor noted that:

> [T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. . . . These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races."[88]

Accordingly, the *Grutter* majority concluded that: "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "minority viewpoint" but rather a variety of viewpoints among minority students."[89] Thus, *Grutter* tied the notion of "critical mass" directly to the educational benefits of diversity—specifically "promot[ing] cross-racial understanding" and "break[ing] down racial stereotypes."[90] Similarly, *Fisher* later described these benefits as "lessening of racial isolation and stereotypes[,]"[91] and "enabl[ing] [students] to better understand persons of different races."[92]

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[87] *See generally* Harpalani, *supra* note 49.

[88] *Bakke*, 438 U.S. at 330; *see also id.* at 308 (holding that "the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes . . . . Thus, the Law School has a compelling interest in attaining a diverse student body").

[89] *Id.* at 319–20. *See also id.* at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' . . . To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). This language in *Grutter* speaks to the immediate, proximal impact of having a critical mass but it still does not suggest how to determine if it is present—an issue that was at play in *Fisher*, but which the Supreme Court did not address in its *Fisher* opinion. *See infra* Parts II.B. and II.C.

[90] Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

[91] *Fisher*, 133 S. Ct. at 2418. *See also Grutter*, 539 U.S. at 308 (holding that "substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes").

[92] *Id.*

Additionally, the *Grutter* majority opinion did point to the trial phase of *Grutter*, where the University of Michigan Law School argued that "critical mass" does not imply any particular number or percentage, but rather "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race."[93] In this vein, the concept of "critical mass" ties the educational benefits of diversity to the feelings and experiences of underrepresented minorities on campus. As Professor Bennett Capers notes:

> [C]ritical mass is not solely numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group. It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard.[94]

Both the *Grutter* majority and Professor Capers recognized that in order to attain the educational benefits of diversity—breaking down racial stereotypes and facilitating cross-racial understanding—minority students cannot feel isolated or tokenized. One can thus view the compelling interest in diversity that justifies race-conscious admissions combining two related aspects: (1) Tangible educational benefits such breaking down stereotypes and promoting interactions between students of different races; and (2) Mitigation of feelings of isolation and tokenism among minority students, so that these educational benefits can occur. At the Supreme Court argument, both parties in *Fisher* focused on the latter.

2. Measuring Critical Mass: A Critical Mess

Both the *Fisher* Plaintiffs and UT agreed that a "critical mass" is attained when minority students no longer feel "isolated or like spokespersons for their race." The *Fisher* Plaintiffs combined numerical goals with the notion of critical mass. They contended that UT should define, ex ante,[95] specific numerical criteria for critical mass, such as a range or target enrollment where minority students are no longer isolated.[96] At oral argument, Plaintiffs' counsel Bert Rein

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[93] *Id.* at 319.

[94] I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 122–23 (2004).

[95] *See* Harpalani, *supra* note 49, at 59 (noting that Plaintiff's counsel Bert Rein "contended that specific numerical criteria for critical mass, such as a range or target enrollment where minority students are no longer isolated, should be defined ex ante by the University").

[96] Transcript of Oral Argument, *supra* note 47, at 19 (noting that Plaintiff's counsel Bert Rein argued that "having a range, a view as to what would be an

stated that absence of such a standard for critical mass was "a flaw in . . . *Grutter*[,]"[97] and asked the Court to require a judicially reviewable standard.[98] When Justice Sonia Sotomayor urged Mr. Rein to define the "standard of critical mass," asking him what "fixed number" is sufficient, Mr. Rein replied that it was "not [the Plaintiffs'] burden to establish that number."[99]

However, it is difficult to understand the *Fisher* Plaintiffs' view of critical mass as "a range" as distinct from a numerical goal/target (even if it is a flexible one). *Bakke* and *Grutter* proscribed such numerical goals,[100] and Justice Sotomayor pressed Mr. Rein on this point at the oral argument: "Boy, it sounds awfully like a quota to me that you shouldn't be setting goals, that you shouldn't be setting quotas . . . ."[101] It is not possible for university to know ex ante whether any particular number or percentage of minority students would significantly curb feelings of isolation among minority students. Such feelings of isolation, alienation, and tokenism depend on more than minority student numbers. While representation is important, student support services and resources, availability of minority faculty and staff mentors, and many other factors contribute to whether minority students feel isolated and marginalized.[102] Even if quotas were not

appropriate level of comfort, critical mass" is necessary for narrow tailoring of race-conscious admissions policies.).

[97] *Id.* at 13 (noting that Plaintiffs' counsel Bert Rein stated that not having working criteria for critical mass is "a flaw . . . in *Grutter*" and that the Supreme Court should "restate that principle.").

[98] *Id.*

[99] *Id.* at 16–17.

[100] Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) ("The Law School's interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin . . . [t]hat would amount to outright racial balancing, which is patently unconstitutional.") (citing Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

[101] Transcript of Oral Argument, *supra* note 47, at 20. *But see* Sheldon Lyke, *Catch Twenty-Wu? The Oral Argument in* Fisher v. University of Texas *and the Obfuscation of Critical Mass*, 107 NW. U. L. REV. COLLOQUY 209, 216 (2013) (arguing that "critical mass has both quantitative and qualitative elements" and that "contrary to Justice Sotomayor's claim[,] . . . goals and quotas are [not] synonymous[.]").

[102] *See* William C. Kidder, *The Salience of Racial Isolation: African Americans' and Latinos' Perceptions of Climate and Enrollment Choices with and without Proposition 209*, REPORT OF THE CIVIL RIGHTS PROJECT AT UCLA, at 13 (Oct. 2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder_Racial-Isolation_CRP_final_Oct2012-w-table.pdf ("Notwithstanding the complexities of racial climate and critical mass . . . data from leading research universities show that higher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action

unconstitutional, the *Fisher* Plaintiffs' view would be problematic.

Unlike the Plaintiffs, UT argued that critical mass should be measured ex post. UT argued that courts could review the presence of a critical mass via surveys on isolation felt by minority students and related criteria,[103] rather than determining it by an ex ante numerical goal. However, UT also did not offer any standard for measuring critical mass. When Chief Justice Roberts asked UT's counsel, Gregory Garre, "*Grutter* said there has to be a logical end point to your use of race[] . . . [w]hen will I know that you've reached a critical mass?"[104] Mr. Garre's response was that "we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race."[105] Further, he argued that courts could review university's determinations in this regard, by looking to surveys of students and other sources.[106]

Chief Justice Roberts did not seem impressed with this answer,[107] and contrary to the entire discourse in *Fisher*, attainment of a critical mass is not the logical end point for race-conscious admissions. First, even if the criteria noted by Mr. Garre could be reliably assessed,[108] they

ban is associated with a more inhospitable racial climate."); *Id.* at 5 ("The data lend support to the concept of 'critical mass' while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass."); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1233 (2010) (acknowledging "the power of creating critical mass and a diverse classroom" but noting that "stigma and racism . . . were still present"); Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDUC. REV. 659, 660 (2009) (examining the ways in which Latinas/os respond to racial microaggressions and confront hostile campus racial climates); JULIE J. PARK, WHEN DIVERSITY DROPS: RACE, RELIGION, AND AFFIRMATIVE ACTION IN HIGHER EDUCATION (2013) (analyzing impact of racial diversity on campus life).

[103] Transcript of Oral Argument, *supra* note 47, at 48.

[104] *Id.* at 46; Justice Sotomayor also asked Mr. Garre a similar question. *See id.* at 49 ("[W]hen do we stop deferring to the University's judgment that race is still necessary? That's the bottom line of this case.").

[105] *Id.* at 47.

[106] *Id.*

[107] *Id.* (Chief Justice Roberts snidely asking Mr. Garre, "So you, what, you conduct a survey and ask students if they fell racially isolated? . . . And that's the basis for our Constitutional determination?").

[108] *See, e.g.*, William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the* Fisher *Case*, 39 J.C. & U.L. 53, 63 (2013) ("The benefits associated with 'critical mass' are highly context-dependent and not amenable to a one-size-fits-all admissions target, but these benefits are no less real and measurable because they are manifest in the complex system of higher learning."). Chancellor Kidder's assertion about critical mass here also distinguishes between two different uses of the concept: (1) Universities' campus-specific determinations of diversity's benefits and minority students' needs, which this Article endorses (*see supra* note 102); and (2) Courts' use of critical mass as a generalizable standard to review the constitutionality of race-

do not signal any logical end point. If race-conscious policies were necessary to achieve a conducive, non-isolating environment for minority students in the first place, how would a university maintain such an environment if it stopped using those race-conscious policies? As Professor Hawkins notes, "the diversity interest may in fact entail both achieving and maintaining diversity."[109] UT's argument regarding critical mass and the "logical end point"[110] for race-conscious policies was not very logical,[111] and the entire *Fisher* litigation missed the important point of maintaining (as opposed to merely achieving) a critical mass[112]—which involves not only numerical representation of minority students, but also a conducive environment for these students.[113]

Second, it is likely that some percentage of minority students will feel "isolated or like spokespersons" for the foreseeable future, even if minority enrollment increases significantly.[114] In *Grutter*, the University of Michigan Law School did not actually contend that it had reached a "critical mass" of any minority group; rather, it contended only that its race-conscious admissions policy "seeks" to attain this "goal."[115] If

conscious admissions policies, which this Article critiques. *See also* Kidder, *supra* note 102, at 13 ("The data lend support to the concept of 'critical mass' while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass.").

[109] Hawkins, *supra* note 44, at 110.

[110] *See supra* notes 47–49 and accompanying text.

[111] *Cf.* Hawkins, *supra* note 44, at 107 ("It is both logical and reasonable to presume that remedies entail finite goals. It is less logical and not altogether clear that the aspirational goals of diversity are as finite or circumscribed.").

[112] To be fair to Mr. Garre and UT, Chief Justice Roberts misframed the question. *See supra* text accompanying note 104. If critical mass could be defined, then the logical end point of race-conscious admissions would not be when critical mass was merely attained, but rather when it could be both attained and maintained without using race.

Professor Elise Boddie argues that with careful assessment of campus social dynamics and demographics, a university may be able to operationally determine a numerical range that constitutes a critical mass and then stop using race in a given admissions cycle—once the number of admitted minority students falls within that range. Elise Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L 781, 817-18 (2015). Nevertheless, although this could be a limiting principle on race-conscious admissions—a ceiling of sorts—it would not be a logical end point. Race-conscious policies would resume at the beginning of each admissions cycle and continue until the critical mass is attained for that cycle. For further discussion of the logical end point of race-conscious admissions policies, see *infra* Part II.D.2.

[113] *See supra* notes 88–94, 102, 105–106, and accompanying text.

[114] *See supra* note 102 and accompanying text.

[115] *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("As part of its *goal* of 'assembling a class that is both exceptionally academically qualified and broadly diverse,' the Law School *seeks* to "enroll a 'critical mass' of minority students."')

the standard for "critical mass" is an environment where most minority students no longer feel isolated, then it is likely that no predominantly-White university has ever had a "critical mass" because studies suggest that many minority students still feel quite isolated and tokenized on college campuses.[116] The novelty of the college experience itself produces feelings of isolation among some students of all racial backgrounds—and such feeling may be exacerbated by the experiences of minority students. All of these suggest reasons to augment race-conscious policies, rather than to stop them.

Third, "critical mass" itself can vary between universities based on local demographics and politics, or based on the institution's history and educational mission, all of which are also evolving. It may also be different for different racial groups.[117] Universities can continue to argue that increasing minority enrollment brings them closer to a "critical mass" and that race-conscious policies serve to help minority students feel less isolated. "Critical mass," however, is an imprecise, hypothetical concept, and it would be difficult to devise a consistent standard to determine whether an institution has attained a "critical mass,"[118] or to apply any standard developed in one case to another. If universities themselves, with their expertise, cannot determine what a "critical mass" is, then how can courts use it as a test for the constitutionality of race-conscious admissions policies?

Measurement of the diversity interest, in this vein, does not present any judicially manageable standard.[119] Perhaps the most defining moment at the *Fisher* Supreme Court oral argument was when

(emphasis added). The University of Michigan Law School's brief in *Grutte*r also suggests that enrollment of a "critical mass" is a "hope" rather than an outcome it attains each year. *See* Brief for Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 at 13 ("[T]he Law School *hopes* that its policy will enroll a 'critical mass' of minority students.") (emphasis added). *See also* Harpalani, *supra* note 26, at 480–83.

[116] *See supra* note 102.

[117] *See* Fisher v. Texas, 631 F.3d 213, 238 (5th Cir. 2011), *rev'd*, 133 S. Ct. 2411 (2013) ("The educational benefits recognized in *Grutter* go beyond the narrow 'pedagogical concept' urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university."). *See also* Harpalani, *supra* note 26, at 479–83 (discussing "[w]hy critical mass can vary for different minority groups[.]").

[118] When *Fisher* was appealed to the Fifth Circuit, the amicus brief of the Mountain States Legal Foundation made a similar claim. *See* Brief for Mountain States Legal Foundation as Amicus Curiae, at 14, Fisher v. Texas, 631 F.3d 213 (5th Cir. 2011), *rev'd*, 133 S. Ct. 2411 (2013) ("[B]ecause critical mass cannot be quantified, no court is able to determine whether a critical mass is present or lacking.").

[119] *Cf.* Vieth v. Jubelirer, 541 U.S. 267 (2004) (holding that there is no judicially manageable standard to assess partisan gerrymandering of legislative districts).

Justice Antonin Scalia quipped, "[w]e should probably stop calling it critical mass . . . [and] . . . [c]all it a cloud or something like that."[120]

For these reasons, in spite of the prominence of "critical mass" at oral argument, the *Fisher* majority opinion did not define "critical mass" or rely on the concept in its ruling,[121] and it did not posit any other external measure of diversity. The Court merely deferred to universities to define their educational missions and related benefits of diversity, and it directed lower courts to stringently review whether race-conscious admissions policies were necessary to attain those benefits.[122] Consideration of *Fisher* on remand also did not shed any new light. Judge Patrick Higginbotham's opinion stated a characteristically obscure definition of critical mass:

> Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like spokespersons for their race. *Grutter* defines critical mass by reference to a broader view of diversity . . . .[123]

Predictably, Judge Emilio Garza, in dissent, critiqued UT for "fail[ing] to define [critical mass] in any objective manner,"[124] noting that "[a]t best the University's attempted articulations of 'critical mass' . . . are subjective, circular, or tautological."[125]

3. "Critical Mass" After *Fisher*

The important takeaway from *Fisher* is the Supreme Court opinion's direct emphasis on the educational benefits of diversity, including "lessening of racial isolation and stereotypes"[126] and

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[120] Transcript of Oral Argument, *supra* note 47, at 70–71. The courtroom erupted in laughter after Justice Scalia made this statement.

[121] The *Fisher* majority opinion only mentions the term "critical mass" twice. One such reference is at the beginning of Justice Kennedy's majority opinion: "[UT] has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a 'critical mass.'" Fisher v. Texas, 133 S. Ct. 2411, 2415 (2013). The other reference just notes that UT concluded that it "lacked a 'critical mass' of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program." *Id.* at 2416. The other *Fisher* opinions do not mention "critical mass" at all. In contrast, the *Grutter* majority opinion mentioned "critical mass" 15 times, and all of the *Grutter* opinions together mention "critical mass" 62 times. *See generally Grutter*, 439 U.S. 306 (2003).

[122] *See supra* notes 4–6.

[123] *Fisher*, 758 F.3d at 656.

[124] *Id.* at 661 (Garza, J., dissenting).

[125] *Id.* at 667 (Garza, J., dissenting).

[126] *Fisher*, 133 S. Ct. at 2418. *See also* Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (holding that "substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down

"enabl[ing] [students] to better understand persons of different races[,]"[127] rather than on a definition of critical mass. These educational benefits, not "critical mass" itself, are the key, as universities can draw from them in defining their educational missions.[128] Creating an operational definition of critical mass, including metrics to measure educational benefits and racial isolation, can be a useful part of this process[129] —but not to serve as a precise end point for narrow tailoring purposes. This Article thus argues that critical mass is merely a part of the compelling interest in diversity, not part of the narrow tailoring test for race-conscious admissions policies.[130]

II. HOLISTIC ADMISSIONS AND RACE-CONSCIOUSNESS

In addition to articulating the educational benefits of racial diversity as a compelling state interest, *Grutter* also laid out narrow tailoring principles for race-conscious admissions policies, and *Fisher* reaffirmed these.[131] *Grutter* held that "truly individualized consideration demands that race be used in a flexible, nonmechanical way."[132] The requirements for individualized review[133] and for flexible use of race in conjunction with other factors[134] are the hallmark of a

of racial stereotypes").

[127] *Grutter*, 539 U.S. 306, 330.

[128] *See infra* Part III.

[129] *See supra* notes 102, 108.

[130] *See* Harpalani, *supra* note 26, at 485 ("[C]ritical mass . . . is merely part of the definition of Grutter's compelling interest, not part of the narrow tailoring test for race-conscious admissions policies."). In its Fifth Circuit brief on remand, UT made a similar argument. *See* Brief for Appellees, at 45, Fisher v. Texas, 758 F.3d 633 (No. 09-50822). ("Fisher . . . specifically—and correctly—framed her critical mass arguments as *compelling interest* arguments."). *But see* Boddie, *supra* note 112, at 817-18 (suggesting that critical mass could be a narrow tailoring test for a given admissions cycle).

[131] *Fisher*, 133 S. Ct. at 2420 ("[I]t 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.'") (quoting *Grutter*, 539 U.S. at 337).

[132] *Grutter*, 539 U.S. at 337.

[133] *Id.* at 336–37. ("When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to 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. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.") (citing Regents of the University of California v. Bakke, 438 U.S. 265, 318 n.52 (1978) (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program.)).

[134] *Grutter*, 539 U.S. at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an

constitutionally permissible race-conscious admissions policy: these features distinguished the *Grutter* plan from the automatic point system struck down in *Gratz v. Bollinger*.[135]

Additionally, the Supreme Court's embrace of the University of Michigan Law School's holistic admissions plan in *Grutter*,[136] coupled with its rejection of the University's undergraduate point system in *Gratz v. Bollinger*,[137] illustrates the relationship between race-conscious policies and the tangible, educational benefits of racial diversity. *Grutter*'s requirement for individualized, flexible consideration of race also goes hand in hand with its notion of "critical mass," because unlike an automatic point system, such individualized, flexible review facilitates the admission of a "variety of viewpoints"[138] within racial groups.[139]

This Article, however, argues that these very requirements for individualized review and flexible consideration of race are in tension with *Grutter*'s other narrow tailoring principles: (1) preference for race-neutral alternatives;[140] and (2) gradual phase-out of race-conscious admissions policies,[141] both of which were reinforced even more

applicant might contribute to a diverse educational environment . . . [u]nlike the program at issue in *Gratz* v. *Bollinger* . . . the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity.").

[135] *Id. See also supra* notes 24–25.

[136] *See supra* note 24.

[137] *Id.*

[138] *See supra* note 89 and accompanying text.

[139] *See* Harpalani, *supra* note 26, at 494–95 (discussing how *Grutter*'s narrow tailoring principles facilitate diversity within racial groups in an admitted class).

[140] *Grutter*, 539 U.S. at 339 ("Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.").

[141] *Id.* at 342 ("[R]ace-conscious admissions policies must be limited in time . . . [i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."). Justice O'Connor's majority opinion also stated:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Id. at 343.

In the aftermath of *Grutter*, there was much scholarly debate on whether the 25 year period constituted a binding time limit on race-conscious admissions policies. *See, e.g.*, Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 201 (2003) (arguing that the *Grutter* majority opinion warns universities to phase out race-conscious admissions policies within 25 years or

strongly in *Fisher*.[142] First, even if they can attain similar numbers of minority students, race-neutral alternatives do not allow the nuanced consideration of race that the diversity interest entails. *Bakke*, *Grutter*, and *Fisher* all proclaimed that the "state interest that would justify consideration of race or ethnic background . . . is not an interest in simple ethnic diversity" that is served when "a specified percentage of the student body . . . [is] members of selected ethnic groups[.]"[143] Second, even if race-neutral alternatives could somehow achieve nuanced racial diversity beyond the numbers, it is still exceedingly difficult to eliminate race from a holistic admissions process with individualized review.[144] Third, universities are already placing a de facto limit on race-conscious admissions, based on their academic selectivity. Most universities would like more racial diversity, but they are only willing to compromise their academic selectivity to a certain extent.

have courts invalidate them); Boyce F. Martin Jr., *Fifty Years Later, It's Time to Mend Brown's Broken Promise*, U. ILL. L. REV. 1203, 1219 (2004) (arguing that *Grutter*'s 25 year prediction for end of race-conscious admissions was aspirational rather than binding.); Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 83 (2006) (arguing that "the twenty-five year expectation is problematic to the extent that it is understood as imposing a definite endpoint"). *But see* Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced* Grutter *and* Gratz, 92 KY. L.J. 241, 260 (2004) (viewing Grutter's 25 year prediction as a binding end point for race-conscious admissions). Nevertheless, both parties in *Fisher* agreed that the 25-year period was not a binding time limit. *See* Transcript of Oral Argument, *supra* note 47, at 11 (Plaintiff's counsel Bert Rein answering "No, I don't" to Justice Scalia's question, "do you think that *Grutter* held that there is no more affirmative action in higher education after 2028?"); *Id.* at 50 (UT counsel Gregory Garre noting that "we don't read *Grutter* as establishing that kind of time clock."). At the *Fisher* oral argument, Justices Antonin Scalia and Stephen Breyer at least hinted that the 25 year period was legally significant. *Id.* at 49 (Justice Scalia stating that *Grutter* "holds for . . . only . . . sixteen more years[.]"); *Id.* at 8 (Justice Breyer noting that "*Grutter* said it would be good law for at least 25 years[.]"). Later in oral arguments, Justice Breyer stated that he "agree[d] it might" be the holding of *Grutter* that there can be no race-conscious admissions policies after 2028. *Id.* at 11. However, Justice O'Connor also later suggested that 25 years was not a binding time limit on race-conscious admissions. *See* Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, *in* THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 58 (David L. Featherman, Martin Hall & Marvin Krislov eds., 2010) ("[T]hat 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028.").

[142] *See supra* text accompanying notes 4–6.

[143] Regents of the University of California v. Bakke, 438 U.S. 265, 315 (1978); *Grutter*, 539 U.S. at 324; Fisher v. Texas, 133 S. Ct. 2411, 2418 (2013).

[144] *See infra* Part II.C.2. *See also* Harpalani, *supra* note 49, at 69–72.

A. Individualized Review and Race-Neutral Alternatives

Bakke, *Grutter*, and *Fisher* all stated that the compelling interest in diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[145] Race can only be used "as one of many 'plus factors'" to determine "the overall individual contribution of each candidate."[146] Holistic, individualized review is thus necessary thoroughly consider all of the contributions of each applicant, not just race.

Percentage plans such as Texas's Top Ten Percent Law compromise this feature by automatically admitting applicants, based on high school rank, without any further review of their applications. *Grutter* explicitly rejected percentage plans as adequate race-neutral alternatives because:

> even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.[147]

Fisher did not abrogate or even address this aspect of *Grutter*. It merely remanded the suit for more stringent review, and on remand the Fifth Circuit upheld UT's plan, noting:

> Race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission. . . . [A] limited use of race is necessary to target minorities with unique talents and higher test scores to add . . . diversity . . . to the student body.[148]

But even if the remand ruling had found the Top Ten Percent Law to be an adequate race-neutral alternative, it would not have any judicial impact beyond Texas. The Texas legislature compelled UT to adopt such the Top Ten Percent Law plan, but there is no authority to

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[145] *Fisher*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 324–25 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., concurring)).

[146] *Fisher*, 133 S. Ct. at 2416.

[147] *Grutter*, 539 U.S. at 340. The *Grutter* majority also questioned how percentage plans could work for admission to graduate and professional schools. *Id.* (noting failure to explain how "'percentage plans,' recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State . . . could work for graduate and professional schools.").

[148] *Fisher*, 758 F.3d at 657.

suggest that courts—as opposed to state legislatures—can compel public universities to adopt such percentage plans: *Grutter* suggests precisely the opposite.[149]

For similar reasons, the *Grutter* majority also rejected lottery admissions plans, which would randomly admit applicants from a pool, even if they could achieve sufficient racial diversity—because they "would make . . . nuanced judgment impossible . . . [and] . . .would effectively sacrifice all other educational values, not to mention every . . . kind of diversity" other than representation of racial groups.[150] Similarly, *Grutter* stated that "lower admission standards for all students" would be a "drastic remedy" and would "sacrifice a vital component of . . . [a school's] educational mission."[151]

Individualized review thus facilitates aspects of the compelling interest in diversity[152] and related educational values that are precluded by many race-neutral alternatives, even if those alternatives can admit sufficient numbers of minority students. Perhaps even more significantly, the educational benefits of diversity articulated in *Grutter* and *Fisher* necessitate not only individualized review of applicants, but also flexible, individualized consideration of race itself.

B. Flexible, Individualized Consideration of Race

In addition to individualized review generally, *Grutter* specifically highlighted flexible, individualized consideration of race. The main feature that distinguished the *Grutter* plan from the one struck down in *Gratz* was that the University of Michigan Law School considered race in a flexible, individualized manner—differently for each applicant—rather than in the mechanical fashion of the undergraduate admissions policy, where exactly the same number of points were awarded to all minority applicants. The *Grutter* court further underscored this point when it noted that the compelling interest in diversity included "breaking down racial stereotypes" and

[149] *See supra* note 147 and accompanying text.

[150] *Grutter*, 539 U.S. at 340.

[151] *Id. But see id.* at 367–38 (Thomas, J., concurring in part and dissenting in part) ("[T]here is much to be said for the view that the use of tests and other measures to 'predict' academic performance is a poor substitute for a system that gives every applicant a chance to . . . succeed[.] . . . [T]he entire [admissions] process is poisoned by numerous exceptions to 'merit.' . . . [T]here is nothing ancient, honorable, or constitutionally protected about 'selective' admissions.").

[152] *Id.* at 337 ("[The] importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount. . . . [A] highly individualized, holistic review of each applicant's file . . . giv[es] serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

having a "variety of viewpoints" within each racial group.[153] Universities can only pursue this variety of perspectives through flexible, individualized review of applicants, based on the discretion of admissions officers.[154]

At the *Fisher* oral argument, Solicitor General Donald Verrilli, arguing in support of UT's policy, underscored these specific educational benefits noted in *Grutter*:

> Universities . . . are looking . . . to make individualized decisions about applicants who will directly further the education mission . . . [f]or example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has . . . mastered classical Greek.[155]

The Supreme Court's *Fisher* opinion described the compelling interest in diversity in terms of "lessening . . . racial stereotypes" and also deferred to universities on their educational missions, which can readily incorporate this goal.[156] Under *Grutter* and *Fisher*, so long as universities can provide a "reasoned, principled explanation" for seeking to admit individuals who defy racial stereotypes, courts should defer to the universities' judgment and allow them to use race-

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[153] *Grutter*, 539 U.S. at 330 ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."). *See also* Harpalani, *supra* note 26, at 477 (arguing that "critical mass refers to a sufficiently diverse group of perspectives within each racial group to actualize the educational benefits of diversity").

[154] *See* Carbado, *supra* note 44, at 1156 ("[I]ndvidualized review enables [discretion] . . . admissions officials have significant leeway to make . . . choices between and among students within the same racial group."). Professor Carbado also discusses various criteria that admissions officers could use to make such choices. *Id.* at 1147–58.

[155] Transcript of Oral Argument, *supra* note 47, at 60. *See also* Carbado, *supra* note 44, at 1181 ("Solicitor General Verrilli's response to Justice Alito highlights how the University of Texas might have made intraracial diversity a more central concern in the litigation."). This Article deals more with intraracial diversity in Part III.B, *infra*.

[156] Fisher v. Texas, 133 S. Ct. 2411, 2419 (2013) ("According to *Grutter*, a university's 'educational judgment that . . . diversity is essential to its educational mission is one to which we defer.' *Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' . . . that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that Grutter calls for deference to the University's conclusion, '"based on its experience and expertise,"' . . . that a diverse student body would serve its educational goals.").

conscious admissions policies, as necessary, to achieve this goal.[157] *Grutter* and *Fisher* both already provide such a "reasoned, principled explanation."[158] Thus, Solicitor General Verrilli's argument ties together the compelling interest (breaking down racial stereotypes) and narrow tailoring (flexible, individualized consideration of race) prongs of *Grutter* and *Fisher*. Such a linkage is the hallmark of a constitutionally viable race-conscious admissions policy.

Moreover, there is no race-neutral alternative that will allow identification of African American fencers or other individuals who explicitly defy racial stereotypes; by definition, any admissions policy that seeks to do so will have to consider race. Proxy measures such as socioeconomic status may be correlated with race, but standing alone, they will not allow universities to identify individuals who defy racial stereotypes. Until racial stereotypes themselves no longer exist, race-conscious policies will be needed to identify individuals who help break them down—and there is no reason to believe that racial stereotypes are going away any time soon.[159]

Solicitor General Verrilli's argument illustrates precisely why race-conscious admissions policies remain viable after *Fisher*. Courts might still inquire whether proxy measures, such as socioeconomic status, attendance at particular schools, family characteristics, or geographic criteria, might serve to produce sufficient racial diversity within student bodies. Unlike percentage plans and lotteries, using these measures does not compromise individualized review of applicants: in fact, universities already include these measures by universities in the individualized assessment of diversity, as potential "plus" factors in addition to race.[160] Whether use of these non-racial factors alone would produce sufficient numerical racial diversity is an empirical question:

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[157] *Id.*

[158] *See supra* notes 153–156 and accompanying text.

[159] *See* Vinay Harpalani, Racial Stereotypes and Achievement-Linked Identity Formation during Adolescence: An Investigation of Athletic Investment and Academic Resilience 1–26 (Aug. 2005) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania) (noting continuing prevalence and salience of racial stereotypes—particularly of stereotypes of Black Americans related to intelligence and athletic abilities); BRUCE EVAN BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 87 (2013) ("[T]hinking about other people in terms of their race is unavoidable.").

[160] *See supra* notes 145–146 and accompanying text.

studies suggest that it would not,[161] although this may vary by locality.[162] Nevertheless, even if these non-racial factors did by themselves significantly increase the numbers of minority students, they would still not fully serve the compelling interest in diversity articulated in *Grutter* and *Fisher*.[163] Using such proxy measures may allow universities to rely

[161] *See, e.g.*, THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 356 (2009) ("Without a doubt, class-based preferences cannot achieve the same ends as racial affirmative action."); Thomas J. Kane, *Race and Ethnic Preferences in College Admissions*, *in* THE BLACK-WHITE TEST SCORE GAP 431, 448 (Christopher Jencks & Meredith Phillips eds.) (1998) ("[C]lass is a very poor substitute for race for selective colleges seeking racial diversity."); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 153 (Richard D. Kahlenberg ed., 2004) ("[I]ncome-based policies are not an effective substitute for conscious racial and ethnic enrollment targets."); Julie J. Park, Nida Denson and Nicholas A. Bowman, *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 AM. EDUC. RESEARCH J. 466, 467 (2013) (finding "that both socioeconomic and racial diversity are essential to promoting a positive campus racial climate and that racial and socioeconomic diversity, while interrelated, are not interchangeable."). *See also* sources cited *supra* note 102.

[162] *See* Kahlenberg, *supra* note 20, at 26–61 (discussing impact of state university bans on race-conscious admissions policies on minority student enrollment). Mr. Kahlenberg finds that through a combination of recruitment and use of socioeconomic criteria and proxies for race as admissions factors, universities in Washington, Florida, Georgia, and Nebraska have been able to recover to prior levels of Black and Latina/o enrollment, after experiencing initial drops in minority enrollment after bans on race-conscious admissions. However, it is unclear how much this recovery is due to demographic changes in the states (particularly the growing Latina/o populations), rather than the efficacy of race-neutral alternatives. Additionally, state universities in Washington and Nebraska had low numbers of Black and Latina/o students even before enacting their bans (owing to the low percentage of minorities in the state population overall). Recovery using recruitment and race-neutral factors in those states did not require much, and these universities may never have approached a "critical mass" of minority students to begin with. Even Justice Scalia agreed that regardless of a state's demographics, a very low percentage of minority students on campus does not constitute a critical mass. *See* Transcript of Oral Argument, *supra* note 47, at 15 (Justice Scalia stating "Why don't you seriously suggest that demographic—that the demographic makeup of the state has nothing to do with whether somebody feels isolated, that if you're in a state that is only 1 percent black that doesn't mean that you're not isolated, so long as there's 1 percent in the class? . . . I wish you would take that position because it seems, to me, right."). Moreover, in 15 years, the flagship public universities in California (UC Berkeley and UCLA) have not recovered to the levels of minority enrollment that they had before California's ban on race-conscious admissions, in spite of a significant increase in the minority population of California. *See* Kahlenberg, *supra* note 20 at 36, 38. Also, it appears that proscription of race-conscious admissions policies may have a larger impact on more elite universities that draw a national student body. *See* ESPENSHADE & RADFORD, *supra* note 161, at 464–65 (private institutions) and 480–81 (public institutions).

[163] *Fisher*, 133 S. Ct. 2411, 2418 (noting that compelling interest is "not an interest in simple ethnic diversity . . . [but rather] . . . encompasses a far broader array of

less on race, but for specific and nuanced identification of individuals who defy racial stereotypes, it is—by definition—also necessary to consider race itself.

C. What Does "Race-Neutral" Mean in an Admissions Process?

Holistic admissions policies implicate other questions that relate to the very legal definitions of race-consciousness and race-neutrality. The *Fisher* Plaintiffs raised one such issue with their claim that race was too small of an admissions factor at UT to serve the diversity interest. A related issue—one that courts will likely have to deal with—is whether race can ever be completely removed from a holistic admissions plan. Both of these issues speak to the importance of race-consciousness.

1. Can Race Be Too Small of A Factor to Serve the Diversity Interest?

In *Fisher*, the Plaintiffs actually claimed that race had "an infinitesimal impact" on UT admissions:[164] too small to be constitutional because it did not contribute enough to the educational benefits of diversity.[165] The Plaintiffs argued "UT is unable to identify any students who were 'ultimately offered admission due to their race who would not have otherwise been offered admission.'"[166] Similarly, in his *Fisher* remand dissent, Judge Garza contended that "[i]f race is indeed without discernible impact, the University cannot carry its

qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

[164] *See* Brief for Petitioner, *supra* note 10, at 38–39 (arguing that "admissions statistics confirm that [UT's] decision to classify . . . applicants by race has 'had an infinitesimal impact on critical mass in the student body as a whole.'").

[165] *Id.* (arguing that "where racial classifications have only a 'minimal impact' in pursuing a compelling interest, it 'casts doubt on the necessity of using racial classifications' in the first instance . . . [.]") (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734 (2007)). *See also* Ayres & Foster, *supra* note 72, at 517, 523 n.27 ("At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest."). Justice Kennedy asked Plaintiff's counsel, Bert Rein, "[W]hat's the problem" with the "University's race-conscious admission plan . . . [admitting] . . . so few minorities" and noting that he "had trouble with that [argument] reading the brief." *See* Transcript of Oral Argument, *supra* note 47, at 22. Justice Kennedy then answered his own question by suggesting that UT "shouldn't impose this hurt or injury [of using race] . . . for so little benefit[,]" and Mr. Rein agreed. *Id.* at 23.

[166] *See* Brief for the Petitioner, *supra* note 10, at 38–39. *But see* Transcript of Oral Argument, *supra* note 47, at 64 (Chief Justice Roberts asking the Solicitor General if he "agree[s] that [race] makes a difference in some cases[,]" to which the Solicitor General responded "[y]es, it does.").

burden of proving that race-conscious holistic review is necessary to achieving . . . diversity."[167]

Throughout the *Fisher* litigation, there has been a dispute (ultimately unresolved) about whether UT's race-conscious policy actually led to the admission of any minority students who would not have been admitted absent the use of race.[168] In any case, however, there are flaws with the *Fisher* Plaintiffs' arguments and Judge Garza's contention.

First, *Grutter* does not state that a race-conscious policy can be too small to be constitutional, and it actually implies the opposite. Under *Grutter,* universities should gradually phase out race-conscious policies and use race-neutral alternatives "as they develop."[169] Justice O'Connor and the majority understood that such a gradual process would be necessary, as universities cannot eliminate race-conscious policies all at once, when some magic "critical mass" is obtained.[170] A logical

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[167] *Fisher*, 758 F.3d at 672 (Garza, J., dissenting).

[168] *See also* Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. 113, 115 (2012) ("Fisher does not claim that racial consideration . . . necessarily doomed her prospects. No evidence supports that position. The record shows that a total of 216 black and Latino applicants gained acceptance to UT through holistic review in 2008, when Fisher unsuccessfully applied to UT. The plaintiff concedes that race played no role in the admission of 183 of those 216 students . . . [t]he record is inconclusive on whether [the remaining] thirty-three black and Latino students benefitted from race."). *But see Fisher*, 133 S. Ct. at 2431 (Thomas, J., dissenting) ("In the University's entering class of 2009 False . . among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile . . . . Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991."). Nevertheless, even the *Fisher* Plaintiffs contended that these disparities did not necessarily make a difference in the admission of any students. The data cited by Justice Thomas combined both the race-neutral (Academic Index) and race-conscious (Personal Academic Index) components of UT's holistic admissions policy. *See supra* Part II.A.3. Moreover, similar academic disparities existed for students admitted via the race-neutral Top Ten Percent Law. For the UT entering class of 2009, among students automatically admitted via the Top Ten Percent Law, White students (n=2508) had a mean SAT score of 1864; African American students (n=297) had a mean SAT score of 1584; Asian American students (n=1101) had a mean SAT score of 1874; and Hispanic students (n=1256) had a mean SAT score of 1628. UNIV. OF TEX. OFF. OF ADMISSIONS, IMPLEMENT. AND RESULTS OF TEX. AUT. ADMISSIONS LAW, (HB 588) AT UNIV. OF TEXAS, SEC. 1: DEMOGRAPHIC ANALYSIS OF ENTERING FRESHMEN, FALL 2010, at 14 tbl. 7, http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf [hereinafter *UT Results of Automatic Admissions Law Report*].

[169] Grutter v. Bollinger, 539 U.S. 306, 342 (2003) ("Universities . . . can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop.").

[170] *See supra* notes 108–112 and accompanying text.

consequence of this is that at some point, a university's use of race will be very small but still be constitutional.[171]

Second, *Grutter* actually contemplated that admission of small numbers of applicants who defy racial stereotypes would facilitate the educational benefits of diversity; Solicitor General Verrilli articulated this stance at the *Fisher* oral argument.[172] Additionally, a small number of minority students can meaningfully impact diversity on campus. They may form student organizations and sponsor events related to diversity, or they may increase representation in majors and programs where minority students are especially underrepresented.[173] In fact, the whole point of a holistic admissions policy with individualized review is to identify applicants who will have a significant individual impact on the educational benefits of diversity.[174] *Grutter* and *Fisher*'s very emphasis on individualized consideration[175] underscores the notion that even one individual can contribute significantly to the educational environment of a university.

Third, even if courts read the diversity interest more narrowly, there are other practical problems with the *Fisher* Plaintiffs' contention that a race-conscious admissions policy can have too small of an impact. Absent a university's admission that it uses race or some other conclusive evidence, it is the impact of race that ultimately must be detected to enforce any proscription on the use of race.[176] If the impact

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[171] Universities will approach this point when there is reduction in disparities between minority and non-minority applicants on grades and standardized test scores. *Cf. infra* Part II.D.2.

[172] *See supra* note 155 and accompanying text.

[173] *See* Harpalani, *supra* note 26, at 532–33 ("It is possible that a race-conscious policy that admits only a small number of minority students can have a meaningful, unique impact if those students add to the diversity of viewpoints and experiences in a manner beyond the race-neutral policy. The admission of even small numbers of African American and Latina/o students from certain majors, or from more competitive schools, would be justifiable if minority students in those majors were not admitted sufficiently via [Texas's] Top Ten Percent Law, as would the admission of small numbers of Native American students via a race-conscious admissions policy.").

[174] *See supra* notes 155–163 and accompanying text.

[175] Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (noting that to use race-conscious policies "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual . . ."); Fisher v. Texas, 133 S. Ct. 2411, 2418 ("[A] race-conscious admissions program . . . must . . . 'ensure that each applicant is evaluated as an individual . . .'") (quoting *Grutter*, 539 U.S. at 337)).

[176] *See* Sander & Taylor, *supra* note 81, at 158 (contending that after Proposition 209 (California's constitutional ban on race-conscious policies) was passed in 1996, faculty in University of California system "spoke of the feasibility of evasion" for "small programs," where "[t]he number of students was so small, and the criteria for selection so subjective, that outside investigators could not easily detect racial discrimination."). Professors Sander and Taylor also note that "[f]or larger programs, such as law schools

is too small to be detected, then there can be no enforcement of such a proscription: it makes no sense to "smoke out" statistically negligible use of race. This leads to another important question about holistic admissions plans: can race ever be completely removed?

2. Can Race be Completely Removed From a Holistic Admissions Plan?

Even if the Supreme Court proscribed race-conscious policies, by overturning *Grutter*, would race be eliminated from the admissions process? Consider another "race-neutral" alternative that universities might use: personal statements and diversity essays, rather than the separate and explicit consideration of race on applications. In practice, this would mean that applicants would no longer check a box that identifies their racial background—or at least that information from any such checked box is not used in the admissions process. Such an admissions policy is holistic and *Grutter*-like in every way, except that there is no explicit consideration of race as a "plus" factor.[177]

Applicants, however, could articulate their potential contributions to diversity, including their racial backgrounds, in a separate essay or personal statement. Holistic admissions policies typically involve such essays and personal statements, regardless of whether race is an explicit admissions factor. At the *Fisher* oral argument, Chief Justice Roberts noted the fact that "race is the only one of [UT's] holistic factors that appears on the cover of every application."[178] But even if race did not "appear on the cover of every application," it may be discerned in other ways. An applicant's personal statement and essays, along with references to student group membership (in groups such as the Black Student League), may provide strong cues that signal the applicant's racial background. Basic information such as the applicant's school or place of residence, or just the applicant's name,[179] could also be highly correlated with

or business schools, that would obviously be more difficult." *Id.*

[177] UT's supplemental holistic admissions policy operated in this manner between the Fifth Circuit's ruling in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) and the abrogation of *Hopwood* by *Grutter*. *See Fisher*, 758 F.3d at 645 ("The legislature adopted a Top Ten Percent Plan that left a substantial number of seats to a complementary holistic review process. Foreshadowing *Grutter*, admission supplementing the Top Ten Percent Plan included factors such as socio-economic diversity and family educational achievements but, controlled by *Hopwood*, it did not include race. In short, a holistic process sans race controlled the gate for the large percent of applicants not entering through the Top Ten Percent Plan.").

[178] Transcript of Oral Argument, *supra* note 47, at 54.

[179] *See* Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767 (2004); Gratz v. Bollinger, 539 U.S. 244, 304 (2003)

racial group membership.

Consequently, as Justice Ruth Bader Ginsburg has warned, even if admissions committees are forbidden from considering race as discerned through these criteria, they may do so surreptitiously—"resort[ing] to camouflage."[180] Admissions reviewers can use all of the application components mentioned above to discern racial information and admit more minority applicants through "winks, nods, and disguises."[181] A holistic admissions plan inherently considers race, even if there is no explicit "plus" factor allowed,[182] because race can come into play through other holistic factors that are considered.

Thus, even if the Supreme Court banned the use of race as a plus factor, admissions committees could still access and use information about applicants' racial background. Statistical evidence might establish large scale use of race-conscious policies: in both *Bakke* and *Grutter*, the Plaintiffs submitted such evidence of disparities in grades and test scores between admitted minority and non-minority students.[183] But no such evidence was presented in *Fisher*, as noted

(Ginsburg, J., dissenting) (noting that without affirmative action, "applicants may highlight . . . Hispanic surnames . . .").

[180] *Fisher*, 133 S. Ct at 2433 (Ginsburg, J., dissenting) ("As for holistic review, if universities cannot explicitly include race as a factor, many may 'resort to camouflage' to 'maintain their minority enrollment.'").

[181] *See Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting) ("One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans. . . . Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished[.] . . . If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

See also Gratz, 539 U.S. at 298 (Souter, J., dissenting) ("Equal protection cannot become an exercise in which the winners are the ones who hide the ball.").

[182] *Cf.* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1146 (2008) (exploring unconscious racial biases in admissions and raising "the question of whether race can in fact be eliminated from admissions processes"); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management At UC-Berkeley, UT-Austin, and UW-Madison*, 32 L. & SOC. INQUIRY 985, 1015 (2007) ("[T]he line between race-based and race-blind policy making can be quite blurry.").

[183] *See* Regents of the University of California v. Bakke, 438 U.S. 265, 277 n.7 (1978) (comparing Plaintiff Alan Bakke's GPA and MCAT scores with those of all admitted applicants and those admitted via the special admissions program); *see* Grutter v. Bollinger, 137 F. Supp. 2d 821, 838 (E.D. Mich. 2001), *overruled by* Grutter v. Bollinger,

above, the Plaintiffs themselves claimed that UT's use of race was too insignificant to be constitutional or even detectable.[184] Absent such statistical evidence, it is difficult whether a given holistic admissions plan uses race.[185]

This is why *Fisher* itself was largely a "fishing expedition."[186] Even if the Supreme Court had struck down UT's use of race, individual reviewers may still be aware of applicants' racial background, and would be able to use this information.[187] It is quite likely that at least some individual reviewers would desire to an increase in racial diversity in the undergraduate student body, and would use available information to do so.[188] Thus, race could still be a factor in UT

539 U.S. 306 (2003) (Plaintiffs' expert witness concluding that "that '[a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value'"). *But see* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) (cited in *Gratz*, 539 U.S. at 303 (Ginsburg, J., dissenting) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.").

[184] *See supra* note 166 and accompanying text.

[185] This point came up in oral arguments when Justice Scalia asked Solicitor General Donald Verrilli that if two applicants "are identical in all other respects . . . what does the racial preference mean if it doesn't mean that in that situation the minority applicant wins and the other applicant loses?" Transcript of Oral Argument, *supra* note 47, at 62–63. Mr. Verrilli responded that "[t]here may not be a racial preference in that situation. It's going to depend on a holistic, individualized consideration of the applicant." *Id.* Justice Kennedy seemed dismayed, stating that he "thought that the whole point is that sometimes race should be a tie-breaker . . . [and]. . . if it isn't . . .then we should just say you can't use race . . ." *Id.* Mr. Verrilli responded that "[race] functions more subtly than that[.]" *Id.*

[186] *See* Harpalani, *supra* note 49, at 73 (arguing that "[t]he entire *Fisher* case may just be a fishing expedition[.]").

[187] *See* text accompanying *supra* notes 178–182.

[188] One might call this endeavor "The Underground Railroad to Elite Universities" to capture the moral suasion of ardent proponents of affirmative action. Given the long history of segregation and denial of educational opportunity to African Americans, a reduction in Black enrollment at selective universities would likely inspire subversive measures analogous to the Underground Railroad during the era of American slavery. *See Underground Railroad*, HISTORY.COM, http://www.history.com/topics/black-history/underground-railroad (last visited Apr. 2, 2015). In fact, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) draws a similar parallel between affirmative action and the abolitionist movement by naming its online journal "Liberator." *See About BAMN*, BAMN.COM, http://www.bamn.com/about-bamn (last visited Apr. 2, 2015). This name derives from *The Liberator*, which was a weekly abolitionist newspaper published by William Lloyd Garrison from 1831–1865. *See The Liberator*, ACCESSIBLE-ARCHIVES.COM, http://www.accessible-archives.com/collections/the-liberator/ (last visited Apr. 2, 2015).

admissions, even if it was not "on the cover of every application."[189]

In fact, accusations of "winks, nods, and disguises" have arisen in California, where the state constitution bans explicit consideration of race in public education and other public arenas.[190] The University of California (UC) system still uses admissions essays and personal statements, where applicants can elaborate on their life experiences, contributions to diversity, and potentially identify their racial backgrounds.[191] Two faculty members at the at the University of California at Los Angeles (UCLA), Professor Tim Groseclose (now of George Mason University)[192] and Professor Richard Sander (of UCLA School of Law),[193] have contended that UCLA's holistic undergraduate admissions process is race-conscious, in defiance of California constitutional proscription on race-conscious policies. Beginning in

[189] Transcript of Oral Argument, *supra* note 47, at 54. Of course, it may cost more for universities to review applications if race is not on the cover. However, universities have adjusted to similar cost increases in the past. *See* Harpalani, *supra* note 26, at 532 n.309 ("[C]olleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems similar to the one struck down in *Gratz*. *See* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("Respondents contend that '[t]he volume of applications and the presentation of applicant information make it impractical for [undergraduate admissions] to use the . . . admissions system' upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.") (internal citation omitted)).

[190] CAL. CONST. art. 1, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

[191] *See Freshman Applicant*, BERKELEY.EDU, http://admissions.berkeley.edu/freshman (last visited Apr. 2, 2015) and *The Personal Statement*, BERKELEY.EDU, http://admissions.berkeley.edu/personalstatement (last visited Apr. 2, 2015) (application and personal statement links for the University of California at Berkeley). Prompt #1 for freshman applicants is "[d]escribe the world you come from—for example, your family, community or school—and tell us how your world has shaped your dreams and aspirations." *Id.* Applicants can readily allude to their racial background in response to this prompt, and members of underrepresented minority groups can self-identify here.

[192] Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-up* (Aug. 28, 2008), http://www.sscnet.ucla.edu/polisci/faculty/groseclose/CUARS.Resignation.Report.pdf; *see generally* CHEATING: AN INSIDER'S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA (2014).

[193] Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions* (Oct. 20, 2012), http://www.seaphe.org/pdf/uclaadmissions.pdf; Sander & Taylor, *supra* note 81, at 169–70 (contending that as of 2012, "the University of California system is still, formally race-neutral, but in practice it has come very close to a form of racial proportionality . . . neither voters nor state officials can end university racial preferences by a single stroke").

2008, Professors Groseclose and Sander accused admissions committee members of using applicant personal statements and other sources of information to identify race and advantage minority applicants (specifically African Americans).[194] An independent review of undergraduate admissions by UCLA Sociology Professor Robert Mare found that:

> [s]ome disparities in outcomes that favor some groups and disfavor others among applicants who are otherwise similar on their measured characteristics. Whether these disparities are considered small or large is a normative, policy issue – not a scientific one.[195]

UCLA concluded that "Mare's report found no evidence of bias in UCLA's admissions process[,]"[196] that the differences reported by Mare "ar[ose] almost exclusively in supplemental review, a step . . . that is intended to give additional attention to atypical applicants[,]"[197] and that "those . . . differences can be explained by the nuances and context of the applicant's experience[.]"[198]

Nevertheless, this type of controversy is quite likely to occur again—in California or any other state where race-conscious admissions policies are prohibited.[199] Whether surreptitious use of race would be detectable and widespread enough to prompt litigation in a

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[194] *See also* Scott Jaschik, *Is 'Holistic Admissions' a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 2, 2008), http://www.insidehighered.com/news/2008/09/02/ucla; Alexia Boyarsky, *Findings By Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012), http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/.

[195] Robert D. Mare, *Holistic Review in Freshman Admissions at UCLA*, at 4 (Jan. 2012), http://www.senate.ucla.edu/committees/cuars/documents/UCLAReporton HolisticReviewinFreshmanAdmissions.pdf; *see also id.* at 3 ("Among otherwise equivalent applicants, Whites, African Americans, and Latinos are overrepresented among those admitted and Asian American applicants are underrepresented.").

[196] Ricardo Vazquez, *Independent Report Confirms UCLA Admissions Process Working as Intended by Faculty*, UCLA NEWSROOM (May 17, 2012), http://newsroom.ucla.edu/stories/independent-report-confirms-ucla-234132.

[197] *Id.*

[198] *Id.*

[199] Professors Groseclose and Sander were not the first to make accusations of racial bias in the UC system. *See* Lipson, *supra* note 182, at 1015 (noting that former UC Board of Regents member and noted race-conscious admissions opponent "Ward Connerly . . . put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were 'slipping' race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements).").

post-*Grutter* regime is an open question.[200] But if so, it would be even messier than litigation under *Grutter*. Universities would not admit to intentionally using race in admissions—as they did in *Bakke*, *Hopwood*, *Gratz*, *Grutter*, and *Fisher*—because doing would be an explicit acknowledgement that they committed a constitutional violation. Universities may not even be aware when individual reviewers use race or to what extent this occurs. They may deliberately ignore the practice or even covertly encourage it.

The only way to detect large scale use of race in such a "race-neutral" admissions plan is to conduct statistical analysis of academic disparities between applicants of different racial backgrounds. But even then, lack of intent would pose a well-known conundrum for equal protection doctrine. Violations of the Equal Protection Clause require proof of the intentional use of race; policies that merely have a disparate impact by race do not violate the Constitution.[201] Plaintiffs would thus have a much higher burden in any post-*Grutter* litigation: they would have to prove intentional use of race by the university. This would probably mean establishing that academic disparities between minority and non-minority applicants are "unexplainable on grounds other than race."[202]

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[200] In his *Grutter* dissent, Justice Scalia contended that *Grutter* would invite more litigation. *See* Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation."). While he may have been correct, Justice Scalia's assertion that striking down race-conscious policies would end litigation is yet untested. If the controversies in the UC system are any indication, the controversy will go on even if the Supreme Court held race-conscious admissions to be unconstitutional.

[201] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that the Supreme Court has "not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, at 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs "because of, not merely in spite of, its adverse effects upon an identifiable group").

[202] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). *See also* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding equal protection violation where permits to operate laundry businesses in wooden building were denied to all 200 Chinese immigrants and granted to nearly all non-Chinese applicants). The question would then become what constitutes a "clear pattern." As the controversy in the UC system indicates, use of race in a holistic admissions process can be far from clear. *See supra* notes 192–199 and accompanying text.

In the context of a holistic admissions policy that incorporates socioeconomic status, personal hardship, and other factors that correlate with race, and are often unquantified and not explicitly weighted, this would be a difficult inquiry. Minority student enrollments would certainly drop if race-conscious admissions became unconstitutional,[203] and universities would look to increase them by all other means possible. As Justice Souter warned, equal protection could indeed become "an exercise in which the winners are the ones who hide the ball."[204] Ironically, the Supreme Court's very mandate to embed race-consciousness in a flexible, holistic admissions process makes it difficult, if not impossible, to fulfill its other desire to eliminate use of race completely.[205]

3. Two Possible Definitions of "Race-Neutral"

The question posed by this Section is "what does race-neutral mean in an admissions process?" Building from the above analysis, there are at least two possible definitions of "race-neutral" in university admissions.[206]

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[203] *See supra* note 161.

[204] Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

[205] There are commentators who posit that stealth in pursuing race-conscious policies, which ultimately leads to the difficulty in eliminating use of race, could itself be a constitutional value. *See* Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) ("The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply 'another factor' among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect."); Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 412 (2003) ("[T]he very nature of what may be conceived as the ultimate goal of affirmative action—namely, the deracialization of American society, insofar as racial identification remains inextricably bound up with a constellation of inegalitarian assumptions—would make it counterproductive to fully disclose that policy's most distinctive and most contentious features—its nonmeritocratic component and the extent to which some of these programs take race into account. . . .[I]n several Supreme Court decisions . . . judges have made a significant, yet underappreciated, contribution to that rational process of minimizing the visibility and distinctiveness of race-based affirmative action."); Heather Gerkin, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) (characterizing Justices Powell and O'Connor's views as "something akin to a 'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it" (internal citation omitted)).

[206] *See also* Harpalani, *supra* note 16, at 850–55 (discussing two different meanings of race-neutrality).

One possible definition is formal race-neutrality, the complete absence of race from the application—or at least the complete absence of consideration of race in the admissions process. The Supreme Court to date has subscribed to such a definition, by presuming that the absence of race "on the cover of every application"[207] would eliminate consideration of race. As discussed earlier, the mere facial presence or absence of race, in the form of a self-identification box checked by the applicant, is far from the only manner in which race comes into play in a holistic admissions process.[208] If the Justices stick to this focus on facial presence of race, then "race-neutral" may lose any tangible meaning, because as Justices Ginsburg and Souter have warned,[209] and as the UC controversies have illustrated,[210] race may continue to play a role in admissions even if the admissions policy is facially race-neutral.

Even for a non-holistic, mechanical admissions policy, facial race-neutrality might not equate to formal race-neutrality if the purpose of the admissions policy is taken into account. The Top Ten Percent Law itself poses this conundrum, as it is facially race-neutral but was motivated by a desire to increase racial diversity—specifically the numerical representation of African American and Latina/o students.[211]

A second possible definition of "race-neutral" is statistical, focusing on disparities between minority and non-minority admitted applicants on academic criteria such as grades and standardized test scores. Under this definition, rather than examining on the presence or consideration of race in the application process, the focus would be on the result: are there any significant statistical disparities on academic criteria between admitted minority and non-minority applicants? Plaintiffs in *Bakke*, *Grutter*, and *Gratz* used data on such disparities as part of their claims—not so much to establish the fact of race-conscious admissions policies (which was conceded by the universities in those cases), but rather to illustrate their magnitude.[212] It is worth noting that under a statistical definition of race-neutrality, the Top Ten Percent Law is also not race-neutral, as there are race disparities in the standardized test scores of students admitted under

[207] Transcript of Oral Argument, *supra* note 47, at 54.

[208] *See supra* notes 178–182 and accompanying text.

[209] *See supra* note 181.

[210] *See supra* notes 190–199 and accompanying text.

[211] *See supra* note 3. The constitutionality of the Top Ten Percent Law and other percentage plans, under the Equal Protection Clause, has not been challenged to date, but such a challenge could occur in the future. *Id.*

[212] *See supra* note 183.

the plan.[213] Nevertheless, in a holistic admissions process, absent a university's admitted use of race in admissions, a statistical definition of race-neutrality is the only viable one—and even then, the issue of intent looms for any Plaintiffs wishing to prove an Equal Protection violation.[214] In a post-*Grutter* regime, courts may have to grapple with such scenarios.

Of course, the Supreme Court's quest to limit race-conscious admissions policies need not reach that far to curb such policies significantly. Currently, for most universities, use of race is admittedly intentional and statistically detectable. While rendering race-conscious admissions policies unconstitutional might encourage surreptitious use of race,[215] the Court could also limit their magnitude without eliminating them. Such a limit might be more constitutionally enforceable than a total prohibition, since universities would not be incentivized to deny use of race altogether. The next Section considers such limits on the magnitude of race-consciousness in admissions and argues that universities already place a de facto limit on their race-conscious admissions policies—below their desired level of racial diversity.

D. Limits on Race-Consciousness

Besides limits on the educational benefits of diversity, limits on the magnitude of race-consciousness itself—the weight of race in the admissions process—could also serve as a limiting principle on universities' use of race. This could occur in one of two ways: courts could impose a limit on the weight of race in the admissions process, or universities' desire to maintain academic selectivity, in terms of high grades and standardized test scores within their student bodies, could serve as a de facto limiting principle on their use of race as an admissions plus factor. This Article argues that the latter is more often the actual limiting principle.

1. Judicial Limits on the Weight of Race in the Admissions Process

Although they have not done so, courts could interpret *Grutter* to place an upper limit on the weight of race in the admissions process.[216] Such a limit could apply even if a university had not fully attained the

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[213] *See* UT Results of Automatic Admissions Law Report, *supra* note 168, at 14 tbl. 7 and data from this source given in note 168.

[214] *See* text accompanying *supra* notes 201–202.

[215] *See supra* notes 181, 190–199 and accompanying text.

[216] Ayres & Foster, *supra* note 72, at 558.

educational benefits of diversity. The "stigmatic harm" of using race,[217] the constitutional burden on non-minority applicants,[218] or the purported harm to minority students (i.e., "mismatch" theory)[219] could serve as the constitutional justification for such a limit. Courts would limit how much of an admissions "plus" factor race can be, regardless of whether universities could attain greater educational benefits from more racially diverse student bodies. The *Grutter* majority articulated two narrow tailoring provisions that seemingly refer to the weight given to race in the admissions process: (1) Race cannot be the "predominant factor" in admissions;[220] and (2) The race-conscious policy cannot "unduly burden" non-minority applicants.[221]

However, *Grutter* did not elaborate on these provisions,[222] and there is no consistent weight given to race for individual applicants in a constitutional, holistic admissions plan: the weight could only be measured in aggregate, for an entire admitted class.[223] Using the weight for race as a limiting principle would be a difficult undertaking, for many of the same reasons that using a diversity limit is difficult. It would be tantamount to the cost-benefit analysis suggested by Professors Ayres and Foster,[224] and even they acknowledge that "[i]t is

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[217] *See* sources cited *supra* note 79.

[218] *See* sources cited *supra* note 80.

[219] *See* Sander & Taylor, *supra* note 81.

[220] Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure . . . that race does not become a predominant factor in the admissions decisionmaking."). Because Justice Kennedy wrote the *Fisher* majority opinion and is now the swing vote on the Supreme Court, his *Grutter* dissent takes on greater significance. In fact, Justice Kennedy's *Grutter* dissent was the basis for *Fisher*. *See infra* note 245.

[221] *Grutter*, 539 U.S. at 341 (O'Connor, J., dissenting) ("To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups.") (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990).

[222] The *Grutter* majority did state that "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants." *Grutter*, 539 U.S. at 341. However, the *Grutter* majority does not provide any general guidance here as to how an "undue burden" relates to the weight given to race in the admissions process. *See also* Ayres & Foster, *supra* note 72, at 558 (contending that "the *Grutter* Court failed to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not").

[223] *See* Harpalani, *supra* note 26, at 528 n.289 and accompanying text. For methods of measuring "aggregate weight," see, e.g., Ayres & Foster, *supra* note 72 (suggesting various ways of measuring weight of race in admissions); *See* ESPENSHADE & RADFORD, *supra* note 161, at 92–93 (2009) (calculating values of race as a "plus" factor in terms of standardized test score enhancement at public and private institutions).

[224] Ayres & Foster, *supra* note 72, at 580.

difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action."[225] Any determination of how much weight should be given to race—how much harm or burden should be allowed to attain the benefits of diversity—is contingent on value judgments on which there are a wide variety of opinions. Charged debates about these issues are unavoidable in resolving disputes about race-conscious admissions policies. If it comes to bear, political considerations and the ideological positions of judges, and ultimately of Justices on the Supreme Court, will likely be the main factor in determining the answer to the question of "how much."

2. Universities' Academic Selectivity as the De Facto Limiting Principle

Universities are already imposing their own de facto limits on race-conscious admissions policies. In spite of the use of these policies, African American and Latina/o students continue to be underrepresented at selective universities,[226] and most universities would like to have greater representation of racial minorities in their student bodies than they currently do. If universities are not enrolling a critical mass and fully attaining the educational benefits of diversity, what is the limiting principle on their actual use of race-conscious admissions policies? Other considerations, such as ensuring race does not become a "predominate factor" in admissions, or maintaining particular grade and standardized test score profiles, appear to limit universities' race-conscious admissions policies before a critical mass is attained.[227]

The latter is most likely to be the de facto limiting principle at elite institutions, where academic disparities between minority and non-minority applicants are the main reason that race is necessary as a "plus" factor. Professor Thomas Espenshade and Dr. Alexandria

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[225] *Id.* at 583.

[226] *See* SEAN F. REARDON, RACHEL BAKER & DANIEL KLASIK, RACE, INCOME, AND ENROLLMENT PATTERNS IN HIGHLY SELECTIVE COLLEGES, 1982–2004 (Aug. 3, 2012), http://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%203%202012.pdf ("Black and Hispanic students are dramatically underrepresented in the most selective colleges, even after controlling for family income."); Josh Keller, *At Top Colleges, an Admissions Gap for Minorities*, N.Y. TIMES (May 7, 2013), http://www.nytimes.com/interactive/2013/05/07/education/college-admissions-gap.html ("Roughly 15 percent of public high school graduates are black. But despite the widespread use of affirmative action at elite colleges, only one college with a graduation rate of more than 70 percent has that many black students in its freshman class.").

[227] *See* Harpalani, *supra* note 26, at 480–83.

Walton report the magnitude of standardized test score differences between admitted minority and non-minority admitted applicants in their studies of public and private institutions.[228] For Fall 1997, in their sample of 7,410 accepted applicants at several selective private institutions, Professor Espenshade and Dr. Walton reported that, compared to White admittees, race-related admissions plus factors were equivalent to 310 points (out of 1600 total) for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points.[229] If universities would like to have more racially diverse student bodies than they currently do, the most likely limiting factor is their own unwillingness to further compromise their standardized test score profiles in order to do so—since lower standardized test score profiles have consequences for universities' academic reputations,[230] or perhaps because universities believe that students with lower grades and test scores would not be academically successful.[231] *Grutter* does not require universities to compromise

[228] ESPENSHADE & RADFORD, *supra* note 161, at 92–93.

[229] *See id.* at 92–93, 412. The disparity between White and Asian American admittees has also raised controversy for a number of years. *See, e.g.*, Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV 1 (1996); DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS (1998). In *Fisher*, Asian American advocacy groups have filed amici briefs both supporting and opposing race-conscious admissions policies. *See* Brief of the Asian American Legal Foundation and the 80-20 National Asian-American Educational Foundation as Amici Curiae Supporting Plaintiffs-Appellants, Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014), *en banc denied*, 771 F.3d 274 (5th Cir. 2014) (No. 09-50822) (amicus brief supporting Abigail Fisher on remand); Brief of the Asian American Legal Defense and Education Fund, Asian/Asian American Faculty and Staff Association of the University of Texas at Austin, and Asian Desi Pacific Islander American Collective Of the University of Texas at Austin as Amici Curiae in Support of Defendants-Appellees, Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014), *en banc denied*, 771 F.3d 274 (5th Cir. 2014) (No. 09-50822) (amicus brief supporting UT on remand); Brief of Amici Curiae Asian Americans Advancing Justice in Support of Defendants-Appellees, Fisher v. Texas, 758 F.3d 633 (5th Cir. 2014), *en banc denied*, 771 F.3d 274 (5th Cir. 2014) (No. 09-50822) (amicus brief supporting UT on remand).

[230] *See also* Grutter v. Bollinger, 539 U.S. 306, 355–56 (2003) (Thomas, J., concurring in part and dissenting in part) ("[T]he [University of Michigan] Law School seeks . . . [to enroll a racially diverse student body] . . . without sacrificing too much of its exclusivity and elite status."). Justice Thomas also devoted one section of his Grutter dissent to critiquing use of standardized tests and the notion of merit at selective institutions. *See supra* note 151.

[231] *See* Sander & Taylor, *supra* note 176. Professors Sander and Taylor believe that universities currently compromise academic selectivity too much with their race-conscious admissions policies. Nevertheless, at some reduced level, universities may accept Sander and Taylor's mismatch theory and limit their race-conscious admissions policies accordingly.

overall academic selectivity in order to achieve racial diversity,[232] and thus implicitly defers to universities to strike the balance between the two—subject only to the "undue burden" and predominant factor requirements.[233]

As such, *Fisher* ignored the most significant reason that most universities use race-conscious admissions policies—because of differences on academic admissions criteria between minority and non-minority applicants. The "logical end point" of race-conscious admissions will occur when these differences no longer exist: at that point, universities will not need to use race as an admissions plus factor to essentially compensate for these differences.[234] Justice O'Connor implicitly acknowledged this reality in her *Grutter* opinion, even as she aspired to see an end to race-conscious admissions:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, *the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary* to further the interest approved today.[235]

Justice O'Connor's statement implies that the need for race-conscious admissions policies is at least in part contingent upon racial disparities on academic criteria. In spite of their vast ideological differences, both Justice Ginsburg and Justice Thomas acknowledged that racial disparities on academic criteria are the underlying reason why universities need to use race-conscious admissions policies, and they both questioned Justice O'Connor's aspiration that racial disparities on academic criteria could be eliminated by 2028.[236]

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[232] *See supra* note 151 and accompanying text.

[233] *See supra* notes 219–220 and accompanying text.

[234] Note that even this "logical end point" would occur only with respect to a statistical definition of race-neutrality. *See supra* Part II.C.3. There still would be no "logical end point" with respect to formal race-neutrality, because race cannot be completely removed from a holistic admissions process, and because the value of diversity has no intuitive end point or ceiling. *See supra* Part II.C.3., *supra* Part I.A., and *supra* notes 178–182, 192–199, and accompanying text.

[235] *Grutter*, 539 U.S. at 343 (emphasis added).

[236] *See id.* at 346 (Ginsburg, J., concurring) ("[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely

Universities can thus argue that they need to continue using race-conscious admissions policies to attain the educational benefits of diversity, and that they actually stop short of fully attaining those benefits because of their interest in academic selectivity, or in ensuring that race does not become a predominant factor in admissions. So long as the Supreme Court does not require universities to choose between academic selectivity of students and racial diversity,[237] this will be a valid argument—and it will be more doctrinally and conceptually robust than any diversity-related limit.[238]

Of course, after *Fisher*, litigants may also raise questions about whether universities are actually attaining the educational benefits of diversity, which justify their use of race-conscious admissions policies. Universities face a greater burden to demonstrate these educational benefits in tangible fashion. The next Part examines two relatively novel strategies that universities could use to defend race-conscious admissions policies, taking advantage of the deference the Supreme Court has given them in by defining their educational missions. Universities can employ the broad nature of the diversity interest to pursue diversity within racial groups, and to promote race-conscious campus spaces—highlighting how both of these facilitate the educational benefits of diversity articulated in *Grutter* and *Fisher*.

III. RACE-CONSCIOUSNESS AND UNIVERSITIES' EDUCATIONAL MISSIONS

This Article does not attempt to resolve the internal tensions and contradictions in Supreme Court's doctrine on race-conscious university admissions.[239] The incongruent combination of the broad diversity interest and the call for race-neutrality is likely a result of

equal opportunity will make it safe to sunset affirmative action."); *Id.* at 375–76 (Thomas, J., dissenting) ("The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe . . . . No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years."). As noted earlier, Justice O'Connor herself later suggested that 25 years was not a binding time limit on race-conscious admissions, and both parties in *Fisher* agreed. *See supra* note 141.

[237] The *Grutter* majority held that universities are not required to compromise academic selectivity of students in order to attain racial diversity in their student bodies. *See* text accompanying *supra* note 151.

[238] *See supra* Part I for critiques of diversity-related limits on race-conscious university admissions.

[239] *See also* Harpalani, *supra* note 16, at 841–46 (describing internal tensions in Supreme Court's race jurisprudence as "Bermuda Triangle of university admissions").

compromises between various Justices on the Court,[240] in conjunction with the Court's need to maintain institutional legitimacy by adhering to precedent.[241] Eventually, the Court will either have to curb the broad diversity interest, or it will have to accept the fact that for the foreseeable future, universities will need to use race-conscious admissions policies to attain that interest.[242] But for now, this Article aims to advise universities on defending race-conscious admissions policies after *Fisher*.

Fisher's call for stringent review of the need for race-conscious admissions will continue to spur litigation to challenge race-conscious admissions. In fact, an organization ironically named "Students for Fair Admissions" has already filed two such lawsuits—challenging race-conscious admissions policies at Harvard University and the University of North Carolina at Chapel Hill.[243] More such challenges can be expected in the future.

Nevertheless, in light of the Supreme Court's broad definition of the compelling interest in diversity, universities can define their educational missions in a manner that justifies their race-conscious admissions policies. The Supreme Court has given universities deference in defining their educational missions,[244] affording them the opportunity to link race-conscious goals with race-conscious means. To defend their use of race in admissions, universities should tie the educational benefits of diversity on their campuses not just to racial representation, but to race-consciousness itself.

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[240] *See supra* note 2.

[241] *See* Boddie, *supra* note 7 ("*Fisher* may suggest that the Court has become concerned about its institutional legitimacy and, therefore, is now wary of issuing sweeping decisions that depart radically from precedent.").

[242] Of course, it is possible that the Supreme Court may not revisit this issue—if more state bans on affirmative action render it moot, or if universities stop using race-conscious admissions policies for other reasons. Given the Court's rulings in *Fisher* and *Schuette*, the conservative-leaning Justices may—at least for the time being—prefer to allow the lower courts or political process to dismantle race-conscious programs rather than issuing a broad ruling to do so. *See supra* notes 2, 16.

[243] Nick Anderson, *Lawsuits Allege Unlawful Racial Bias in Admissions at Harvard, UNC-Chapel Hill*, WASH. POST (Nov. 17, 2014), http://www.washingtonpost.com/local/education/lawsuits-allege-unlawful-racial-bias-in-admissions-at-harvard-unc-chapel-hill/2014/11/17/b117b966-6e9a-11e4-ad12-3734c461eab6_story.html; Lyle Denniston, *Direct New Challenges to* Bakke *Ruling (FURTHER UPDATE)*, SCOTUSBLOG (Nov. 17, 2014, 10:17 AM), http://www.scotusblog.com/2014/11/direct-new-challenges-to-bakke-ruling/.

[244] *Fisher*, 133 S. Ct. 2411, 2419 (2013) ("[A] university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'") (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

This Article suggests two relatively novel ways that universities incorporate can race-consciousness into their missions, as part of the diversity interest: (1) Highlighting the educational benefits of diversity that occur within race-conscious campus spaces.; and (2) Emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students. Universities should also tie these aspects of the diversity interest to their need for race-conscious admissions to attain that interest.

A. Judicial Deference to Universities in Defining their Educational Missions

Judicial deference to universities was the one issue resolved by the Supreme Court in *Fisher*. One might have expected this result, as Justice Kennedy's *Grutter* dissent contended that the *Grutter* majority "confuses deference to a university's definition of its educational objective with deference to the implementation of this goal,"[245] and the *Fisher* majority opinion was consistent with this view. The *Fisher* majority made clear that a "[u]niversity receives no deference" from the reviewing court on whether the "means chosen by the [u]niversity to attain diversity are narrowly tailored[.]"[246] *Fisher* called for "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications[,]"[247] and this was the basis for vacating the Fifth Circuit opinion.[248]

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[245] *Id.* at 388 (Kennedy, J., dissenting).

[246] *Fisher*, 133 S. Ct. at 2420.

[247] *Id.*

[248] *Id.* at 2421 ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. . . . [T]he Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."). My prior article partially foreshadowed the result in *Fisher*. *See* Harpalani, *supra* note 26, at 526 ("If the Supreme Court adopted . . . [the test that I propose] . . . it would vacate the Fifth Circuit ruling in *Fisher*, but it would not declare UT's race-conscious policy to be unconstitutional. Rather, it would remand the case for review based on the more stringent standard proposed here."). *Compare Fisher*, 133 S. Ct. at 2421 (stating that UT has to "prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity"), *with* Harpalani, *supra* note 26, at 526 (stating that UT should have to prove that its race-conscious policy is "narrowly tailored to fit the compelling interest of attaining within-group diversity and its educational benefits"). The Supreme Court called for the same standard as did my article, although not for the same reasons; it did not address the issue of within-group diversity, which was the specific focus of my prior article.

However, given the broad diversity interest espoused by the Court, *Fisher*'s deference to universities in determining their educational missions is just as significant.[249] First Amendment values provide the basis for judicial deference to universities in defining their educational missions. Justice Powell's *Bakke* opinion noted that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body[,]"[250] citing the last of Justice Felix Frankfurter's "four essential freedoms" that constitute academic freedom: "'who may be admitted to study.'"[251] *Grutter* reinforced this idea, noting a "constitutional dimension, grounded in the First Amendment, of educational autonomy[,]"[252] for universities.[253] The

[249] *Fisher*, 133 S. Ct. at 2419 ("According to *Grutter*, a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.' 539 U.S. at 328, 123 S. Ct. 2325. Grutter concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' *Id.* at 330, 123 S. Ct. 2325, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under Grutter.").

[250] Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978).

[251] Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring) ("[D]ependence of a free society on free universities . . . means the exclusion of governmental intervention in the intellectual life of a university . . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

[252] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

[253] It should be noted that this "constitutional dimension" is not a full-fledged First Amendment right, which would entail much more freedom from government intrusion. Deference to universities in choosing their student bodies is limited to the judiciary. State legislatures can pass laws which curb this "essential freedom." Texas's Top Ten Percent Law itself is a prime example: it automatically determines 80 percent of UT's incoming class and thus takes it out of the University's control. *See supra* note 3. Legislative or executive action can eliminate race-conscious university admissions. *See supra* notes 17–19. State constitutional provisions passed via popular referenda can also curb a university's freedom to choose its own student body, by eliminating race-conscious admissions. *See supra* note 17. The Supreme Court recently upheld such state constitutional bans. Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary, 134 S. Ct. 1623 (2014). Given all of these allowable government and popular intrusions on their autonomy, deference to universities does not imply that they have a constitutional right to choose their student bodies, despite the language in Justice Frankfurter's concurrence in *Sweezy*. *See* Paul Horowitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 481–94 (2005) ("[T]he freedom 'to determine . . . who may be admitted to study' . . . [is] . . . the jurisprudential roots of *Bakke* and *Grutter* and their command of deference to university admissions programs. But if Justice Frankfurter's *Sweezy* concurrence has provided fertile ground for future doctrinal developments, it is not because his opinion provides a meaningful definition of constitutional academic freedom or proper guidance on its application. To the contrary, *Sweezy*'s influence

Fisher majority noted that "the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, '"based on its experience and expertise,"' . . . that a diverse student body would serve its educational goals."[254]

Fisher did state that such judicial deference was "not complete"—that the "court . . . should ensure that there is a reasoned, principled explanation for the [university's] academic decision."[255] Nevertheless, *Fisher* and *Grutter*'s articulation of the educational benefits of diversity, which include "lessening of racial isolation and stereotypes[,]"[256] "promot[ing] cross-racial understanding,"[257] and "enabl[ing] [students] to better understand persons of different races[,]"[258] all suggest principled explanations for incorporating race-conscious goals, in various forms, into a university's educational mission. Universities can define their educational missions in a manner that emphasizes these educational benefits of diversity and tie these benefits more directly to their race-conscious admissions policies.

B. Race-Conscious Goals as Part of the Compelling Interest in Diversity

By giving universities deference in defining their educational missions, the Supreme Court inherently gives universities the power to determine the educational benefits of diversity—and thus to give content to the compelling interest in diversity. Of course, this power is not absolute; it is rooted in the Court's rulings in *Bakke*, *Grutter*, and *Fisher*—but these rulings all incorporate race-conscious goals.[259] As

stems from the combination of its sweeping grandiloquent rhetoric and its lack of real guidance for future courts."). Rather, deference to universities appears to be a part of judicial balancing in the context of race-based equal protection. *See Grutter*, 539 U.S. at 362 (Thomas, J., dissenting) ("The Court bases its unprecedented deference to the Law School . . . on an idea of 'educational autonomy' grounded in the First Amendment[] . . . [that] the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause.").

[254] Fisher v. Texas, 133 S. Ct. 2411, 2419 (2013). *See also* Eboni S.Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in* Fisher v. Texas, 47 U. RICH. L. REV. 1133 (2013).

[255] *Fisher*, 133 S. Ct. at 2419.

[256] *Id.* at 2418. *See also Grutter*, 539 U.S. at 308 (holding that "substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes."); *Id.* at 319 (noting that "critical mass" entails ""numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race").

[257] *Grutter*, 539 U.S. at 330 ("[T]he educational benefits that diversity is designed to produce . . . are substantial [and include] promot[ing] 'cross-racial understanding,' . . . break[ing] down racial stereotypes, and 'enabl[ing] [students] to better understand persons of different races.'").

[258] *Id.*

[259] *See supra* notes 153–156, 256–258, and accompanying text.

such, race-consciousness is part of the compelling interest in diversity, and universities can readily articulate a "reasoned, principled explanation"[260] for incorporating it into their educational missions in various forms—particularly if they can produce empirical data relating it to the compelling interest.[261] In this vein, two specific race-conscious goals that university can pursue in this vein are: (1) emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and (2) highlighting the educational benefits of diversity that occur within race-conscious campus spaces.

1. Diversity Within Racial Groups

Diversity within racial groups represents a particularly nuanced form of race-consciousness—one that inherently transcends the tension between racial diversity and racial stereotyping in constitutional jurisprudence.[262] The idea of diversity within racial groups as part of *Grutter*'s compelling interest is a relatively new one.[263]

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[260] *Fisher*, 133 S. Ct. at 2419 ("According to *Grutter*, a university's 'educational judgment that . . . diversity is essential to its educational mission is one to which we defer.' *Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' . . . that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that Grutter calls for deference to the University's conclusion, "'based on its experience and expertise,'" . . . that a diverse student body would serve its educational goals.").

[261] *Cf.* Meera Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L. J. 661 (2014) (proposing that empirical data can support new compelling state interests for race-conscious policies). This Article argues that race-consciousness is inherently part of the existing compelling interest in the educational benefits of diversity.

[262] *See* Harpalani, *supra* note 26, at 495 (discussing how diversity within racial groups facilitates substantive educational benefits such as breaking down racial stereotypes and also allows a race-conscious policy to mitigate racial stereotyping during admissions process); *Cf.* Reva B. Siegel, *From Colorblindness to Antibalkination: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1299 (2011) (noting that "Justice O'Connor interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion. Concern with balkanization thus supplies affirmative reason to allow affirmative action *and* to limit it . . .").

[263] The first law review article to articulate this idea was my prior article, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, *supra* note 26. Professor Devon Carbado also later analyzed intraracial diversity as a compelling interest. *See* Carbado, *supra* note 44. Additionally, Professor Elise Boddie authored a short commentary on within-group diversity while she was Acting Litigation Director of the NAACP Legal Defense Fund, Inc. Elise Boddie, *Commentary on* Fisher*: The Importance of Diversity Within Diversity*, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM),

In *Fisher*, UT did not raise this argument until its Supreme Court brief,[264] and UT's counsel Gregory Garre also responded to questions about it at the *Fisher* oral arguments.[265] However, in neither instance did UT defend the idea very well or elaborate on it much.[266] It did not really link within-group diversity directly to the compelling interest in diversity,[267] or to holistic admissions and *Grutter*'s narrow tailoring requirements.[268]

There is firm ground to support diversity within racial groups as part of the compelling interest in diversity. Justice Powell's *Bakke* opinion first supported this notion,[269] and *Grutter* specifically articulates

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http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity.

[264] Brief for Respondents at 33, Fisher v. Texas, 133 S. Ct. 2411 (2013) (No. 11-345) ("Holistic review permits the consideration of diversity within racial groups.") This Article uses the term "diversity within racial groups" interchangeably with "within-group diversity" and "intraracial diversity."

[265] Transcript of Oral Argument, *supra* note 47, at 43–45.

[266] *See* Harpalani, *supra* note 49, at 63 ("UT had already built its argument about critical mass around classroom isolation of minority students: as a consequence, the reference to diversity within racial groups was cursory and seemed like a last-minute addition."); Carbado, *supra* note 44, at 1179 (asserting that at the Supreme Court oral arguments in *Fisher*, there were "significant problems with the way in which the university's counsel responded to . . . questions about intraracial diversity").

[267] In its brief to the Fifth Circuit on remand, UT did begin to make the link between diversity within racial groups and the compelling interest. *See* Brief for Appellees, *supra* note 130, at 48 ("Ensuring a diversity of backgrounds—within racial groups—is one of the best ways to help breakdown racial stereotypes and promote cross-racial understanding, and often students who come from integrated environments are particularly successful in bridging racial barriers. This is not news. The Harvard plan commended by the Supreme Court in *Bakke* itself recognized this added dimension of diversity. Regents of the University of California v. Bakke, 438 U.S. 265, 323–24 (1978)."). In spite of its pronouncement that "[t]his is not news," UT did not initially incorporate the "diversity within racial groups" argument in its defense of race-conscious admissions: it raised the argument for the first time at the U.S. Supreme Court. *See* Brief for Appellants, at 28, Fisher v. Texas, 758 F.3d 633 (No. 09-50822). ("UT asserted for the first time before the Supreme Court that its failure to achieve critical mass is a qualitative—not quantitative—problem because its real concern is a lack of 'diversity within racial groups.' . . . But UT raised this argument for the first time at the Supreme Court. Naturally, then, there is nothing in the record demonstrating that UT relied on this interest when it reintroduced race in 2004 or retained it in 2007, or any evidence whatsoever supporting UT's argument . . .") (citation omitted).

[268] *See* Harpalani, *supra* note 26, at 494–95 (discussing how within-group diversity is related to both compelling interest and narrow tailoring requirements articulated in *Grutter*); Carbado, *supra* note 44, at 1163–72 (analyzing whether intraracial diversity can satisfy strict scrutiny by meeting compelling interest and narrow tailoring requirements of *Grutter*.).

[269] *See Bakke*, 438 U.S. at 321 n.55 (Powell, J., concurring) ("[An] [a]dmissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of

educational benefits related to within-group diversity. The *Grutter* majority opinion noted that one of the goals of a race-conscious admissions policy is to produce a "critical mass" of minority students with a "variety of viewpoints."[270] Having such diversity within racial groups augments the educational benefits of diversity, such as breaking down racial stereotypes: "[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[271] *Grutter*'s language thus suggests that "meaningful representation"[272] of minority students depends not only upon numbers of minority students, but also on sufficiently diverse perspectives within racial groups.[273] Students with such different perspectives help break down racial stereotypes and facilitate the educational benefits of diversity—the constitutional justification for race-conscious admissions policies in the first place. When understood in terms of these educational benefits, there is a strong argument that diversity within racial groups is part of the compelling interest in diversity.[274]

Other language from *Bakke*, *Grutter*, and *Fisher* also reinforces the notion of within-group diversity as part of the compelling interest. In

superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa."). Justice Powell gave this example when discussing the Harvard College Admissions Program. *Id.* The Court also cited Justice Powell's example in its *Gratz* decision. Gratz v. Bollinger, 539 U.S. 244, 272–73 (2003).

[270] Grutter v. Bollinger, 539 U.S. 306, 320 (2003).

[271] *Id.* at 319–20. *See also id.* at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' . . . . To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). This language in *Grutter* speaks to the immediate, proximal impact of having a "critical mass."

[272] *Grutter*, 539 U.S. at 318.

[273] *See* Harpalani, *supra* note 26, at 478 n.48 ("[T]here cannot be sufficient within-group diversity if there are not adequate numbers of a particular minority group. However, no particular number or percentage of a given racial group automatically guarantees that within-group diversity is present.").

[274] *See id.* at 478 (arguing that "different experiences and perspectives within racial groups" can be understood as "directly related to the compelling interest articulated in *Grutter*"); Carbado, *supra* note 44, at 1164 (agreeing that "intraracial diversity can function as a compelling state interest for affirmative action admissions"). Professor Carbado also analyzes the relationship between intraracial diversity and the educational benefits he lists from *Grutter*. *Id.* at 1145–46, 1164.

describing the diversity interest, these cases state that:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[275]

By its very nature, within-group diversity cannot be attained by admitting a specific percentage of any racial or ethnic group.[276] Moreover, diversity within racial groups also inherently requires admissions committees to pay attention to factors other than race when making admissions decisions.[277] Justice O'Connor's *Grutter* majority opinion implied that admissions committees should not view all individuals of the same race in exactly the same way,[278] which is a hallmark feature of within-group diversity as an admissions factor.[279]

While there have been numerous studies of the educational benefits of diversity more generally,[280] these have not focused on diversity within racial groups.[281] Nevertheless, there are many possibilities here as well. Various campus events, sponsored by students-of-color organizations and cultural centers on campus,

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[275] Fisher v. Texas, 133 S. Ct. 2411, 2418 (2013) (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J., concurring)). *See also Grutter*, 539 U.S. at 324–25 (quoting same language from Justice Powell's *Bakke* opinion).

[276] Harpalani, *supra* note 26, at 478.

[277] *Id.* at 495.

[278] *Grutter*, 539 U.S. at 337 ("[A] university's admissions program must remain flexible enough to 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 . . . [T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.").

[279] Harpalani, *supra* note 26, at 495.

[280] *See, e.g.*, sources cited *supra* note 43.

[281] Professor Carbado notes that "[I]ntraracial selections take place . . . with relatively little . . . engagement on the part of scholars." Carbado, *supra* note 44, at 1139. He cites my prior article as an "important exception." *Id.* at 1139 n.36. A few studies have begun to assess within-group diversity on college campuses in more depth. *See, e.g.*, Camille Z. Charles, Camille Z., Kimberly C. Torres & Rachelle J. Brunn, *Black Like Who? Exploring the Racial, Ethnic, and Class Diversity of Black Students at Selective Colleges and Universities*, 86 SOC. FORCES 561 (2007); KEVIN BROWN, BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL & ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION (2014). Nevertheless, these studies seek mainly to understand and analyze within-group demographics rather than to identify and document potential educational benefits of within-group diversity.

involve debates and discussions that emphasize different within-group perspectives. For example, there are discussions about relations between African American and African or Afro-Caribbean students on campus, integrationist versus nationalist ideals among Black students, and within-group student coalitions that bring together various Black, Asian American, and Latina/o groups.[282] White students and students from a variety of other ethnic backgrounds attend these events and participate in these groups, learning about different perspectives firsthand—probably more so than in most classrooms.[283] Universities can document these events and collect information from them, to illustrate the educational benefits of within-group diversity—most notably for lessening racial stereotypes and promoting cross-racial understanding.

Additionally, diversity within racial groups may contribute to the compelling interest in another significant way: by preventing minority students from feeling "isolated or like spokespersons for their race."[284] Another reason to have a mix of minority students from higher and lower socioeconomic backgrounds is that the former, who have often

[282] For example, at the University of Pennsylvania, there is a coalition of various Black student groups called UMOJA, *UMOJA*, UPENN, http://www.dolphin.upenn.edu/umoja/ (last visited Apr. 2, 2015); a coalition of various Latina/o student groups called the Latino Coalition, *Latino Coalition*, UPENN, https:// upennlc.wordpress.com/ (last visited Apr. 2, 2015); and a coalition of various Asian American groups called the Asian Pacific Student Coalition (APSC), *APSC*, UPENN, http://www.upennapsc.org/ (last visited Apr. 2, 2015). Additionally, the United Minorities Council (UMC) at the University of Pennsylvania is an umbrella group that brings together all the various students-of-color organizations. *See United Minorities Council*, UPENN, http://unitedminoritiescouncil.org/ (last visited Apr. 2, 2015). Such groups regularly sponsor events that tackle within-group diversity. For example, when I was at Penn, Black student organizations frequently sponsored educational events that involved debates between Black nationalists and integrationists on a variety of issues.

[283] *See, e.g.*, Rebecca Borison, *United Minorities Council kicks off Unity Month*, DAILY PENNSYLVANIAN (Nov. 11, 2012, 10:43 PM), http://www.thedp.com/article/2012/11/united-minorities-council-kicks-off-unity-month (noting that out-of-class events during United Minorities Council's Unity Month aim to foster "exchange of ideas . . . between students from all different backgrounds") (internal quotations omitted). Another aim of Unity Month is to "bridge the gap between Penn and its surrounding community [predominantly Black and working class West Philadelphia]." *Id.* This aim also promotes cross-racial understanding and helps to lessen racial stereotypes—both of which are part of the compelling interest that justify race-conscious admissions policies. Moreover, Penn could tie this compelling interest directly to its race-conscious admissions policy, by "augment[ing] its outreach in surrounding neighborhoods . . . [and] recruit[ing] more students directly from West Philadelphia . . . . [thereby] creat[ing] a renewed sense of connection to the local community." Vinay Harpalani, *Diversity and Community Upliftment*, DAILY PENNSYLVANIAN (Mar., 13, 2013, 12:55 AM), http://www.thedp.com/article/2013/03/vinay-harpalani-diversity-and-community-upliftment.

[284] Grutter v. Bollinger, 539 U.S. 306, 319 (2003).

attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust socially to elite, predominantly White universities and feel less isolated on those campuses. Shanta Driver, a lawyer for the student intervenors in *Grutter*, raised this point at a debate on affirmative action shortly after the Supreme Court's ruling in *Grutter*. An audience member asked Ms. Driver why affirmative action should benefit more privileged members of minority groups. She responded by stating that at University of Michigan, about one-half of the Black undergraduate students come from relatively privileged families, while the other half come from inner-city Detroit, and that the "reason [Black students from the inner-city] survive on campus is because of the [more privileged Black students]."[285]

Ms. Driver's assertion is unproven but very important to consider. At the *Fisher* oral argument, Justice Samuel Alito characterized UT's race-conscious admissions policy as a preference for minority students from privileged backgrounds[286]—but this critique is significantly mitigated if these privileged students enhance the college experience of their less privileged peers. It is certainly a reasonable hypothesis that affluent minority students can serve as social supports for their less privileged same-race peers.[287] Moreover, student peers are present at social events and in residence halls late at night,[288] when other university services may not be readily available. Of course, universities need to admit underprivileged minority students for these effects to occur. Elite universities in particular have been criticized—often deservedly so—for admitting mostly affluent and privileged minority students.[289] In addition to Justice Alito's critique above, this may also

[285] *See* Harpalani, *supra* note 49, at 64–65 nn.57–58 and accompanying text. I cannot verify the numbers or the assertion by Ms. Driver, but I have witnessed similar examples of intragroup social support among minority students. Intragroup social support among minority students is a well-founded hypothesis and worthy of more empirical investigation.

[286] Transcript of Oral Argument, *supra* note 47, at 58–59.

[287] *See* Harpalani, *supra* note 26, at 514 n.226.

[288] Harpalani, *supra* note 283 ("While the university has support services for underprivileged students, it is their classmates who are available to help them in classes, at social events and in the dormitories late at night.").

[289] *Id.* (contending that "elite, private universities . . . . do exactly what Justice Alito maligned: preferring minority students from privileged schools over those who are less privileged"). *See also* BROWN, *supra* note 281 (discussing changing racial and ethnic ancestry of Black students at selective universities); Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008) (questioning admissions policies "that lump[ ] all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities,

fuel Justice Thomas's concerns that "racial aesthetics" rather than substantive educational benefits drive race-conscious policies.[290] Diversity within racial groups requires attention not only to race, but also to socioeconomic status and other variables,[291] and elite universities can do much better in ensuring that their student bodies are ethnically and socioeconomically diverse within racial groups.[292]

While there have been many studies of campus climate and feelings of isolation among minority students generally,[293] none have specifically explored if more privileged minority students help their less privileged, same-race peers navigate these challenges. Universities should investigate whether such intragroup social support does occur among minority students.[294] If so, such empirical research can further

and graduate programs" and noting that with "the growing percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters" at selective institutions, "blacks whose predominate racial and ethnic heritage is traceable to the historical oppression of blacks in the U.S. are far more underrepresented than administrators, admissions committees, and faculties realize"); Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 302 (2011) (arguing that "admissions committees of selective higher education institutions should not provide treatment that is more favorable to Black immigrant applicants . . ."); Cara Anna, *Immigrants Among Blacks at Colleges Raises Diversity Questions*, BOSTON GLOBE (Apr. 30, 2007), http://www.boston.com/news/education/higher/articles/2007/04/30/immigrants_among_blacks_at_colleges_raises_diversity_questions/?page=2 ("The issue of native vs. immigrant blacks took hold at Harvard in 2004, when professors Henry Louis Gates and Lani Guinier pointed out at a black alumni reunion that a majority of attendees were of African or Caribbean origin.").

[290] Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part) ("A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably."). *See also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013) ("The irony, then, is that our legal and social emphasis on diversity—while intended to produce progress toward a racially egalitarian society—has instead in many cases contributed to a state of affairs that . . . relegates nonwhite individuals to the status of 'trophies' or 'passive emblems.'") (citing Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1041 (2011)).

[291] *See* Harpalani, *supra* note 26, at 496 ("By definition, achieving . . . within-group diversity . . . requires admissions committees to consider factors besides race and to treat applicants of the same race differently based on non-racial factors.").

[292] *See supra* note 289.

[293] *See supra* note 102.

[294] Moreover, in addition to *intragroup* social support, universities should also investigate *intergroup* social support: whether minority students of one group can serve as social supports for students of another group (for example, Black students supporting Native American or Asian American students). *See* Harpalani, *supra* note 26, at 483 ("[I]f there are African American and Latino students in a class who speak up and share their views, then a Native American student may feel more emboldened to do so. . . . [M]inority student organizations regularly collaborate on activities and interact and support one another at many institutions of higher education."); *see also* Vinay Harpalani, *Ambiguity, Ambivalence, and Awakening: A South Asian Becoming*

support the notion of diversity within racial groups as part of the compelling interest. By highlighting the social and educational benefits of diversity within racial groups, universities can defend their continued use of race-conscious, holistic admissions policies.

2. Race-Conscious Campus Spaces

The educational benefits of diversity occur well beyond the classroom and in fact, may occur more commonly in extracurricular venues than in classes. Yet in *Fisher*, UT's defense largely focused on data showing minority underrepresentation in classes[295]—important data without a doubt, but limited in many ways. While minority representation itself can help break down racial stereotypes, it is difficult to tie classroom diversity numbers to the tangible educational benefits of diversity espoused by the Supreme Court. Even small, discussion-oriented classes, such as the ones noted by UT in its Supreme Court brief, may not always focus on cross-racial understanding or bring out different perspectives related to race. A simple focus on classroom diversity also fuels the critique that universities' interest in diversity is largely superficial. In his *Grutter* dissent, Justice Clarence Thomas critiqued the majority's reasoning by characterizing it in such terms: "Classroom aesthetics yield[] educational benefits, [race-conscious] admissions policies are required to achieve [racial diversity], and therefore the policies are required to achieve the educational benefits."[296] Given the ever-continuing need to defend race-conscious admissions policies, universities should demonstrate that their efforts towards diversity go beyond numbers in classrooms—and they can do so by documenting the educational benefits of racial diversity not only in classrooms, but also in other campus venues.

"Critically" Aware of Race in America, 11 BERKELEY J. AFR.-AM. L. & POL'Y 71, 82 (2009) (citing NYU Law student symposium, "Can People of Color Become a United Coalition?" which focused on forging social and political relationships between different minority groups); *All-ALSA Coalition Mixer*, NYU LAW http://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=20157 (last visited Mar. 7, 2015) (noting that "[t]he All-ALSA Coalition is an alliance of NYU's diversity groups that seeks to build community among diverse student groups and advocate collectively on their behalf").

[295] *See* Brief for Respondents, Fisher v. Texas, 133 S. Ct. 2411 (No. 11-345); *see also* Harpalani, *supra* note 26, at 504–05.

[296] Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting). Justice Thomas generally questions the link between racially diverse student bodies and any purported educational benefits. *Id.* at 355–57.

A good place to start would be the most racially diverse environments on many college campuses: "race-conscious campus spaces." As defined in this Article, these are physical campus locations or campus initiatives and activities that focus on racial identity, whether for a specified racial group or in a more general sense (i.e., a campus lecture or film series on race). Such spaces are often, though not always, "majority-minority" environments—where White students may not be a numerical majority or plurality on a regular basis. These spaces can include ethnic studies departments and programs, campus cultural centers, and residence halls devoted to the study and experiences of a particular racial/ethnic group (e.g., African Americans), all of which contribute to the educational benefits of diversity.

Legal and academic discourse on the benefits of diversity has focused on the presence of a "critical mass" of minority students in predominantly White settings. Race-conscious spaces—although once thought to cater to specific groups and promote "institutionalized separatism"[297]—have now become the most racially diverse environments on college campuses. For example, in the W.E.B. Du Bois College House, University of Pennsylvania's residence hall devoted to African American studies, "46 percent of . . . residents report a racial identity other than African American."[298] The Du Bois College House website states:

> As the African American theme-based house, and in adhering to its original mission, most of the programs and events in Du Bois College House are based upon the history and culture of people of the African Diaspora. However, in

[297] *See* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 104 (1992) (decrying "black dormitories" and other ethnic spaces as "institutionalized separatism"). *See also* WAYNE GLASKER, BLACK STUDENTS IN THE IVORY TOWER: AFRICAN AMERICAN STUDENT ACTIVISM AT THE UNIVERSITY OF PENNSYLVANIA, 1967–1990, at 115–46 (2002) (describing opposition to W.E.B. Du Bois College House at University of Pennsylvania); *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part) ("[U]niversities . . . talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.").

[298] Rachel E. Ryan, *Turmoil and Transformation: Du Bois House Turns 40*, PA. GAZETTE, Mar. | Apr. 2013, at 23–24. This phenomenon is not unique to Du Bois College House or to Penn. During my time as a Visiting Assistant Professor at Chicago-Kent College of Law, the most diverse student activity I have observed, in terms of attendance, was the Black Law Student Association's "State of Black Chicago" Voting Rights Symposium in March 2013. Each of the four panelists was of a different racial background, and of approximately 40 attendees, one-half appeared to be Black, while the remainder appeared to be from a variety of backgrounds.

> recognizing the range of diversity within the House's population, we must also acknowledge, not only its role as a microcosm of the Greater American society, but the House's role in preparing our residents for the greater global world. Du Bois College House is one of the most diverse college houses on Penn's campus, and often refers to itself as "the U.N. at UPenn!" This means that the entire staff works hard to ensure that our programming is just as diverse as the population, and that it meets the needs of all residents.[299]

Moreover, not only are these spaces quite racially diverse, but they also often focus directly on race-related dialogue and cultural exchange—thus directly facilitating the educational benefits noted in *Fisher*. The Du Bois website notes different events and activities that occur at Du Bois, many of which involve issues related to racial identity and equality, and also celebration of different cultural heritages.[300] The discussions at these events, in conjunction with the diverse student population in Du Bois, epitomizes *Grutter* and *Fisher*'s values of promoting cross-racial interaction[301] and "lessening of racial isolation and stereotypes."[302] Professor Kim Forde-Mazrui takes this one step further, arguing that "a foundation for good citizenship requires awakening students to the full range of American cultures which, in turn, requires exposing students to the full range of American races."[303]

This view of race-conscious campus spaces itself counters stereotypes of minority students. For example, Justice Antonin Scalia, among others, has decried "tribalism and racial segregation on . . .

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[299] W.E.B. DU BOIS COLLEGE HOUSE, UPENN, http://dubois.house.upenn.edu/frontpage (last visited Mar. 7, 2015); *see also* Ernest Owens, Farrah Alkhaleel, Simon Tesfalul & Taylor Blackston, *Appreciating Du Bois as a Loving Home*, DAILY PENNSYLVANIAN (Oct. 15, 2012, 1:14 AM), http://www.thedp.com/article/2012/10/du-bois-house-council-appreciating-du-bois-as-a-loving-home ("Du Bois [College House] is not just a space for black students. It is a college house for students of all cultures . . . Du Bois has evolved to serve as a college house for Penn students. We haven't forgotten our heritage, but we also wish to accommodate a more diverse group of residents. We are no longer a college house that caters solely to the black community, but one that still emphasizes Africana interests through its programming.").

[300] W.E.B. DU BOIS COLLEGE HOUSE, UPENN, http://dubois.house.upenn.edu/frontpage (last visited Mar. 7, 2015).

[301] *Grutter*, 539 U.S. at 333 ("[T]he educational benefits that diversity is designed to produce . . . are substantial . . . [and include] promot[ing] cross-racial understanding, . . . break[ing] down racial stereotypes, and enabl[ing] [students] to better understand persons of different races.") (internal quotations and citation omitted).

[302] Fisher v. Texas, 133 S. Ct. 2411, 2418 (2013).

[303] Kim Forde-Mazrui, *Does Racial Diversity Promote Cultural Diversity?: The Missing Question in* Fisher v. University of Texas, 17 LEWIS & CLARK L. REV. 987, 1017 (2013).

campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies."[304] Justice Scalia is misinformed: none of these spaces and events excludes any individuals on the basis of race,[305] and most are quite welcoming to students of all backgrounds, including interested White students.[306]

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[304] *Grutter*, 539 U.S. at 345 (Scalia, J., concurring in part and dissenting in part).

[305] In fact, to do so would almost certainly be unconstitutional.

[306] *See supra* notes 298–300 and accompanying text. *See also* Harpalani, *supra* note 294, at 81 (describing my experience of being welcomed by residents at Du Bois College House when I was a graduate resident advisor there). Even beyond Du Bois College House, my personal experience supports this assertion. As a student, I was involved in numerous undergraduate student-of-color organizations at the University of Pennsylvania, along with the Black Allied Law Students Association (BALSA) at New York University School of Law. I have also been a faculty advisor for Black student organizations at Seattle University School of Law and Chicago-Kent College of Law, and I have observed the Black Law Students Association at Savannah Law School. Across all of these very different institutions, all the Black student organizations I have encountered have welcomed participation by students of all ethnicities, and many have sponsored events where attendance was more racially diverse than most other activities at their respective law schools.

A somewhat contrary finding is reported in recent issue of the *Journal of Law and Economics*. *See* Peter Arcidiacono, Esteban Aucejo, Andrew Hussey & Kenneth Spenner, *Racial Segregation Patterns in Selective Universities*, 56 J.L. & ECON. 1039, 1039 (2013) (reporting that Black students' "friendships are no more diverse in college than in high school" even though the colleges in question have "substantially smaller" Black student populations). The authors acknowledge that "while the rather small number of reported friends . . . may reflect . . . a student's closest friends, it by no means provides a comprehensive measure of the degree of social interaction among students within or across racial groups." *Id.* at 1059. This is an important limitation, as the educational benefits of diversity do not necessitate formation of close friendships, but rather cross-racial interactions for the purpose of breaking down racial stereotypes and learning about people of different racial and cultural backgrounds. *See Grutter*, 539 U.S. at 330; *Fisher*, 133 S. Ct. at 2418. My own observations also indicate that the closest friendships, even in diverse settings such as Du Bois College House, are usually (though not always) between students of the same race—but this does not negate the cross-racial interaction and understanding that also occurs. Also, the authors' implicit expectation that Black students would have more cross-racial friendships in college because of the "substantially smaller" Black student populations at colleges is short-sighted. Empirical data indicate that smaller Black student populations at colleges relate to greater feelings of racial isolation among Black students. *See* Kidder, *supra* note 102, at 13 ("[D]ata from leading research universities show that higher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate."). One might thus infer the opposite: that Black students would actually be more likely to stick together and draw upon each other for support when their numbers are small and they feel racially isolated. *See also* Boddie, *supra* note 112, at 801 (arguing that if there are few African American students on a campus, "[t]heir small numbers . . . make[] cross-racial interactions awkward and uncomfortable and, therefore, infrequent[] . . . lead[ing] to even greater social distance between whites and blacks on campus . . . [.]").

Cross-racial interactions and conversations involving race occur much more frequently in race-conscious campus spaces than they do in the typical classroom, or in any predominantly White setting. Indeed, such interactions and conversations are the very mission of many race-conscious spaces. Perhaps more than any other space on campus, the specific educational benefits of diversity on campus—as espoused in Supreme Court jurisprudence—occur in environments such as the W.E.B. Du Bois College House. Academic and social discourse has historically treated Black-themed residence halls and similar environments as promoting "self-segregation" among groups of minority students.[307] Conversely, this Article argues that universities should actually look to these environments when documenting and defending the educational benefits of diversity that justify their race-conscious admissions policies.[308]

In addition to facilitating the educational benefits of diversity for students of all backgrounds, spaces such as the W.E.B. Du Bois College House also serve another aspect of the compelling interest in diversity: they inherently help minority students feel less "isolated or like spokespersons for their race."[309] They are some of the few environments on campus where particular groups of minority students might actually be in a numerical majority, and they function as social support centers for minority students. As noted by Professor Samuel Museus, "ethnic student organizations . . . provid[e] students with venues of cultural familiarity, vehicles for cultural expression and advocacy, and sources of cultural validation, function[ing] to facilitate racial/ethnic minority students' adjustment to and membership in . . . predominantly White campus cultures."[310]

Universities already recognize these phenomena, which is why they created race-conscious campus spaces in the first place.[311] Nevertheless, studying these spaces more thoroughly and documenting their activities can also help with the defense of race-

[307] *See supra* note 297.

[308] Some of these spaces, like the Greenfield Intercultural Center at Penn, also focus specifically on bringing together different groups of minority students such Black and Latino students. *See Welcome to the Albert M. Greenfield Intercultural Center!*, UPENN, http://www.vpul.upenn.edu/gic/ (last visited Apr. 2, 2015).

[309] *Grutter*, 539 U.S. at 319.

[310] Samuel D. Museus, *The Role of Ethnic Student Organizations in Fostering African American and Asian American Students' Cultural Adjustment and Membership at Predominantly White Institutions*, 49 J. COLLEGE STUDENT DEV. 568, 580 (2008).

[311] Student activism also played a large role in the creation of such spaces. *See* Glasker, *supra* note 297 (describing Black student activism at University of Pennsylvania and its role in creation of various race-conscious campus spaces).

conscious admissions policies.[312] By highlighting race-conscious spaces as venues for the educational benefits of diversity, along with their established role as support centers for minority students, universities can more thoroughly demonstrate the benefits of race-conscious dialogue itself—not just for minority students but for all students. This would also augment the defense of race-conscious admissions policies, as it would very tangibly illustrate their educational benefits and signal the salience of race in universities' educational missions—going beyond the "racial aesthetics" decried by Justice Thomas.[313]

Both of the proposals in this Section—emphasis on diversity within racial groups and increased attention to race-conscious campus spaces—illustrate that the compelling interest in diversity can readily incorporate race-consciousness, manifested through tangible activities and intangible values at universities. By incorporating race-conscious goals and campus programs as central components of their educational missions, universities will more readily be able to defend their race-conscious admissions policies as narrowly tailored means to attain the educational benefits of diversity.

CONCLUSION

In spite of its quest for race-neutral alternatives, *Fisher* does not spell doom for race-conscious admissions policies. This Article argues that the Supreme Court's broadly-defined compelling interest in diversity, its endorsement of nuanced consideration of race in admissions, and its deference to universities in defining their educational missions, all actually support universities' continuing use of race-conscious admissions policies. Through its articulation of educational benefits of diversity, such as lessening racial stereotypes, and its emphasis on individualized, nuanced consideration of race, *Fisher* gives universities room to show that "no workable race-neutral alternatives would produce the educational benefits of diversity."[314]

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[312] There is a small but growing academic literature on race-conscious campus spaces. *See* Museus, *supra* note 310, at 569 (citing studies on ethnic student organizations); *see, e.g.*, Lori D. Patton, Brian K. Bridges & Lamont A. Flowers, *Effects of Greek Affiliation on African American Students' Engagement: Differences by College Racial Composition*, 29 COLLEGE STUDENT AFFAIRS J. 113 (2011); Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L & POL'Y 83 (2013).

[313] *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part). *See also supra* note 290 and accompanying text.

[314] Fisher v. Texas, 133 S. Ct. 2411, 2420 (2013).

Nevertheless, this Article also calls on universities to do more than they have done to defend their race-conscious policies and programs. UT did argue that its race-conscious admissions policy facilitates diversity within racial groups, but universities can do much more to show how such within-group diversity relates to their compelling interest in diversity, and how their pursuit of diversity within racial groups falls in line with *Grutter* and *Fisher*'s narrow tailoring principles. This Article gives tangible suggestions for how universities can illustrate the importance of diversity within racial groups.

Additionally, this Article argues that universities should highlight not only diversity within classrooms and within predominantly White settings, but also in race-conscious campus spaces where White students may not be the majority or even the plurality. Such spaces do not merely cater to minority students; they are often the most salient venues for the educational benefits of diversity more broadly. Cross-racial interactions and lessening of racial stereotypes occur readily when White students are exposed to race-conscious campus spaces and partake in dialogues on race framed from the perspectives of minority students. These spaces also help minority students feel less isolated and tokenized on campus, and they give White students a taste (albeit a relatively mild one) of life as a minority student on campus. Universities should not only encourage all of these activities, but also study and document them.

In a broader sense, this Article calls upon universities to embrace race-consciousness—not only in their admissions policies but also in their educational missions and campus activities that promote the benefits of diversity. Future defense of race-conscious admissions will require universities to be assertive about the importance of race, not only in admissions, but in everyday education and campus life. This endeavor may well meet resistance and generate political and legal controversy.[315] Nevertheless, there always has been and always will be such controversy surrounding race-conscious programs and policies, and universities should be assertive in defending them. By requiring stringent review of the need for race-conscious admissions in *Fisher*, the Supreme Court essentially requires universities to take such a position.

[315] There could be two levels of opposition to such openness. There are those who oppose race-conscious policies altogether. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Part IV of majority opinion, authored by Chief Justice Roberts and joined by Justices Alito, Scalia, and Thomas, states "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Some, however, may support such policies, but believe that stealth in pursuing them is a constitutional value. *See* sources cited *supra* note 205.

As such, universities should embrace not only diversity, but race-consciousness—with all of its complexities.[316] They should do so not only in admissions or in special programs, but also in their educational missions. In his 1978 *Bakke* dissent, the late Justice Harry Blackmun stated that: "In order to get beyond racism, we must first take account of race. There is no other way."[317] More recently in her *Schuette* dissent, Justice Sotomayor contended that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race."[318] While Supreme Court jurisprudence as a whole is currently hostile to these views, universities can and should use the Court's broadly defined diversity interest to embrace race-consciousness in their campus programs, and to show that race-conscious admissions policies are necessary to fulfill their educational missions.

[316] Some of these complexities are beyond the scope of this Article: for example, the conundrums of reconciling race-consciousness with racial self-identification and multiracial identity. *See, e.g.*, Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of New Functionalism*, 102 GEO. L.J. 179 (2013); Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CAL. L. REV. 1243 (2014). *See also* Nancy Leong, *Identity Entrepreneurs* at 2, 104 CAL. L. REV. (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574987 (describing student who identifies as Native American on application based on one distant Native American ancestor as an "*identity entrepreneur*—someone who leverages his or her identity as a means of deriving social or economic value."); Charles M. Blow, The Delusions of Rachel Dolezal, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/opinion/charles-blow-the-delusions-of-dolezal.html (noting how story of woman who was born White but later began identifying herself as Black "has sparked a national conversation about how race is constructed and enforced, to what extent it is cultural and experiential, and whether it is mutable and adoptable.").

[317] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

[318] Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).