

## THE DOUBLE-CONSCIOUSNESS OF RACE-CONSCIOUSNESS AND THE BERMUDA TRIANGLE OF UNIVERSITY ADMISSIONS

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### ABSTRACT

*This Article draws upon the thought of W.E.B. Du Bois and the late Professor Derrick Bell to analyze race-conscious university admissions today. The Article has three main points. First, it argues that there is a “double-consciousness” to race-consciousness. In other words, there are two*

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I would like to thank the editors of the *University of Pennsylvania Journal of Constitutional Law* for inviting me to participate in their 2014 symposium, “Educational Equality and the Constitution in the 21st Century.” It was an excellent event with many distinguished speakers, and I am proud to contribute to this Symposium issue. My Article is part of a series of works I have written about race-conscious admissions policies, and the ideas herein are the product of feedback from a variety of forums. In addition to the *Journal*, I would like to thank participants in the 2013 Houston Higher Education Law Roundtable, the Fourth Annual John Mercer Langston Black Male Law Faculty Writing Workshop, the 2013 Chicago Junior Faculty Workshop, the Latina/o Critical Theory, Inc. (LatCrit) 2013 Conference, the Fourth Annual Loyola (Chicago) Constitutional Law Colloquium, and the faculty of Savannah Law School for their insightful commentary. Additionally, Professors Christopher Buccafusco, Richard Epstein, Wendy Netter Epstein, Michael Green, Stacy Hawkins, Helen Hershkoff, Darryl Levinson, Deborah Malamud, Mark Rosen, Christopher Schmidt, Carolyn Shapiro, along with Brian Burgess, also provided helpful feedback on earlier versions. Also, Professors Paulette Caldwell, Devon Carbado, Robert Chang, Richard Delgado, Norman Dorsen, Sylvia Law, Michael Olivas, Angela Onwuachi-Willig, Cristina Rodríguez, and Margaret Beale Spencer have consistently supported my scholarly endeavors. IIT Chicago-Kent College of Law provided financial and logistical support for my work from July 2012 to June 2014, while I was a Visiting Assistant Professor of Law; also, the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law provided similar support from August 2010 to May 2012, while I was the Korematsu Teaching Fellow. The W.E.B. Du Bois College House at the University of Pennsylvania initiated my interest in Du Bois’s writings, while I was a graduate resident advisor there from 1999 to 2003, and later an interim faculty fellow from 2005 to 2006. Finally, the late Professor Derrick Bell and Ms. Janet Dewart Bell have supported my work in immeasurable ways, while I was the Derrick Bell Fellow at NYU School of Law from September 2009 to June 2010. In Fall 2009, Professor Bell and I faced each other in an appellate oral argument, as a demonstration for the first class of his Current Constitutional Issues seminar. The case we argued, chosen by Professor Bell, was *Fisher v. University of Texas*, which had been recently decided in the U.S. District Court for the Western District of Texas. I thus began formulating the ideas that resulted in two law review articles prior to the Supreme Court’s *Fisher* ruling, now this one after the ruling, and another one which is forthcoming. It is thus particularly fitting that Professor Bell’s life and work are the inspiration for this Article.

*different understandings of diversity, of race-neutrality, and of individualized review—the key tenets of Supreme Court doctrine on race-conscious admissions. The double-consciousness of diversity, race-neutrality, and individualized review was prominent in the Fisher litigation and the legal discourse around Fisher more generally, leading to much confusion.*

*Second, in addition to double-consciousness, this Article argues that there is another source of confusion and contradiction in the Supreme Court’s doctrine on race-conscious admissions policies. Together, the three prongs of diversity, race-neutrality, and individualized review form a “Bermuda Triangle” for university admissions. Currently, admissions plans cannot have these three features together, but the Supreme Court requires universities to simultaneously strive for all three.*

*Finally, this Article revisits the idea of double-consciousness and contends that advocates of race-conscious admissions policies are, in the words of Professor Bell, “serving two masters”—freedom of universities to be diverse and elite, and social justice for poor people of color. The Article contends that rather than a broad pronouncement by the Supreme Court, political process and lower court rulings will determine the fate of race-conscious admissions, at least in the near future. The concluding section also discusses the Orwellian irony of “post-racial” America, where victory for racial justice is hard to distinguish from defeat.*

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## I. INTRODUCTION: SERVING TWO MASTERS

Slightly over a decade ago, when the Supreme Court upheld diversity as a compelling interest to justify race-conscious admissions policies in *Grutter v. Bollinger*,<sup>1</sup> activists for racial justice—including me<sup>2</sup>—claimed to have won a huge victory. However, one of our most cherished and respected role models had a very different reaction.

In trademark iconoclastic fashion, the late Professor Derrick Bell wrote an essay entitled *Diversity's Distractions*,<sup>3</sup> where he called diversity a “serious distraction in the ongoing efforts to achieve racial justice . . . .”<sup>4</sup> Professor Bell predicted that the Court’s approval of race-

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1 539 U.S. 306 (2003) (upholding a holistic, individualized race-conscious admissions policy at the University of Michigan Law School after finding a compelling state interest in attaining the educational benefits of diversity). *Grutter* affirmed the diversity rationale as a compelling interest and the use of race as a flexible “plus” factor—both of which the Supreme Court first articulated in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). On the same day *Grutter* was decided, the Supreme Court struck down the University of Michigan College of Letters, Arts, and Sciences’ race-conscious admissions plan, which automatically awarded twenty points on a 150 point scale to applicants from designated minority groups. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that because the points system was not narrowly tailored to achieve the University’s compelling interest in diversity, the admissions policy violated the Fourteenth Amendment).

With occasional exception for word variety, this Article uses the term “race-conscious admissions” rather than “affirmative action,” because the latter refers to a broader range of programs and policies than just university admissions, even though it is commonly used to refer specifically to race-conscious admissions policies. Also, this Article uses the term “university” to refer to selective institutions of higher education generally, including colleges and professional schools that are not technically “universities.” Unless otherwise indicated, the arguments herein apply broadly to selective institutions of higher education.

2 While at the University of Pennsylvania, I founded the CALL TO ACTION Project, a student initiative to defend race-conscious admissions policies, leading up to the Supreme Court oral arguments in *Gratz* and *Grutter*. See Vinay Harpalani, *Ambiguity, Ambivalence, and Awakening: A South Asian Becoming “Critically” Aware of Race in America*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 71, 80 (2009) [hereinafter Harpalani, *Ambiguity*] (noting that the CALL TO ACTION project was founded in response to the right wing assault on affirmative action and to promote racial justice through scholarship and activism). See also Vinay Harpalani, *Activism With the Pen, Not the Sword*, DAILY PENNSYLVANIAN, Apr. 23, 2003, at 6 [hereinafter Harpalani, *Activism*] (discussing how I formed the CALL TO ACTION project to mobilize the Penn community in defense of affirmative action).

3 Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003).

4 *Id.* at 1622 (arguing that “the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice”). See also, e.g., Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (expressing “concern[] that liberal supporters of affirmative action have used the diversity argument to defend affirmative action at elite universities and law schools without questioning the ways that traditional admissions criteria continue to perpetuate race and class privilege”). Professor Bell was one of my

conscious admissions policies, with diversity as the compelling interest to constitutionally justify them, would merely invite further litigation; simultaneously, it would divert attention from race and class-related inequalities and from universities' reliance on admissions criteria that benefit more privileged applicants, such as grades and test scores.<sup>5</sup> He also forecasted that, in the long run, "this latest civil rights victory" would be "hard to distinguish from defeat."<sup>6</sup>

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mentors, and this Article is inspired by his work. For other, similar critiques of diversity, see Derrick Bell, *What's Diversity Got to Do With It?* 6 SEATTLE J. FOR SOC. JUST. 527, 529 (2008) ("We must even consider that racial diversity is a snare, and not an efficient means of achieving effective schooling for children who are poor or minority group members."); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 450 (2014) (noting that the diversity rationale has been criticized "for failing to advance racial justice, for primarily benefiting white institutions instead of students of color, for legitimizing admissions policies that favor the privileged, and for potentially pitting minority students against each other"); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 582 (2009) (arguing that the pursuit of diversity has come at a cost to the provision of equal opportunities to minority students). 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)).

<sup>5</sup> Bell, *supra* note 3, at 1622. Professor Bell also referred to the race-conscious admissions policies approved in *Grutter* as "litigation-prompting compensation for admissions criteria that benefit the already privileged and greatly burden the already disadvantaged." *Id.* at 1631. Ironically, in spite of their vast ideological differences, Professor Derrick Bell and Justice Antonin Scalia did agree that *Grutter* would invite more litigation. See *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.").

*Grutter* also provided an interesting point of confluence between Professor Derrick Bell and Justice Clarence Thomas. Justice Thomas devoted one section of his *Grutter* dissent largely to critiquing the use of standardized tests in admissions—a view shared by Professor Bell. Compare *id.* at 367–71 (Thomas, J., dissenting) ("The Law School's continued adherence to measures [like the LSAT that] it knows produce racially skewed results is not entitled to deference by this Court."), with Bell, *supra* note 3, at 1630 ("Standardized tests . . . give an advantage to candidates from higher socioeconomic backgrounds and disproportionately screen out women, people of color, and those in lower income brackets."). Additionally, Justice Thomas was critical of universities' elitism—another point of partial agreement with Professor Bell. Compare *Grutter* at 355–56 (Thomas, J., dissenting) ("[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."), with Bell, *supra* note 3, at 1622 ("Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants."). Of course, Justice Thomas's broader view of race-conscious policies is very different than that of Professor Bell. See *id.* at 1632 (Professor Bell noting that

Many years later, after working with Professor Bell and getting to know him well, his prediction reminds me of W.E.B. Du Bois's classic metaphor of "double-consciousness": that "peculiar sensation . . . of . . . two-ness . . . two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body . . ."<sup>7</sup> Professor Bell knew plenty about such "warring ideals"—captured eloquently in his classic article, *Serving Two Masters*.<sup>8</sup> There, he analyzed the conflict between "integration ideals and client interests in school desegregation litigation"<sup>9</sup> after *Brown v. Board of Education*.<sup>10</sup> Professor Bell's implicit use of the double-consciousness metaphor could just as easily apply to *Grutter*, where civil rights advocates felt similarly conflicted about serving two masters: universities' freedom to be diverse and elite,<sup>11</sup> and the advocates' own ideals of racial equality and justice,

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"Justice Thomas knows that [an elite university admissions] process is not based on merit, but his view of the Fourteenth Amendment is impotent to address the unfairness.").

<sup>6</sup> Bell, *supra* note 3, at 1622.

<sup>7</sup> W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* 3 (1903) ("It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.")

<sup>8</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 471 (1976) (describing tension between the goals of civil rights advocates and those of their clients). Professor Bell derived the "serving two masters" metaphor from the New Testament. *See id.* at 472 n.4 (quoting *Luke* 16:13 (King James) ("No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.")). For an interesting analysis of parallels between the work of Professor Bell and W.E.B. Du Bois, see James R. Hackney, Jr., *Derrick Bell's Re-Sounding: W. E. B. Du Bois, Modernism, and Critical Race Scholarship*, 23 *LAW & SOC. INQUIRY* 141, 142 (1998) (analyzing how W. E. B. Du Bois's ideas "are taken up, transformed, and *re-sounded* by later generations" of scholars, including Professor Derrick Bell).

<sup>9</sup> Bell, Jr., *supra* note 8, at 470.

<sup>10</sup> 347 U.S. 483 (1954) (holding that racially segregated schools were unconstitutional); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (ordering racial integration of segregated public schools "with all deliberate speed"). W.E.B. Du Bois and Professor Derrick Bell expressed a similar ambivalence about racial integration of schools. *See* DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 102–22 (1987) (arguing that "[n]either separate schools nor mixed schools" necessarily provide Black children with better education); Bell, Jr., *supra* note 8, at 516 ("[A] single minded commitment to racial balance . . . [is] all too often educationally impotent."); W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 *J. NEGRO EDUC.* 328, 335 (1935) (arguing that quality of education is more important than whether schools are separate or integrated).

<sup>11</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (noting "a constitutional dimension, grounded in the First Amendment, of educational autonomy" for universities); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *cf. Grutter*,

which extended far beyond the elite.<sup>12</sup> And with my ties to Professor Derrick Bell<sup>13</sup> and to W.E.B. Du Bois,<sup>14</sup> I see double-consciousness as a very fitting metaphor to understand race-conscious university admissions today.

Supreme Court jurisprudence on the constitutionality of race-conscious admissions is confusing and convoluted, to say the least. The Court's 2013 decision in *Fisher v. University of Texas at Austin* illustrated this.<sup>15</sup> After granting certiorari and deliberating for eight months after oral argument, the Court did very little that was new.<sup>16</sup>

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539 U.S. at 339 (“Narrow tailoring does not require . . . a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”); *id.* at 340 (rejecting “the suggestion that the Law School simply lower admissions standards for all students, [because this is] a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission”); *id.* at 355–56 (Thomas, J., concurring in part and dissenting in part) (“[T]he [University of Michigan] Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.”).

<sup>12</sup> See Vinay Harpalani, *Diversity and Community Upliftment*, DAILY PENNSYLVANIAN, Mar. 13, 2013, <http://www.thedp.com/article/2013/03/vinay-harpalani-diversity-and-community-upliftment> (noting that “elite, private universities like Penn . . . prefer[] minority students from privileged schools over those who are less privileged”); Vinay Harpalani, *A Long Legacy of Activism at Penn*, DAILY PENNSYLVANIAN, Apr. 9, 2003, [http://www.thedp.com/article/2003/04/vinay\\_harpalani\\_a\\_long\\_legacy\\_of\\_activism\\_at\\_penn](http://www.thedp.com/article/2003/04/vinay_harpalani_a_long_legacy_of_activism_at_penn) (“[D]iversity was not the original motivation behind affirmative action. Affirmative action programs in higher education began as radical desegregation measures; they were demanded by people of color who were fighting for equality . . . . Unfortunately, while the current Penn administration embraces ‘diversity,’ it has forgotten how Penn became diverse in the first place.”).

<sup>13</sup> I served as the Derrick Bell Fellow at New York University (NYU) School of Law in 2009–10, sharing an office with Professor Bell for my first job out of law school and assisting him with teaching his classes. See Vinay Harpalani, *From Roach Powder to Radical Humanism: Professor Derrick Bell’s “Critical” Constitutional Pedagogy*, 36 SEATTLE U. L. REV. xxiii (2013) (describing Professor Derrick Bell’s teaching and life philosophies and his impact on students).

<sup>14</sup> I served as a graduate resident advisor (1999–2003) and faculty fellow (2005–2006) in the W.E.B. Du Bois College House at the University of Pennsylvania and spent many hours analyzing and discussing Du Bois’s writings. See Harpalani, *Ambiguity*, *supra* note 2, at 81 (“Looking at myself through the eyes of Du Bois College House became part of my own ‘double-consciousness[.]’”).

<sup>15</sup> 133 S. Ct. 2411 (2013).

<sup>16</sup> In *Fisher*, the Court vacated the Fifth Circuit’s ruling that the University of Texas at Austin (“UT”) had a constitutionally permissible race-conscious admissions policy, but it did not deem UT’s policy to be unconstitutional. Rather, it remanded the case for more stringent review, holding that the District Court for the Western District of Texas and Fifth Circuit had “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications[.]” *Id.* at 2421. Justice Ruth Bader Ginsburg dissented. *Id.* at 2432. Justice Elena Kagan did not take part in the decision. *Id.* at 2422.

Seven Justices signed on to Justice Anthony Kennedy's majority opinion, agreeing essentially to make no major alteration to the Court's 2003 framework from *Grutter v. Bollinger*—even though three of them, including Justice Kennedy, had dissented in *Grutter*.<sup>17</sup> The only new tenet from *Fisher* was that courts must review compliance with *Grutter* more stringently.<sup>18</sup> Race-conscious admissions policies are constitutionally permissible in the manner prescribed by *Grutter*: they must be necessary to fulfill the compelling interest in diversity,<sup>19</sup> and they must involve individualized review of applicants.<sup>20</sup> But courts must

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My prior Article in the *Journal of Constitutional Law* partially foreshadowed the result in *Fisher*. See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 526 (2012) (“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*, 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.

Upon remand, the Fifth Circuit has once again affirmed the District Court’s ruling upholding UT’s race-conscious admissions policies. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014). A petition for rehearing en banc was denied on November 12, 2014. See *Fisher v. Univ. of Tex. at Austin*, 771 F.3d 274 (5th Cir. 2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Fisher-en-banc-denial-11-12-14.pdf>. Nevertheless, the case could still be heard again by the U.S. Supreme Court. See Lyle Denniston, *Fisher Case on Way Back to the Court*, SCOTUSBLOG (Nov. 12, 2014, 3:58 PM), <http://www.scotusblog.com/2014/11/fisher-case-on-way-back-to-the-court>.

<sup>17</sup> See *Fisher*, 133 S. Ct. 2411 (containing only one dissent—by Justice Ginsberg—and having been heard without Justice Kagan present); *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia & Thomas, JJ., dissenting); *id.* at 349–78 (Thomas & Scalia, JJ., dissenting); *id.* at 387 (Kennedy, J., dissenting).

<sup>18</sup> *Fisher*, 133 S. Ct. at 2420 (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense.’” (citation omitted)); see also *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time. . . . In 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.”).

<sup>19</sup> *Fisher*, 133 S. Ct. at 2417 (recognizing that there is at least “one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body”); *id.* at 2420 (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. . . ‘at tolerable administrative expense.’” (citation omitted)).

<sup>20</sup> *Id.* at 2418 (“To be narrowly tailored, a race-conscious admissions program . . . must remain flexible enough to ensure that each applicant is evaluated as an individual. . . .” (quoting *Grutter*, 539 U.S. at 334, 337) (internal quotation marks omitted)). See also *Grutter*, 539 U.S. at 336–37 (“When using race as a ‘plus’ factor in university admissions, a

now closely assess whether a university can use race-neutral policies instead and achieve the same diversity result.<sup>21</sup> Read together, *Grutter* and *Fisher* create a perplexing nexus between diversity, individualized review, and race-neutrality. The Court's more recent decision in *Schuette v. BAMN* does not shed any light on the issue, as Justice Kennedy's controlling opinion clearly stated that *Schuette*—which upheld Michigan's state ban on race-conscious policies—was “not about the constitutionality, or the merits, of race-conscious admissions policies in higher education.”<sup>22</sup>

This Article has three main points. First, it argues that there is a “double-consciousness” to race-consciousness. In other words, there are two different understandings of diversity, of race-neutrality, and of individualized review—the key tenets of Supreme Court doctrine on race-conscious admissions.<sup>23</sup> The double-consciousness of diversity, race-neutrality, and individualized review was prominent in the *Fisher* litigation and the legal discourse around *Fisher* more generally. Litigants, commentators, and the courts have all proffered different views of these key tenets, leading to much confusion.

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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.”); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978) (considering the “denial . . . of th[e] right to individualized consideration without regard to . . . race” to be the “principal evil” of the medical school's admissions program).

21 *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (calling for “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications”). See also *id.* (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense.’”). The Supreme Court's ruling in *Fisher* was consistent with the “Kennedy template” for *Grutter's* demise, articulated by Professor Ellen Katz prior to the decision. See Ellen D. Katz, *Grutter's Denouement: Three Templates From the Roberts Court*, 107 NW. U. L. REV. 1045, 1051, 1053 (2013) (explaining that Justice Kennedy's prior opinions in *Grutter* and two other cases form a template that, if applied in *Fisher*, would require the Court to “examine with rigor the distinct ways administrators at the University of Texas (UT) use racial criteria to pursue their goal of racial diversity on campus” but “would nevertheless leave undisturbed *Grutter's* recognition that the goal of diversity is a compelling objective that school administrators may lawfully pursue”).

22 *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1630 (2014). Rather than evaluating the merits of race-conscious admissions policies, the Court in *Schuette* only considered “whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.” *Id.* In other words, *Schuette* was “not about how the debate over racial preferences should be resolved. It [wa]s about who may resolve it.” *Id.* at 1638.

23 See *supra* notes 18–21 and accompanying text.



Second, in addition to double-consciousness, this Article argues that there is another source of confusion and contradiction in the Supreme Court's doctrine on race-conscious admissions policies. The three prongs of diversity, race-neutrality, and individualized review form a "Bermuda Triangle" for university admissions. An admissions plan cannot currently have these three features together, but the Supreme Court requires universities to simultaneously strive for all three.<sup>24</sup>

Finally, this Article revisits the idea of double-consciousness and the notion of serving two masters. It contends that, at least in the near future, state and local politics and lower court rulings will determine the fate of race-conscious admissions policies, rather than a broad national pronouncement by the Supreme Court.

This concluding section also examines Professor Bell's prediction and discusses how advocates of race-conscious policies continue to grapple with their own double-consciousness, and more generally with the irony of "post-racial" America—where it is hard to distinguish between victory and defeat for racial justice.

## II. THE DOUBLE-CONSCIOUSNESS OF RACE-CONSCIOUSNESS

The Supreme Court has always had its own internal conflict over race-conscious admissions policies, due to its growingly conservative composition since their advent. Ever since their fractured 1978 ruling in *Regents of the University of California v. Bakke*—where Justice Lewis Powell's controlling opinion espoused diversity as a compelling interest, struck down racial set-asides in higher education, but upheld the use of race as a "plus factor" in admissions<sup>25</sup>—the Justices have been very divided in their views of race-conscious admissions. Over four separate dissents, Justice Sandra Day O'Connor authored a 5-4 *Grutter* majority opinion that affirmed all the central tenets of *Bakke* and, in conjunction with *Gratz v. Bollinger*,<sup>26</sup> established individualized

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<sup>24</sup> See *supra* notes 18–21 and accompanying text.

<sup>25</sup> *Bakke*, 438 U.S. at 311–12 (finding that "the 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, yet it does not insulate the individual from comparison with all other candidates for the available seats.").

<sup>26</sup> 539 U.S. 244, 275 (2003) (striking down the University of Michigan's race-conscious undergraduate admissions policy on the grounds that, because it involved a fixed point

review of applicants as a necessary condition of any race-conscious admissions policy. *Grutter* also required universities to give “good faith consideration”<sup>27</sup> to race-neutral alternatives, and to eventually phase out race-conscious admissions policies when feasible.<sup>28</sup>

Unlike *Bakke* and *Grutter*, *Fisher* was not a fractured ruling in the usual sense. Seven of the eight Justices who heard the case signed on to Justice Kennedy’s majority opinion.<sup>29</sup> Nevertheless, *Fisher*’s reaffirmation of the diversity interest—without any further clarification of it—and its emphasis on stringent review of race-neutral alternatives both reinforce the Court’s divisions on this charged issue. *Diversity*, *race-neutrality*, and *individualized review* all have their own double-consciousness—due to the Supreme Court’s internal disagreements, and due to varying understandings of these tenets at large.

#### A. *Diversity’s Double-Consciousness: It’s More than the Numbers*

Diversity is of course fundamental to the constitutionality of race-conscious admissions policies: it is the compelling state interest that justifies them.<sup>30</sup> But what exactly is this compelling interest and how do we determine if a race-conscious admissions policy is necessary to attain it? These are difficult questions, in part because of diversity’s double-consciousness.

On the one hand, the language of *Grutter* and *Fisher* highlights the educational benefits of diversity in higher education settings as the compelling interest.<sup>31</sup> Professor Devon Carbado identifies eight benefits of diversity that Justice O’Connor espoused in her *Grutter* majority opinion: diversity serves to “promote speech and the robust exchange of ideas . . . effectuate the inclusion of underrepresented students . . . change the character of the school . . . disrupt and negate racial stereotypes . . . facilitate racial cooperation and understanding . . . create pathways to leadership . . . ensure democratic le-

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system rather than flexible, individualized review of applicants, it was therefore not sufficiently narrowly tailored).

27 *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

28 *Id.* at 342 (“[R]ace-conscious admissions policies must be limited in time . . . . In 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.”).

29 *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2414 (2013).

30 *See supra* notes 1, 19 & 25.

31 *See supra* notes 1, 19 & 25.

gitimacy [and] . . . prevent racial isolation and alienation[.]”<sup>32</sup> The *Fisher* opinion itself focused on “the educational benefits that flow from a diverse student body”<sup>33</sup> as the “one compelling interest that could justify the consideration of race”<sup>34</sup> in admissions. Through its *Grutter* and *Fisher* majority opinions, the Supreme Court has framed the diversity interest in terms of educational activities and exchanges between diverse groups of students—intangibles that improve the quality of education for all involved.

On the other hand, however, because the educational benefits of diversity are difficult to measure and review, litigants in *Fisher* framed diversity in terms of numerical representation: numbers and percentages of various groups of minority students. Because the Supreme Court in *Bakke* prohibited the use of numerical goals or quotas for race-conscious admissions,<sup>35</sup> the *Fisher* litigation focused on the presence of a “critical mass” of underrepresented students—a concept that attempts to combine numerical representation with the educational benefits of diversity.<sup>36</sup> And as we saw in *Fisher*, “critical mass” turns out to be a rather vague concept.<sup>37</sup>

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<sup>32</sup> Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1145–46 (2013).

<sup>33</sup> *Fisher*, 133 S. Ct. at 2417.

<sup>34</sup> *Id.*

<sup>35</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (noting that the school’s admissions program neglected to consider enough “qualifications and characteristics” of applicants and therefore could not attain “diversity that furthers a compelling state interest”).

<sup>36</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 319 (2003) (“[C]ritical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”); *see also* I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 122–23 (2004) (“[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.”). For more discussion of different definitions of “critical mass” in the context of race-conscious admissions policies, *see* Harpalani, *supra* note 16, at 471–85; Vinay Harpalani, *Fisher’s Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57, 58–66 (2013) [hereinafter Harpalani, *Fishing Expedition*].

<sup>37</sup> *See generally* Harpalani, *Fishing Expedition*, *supra* note 36 (discussing the various ways of defining “critical mass”). *But see* 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 ecosystem 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; and (2) courts’ use of critical mass as a generalizable standard to review the constitutionality of race-conscious admissions policies, which this Article critiques. *See also* William C. Kidder, *The Salience of Racial Isolation: African Americans’ and Latinos’ Perceptions of Climate and Enrollment Choices with and without*

The plaintiffs in *Fisher* based their claim on “critical mass”: they argued that the 21.4% minority (Black and Latina/o combined) enrollment at the University of Texas at Austin (“UT”), attained in 2004 with the race-neutral Top Ten Percent Law<sup>38</sup> alone, was a “critical mass” and fulfilled the constitutionally permissible compelling interest in diversity. Consequently, they contended that UT was not justified in using a race-conscious admissions policy in addition to the Top Ten Percent Law.

UT’s response to the plaintiff’s argument also focused on numerical representation. It pointed to low percentages of Black and Latina/o students in many small classes to show that it had not attained a “critical mass.”<sup>39</sup> Although UT did allude to the linkage between “critical mass” and the educational benefits of diversity, its emphasis was also on numbers sufficient (or insufficient) to constitute a “critical mass.”<sup>40</sup>

But neither the *Fisher* plaintiffs nor UT could provide a measurable definition of “critical mass.” Ironically, both parties agreed that “critical mass” implied numbers such that minority students “do not feel isolated and like spokespersons for their race,”<sup>41</sup> but neither

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*Proposition 209*, at 13, UCLA CIVIL RIGHTS PROJECT (Oct. 9, 2012), available at <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/>. (“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.”).

38 Tex. Educ. Code Ann. § 51.803 (West 1997). The Top Ten Percent Law guarantees admission 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*, 78 F.3d 932 (5th Cir. 1996) (holding that UT Law 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% of the seats designated for Texas residents. See Tex. Educ. Code Ann. § 51.803(a-1) (West 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. Univ. of Tex. at Austin*, 631 F.3d 213, 224 n.56 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

The *Fisher* litigation and ruling assumed that the Top Ten Percent Law is “race-neutral.” *But see infra* note 68.

39 See Harpalani, *supra* note 16, at 504–06, and sources cited therein.

40 See Harpalani, *supra* note 16.

41 Transcript of Oral Argument at 16, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (noting by plaintiff’s counsel that the question to consider when determining if a critical mass exists is whether underrepresented minority students are “isolated . . . [and] unable to speak out[.]”); *id.* at 47 (noting by UT’s counsel that to determine if critical mass is present, “we look to feedback directly from students about

could say how to determine when this occurs. The plaintiffs contended it was UT's burden to define and measure critical mass.<sup>42</sup> UT offered that surveys of student isolation, along with other campus data including numerical representation of various groups, could help determine whether a critical mass was present,<sup>43</sup> but it did not provide any guidance on how to do this—much less on how to determine whether race-conscious policies are necessary to achieve the “critical mass.” This led Justice Antonin Scalia to say, derisively, “[w]e should stop calling it ‘critical mass’ . . . call it a cloud or something like that.”<sup>44</sup>

The only reliably measurable diversity-related outcome in the *Fisher* litigation was the numerical representation of minority students itself—on campus and in various classes. And focus on numerical representation poses its own conundrum: *Bakke*, *Grutter*, and *Fisher* clearly stated that numerical goals for race-conscious admissions policies are unconstitutional.<sup>45</sup> Justice Sonia Sotomayor recognized this at the *Fisher* oral argument, when she said to plaintiffs' counsel: “Boy, it sounds awfully like a quota to me that you shouldn't be setting goals, that you shouldn't be setting quotas . . . .”<sup>46</sup>

In spite of the focus on numerical representation by litigants in *Bakke*, *Grutter*, and *Fisher*, the controlling opinions in all of these cases indicate that the goal of a race-conscious admissions policy is more nuanced than attaining any numerical index of diversity:

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racial isolation that they experience” and ask, “[d]o they feel like spokespersons for their race[?]”).

42 *Id.* at 16–17 (noting by plaintiff's counsel that it is “not [the Plaintiff's] burden to establish the number” that constitutes critical mass).

43 *Id.* at 47–49 (noting by UT's counsel that critical mass is determined via “feedback [via surveys] directly from students about racial isolation that they experience,” “enrollment data, . . . [d]iversity in the classroom[,] . . . [and] the racial climate on campus”).

44 *Id.* at 71–72. The courtroom erupted in laughter after Justice Scalia made this statement.

45 *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (noting that “[t]he 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 Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978))); *Fisher*, 133 S. Ct. at 2418 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system[.]”) (quoting *Grutter*, 539 U.S. at 334); *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 656 (5th Cir. 2014) (“[A]n examination that looks exclusively at the percentage of minority students fails before it begins.”).

46 Transcript of Oral Argument, *supra* note 41, at 19. *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), available at <http://www.law.northwestern.edu/lawreview/colloquy/2013/19/LRColl2013n19Lyke.pdf> (arguing that “critical mass has both quantitative and qualitative elements” and that “contrary to Justice Sotomayor's claim[,] . . . goals and quotas are [not] synonymous”).

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.<sup>47</sup>

Diversity is thus caught between “two unreconciled strivings”<sup>48</sup>: the educational benefits of nuanced, individualized race-conscious admissions—emphasized in the language of all major Supreme Court cases—and the numerical representation of minority groups, which provides the main data used to make arguments for and against race-conscious admissions policies.<sup>49</sup> *Fisher* did not resolve this double-consciousness, and lower courts will have to grapple with the issue and decide how to assess diversity.

*B. Individualized Review’s Double-Consciousness: Is It Just the Numbers?*

Individualized review of applicants is a requirement for any constitutionally-permissible race-conscious admissions policy under *Grutter* and *Fisher*<sup>50</sup>—a requirement that, in a sense, also has a double-consciousness of its own. The *Grutter* and *Fisher* majority opinions described holistic admissions policies that consider race in a flexible, nuanced, and individualized manner, in conjunction with other admissions factors, and the Fifth Circuit’s opinion in *Fisher* on remand emphasized that individuals of any race could benefit in the admissions process.<sup>51</sup> Individualized review in this vein is discretionary, sub-

47 *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Bakke*, 438 U.S. at 315).

48 DU BOIS, *supra* note 7 (“One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.”).

49 Justice Clarence Thomas critiques this double-consciousness of diversity in his *Grutter* dissent. *Grutter*, 539 U.S. at 355 (Thomas, J., dissenting) (“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.”).

50 *See supra* note 20.

51 *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 638 (5th Cir. 2014) (“No numerical value is ever assigned to . . . race . . . [which] is a factor considered in the unique context of each applicant’s entire experience . . . [and] . . . may be a beneficial factor for a minority or a non-minority student.”); *id.* at 659 (“Race is relevant to minority and non-minority, notably when candidates have flourished as a minority in their school—whether they are white or black.”); *see also* *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236 (5th Cir. 2011), *vacated*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (noting that in framework of UT’s race-conscious admissions policy, “race can enhance the personal achievement score of a student from any racial background, including whites and Asian-Americans”).

jective, and, above all, flexible. However, critics of race-conscious admissions contend that this is a smokescreen—that elite universities merely institute a thin veneer of individualized review and holistic admissions to cover much larger systematic “race preferences” for particular groups, usually African Americans, Latina/os, and Native Americans. To these critics, the university admissions game is still numbers-centered and only three factors really matter: GPA, standardized test scores, and race.<sup>52</sup> Thus, there is a discord between how Supreme Court doctrine describes individualized review and how some perceive that elite university admissions use it in practice.<sup>53</sup>

<sup>52</sup> See, e.g., RICHARD H. SANDER & STUART TAYLOR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 18–19 (2012) (“At most large schools . . . descriptions [such as ‘holistic’] are completely fanciful; admissions are driven by fairly mechanical decision rules. . . . [E]ven at schools that truly do make decisions on a case-by-case basis . . . implicit weight given to . . . [an] applicant’s race . . . is generally very large indeed.”). But see 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> (analyzing and describing variations and nuances of holistic admissions plans at different types of universities).

<sup>53</sup> There is a school of thought suggesting that it is better not to know the particulars of race-conscious policies, to avoid stigmatization. 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.”); see also 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)); 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.”). But see Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902 (2006) (critiquing *Grutter* because “[i]t is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment . . .”); David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 528 (2004) (“One can argue that the undergraduate Michigan program at issue in *Gratz*, involving a fixed-point system, should have been regarded as constitutionally superior to the unlimited discretion model

Beyond this double-consciousness, individualized review affects our understanding of both diversity and race-neutrality. It is through individualized review that a university admissions committee can use race in a flexible, nuanced manner, in conjunction with other admissions factors,<sup>54</sup> and thus fulfill the compelling interest in diversity articulated in *Bakke*, *Grutter*, and *Fisher*.<sup>55</sup> Both *Grutter* and *Fisher* specifically noted that the breakdown of racial stereotypes is one of the educational benefits of diversity,<sup>56</sup> and that universities can use individualized review to identify applicants to help accomplish this end.<sup>57</sup> At the *Fisher* oral argument, Solicitor General Donald Verrilli—arguing in favor of UT’s race-conscious admissions policy—contended that one purpose of such a policy is to identify individuals who defy racial stereotypes, such as “the African American fencer.”<sup>58</sup> If identifying and admitting individuals who break down racial stereotypes is part of the compelling interest in diversity, this creates a conundrum for race-neutrality: there is no race-neutral policy that can identify and admit African American fencers. By definition, one must consider race in order to do so.

But even if such nuanced use of race is not necessary to fulfill the diversity interest, individualized review has broader consequences for

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in *Grutter* . . . . At least in such a system the invidious exercise of discretion has been structured, confined, and checked . . . . The point system used in the undergraduate program struck down in *Gratz* should instead have been preferred because it makes the racial remedy visible . . . .”).

<sup>54</sup> See *supra* note 20.

<sup>55</sup> See *supra* notes 25–29 and accompanying text.

<sup>56</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[T]he educational benefits that diversity is designed to produce . . . are substantial . . . [and include] break[ing] down racial stereotypes[.]”); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (noting that educational benefits of diversity include “lessening of racial isolation and stereotypes”).

<sup>57</sup> See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013) (noting that in the framework of UT’s race-conscious admissions policy, “a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school . . . [and] just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes”).

<sup>58</sup> Transcript of Oral Argument, *supra* note 41, at 61 (“[U]niversities . . . are looking . . . to make individualized decisions about applicants who will directly further the educational mission. For example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has . . . mastered classical Greek.”).



our understanding of race-neutrality—as the next section on the double-consciousness of race-neutrality will show.

*C. Race-Neutrality’s Double-Consciousness: It Is the Numbers!*

Unlike diversity and individualized review, race-neutrality is not (and cannot be!) part of the constitutional requirement for race-conscious admissions. It is actually the opposite: the absence of viable race-neutral policies that can attain the compelling interest in diversity is a constitutional requirement for any university using race-conscious admissions.<sup>59</sup> But like diversity and individualized review, race-neutrality also suffers from its own double-consciousness—and perhaps even more so. It can have at least two different meanings, and the Supreme Court has not even acknowledged these disparate understandings of race-neutrality, much less addressed them in any meaningful way.

One definition of race-neutrality is “colorblindness”: information about an applicant’s race is completely absent in the admissions process—or, at least, it cannot be considered by admissions reviewers. In *Fisher*, the Supreme Court and the litigants held to this view.<sup>60</sup> But race-neutrality in this formal sense can occur only in an admissions process that is mechanistic—that is, without individualized review or discretion by admissions officers. In such a process, admissions decisions occur automatically, based on academic criteria such as GPAs, class rank, and/or standardized test scores. Texas’s Top Ten Percent Plan is one example of such an admissions plan, which is why *Fisher* held to this definition.

This type of formal race-neutrality is difficult to achieve in a holistic admissions process, where race is not as simple as a box that applicants can check. Individualized review inherently provides admissions officers with discretion, along with plenty of other information about each applicant. Applicants’ personal statements and essays, extracurricular activities,<sup>61</sup> and even their names<sup>62</sup> may reveal clues as to

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<sup>59</sup> *Fisher*, 133 S. Ct. at 2420 (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense . . . .’”).

<sup>60</sup> See Harpalani, *Fishing Expedition*, *supra* note 36, at 69–71 (discussing how race was a small factor in the UT admissions process).

<sup>61</sup> See *How Berkeley Selects Students*, UNIVERSITY OF CALIFORNIA, BERKELEY OFFICE OF UNDERGRADUATE ADMISSIONS, <http://admissions.berkeley.edu/selectsstudents> (last visited Dec. 31, 2014) (providing a description of selection criteria for admission, including a “holistic review of all information—both academic and personal”); *The Personal Statement*, UNIVERSITY OF CALIFORNIA, BERKELEY OFFICE OF UNDERGRADUATE ADMISSIONS, <http://admissions.berkeley.edu/personalstatement> (last visited Dec. 31,

their racial/ethnic background. Admissions officers' unconscious biases may come into play during their individualized review of applications, and conscious biases can also come into play: those reviewers who desire to increase the number of admitted minority students already have access to the information to do so. Even in states with constitutional bans on race-conscious admissions, there have been accusations that admissions officers consider race subversively, as individualized review and holistic admissions plans allow them to do so.<sup>63</sup> Moreover, there is no practical way to fully eliminate this phenomenon.<sup>64</sup>

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2014) (calling the personal statement “a vital part of [an applicant’s] application”). The first prompt to which applicants must respond is, “Describe the world you come from—for example, your family, community or school—and tell us how your world has shaped your dreams and aspirations.” See *The Personal Statement*, *supra*. In response to this prompt, applicants can readily allude to their racial background and members of underrepresented minority groups can self-identify.

62 See *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) (noting that without affirmative action, “[s]eeking to improve their chances for admission, applicants may highlight . . . the Hispanic surnames of their mothers or grandparents”). See generally Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. OF ECON. 767 (2004) (discussing the shift from similarities between black and white names in the 1960s to distinctly African American names in the 1970s).

63 See Harpalani, *Fishing Expedition*, *supra* note 36, at 70–72. See also SANDER & TAYLOR, *supra* note 52, 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 . . . [and that] . . . neither voters nor state officials can end university racial preferences by a single stroke”); *id.* at 158 (contending that after Proposition 209 (California’s constitutional ban on race-conscious policies) was passed in 1996, faculty in the 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 or business schools, that [subversive use of race] would obviously be more difficult.” *Id.* But see TIM GROSECLOSE, REPORT ON SUSPECTED MALFEASANCE IN UCLA ADMISSIONS AND THE ACCOMPANYING COVER-UP (2008), available at <http://images.ocregister.com/newsimages/news/2008/08/CUARGrosecloseResignationReport.pdf>; CHEATING: AN INSIDER’S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA (2014).

One article on the UCLA controversy questioned whether “holistic” admissions policies simply help Black applicants. Scott Jaschik, *Is “Holistic” Admissions a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 2, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/09/02/ucla>.

64 See Jaschik, *supra* note 63 (describing UCLA’s insistence on the sufficiency and legality of its admissions process); see also 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 LAW & SOC. INQUIRY 985, 1015 (2007) (noting that “the line between race-based and race-blind policy making can be quite blurry”).

Most elite universities—and particularly private universities—use holistic admissions plans with individualized review. *Grutter* and *Fisher* endorsed this type of admissions plan and went as far as to require it if race is to be an admissions factor.<sup>65</sup> As such, if race-neutrality is understood in formal terms, *Grutter*'s and *Fisher*'s narrow tailoring principles are self-contradictory: their requirement for holistic, individualized review undercuts their espoused goal of race-neutrality.

A second definition of race-neutrality, which is more compatible with holistic admissions plans, is rooted in statistical disparities rather than in formal absence of race. Here, we can define race-neutrality as the lack of any significant statistical disparities between minority and non-minority admittees on academic criteria such as grades, class rank, and standardized test scores. Under this view, it does not matter that admissions reviewers can access and even consider information about an applicant's race, so long as doing so does not lead to significant statistical disparities in admitted applicants' academic criteria by race.

Such statistical disparities are the major concern of critics of race-conscious admissions policies. Plaintiffs in *Bakke* and *Grutter* (but not in *Fisher*) relied heavily on such statistical disparities to make constitutional arguments against race-conscious admissions policies.<sup>66</sup> Also, proponents of “mismatch theory” focus on those disparities to contend that race-conscious policies can harm minority students.<sup>67</sup> In this vein, it makes sense to effectively deem an admissions process as race-neutral if there are no academic disparities between admitted

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<sup>65</sup> See *supra* note 20.

<sup>66</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 277–78 n.7 (comparing Plaintiff Alan Bakke's GPA and MCAT scores “with the average scores of regular admittees and of special admittees in both 1973 and 1974”); see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 838 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (discussing how the plaintiffs' expert witness concluded that “all 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” (quotation marks omitted)). 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.”).

<sup>67</sup> In its critiques of race-conscious admissions, “mismatch theory” also focuses on statistical academic disparities between admitted students of different racial groups. See generally SANDER & TAYLOR, *supra* note 52. For a critique of mismatch theory, see generally 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. 855 (2015).

minority and non-minority applicants, regardless of whether the process itself takes race into account. While they are not enough to define diversity, the numbers really should be at the core of race-neutrality.

We should also note that under this second definition, Texas's Top Ten Percent Plan is not race-neutral: there are disparities in standardized test scores between minority and non-minority students admitted under the Top Ten Percent Plan.<sup>68</sup>

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68 For the UT entering class of 2009, among students automatically admitted via the Top Ten Percent Law, White students (a total of 2,508 students) had a mean SAT score of 1864; African American students (a total of 297) had a mean SAT score of 1584; Asian American students (a total of 1101) had a mean SAT score of 1874; and Hispanic students (a total of 1256) had a mean SAT score of 1628. UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF TEX. AUT. ADMISSIONS LAW (HB 588) AT UNIV. OF TEXAS AT AUSTIN: SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY ENTERING 2009, at 14 tbl. 7.

Others have contended that the Top Ten Percent Plan is not even formally race-neutral. See *Gratz v. Bollinger*, 539 U.S. 244, 303–04 n.10 (2003) (Ginsburg, J., dissenting) (“Calling such 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.’”); see also *id.* at 298 (Ginsburg, 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 v. Univ. of Tex.*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“[O]nly an ostrich could regard the supposedly neutral alternatives [in Texas’s Top Ten Percent Law] as race unconscious. . . . [T]he vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.’” (quotations omitted)); see also *Fisher v. Univ. of Tex.*, 631 F.3d 213, 242 n.156 (5th Cir. 2011), *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.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding that granting an absolute lifetime preference does not unfairly discriminate against women); cf. Brief for Social Scientists Glenn C. Loury et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 402129, at \*3, \*9–10 (noting that “it is not clear that these [percentage] plans are actually race-neutral” and that some *amici* counsel in *Grutter* “signaled interest in moving on after this case to challenge these aspects of the Texas program”). But see Leslie Yalof Garfield, *The Paradox Of Race-Conscious Labels*, 79 BROOK. L. REV. 1523, 1567 (2014) (“By categorizing the Texas [Top Ten Percent] Law as race-neutral, the Court turns a blind eye to the segregation that serves as the foundation for assembling diverse student bodies in the State’s post-secondary schools. . . . On the other hand . . . [l]abeling the Top Ten Percent Law as race-conscious demands that courts subject it to rigorous strict scrutiny[.]. . . making it a likely candidate for constitutional demise.”); 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 . . . [i]t is only necessary that [programs] do not allow applicants to be classified and/or selected based on their race or ethnicity”). See also 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.”).

One can also combine the two definitions of race-neutrality posited here: an “either-or” definition is plausible. Under this view, we can deem an admissions policy as “race-neutral” if: (1) it is mechanistic rather than discretionary and does not formally access information about an applicant’s race; or (2) regardless of whether the admissions process accesses information about an applicant’s race, there are no statistical disparities in academic criteria between admitted applicants of different racial groups.

The Supreme Court, however, has stuck to a formal definition of race-neutrality—one that is focused on the absence of race from the admissions process. The Court has acted as if diversity and its educational benefits, holistic, individualized review of applicants, and formal race-neutrality are all compatible. But as the next Part shows, they are not; they form a “Bermuda Triangle” for university admissions.

### III. THE BERMUDA TRIANGLE OF UNIVERSITY ADMISSIONS

By itself, the double-consciousness of diversity, race-neutrality, and individualized review—the varying understandings of these terms in Supreme Court litigation and opinions—creates enough confusion about the future of race-conscious admissions policies. But even beyond this confusion, these three core tenets of the Supreme Court’s doctrine on race-conscious admissions are incompatible. They cannot all be attained at the same time—they form a “Bermuda Triangle” for university admissions.

#### A. *Fisher and the Bermuda Triangle: Still a Fishing Expedition*

From one perspective, *Fisher v. University of Texas* illustrated well the Bermuda Triangle of university admissions. The *Fisher* litigation framed diversity largely in terms of numerical representation of minority groups, even if the language of the litigants’ briefs alluded to educational benefits and the like. With changes in racial demographics—increasing numbers of Black and Latino/a residents in Texas—the Top Ten Percent Plan might yield numerical representation of minority students equivalent to most holistic admissions plans—if not now, then in the near future. Also, the Top Ten Per-

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Professor Siegel argues that in *Fisher*, the U.S. Supreme Court could not possibly have “overlooked the race-conscious aims of the [Top Ten] percent program[.]” but “[n]o Justice raised questions about the [plan’s] constitutionality[.]” *Id.* at 673–74. Of course, the *Fisher* litigation did not raise a constitutional challenge to the Top Ten Percent Plan.

cent Plan is formally race-neutral<sup>69</sup>: race does not play any direct role in admission of students. So two of the three tenets could be fulfilled.

But the Top Ten Percent Plan is not a holistic admissions policy and does not include individualized review of applicants. Students admitted to UT under the Top Ten Percent Plan did not have anyone exercise discretionary review over their applications: they were admitted via an automatic formula that considered only their class ranks.<sup>70</sup> *Fisher* was an unusual case: the only reason it came in to being was that the Texas state legislature voluntarily adopted the Top Ten Percent Law, and then-Governor George W. Bush signed it into law. This has not happened in most states and could not practically apply to private universities or graduate and professional schools. In fact, the *Grutter* majority stated that percentage plans such as the Top Ten Percent Plan are not adequate substitutes for race-conscious holistic admissions policies, which consider race and other diversity factors in a nuanced, individualized fashion.<sup>71</sup> *Grutter* thus suggests that courts cannot compel universities to adopt percentage plans, even if the universities can attain numerical diversity similar to race-conscious holistic admissions.

*Fisher* was a very limited case to begin with, and it was never a good venue for the Court to make a broad pronouncement on race-consciousness. Rather, it is and always has been a “fishing expedition.”<sup>72</sup>

#### B. *Holistic Admissions and the Bermuda Triangle: The Numbers Still Don't Add Up*

Looking beyond *Fisher*, if a university employs a holistic admissions process with individualized review, then in most cases, it cannot achieve both diversity and race-neutrality—regardless of how we define those tenets. As noted earlier, if the diversity interest incorpo-

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69 *But see supra* note 68 (discussing different perspectives on whether the Top Ten Percent Plan is actually “race-neutral.”).

70 *See* Tex. Educ. Code Ann. § 51.803(a-1) (West 2010).

71 *Grutter*, 539 U.S. at 340 (noting that percentage plans “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”). The *Grutter* majority also questioned how percentage plans could work for admission to graduate and professional schools. *Id.* (noting the 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”).

72 *See* Harpalani, *Fishing Expedition*, *supra* note 36.

rates admission of individuals who specifically defy racial stereotypes, then there is no race-neutral admissions process that can attain it.<sup>73</sup> And if race-neutrality is defined in formal terms—as the absence of information about race in the admissions process—then it cannot be attained in a holistic admissions process with individualized review.<sup>74</sup> But what if we measure diversity solely by numerical representation, and what if we define race-neutrality in statistical terms—as the absence of disparities in academic criteria between minority and non-minority admitted students?

In theory, it may be possible to have a holistic admissions plan, attain the desired numerical representation of minority groups, and have no statistical disparities in academic criteria between racial groups. In practice, however, it is not currently possible most of the time.<sup>75</sup> The underlying reason that universities need to use race-conscious admissions policies is not to attain diversity per se, but because the magnitude of academic disparities between minority and non-minority applicants would not allow them to attain this diversity

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<sup>73</sup> See *supra* notes 56–58 and accompanying text.

<sup>74</sup> See *supra* notes 61–64 and accompanying text.

<sup>75</sup> See RICHARD D. KAHLBERG, CENTURY FOUND., A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 26–61, available at <http://tcf.org/assets/downloads/tcf-abaa.pdf> (discussing the 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. *Id.* at 42, 46, 50 & 57. 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), and recovery using recruitment and race-neutral factors in those states did not require much. *Id.* at 42 & 47. 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, very low percentages of minority students on campus does not constitute a critical mass. At the oral argument in *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), Justice Scalia asked “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.” See Transcript of Oral Argument, *supra* note 41, at 15.

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 KAHLBERG, *supra*, at 36, 38.

absent consideration of race.<sup>76</sup> For the most part, the *Fisher* litigation ignored the most significant reason that most universities use race-conscious admissions policies—because of disparities in academic admissions criteria between minority and non-minority applicants.<sup>77</sup> In her *Grutter* majority opinion, Justice O’Connor acknowledged this reality:

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.<sup>78</sup>

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<sup>76</sup> THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 10, 92–93 (2009) (reporting that in sample of 9,100 student respondents from eight highly-selective public and private institutions of higher education, compared to White admittees, race-related admissions plus factors were equivalent to 310 points (out of 1,600 total) for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points). For projected effects of eliminating race-conscious admissions on minority enrollments, see *id.* at 464–65 (private institutions), and *id.* at 480–81 (public institutions). Both private and public institutions would see significant declines in Black and Hispanic enrollment with the elimination of race-conscious admissions policies.

<sup>77</sup> Justice Clarence Thomas did make mention of academic disparities in his concurrence. *Fisher*, 133 S. Ct. at 2431 (Thomas, J., concurring) (“Blacks and Hispanics admitted to the University [of Texas at Austin] . . . are, on average, far less prepared than their white and Asian classmates. . . . [T]he University . . . has [not] presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University.”).

<sup>78</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (emphasis added) (internal citation omitted). Ironically, in 2003, Justice O’Connor was all too willing to suggest a time limit for race-conscious admissions policies, one-half century after the Supreme Court refused to do so with school desegregation. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (ordering racial integration of segregated public schools “with all deliberate speed”). But see *infra* note 85–86 and accompanying text.

Nevertheless, Justice O’Connor herself later suggested that twenty-five 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 TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 58, 62 (David L. Featherman, Martin Hall & Marvin Krislov eds., 2010) (“That 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.”). Both parties in *Fisher* also agreed that the twenty-five year limit was not binding. See Transcript of Oral Argument, *supra* note 41, at 11 (citing the plaintiff’s counsel, Bert Rein, as 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 (citing counsel for UT, Gregory Garre, as noting that “we don’t read *Grutter* as establishing that kind of time clock”). However, at the *Fisher* oral argument, Justices Antonin Scalia and Stephen Breyer at least hinted that the twenty-five year period was legally significant. *Id.* at 50 (citing Justice Scalia as stating that *Grutter* “holds for . . . only . . . [s]ixteen more years”); *id.* at 8 (citing Justice Breyer as noting that



Justice O'Connor's statement implies that the need for race-conscious admissions policies is contingent upon racial disparities in academic criteria. Moreover, in spite of their vast ideological differences, both Justice Ruth Bader Ginsburg and Justice Clarence Thomas acknowledged that racial disparities in academic criteria are the underlying reason why universities need to use race-conscious admissions policies to attain diversity, and they both questioned Justice O'Connor's aspiration here that racial disparities in academic criteria could be eliminated by 2028.<sup>79</sup>

As such, even if we accepted a purely numerical definition of the diversity interest, it is not possible in most cases to attain appreciable numbers of minority students, unless universities use race as a flexible "plus factor" to compensate for academic disparities between groups. The "logical end point"<sup>80</sup> of race-conscious admissions will occur when such disparities no longer exist. At that time, it will be possible for universities to simultaneously use a holistic admissions process with individualized review, attain sufficient numerical diversity, and achieve statistical race-neutrality on academic criteria among admitted applicants of all racial groups. But that time is still far off.<sup>81</sup>

### C. *Summing Up the Bermuda Triangle: Two Out of Three Ain't Good Enough*

For the foreseeable future, diversity, race-neutrality, and individualized review will form a Bermuda Triangle for university admissions.

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"*Grutter* said it would be good law for at least 25 years"). Later in the 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 12.

79 See *Grutter*, 539 U.S. at 346 (2002) (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 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, Justice O'Connor herself later backtracked from the twenty-five year timing for an end to race-conscious admissions. See *supra* note 78.

80 *Grutter*, 539 U.S. at 342 ("[R]ace-conscious admissions policies must be limited in time. . . . [A]ll governmental use of race must have a logical end point.").

81 See *supra* note 79.



## IV. CONCLUSION: STILL SERVING TWO MASTERS

The double-consciousness of race-consciousness and the Bermuda Triangle of university admissions leave much uncertainty about the future of race-conscious admissions policies. The Supreme Court has taken W.E.B. Du Bois's proverbial "problem of the color line"<sup>82</sup> and tied it into a complex, doctrinal Gordian knot.<sup>83</sup> About the only things we can be sure of are that: (1) race-conscious policies will continue to generate much controversy and debate—albeit mainly in lower courts and state governments rather than at the U.S. Supreme Court; and (2) advocates of race-consciousness will continue to face their own double-consciousness, reconciling the fight for racial equity in higher education and the confusing and convoluted doctrine that we must navigate to get there.

A. "With All Deliberate Speed": *The Future of Race-Conscious Admissions*

While a majority of Justices on the Supreme Court would like to see an end to race-conscious admissions policies, we still have them. *Fisher* suggests that the Justices are not willing to end race-conscious policies in one fell swoop, and *Schuette* indicates they are content with state-level politics resolving the issue.<sup>84</sup> In an ironic twist—*déjà vu* right amidst *Brown*'s diamond anniversary<sup>85</sup>—the Supreme Court seems content to let race-conscious admissions slip away gradually: "with all deliberate speed."<sup>86</sup>

How might this happen? It will probably involve both law and politics. While the Supreme Court punted in *Fisher*, the case still has a legal impact: it allows lower courts do the dirty work. District and

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<sup>82</sup> See DU BOIS, *supra* note 7.

<sup>83</sup> The "Gordian knot" metaphor is associated with Alexander the Great and refers to an intractable problem that requires an unorthodox solution. See WILLIAM SHAKESPEARE, KING HENRY THE FIFTH, ACT I, sc. 1. ("Turn him to any cause of policy, The Gordian Knot of it he will unloose, Familiar as his garter . . ."); see also Harpalani, *supra* note 2, at 83 (noting how American race relations in the twenty-first century have "tied the proverbial 'color line' into a Gordian Knot.").

<sup>84</sup> See *supra* note 22 and accompanying text.

<sup>85</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that racially segregated schools were unconstitutional). The first *Brown* decision occurred on May 17, 1954. *Id.* The Supreme Court then addressed the appropriate remedy for racially segregated schools in 1955. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (ordering racial integration of segregated public schools "with all deliberate speed."). This second *Brown* decision occurred on May 31, 1955. *Id.* Thus, it is now right between *Brown I* and *Brown II*'s diamond anniversaries.

<sup>86</sup> *Brown*, 349 U.S. at 301. The Court's vague and tenuous language, embodied by the phrase, "with all deliberate speed," allowed Southern states to resist desegregation for many years—another twist of irony.

circuit courts can interpret ambiguities in definitions of diversity and race-neutrality to either uphold or to strike down specific race-conscious admissions programs. In particular, *Fisher's* call for stringent review, with “no deference” to universities on the implementation of race-conscious policies,<sup>87</sup> may invite district court judges to strike down these policies—especially where the link between race-consciousness and the educational benefits of diversity is not clearly articulated or demonstrated. Lower courts may well differ in their application of the law, based on specific attributes of admissions policies and on political leanings of judges.

The result is likely to be a very fractured jurisprudence. Lower courts may come to various conclusions about the meaning and measurement of the diversity interest, about how much can be inferred from numerical representation, about whether universities bear the burden to show educational benefits of diversity in addition to numerical representation, and about how universities must link the two.<sup>88</sup> Courts might also view race-neutrality in different ways, and they may have different standards for evaluating the efficacy of race-neutral alternatives in producing diversity. Eventually, another case will make it back to the Supreme Court. We cannot predict the timing of said case: twenty-five years elapsed between *Bakke* (1978) and *Gratz and Grutter* (2003), and then another ten years elapsed before *Fisher* (2013). We also cannot predict the result, which will depend, more than anything else, on the composition of the Court at the given time.

But it might not even come to that, if the political aspect predominates. With its 2014 ruling in *Schuette*, the Court upheld the ability of states to pass constitutional bans on race-conscious policies. California, Washington, Michigan, Nebraska, Arizona, and Oklahoma have already passed such state constitutional bans.<sup>89</sup> Additionally, race-

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87 See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2414 (2013) (“[A] University must prove that the [race-conscious] means it chose to attain . . . diversity are narrowly tailored to its goal. On this point, the University receives no deference.”).

88 This debate has already started with Judge Emilio Garza’s dissent in *Fisher* on remand. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 672 (5th Cir. 2014) (Garza, J., dissenting) (“[A]ssuming that the University’s diversity goal is establishing classroom diversity, it is the University that bears the burden of proving that the use of race . . . is necessary to furthering this goal.”). Judge Garza critiqued the *Fisher* remand majority opinion for “continu[ing] to defer impermissibly to the University’s claims . . . deference [which] is squarely at odds with the central lesson of [the Supreme Court’s ruling in] *Fisher*.” *Id.* at 662 (Garza, J., dissenting).

89 NATIONAL CONFERENCE OF STATE LEGISLATORS, AFFIRMATIVE ACTION: STATE ACTION (2014), available at <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>.

conscious policies have been banned via executive action in Florida,<sup>90</sup> and via state legislative action in New Hampshire.<sup>91</sup> Political process at the state level may continue to eliminate race-conscious admissions policies in many states<sup>92</sup> before the Supreme Court takes up the constitutionality of such policies again. By then, if most states have already banned race-conscious policies, a Supreme Court ruling on eliminating race-conscious admissions might be a mere rubber stamp, reeling in any outlier jurisdictions that still allow them.

Law and politics could also fold back on each other. In jurisdictions with state constitutional bans on race-conscious policies, such as California and Michigan, there could be legal challenges contending that universities still use race surreptitiously.<sup>93</sup> As noted earlier, there have been such accusations in California, and Justices Souter and Ginsburg have warned us about this phenomenon.<sup>94</sup> If such legal challenges come to bear, they would be different from *Bakke*, *Gratz*,

<sup>90</sup> Fla. Exec. Order No. 99-281 (Nov. 9, 1999).

<sup>91</sup> H.B. 623, 2011 Leg. (N.H. 2011) (codified as amended in N.H. REV. STAT. ANN. §§ 187 & 188).

<sup>92</sup> It is also possible that voters in some states will reject referenda to eliminate affirmative action, as occurred in Colorado in 2008. See Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, USA Today, Nov. 7, 2008, [http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800\\_x.htm](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.”). Additionally, a recent poll in California indicated that a majority of residents of each racial group supported “affirmative action programs designed to help blacks, women, and other minorities get better jobs and education[.]” See Karthick Ramakrishnan & Taeku Lee, *Views of a Diverse Electorate: Opinions of California Registered Voters in 2014*, NAT’L ASIAN AM. SURV. 8 (Aug. 2014), available at <http://www.naasurvey.com/resources/Home/NAAS-Field-2014-final.pdf>.

<sup>93</sup> See *supra* note 63.

<sup>94</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 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.”). Justice Ginsburg reiterated this concern in her *Fisher* dissent. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (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.’” (quoting *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting))); 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.”).

*Grutter*, and *Fisher*. The universities involved would deny any intentional use of race in admissions; to do otherwise would be an admission of unlawful activity. Plaintiffs in such cases would have the higher burden of proving intent,<sup>95</sup> which would create quite a quandary.<sup>96</sup>

In short, the double-consciousness of race-consciousness and the Bermuda Triangle of university admissions pervade the Supreme Court's rulings and render them a convoluted mess, open to highly varying interpretations. Lower courts will have to deal with this mess until the Supreme Court gives further guidance, and it is likely that political actors—be they district court judges with strong feelings about the issue or state politicians seeking affirmative action bans—will decide the foreseeable future of race-conscious admissions policies.

### *B. Double-Consciousness or Doublethink?: Victory is Defeat*

Finally, in the wake of the Supreme Court's recent decisions and the Bermuda Triangle of university admissions, it is important to highlight the continuing double-consciousness of advocates of race-consciousness. Like the late Professor Derrick Bell, many such advocates are not huge fans of the diversity interest.<sup>97</sup> Although we may value diversity, we would prefer more social justice-oriented rationales for race-conscious admissions, such as remediation for the effects of racial discrimination.<sup>98</sup> We also fear that many of the risks that

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<sup>95</sup> 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, 279 (1979) (holding that the Equal Protection Clause protects against discrimination that occurs “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”). Alternatively, a federal constitutional claim might rest on “a clear pattern, unexplainable on grounds other than race,” even if proof of intent is lacking. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The question would then become: what constitutes a “clear pattern”?

<sup>96</sup> Of course, where there are state constitutional bans on race-conscious admissions policies, state courts could apply a different standard to allow disparate impact to serve as a basis for claims under those constitutional bans.

<sup>97</sup> See *supra* notes 3–6.

<sup>98</sup> See Rhonda V. Magee Andrews, *Affirmative Action After Grutter: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation*, 63 LA. L. REV. 705, 706 (2003) (contending “that the standard ‘diversity’ rationale for affirmative action . . . is not a remedial or corrective justice-based rationale, and hence, fails to address the central concerns of traditionally disadvantaged groups.”); Ronald J. Krotoszynski, Jr., *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, 913–14 (2010) (“The problem with the diversity rationale . . . is that it has come to serve as a de facto proxy for remedial

Professor Bell warned of a decade ago have come to bear: diversity distracts attention from important issues of race and class justice, from efforts to reform universities' reliance on admissions criteria such as grades and test scores, and from elite universities' tendency to admit the most privileged members of minority groups.<sup>99</sup> In Professor Bell's words, affirmative action advocates feel like we are still "serving two masters"—freedom for elite universities and social justice for poor people of color<sup>100</sup>—and trying to make sense of a confusing and convoluted doctrine to do so.

Despite his warnings, Professor Bell acknowledged that confronting the real issues would "not be easy and [would] be resisted fiercely."<sup>101</sup> Indeed, they constitute a direct confrontation not only with mismatch theorists and other affirmative action opponents, but also with university administrators.<sup>102</sup> The diversity rationale—now thrice reinforced by the Supreme Court<sup>103</sup> and tied to individualized review and holistic admissions—appears much safer. But Professor Bell still preferred those tougher battles to diversity's distractions<sup>104</sup> because those battles confronted the real issues that can lead towards racial

concerns."); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002) ("[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."). The Supreme Court has rejected "the remedying of the effects of 'societal discrimination'" as a compelling interest, stating that societal discrimination constitutes "an amorphous concept of injury that may be ageless in its reach into the past." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496–98 (1989) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

<sup>99</sup> See *supra* notes 3–5 and accompanying text.

<sup>100</sup> See *supra* text accompanying notes 8–12; See also Bell, *supra* note 3, at 1632 ("Diversity. . . is less a means of continuing minority admissions programs in the face of widespread opposition than it is a shield behind which college administrators can retain policies of admission that are. . . convenient vehicles for admitting the children of wealth and privilege. Justice O'Connor is comfortable with having elites handle admissions and then legitimate their choices with a critical mass of people of color.").

<sup>101</sup> Bell, *supra* note 3, at 1633.

<sup>102</sup> See *id.* ("[T]he long-overdue reform of admissions standards . . . will be resisted fiercely by many if not most of those colleges and graduate schools with whom civil rights advocates joined in the effort to save minority admissions through the distraction we are calling diversity.").

<sup>103</sup> See *supra* notes 1, 19 & 25.

<sup>104</sup> See Bell, *supra* note 3, at 1633 ("It may be that challenges by civil rights and community groups calling attention to the inaccuracies and unfairness of standardized tests will lead to their revision or even abandonment. If that effort is successful, it will not be the first time that civil rights campaigns initiated to remedy racial barriers resulted in reforms that worked to the benefit of all. . . . Predictably, though, the long-overdue reform of admissions standards will not be easy and will be resisted fiercely by many if not most of those colleges and graduate schools with whom civil rights advocates joined in the effort to save minority admissions through the distraction we are calling diversity.").

equality. From a strategic perspective, it is debatable whether Professor Bell was correct, but regardless, he was well-known for challenging the civil rights orthodoxy<sup>105</sup> and for confronting authority more generally.<sup>106</sup> By expressing his own double-consciousness, he gave voice to the profound ambivalence felt by many advocates of racial justice in the years after the civil rights movement. Nevertheless, in W.E.B. Du Bois's words, Professor Bell was truly "gifted with a second-sight,"<sup>107</sup> and his insights influenced several generations of legal scholars and social activists,<sup>108</sup> including me.<sup>109</sup>

When the Supreme Court issued its opinion in *Fisher* in June 2013, my immediate reaction was that it was "the best *realistic* outcome for proponents of affirmative action (I consider myself to be a strong one)" and that "proponents of affirmative action should declare victory for now,"<sup>110</sup> in spite of the fact that the Court had ruled against UT by vacating its lower court victory.<sup>111</sup> And one year later, when *Schuette* upheld Michigan's state constitutional ban on race-conscious admissions,<sup>112</sup> right on *Grutter*'s original victory ground, my commentary on HuffPost Live similarly spun a defeat positively.<sup>113</sup> I focused on the fact that Colorado voters had rejected a state referendum to

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105 See Bell, *supra* note 3, at 1633 (arguing that reforms "initiated to remedy racial barriers" often "provide more advances for whites than for blacks").

106 See DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* xi (1994) (encouraging readers to confront the wrongs that "afflict their lives and the lives of others").

107 DU BOIS, *supra* note 7, at 3 ("After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and *gifted with second-sight* in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world." (emphasis added)).

108 See, e.g., Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 284 (2000) ("Derrick Bell . . . conducted me to intellectual realms hitherto unknown and unimagined, opening up vistas I never knew existed. And . . . he never charged me a nickel, and left me secure, as a reader and now a friend, that I was always in good hands.").

109 See Harpalani, *supra* note 13, at xxiii, xxviii (describing Professor Derrick Bell's teaching and life philosophies and his impact on students); Vinay Harpalani, *Tributes in Memory of Professor Derrick Bell*, DERRICK BELL OFFICIAL SITE (Oct. 16, 2011), <http://professorderrickbell.com/tributes/vinay-harpalani/> (same).

110 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>.

111 See *supra* note 16.

112 See *supra* note 22 and accompanying text.

113 *Affirmative Action: SCOTUS Upholds Michigan Ban* (Huffpost Live broadcast Apr. 22, 2014), available at <http://live.huffingtonpost.com/r/segment/affirmative-action-scotus-upholds-michigan-ban/5353ba20fe34449b6f00024e> (featuring Vinay Harpalani in a discussion of *Schuette v. Coalition to Defend Affirmative Action*).



ban race-conscious policies not too long ago,<sup>114</sup> demonstrating that social activism could convince voters to reject these bans.<sup>115</sup> My forthcoming piece in the *Seton Hall Law Review* also charges forward: it argues that the Court's broad definition of the diversity interest allows universities to defend race-conscious admissions policies, and it proposes novel strategies for universities to do so.<sup>116</sup>

Most recently, UT prevailed in *Fisher* on remand.<sup>117</sup> I could conclude this Article by once again claiming a victory for affirmative action, as I did after *Grutter*,<sup>118</sup> and on several occasions since.<sup>119</sup> But double-consciousness is indeed a "peculiar sensation"<sup>120</sup>—it is fraught with Orwellian irony and often feels more like *doublethink*: "holding two contradictory beliefs in one's mind simultaneously, and accepting both of them."<sup>121</sup> The *Fisher* remand appeal to the Supreme Court still looms,<sup>122</sup> and recently an anti-affirmative action organization (ironically named "Students for Fair Admissions")<sup>123</sup> filed two new

114 See Slevin, *supra* note 92.

115 See *id.* (noting that opponents of Colorado's proposed ban on affirmative action "launched a door-to-door campaign . . . [and] ran radio ads in English and Spanish against the amendment").

116 Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. (forthcoming 2015) ("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.").

117 See *supra* note 16.

118 See *supra* note 2 and accompanying text.

119 See *supra* notes 110–16 and accompanying text.

120 DU BOIS, *supra* note 7 ("It is a peculiar sensation, this double-consciousness . . .").

121 GEORGE ORWELL, 1984, at 224 (Knopf Doubleday Publ'g Grp. 2009) (defining "doublethink" as "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them"). 1984's dystopian world also gives the ironic Party slogans of "War is Peace," "Freedom is Slavery," and "Ignorance is Strength". *Id.* at 6. 1984 is in many ways similar to Professor Derrick Bell's own dystopian narratives in *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) and *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

122 See *supra* note 16.

123 Organizations that focus on eliminating race-conscious university admissions often choose such ironic names, such as "Center for Equal Opportunity" and "the Project on Fair Representation." See *Center for Equal Opportunity: The Nation's Only Conservative Think Tank Devoted to Issues of Race and Ethnicity*, CENTER FOR EQUAL OPPORTUNITY, <http://www.ceousa.org>; *Welcome to the Project on Fair Representation!*, PROJECT ON FAIR REPRESENTATION, <http://www.projectonfairrepresentation.org>. Anti-affirmative action ballot initiatives are also given ironic names; California's Proposition 209 is called the California Civil Rights Initiative, Washington's Initiative 200 is called the Washington Civil Rights Initiative, and Michigan's Proposal 2 is called the Michigan Civil Rights Initiative. See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1397 (1997) ("Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act and proclaims simply and clearly: 'The state shall not discriminate against, or grant preferential treatment to, any

lawsuits, challenging race-conscious admissions policies at Harvard University and at the University of North Carolina at Chapel Hill.<sup>124</sup> I can only conclude with Professor Bell's prophetic admonition that "civil rights victory" would indeed be "hard to distinguish from defeat."<sup>125</sup>

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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.""); Paul Guppy, *Policy Brief—A Citizen's Guide to Initiative 200: The Washington State Civil Rights Initiative*, WASH. POL'Y CENTER (Sept. 1998), <http://www.washingtonpolicy.org/publications/brief/citizens-guide-initiative-200-washington-state-civil-rights-initiative> (referring to Washington's Initiative 200 as "the Washington Civil Rights Initiative"); *The Michigan Civil Rights Initiative: News and Commentary*, ADVERSITY.NET (Nov. 7, 2006), [http://www.adversity.net/michigan/mcri\\_mainframe.htm](http://www.adversity.net/michigan/mcri_mainframe.htm) (referring to Michigan's Proposal 2 as "the Michigan Civil Rights Initiative"). All of these names are again reminiscent of George Orwell's 1984, *supra* note 121, in which the Ministry of Peace focused on perpetuating warfare, the Ministry of Truth focused on propaganda and distortion of history, and the Ministry of Love focused on torturing dissidents and forcing them to comply with Big Brother's directives. *See id.* at 6.

<sup>124</sup> 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](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) (discussing the two pending lawsuits alleging unlawful bias in admission policies at Harvard University and the University of North Carolina at Chapel Hill brought by a group plaintiff called "Students for Fair Admissions"); 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/> (describing the lawsuits against Harvard University and the University of North Carolina at Chapel Hill and characterizing them as sequels to the Supreme Court's ruling in *Fisher v. Univ. of Tex. at Austin*).

<sup>125</sup> Bell, *supra* note 3, at 1622.