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Fisher v. University of Texas at Austin: Grutter (Not) Revisited

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Fisher v. University of Texas at Austin: *Grutter* (Not) Revisited

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I. INTRODUCTION

The Supreme Court of the United States' widely anticipated decision in *Fisher v. University of Texas at Austin*[1] proved to be a disappointment to interested parties on both sides of this still-simmering question: does the consideration of race as a factor in university admissions – *for the purpose of achieving the alleged educational benefits of a diverse student body* – violate the Equal Protection Clause of the Fourteenth Amendment?

Following a historic series of decisions, which began with the Supreme Court's 1954 decision in *Brown v. Board of Education*[2] unanimously adopting the bedrock principle that "racial discrimination in public education is unconstitutional,"[3] no Court upheld the use of race in university admissions for *any* purpose, much less for an admittedly non-remedial[4] purpose, until the 2003 decision in *Grutter v. Bollinger*.[5] In *Grutter*, the Court upheld the University of Michigan's heavy use of racial preferences in its law school admis-

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

2. 347 U.S. 483 (1954).

3. Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan. (*Brown II*), 349 U.S. 294, 298 (1955).

4. Note Justice O'Connor's language in a pre-*Grutter* decision regarding the importance of limiting the use of racial classifications to *remedial* settings: "Unless they are strictly reserved for *remedial* settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (emphasis added). Of course, she dramatically changed course in *Grutter* where her opinion for the Court entirely ignored the significance of her own words in *Croson*. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

5. 539 U.S. 306 (2003).

sions program based on the university's claimed interest in "diversity."[6] Because the University of Texas at Austin (UT) adopted a "holistic" admissions program modeled after the program approved in *Grutter*,[7] *Fisher* provided the Court with a rare opportunity to revisit *Grutter* and either reaffirm its principal holding[8] or overrule, in whole or in part, what many view as *Grutter*'s remarkable deviation from previous Equal Protection jurisprudence.[9] Alas, the Court, in its brief opinion,[10] did neither.

What follows is a description of UT's race-conscious undergraduate admissions policy, which was at issue in *Fisher* (and which the parties and

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6. *Id.* at 328 ("[The Law School] assert[s] only one justification for [its] use of race in the admissions process: obtaining 'the educational benefits that flow from a diverse student body.'"). The "diversity" rationale was first mentioned twenty-five years earlier by Justice Lewis F. Powell, Jr. in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311 (1978). *See infra* note 68 and accompanying text. In *Bakke*, Justice Powell opined (in a portion of his opinion that drew no support from any other justice) that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12.

7. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 631 F.3d 213, 217-18 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013) ("We begin with *Grutter* . . . because UT's race-conscious admissions procedures were modeled after the program [*Grutter*] approved."). The Fifth Circuit also noted that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*, and as long as *Grutter* remains good law, UT's current admissions program remains constitutional." *Id.* at 218 (quoting Fisher v. Univ. of Tex. at Austin (*Fisher I*), 645 F. Supp. 2d 587, 612-13 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013)) (internal quotation marks omitted). And finally, UT's counsel commenced his argument before the Supreme Court by stating that "[UT's plan] is indistinguishable [from *Grutter*] in terms of how it operates in taking race into account." Transcript of Oral Argument at 31, Fisher v. Univ. of Tex. at Austin (*Fisher IV*), 133 S. Ct. 2411 (2013) [hereinafter "Transcript"] (No. 11-345), 2012 WL 4812586.

8. *See Fisher IV*, 133 S. Ct. at 2418 ("In *Grutter*, the Court [adopted Justice Powell's lone] conclusion [in *Bakke*] that obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions.") (quoting *Grutter*, 539 U.S. at 325) (internal quotation marks omitted).

9. *See Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part) ("The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."); *id.* at 378 (Thomas, J., concurring in part and dissenting in part) ("For the immediate future . . . the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."); *see also Fisher II*, 631 F.3d at 266 (Garza, J., concurring) ("[T]he Constitution prohibits all forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on . . . ruinous behavior . . . . I await the Court's return to constitutional first principles.").

10. The actual text of Justice Kennedy's opinion for the Court runs a single sentence longer than seven pages. *See Fisher IV*, 133 S. Ct. at 2415-22.

the courts concede is all but identical to the policy upheld in *Grutter*). This is followed by a brief description of the procedural posture of the case and an analysis of the Supreme Court's decision. Finally, this Article argues that *Grutter* (and, by default, *Fisher*) represents a dramatic deviation from – and, in effect, a reversal of – the bedrock principle established in *Brown*. Left unanswered, of course, is whether our nation's highest court will ever reassert that the principle established in *Brown* governs the use of race – and forbids its use in a discriminatory way – when it comes to public education, particularly in the context of university admissions.

II. THE CONTROVERSY IN *FISHER*

A. UT's Race-Conscious Program

Shortly after the Supreme Court's decision in *Grutter*, UT adopted an admissions plan virtually identical to the plan approved in that case.[11] This plan explicitly considers race as a factor in admissions.[12] Under UT's program, an applicant is admitted based on a combination of her Academic Index (AI) and Personal Achievement Index (PAI) scores,[13] with "race" added to the eventual number assigned to each applicant's PAI score.[14] Once applications have been scored, they are plotted on a grid with the AI score on the x-axis and the PAI score on the y-axis.[15] "On that grid [applicants] are assigned to so-called cells based on their individual scores. All [applicants] in the cells falling above a certain line are admitted. All [applicants] below that line are not."[16] As every court reviewing the policy con-

11. *Id.* at 2416.

12. *See id.*

13. The AI is "a numerical score reflecting an applicant's test scores and academic performance in high school." *Id.* at 2415. The PAI "measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background[,]" including *inter alia* "growing up in a single-parent home, speaking a language other than English at home, . . . and the general socioeconomic condition of the student's family." *Id.* at 2415-16; *see also Fisher II*, 631 F.3d at 222-23, 227-28.

14. Beginning with the applicants in the fall of 2004, UT asked applicants to classify themselves from among five predefined racial categories. *See Fisher IV*, 133 S. Ct. at 2416. Race is not assigned an explicit numerical value as part of the PAI score. *Id.* However, "[a]dmissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent." *Fisher II*, 631 F.3d at 228.

15. *Fisher IV*, 133 S. Ct. at 2416.

16. *Id.*

ceded, the manner in which race is "scored" can make a difference in whether an applicant is admitted or rejected.[17]

The *Grutter*-like plan was a supplement to a measure known as the "Top Ten Percent Law," which "grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards."[18] In recent years, the vast majority (in excess of eighty percent in 2008) of the Texas-resident enrollees at UT have been admitted through the "Top Ten Percent Law."[19] Thus, fewer than twenty percent of the enrollees each year are subjected to UT's *Grutter*-like plan.[20]

B. Procedural History

On April 7, 2008, Petitioner Abigail Fisher filed suit against UT in the U.S. District Court for the Western District of Texas, arguing that the university's refusal to offer her admission was due to her skin color.[21] Ten days later, on April 17, 2008, she was joined by fellow plaintiff Rachel Michalewicz[22] (who later dropped out of the lawsuit before it reached the Supreme Court). The students' original lawsuit was dismissed by the district court on cross-motions for summary judgment.[23] The Fifth Circuit Court of Appeals affirmed the district court's judgment.[24] However, the Supreme Court reversed, stating:

> The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment . . . [and remands the case for further proceedings] so that the admissions process can be considered under a correct analysis. . . . [I]n determining whether summary judgment in favor of the University would be appropriate, *the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions pro-*

17. *See id.*; *see also Fisher II*, 631 F.3d at 230 (quoting *Fisher I*, 645 F. Supp. 2d 587, 597-98 (W.D. Tex. 2009)) ("[T]he district court found that race 'is undisputedly a meaningful factor that can make the difference in the evaluation of a student's application.'").

18. *Fisher IV*, 133 S. Ct. at 2416.

19. *See Fisher II*, 631 F.3d at 227.

20. *Id.*

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

22. *Id.*

23. *Id.* at 613.

24. *Fisher II*, 631 F.3d at 247. The Fifth Circuit denied a petition for rehearing en banc. Fisher v. Univ. of Tex. at Austin (*Fisher III*), 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

> *gram is narrowly tailored to obtain the educational benefits of diversity. Whether this record* – and not "simple . . . assurances of good intention" – *is sufficient is a question for the Court of Appeals in the first instance.*[25]

The Court's directive notwithstanding, it is difficult to imagine that the Court of Appeals will – much less can – do anything but reverse the district court's original grant of summary judgment in favor of UT and remand the case for a full trial on the merits.[26] Indeed, *Fisher* seems to anticipate just such a process.[27]

III. WHAT, IF ANYTHING, DID *FISHER* DECIDE?

While the Court in *Fisher* refused to reconsider whether race should ever be a factor in university admissions, the decision did take issue with the rather straightforward manner in which the lower courts applied *Grutter*.[28] Indeed, without explicitly saying so, the Court appears to subtly alter *Grutter*

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25. *Fisher IV*, 133 S. Ct. 2441, 2421 (emphasis added) (citations omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

26. Well-established legal principles require a reviewing court to "construe[] all facts and inferences in the light most favorable to the nonmoving party." *Fisher I*, 645 F. Supp. 2d at 599. Thus, it is difficult to imagine the Court of Appeals and/or the district court reaffirming the previous judgment in favor of UT based on a record, which the Supreme Court, at least implicitly, has described as not sufficient on its face to uphold the earlier summary judgment awarded in favor of UT. *See Fisher IV*, 133 S. Ct. at 2415, 2421. In fact, UT requested that the case be remanded to the district court "as the most natural and appropriate course." *See* Appellees' Statement Concerning Further Proceedings on Remand (filed 07/23/2013) at 3. *Amici* for UT also argue (albeit in the alternative) that the Fifth Circuit "should remand the case to the District Court, which is best positioned to conduct the sort of fact-based 'careful judicial inquiry' that narrow tailoring requires." *See* Supplemental Brief of Amici Curiae the Black Student Alliance at the University of Texas at Austin, the Black Ex-Students of Texas, Inc., and the NAACP Legal Defense & Educational Fund, Inc. In Support of Appellees (filed 11/01/2013) at 5.

27. *See Fisher IV*, 133 S. Ct. at 2421 ("[F]airness to the litigants and the *courts* that heard the case requires that it be remanded so that *the admissions process can be considered and judged* under a correct analysis.") (emphasis added). Earlier the Court made the point that *Grutter*, unlike *Fisher*, "was decided after trial." *Id.* This may prove to be an irresistible invitation to the Fifth Circuit to send the case back to the district court where "sufficient," and presumably contested, evidence would be offered to determine whether UT's program *is*, in fact, narrowly tailored.

28. *Id.* at 2420-21; *see also Fisher I*, 645 F. Supp. 2d at 613 ("As long as *Grutter* remains good law, UT's current admissions program remains constitutional."); *Fisher II*, 631 F.3d at 247 (Garza, J, concurring) ("[T]oday's opinion [upholding the district court's grant of summary judgment in favor of UT] is a faithful . . . application of [*Grutter*].").

itself, particularly with regard to the "deference" and "good faith" presumptions accorded to universities.[29]

Writing for the Court in *Fisher*, Associate Justice Anthony Kennedy began by suggesting that the broad question of whether race should ever be a factor in admissions was the question facing the Court.[30] However, his next sentence outlined a more circumscribed issue: "The parties asked the Court to review whether the judgment below [in the U.S. Court of Appeals for the Fifth Circuit] was *consistent* with . . . *Grutter*[.]"[31]

The Court's decision to vacate the lower court's decision and remand for further proceedings rested almost entirely on the degree of deference that both the district court and the Fifth Circuit extended to UT when assessing the university's need to employ a *Grutter*-like admissions program.[32] As the Court explained:

> [The Court of Appeals] "presume[d] the University acted in good faith" and thus concluded that "the narrow-tailoring inquiry – like the compelling interest inquiry – is undertaken with a degree of deference to the Universit[y]." Because "the efforts of the University have been studied, serious, and of high purpose," the [Fifth Circuit] held that the use of race in the admissions program fell within "a constitutionally protected zone of discretion."[33]

Allegedly contrasting the discretion and deference afforded to UT by the Fifth Circuit with what *Grutter* arguably demanded, the Court in *Fisher* observed:

> [T]he District Court and the Court of Appeals were correct in finding that *Grutter* calls for deference to [UT's] conclusion . . . that a diverse student body would serve its educational goals.
>
> . . . .
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> [But] [o]nce the University has established that its goal of diversity is consistent with strict scrutiny[34] . . . there must still be a further judi-

29. *See Fisher IV*, 133 S. Ct. at 2420-21.

30. *See id.* at 2415 ("[Petitioner] contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.").

31. *Id.* (emphasis added) (quoting Petition for Writ of Certiorari at i, *Fischer IV*, 133 S. Ct. 2411 (No. 11-345), 2011 WL 4352286) (internal quotation marks omitted).

32. *See id.* at 2415, 2420-21.

33. *Id.* at 2420-21 (second alteration in original) (citations omitted) (quoting *Fisher II*, 631 F.3d at 231-32).

34. *Id.* at 2419-20. The phrase "[o]nce the University has established that its goal of diversity is consistent with strict scrutiny" is puzzling inasmuch as *Grutter* seemed to have removed any need for an institution of higher learning to "establish"

> cial determination that the admissions process meets strict scrutiny *in its implementation*. The University must prove that *the means chosen* by the University to attain diversity are narrowly tailored to that goal. *On this point, the University receives no deference.*[35]

Yet the discretion and deference extended to UT by the Fifth Circuit did not appear to differ materially from the broad deference afforded to the University of Michigan Law School in *Grutter*.[36] It is difficult to imagine that the lower courts in *Fisher* could have afforded UT a higher degree of deference than that extended to the law school in *Grutter*, both as to the law school's assertion of a "compelling interest" in enrolling a "diverse" student body, and as to the means chosen by the law school to attain the "critical mass" of minority students believed necessary to achieve that goal.

In fact, it was on these latter two points – the "means chosen by [the law school in *Grutter*]" and the actual implementation of the school's program[37] – that the deference extended by the Court in *Grutter* knew no bounds. The only real admonition by the *Grutter* Court to the University of Michigan Law School was that the school was not to mechanically add predetermined points to every minority applicant, as was impermissibly being done in the University of Michigan's undergraduate admissions program.[38] Inextricably tied to the University of Michigan Law School's claimed interest in diversity in *Grutter* was its stated desire to enroll a "critical mass" of minority stu-

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what *Grutter* already seemed to enshrine as a "compelling state interest." In other words, after *Grutter* it seemed that virtually every institution of higher learning could claim – without the need to offer further proof – that achieving "the educational benefits that flow from student body diversity" was now a recognized compelling state interest. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328-33 (2003) (discussing the alleged benefits of "student body diversity").

35. *Fisher IV*, 133 S. Ct. at 2419-20 (emphasis added).

36. *See Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its education mission *is one to which we defer.*") (emphasis added); *cf. Fisher III*, 644 F.3d 301, 305 (5th Cir. 2011) (Jones, C.J., dissenting) (contrasting *Grutter*'s allegedly more limited deference to university administrators with what Chief Judge Jones characterized as the Fifth Circuit panel's "*total deference* to University administrators" in *Fisher*) (emphasis added).

37. *Fisher IV*, 133 S. Ct. at 2420.

38. *See Grutter*, 539 U.S. at 337. In *Gratz v. Bollinger*, the Court struck down the University's undergraduate race-conscious program, 6-3, on the grounds that "the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program." 539 U.S. 244, 270 (2003).

dents.[39] UT's claim in *Fisher* was no different.[40] Like Michigan, UT claimed that without resorting to the explicit consideration of race, it would lack the "critical mass" of minority students it needed, in part, to assure greater classroom diversity.[41] Nothing in the record suggests that UT employed more "camouflage" or "winks, nods, and disguises"[42] in implementing its goal of enrolling a "critical mass" of minority students than did Michigan's law school in *Grutter*.[43] Because UT's program was modeled after the program approved by the Court in *Grutter*,[44] it is difficult to understand how the *Fisher* Court, assuming it simply applied the rationale in *Grutter* to the facts before it in *Fisher*, could have reached any conclusion other than to uphold UT's program.

Nevertheless, there do appear to be some slight distinctions between the Court's analyses in *Grutter* and *Fisher* that may impact the Fifth Circuit's review on remand. For example, the lower court may read *Fisher*'s "degree of deference" language[45] as markedly reducing the level of deference granted

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39. *Grutter*, 539 U.S. at 330 ("[T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.").

40. *See Fisher IV*, 133 S. Ct. at 2415.

41. *Id.* at 2416 ("[Based] in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students[,] . . . [the study] concluded that the University lacked a 'critical mass' of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program."); *see also Fisher II*, 631 F.3d 213, 241 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

42. *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting). Justice Ginsburg concluded her dissent in *Gratz* (where the Court struck down the mechanical undergraduate race-conscious policy at the University of Michigan on the same day it upheld the Law School's policy) by observing:

> 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 the adoption of affirmative action plans of the kind [struck down in *Gratz*]. *Without recourse to such plans, institutions of higher education may resort to camouflage*. . . . [and seek] to achiev[e] similar numbers *through winks, nods, and disguises*.

Id. (emphasis added). Justice Souter, who joined Ginsburg's dissent in *Gratz*, added this: "Equal protection cannot become an exercise in which the winners are the ones who hide the ball." *Id.* at 298 (Souter, J., dissenting). A similar view was expressed by Justice Brennan about the so-called "Harvard Plan" extolled by Justice Powell in *Bakke*. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, J., concurring and dissenting). Brennan, who voted to uphold the UC-Davis system in *Bakke*, wrote: "*[T]here is no basis for preferring* [the Harvard Plan] *simply because* in achieving the same goals that the Davis Medical School is pursuing, *it proceeds in a manner that is not immediately apparent to the public*." *Id.* (emphasis added).

43. *See Fisher IV*, 133 S. Ct. at 2415.

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

45. *See supra* note 32 and accompanying text.

to universities by *Grutter*. This inference is supported by Justice Kennedy's vigorous dissent in *Grutter*, in which he critiqued the majority's extraordinarily broad deference standard.[46]

In *Fisher*, Justice Kennedy also chastised the lower courts because each deferred to UT's "*good faith* in its use of racial classifications."[47] Yet it is difficult to imagine how UT's decision to adopt race as a factor in admissions and the manner in which it implemented its *Grutter*-like program could be markedly different (in terms of "good faith" or otherwise) from the manner in which the University of Michigan implemented its policy in *Grutter*. Based on the record before the Fifth Circuit, one could even argue that UT's program was *less objectionable* than the program at the University of Michigan,[48] even if both remained objectionable from a narrow-tailoring standpoint.

Justice Kennedy also wrote in *Fisher* that good faith on the part of the university should not be presumed,[49] despite the Court's holding in *Grutter* "that 'good faith' on the part of a university *is* 'presumed' absent 'a showing to the contrary.'"[50] In fact, nothing in *Grutter* explicitly suggested that this good faith analysis was confined, as Justice Kennedy seems to suggest in *Fisher*,[51] to an institution's determination that diversity is a compelling interest.[52] Justice Kennedy's language in *Fisher* suggesting that "no deference" is

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46. *See* Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) ("Deference is antithetical to strict scrutiny, not consistent with it.").

47. *Fisher IV*, 133 S. Ct. at 2421 (emphasis added).

48. *See, e.g.*, *Fisher II*, 631 F.3d 213, 235 (5th Cir. 2011), *vacated,* 133 S. Ct. 2411 (2013) (citing *Grutter*, 539 U.S. at 391-92 (Kennedy, J., dissenting)) (analyzing the Law School's practice and noting that "UT's policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process."); *see also id.* at 247 ("The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored – procedures in some respects superior to the *Grutter* plan because the University does not keep a running tally of underrepresented minority representation during the admissions process.").

49. *See Fisher IV*, 133 S. Ct. at 2421.

50. *Grutter*, 539 U.S. at 329 (emphasis added) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978)).

51. Justice Kennedy resorts to *Croson* rather than to *Grutter* for the following proposition:

> It must be remembered that the mere recitation of a benign or legitimate purpose for a racial classification is entitled to little or no weight. Strict scrutiny does not permit a court to accept a school's assertion that its admission process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

Fisher IV, 133 S. Ct. at 2421 (citations omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)) (internal quotation marks omitted).

52. *See, e.g.*, *Grutter*, 539 U.S. at 343 ("*We take the Law School at its word* that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.") (emphasis

to be given to the "means chosen" or the manner of "implementing" a race-conscious program,[53] then, appears to be a subtle modification of the "presumption of good faith" language in *Grutter*.[54] However, if Justice Kennedy intended to make this modification, why did he not explain more clearly that *Grutter*'s good faith holding[55] was being clarified, if not overruled?[56] In the end, however, it is difficult to find within the Court's opinion in *Fisher* much concrete guidance to the lower courts on remand or additional help to those colleges and universities that presently consider race in admissions.

IV. BE CAREFUL WHAT YOU *DON'T* ASK FOR

So why did the Court choose *not* to reexamine *Grutter*, particularly when one of the concurring judges on the Fifth Circuit's panel issued the Court a direct challenge to do so?[57] The answer, it seems, came down to Peti-

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added). Certainly this appears to be an expression of almost complete "deference" to the Law School's "good faith" in its selection and implementation of the program at issue in *Grutter*.

53. *Fisher IV*, 133 S. Ct. at 2420.

54. *See Grutter*, 539 U.S. at 308.

55. *See, e.g.*, *id.* at 343 (referencing Justice Powell's commentary on the presumption of good faith of university officials in *Bakke*).

56. One potentially intriguing explanation for Justice Kennedy's approach may be based in part on his tacit agreement with the views expressed by Circuit Court Judge Edith Jones. *See supra* note 36 and accompanying text. In her dissent from the denial of en banc rehearing, Judge Jones wrote, in words that somewhat mirror Kennedy's dissent in *Grutter*, that "I [agree] with the panel's conclusion that following *Grutter*, we may presume a university's good faith in the decision that it has a compelling interest in achieving racial and other student diversity. *But that is about as far as deference should go*." *Fisher III*, 644 F.3d 301, 305 n.3 (5th Cir. 2011) (Jones, C.J., dissenting) (emphasis added). Perhaps Kennedy sees Jones' views regarding the alleged errors committed by the Fifth Circuit panel as one means by which Fifth Circuit, on remand, might impose a significant, if subtle, adjustment in terms of the manner in which *Grutter* applied (or, more accurately, failed to apply) "strict scrutiny" to the law school's admissions program. Such an adjustment – if followed by the Fifth Circuit on remand – might more likely result in the striking down of UT's *Grutter*-like policy, an outcome that would be consistent with Kennedy's dissent in *Grutter* (where, according to Kennedy, the Court refused to apply "meaningful strict scrutiny" to the policy in question). *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

57. *See Fisher II*, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., concurring), *vacated*, 133 S. Ct. 2411 (2013) ("[D]espite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. *The Supreme Court has chosen this erroneous path and only the Court can rectify the error*." (emphasis added)). Judge Garza concluded his lengthy special concurrence with this:

> [T]he Constitution prohibits all forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American

tioner's rather surprising tactical decision *not* to ask the Court to do so.[58] Justice Kennedy's opinion highlighted this point: "There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. . . . *But the parties here do not ask the Court to revisit that aspect of* Grutter*'s holding.*"[59]

Justice Antonin Scalia's single-paragraph concurring opinion addressed the issue a bit more directly. First, he left no doubt that he would have voted to overrule *Grutter* in its entirety[60] had he been asked to do so. Second, he repeated Justice Kennedy's observation that the Petitioner did not ask the Court to overrule *Grutter*'s holding that achieving the educational benefits of diversity is a "compelling interest" that can justify using racial preferences in university admissions.[61] For that reason alone, Justice Scalia "join[ed] the Court's opinion in full."[62]

Later in the opinion, addressing the strict scrutiny and narrow-tailoring aspects of *Grutter*'s holding, Justice Kennedy described the allegedly critical features of the law school's admissions plan which led to its approval in *Grutter*: "In *Grutter*, the Court approved the plan at issue upon concluding that it [1] was not a quota, [2] was sufficiently flexible, [3] was limited in time, and [4] followed 'serious, good faith consideration of workable race-neutral alternatives.'"[63] He added: "[T]he parties [again] do not challenge, and *the Court . . . does not consider, the correctness of that determination.*"[64] The italicized language is an odd – and seemingly superfluous – statement. It suggests that even if a majority of the *Fisher* Court were of the view that *Grutter* wrongly applied "strict scrutiny" to the law school's pro-

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> life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, *I await the Court's return to constitutional first principles.*

Id. at 266 (emphasis added).

58. Petitioner's decision not to challenge the principal holding in *Grutter* was foreshadowed before the Court of Appeals: "[Petitioner] question[s] whether UT *needs* a *Grutter*-like policy [to achieve a critical mass of minority students]." *Id.* at 234.

59. *Fisher IV*, 133 S. Ct. 2411, 2419 (2013) (emphasis added) (citations omitted). When asked by Justice Breyer during oral argument whether Petitioner was seeking to have *Grutter* overruled, her counsel stated, "[W]e were not trying to change the Court's disposition . . . in *Grutter* [of whether there could] be a . . . compelling interest in . . . using race to establish a diverse class." Transcript, *supra* note 7, at 8. Justice Breyer followed up: "[Y]our point is, does your case *satisfy* Grutter?" which elicited this response: "[Y]es." *Id.* at 9 (emphasis added).

60. *See Fisher IV*, 133 S. Ct. at 2422 (Scalia, J., concurring).

61. *Id.*

62. *Id.*

63. *Id.* at 2421 (quoting Grutter v. Bollinger 539 U.S. 306, 339 (2003)) (numbering not present in original).

64. *Id.* (emphasis added).

gram (which Justice Kennedy most certainly concluded in *Grutter*),[65] the Court decided to avoid any mention of this potentially critical and corrective – but unspoken – observation simply because Petitioner appeared not to challenge that aspect of *Grutter*.

In fact, it is not clear that Petitioner was not, at least to some limited extent, challenging the "strict scrutiny" analysis employed in *Grutter* as to generating a "critical mass" of minority students. For example, in response to several questions from Justices Scalia and Breyer during oral argument, Petitioner's counsel said:

> [T]here was no effort in this case [by UT] to establish even a working target for critical mass. . . . [UT] never answered the predicate question which *Grutter* asks: Absent the use of race, can we generate a critical mass? . . . *[T]hat's a flaw we think is in* Grutter. *We think it's necessary for this Court to restate that principle.*[66]

However, rather than addressing this "flaw" – the manner in which *Grutter* applied "strict scrutiny" to the law school's program (a flaw of which Justice Kennedy was keenly aware) – Justice Kennedy apparently chose to ignore Petitioner's challenge and proceeded simply to parrot the language from *Grutter*.

The unavoidable conclusion is that the Court took Petitioner's unwillingness to directly challenge *Grutter* as reason enough to avoid addressing what many believed to be the two most important issues presented in *Fisher*: (1) whether, as *Grutter* held, there is a sufficiently compelling interest in "diversity" such that a public university may consider an applicant's race during the admissions process;[67] and (2) whether the Court in *Grutter* properly applied "strict scrutiny" to the law school's heavily race-conscious program. As a consequence, the Court – at least for the time being – left in place race preference admissions policies that indisputably result in injustices to individual candidates who will, innocent of any wrongdoing on their part, continue to be denied admission solely because of their race or ethnicity.[68]

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

66. Transcript, *supra* note 7, at 13 (emphasis added).

67. *See Grutter*, 539 U.S. at 328.

68. *See id.* at 341 ("We acknowledge that '*there are serious problems of justice connected with the idea of preference itself.*' . . . Even remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'" (emphasis added) (citations omitted) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298, 308 (1978))); *see also* R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POLITICS 313, 315 (2003) [hereinafter Purdy, *Prelude*] (highlighting the trial testimony of the Law School dean who admitted that underrepresented minority students were admitted to the Law School who, had they been white or Asian American, would not have been admitted).

Given the Court's unwillingness to reconsider *Grutter*, supporters of the "diversity rationale" – while certainly happy that *Grutter* seemingly was left untouched – undoubtedly were surprised and disappointed when the Court, by a wide 7-1 margin,[69] reversed the Fifth Circuit's decision upholding UT's *Grutter*-like program.[70] Equally disappointing to UT's supporters was the absence of language reaffirming *Grutter*. Because of Petitioner's concessions, the Court simply took *Grutter* "as [a] given for purposes of deciding this case"[71] and apparently determined that it did not need to address the broader question of whether *Grutter* should remain good law.[72]

Those who oppose *Grutter*'s adoption of the "diversity rationale" and believe race has no legitimate role to play in university admissions policies came away disappointed as well. Their frustration was due mainly to the Court's surprising refusal – irrespective of Petitioner's concessions – to conduct a thoughtful reassessment of *Grutter*'s holding that permits race-conscious college and university admissions policies to continue.[73]

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69. Only Justice Ginsburg dissented from the Court's reversal of the Fifth Circuit's decision. *Fisher IV*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting). Justice Elena Kagan was recused and did not participate in the decision. *Id.* at 2422.

70. *Id.* at 2422.

71. *Id.* at 2417. Also mentioned as a "given" were *Bakke* and *Gratz*, neither of which upheld the respective race-conscious program at issue. *See id.* at 2417.

72. Notably, Justice Clarence Thomas did not feel constrained and wrote extensively in *Fisher* why he "would overrule *Grutter* . . . and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." *Id.* at 2422 (Thomas, J., concurring) (citation omitted).

73. It is, of course, unknown whether this Court would have reversed *Grutter*'s approval of the "diversity rationale." Assuming they have not changed since *Grutter* was decided, the views of four justices seem quite clear: Justices Scalia and Thomas reject the rationale; Justices Breyer and Ginsburg approve. *See Grutter*, 539 U.S. at 346-49 (Scalia, J., concurring in part and dissenting in part); *id.* at 349-78 (Thomas, J., concurring in part and dissenting in part); *id.* at 343-46 (Ginsburg, J., concurring). For his part, Justice Kennedy, in *Grutter*, expressed his "approval of giving appropriate consideration to race in this one context [i.e., university admissions]" so long as "the program can meet the test of strict scrutiny by the judiciary." *Id.* at 387, 395 (Kennedy, J., dissenting). Thus, for *Grutter*'s approval of the "diversity rationale" to be overruled would require Justice Kennedy to change his position together with the assumption that at least two additional justices (from among the four who have joined the Court since *Grutter* was decided) would share the view of Justices Scalia and Thomas. Less certain is whether the strict scrutiny analysis employed by the Court in *Grutter* and the actual manner in which it was applied to the law school's policy would have survived a full challenge particularly given Justice Kennedy's unambiguous view that "*the concept of critical mass is a delusion* used by the Law School . . . to achieve numerical goals indistinguishable from quotas." *Id.* at 389 (emphasis added). For a more detailed discussion of the problems surrounding UT's (and *Grutter*'s) use of the phrase "critical mass," see R. Lawrence Purdy, *The Critical Question Involves "Critical Mass,"* NAT'L ASS'N OF SCHOLARS (Sept. 30, 2013) [hereinafter,

In addition, the "strict scrutiny/narrow tailoring" analysis described by Justice O'Connor in *Grutter* – which concededly was an accurate recitation of how "strict scrutiny" should be applied when analyzing race-conscious programs – was, for all intents and purposes, ignored by the Court in *Grutter*.[74] Those who disapproved of the outcome in *Grutter* were therefore expecting the Court in *Fisher* to at least reconsider, if not entirely overrule, the manner in which *Grutter* applied "strict scrutiny" to the law school's program. That reconsideration did not happen, at least not in any explicit fashion. And this, perhaps more than any other defect in *Grutter*, is why colleges and universities – and the courts that are asked to review their race-conscious policies – will continue to struggle with *Grutter* so long as it remains the law.

V. WHAT GUIDANCE DOES *FISHER* OFFER?

Because *Fisher* relies almost exclusively on *Grutter*, no analysis of the *Fisher* decision itself or its impact on future cases can be accomplished without fully revisiting *Grutter*. Emphasizing that Petitioner failed to challenge *Grutter*, the Court in *Fisher* proceeded to outline four factors that led to the *Grutter* Court's approval of the University of Michigan Law School's heavily race-conscious admissions policy.[75] These four factors undoubtedly are intended as a guide for future courts – as well as for the universities themselves – when evaluating race-based admissions policies. However, significant ambiguity, if not outright confusion, remains regarding how the factors should actually be applied. As a consequence, they arguably provide little meaningful guidance. Each of these four factors is discussed separately below.

Purdy, *Critical Question*], http://www.nas.org/articles/the_critical_question_involves_critical_mass.

74. *See, e.g.*, *Fisher II*, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., concurring), *vacated,* 133 S. Ct. 2411 (2013) ("[I]n *Grutter* . . . the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding."). In fact, the alleged defects in Court's application of "strict scrutiny" to the facts before it in *Grutter* are too numerous to summarize. To fully understand the depth of the disagreements on this topic, the reader should review the opinions of the four dissenting justices (the late Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas), paying particular attention to the entire dissenting opinion by Justice Kennedy. *See Grutter*, 539 U.S. at 387-395 (Kennedy, J., dissenting); *id.* at 346-49 (Scalia, J., concurring in part and dissenting in part); *id.* at 349-78 (concurring in part and dissenting in part); *id.* at 378-87 (Rehnquist, C.J., dissenting); *see also* Purdy, *Critical Question*, *supra* note 73.

75. *See Fisher IV*, 133 S. Ct. at 2421 ("In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed serious, good faith consideration of workable race-neutral alternatives." (citations omitted) (internal quotation marks omitted)).

A. Prohibition Against Quotas

Writing for the majority in *Grutter*, Justice Sandra Day O'Connor stated that "[q]uotas impose a fixed number or percentage *which must be attained* . . . and insulate the individual from comparison with all other candidates for the available seats."[76] While there was no fixed "number" explicitly contained in the admissions policy in *Grutter*,[77] it is disingenuous to suggest that the efforts of Michigan and UT to enroll at least a minimum number or percentage – a "critical mass" – of underrepresented minority students was anything other than a quota.[78] Indeed, Justice O'Connor's quotation from *Grutter* – notwithstanding the presence of the word "fixed" – all but refutes her illogical conclusion that the law school's admissions program "[did] not operate as a quota."[79] The facts pointed overwhelmingly to the opposite conclusion. As made clear by one of the principal architects of the law school's policy and by the school's historical documents, there was, in fact, a *minimum* percentage (never less than ten percent) of underrepresented minority students "which must be attained" for "critical mass" to exist within each entering law school class.[80] Also clear was the fact that a person who was not

76. *Grutter*, 539 U.S. at 335 (citations omitted) (internal quotation marks omitted).

77. Justice O'Connor's acknowledgement that "the Law School seeks to enroll a critical mass of minority students" is followed by a convoluted and virtually incoherent contortion of the ever-elusive "critical mass." *See id.* at 329 (internal quotations marks omitted). On the one hand, O'Connor describes *critical mass* as not being "some specified percentage of a particular group merely because of its race or ethnic origin," while acknowledging several pages later that "[t]he Law School has determined, based on its experience and expertise, that *a 'critical mass'* of underrepresented minorities *is necessary* to further its compelling interest in securing the educational benefits of a diverse student body." *Id.* at 329, 333 (emphasis added). Of course, it goes without saying that *critical mass* must be a "number" below which *critical mass* has not been achieved. *See* Purdy, *Prelude*, *supra* note 68, at 375 (testimony of Law School dean admitting to this fact); Purdy, *Critical Question*, *supra* note 73.

78. *See Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) ("The dissenting opinion by THE CHIEF JUSTICE, which [Kennedy] join[ed] in full, demonstrates beyond question why *the concept of critical mass is a delusion used by the Law School* to mask its attempt to make race an automatic factor in most instances *and to achieve numerical goals indistinguishable from quotas*." (emphasis added)). Based on his language in *Grutter*, it is puzzling why Justice Kennedy permitted UT's virtually identical race-conscious program to escape the same criticism he expressed over the system in *Grutter*.

79. *See id.*

80. *See, e.g.*, Grutter v. Bollinger (*Grutter I*), 137 F. Supp. 2d 821, 840, 842-43, 851 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (highlighting University of Michigan law professor Richard Lempert's trial testimony in *Grutter* and law school documents establishing that "critical mass" required, at a minimum, ten percent underrepresented minority enrollment, a percentage the law school never fell below once it began employing its race-conscious policy); *see also* Purdy, *Critical Question*, *supra* note 73.

an underrepresented minority was, by definition, excluded from competing for these "critical mass" seats.[81] The uncontroverted evidence at trial on these very points resulted in the district court finding that "by using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school has made the current admissions policy practically indistinguishable from a quota system."[82] The district court in *Grutter* went on to find that,

> [A]pproximately 10% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. *The practical effect of the law school's policy is indistinguishable from a straight quota system*, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause.[83]

It is disappointing if not inexplicable that the *Grutter* Court ignored this indisputable evidence and, in the process, rejected the district court's finding that the law school's policy constituted an impermissible quota.[84]

Setting aside *Grutter*'s questionable recognition of the non-remedial "diversity" rationale as sufficient justification for engaging in race-conscious decision-making, the Court's failure to (1) respect the district court's conclu-

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81. *See* Purdy, *Critical Question*, *supra* note 73.

82. *Grutter I*, 137 F. Supp. 3d at 851.

83. *Id.* (emphasis added); *see also id.* at 389 (Kennedy, J., dissenting). Kennedy referenced "uncontested" facts in the trial court record supporting the district court's finding that the law school's policy was the equivalent of a quota. *See supra* note 80 and accompanying text; *see also* Purdy, *Prelude*, *supra* note 68, at 321-25; Purdy, *Critical Question*, *supra* note 73 (examining the "uncontested facts").

84. The Court's action in *Grutter* arguably violated long-standing precedent regarding the "clearly erroneous" standard of review that applies to findings of fact by a trial court. For example, in *Anderson v. City of Bessemer*, the Court said that "a finding of intentional discrimination is a finding of fact" and held forth at some length about what "clearly erroneous" review entails:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

470 U.S. 564, 573-74 (1985) (citations omitted) (quoting Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 123 (1969)) (internal quotation marks omitted).

sion that the admissions policy functioned as a quota, and (2) honestly come to grips with the reality of how the pursuit of "critical mass" actually functioned within the law school's system, certainly are among the more disturbing aspects of *Grutter*. Because these failures were passed along by default in *Fisher*, they will continue to confound colleges and universities attempting to implement race-based admissions policies, not to mention the courts that may be called upon to review *Grutter*-like policies in the future.[85]

Thus, if one accepts that UT's policy was administered in a similar fashion to the University of Michigan Law School's policy in *Grutter* – that is, in pursuit of a "critical mass" of underrepresented students (which is precisely how the case was argued)[86] – one is left to ponder a critical question. Why was this fact alone not a sufficient ground for Justice Kennedy to find UT's system and pursuit of a "critical mass" to be similarly indistinguishable from a quota and, thus, "patently unconstitutional"?[87]

B. Sufficient Flexibility

According to *Fisher*, the second factor in *Grutter* mandated that a program be "sufficiently flexible."[88] However, the Court in both *Grutter* and *Fisher* failed to address the ambiguity in this factor by specifying in what way the program needed to be "flexible." Therefore, it is all but impossible to know what the Court meant by this phrase. The *Grutter* decision did note that "truly individualized consideration demands that race be used in a *flexible*, nonmechanical way [and, it] follows from this mandate that *universities cannot . . . put members of* [certain racial groups] *on separate admissions tracks*."[89] In truth, however, applicants to Michigan's law school were listed on admissions grids segregated by race.[90] Thus, in no way were the law school's admissions decisions consistent with the "individualized

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85. Schools attempting to implement admissions policies like the one approved in *Grutter* must recognize that in their attempts to achieve a "critical mass," they are really seeking to achieve little more than a quota. *See, e.g.*, Purdy, *Prelude*, *supra* note 68, at 374-75 ("Q [by Mr. Purdy]: Well, I assume that if you're saying that you want to enroll a critical mass of minority students, you have to have some number [in mind] below which you would feel that you have failed in that effort, is that a fair statement? A: [by Law School Dean Jeffrey Lehman]: Yes."); *see also Purdy*, *Critical Question*, *supra* note 73 (discussing the Law School Dean's various admissions).

86. *See Fisher II*, 631 F.3d 213, 234 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013) ("[Petitioner does] not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*.").

87. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

88. *Fisher IV*, 133 S. Ct. 2411, 2421 (2013).

89. *Grutter*, 539 U.S. at 334 (emphasis added).

90. *Grutter I*, 137 F. Supp. 2d 821, 836 n.19 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

treatment" suggested by Justice Powell in *Bakke* and later sanctified by Justice O'Connor in *Grutter*.[91] In fact, it is disingenuous to suggest that any applicant receives "individualized consideration" without regard to his or her race or ethnicity under any race-conscious admissions program. To suggest otherwise is simply to deny the undeniable: under every race-conscious admissions program, by definition, race matters. And in *Grutter*, it mattered a great deal.[92]

In his dissent in *Grutter*, Justice Kennedy recognized the fatal flaw in the law school's policy: "The Law School has not demonstrated *how individual consideration is, or can be, preserved* [in] the application process *given the instruction to attain what it calls critical mass*. In fact, the evidence shows otherwise."[93] Given that UT's admissions program was modeled on the policy upheld in *Grutter* and implemented for precisely the same reason, it remains puzzling why Justice Kennedy did not level the same criticism against UT's system that he expressed in response to the system in *Grutter*.

C. Limited in Time

Even though a deeply divided Court in *Grutter* found the law school's race-conscious admissions policy constitutional, it nevertheless imposed a judicially-legislated twenty-five year limit on its anointment of "diversity" as a compelling state interest.[94] In other words, the Court imposed its own time

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91. *See Grutter*, 539 U.S. at 337 ("The importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount.").

92. *See Grutter I*, 137 F. Supp. 2d at 836-42; *see also* Purdy, *Prelude*, *supra* note 68, at 322-26 (providing examples of the extent to which race mattered in *Grutter*); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). UCLA law professor Richard Sander who "favors race-conscious strategies in principle, if they can be pragmatically justified," *id.* at 371, said this about the decision in *Grutter*:

> [I]t is difficult to see how Justice O'Connor could have thought the law school's system passed constitutional muster, or that blacks and whites were in any sense on the same "playing field" in admissions, being judged by a myriad of personal characteristics of which "race" was only one. *Race is obviously given far more weight* [under the law school's system] *than all other "diversity" factors together.*

Id. at 405 (emphasis added).

93. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) (emphasis added). In addition, Kennedy wrote that, "With respect to 15% to 20% of the remaining seats [in the law school class], race is likely outcome determinative for many members of minority groups. . . . [and] any given applicant's chance of admission is far smaller if he or she lacks minority status." *Id.* How could UT's *Grutter*-like system be expected to function any differently?

94. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Justice O'Connor's judicially legislated twenty-five year time limitation begs this question:

limit in *Grutter* because the law school had refused to place any time limit on its use of race.[95]

However, if achieving the educational benefits of "diversity" is in fact a truly compelling interest, and if the only way to achieve these benefits is through the use of race-conscious programs, why should any time limit ever be imposed on the attainment of this allegedly compelling interest? So long as school administrators consider the levels of racial diversity to be insufficient to achieve their educational goals, what possible grounds would ever preclude a university – under *Grutter*'s rationale – from claiming a "good faith" need to use race as a factor in admissions? And thus might it be true that, under the *Grutter* Court's own analysis, racially discriminatory admissions policies will live on forever?[96]

Yet according to *Fisher*, a time limit is required whenever a race-conscious program faces a constitutional challenge.[97] Notably, like the University of Michigan, UT had "no set date by which it will end the use of race in undergraduate admissions."[98] Thus, unless *Grutter*'s twenty-five year judicially-legislated time limit[99] is considered binding, there appear to be no time limits imposed on the use of *Grutter*-like policies. This presumably would be the case with regard to UT's policy were it to be upheld upon further review. Under that circumstance, the Supreme Court in both *Grutter* and *Fisher* will have articulated at least one "strict scrutiny" requirement for race-

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Why not five, or fifty, or 100 years? Interestingly, both Justices Scalia and Thomas "concurred" with the twenty-five year time limit on the use of the "diversity" rationale. *See, e.g., id.* at 351 (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. . . . I respectfully dissent from the remainder of the Court's opinion . . . because *I believe the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months*." (emphasis added)).

95. *See Grutter I*, 137 F. Supp. 2d. at 851 ("The defendants have indicated that they will continue to use race as a factor in admissions for as long as necessary to admit a critical mass of underrepresented minority students, and no one can predict how long that might be.").

96. Even Petitioner's counsel in *Fisher* seemed to concede, bizarrely, that the sunset provision in *Grutter* did not mean the end of race-conscious admissions plans in 2028 (or twenty-five years after *Grutter* was decided). *See* Transcript, *supra* note 7, at 11-12. It was a response that certainly took Justice Scalia by surprise. *Id.*

97. *See Fisher IV*, 133 S. Ct. 2411, 2421 (2013).

98. *Fisher II*, 631 F.3d 213, 226 (5th Cir. 2011), *vacated,* 133 S. Ct. 2411 (2013); *see also Grutter*, 539 U.S. at 343 (highlighting the University of Michigan's assertion that it would stop the practice "as soon as practicable."). For its part, UT suggested during oral argument that while it accepted *Grutter* as the appropriate "preceden[t]," it, too, rejected *Grutter*'s twenty-five year limitation on using race to achieve diversity. Transcript, *supra* note 7, at 50.

99. *See Grutter*, 539 U.S. at 343.

conscious admissions programs – that such policies be "limited in time" – which the Court apparently has no intention of enforcing.[100]

D. Serious Good Faith Consideration of Workable Race-Neutral Alternatives

While this last factor is perhaps the most important of all, its difficulty rests on the fact that in *Grutter* – where the race-conscious policy was upheld – there was no meaningful evidence that the University of Michigan Law School had given any consideration, much less good faith consideration, to the use of *any* race-neutral alternatives.[101] Apart from blaming failed "pre- and post-admission recruiting" efforts,[102] the law school witnesses simply professed fear that without explicitly considering race in admissions, minority enrollment would drop to "token levels."[103]

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100. This would be particularly disappointing given Justice Kennedy's remarks in both *Fisher IV*, 133 S. Ct. at 241 (mandating that race-conscious policies must be "limited in time"), and in *Grutter*, where he wrote:

> "It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither [Barbara Grutter] nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century."

Grutter, 539 U.S. at 394 (Kennedy, J., dissenting) (citations omitted).

101. *See Grutter*, 539 U.S. at 339-40; *cf. Fisher IV*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (contemplating whether the "Texas Top Ten Percent Law" – which was not being challenged in *Fisher* – was "race-neutral"). Justice Ginsburg notes, fairly, that "[i]t is race consciousness, not blindness to race, that drives such plans." *Id.* However, conceding *arguendo* that the "Top 10%" plan produces racial diversity because it is "race conscious," i.e., dependent for its success upon the continued clustering of minority students in a large number of high schools throughout the State, the plan nevertheless remains "race-blind" in its implementation because it rewards academic achievement by Texas high school students *irrespective of their race or ethnicity*. Such a plan, therefore, would seem to fall more clearly within the "narrow-tailoring" demanded of any program that employs, as Justice Ginsburg asserts, considerations of race. Certainly the plan has proven largely acceptable to the public because of the race-neutral manner in which it has been implemented.

102. Grutter v. Bollinger (*Grutter II*), 288 F.3d 732, 750 (6th Cir. 2002), *aff'd*, 539 U.S. 305 (2003) (citing to no evidence from the district court's opinion). In fact, it is difficult to understand how a university's hypothetical failure to successfully recruit and enroll minority applicants (assuming that was even the case at the Law School) could justify the adoption of racially discriminatory admissions policies as the solution.

103. *Id.* at 737-38 (internal quotation marks omitted) (citing testimony of the Law School dean); *see also Grutter*, 539 U.S. at 32 (highlighting testimony of the Law School's statistical expert who, without commenting on any race-neutral alternative, merely opined that a "race-blind" admissions system would have a "very

In *Fisher*, of course, there is the overlay provided by the ostensibly race-neutral "Top Ten Percent" law[104] which provides in excess of eighty percent of the university's admissions each year. This law, passed by the Texas legislature in response to the Fifth Circuit's 1996 decision in *Hopwood v. Texas*[105] banning UT's previous attempts to explicitly use race in admissions, resulted in increasing racial diversity at UT beyond the levels reached under the previous, pre-*Hopwood* race-conscious system.[106] The efficacy of the Top Ten Percent law in terms of enrolling meaningful numbers of underrepresented minority students at UT raises the question, left largely unaddressed by the Court in *Fisher*, as to whether this "race-neutral" law provides sufficient racial diversity – a "critical mass" – without the need to resort to the race-conscious measures contained within the *Grutter*-like program at issue. Presumably, this will be one of the principal evidentiary hurdles UT must overcome on remand if it hopes to preserve its program.

VI. WHITHER *BROWN*?

Brown v. Board of Education[107] is one of the most important – if not *the* most important – of all Supreme Court cases ever decided. In *Brown*, a unanimous Court, comprised at the time of nine white male Justices, famously wrote: "The opinions of [May 17, 1954], declar[ed] *the fundamental principle that racial discrimination in public education is unconstitutional* . . . . All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."[108] Although *Brown* did not involve college or university admissions, the principle it announced is undiluted by the context in which it was decided. As Justice Clarence Thomas wrote in *Fisher*:

> My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." . . . All applicants must be treated equally under the law, and no benefit in the eye of the

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dramatic" negative effect on minority admissions) (citations omitted) (internal quotation marks omitted).

104. *See Fisher IV*, 133 S. Ct. at 2416. *But see supra* note 101 (analyzing Justice Ginsburg's views).

105. 78 F.3d 932 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

106. *See Fisher IV*, 133 S. Ct. at 2416.

107. 347 U.S. 483 (1954).

108. *Brown II*, 349 U.S. 294, 298 (1955) (emphasis added). What seems to be indisputable is that the two principal cases leading up to *Fisher* – *Bakke* and *Grutter* – share a common defect. The opinions for the Court in each case contain language that deviates from *Brown*'s fundamental principle.

> beholder [e.g., achieving the purported educational benefits from enrolling a diverse class] can justify racial discrimination.[109]

Notably, there were no special circumstances or qualifications cited in *Brown* to suggest any constitutional means of circumventing the *fundamental principle* it announced.[110] Nor should there have been, particularly in light of the fact that the nation labored for nearly sixty years before *Brown* under the racist and notoriously mislabeled "separate but equal" doctrine established in *Plessy v. Ferguson*.[111] Thus, one of the more disappointing aspects of both *Grutter* and *Fisher* is that neither Court looked to *Brown*'s unqualified principle for the answer to the question being presented in each case.

Brown was not only important for what it held, it was also important for the arguments that were made and largely adopted by the Court almost sixty years ago. For example, Thurgood Marshall and his colleagues, serving as counsel for the plaintiffs in *Brown*, argued that "[t]he State of Kansas ha[d] no power [under the Fourteenth Amendment] to use race as a factor in affording educational opportunities to its citizens."[112] In a statement undiluted by considerations of "diversity," Marshall and his colleagues argued, "[t]hat the Constitution is color blind is our dedicated belief."[113]

Counsel in *Brown* commenced their arguments with this observation: "It is [our] thesis [that] . . . the Fourteenth Amendment prevents states from ac-

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109. *Fisher IV*, 133 S. Ct. at 2428 (Thomas, J., concurring) (citations omitted).

110. *But see* Gratz v. Bollinger, 539 U.S. 244, 302 (Ginsburg, J., dissenting) ("*Brown* may be seen as disallowing racial classifications that 'impl[y] an invidious assessment' while allowing such classifications when 'not invidious in implication' but advanced to 'correct inequalities.'" (citation omitted)). Ginsburg's interpretation is, of course, inconsistent with the clear language in *Brown*. In addition, she ignores the fact that she essentially is describing a *remedial* use of race, i.e., to "correct inequalities" presumably due to a history of "societal discrimination," a rationale that the Court has rejected. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of *identified discrimination*. . . . That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." (emphasis added) (citations omitted)). Of course, *remediation* was never argued in either *Grutter* or *Gratz* – nor for that matter in *Fisher* – where the Universities' sole justification for using race was *non-remedial* in nature (i.e., to obtain the educational benefits of "diversity"). *See, e.g.*, *Grutter*, 539 U.S. at 333; *Gratz*, 539 U.S. at 245.

111. 163 U.S. 537, 550-51 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

112. Brief for Appellants at 5, *Brown*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1952 WL 82041.

113. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, *Brown*, 347 U.S. 483 (1954) [hereinafter Brief for Appellants in Nos. 1, 2, and 4], (Nos. 1, 2, 4, 10), 1953 WL 48699.

cording differential treatment to American children on the basis of their color or race."[114] Marshall and his colleagues then framed the following question:

> [W]hether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.[115]

This is the same question that should have been asked in *Grutter* and *Fisher*.

There also can be no misunderstanding of where Marshall and his colleagues stood on the question of whether the Constitution is color-blind: "The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated on race or color."[116] They repeated this thesis when they wrote that "[t]he broad general purpose of the [Fourteenth] Amendment – obliteration of race and color distinctions – is clearly established by the evidence."[117] Then, referring to an earlier decision in the 1948 case *Shelley v. Kraemer*,[118] they added that "[t]he sole basis for the decision [in *Shelley*] . . . was that the Fourteenth Amendment compels the states to be color blind in exercising their power and authority."[119]

The breadth of Marshall and his colleagues' historical research was impressive. It was filled with numerous examples demonstrating that there never can be a proper rationale for allowing race to intrude on decisions affecting the educational opportunities afforded to our citizens.[120] It was this very principle – that race should never matter when deciding who shall be permitted to attend our nation's public schools – that drove Marshall to ask for a decree in *Brown* commanding the defendants "to discontinue use of race or color as a criterion for the admission of students."[121] Ironically, Marshall's successful plea in *Brown* was word-for-word the same decree that Barbara Grutter and Abigail Fisher sought in their respective challenges to the mod-

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114. *Id.* at 15.

115. *Id.* at 16.

116. *Id.* at 18.

117. *Id.*

118. 334 U.S. 1 (1948).

119. Brief for Appellants in Nos. 1, 2 and 4, *supra* note 113, at 22.

120. *See* Purdy, *Prelude*, *supra* note 68, at 343-44 and accompanying notes (providing examples of Marshall's and his colleagues' research).

121. Memorandum Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 5 on Further Reargument with Respect to the Effect of the Court's Decree at 11, *Brown II*, 349 U.S. 294 (1955) (Nos. 1, 2, 4, and 10), 1954 WL 45731.

ern-day race-conscious admissions policies employed by the University of Michigan (until 2006)[122] and the University of Texas, respectively.[123]

These color-blind principles are not unimportant; indeed, they are at the very heart of what *Brown* sought to accomplish. They are integral, not only in terms of developing our laws but also in advancing the evolution of our society from one where race and color most certainly *did* matter – even legally – to one where the law would no longer brook any consideration of race when it comes to the treatment of our citizens.

When it comes to condoning racial discrimination in the public sphere (as *Grutter* most definitely does), it is puzzling – if not tragic – that, with the notable exception of Justice Thomas,[124] the Court in *Fisher* entirely ignored the principle unanimously established in *Brown*. With all due respect to *Bakke*, *Grutter*, and *Gratz v. Bollinger*, *Brown* alone articulated an unambiguous principle that clearly provides the answer to the issue presented in each and every one of these cases: "[R]acial discrimination in public education is unconstitutional."[125]

VII. THE ROAD FROM *BROWN*, THROUGH *BAKKE*, TO *GRUTTER* AND *FISHER*

Almost unnoticed, the landmark ruling in *Brown* began to lose its power in the aftermath of Justice Powell's musings regarding "diversity" in *Bakke*. Indeed, it is surprising that Justice Powell ever conceived of "diversity" as a rationale for using race as a factor in school admissions given his eloquent and extensive references throughout his opinion in *Bakke* to principles akin to the one expressed in *Brown*.[126] In fact, one can read Justice Powell's opinion

122. *See* Grutter v. Bollinger, 539 U.S. 306, 316-17 (2003). In November 2006, the citizens in Michigan adopted an amendment to the Michigan constitution that expressly prohibits the use of racial preferences in the context of public education. *See* MICH. CONST., art. I, § 26. The Supreme Court of the United States held that this provision, which is entirely consisted with the language in *Brown*, does not violate the U.S. Constitution's Equal Protection Clause. *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

123. *See Fisher IV*, 133 S. Ct. 2411, 2417 (2013).

124. *See id.* at 2428-30 (Thomas, J., concurring) (discussing, at length, the series of cases that made up *Brown*).

125. *Brown II*, 349 U.S. at 298.

126. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284-310 (1978) (plurality opinion). For example, the Court states that:

> The guarantees of the Fourteenth Amendment extend to all persons. . . . It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.*

in *Bakke* and find no hint, until the very end, that he would have condoned *any* use of skin color as a reason to prefer, much less to penalize, any individual university applicant.[127] One must turn the law and the language from the Fourteenth Amendment, *Brown*, Title VI of the Civil Rights Act of 1964,[128] and most of Justice Powell's words in *Bakke*[129] on their respective heads to conclude that universities should be free to consider race or ethnicity in the admissions process for any reason, let alone for the non-remedial purpose of creating "diversity."[130]

In the end, Justice Powell cast the deciding vote in *Bakke*, holding that the University of California-Davis School of Medicine violated Allan Bakke's civil rights by impermissibly discriminating against him solely on the basis of his skin color.[131] However, as a consequence of Justice Powell's reference to "diversity," the door leading to the reinstitution of racially discriminatory practices in public education – once believed to be forever shut by the decision in *Brown* – was cracked open. Twenty-five years after *Bakke*, the door was blown off its hinges by Justice O'Connor's opinion in *Grutter*. Whether the door can, or should, be re-hung remains an important question that should have been addressed in both *Grutter* and *Fisher*.

Another indication that *Brown*'s influence may be fading can be gleaned from the Court's opinion in *Fisher* where, apart from Justice Thomas' eloquent concurring opinion, not a single reference to *Brown* appears. *Grutter*, too, paid scant attention to *Brown*.[132] These sleights beg this question: Is *Brown* destined to lose its "landmark ruling" status and simply fade away unnoticed, becoming little more than a brief historical footnote? Whatever the eventual answer to that question may be, it is bewildering that *Brown*'s bedrock principle was ignored by the Court in both *Grutter* and *Fisher*.

Id. at 289-90 (emphasis added) (citations omitted).

127. *See id.* at 269-320.

128. 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

129. *See supra* note 126 and accompanying text.

130. The malleable nature of the word "diversity" is demonstrated by the fact that on April 6, 1864, United States Senator Willard Saulsbury of Delaware invoked "diversity" as one reason why slavery should *not* be abolished by an Amendment to the Constitution. *See* Supplemental Brief for the United States on Reargument at 254-57, Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) (Nos. 1, 2, 4, and 10), 1953 U.S. S. Ct. Briefs LEXIS 4.

131. *See Bakke*, 438 U.S. at 319-20.

132. *See* Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (referring to *Brown* only once and in a largely irrelevant context: "This Court has long recognized that 'education . . . is the very foundation of good citizenship.'") (citing *Brown*, 347 U.S. at 493).

VIII. CONCLUSION

Justice John Marshall Harlan, writing in lonely dissent in *Plessy* over a century ago, said this: "Our [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens."[133] Justice Harlan continued:

> In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[134]

Justice Harlan's 100-plus-year-old words bear endless repeating.[135] These noble sentiments were finally adopted in 1954 in *Brown*, and were enshrined a decade later as part of our nation's legislative landscape through the passage of Title VI of the Civil Rights Act of 1964. However, these words were inexplicably shredded the moment the Court released its opinion in *Grutter*. Now, rather than taking "no account of . . . [a man's] color," as Justice Harlan implored us to do, our flagship public universities may – under Justice O'Connor's gauzy "diversity" rationale in *Grutter* – take exquisite account of an applicant's color and consider it a "plus" when deciding who will be admitted or a "penalty" when deciding who will be rejected.

Over ten years before writing her fateful opinion in *Grutter*, Justice O'Connor – along with Justice Kennedy and Justice David Souter – wrote that *Plessy* "was wrong the day it was decided."[136] Though it did not happen in *Fisher*, a future Court may someday say the same thing about *Grutter*. And when that day comes, our nation will be firmly back on track in our quest to achieve Dr. Martin Luther King, Jr.'s dream of a society where each of us will be judged by the content of our character, and not by the color of our skin.[137]

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133. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

134. *Id.*

135. Portions of the "Conclusion" are adapted from a speech given by the author to a joint session of the Virginia/West Virginia Bar Associations on July 11, 2003, shortly after *Grutter* was decided.

136. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992).

137. THE WORDS OF MARTIN LUTHER KING, JR. 83 (Coretta Scott King, ed., 1983) ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.").