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Diversity Within Racial Groups and the Constitutionality of Race Conscious Admissions

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Abstract

This Article offers a novel doctrinal resolution of the key issues in *Fisher v. Texas*, the impending Supreme Court case which involves race conscious admissions policies at the University of Texas at Austin (UT). The resolution proposed here addresses Justice Anthony Kennedy's concerns about race conscious policies, but also preserves most of the Court's 2003 *Grutter v. Bollinger* ruling, in spite of the fact that Justice Kennedy dissented in *Grutter*. Substantively, the Article clarifies the key issues in *Fisher* (the meaning of "critical mass" and the scope of deference that courts give to universities) by focusing on a simple idea that permeates *Grutter* and *Fisher* but has not been analyzed in the scholarly literature to date: the significance of diversity within racial groups. It argues that under *Grutter*, a race conscious policy can aim not only to increase minority representation overall, but also to increase diversity within racial groups. Moreover, the Article contends that diversity within racial groups is key to understanding the constitutionality of race conscious admissions policies for several reasons: 1. Within-group diversity elucidates clearly how a "critical mass" of minority students is different from numerical goals and quotas; 2. Within-group diversity directly reflects the compelling interest in educational diversity at the classroom level that was articulated in *Grutter*—the breakdown of racial stereotypes and the facilitation of cross-racial understanding through admission of a "critical mass"; 3. A holistic admissions policy that emphasizes within-group diversity reduces the stigmatic harm of race conscious measures; and 4. Attaining diversity within racial groups necessitates a degree of deference to universities in their admissions policies. Nevertheless, after reviewing the basic substantive issues in *Fisher*, the Article also illustrates how the Fifth Circuit could have been less deferential to UT in its *Fisher* ruling. It distinguishes between three different categories of deference to universities—implementation of

race conscious policies, educational objectives related to racial diversity, and need for race conscious policies—and analyzes the appropriate standard of review for each. The third category, need for race conscious policies, is the issue at play in *Fisher*, and the Article contends that Justice Kennedy's view on this issue will be outcome determinative in *Fisher*. The Article then proposes a different analysis to decide *Fisher*—the "unique contribution to diversity" test—which focuses on within-group diversity and applies strict scrutiny rather than the "good faith" standard adopted by the Fifth Circuit. These distinctions are directly reflective of the concerns raised in Justice Kennedy's *Grutter* dissent. Finally, the Article highlights a key values conflict that Justice Kennedy will face when deciding *Fisher*: the tension the case presents between diversity in higher education and racial segregation in K-12 schooling.

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Introduction

In the fall of 2012, when it hears the case of *Fisher v. Texas*,[1] the U.S. Supreme Court will revisit one of the most contentious issues it has decided in recent decades: the constitutionality of race conscious admissions policies in higher education. In 2003, a fractured Court upheld such policies in *Grutter v. Bollinger*,[2] with a 5-4 majority opinion authored by Justice Sandra Day O'Connor. While *Grutter* was clear in its approval of race conscious policies and educational diversity as a compelling interest, it left open some contentious questions: the meaning of a "critical mass" of minority students and the scope of deference given to universities regarding the use of race conscious policies. These will be the key issues when the Court decides *Fisher* and determines the constitutionality of the University of Texas at Austin's (UT) undergraduate admissions policy.

Justice Anthony Kennedy's swing vote will now likely be outcome determinative in *Fisher*.[3] Justice Kennedy dissented from the holding in *Grutter*,[4] but he did not completely

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[1] Fisher v. Texas, 631 F.3d 213 (2011)(en banc denied), *cert. granted* (February 21, 2012)(No. 11-345), http://www.supremecourt.gov/qp/11-00345qp.pdf

[2] 539 U.S. 306 (2003).

[3] Justice Elena Kagan has recused herself from *Fisher* because of her role in the case, as Solicitor General, when it was still in the U.S. District Court for the Western District of Texas. Based on their prior jurisprudence, Justices Samuel Alito, Antonin Scalia, and Clarence Thomas, along with Chief Justice Roberts, will likely vote to overturn *Fisher* and even *Grutter*. *See generally* Grutter at 346-87 (Scalia, J. dissenting; Thomas, J., dissenting)(expressing disdain for the *Grutter* majority's approval of race conscious admissions policies); Parents Involved *in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (Chief Justice Robert's majority opinion, joined by Justice Alito, striking down race conscious admissions policy.). Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor will likely vote to uphold the Fifth Circuit's *Fisher* ruling. *See generally* Grutter at 311-45 (majority opinion upholding race conscious admissions policy joined by Justices Breyer and Ginsburg); Charlie Savage, *Videos Shed New Light on Sotomayor's Positions*, N.Y. TIMES, June 10, 2009, at A17, http://www.nytimes.com/2009/06/11/us/politics/11judge.html (noting that Justice Sotomayor "once described herself as 'a product of affirmative action' and "thought it was 'critical that we promote diversity …'."). If Justice Kennedy votes with Justices Breyer, Ginsburg, and Sotomayor, the Court would vote to a 4-4 tie and automatically affirm the Fifth Circuit opinion in *Fisher*. Thus, Justice Kennedy's resolution of the case will be key. *See also* Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV COLLOQUY 74, 77 (2012)(noting that when the Supreme Court decides *Fisher v. Texas*, "Justice Kennedy's vote would carry the day regardless of whether Kagan participates in the case.").

[4] Grutter at 387 (Kennedy, J., dissenting). The question presented to the Supreme Court in *Fisher* is narrowly framed to include *Grutter* as precedent: "Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at

rebuff the use of race as an admissions factor;[5] moreover, his race and equal protection jurisprudence has been evolving over time.[6] So the overarching question in *Fisher* is how much, if at all, will Justice Kennedy curb the use of race conscious policies?[7] And the answer to this question depends on Justice Kennedy's view of the two key issues in Fisher: "critical mass" and deference.

Austin's use of race in undergraduate admissions decisions."). *See* http://www.supremecourt.gov/qp/11-00345qp.pdf. Thus, Justice Kennedy and the Court might not reconsider *Grutter* itself, but just aim to clarify it.

[5] Grutter at 392-93 (Kennedy, J., dissenting)("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity …"). Moreover, although Justice Kennedy dissented in *Grutter*, he did agree with the *Grutter* majority's affirmance of Justice Lewis Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). *See Grutter* at 387 (Kennedy, J., dissenting)("The opinion by Justice Powell, in my view, states the correct rule for deciding the case … Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its on educational massion."). In *Bakke*, four Justices voted to strike down the University of California at Davis Medical School special admissions program, which set aside 16 of 100 spots in each admitted class for members of minority groups, and four Justice voted to uphold the admissions policy. Justice Powell voted to strike down the UC-Davis program, but wrote that race could be used as a "plus factor" for achieving the compelling state interest of diversity in education. Powell's concurring opinion was cited as support for this proposition in *Grutter*. Grutter at 307 ("[T]he Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions.").

[6] *See* Heather Gerkin, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 130 (2007)(noting that "Justice Kennedy's opinions in LULAC and Parents Involved invite us to abandon our monolithic stories about race and think about equal protection in domain-centered terms."). Professor Gerkin also observes that in *Parents Involved*, "Justice Kennedy makes a remarkably similar argument [to Justice O'Connor's argument in *Grutter*] … even observing that public schools could use a Grutter-like admissions policy as a last resort."). *Id.* at 117. *See also* Parents Involved at 797-98 (Kennedy, J., concurring in part and concurring in the judgment)(" [A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

[7] Other commentators also note that Justice Kennedy will probably not completely preclude the use of race in admissions. *See, e.g.*,Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 117 (2012)(noting that in *Fisher*, "the decisive vote of Justice Anthony Kennedy … likely will preclude repudiation of *Grutter*'s central holding."); Lyle Denniston, *Constitution Check: Is Affirmative Action in College Admissions Doomed?*(Feburary 23, 2012), http://www.huffingtonpost.com/lyle-denniston/affirmative-action_b_1294671.html, ("Looking back to what Kennedy wrote in dissent in 2003, he recalled with approval Justice Powell's view that a university admissions program 'may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual,' … Justice Kennedy has been somewhat more flexible on race issues than some of his conservative colleagues, and he may not yet be ready to cast aside altogether the use of race as 'one, nonpredominant factor …'). Some commentators have also contended that Justice Kennedy will very likely narrow the scope of race conscious admissions in *Fisher*. *See* Rostron, *supra* note 3, at 78 (contending that in *Fisher*, "the most likely outcome is that Kennedy will … refus[e] to put a complete stop to affirmative action, but insist[] … that rigorous strict scrutiny really and truly will apply."); Vikram D. Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes* (April 2012). VAND. L. REV. EN BANC, 2012 Forthcoming; UC Davis Legal Studies Research Paper No. 298. Available at SSRN: http://ssrn.com/abstract=2064995 (contending that "the most likely *Fisher* result is … one in which the window for race-based affirmative action in higher education will be narrowed, but left ever-so-slightly open.")(footnote omitted).

This Article offers a novel doctrinal resolution of the key issues in *Fisher*—a resolution which preserves most of the *Grutter* holding but also addresses the concerns in Justice Kennedy's *Grutter* dissent. The Article clarifies the meaning of "critical mass" and the scope of deference given to universities by focusing on a simple idea that permeates *Grutter* and *Fisher* but which has not been explicated to date: the significance of diversity within racial groups.[8] It argues that a race conscious policy can aim not only to increase minority representation overall, but also to increase diversity within racial groups—a point which has not been analyzed in scholarly discourse on *Grutter* or *Fisher*. Moreover, the Article contends that diversity within racial groups is key to understanding the constitutionality of race conscious admissions policies for several reasons: 1. Within-group diversity elucidates how "critical mass" of minority students is different from numerical goals and quotas; 2. Within-group diversity directly reflects the compelling interest in educational diversity at the classroom level that was articulated in *Grutter*—the breakdown of racial stereotypes and the facilitation of cross-racial understanding

[8] This Article will use the phrases "diversity within racial groups" and "within-group diversity" interchangeably. Both refer to the variety of viewpoints and experiences that exist among members of the same racial group. It should be noted that while the implications of within-group diversity for the constitutionality of race conscious admissions have not considered, there has been scholarly attention to within-group diversity in admissions from a social justice perspective. For example, Professors Kevin Brown and Jeanine Bell advocate for universities to distinguish between different Black groups, such as Black immigrants (from Africa and the Caribbean), multiracial persons, Black Latinos, and African Americans, when implementing their race conscious admissions policies. *See* Kevin Brown & Jeanine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008)(questioning admissions policies "that lump[ ] all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs."). Professors Brown and Bell further note that given "the growing percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters" at selective institutions, "blacks whose predominate racial and ethnic heritage is traceable to the historical oppression of blacks in the U.S. are far more underrepresented than administrators, admissions committees, and faculties realize."). *Id. See also* Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 How. L.J. 255, 302 (2011)(arguing that "admissions committees of selective higher education institutions should not provide treatment that is more favorable to Black immigrant applicants … ."). Professors Henry Louis Gates and Lani Guinier have raised similar concerns. *See* Cara Anna, *Immigrants among blacks at colleges raises diversity questions*, BOSTON GLOBE, April 30, 2007, http://www.boston.com/news/education/higher/articles/2007/04/30/immigrants_among_blacks_at_colleges_raises_diversity_questions/?page=2 ("The issue of native vs. immigrant blacks took hold at Harvard in 2004, when professors Henry Louis Gates and Lani Guinier pointed out at a black alumni reunion that a majority of attendees were of African or Caribbean origin.").

through admission of a "critical mass"; 3. A holistic admissions policy that emphasizes within-group diversity reduces the stigmatic harm of race conscious measures; and 4. Attaining diversity within racial groups necessitates a degree of deference to universities in their admissions policies. Nevertheless, after reviewing the basic substantive issues in *Fisher*,[9] the Article also illustrates how the Fifth Circuit could have been less deferential to UT in its *Fisher* ruling, and it proposes a different method for resolving the case.

Part I provides the background on *Grutter*'s holding that enrollment of a "critical mass" of minority students is a compelling state interest. This Part illustrates that the chief educational benefits of diversity espoused in *Grutter* are the breakdown of racial stereotypes and the facilitation of cross-racial understanding—by showing White students that minority students from each group have a "variety of viewpoints."[10] Consequently, a "critical mass" of minority students refers not only to numerical representation of racial groups, but also to the diversity of viewpoints and experiences within each group, which contribute to the educational benefits of diversity articulated in *Grutter*. This view of "critical mass" is different from other notions of the concept that focus narrowly on numbers or define it by feelings of isolation encountered by minority students. Thus, this Part shows how "critical mass" is distinct from numerical goals and quotas, which was a one of Justice Kennedy's key concerns in his *Grutter* dissent. Ultimately, this Part argues that "critical mass" is not a measurable entity—it is a concept which

[9] This Article analyzes the merits issues in Fisher; it does not address procedural challenges, including standing and mootness, that UT raised in its response to the Plaintiff's cert petition. *See* Brief in Opposition to Petition for Writ of Certiorari, *Fisher*, (No. 11-345). Available at http://www.utexas.edu/vp/irla/Fisher.BIO.Final.12.7.2011.pdf. For a discussion of these issues, see Amar, *supra* note 7, at 12-18; Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge* (August 2, 2012). 122 Yale Law Journal 2012 Forthcoming; Available at SSRN: http://ssrn.com/abstract=2122956 (arguing that there are significant procedural defects in *Fisher v. Texas*).

[10] Grutter at 319-20 ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students.").

articulates a university's compelling interest in diversity, not part of the narrow tailoring test for race conscious admissions policies.

Part II expands upon this discussion by showing how within-group diversity and "critical mass" are related to *Grutter*'s narrow tailoring principles—thus illustrating the internal logic and coherence of a much maligned *Grutter* majority opinion.[11] It argues that *Grutter*'s narrow tailoring principles aim to minimize the stigmatic harm[12] of race conscious policies, by ensuring that members of the same racial group are given individualized consideration and not treated in exactly the same manner—the "least stigmatic means" theory of narrow tailoring. [13] This Part also argues that in addition to its educational benefits, within-group diversity helps to minimize stigmatic harm. As such, within-group diversity links "critical mass" and narrow tailoring and highlights the internal logic and coherence of the *Grutter* majority opinion. Furthermore, a race conscious policy can aim not only to increase representation of different racial groups, but also to generate diversity within racial groups. Finally, the analysis in this Part illustrates how within-group diversity and narrow tailoring are related to courts' deference to universities decisions in determining their admissions policies.

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[11] *See, e.g.*, James F. Blumstein, Grutter *and* Fisher*: A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57, 64 (2012)(discussing "problems with and perverse implications of the student body diversity rationale *Grutter* adopts for justifying the use of racial preferences in the context of higher education students admissions."); Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 431 (2005) (claiming that "the *Grutter* Court relied on this rather convoluted reasoning" in its articulation of diversity as a compelling interest.); Fisher at 247 (Garza, J., specially concurring)("*Grutter* represents a digression in the course of constitutional law … .")oral Even proponents of affirmative action have been critical of *Grutter*'s emphasis on diversity instead of racial justice. *See, e.g.*, Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003)("[T]he 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.").

[12] Stigmatic harm is the constitutional harm that occurs when a government policy treats individuals in the same manner solely because of their race. For a more detailed discussion of stigmatic harm, see *infra* Part II.A.

[13] This Article argues that reducing the stigmatic harm of race conscious admissions policies is a key facet of *Grutter*, particularly for the narrow tailoring requirements and the "critical mass" concept. *See* Part II.B. It does not, however, take a normative stance on whether reducing such stigmatic harm should be a major concern.

Part III focuses the application of "critical mass" and deference in *Fisher*. It first gives the background to *Fisher*, including the Fifth Circuit's 1996 decision in *Hopwood v. Texas*,[14] the enactment of the "race neutral"[15] Top Ten Percent Law, and the reinstatement of race conscious admissions after *Grutter*. Next, this Part considers the parties' arguments regarding "critical mass" and deference, the Fifth Circuit's ruling on these issues, and Chief Judge Jones's critique of this ruling in her dissent to the denial of an en banc hearing in *Fisher*. It then critiques the application of "critical mass" in *Fisher*, concluding that "critical mass" and numerical goals were indistinguishable in the Fifth Circuit's analysis of the case. Moreover, this Part also illustrates how the *Fisher* panel's deference to UT did not leave sufficient room for judicial review. In the process, this Part underscores how "critical mass" and deference will be key points for Justice Kennedy when deciding *Fisher*.

Part IV addresses standard of review and deference in detail. It lays out three categories of review with respect to deference to universities: 1. Review of the actual implementation of race conscious policies as implemented, which requires strict scrutiny; 2. Review of whether the university's educational objective encompasses racial diversity (essentially, whether the university has a compelling interest in diversity), which requires only "good faith" on the part of the university; and 3. Review of whether race conscious admissions policies are needed to attain this educational objective, which is the core issue in *Fisher* and the source of controversy.

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[14] 78 F.3d 932 (5th Cir. 1996).

[15] This Article presumes, as the *Fisher* litigation did, that the Top Ten Percent Law is "race neutral"—meaning that there is no direct and explicit consideration of race in the decision-making process. *But see* Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003)(Ginsburg, J., dissenting)("Calling … 10% or 20% plans 'race-neutral' seems to me disingenuous, for they 'unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.'"). *See also* Fisher at 242n.156 ("A court considering the constitutionality of the [Top Ten Percent Law] would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *cf.* Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), *available at* 2003 WL 402129, at *2, *9–*10 (noting that 'it is not clear that [percentage] plans are actually race-neutral' and that some *amici* counsel in *Grutter* 'have signaled interest in moving on after this case to challenge these aspects of the Texas program').").

Focusing on the third category, this Part distinguishes between *ex ante* deference (before a university applies a race neutral policy to increase diversity) and *ex post* deference (after a university applies a race neutral policy to increase diversity, as is the case in *Fisher* after the Top Ten Percent Law was implemented). This Part then contends that after a race neutral admissions policy has been implemented, it is easier for courts to review the effectiveness of that policy and thus to apply a higher standard of review such as strict scrutiny.

Part V proposes an alternative method to decide *Fisher*, the "unique contribution to diversity" test, which applies strict scrutiny. The test proposed here does not treat "critical mass" in terms of numbers; in fact, it focuses on the race conscious admissions policy itself rather than on "critical mass." The "unique contribution to diversity" test assesses whether a race conscious policy contributes to diversity in a manner above and beyond any race neutral measures that are in place, such as the Top Ten Percent Law in *Fisher*. The argument here is that UT should have to demonstrate explicitly that its race conscious policy is used to increase the variety of viewpoints and experiences among minority students—by admitting minority students in different majors, or from different cultural or socioeconomic backgrounds who are not admitted in sufficient numbers via the Top Ten Percent Law. Such a goals-means fit is characteristic of strict scrutiny. This Part then highlights the advantages of the "unique contribution to diversity" test and shows how the test addresses Justice Kennedy's dissent in *Grutter*. Moreover, the test proposed here also resolves a values conflict that Justice Kennedy faces in *Fisher*: the prospect that a race neutral admissions policy (the Top Ten Percent Law) which generates diversity only because of rampant racial segregation in public schools, could preclude UT from using race conscious admissions measures. This conflict is key for Justice Kennedy, who stated that

"avoiding racial isolation" is a compelling state interest in his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.[16]

I. "Critical Mass" as a Compelling Interest: The Role of Diversity Within Racial Groups

In 2003, Justice Sandra Day O'Connor authored the 5-4 majority opinion in *Grutter*, in which the Court upheld the University of Michigan Law School's holistic admissions policy.[17] *Grutter* adopted Justice Lewis Powell's concurrence in *Regents of the University of California v. Bakke*,[18] which had introduced the idea of diversity in education as a compelling interest.[19] The

[16] 551 U.S. 701, 797 (2007)(Kennedy, J., concurring in part and concurring in the judgment)(stating that "[a] compelling interest exists in avoiding racial isolation …"). In Parents Involved, Justice Kennedy also critiqued Chief Justice Roberts's plurality opinion for its "all-too-unyielding insistence that race cannot be a factor in instances when, in [Justice Kennedy's] view, it may be taken into account." *Id.* at 787. Justice Kennedy further asserted that "[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken." *Id.* at 788. For an excellent scholarly analysis and critique of Chief Justice Roberts's plurality opinion in *Parents Involved*, see Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 206 (2008)(noting that "[o]nce one seriously looks to the history of colorblind constitutionalism in the struggle that led to *Brown* … the shortcomings of the Chief Justice's account [in *Parents Involved*] become readily apparent.").

[17] This Article defines a holistic admissions policy as one where various factors, from academic achievement to extracurricular activities to race, are subjectively considered together and weighed by admissions reviewers to make admissions decisions. This can be contrasted with an admissions system which gives fixed weights to those various factors and applies objective, mechanical formulas to determine who should be admitted.

[18] 438 U.S. 265 (1978). In *Bakke*, four Justices voted to strike down the University of California at Davis Medical School special admissions program, which set aside 16 of 100 spots in each admitted c lass for members of minority groups, and four Justice voted to uphold the admissions policy. Justice Lewis Powell voted to strike down the UC-Davis program, but wrote that race could be used as a "plus factor" for the compelling state interest of achieving diversity in education. *Id.* at 317-18 (Powell, J.). Subsequent to the Court's ruling in *Bakke*, Powell's concurring opinion was cited as support for the use of race as one of many "plus" factors in an admissions process.

[19] *Id.* at 311-12 (Powell, J., concurring)(finding that "the attainment of a diverse student body … clearly is a constitutionally permissible goal for an institution of higher education."). In his *Grutter* dissent, Justice Kennedy also made it clear that he did not object to the use of race in admissions to obtain the educational benefits of diversity. *See Grutter* at 387-88 (Kennedy, J., dissenting)("The [Bakke concurring] opinion by Justice Powell, in my view, states the correct rule for resolving [*Grutter*]. … Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. … Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task …"); *See also id.* at 392-93 (Kennedy, J., concurring)("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity …").

Court held that a holistic admissions policy could use race as one, flexible factor, for the purpose of admitting a "critical mass" of minority students.[20] But what exactly is a "critical mass"?[21]

This is a key question in understanding the constitutionality of race conscious admissions; yet, the answer remains elusive. At the trial stage of *Fisher v. Texas*, Judge Sam Sparks of the U.S. District Court for the Western District of Texas noted that "this esoteric critical mass of diversity of students"[22] was a concept that "kept eluding him."[23] This Part reviews and critiques some different interpretations of the "critical mass" concept. Then, drawing upon Justice O'Connor's majority opinion in *Grutter*, it argues that a "critical mass" refers to the diversity of viewpoints and experiences within racial groups. Such within-group diversity is related to the specific compelling interest in diversity articulated in *Grutter*: the breakdown of racial stereotypes and promotion of cross-racial understanding.[24]

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[20] Grutter at 308 (holding that "the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. … Thus, the Law School has a compelling interest in attaining a diverse student body.").

[21] *See* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 Cardozo L. Rev. 97 (2007)(discussing uses of "critical mass" concept in law). Professor Addis notes that "[i]n the scientific world, the [term "critical mass"] is used to refer to the precise minimum level of fissionable plutonium or uranium that is required to start and sustain a chain reaction of nuclear fission which will in turn lead to explosion." *Id*. at 98. Professor Addis goes on to observe that:

> While there is a degree of certainty as to what the phrase refers in the scientific realm, there does not seem to be such clarity in relation to the application of the phrase in the social and political world. .. [I]t may even be that its popularity is … partly a function of its vagueness and elasticity that allow people to invoke it in various activities of social and political life. Sometimes the phrase is used to refer to specific and empirically verifiable minimum numbers of people or levels of resources required for a social activity to succeed… [o]ther times, however, the phrase seems to be used not as an analogy but as a metaphor, simply to indicate that people's actions or behavior depend on what others do or on what they expect others to do without an attempt to specify whether there is a minimum number or level of resource to trigger those actions or behavior. *Id*. at 99.

Professor Addis's observations here show the flaws in directly analogizing between the scientific and social realms. This Article contends that the meaning of "critical mass" is context-specific, and that in *Grutter*, "critical mass" was intended merely as a metaphor to capture the notion of diversity within racial groups. *See infra* Part I.C.

[22] Adam Liptak, *College Diversity Nears its Last Stand*, N.Y. TIMES, October 16, 2011, at SR4.

[23] *Id*.

[24] *See* Grutter at 330 ("[T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"). *But see Grutter* at 389, (Kennedy, J., dissenting)("[T]he concept of critical mass is … used … to achieve numerical goals

A. Rejecting "Critical Mass" as a Racial Quota or Numerical Goal

Critics of the *Grutter* ruling have viewed the concept of "critical mass" solely in numerical terms. For example, Professor Lino Graglia argues that "[i]t is difficult to see, in any event, how a 'critical mass,' some minimum number of a racial group, avoids being a quota by not being more specifically defined."[25] In his *Grutter* dissent, Justice Kennedy also stated that "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."[26] Independent of the University of Michigan Law School's practices, however, it is important to delineate the theoretical distinction between "critical mass" and numerical goals.

The *Grutter* majority affirmed *Bakke*'s rejection of racial quotas;[27] thus, it could not have adopted a definition of "critical mass" based solely, or even primarily, on numbers or percentages of minority students. Justice O'Connor's opinion noted that "[e]nrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional."[28] The *Grutter* majority did distinguish between a strict quota and a "permissible goal";[29] however, Justice

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indistinguishable from quotas."). Justice Kennedy's concern here underscores the need to clarify how "critical mass" is different from numerical goals.

[25] Lino A. Graglia, Grutter *and* Gratz: *Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity*", 78 Tul. L. Rev. 2037, 2048 (2004). *See also* Chief Justice Rehnquist's view of "critical mass," *infra* note 55 and accompanying text.

[26] Grutter at 389 (Kennedy, J., dissenting). Justice Kennedy's concern reflected the University of Michigan's use of "critical mass" in practice, not an underlying concern with the theory of "critical mass" as entailing within-group diversity. *See id.* at 389-90 (Kennedy, J., dissenting)(discussing how the University of Michigan School of Law's admissions numbers from 1987-1998 suggested that the school used numerical goals or racial quotas.). Parts IV and V., *infra*, discuss how courts can review race conscious admissions policies more stringently.

[27] Grutter at 334 ("As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.")(internal citation omitted).

[28] *Id*. at 308.

[29] *Id*. at 335 ("In contrast [to a quota], 'a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself[.]'")(internal citation omitted).

Kennedy's dissent did not accept this subtle distinction,[30] and it would likely not survive further review in *Fisher*.[31] Considering these circumstances, one can posit that *Grutter* allows "some attention to numbers,"[32] but there must be more to the definition of "critical mass" to distinguish it from numerical goals.

B. "Critical Mass" as a Counter to Tokenism: A Relevant but Limited View

During the trial phase of *Grutter*, the University of Michigan Law School contended that there is "no number, percentage, or range of numbers or percentages that constitute critical mass,"[33] but it noted that "critical mass" entailed "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race."[34] Professor Bennett Capers contends that:

> [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.[35]

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[30] *Id*. at 391 (Kennedy, J., dissenting)(noting "obvious tension between the pursuit of critical mass and the requirement of individual review" in the University of Michigan Law School's admissions policy, and citing the Law School's consultation of "daily reports which indicated the composition of the incoming class along racial lines.").

[31] It is possible the Court could rule solely on the issue of deference to universities and not address the meaning of "critical mass." Nevertheless, if the Court does consider the "critical mass" issue, Justice Kennedy's *Grutter* dissent underscores his problems with the concept. *See supra* note 26 and accompanying text.

[32] *Id*. at 335-36. "The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.' … [but] … [s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.'"

[33] Grutter at 318.

[34] *Id*. at 319. The Plaintiffs in *Fisher* also defined "critical mass" in similar terms. *See* Br. Pl.s-Appellants 6, http://www.utexas.edu/vp/irla/Documents/Plaintiffs.5th.Circuit.Brief.pdf. (arguing that "critical mass" is defined as "a sufficient number of underrepresented minority students such that such minority students would 'not feel isolated or like spokespersons for their race.'"); *Fisher* at 243 (noting that the Plaintiffs contend that "the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race.").

[35] I. Bennett Capers, *Flags*, 48 How. L.J. 121, 122-23 (2004). Professor Capers presents a more nuanced view, focusing on the climate for minority students rather than on numbers. This Article agrees with Professor Capers's point, but it contends that Grutter defined "critical mass" primarily in terms of the educational benefits of diversity. It is these educational benefits that are the compelling interest in *Grutter*. *See infra* Part II.C.

It is very important for universities to acknowledge and address feelings of isolation and tokenism among minority students. But for several reasons, this is not sufficient to define "critical mass" under *Grutter*. First, "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race"[36] still implies that "critical mass" can be defined by numbers, even if these numbers may vary or constitute a range rather than a set numerical goal. This runs very close to Justice Kennedy's concern that "critical mass is a delusion used by the Law School … to achieve numerical goals indistinguishable from quotas."[37] Second, studies suggest that minority students still do feel isolated and alienated on college campuses,[38] so if this is the primary justification for race conscious admissions policies, then those policies may not be working. This could raise questions about whether universities are actually fulfilling their compelling interest in diversity.[39] Finally, while alleviating feelings of isolation and tokenism is important to attaining the educational benefits of diversity, the

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[36] Grutter at 319.

[37] Grutter at 389 (Kennedy, J., dissenting). *Grutter* did attempt to distinguish "critical mass" from racial quotas. *Id*. at 335 ("In contrast [to a quota], 'a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself[.]'")(internal citation omitted). However, Justice Kennedy did not accept this distinction, and it may well be raised again in *Fisher*. In the *Grutter* oral argument, Justice Scalia asked counsel for the University of Michigan whether two, four, or eight percent constitutes a "critical mass" and followed up by stating "You have to pick some number, don't you?" *Transcript of Arguments in* Grutter v. Bollinger, N.Y. Times, April 1, 2003, at 11, http://www.nytimes.com/2003/04/01/politics/02TEXT1.html?pagewanted=11
Counsel for the University of Michigan responded, "No, Your Honor, if it was a fixed range that said that it will be a minimum of 8 percent, come hell or high water, no matter what the qualifications of these applicants look like, no matter what it is that the majority applicants could contribute to the benefits of diversity, then certainly that would be a quota, but that is not what occurred here. And in fact the testimony was undisputed, that this was not intended to be a fixed goal." *Id*. Nevertheless, this Article argues that numbers alone are not sufficient to understand or apply the "critical mass" concept. From the perspective of this Article, asking what percentage constitutes a "critical mass" is insufficient because it does not take into account the within-group diversity which is necessary to break down racial stereotypes and obtain the educational benefits of diversity.

[38] *See, e.g.*, Tara Yosso, William Smith, Miguel Ceja, & Daniel Solórzano, *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDUC. REV. 659, 659 (2009)(examining "processes by which Latinas/os respond to racial microaggressions and confront hostile campus racial climates."); Deirdre M. Bowen, *Brilliant Disguise:An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1233 (2010)(acknowledging "power of creating critical mass and a diverse classroom" but noting that "stigma and racism … were still present.").

[39] *But see infra* note 58 and accompanying text (noting that the University of Michigan Law School did not actually contend that it had enrolled a "critical mass" of minority students, but only that its admissions policy aimed toward that goal.). It is possible that the Law School never attained an actual "critical mass," where minority students no longer felt isolated. This could well be a good argument to expand race conscious policies to admit more minority students, but Justice Kennedy and the Supreme Court are very unlikely to do so in *Fisher*.

Grutter majority opinion focused more directly on those educational benefits.[40] In order to attain the educational benefits of diversity, universities must aim to create campus environments where minority students feel comfortable speaking and interacting with non-minority students. But from the *Grutter* majority's perspective, this is the means rather than the end, and it is not the defining feature of "critical mass."[41]

C. The *Grutter* Majority's Functional View of "Critical Mass": Educational Benefits of Within-Group Diversity

The *Grutter* majority further defined "critical mass" in functional terms:

> [T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. … These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races."[42]

Under this view, "critical mass" refers to a sufficiently diverse group of perspectives within each racial group to actualize the educational benefits of diversity.[43] According to the *Grutter* majority, the goal of a race conscious admissions policy should be to produce a "critical mass" with a "variety of viewpoints among minority students."[44] Such within-group variation actualizes the educational benefits of diversity, as it serves to break down racial stereotypes:

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[40] *Grutter* at 308 ("[T]he Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce."). *See also* Fisher at 219 (noting that "critical mass" should be defined through "reference to the educational benefits that diversity is designed to produce."). This Article contends that while the *Fisher* opinion claimed that "critical mass" should be defined in terms of the educational benefits of diversity, its application of the concept did not reflect this, and its articulation of these educational benefits was incomplete. *See infra* Parts III.B. and III.D. But even the *Fisher* Plaintiffs agree that "*Grutter* endorses an inward-facing concept of diversity that focuses on the functioning of the *student body* and the educational benefits that arise from admitting a 'critical mass' of underrepresented minority students [.]" Br. Pl.s-Appellants 33, http://www.utexas.edu/vp/irla/Documents/Plaintiffs.5th.Circuit.Brief.pdf

[41] *See infra* Part I.C.

[42] Grutter at 330.

[43] *See also id.* ("[Educational] benefits [of diversity] are substantial … the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' … These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'").

[44] *Id.* at 320.

> when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "minority viewpoint" but rather a variety of viewpoints among minority students.[45]

Grutter's language thus suggests that "meaningful representation"[46] is not just contingent upon numbers of minority students, but also includes sufficiently diverse experiences and perspectives within racial groups.[47] This allows racial stereotypes to be broken down and facilitates the educational benefits of diversity, which are the constitutional justification for race conscious admissions policies in the first place. When understood not only in terms of diverse representation of racial groups, but also different experiences and perspectives within racial groups, the concept of a "critical mass" of minority students is directly related to the compelling interest articulated in *Grutter*.[48]

1. Why "Critical Mass" Cannot Be Defined by Minority Student Numbers

This emphasis on within-group diversity also clarifies how "critical mass" is different from numerical goals or quotas. By definition, diversity within racial groups cannot be attained

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[45] *Id*. at 319-20. *See also id*. at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' … To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). This language in Grutter speaks to the immediate, proximal impact of having a "critical mass." When evaluating "critical mass" in *Fisher*, the Fifth Circuit panel did not cite this language, instead defining the educational benefits of diversity in much broad terms: 1. "Increased Perspectives" - those brought by diverse groups of students into the classroom, which add valuable knowledge and make for engaging classroom discussions; 2. "Professionalism" – preparing students for "work and citizenship" by exposing them to diverse people and viewpoints; and 3. "Civic Engagement" – creating paths to leadership for individuals of every race and ethnicity. *See* Fisher at 219-220 and *infra* notes 183 and 209-211 and accompanying text.

[46] Grutter at 318.

[47] Of course, there cannot be sufficient within-group diversity if there are not adequate numbers of a particular minority group. However, no particular number or percentage of a given racial group automatically guarantees that within-group diversity is present. That is an assessment that institutions must make themselves.

[48] *But see* Edward C. Thomas, Comment, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities threaten "Critical Mass" Justification in Higher Education*, 2007 B.Y.U. L. REV. 813, 815-16 (arguing that "phantom minorities," who take advantage of race conscious admissions policies even though they "look white, have Anglo names, and come from backgrounds void of racial-life experience," undermine the "critical mass" justification for affirmative action.). Thomas's point underscores the need for admissions committees to consider race in the context of an applicant's entire profile, in conjunction with other factors, and to use individualized review to consider how each applicant contributes to the educational benefits of diversity. Regardless of whether this type of nuanced review is the current norm in university admissions, this Article argues that it is the standard that courts should enforce when evaluating universities' race conscious admissions policies. *See infra* Part IV.

merely by admitting particular numbers or percentages of students from each minority group, or even by monitoring the numbers of students admitted from such groups.[49] Within-group diversity may involve "some attention to numbers," [50] but universities must consider factors beyond race to attain a variety of viewpoints and experiences within various racial groups.[51] This point is key to addressing Justice Kennedy's concern about "critical mass,"[52] because unlike the two views of "critical mass" posited earlier,[53] within-group diversity cannot conceivably be defined by a number, percentage, or range of students from a minority group: it cannot be even expressed be expressed in such terms, as some account of variation within that group is necessary.[54] Moreover, Part II *infra* will illustrate how *Grutter*'s narrow tailoring principles make much more sense in light of this view of "critical mass."

2. Why "Critical Mass" Can Vary for Different Minority Groups

In his dissenting opinion in *Grutter*, the late Chief Justice William Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, raised a more general question about "critical mass": why were different numbers of students admitted for different racial groups? Chief Justice Rehnquist noted that:

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[49] This was another salient concern raised by Justice Kennedy. *See* Grutter at 392(Kennedy, J., dissenting)("The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.").

[50] Grutter at 336.

[51] *See infra.* Part II.C.

[52] *See supra* notes 26 and 37and accompanying text.

[53] *See supra* Parts I.A and I.B.

[54] A quota or numerical goal is obviously expressed as a number or percentage, and there are numbers and percentages (e.g., 50% or 75%) which would have to be sufficient for group members not to feel isolated—leading to the inquiry posed by Justice Scalia in the *Grutter* oral argument: "You have to pick some number, don't you?" *Transcript of Arguments in* Grutter v. Bollinger, N.Y. Times, April 1, 2003, at 11, http://www.nytimes.com/2003/04/01/politics/02TEXT1.html?pagewanted=11. *See also supra* note 37. Within-group diversity, on the other hand, can never be determined by numbers or percentages. To take an extreme example, even if 95% of the students in a class are members of a given group, the class might benefit from a member of that group who has very different viewpoints and experiences.

> [f]rom 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.[55]

Professor Clark Cunningham echoes Chief Justice Rehnquist in lamenting the lack of response from other Justices to these critiques of the Law School's admissions numbers.[56] Both Chief Justice Rehnquist and Professor Cunningham assume a numerical definition of "critical mass," which the *Grutter* majority repudiated.[57] Nevertheless, there are several possible responses to Chief Justice Rehnquist's question.

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[55] Grutter at 381(Rehnquist, J., dissenting)(footnote omitted).

[56] Clark D. Cunningham, *After* Grutter *Things Get Interesting! The American Debate over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad*, 36 Conn. L. Rev. 665, 670 (2004)("Although one wonders whether the Chief Justice actually would have voted to uphold the law school's affirmative action program as long as it had admitted larger numbers of Hispanic and Native American applicants, the evidence he cited would seem to call for a response. However, the majority opinion authored by Justice O'Connor did not really respond to either Justice Kennedy or Chief Justice Rehnquist's concerns.").

Justice O'Connor did actually respond directly to Chief Justice Rehnquist in her *Grutter* opinion. 539 U.S. at 336 ("THE CHIEF JUSTICE believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass … But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. "). Justice O'Connor's response suggests that "critical mass" can vary because it is not just about numbers of minority students, but about the diverse viewpoints and experiences within each minority group—a mix that varies substantially from year to year.

[57] *See supra* notes 27-29 and accompanying text. *See also Fisher* at 219 ("In his [*Grutter*] dissent, Chief Justice Rehnquist saw critical mass as only the minimum level necessary '[t]o ensure that the[ ] minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine

First, in *Grutter*, the University of Michigan Law School did not actually contend that it had reached a "critical mass" of any minority group, but rather only that its race conscious admissions policy "seeks" to attain this "goal."[58] It is possible that the number of Native Americans admitted was limited by the number of Native American applicants. Moreover, even if there were more Native American applicants who could have been admitted, the University was limited by the finite consideration it could give to race in the admissions process, lest race become too large of a factor and render the policy unconstitutional.[59] Justice Kennedy in particular emphasized that race should not be the "predominant factor" in admissions.[60] Thus, the Law School could not have categorically admitted every Native American student without violating *Grutter*'s own narrow tailoring principles for race conscious admissions policies. Attaining a "critical mass" of a minority group was one of the University's goals, but that goal had to be balanced with other priorities.[61]

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stereotypes.' On this view, critical mass is defined only as a proportion of the student body, and the percentage that suffices for one minority group should also suffice for another group. … In contrast, Justice O'Connor, writing for the Court [in *Grutter*], explained that critical mass must be 'defined by reference to the educational benefits that diversity is designed to produce.'")(internal citations omitted).

[58] *See* Grutter at 329 ("As part of its goal of 'assembling a class that is both exceptionally academically qualified and broadly diverse,' the Law School seeks to "enroll a 'critical mass' of minority students."')(emphasis added). The University of Michigan Law School's brief in *Grutte*r also suggests that enrollment of a "critical mass" is a "hope" rather than an outcome it attains each year. *See* Brief of Respondents at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 ("[T]he Law School hopes that its policy will enroll a "critical mass" of minority students.")(emphasis added).

[59] *See Grutter* at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system-it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.' Bakke, 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a ' "plus" in a particular applicant's file,' without 'insulat[ing] the individual from comparison with all other candidates for the available seats.'").

[60] Grutter at 392-93 (Kennedy, J., dissenting). ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that … race does not become a predominant factor in the admissions decisionmaking."). It should be noted that the Plaintiff's expert witness in *Grutter* conceded that "race is not the predominant factor in the Law School's admissions calculus." *Id*. at 320.

[61] *See* Brief of Respondents at 42-43, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 ("The Law School's desire for a 'critical mass' of students from otherwise underrepresented minority groups is only one of many educational goals pursued through the admissions policy, and it is at all times weighed against other educational objectives. Dean Lehman and the other trial witnesses testified unequivocally that the Law School would and does regularly reject qualified minority candidates, even if that risks falling short of a critical mass … .").

In that vein, not only is there a limited applicant pool, but there are also a limited number of spots in any admitted class. An institution must make decisions about which perspectives are most important to achieving its desired educational benefits, and this can lead to different numbers of students admitted from various racial groups. As part of its educational autonomy, an institution must also determine which of many diverse perspectives is most important in breaking down racial stereotypes and promoting the other educational benefits of diversity.[62] For example, a university in Arizona or New Mexico may determine that more perspectives from Mexican Americans are necessary, given the large Mexican American populations in those states. Similarly, an institution in South Dakota may choose to emphasize perspectives from Native Americans to a greater extent. Local history and social and political dynamics determine both the prevalence of racial stereotypes in a given area, and the particular mix of perspectives necessary to help break down those stereotypes and facilitate cross-racial understanding. Even at elite universities with national student bodies, there is significant variation in local and institutional history and social dynamics.[63]

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[62] *Grutter* at 329 ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.' … From this premise, Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the "robust exchange of ideas," ' a university 'seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.'")(internal citations omitted).

[63] For example, some Ivy League universities, such as Yale, Columbia, and the University of Pennsylvania, are located in urban communities that are predominantly African American, whereas others, such as Cornell and Dartmouth, are located in rural, predominantly White communities. Moreover, institutional history can also play a significant role: for example, the charter for Dartmouth aimed to create an institution "for the education and instruction of Youth of the Indian Tribes in this Land ... and also of English Youth and any others." *See About the Native American Program*, Dartmouth University, http://www.dartmouth.edu/~nap/about/ (last updated March 26, 2012). Since 1970, when then President John G. Kemeny of Dartmouth renewed the institution's commitment to Native Americans, "nearly 700 Native Americans from over 200 different tribes have attended Dartmouth, more than at all the other Ivy League institutions combined." *Id*.

Thus, universities are in the best position to determine the mix of students that constitutes a "critical mass" of diverse perspectives.[64] Even if "critical mass" could be conceptualized solely in terms of numbers of minority students,[65] a university cannot possibly admit a "critical mass" of every group. There are too many different racial/ethnic groups with varying experiences and perspectives, all of which could contribute to the educational benefits of diversity. Moreover, enrollment of minority students may be limited by other factors, such as the availability of financial aid.[66] Given limited resources and the limited size of its admitted class, a university must make its own judgments about which perspectives should be included and are most central to its educational mission[67]--so long as any race conscious admissions policies it employs adhere to *Grutter*'s guidelines. In fact, this is the reason for *Grutter*'s deference to colleges and universities in the admissions process.[68]

Finally, in terms of minority students feeling "isolated or like spokespersons for their race,"[69] Justice Rehnquist failed to consider that members of one minority group may help members of other minority groups feel less isolated. For example, if there are African American and Latino students in a class who speak up and share their views, then a Native American student may feel more emboldened to do so. In fact, minority student organizations regularly

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[64] *See* Fisher at 39 ("[T]here is no reason to assume that critical mass will or should be the same for every racial group or university."). Alternatively, a university might also decide that racial stereotypes of a specific group—for example, African Americans—are particularly pervasive and pernicious on a broader level, and that the breakdown of those stereotypes is central to its educational mission. Racial stereotypes are perpetuated by both local circumstances and the national media, and there is no prescription for how to best break them down.
[65] *See supra* notes 27-29 for a discussion of why "critical mass" cannot be defined numerically.
[66] *See* Osamudia James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 853 (2010)(noting that "actually enrolling a critical mass of minority students … [is] … a goal that is often unattainable without financial aid.").
[67] *See supra* notes 63-64.
[68] *See* Grutter at 329-330 ("Our holding [in *Grutter*] is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. … 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'").
[69] *Id.* at 319.

collaborate on activities and interact and support one another at many institutions of higher education.[70]

3. Can "Critical Mass" be Measured At All?

It is important to note that while *Grutter* allows "some attention to numbers,"[71] this Article argues that "critical mass" is not readily measurable in practice. As noted, attaining a "critical mass" requires an admissions committee to look to other factors beyond race,[72] so mere numbers or percentages of minority students would not allow one to determine if a "critical mass" is present. Based on the interaction of various demographic characteristics and life experiences (including those involving race), *Grutter* envisioned that a given student may express one or more perspectives or characteristics that add to the mix of ideas in an admitted class.[73] The student's unique contribution in this milieu depends in part on the other perspectives represented in the applicant pool; thus, it is not possible to accurately predict *ex ante* how many students of a given group are necessary to meet the goals of attaining the educational benefits of

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[70] For example, since 1978, undergraduate student of color organizations at the University of Pennsylvania (where the author attended graduate school) have formed an umbrella group called the United Minorities Coalition, which sponsors events that promote unity among various minority groups. *See* http://www.dolphin.upenn.edu/umc/ White students are also sometimes involved in these coalitions; for example, at Penn, there is a Black-Jewish student coalition called Alliance and Understanding. *See* http://www.vpul.upenn.edu/gic/au.php

Additionally, at NYU School of Law, the various student of color organizations—the Black Allied Law Students Association (BALSA), Latino Law Students Association (LLSA), Asian Pacific American Law Students Association (APALSA), South Asian Law Students Association (SALSA), and the Multiracial Law Students Association (MuLSA)—held an "All-ALSA" Symposium in 2008 entitled "Can People of Color Become a United Coalition?" *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, 82 (2009). These organizations have also formed an "All-ALSA" Coalition and regularly meet and collaborate on events. *See, e.g.*, "All ALSA Coalition Graduation and Reception," "http://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=18723. Also, the Black, Latino, Asian Pacific Alumni Association (BLAPA) serves the same purpose for alumni of NYU School of Law. *See* http://www.law.nyu.edu/alumni/alumniassociations/blapa/index.htm

[71] Grutter at 336.

[72] *Id*. at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

[73] Grutter at 309 ("The Law School's admissions program … is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. … The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. … [T]he program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race.").

diversity. Moreover, these benefits may vary based on local history, demographics, and politics, or the institution's history and educational mission, all of which can also change over time. Thus, "critical mass" may vary by institution and may vary over time with local and national demographic changes. As noted, it may also be different for different racial groups.[74]

Because of these complexities, it would be difficult to devise a consistent judicial standard to determine whether an institution has attained a "critical mass."[75] In theory, one might devise an index of various types of diversity—socioeconomic, geographic, experiential, political, etc.—and aim to measure diversity within racial groups, in addition to the numbers of students from each racial group. In practice, however, this would be a difficult and subjective enterprise for a court to undertake; it is best left to university admissions committees who can assess these factors and local conditions more effectively. This is why *Grutter* entrusts colleges and university admissions committees to employ "good faith" when using race as a factor in the admissions process.[76]

Because "critical mass" cannot be readily measured, this Article argues that it is merely part of the definition of *Grutter*'s compelling interest, not part of the narrow tailoring test for race conscious admissions policies.[77] This does not mean, however, that there is no room for

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[74] *See supra* Part I.C.2; Fisher v. Texas, 631 F.3d 213, 238 (5th Cir. 2011)("The educational benefits recognized in *Grutter* go beyond the narrow 'pedagogical concept' urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university.").

[75] When *Fisher* was appealed to the Fifth Circuit, the amicus brief of the Mountain States Legal Foundation made a similar claim. *See* Brief for Mountain States Legal Foundation as Amicus Curiae at 14, *Fisher v. Texas*, 631 F.3d 213 (5th Cir. 2011)("[B]ecause critical mass cannot be quantified, no court is able to determine whether a critical mass is present or lacking."). *Available* http://www.utexas.edu/vp/irla/Documents/Amicus.Mountain.States.Legal.Foundation.pdf

[76] *Cf.* Grutter at 309-10. ("The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable.").

[77] UT contended that the *Fisher* Plaintiffs framed "critical mass" as part of both the compelling interest and narrow tailoring prongs of strict scrutiny. Appellees' Br. at 43 ("Plaintiffs contend that UT's revised admissions policy is not narrowly tailored because … it was not needed for UT to enroll a critical mass of underrepresented minorities. (At times, Plaintiffs refer to this as a "compelling interest" argument, and at other times they characterize it as a "narrow tailoring" argument. But the argument is meritless regardless of nomenclature.)." The argument for

more stringent judicial review of race conscious admissions policies in *Fisher v. Texas*, as Parts IV and V *infra* will show.

II. Within-Group Diversity, Narrow Tailoring and Deference: Reducing Stigmatic Harm

Grutter stands in contrast with much of the Supreme Court's recent race and affirmative action jurisprudence. In the two decades preceding *Grutter*, the Court was much more apt to strike down race conscious policies.[78] Since 2003, the Court has narrowed the scope of *Grutter* to higher education.[79] The Court's deviation in *Grutter* has largely been attributed to the unique educational benefits of student diversity at colleges and universities.[80]

However, another factor that distinguished *Grutter* from other affirmative action cases was the flexible, unquantified manner in which the University of Michigan Law School used

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resolving *Fisher* posed by this Article is not contingent upon whether "critical mass" is considered part of the compelling interest or narrow tailoring prong. *See infra* Parts IV and V.

[78] Justice O'Connor herself had authored numerous opinions which invalidated race conscious policies under the Equal Protection Clause. *See, e.g.*, Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)(O'Connor, J., concurring)(striking down "layoff provision" which preserved jobs of minority teachers with less seniority); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)(striking down City of Richmond's minority set-aside program for contracts); Shaw v. Reno, 509 U.S. 630, 657 (1993)(striking down North Carolina's congressional redistricting plan because "[r]acial classifications … pose the risk of lasting harm to our society … [because] … [t]hey reinforce the belief … that individuals should be judged by the color of their skin. … [r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."). Even in the few cases where the Court upheld race conscious policies, Justice O'Connor had dissented. *See* U.S. v. Paradise, 480 U.S. 149 (1987) (O'Connor, J., dissenting)(upholding "one-black-for-one-white promotion requirement."); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (O'Connor, J., dissenting)(upholding race conscious policies implemented by Federal Communications Commission.).

[79] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 765 (2007)(striking race conscious public school assignment plans in Seattle and Louisville and noting that in *Grutter*, the Court's "deference [in the use of race] was prompted by factors uniquely relevant to higher education.").

[80] *See* Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 60 (2004) (noting that "in *Grutter*, the Court spelled out in some detail the potential educational advantages of student diversity…thus…grounding in social science…the advantages Justice Powell had asserted [in *Bakke*] on the basis of less evidence."). Professor also Karst highlighted the role of three amicus briefs—one from military leaders, another from business leaders, and a third from organized labor—in facilitating the Court's acceptance of diversity in education as a compelling state interest. *Id*. at at 66-69. *See also* Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From* Regents v. Bakke *to the University Of Michigan Cases*, 90 Cornell L. Rev. 463, 493 (2005)("Justice O'Connor's majority opinion recognized that race may also be used in an inclusive way to achieve diversity that is beneficial to white and minority students alike."); Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. Ill. L. Rev. 691, 699 (2004) ("In her opinion for the *Grutter* majority, Justice O'Connor variably characterizes the state's interests as: 'obtaining 'the educational benefits that flow from a diverse student body'"; 'attaining a diverse student body'; and 'assembling a class that is both exceptionally academically qualified and broadly diverse.'").

race—in the context of its holistic admissions policy. Justice O'Connor's *Grutter* opinion laid out several criteria for narrowly tailored, race conscious, holistic admissions policies: individualized consideration of all applicants, flexible, non-mechanical use of race, no insulation from competition based on race, no undue harm or burden to non-minority applicants, and "sunset" provisions to eventually end race conscious policies.[81] While many commentators have criticized its treatment of narrow tailoring as a deviation from the Supreme Court's jurisprudence,[82] this Part explains *Grutter*'s narrow tailoring principles in terms of minimizing the stigmatic harm of race conscious admissions policies—a goal that is consistent with the Court's recent race jurisprudence. Additionally, this Part illustrates how *Grutter*'s narrow tailoring principles are related to the "critical mass" concept and particularly to diversity within racial groups—thus providing internal logic and coherence to the much maligned *Grutter* majority opinion.[83]

A. Overview of Stigmatic Harm

To explain *Grutter*'s theory of narrow tailoring, it is first necessary to define "stigmatic harm." In the Supreme Court's recent race jurisprudence, stigmatic harm can be understood as the harm that occurs when a government policy reinforces racial stereotypes. For example, Justice O'Connor, in *City of Richmond v. J.A. Croson Co.*, describes this harm:

> Classifications based on race carry a danger of stigmatic harm … they may in fact promote notions of racial inferiority and lead to a politics of racial hostility … reinforce common stereotypes holding that certain groups are unable to achieve

[81] Grutter at 334, 341-42 (describing the features of a narrowly tailored race conscious admissions policy).
[82] *See, e.g.*, Ian Ayres and Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. LAW REV. 517 (2007)(arguing that *Grutter* deviates from the traditional "least restrictive means" test of narrow tailoring); 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, 538 (2004)(arguing that in Gratz and Grutter, "the Court performed poorly in defining narrow tailoring. The majority spent most of its effort explaining what narrow tailoring is not, and little in defining what it is.").
[83] *See supra* note 11.

> success without special protection based on a factor having no relation to individual worth[84]

The harm espoused here is a constitutional harm, not a tangible or psychological one.[85] Some commentators have embraced the view that race conscious policies directly stigmatize and inflict psychological harms upon minorities, and this is a debated issue.[86] However, the presence or absence of any such psychological harms or other tangible effects is not the relevant issue. The Court's recent race jurisprudence describes constitutional stigmatic harm as that which occurs when government action itself reinforces racial stereotypes; the tangible results of such action are not relevant to the constitutional analysis. As Justice O'Connor noted in her dissenting opinion in *Metro Broadcasting, Inc. v. FCC*,

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate

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[84] 488 U.S. at 494.

[85] This notion of stigmatic harm is very similar to the definition of "expressive harm" articulated by Professors Richard Pildes and Richard Niemi:

> An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.

Richard Pildes & Richard Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483, 507-8 (1993). Professors Pildes and Niemi further note that the "harm is not concrete to particular individuals," but rather "lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values." *Id*. at 507.

[86] *See, e.g.*, Clegg, *supra* note 11 at 435 (contending that race conscious admissions policies "stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves …"); Richard H. Sander, *The Racial Paradox of the Corporate Law*, 84 N.C. L. REV. 1755, 1812 (2006) (arguing that partners in law firms "have low expectations of black associates"); Grutter at 373 (Thomas, J., dissenting)("[T]he majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma-because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination."). Joshua Levine, Comment, *Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 Cal. L. Rev. 457, 487 (2006)(referring to Justice Clarence Thomas as "a black person who has felt stigmatic harm from others questioning his competency and pressuring him to conform to racial stereotypes."). *But see* Angela Onwauchi-Willig, Emily Houh, & Mary Campbell, *Cracking the Egg: Which Came First--Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1346 (2008) (arguing that "affirmative action policies do not in fact 'harm' students of color in the way that opponents of affirmative action have claimed.").

> benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.[87]

Thus, stigmatic harm as conceptualized in the Court's jurisprudence occurs when a government policy treats individuals in the same manner based on racial group membership, regardless of the negative or positive consequences for minorities (or for non-minorities).[88]

B. *Grutter*'s Theory of Narrow Tailoring

Having defined stigmatic harm, this Part now illustrates how *Grutter*'s narrow tailoring principles aim to minimize the stigmatic harm of its race conscious policies.

1. The *Gratz/Grutter* Distinction

At the same time it upheld the Law School's admissions policy in *Grutter*, the Court struck down the University of Michigan's race conscious admissions policy for the College of Letters, Sciences, and Arts (LSA) in *Gratz v. Bollinger*.[89] The *Gratz* plan relied on a fixed weight point system rather than a flexible, holistic admissions process; LSA's admissions policy automatically awarded 20 points on a 150 point scale to applicants from underrepresented minority groups,[90] a measure the Court found to be too rigid and mechanical—failing to "provide … individualized consideration."[91]

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[87] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). Also, in *Shaw v. Reno*, Justice O'Connor's majority opinion noted that "an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." 509 U.S. 630, 643. Professors Pildes and Niemi argue that Shaw is rooted in the notion that "the state has impermissibly endorsed too dominant a role for race," and that the decision "might rest on the intrinsic ground that the endorsement is wrong, in and of itself," or "on the instrumental ground that this state endorsement threatens to reshape social perceptions along similar lines." Pildes and Niemi, *supra* n., at 509.

[88] For an alternative view of racial stigmatic harms, *see* Robin A. Leinhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004)(arguing "that stigmatic harm occurs when a given act or policy sends the message that racial difference renders a person or a group inferior to Whites, the category constructed as the racial norm."). This Article does not question the validity of Professor Leinhardt's proposition; it merely contends that the Supreme Court has a different view of stigmatic harm, as apparent in its race jurisprudence, including *Grutter*. *See supra* Part II.A.

[89] 539 U.S. 244 (2003).

[90] *Id*. at 255.

[91] *Id*. at 271.

Various scholars have critiqued the Court's distinction between *Gratz* and *Grutter*.[92] Professor Cass Sunstein contends that:

> [I]n the context of affirmative action, Justice O'Connor's … judgment has led her to a puzzling and probably indefensible conclusion. It is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment—and that does so while imposing significant burdens on officials who must evaluate particular applications for admission.[93]

Professor Sunstein attributes Justice O'Connor's *Grutter* decision to her general "holistic practice,"[94] shown through judicial minimalism and a "preference for case-by-case judgment."[95] Professor Heather Gerkin espouses a different view, emphasizing stealth as value embraced in the *Grutter* approach to race conscious admissions.[96]

While these are valid perspectives, another explanation for the *Gratz-Grutter* distinction can be found in the Court's attempt to minimize the stigmatic harm of race preferences.[97] In *Gratz*, the majority noted that the "LSA policy does not provide … individualized consideration … [because it] … automatically distributes 20 points to every single applicant from an

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[92] *See, e.g.,* Ayres & Foster, *supra* note 82; Cass R. Sunstein, *Problems with Minimalism*, 58 Stan. L. Rev. 1899, 1902 (2006); 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, 528-29 (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 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 … [.]").

[93] Sunstein, *supra* note 92, at 1902.

[94] *Id*. at 1901.

[95] *Id*.

[96] *See* Gerkin, *supra* note 6, at 104 (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).

[97] *See* Michelle Adams, *Searching for Strict Scrutiny in* Grutter v. Bollinger, 78 Tul. L. Rev. 1941, 1953 (2004)(arguing that in *Grutter*, "the Court was more concerned with how the Law School's application process actually appeared and the message that it sent to the public than with its impact on any particular white applicant. In this way, Justice O'Connor's acceptance of the Law School's application process in *Grutter* is consistent with her rejection of the bizarrely shaped electoral districts in *Shaw v. Reno*. … In *Grutter*, as in *Shaw*, the message communicated by the governmental action was paramount."). Joshua Levine also notes that *Grutter*'s narrow tailoring principles may reduce stigmatic harm. *See* Levine, *supra* note 86, at 520 ("[I]f race truly is 'one of many' factors and acts only as a small 'plus'--such that the applicant and others can never really know whether race played a role in one's admission, then it is possible the stigmatic harm would be reduced."). However, Levine's definition of "stigmatic harm" is broader than one posed in this Article, as it encompasses tangible harm to minority applicants. *See supra* Part II.B.

'underrepresented minority' group, as defined by the University."[98] In contrast to the LSA policy struck down in *Gratz*, the Law School admissions policy upheld in *Grutter* did not use a point system; rather, it considered race subjectively as one element of a holistic admissions process.[99] Minority applicants did not all receive the same benefit and race was considered along with other factors to determine its place in the overall evaluation.[100] *Grutter*'s requirements for a narrowly tailored, holistic admissions program—individualized review, flexible use of race, consideration of factors other than race, preference for race neutral alternatives, and "sunset" provisions to gradually phase out race conscious policies—all reflect a principle of minimizing stigmatic harm. *Grutter* held that "truly individualized consideration demands that race be used in a flexible, nonmechanical way."[101] The decision contemplates that race will be considered as a "plus" factor only in the context of a given applicant's other characteristics,[102] and individualized review of all applicants is required to determine if and how race should serve as a "plus factor."[103] These provisions serve to minimize stigmatic harm by ensuring that beyond the holistic, individually variable consideration of race, minority students are not treated differently than non-minority students.[104] *Grutter* also requires colleges and universities to undertake "good

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[98] Gratz at 271.

[99] Grutter at 337("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment … [u]nlike the program at issue in *Gratz* v. *Bollinger* ... the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity.").

[100] Grutter at 336-37. ("When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke,* 438 U.S., at 318, n. 52, 98 S.Ct. 2733 (opinion of Powell, J.) (identifying the "denial ... of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).").

[101] Grutter at 337.

[102] *Id.* at 337. ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.").

[103] *Id.* at 334. ("Universities can … consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.").

[104] *Cf.* 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

faith" consideration of race neutral alternatives to the race conscious admissions policy,[105] and to periodically review the policy to determine if it is still necessary.[106] Here, *Grutter* recognized that any preferential treatment based on race creates stigmatic harm and should be phased out eventually.[107]

In these ways, *Grutter*'s mandate that "the importance of individualized consideration in the context of a race-conscious admissions program is paramount"[108] was consistent with the view in *Croson* and *Shaw* that "individual worth" should predominate over race.[109] While the cases differ in that the former upheld a race conscious policy and the latter two did not, all of them reflect a broader principle of avoiding or minimizing stigmatic harm.

Scholarly analysis has generally not examined this aspect of *Grutter*[110]—probably because *Grutter* did not strike down a race conscious policy, and because some commentators view *Grutter*'s narrow tailoring provisions as a smokescreen that merely hides racial quotas and race balancing,[111] or at least serves mainly to hide the use of race rather than to insure that race is

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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."). Professor Mishkin focused here on advantages of the *perception* that race is used in a flexible, individualized manner. In contrast, this Article focuses on advantages of actually using race in such a manner.

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

[106] *Id*. at 342 ("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.").

[107] *Id*.

[108] *Id*. at 227.

[109] *See supra* note 84 and accompanying text.

[110] Two exceptions are Professor Michelle Adams and Joshua Levine, *supra* note 97.

[111] *See, e.g.*, Graglia, *supra* note 25, at 2048 (2004). In his Grutter dissent, Justice Kennedy also expresses a similar view. *See* Grutter at 389 (Kennedy, J., dissenting)("[T]he Law School … attempt[s] to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."). This Article only aims to articulate the theory underlying *Grutter* and to apply this theory to *Fisher v. Texas*. The Article takes no position on whether the University of Michigan Law School's admissions policy actually adhered to this theory based on the facts in *Grutter*.

actually used in a flexible, individualized manner.[112] Part IV will discuss how courts can review race conscious policies more stringently under *Grutter*.

2. Least Restrictive Means as the "Least Stigmatic Means"

Professors Ian Ayres and Sydney Foster provide another critique of *Grutter*'s narrow tailoring requirements. They argue that the *Grutter* ruling deviated from prior constitutional doctrine requiring government use of suspect classifications to employ the "least restrictive means."[113] In their view, narrow tailoring of race conscious admissions policies should require the "minimum necessary preference" to achieve sufficient diversity.[114] Part V *infra* will discuss these issues further.

Professor Ayres and Foster also contend that the *Grutter* admissions plan gave more weight to race than the plan struck down in *Gratz*,[115] and thus did not employ the "minimum necessary preference."[116] Assuming that Professor Ayres and Foster are correct in their assessment of weight given to race, one can posit that under *Grutter*, stigmatic harm is not determined solely by the weight of race preferences (although that is a factor),[117] but also by the

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[112] *See supra* notes 96 and 104, and accompanying text.

[113] Ayres and Foster, *supra* note 82, at 523 n.28 (citing Bakke, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting that state action which employs "'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."). Ayres and Foster conced that "[s]ome older cases include language suggesting that strict scrutiny does not demand use of the least restrictive means[,]" but they contend that "[i]n light of more recent cases demanding consideration of race-neutral alternatives and applying a stricter version of strict scrutiny, however, these cases are no longer good law with respect to this point." *Id*. Nevertheless, for a different view of narrow tailoring, see Jeb Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 438 (1997)(noting that strict scrutiny in recent equal protection jurisprudence can be viewed as "a cost-benefit justificatory test … [which] … serve[s] to determine whether a law that causes acknowledged constitutional harms is justified by sufficiently important benefits that a less constitutionally costly … law could not have achieved.").

[114] *Id.* at 521.

[115] Ayres and Foster, *supra* note 82 at 534(concluding that "the Law School gave more weight to race than the College."). *See also infra* Part V.B.2 (discussing weight given to race in admissions as an limiting principle for race conscious admissions policies).

[116] *See id*.

[117] This Article builds on Professors Pildes and Niemi's analysis by arguing that the stigmatic harm associated with government use of race accrues not only when race has too dominant a role, but also when it is used in a manner that promotes stereotyping by treating all of individuals of the same race in exactly the same way (e.g., by using a

manner in which those preferences are applied. A flexible, holistic admissions process with individualized review creates less stigmatic harm than a fixed, weight point system, even if the latter gives less overall weight to race, because flexibility and individualized review ensure—to the greatest extent possible—that all applicants from a given group will not be treated exactly the same merely because of their race.[118] Professor Ayres and Foster do acknowledge that narrow tailoring inquiry can vary by context,[119] and in this context, the *Grutter* majority created a *least stigmatic means* principle—a standard that defines narrow tailoring in terms of minimizing the stigmatic harm of race conscious admissions policies.[120]

C. Within-Group Diversity and *Grutter*'s Internal Logic

"Critical mass" and *Grutter*'s narrow tailoring principles are essentially two sides of the same coin, and considering them together shows the internal logic and coherence of the *Grutter* opinion. A "critical mass" of minority students, which includes sufficient diversity of viewpoints and experiences within each racial group, facilitates the educational benefits of diversity that *Grutter* held as a compelling interest: breaking down racial stereotypes and promoting cross-racial understanding and dialogue.[121] *Grutter* recognized that these benefits are tangible and important, and that race conscious admissions policies are necessary to attain them.

At the same time, however, *Grutter* recognized the stigmatic harm of using race conscious admissions policies and how they could reinforce the very stereotypes that a "critical

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mechanical point system such as the one struck down in *Gratz*). *Grutter* essentially prioritizes the latter concern over the former.

[118] As noted earlier, some commentators, including Justice Kennedy, claim that *Grutter*'s narrow tailoring principles allow universities to hide their use of quotas and point systems under the guise of holistic admissions. *See supra* notes 25 and 111 and accompanying text. To the extent this is true, courts must be more vigilant in enforcing *Grutter*'s narrow tailoring principles, and emphasizing within-group diversity aids in this process. *See infra* Parts II.C. and IV.

[119] Ayres and Foster, *supra* note 82, at 577 ("[T]he narrow tailoring inquiry has always had multiple dimensions."). *See also Grutter* at 333-34 ("[T]he contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs … must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."). Ayers and Foster themselves acknowledge that

[120] Part IV.C.2., *infra*, reconciles the least restrictive means and least stigmatic means theories of narrow tailoring.

[121] Grutter at 330.

mass" of viewpoints and experiences was intended to break down. Thus, *Grutter*'s narrow tailoring principles aim to reduce stereotyping within the admissions process, by minimizing stigmatic harm and requiring that applicants be reviewed on an individual basis. This is why *Grutter* mandates that race be used in a flexible, rather than a mechanical, manner. Even though race conscious policies can be employed, it is paramount that they not treat all applicants of the same racial group in exactly the same manner.[122] *Grutter*'s other narrow tailoring requirements, including its "sunset" requirement,[123] also aim to reduce and eventually eliminate stigmatic harm.

When viewed together, "critical mass" and the *least stigmatic means* principle of narrow tailoring represent *Grutter*'s balance between the educational benefits of diversity and the stigmatic harm of race conscious policies.[124] In fact, if properly implemented, *Grutter*'s narrow tailoring provisions inherently facilitate the admission of a "critical mass" of perspectives and experiences within racial groups. Unlike a racial quota, numerical goal/range, or a *Gratz*-type point system, a "critical mass" cannot be attained merely by identifying an applicant's race and mechanically using this information. A holistic admissions process—which includes individualized review, considers race in a flexible manner, and uses diversity factors other than race—is necessary to yield a "critical mass" that includes diversity within racial groups. By definition, achieving such within-group diversity reduces stigmatic harm, because it requires admissions committees to consider factors besides race and to treat applicants of the same race

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[122] *See supra* Part II.B.

[123] Grutter at 342 ("[R]ace-conscious admissions policies must be limited in time. … [i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.").

[124] *See* Adams, *supra* note 97 at 1953 (noting that "the balancing performed by Justice O'Connor in the *Grutter* case is as an example of cost-benefit balancing between societal harms and societal benefits."); Rubenfeld, *supra* note 113, at 438 (noting that strict scrutiny in recent equal protection jurisprudence can be viewed as "a cost-benefit justificatory test … [which] … serve[s] to determine whether a law that causes acknowledged constitutional harms is justified by sufficiently important benefits that a less constitutionally costly … law could not have achieved.").

differently based on non-racial factors.[125] These were precisely the concerns expressed in Justice Kennedy's *Grutter* dissent.[126]

D. Standards of Review in *Grutter*: The Need for Deference to Universities

Justice Kennedy's dissent in *Grutter* also contends that the *Grutter* majority abandoned strict scrutiny[127] and critiques the majority for its deference to the Law School.[128] The *Grutter* opinion does delineate multiple standards of review, deferring to universities' "good faith" that racial diversity is necessary to attain educational benefits, while still applying strict scrutiny (the "least stigmatic means") to evaluate the manner in which race is used (or at least claiming to do so).[129] The "good faith" standard with respect to the educational benefits of diversity is a natural consequence of the analysis presented earlier: because "critical mass" is a complex entity and

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[125] Grutter at 309 ("The Law School's admissions program … is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. … The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. … Also, the program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race."). *See also* Gratz at 271 (noting that "Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education.").

For an example of how the Supreme Court envisioned this would work, see Gratz at 272-73 ("[I]nstructive in our consideration … is the example … which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" … It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."

[126] Grutter at 392-93(Kennedy, J., dissenting)("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity …"). Justice Kennedy's dissent in *Grutter* stemmed from his belief, based on the facts, that the University of Michigan School of Law did use race as a predominant factor. *Id*. at 389 (Kennedy, J., dissenting)(noting that at the University of Michigan School of Law, "race is likely outcome determinative for many members of minority groups."). He further noted that "an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking." *Id.* at 393 (Kennedy, J., dissenting).

[127] *Id.* at 387 (Kennedy, J., dissenting)(contending that "[t]he Court … does not apply strict scrutiny" in *Grutter*.).

[128] *Id*. at 394 (Kennedy, J., dissenting)(" Deference is antithetical to strict scrutiny, not consistent with it.").

[129] *Id.* at 326 (noting that the Court has "held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'"). *But see supra* notes 127-128 and accompanying text.

cannot be measured accurately by courts, universities are in the best position to determine the level and type of diversity needed to fulfill their educational missions. *Grutter* also cites the Supreme Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits[,]"[130] particularly with respect to "complex educational judgments in an area that lies primarily within the expertise of the university."[131] Thus, both pragmatic and doctrinal reasons exist for deferring to universities' judgment on the educational benefits of diversity.

Nevertheless, Justice Kennedy's *Grutter* dissent takes strong issue with such deference, critiquing the majority for being "satisfied by the Law School's profession of its own good faith."[132] This aspect of *Grutter* is likely to be modified or overturned when the Supreme Court decides *Fisher*. Part IV of this Article proposes a more nuanced, alternative interpretation of *Grutter*'s deference and judicial review provisions—one that addresses Justice Kennedy's concerns as applied to *Fisher*.

In sum, this Part has illustrate how "critical mass" and *Grutter*'s least stigmatic means theory of narrow tailoring encompass diversity within groups. Within-group diversity is relevant to the constitutionality of race conscious admissions for several reasons: 1. Distinguishing "critical mass" from racial quotas and numerical goals; 2. Attaining the educational benefits of

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[130] *Id.* at 328.

[131] *Id*. See also *id*. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. … In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.' *Bakke, supra*, at 312 … From this premise, Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the "robust exchange of ideas,"' a university 'seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.'"); Bakke at 319 (Powell, J., concurring)(" Universities … may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.").

[132] Grutter at 394 (Kennedy, J., dissenting).

diversity articulated in *Grutter*; and 3. Reducing the stigmatic harm of race conscious policies; and 4. Clarifying the need for courts' deference to universities with respect to admissions policies Moreover, as the analysis of *Fisher* in the subsequent Parts will illustrate, race conscious admissions policies may be used not only to increase numbers of minority students, but also specifically to target particular subgroups of minority students, in order to increase diversity within racial groups.

III. *Fisher v. Texas*, "Critical Mass," and Deference to Universities

Part II illustrated the internal logic and theoretical coherence of *Grutter*'s various components. This Part discusses the application of "critical mass" in *Fisher v. Texas* and the Fifth Circuit panel's deference to UT in determining whether it had enrolled a "critical mass." It then presents a critique of the Fifth Circuit's *Fisher* opinion on these bases, setting the stage for the proposed alternative method to decide *Fisher*.

A. Overview

Fisher v. Texas[133] is the Supreme Court's first opportunity to clarify *Grutter*'s "critical mass" concept.[134] In order to understand *Fisher*, it is necessary to briefly review the University of Texas's changing undergraduate admissions policy and provide historical context for the case.[135]

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[133] 631 F.3d 213 (5th Cir. 2011)(upholding the University of Texas at Austin's race conscious undergraduate admissions policy).

[134] In *Parents Involved*, 551 U.S. 701 (2007), the Court did consider and strike down race conscious assignment plans for public schools, but the definition of "critical mass" was not a factor in the Court's decision. In fact, the Court distinguished these assignment plans from the holistic admissions policy upheld in *Grutter*. *Id.* at 704-5 ("In *Grutter*, the number of minority students the school sought to admit was an undefined 'meaningful number' necessary to achieve a genuinely diverse student body … and the Court concluded that the law school did not count back from its applicant pool to arrive at that number [.] … Here, in contrast, the schools worked backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent.").

[135] *Id*. at 222-31 (5th Cir. 2011) (describing the history of changes in the University of Texas at Austin undergraduate admissions policy).

1. *Hopwood v. Texas* and the Top Ten Percent Law

Prior to the Fifth Circuit's 1996 decision in *Hopwood v. Texas*,[136] the University of Texas (UT) used a variety of race conscious admissions procedures, and in Fall 1993, these resulted in an entering freshman class that was 4.5% African American and 15.6% Latina/o.[137] In 1996, *Hopwood* outlawed the use of race conscious policies in the Fifth Circuit (Texas, Louisiana, and Mississippi), and as a result, for Fall 1997, the African American enrollment in the incoming class dropped to 2.7% and the Latina/o enrollment dropped to 12.6%.[138] In response, the Texas legislature passed the Top Ten Percent Law,[139] which guaranteed admission to any Texas state university to Texas public high school seniors in the top ten percent of their class.[140] This law was intended to increase minority representation without directly using race as part of the admissions process.[141] By 2004, partly as a result of the Top Ten Percent Law, the percentage of African Americans in the incoming class had increased to 4.5% and the percentage of Latina/os increased to 16.9%.[142]

2. Post-*Grutter* Return of Race Conscious Admissions

With the Supreme Court's 2003 decision in *Grutter*, *Hopwood* was overturned, and race conscious admissions policies, in accordance with *Grutter*'s principles, were once again permissible in Texas to enroll a "critical mass" of underrepresented minority students. UT conducted a series of studies to determine whether it was enrolling a "critical mass" and concluded that it was not. One study found that of classes with 10 to 24 students at UT, 89% had

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[136] 78 F.3d 932 (5th Cir. 1996).
[137] Fisher at 223.
[138] *Id*. at 224.
[139] Tex. Educ. Code Ann. § 51.803. In 2011, the Top Ten Percent Law was amended "to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents." *Fisher* at 224 n.56.
[140] Fisher at 224.
[141] *Id*. ("The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose.").
[142] *Id*. Part of his increase may have been due to demographic changes in the state of Texas. *Id*. at 226.

0-1 African American students, 41% had 0-1 Asian American students, and 37% had 0-1 Latina/o students. Another study which surveyed undergraduate students found that a majority felt that there was "insufficient minority representation" for the "full benefits of diversity to occur,"[143] and that minority students reported feeling isolated.[144]

In response, the UT created a new, multifaceted admissions policy which significantly increased the enrollment of African American and Latina/o students, and also of Asian American students in the next few years.[145] The vast majority of African American and Latina/o students were admitted under the Top Ten Percent Law, which was still in effect, as were over 80% of total admitted students to the University of Texas.[146] The rest of the class was admitted on the basis of two measures: 1. Academic Index – a formula that predicts first year GPA based on high school class rank and standardized test scores;[147] and 2. Personal Achievement Index (PAI) – based on holistic evaluation of an applicant's entire file, including essays and a personal achievement score which factors in extracurricular activities, family and socioeconomic background, academic achievement as related to these variables, and race.[148]

The PAI is a numerical score based on ratings by admissions staff members, but consistent with the *Gratz*/*Grutter* framework, it does not attach a specific weight to race in the application process.[149] The PAI was the only "race conscious" element of the new UT admissions plan.

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[143] *Id*. at 225.
[144] *Id.*
[145] *Id*. at 226. it is possible that some of these increases were due in part to demographic changes in the state of Texas. *Id*.
[146] *Id*. at 229. In 2011, the Top Ten Percent Law was amended "to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents." *Id.* at 224 n.56.
[147] *Id.* at 222.
[148] *Id.* at 227-28.
[149] *Id.* at 228. Also noteworthy is the fact that any applicant, of any race, could benefit from 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. For example, a white student who has demonstrated substantial community

3. Plaintiffs' Claim

Plaintiffs[150] Abigail Fisher and Rachel Michalewicz were both denied admission to the University of Texas for the entering class of Fall 2008 and filed suit, alleging that UT's race conscious admissions policy violated the Equal Protection Clause. Specifically, the Plaintiffs claimed that the race conscious aspects of the UT admissions policy was unwarranted because a "race neutral" policy, the Top Ten Percent Law, had already yielded a "critical mass" of Black and Latina/o students without the additional race conscious measure (the Personal Achievement Index).[151] Thus, the issue in *Fisher* is different than that in *Bakke*,[152] *Hopwood*,[153] *Gratz*,[154] and *Grutter*.[155] All of those earlier cases were brought by Plaintiffs who claimed that their grades and standardized test scores would have almost certainly garnered them admission if they had been a member of a designated racial/ethnic group (usually Black or Latina/o). The Plaintiffs in *Fisher*, in contrast, did not argue that UT would have admitted them but for the race conscious policy.[156] Rather, they contended that UT had achieved sufficient diversity—a "critical mass" of

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> 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. This possibility is the point of *Grutter*'s holistic and individualized assessments, which must be " 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.' Indeed, 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. *Id.* at 236.

[150] This Article will refer to the parties who brought *Fisher* as the "Plaintiffs," although the *Fisher* opinion sometimes refers to them as "Appellants" or "Plaintiff-Appellants." For purposes of this Article, these terms are interchangeable.

[151] 631 F.3d 213 (5th Cir. 2011).

[152] 438 U.S. 265 (1978).

[153] 78 F.3d 932 (5th Cir. 1996).

[154] 539 U.S. 244 (2003).

[155] 539 U.S. 306 (2003).

[156] *See* Brown-Nagin, *supra* note 7, at 115 ("Fisher does not claim that racial consideration … necessarily doomed her prospects. No evidence supports that position. The record shows that a total of 216 black and Latino applicants gained acceptance to UT through holistic review in 2008, when Fisher unsuccessfully applied to UT. The plaintiff concedes that race played no role in the admission of 183 of those 216 students … [t]he record is inconclusive on whether [the remaining] thirty-three black and Latino students benefitted from race.").

underrepresented minority students—through its race neutral Top Ten Percent Law.[157] Consequently, given *Grutter*'s preference for race neutral alternatives, the Plaintiffs argued that UT could not use a race conscious admissions plan.[158]

4. Fifth Circuit Ruling in *Fisher*

The U.S. District Court for the Western District of Texas, in a ruling by Judge Sam Sparks, rejected the Plaintiffs' arguments and granted summary judgment to UT.[159] A three judge panel of the Fifth Circuit affirmed the ruling and elaborated upon several of the issues presented. The Fifth Circuit majority opinion in *Fisher*, by Judge Patrick Higginbotham, framed *Grutter* as "holding that diversity, including seeking a critical mass of minority students, is 'a compelling state interest that can justify the use of race in university admissions.'"[160] The Fifth Circuit panel rejected the Plaintiffs' argument that UT's admissions policy amounts to racial balancing because it focuses on demographically underrepresented groups.[161] The panel noted that demographics were only considered in assessing the initial need for a race conscious policy, not during the actual admissions process.[162] Applying a "good faith" standard,[163] the panel also deferred to UT's judgment that race conscious policies were still necessary to attain a "critical mass" and actualize the educational benefits of diversity. Judge Higginbotham's opinion, along with the concurrence by Judge Emilio Garza, both found that UT's admissions policy was consistent with *Grutter*, although in dicta, Judge Garza expounded upon his disdain for

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[157] Fisher at 234 (noting that Plaintiffs "question whether UT needs a Grutter-like policy… [because] … UT's minority enrollment under the Top Ten Percent Law already surpassed critical mass … .").
[158] *See id.* ("[Plaintiffs] do 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*. Rather, [Plaintiffs] question whether UT needs a *Grutter*-like policy.").
[159] 556 F.Supp.2d 603 (W.D.Tex. 2008).
[160] Fisher at 219.
[161] *Id*. at 235-36.
[162] *Id*. at 236.
[163] *Id*. at 233 ("[S]o long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.").

Grutter.[164] Also in dicta, Judge Higginbotham was very critical of the Top Ten Percent Law, stating that it excluded well qualified minority students who attended more competitive high schools, and that it threatened to make UT's race conscious policies unnecessary and unconstitutional.[165]

In June 2011, by a narrow vote of 9 to 7, the Fifth Circuit denied the Plaintiffs request for a rehearing of *Fisher* en banc.[166] Chief Judge Edith Jones authored a dissenting opinion, joined by four other judges.[167] Chief Judge Jones's critiques of Judge Higginbotham's *Fisher* opinion were threefold. First, Chief Judge Jones contended that *Fisher* essentially abrogates strict scrutiny by replacing *Grutter*'s narrow tailoring inquiry with a "good faith" standard.[168] Additionally, Judge Jones's dissent found that the minimal impact of UT's race conscious policy—the fact that over 80 percent of students are admitted through the race neutral Top Ten Percent plan—calls into question whether the race conscious policy is necessary to attain the educational benefits of diversity.[169] Finally, Chief Judge Jones contended that the application of "critical mass" at the classroom level "offers no stopping point for racial preferences."[170] Under

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[164] *Id.* at 247(Garza, J., specially concurring)(stating that "*Grutter* represents a digression in the course of constitutional law.").
[165] *See infra* Part III.B.3.
[166] Fisher v. Texas, 644 F.3d 301 (5th Cir. 2011)(*en banc* denied).
[167] *Id*. at 303 (Jones, C.J., dissenting).
[168] Chief Judge Jones contended that the court "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 as about as far as deference should go." *Id*. at 305 n.3.
[169] For a counterargument to Chief Judge Jones's contention here, *see infra* Part V.C.2 (arguing that a race conscious admissions policy could be useful in attaining within-group diversity even if it only affects small numbers of students, because it is the novel and diverse perspectives those students bring, not their small numbers, that ties the race conscious policies to the educational benefits of diversity). In fact, race conscious policies with a smaller impact are preferable because they create less stigmatic harm. Moreover, as institutions gradually phase out race conscious policies in accordance with *Grutter*'s sunset requirement, one should expect a gradual reduction in their impact. *See infra* Part V.C.3.
[170] 644 F.3d at 307. *See also* Brown-Nagin, *supra* note 7, at 126 (noting that some Justices "might find the appellant's pleas for an upper limit on critical mass—a ceiling and a firm end point—appealing. Without some concrete foundation for critical mass, Texas's pursuit of the right mix of underrepresented students arguably is limitless and would permit consideration of race in perpetuity [.]"). The "ceiling" and the "end point" here are actually different concepts, and the term "stopping point" in Chief Judge Jones' dissent could have two different meanings: 1. The "ceiling": A limiting principle on the weight of race in the admissions process. This is discussed

Fisher, a college or university could use lack of representation of minorities in any class or major as justification for a race conscious policy, and this emphasis on diversity at the classroom level "offers no serious ground for judicial review of a terminus of the racial preference policy."[171]

The Plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court, which after several delays,[172] the Court granted on February 21, 2012. The question presented in *Fisher* is:

> Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.[173]

The Supreme Court will hear oral arguments in *Fisher* on October 10, 2012, and the Court's ruling should occur in early 2013.

B. "Critical Mass" as Applied in *Fisher*

Fisher v. Texas represents the first post-*Grutter* litigation on affirmative action in higher education to apply the "critical mass" concept. The arguments in *Fisher* with respect to "critical mass" focused mainly on numbers and percentages of minority students. While the Fifth

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infra in Part V.B.; or 2. The "end point": the termination of race conscious policies altogether, in accordance with *Grutter*'s preference for race neutral policies and its "sunset" provision. Part V.C.3 *infra* discusses how race preferences can be gradually phased out.

[171] 644 F.3d at 307.

[172] On September 15, 2011, the Plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court. *See* Petition for Writ of Certiorari, *Fisher*, http://sblog.s3.amazonaws.com/wp-content/uploads/2011/09/Fisher-petiton-aff.-action.pdf. UT did not file a response brief, and the Supreme Court requested a response from UT by November 30, 2011, later extending that deadline until December 7, 2011. *See* Lyle Denniston, *Affirmative Action Case Develops*, November 1, 2011, http://www.scotusblog.com/2011/11/affirmative-action-case-develops/. UT then filed its response, arguing against certiorari largely on inappropriate vehicle grounds. *See* Brief in Opposition to Petition for Writ of Certiorari, *Fisher*, (No. 11-345). Available at http://www.utexas.edu/vp/irla/Fisher.BIO.Final.12.7.2011.pdf. The Court was first scheduled to consider the cert petition in conference on January 13, 2012, and then deferred consideration to its January 20 conference, and then again until the February 17 conference, before finally granting certiorari. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm.

[173] Fisher v. Texas, 631 F.3d 213 (2011)(en banc denied), *cert. granted* (February 21, 2012)(No. 11-345), http://www.supremecourt.gov/qp/11-00345qp.pdf

Circuit's opinion espoused a more comprehensive definition of "critical mass," its analysis was also based largely on numbers.

1. Plaintiffs' View of "Critical Mass"

The *Fisher* Plaintiffs' analysis of "critical mass" focused solely on campus-wide numbers of minority students. They argued that 21.4% minority (Black and Latina/o) enrollment at UT was a sufficient "critical mass," noting that in *Grutter*, the University of Michigan School of Law only attained 13.5% to 20.1% minority enrollment in the years preceding the lawsuit.[174] The Plaintiffs argued that "the concept of critical mass is defined as 'a sufficient number of underrepresented minority students such that such minority students would 'not feel isolated or like spokespersons for their race.'"[175] The Fifth Circuit panel purported to reject this view and was clear in noting that "critical mass" did not refer to "any fixed number."

2. UT and Fifth Circuit Panel's View of "Critical Mass"

The University of Texas had described "critical mass" in more abstract terms such as "meaningful representation"; however, the University's argument also centered on numbers. UT argued that: 1. The Plaintiffs improperly combined African Americans and Latina/os for purposes of assessing "critical mass";[176] and 2. In any case, "critical mass" had not been attained within the student body or at the "classroom level."[177]

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[174] *Id*. at 243. The Plaintiffs also argued "that minority enrollment at UT now exceeds the level it had reached in the mid-1990s, pre- Hopwood, when the University was free to obtain any critical mass it wanted through overtly race-based decisions." *Id.* at 244.

[175] Br. Pl.s-Appellants 6, http://www.utexas.edu/vp/irla/Documents/Plaintiffs.5th.Circuit.Brief.pdf. *See also Fisher* at 243 (noting that the Plaintiffs contend that "the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race.").

[176] Brief of Appellees at 46, Fisher v. Texas, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822), Available at: http://www.utexas.edu/vp/irla/Documents/Fisher.v.St.o.Tx-Appellees.Brief.pdf ("Plaintiffs … commit the fatal error of combining two different groups of underrepresented minorities in order to determine critical mass.").

[177] *See id*. at 48-49 (arguing that UT's classroom study "provides a dramatic illustration of the absence of diversity on campus at UT prior to 2005 … [and] … only further dramatized … that UT lacked sufficient diversity, including a critical mass of minority students, across the entire student body …").

To support this argument, UT noted that a large percentage of its seminar classes, with 10-24 students, had only 0 or 1 Black, Latino, and/or Asian American students.[178] These small classes are presumably the classroom settings where racial stereotypes could be broken down and cross racial understanding could be fostered, and unless there are at least two students of any group, there cannot be diverse perspectives represented from that group. In that sense, diversity within racial groups was implicit in UT's concept of "critical mass," although not stated directly.[179]

UT's response may have been a simple legal strategy for the lower court case, as it directly refuted the Plaintiff's claims in the clearest and simplest manner possible, and it provided a more nuanced view of "critical mass." Nevertheless, it did not fully articulate how within-group diversity has its own benefits and relates to the "critical mass" concept,[180] and it did not clearly distinguish "critical mass" from numerical goals at the classroom level.[181] Part V

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[178] *See Fisher* at 225 (According to[UT's study of classroom diversity], 90% of these smaller classes in Fall 2002 had either one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.")(internal citations omitted). Presumably, UT omitted the smallest classes—those with less than 10 students—because they would be statistically unlikely to have more than 0 or 1 students from various minority groups even if the numbers of minority students increased significantly.

[179] Judge Sam Sparks's district court opinion in *Fisher* also suggests this point. *See* 645 F.Supp.2d 587, 602-3 (W.D.Tex., 2009). ("Critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, affects in a positive way all students because they learn that there is not 'one' minority or majority view. … [T]here is a compelling educational interest for the University not to have large numbers of classes in which there are no students-or only a single student-of a given underrepresented race or ethnicity.").

[180] In its brief to the Supreme Court, UT does note that "[p]etitioner completely overlooks the diversity within racial groups that UT's holistic plan fosters." Brief of Respondents at 20, *Fisher v. Texas*, No. 11-345 (U.S. *argued* October 10, 2012). Available at http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf. UT's Supreme Court brief also asserts that "[h]olistic review permits the consideration of diversity within racial groups." *Id.* at 33. However, UT does not elaborate upon this idea or analyze it in depth, as this Article does. Additionally, the amicus brief for the Society of American Law Teachers, supporting UT and citing a draft of this Article, notes that Black and Latino students admitted under UT's race conscious policy "could contribute to diversity in various ways." *See* Brief of *Amicus Curiae* Society of American Law Teachers in Support of Respondents at 23, *Fisher v. Texas*, No. 11-345 (U.S. *argued* October 10, 2012). Available at http://www.utexas.edu/vp/irla/Documents/11-345%20bsac%20Society%20of%20American%20Law%20Teachers.pdf

[181] UT argued that it "[d]id [n]ot [a]rticulate a [r]igid, [n]umerical [d]efinition of [c]ritical [m]ass. Br. Pl.s-Appellants at 34, http://www.utexas.edu/vp/irla/Documents/Plaintiffs.5th.Circuit.Brief.pdf. However, while its definition may not have been "rigid," UT did not show how "critical mass" could be defined in any terms other numerical goals or ranges. *See also infra* Part III.D.1.

infra will discuss some other ways in which the goal of attaining diversity within racial groups might be used to justify a race conscious admissions policy.

Judge Higginbotham's *Fisher* opinion noted that the Supreme Court in *Grutter* was divided over the meaning of "critical mass," but it cited Justice O'Connor's majority opinion, which defined "critical mass" through "reference to the educational benefits that diversity is designed to produce."[182] The Fifth Circuit panel defined these benefits in broad terms: 1. "Increased Perspectives" - those brought by diverse groups of students into the classroom, which add valuable knowledge and make for engaging classroom discussions; 2. "Professionalism" – preparing students for "work and citizenship" by exposing them to diverse people and viewpoints; and 3. "Civic Engagement" – creating paths to leadership for individuals of every race and ethnicity.[183] However, the Fifth Circuit did not apply this definition further; it merely adopted UT's view of "critical mass" at the classroom level.

3. Judge Higginbotham's Analysis of the Top Ten Percent Law

Beyond the ruling in *Fisher*, Judge Higginbotham's analysis of the Top Ten Percent Law illustrates the need to understand "critical mass" in terms of within-group diversity. The other Fifth Circuit panel judges did not join this part of Judge Higginbotham's opinion, which stated that the Top Ten Percent Law "threatens to erode the foundations UT relies on to justify implementing *Grutter* polices . . . ."[184] Judge Higginbotham noted that the Top Ten Percent Law did lead to an increase in minority enrollment, and that by 2008, 81% of incoming in-state students at UT were admitted via the Top Ten Percent Law.[185] As a consequence, the opinion contended that the Top Ten Percent Law precluded UT from admitting minority students who

[182] Fisher at 219.
[183] *Id*. at 219-220. The Fifth Circuit panel also did not discuss the breakdown of racial stereotypes in classrooms, which was the specific educational benefit that *Grutter* cited at the classroom level. *See supra* notes 45-48 and accompanying text, and *infra* Part III.D.2.
[184] *Id*. at 242.
[185] *Id*. at 227.

went to more competitive schools but did not finish in the top 10 percent of their graduating classes, and who could contribute to diversity in various ways.[186] Judge Higginbotham referred to the Top Ten Percent Law as "a polar opposite of the holistic focus upon individuals" which was sanctioned by *Grutter*, and noted that "its internal proxies for race end-run the Supreme Court's studied structure for use of race in university admissions decisions."[187] Further, he opined:

> the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities. Such costs may be intrinsic to affirmative action plans. If so, *Grutter* at least sought to minimize those costs through narrow tailoring. The Top Ten Percent Law is anything but narrow.[188]

Thus, in spite of ruling in favor of the University, Judge Higginbotham also concluded that "[a]ppellants are correct that the decision to [enact the Top Ten Percent Law] … places at risk UT's race-conscious admissions policies."[189] Part III.D.4. presents a critique of Judge Higginbotham's analysis of the Top Ten Percent Law's effect on the constitutionality of race conscious policies.

C. Deference to Universities in *Fisher*

The issue of deference to universities on determining whether they had enrolled a "critical mass" of minority students was a contentious point in the Fifth Circuit's *Fisher* opinion, and it will be a major issue when the Supreme Court considers the case. The question is essentially what standard of review courts should apply when evaluating whether it is necessary for a university to use race conscious admissions policies to attain the educational benefits of

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[186] *Id*. Unlike Judge Higginbotham, this Article argues that *Grutter* allows race conscious policies to be used specifically to target the minority students noted here. *See infra* Part V.A.2.
[187] *Id*. at 242.
[188] *Id*. at 242.
[189] *Id*. at 243.

diversity. In the *Fisher* litigation itself, the two standards debated were "strong basis in evidence"[190] and "good faith."[191]

1. Plaintiffs' View of Deference

To determine whether a university needed to use race conscious admissions policies to attain the educational benefits of diversity, the *Fisher* Plaintiffs argued that the Fifth Circuit should adopt a "strong basis in evidence" standard, comparable to that used to evaluate the necessity of remedial race conscious policies in "public employment and government contracting cases."[192] This standard would place a significantly higher burden on universities than the "good faith" standard suggested in *Grutter*.[193] The Fifth Circuit panel rejected this argument.[194]

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[190] *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2675 (2009)(noting that "in the context of the Equal Protection Clause of the Fourteenth Amendment …[t]he Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a " 'strong basis in evidence' " that the remedial actions were necessary.")(internal citations omitted); *See also* Wygant v. Jackson Bd. of Educ. 476 U.S. 267, 277 (1986)(noting that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)(noting that City of Richmond did not provide a "strong basis in evidence for its conclusion that remedial action was necessary.")(internal quotation omitted).

[191] *See* Grutter 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. *See* … *Bakke*, supra, at 317-318, 98 S.Ct. 2733 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary)."). Justice Kennedy and Chief Judge Jones discussed the issue of deference in terms of strict scrutiny, and Part IV *infra* considers how strict scrutiny relates to deference.

[192] *See* Fisher at 232. ("Appellants urge that *Grutter* did not extend such deference to a university's decision to implement a race-conscious admissions policy. Instead, they maintain *Grutter* deferred only to the university's judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end. … Appellants would have us borrow a more restrictive standard of review … in which the Supreme Court 'held that certain government actions to remedy past racial discrimination-actions that are themselves based on race-are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary.'"). *See also supra* note 190 (discussing the "strong basis in evidence" standard).

[193] *See supra* notes 68 and 191.

[194] Fisher at 233 ("The high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration. In doing so, it touches the third rail of racial quotas. "). The *Fisher* panel also cited *Parents Involved in Community Schools v. Seattle School District No. 1* noting that "[w]hen scrutinizing two school districts' race-conscious busing plans, the Court invoked *Grutter*'s "serious, good faith consideration" standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply. .. The *Parents Involved* Court never suggested that the school districts would be required to prove their plans were meticulously supported by some particular quantum of specific evidence. Rather, the Court struck down the school districts' programs because they pursued racial balancing and defined students based on racial group classifications, not on individual circumstances." Fisher at 233-34 (internal citations omitted). *See also* Parents Involved at 704-

2. UT and Fifth Circuit Panel's View of Deference

UT argued for a "good faith" standard to assess the need for race conscious admissions policies,[195] citing *Grutter*'s deference to universities in choosing their student bodies.[196] As noted earlier,[197] the Fifth Circuit panel adopted this view,[198] which was heavily criticized by Chief Judge Jones in her dissent to the en banc denial.[199]

D. Critiquing *Fisher*'s Approach to "Critical Mass" and Deference

There are several critiques of the application of "critical mass" and deference to universities in *Fisher*, including those noted by Chief Judge Jones in her dissent.[200] Because the two issues are intricately linked in the Fifth Circuit's analysis,[201] this Section considers them together.

1. Focus on Numbers and Percentages

In spite of the Fifth Circuit panel's elaborate articulation of diversity-related objectives in *Fisher*, and its claim that "critical mass" should be defined in terms of the educational benefits of diversity, rather than by numbers,[202] the panel's analysis focused largely on numbers. It adopted UT's notion of "critical mass" at the classroom level, but it did not articulate any theory that

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5(noting that "[working] backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits … is a fatal flaw under the Court's existing precedent.")(internal citations omitted).

[195] *See* Appellee's Br. At 25-26, http://www.utexas.edu/vp/irla/Documents/Fisher.v.St.o.Tx-Appellees.Brief.pdf (noting that given "a university's unique First Amendment rights … universities are entitled to 'a degree of deference' and a 'presumption of good faith'—'absent a showing to the contrary' … [c]ourts must therefore'defer' to the considered judgment of admissions officials—and must not interfere with their admissions policies and decisions—unless the officials have acted unreasonably or in bad faith.").

[196] Grutter at 328-29.

[197] *See supra* Part III.A.4.

[198] Fisher at 233 ("*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.").

[199] *See supra* note 168.

[200] *See supra* notes 167-169 and accompanying text.

[201] Essentially, the Fifth Circuit deferred to UT not only the need for race conscious admissions policies, but also on the meaning of "critical mass."

[202] *See supra* notes 57 and 182-183 and accompanying text.

would allow *Fisher* to be decided on a basis other than whether a particular number or percentage of minority students were present at the classroom level. One might argue that because it did not adopt any fixed number as a "critical mass," *Fisher* is not in conflict with *Bakke*'s proscription of numerical goals.[203] However, by its very conclusion that the numbers of minority students in UT's participatory size classes did not constitute a "critical mass," the Fifth Circuit's *Fisher* opinion implies that some number or percentage—perhaps having at least two Black, Latino, and Asian American students in every class—would constitute a "critical mass." If this is the case, then that number or percentage effectively becomes a numerical goal.[204] *Fisher* then runs dangerously close to Justice Kennedy's concern that "critical mass is … used … to achieve numerical goals indistinguishable from quotas."[205] And if there is no such theoretical goal, then Chief Judge Jones's critique[206] that *Fisher* offers no meaningful ground for judicial review is valid.[207]

2. Incomplete Consideration of the Educational Benefits of Diversity

As noted, *Fisher* discussed "critical mass" in terms of "the educational benefits that diversity is designed to produce,"[208] and the Fifth Circuit stated these as: "Increased Perspectives," "Professionalism, "and "Civic Engagement."[209] The *Grutter* majority opinion was more nuanced, specifically linking "critical mass" to the breakdown of racial stereotypes through classroom discussions—by exposing students to a "variety of viewpoints" within each

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[203] *See supra* note 27 and accompanying text.
[204] *See supra* notes 37 and 54 and accompanying text. Professor Brown-Nagin notes that "UT's reliance on state population figures and classroom- and program-level racial diversity numbers as critical mass metrics is likely to elicit strong objection[]" and offers a "an alternative critical mass benchmark: the proportion of underrepresented senior high school students in Texas whom UT deems viable candidates for admission."). Brown-Nagin, *supra* note 7, at 118. This Article contends that any numerical benchmark for "critical mass" is likely to elicit objection from Justice Kennedy as a violation of *Bakke* and *Grutter*'s proscription on quotas and numerical goals. *See supra* note 30. *See also supra* Part I.A. for a general critique of numerical "critical mass" benchmarks.
[205] Grutter at 389 (Kennedy, J., dissenting).
[206] *See supra* notes 170-171 and accompanying text.
[207] *See infra* Part III.D.3.
[208] Fisher at 219.
[209] *Id*. at 219-220.

group.[210] While it also discussed broad societal benefits, such as producing a diverse representation of leaders, the *Grutter* majority delineated the classroom functions of "critical mass" more directly than *Fisher*, and implicit in those functions was a notion of "critical mass" that included diversity within racial groups.[211]

This omission in *Fisher* is important because the breakdown of racial stereotypes is key to understanding why "critical mass" must include diversity within racial groups, and why consideration of such within-group diversity is important in applying *Grutter*'s principles.[212]

3. Problematic Analysis of the Top Ten Percent Law

Judge Higginbotham opined (not joined by the other members of the three judge panel) that the Top Ten Percent Law, by increasing the number of Black and Latino students, raises questions about the need for further race conscious policies.[213] As noted earlier, mere numbers of minority students do not speak to the constitutionality of a race conscious policy. *Grutter* dictated that such policies are necessary to attain diversity within racial groups and break down racial stereotypes, not to attain any particular number of minority students.[214]

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[210] Grutter at 319-20. ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "minority viewpoint" but rather a variety of viewpoints among minority students.).

[211] *See id*. at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' … To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). *See also id.* 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. … These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races.).

[212] *See supra* Parts I.C. and II. As noted earlier, UT did allude to diversity within racial groups in its Supreme Court brief. *See supra* note 180. UT also noted the breakdown of racial stereotypes in its Supreme Court brief. *See infra* note 277.

[213] Fisher at 243. ("Appellants are correct that the decision to [enact the Top Ten Percent Law] … places at risk UT's race-conscious admissions policies."). This Article does not endorse or critique the Top Ten Percent Law as a policy. Rather, it just contends that Judge Higginbotham's assertion that the Top Ten Percent Law "places at risk" UT's race conscious policy is erroneous.

[214] *See supra* Part I.C.

Moreover, as the *Fisher* panel itself recognized, minority students admitted under the Top Ten Percent Law disproportionately enroll in certain schools and majors, and are underrepresented in other majors.[215] Earlier in the opinion, Judge Higginbotham's conclusion stated precisely why UT's race conscious policy is justified in addition to the Top Ten Percent Law:

> It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by *Grutter* gives UT that discretion …[216]

Essentially, the principle espoused here is that UT's race conscious policy is constitutionally justifiable to attain within-group diversity among minority students, which yields the educational benefits noted in *Grutter*.[217] Judge Higginbotham's statement that the Top Ten Percent Law "places at risk UT's race-conscious admissions policies"[218] merely obscures this point and is off base. This also illustrates the need for a coherent, well-articulated theory of "critical mass" that explicitly includes within-group diversity.[219]

Additionally, in the UT admissions system, the Top Ten Percent Law serves largely to admit Black and Latina/o students from segregated public schools.[220] UT could justify its race

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[215] Fisher at 240 ("While the [Top Ten Percent Law] may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.FN147 For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in theCollege of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American.").

[216] Fisher at 240.

[217] *See* Parts I.C. and II.C. In its Supreme Court brief, UT makes a similar point. *See supra* notes 180 and 277 and accompanying text.

[218] Fisher at 243.

[219] *See supra* Part I.C.

[220] *See* Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003)(Ginsburg, J., dissenting)("Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10% or 20% are minorities. Moreover, because such plans link college admission to a single criterion-high school class rank-they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."); Jennifer L. Shea, *Percentage Plans: An*

conscious policy on grounds of within-group socioeconomic and demographic diversity—to admit Black and Latina/o students from predominantly White schools in more affluent districts.[221] Not only would these students be more competitive academically,[222] but consistent with *Grutter*'s mandate, they would add diverse perspectives and experiences within the Black and Latina/o student populations on campus. One common stereotype of Black and Latino students is that all students from these groups come from poor, inner city backgrounds. If UT's race conscious policy did indeed target the noted population, then it serves directly to break down this racial stereotype, and thus to help attain the educational benefits of diversity noted in *Grutter*.[223] Moreover, the race conscious policy also adds to the overall diversity of viewpoints on campus, as Black and Latina/o students from more competitive, predominantly White schools have different experiences and perspectives than their counterparts who gain admission through the Top Ten Percent Law.

While there are many possible critiques of the Top Ten Percent Law,[224] it does not automatically impact the constitutionality of UT's race conscious admissions policy merely

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Inadequate Substitute for Affirmative Action In Higher Education Admissions, Note, 78 Ind. L.J. 587, 615 (2003)("In Texas, one critic of the Texas Plan remarked that the 'very success [of the percentage plan] to produce a diverse student body depends on continuing the de facto segregation of Texas high schools.'").

[221] At the Fifth Circuit, UT did not use this defense, focusing instead on "critical mass" at the classroom level. IT did, however, raise the a similar point in its Supreme Court brief. *See infra* note 277.

[222] The Fifth Circuit panel acknowledged this point. *See* Fisher at 240 ("[T]he Top Ten Percent Law hurts academic selectivity: UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive high school.").

[223] Grutter at 319-20 ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."). UT raised this point in its Supreme Court brief. *See infra* note 277. Another possible reason to have a mix of minority students from high and low socioeconomic backgrounds is that the former, who have often attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust to elite, predominantly White universities. This argument was raised by Shanta Driver, a lawyer for the student intervenors in *Grutter*, at a debate on affirmative action shortly after the Supreme Court's *Grutter* ruling. Social science studies can investigate whether such an effect does indeed occur and bolster any arguments for within-group diversity by UT and other institutions.

[224] *See, e.g., supra* note 220.

because it increases the number of minority students.[225] As long as UT's race conscious policy contributes to diversity in a unique manner, by admitting Black and Latina/o students from different backgrounds and with different viewpoints than those admitted via the Top Ten Percent Law, there is no problem with its constitutionality. Nevertheless, Part V elaborates further on how courts can evaluate the contribution of a race conscious admissions policy, while also applying strict scrutiny rather than the "good faith" standard adopted by the Fifth Circuit panel in *Fisher*.

4. The Question of Different Racial Groups

There is another potential problem that can arise if courts try to determine whether an institution has attained a "critical mass": what if a race conscious policy is necessary for some groups but not others? *Fisher* only dealt with numbers and percentages of Black and Latina/o students, and the Fifth Circuit seemed to assume that if Black and Latina/o students had been sufficiently represented, then the use of race would have been deemed entirely unconstitutional. However, this position does not take into account Native Americans and other groups. Even if there were sufficient numbers (and sufficient within-group diversity) for Black and Latina/o students, UT could still potentially have justified its race conscious policy for the purpose of admitting greater numbers of Native American students, or any other racial/ethnic group that is underrepresented.[226] Moreover, even if the number of Native American students admitted via

[225] This Article does argue that the Top Ten Percent Law or any other race neutral policy which contributes significantly to racial diversity may allow more stringent review of a co-existing race conscious admissions policy. *See infra* Part IV.C.2. However, it would still be erroneous to say that the race neutral policy automatically puts the race conscious policy in danger; that would only be true if the race conscious policy did not uniquely contribute to diversity above and beyond the race neutral policy. *See infra* Parts IV.C.2 and V.C.1.

[226] UT's policy did not grant *ex ante* preference to any particular group. *See supra* note 149. However, it can be presumed, given the University's arguments, that its race conscious policy primarily targeted Black and Latino students. Between 2007 and 2010, UT enrolled no more than 26 Native American students in any year, and in 2010 the number was only 13. *See Report 13: Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* 8, Office of Admissions at the University of Texas at Austin, http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf

the race conscious policy were very small, these students may still add different perspectives and contribute to the educational benefits of diversity.

Although not raised in *Fisher*, this example raises some problems with assessing "critical mass" that could occur in another case. Unlike a point system (*e.g.*, the policy rejected in *Gratz*), race conscious policies in a holistic admissions system are not group specific. Many different groups could contribute to the "critical mass" of perspectives that actualizes the educational benefits of diversity. Using demographic data from one or two groups to determine the constitutionality of an entire race conscious policy is problematic, as the policy could affect enrollment of other groups that may still be underrepresented. It is quite possible that at least some Native American students were admitted under UT's race conscious admissions policy; yet, neither the parties nor the Fifth Circuit addressed the impact on these students if the race conscious policy is struck down.

5. No Meaningful Standard for Judicial Review

As noted earlier in Part III.D.1, the *Fisher* panel's treatment of "critical mass" was indistinguishable from a numerical goal. Moreover, even if there is no such theoretical goal implicit in the Fifth Circuit's analysis of "critical mass," and even if there were no problem with defining "critical mass" in terms of numbers, Chief Justice Jones's criticism that the *Fisher* opinion offers no meaningful ground for judicial review is valid.[227] The *Fisher* opinion did not provide any indication regarding what would constitute a "critical mass" at the classroom level or how a court would review whether this goal had been attained; it merely deferred to UT. The panel noted that "[i]f a plaintiff produces evidence that calls into question a university's good faith pursuit of those educational benefits [that diversity is designed to produce], its race-

[227] *See supra* note 171 and accompanying text.

conscious admissions policies may be found unconstitutional."[228] However, it held that there was "insufficient reason to doubt UT's good faith conclusion that 'the University still has not reached a critical mass at the classroom level.'"[229] Regardless of whether this was a valid result,[230] it leads one to ask: 1. What would be necessary, beyond the evidence presented by the *Fisher* Plaintiffs, to create sufficient doubt? and 2. If there was such doubt, how would a court evaluate whether the race conscious policy was, in fact, constitutional?[231] These questions are particularly important given Justice Kennedy's concerns about deference to universities in his *Grutter* dissent.[232] The next two Parts take up these questions.

IV. Three Categories for Review: Implementation vs. Educational Objective vs. Need

As noted earlier, the appropriate standard of review—the level of deference given to universities—was an issue of contention in *Fisher*.[233] Moreover, Justice Kennedy's *Grutter* dissent distinguished between two categories of deference to universities, as he contended that the *Grutter* majority "confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."[234] An analysis of *Grutter* and *Fisher* together suggests that there are three separate categories of review when examining deference to universities: 1. Review of the actual implementation of race conscious policies as implemented to insure they comply with *Grutter*'s requirements, which requires strict scrutiny; 2. Review of whether the university's educational objective encompasses racial diversity (essentially, whether

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[228] *Id*. at 245.
[229] *Id*. at 244.
[230] This Article does not take a position on the Fifth Circuit's ruling in *Fisher*; it focuses on providing an alternative basis for analyzing the case.
[231] Part IV provides this Article's proposed answers to these questions.
[232] Grutter at 394 (Kennedy, J., dissenting)(noting that "courts … [should] apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives … [rather than] … be satisfied by … profession of its … "good faith …").
[233] *See supra* Part III.C.
[234] Grutter at 388 (Kennedy, J., dissenting).

the university has a compelling interest in diversity), which requires only "good faith" on the part of the university; and 3. Review of whether race conscious admissions policies are needed to attain this educational objective, which is the source of controversy in *Fisher*.[235] After delineating these three categories, this Part will focus on the last one. Justice Kennedy's view of this specific issue—how courts should review whether a university needs to use race conscious policies to attain its educational objective—will be key to the Supreme Court's ruling in *Fisher*.

A. Review of the Implementation of a Race Conscious Policy – Strict Scrutiny

The standard of review for race conscious policies as implemented is strict scrutiny: such policies must adhere to *Grutter*'s narrow tailoring principles. The *Grutter* majority,[236] the *Fisher* three judge panel,[237] Chief Judge Jones's dissent to the *Fisher* en banc denial,[238] and Justice Kennedy's *Grutter* dissent[239] all agree here. As noted earlier, there are commentators who argue that *Grutter*'s narrow tailoring test does not equate with traditional notions of strict scrutiny,[240] and Justice Kennedy's *Grutter* dissent contended that the *Grutter* majority did not actually apply strict scrutiny when assessing the University of Michigan Law School's admissions policy.[241] Nevertheless, in theory, there is agreement that strict scrutiny should be the standard of review for the implementation of a race conscious admissions policy.

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[235] *See* Br. Pl.s-Appellants at 43, http://www.utexas.edu/vp/irla/Documents/Plaintiffs.5th.Circuit.Brief.pdf ("The only dispute with regard to narrow tailoring … is whether UT has demonstrated a valid need for its policy.").
[236] Grutter at 308 ("All government racial classifications must be analyzed by a reviewing court under strict scrutiny.").
[237] Fisher at 231 ("It is a given that as UT's Grutter-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring …").
[238] 644 F.3d at 305 (Jones, C.J., dissenting)("[T]he Court['s] … many holdings … have applied conventional strict scrutiny analysis to all racial classifications.").
[239] Grutter at 388 (Kennedy, J., dissenting)("This Court has reaffirmed, subsequent to *Bakke*, the absolute necessity of strict scrutiny when the State uses race as an operative category.").
[240] *See* Ayres and Foster, supra note 82.
[241] Grutter at 387 (Kennedy, J., dissenting)("The Court … [in Grutter] … does not apply strict scrutiny."); *Id*. at 390 ("The majority fails to confront the reality of how the Law School's admissions policy is implemented.").

B. Review of a University's Educational Objective – "Good Faith"

The standard of review for a university's educational objective—whether a university has a compelling interest, given its educational goals and mission, in pursuing racial diversity—is "good faith." The *Grutter* majority,[242] the *Fisher* three judge panel,[243] Chief Judge Jones's dissent to the *Fisher* en banc denial,[244] and Justice Kennedy's *Grutter* dissent[245] all agree here also. Courts can presume on good faith that a university has a compelling interest in the educational benefits of racial diversity and that the university's goals and mission encompass this interest.[246]

C. Review of the Need for Race Conscious Policy to Achieve a University's Educational Objective: The Question in *Fisher*

The standard of review for whether race conscious policies are needed to attain a university's educational objective (*i.e.*, its compelling interest in racial diversity) is a key issue as the Supreme Court considers *Fisher*. The substantive question is whether race conscious policies are needed to attain the educational benefits of diversity, given that a race neutral policy (the Top Ten Percent Law) has increased racial diversity. Is the standard of review a deferential, "good faith" standard—as it is for whether the university has a compelling interest in racial diversity itself—or is the question of need subject to strict scrutiny, as the implementation of race

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[242] *Id.* at 343 ("We take the Law School at its word … [and] … presume[e] good faith of university officials …").
[243] Fisher, 631 F.3d 213, 233 (5th Cir.2011)("[S]o long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith …").
[244] Fisher at 644 F.3d 301, 305 n.3 (5th Cir. 2011)(Jones, C.J., dissenting)(*en banc* denied) (noting that a court "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 as about as far as deference should go.").
[245] *See* Grutter at 388(Kennedy, J., dissenting)(noting that "[i]n the context of university admissions the objective of racial diversity can be accepted … but deference is not given with respect to the methods by which it is pursued."). Justice Kennedy's language here suggests that he applies a deferential standard to reviewing a university's educational goals and compelling interest in seeking racial diversity.
[246] *See also* Bakke at 319 n.53 (Powell, J., concurring)("Universities … may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.").

conscious policies is?[247] The level of judicial review with respect to need was a major point of disagreement between the *Fisher* three judge panel and Chief Judge Jones.[248] In her dissent to the denial of the *Fisher* en banc hearing, Chief Judge Jones was extremely critical of the Fifth Circuit panel's deference to UT with respect to the need for race conscious policies; she claimed that such deference leaves no place for meaningful judicial review.[249] Chief Judge Jones stated that the *Fisher* three judge panel abrogated strict scrutiny by replacing *Grutter*'s narrow tailoring inquiry with a "good faith" standard,[250] and contended that the "good faith" standard applied to a university's compelling interest in diversity, not to the need for race conscious policies to attain this diversity.[251] Further, Chief Judge Jones criticized the *Fisher* panel for its conclusion that:

> so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.[252]

Chief Judge Jones contended that "this statement apparently conflates the University's compelling interest with narrow tailoring, or at least it misleads as to the importance of each prong of strict scrutiny analysis."[253]

A close reading of *Grutter* suggests otherwise: "The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will

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[247] The *Fisher* Plaintiffs advocated a "strong basis in evidence" standard to evaluate the need for race conscious admissions policies. *See supra* notes 190 and 192 and accompanying text. The *Fisher* three judge panel rejected this standard. *See supra* note 194.
[248] *See supra* Part III.A.4.
[249] *See supra* note 171 and accompanying text.
[250] *See* Fisher v. Texas, 644 F.3d 301, 305 (5th Cir. 2011)(Jones, C.J., dissenting)(*en banc* denied)("The *Fisher* panel opinion … supplants strict scrutiny with total deference to University administrators.")(footnote omitted).
[251] *Id*. at 305 n.3. (noting that a court "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 as about as far as deference should go.").
[252] *Fisher*, 631 F.3d 213, 233 (5th Cir.2011).
[253] *Id*.

terminate its use of racial preferences as soon as practicable."[254] This language implies that the Supreme Court in *Grutter* gave "good faith" deference to the University of Michigan Law School with respect to the need for race conscious admissions policies. The *Fisher* three judge panel also interpreted *Grutter* in this way.[255]

Nevertheless, when the Supreme Court decides *Fisher*, *Grutter*'s "good faith" deference may well not survive. As noted, Justice Kennedy was quite critical of this deference;[256] it was his chief reason for dissenting in *Grutter*.[257] Although his *Grutter* dissent addressed "educational objective" and "implementation" rather than need for race conscious policies,[258] it is likely that Justice Kennedy will apply a higher standard of review to assessing need than the Fifth Circuit panel did.

However, there is another method to examine this issue which is consistent with *Grutter*. The distinction between *ex ante* and *ex post* deference is significant, in terms of the practicability of judicial review. *Ex ante* here refers to assessing the need for race conscious policies before a race neutral strategy has been tried and proven effective in increasing diversity. *Ex post*, on the other hand, refers to the need for such policies after a race neutral policy (such as the Top Ten Percent Law) has been implemented and proven successful in increasing racial diversity: this is

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[254] *Grutter* at 309-10. This language—specifically "at its word"—implies that the Supreme Court in *Grutter* gave "good faith" deference to the University of Michigan Law School in determining the necessity of its race conscious policies.

[255] *See supra* note 198 and accompanying text.

[256] *Grutter* at 394 (Kennedy, J., dissenting)(noting that "[d]eference is antithetical to strict scrutiny, not consistent with it[,'" and criticizing *Grutter* majority for being "willing to be satisfied by the Law School's profession of its own good faith.").

[257] *See id.* at 395 (Kennedy, J., dissenting)("If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity.").

[258] *See id.* at 388 (Kennedy, J., dissenting)("The Court confuses deference to a university's definition of its educational objective with deference to implementation …"). Kennedy's dissent here addresses the university educational objective and the "implementation" of its race conscious policies, but not assessment of the need for race conscious policies.

the case in *Fisher*. This Article argues that *ex post*, it is more practical to apply a higher standard of review and give less deference to universities.

1. *Ex ante* Review with Respect to Need: "Good Faith"

It would be very difficult for a court to assess, *ex ante*, whether any viable race neutral alternative exists for enrolling a "critical mass" and attaining the educational benefits of diversity. First, there are numerous potential admissions policies that might increase diversity in one way or another, and *Grutter* stated that a university need not exhaust all race neutral alternatives.[259] Second, as argued earlier, "critical mass" cannot be measured readily,[260] and it would be difficult to devise judicial standards to determine whether a university has attained a "critical mass" and the accompanying educational benefits of diversity. This is why *Grutter* deferred to the "good faith" of universities on the issue of whether race neutral admissions policies can adequately replace race conscious ones.[261]

One could thus interpret *Grutter* as applying "good faith" deference to universities *ex ante* on the need for race conscious admissions policies. However, *Fisher* fits into the *ex post* category, because a race neutral policy—the Top Ten Percent Law—is already in place at UT.

2. *Ex post* Review with Respect to Need: Strict Scrutiny

The *ex post* analysis—after a race neutral policy has been implemented, as is the case in *Fisher*—is different. Here, a more stringent level of judicial review is practical and consistent

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[259] *Grutter* at 339 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."). Of course, *Fisher* could change this standard.
[260] *See supra* Part I.C.3.
[261] It may be possible for a Plaintiff to provide evidence, *ex ante*, that a race neutral policy could be as effective as a race conscious one in producing diversity. To take a hypothetical example, a Plaintiff (or an advocacy organization representing an appropriate Plaintiff) might conduct a study and show that if the University of Michigan implemented a policy similar to Texas's Top Ten Percent Law, then it could attain the same level of diversity as it does with race conscious policies. If that study was presented as evidence, it might warrant less deference; the University of Michigan would have to rebut the evidence or show how its race conscious policy contributed uniquely to diversity.

with *Grutter*.[262] A court need not just consider the possibilities: it can instead assess the efficacy of the implemented race neutral policy and compare it to the race conscious policy being challenged. This can create a meaningful standard by which courts can review the need for race conscious admissions policies.[263] If an institution has already implemented a race neutral policy to increase diversity, then a Plaintiff can make the argument that such a policy has yielded sufficient diversity. The *Fisher* Plaintiffs did this, by comparing percentages of Black and Latino students admitted prior to Hopwood and under the Top Ten Percent Law, and also by comparing UT's minority enrollment percentages with those of the University of Michigan Law School at the time of *Grutter*.[264]

UT rebutted this claim by showing that diversity at the classroom level was insufficient. However, the Fifth Circuit did not require UT to demonstrate that its race conscious policy was the least restrictive means for attaining sufficient diversity at the classroom level. The panel's analysis did lay out why the Top Ten Percent Law did not yield sufficient diversity—because it disproportionately admitted minority students in certain majors[265]--but the panel did not require UT to show that its race conscious admissions policy explicitly aimed to admit students who were not admitted through the Top Ten Percent Law. The panel rejected any standard higher than "good faith" for reviewing UT's decision to implement a race conscious admissions policy.[266]

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[262] *Grutter* did not make the *ex ante*/*ex post* distinction and thus did not address *ex post* review at all.
[263] Courts can also review Plaintiffs' claims that race neutral policies would generate sufficient diversity, if those claims are supported by sufficient evidence, such as empirical data. *See infra* Parts V.A. and V.C.1.
[264] *See supra* note 174 and accompanying text.
[265] *See supra* notes 215-216 and accompanying text.
[266] *Fisher* at 233 ("Grutter teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment."). The Plaintiffs in *Fisher* had argued for a higher standard of review. *See supra* notes 190 and 192 and accompanying text.

Nevertheless, a more stringent standard is certainly possible and practical. As noted in Part II.B.2, Professors Ian Ayres and Sydney Foster argue that *Grutter* deviates from the traditional least restrictive means standard of narrow tailoring.[267] Their critique centered broadly on *Grutter*'s narrow tailoring requirements, but can also apply to the Fifth Circuit's review of the need for UT's race conscious admissions policy in *Fisher*.[268] This Article argues that *Grutter* is consistent with a higher level of scrutiny *ex post*, for a race conscious policy implemented after a race neutral policy has increased diversity.[269] The Fifth Circuit could have required UT to demonstrate that its race conscious policy actually made a unique contribution to diversity, beyond that obtained through the Top Ten Percent Law. If courts are going to enforce *Grutter*'s preference for race neutral alternatives over race conscious admissions policies,[270] a higher standard than "good faith" would be necessary. The standard proposed is a goals-means fit which is considered the hallmark of strict scrutiny.[271]

Consistent with Justice Kennedy's view,[272] the next Part proposes and lays out the "unique contribution to diversity" test, which focuses on diversity within racial groups as a compelling interest and also employs strict scrutiny as the standard for reviewing the need for race conscious policies to attain this interest.

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[267] Ayres and Foster, *supra* note 82.
[268] *See supra* note 168 and accompanying text.
[269] *See supra* notes 262-266 and accompanying text.
[270] *See supra* notes 105-106 and accompanying text.
[271] *See supra* note 113 and accompanying text.
[272] *See Grutter* at 388 (Kennedy, J., dissenting)("The Court confuses deference to a university's definition of its educational objective with deference to implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted … but deference is not to be given with respect to the methods by which it is pursued.").

V. Unique Contribution to Diversity: Applying Strict Scrutiny in *Fisher*

This Part presents an approach to *Fisher* that is less deferential to universities than the Fifth Circuit opinion and applies strict scrutiny: the "unique contribution to diversity" test. The purpose of this test is to assess the underlying issue raised by *Fisher*—whether a race conscious policy is necessary to attain the educational benefits of diversity when a race neutral policy is in place and has increased diversity. The "unique contribution to diversity" test builds upon the earlier analysis of diversity within racial groups and "critical mass," but it does not require a court to determine whether a "critical mass" of minority students is present, or to define "critical mass" precisely in any specific numerical or other terms. Rather than attempting to determine whether a "critical mass" is present, the test focuses on whether the race conscious policy contributes uniquely to the educational benefits of diversity articulated in *Grutter*.

A. Assessing Unique Contribution to Diversity Instead of "Critical Mass"

Building on the analysis of standard of review and the general discussion of within-group diversity, this Article argues that a court could decide *Fisher* by assessing whether a race conscious admissions policy makes a unique, meaningful contribution to the educational benefits of diversity articulated in *Grutter*, rather than trying to determine whether a "critical mass" of minority students is present at the classroom or campus level.[273] For example, in *Fisher*, after

[273] The unique contribution to diversity test articulated here could work for the Top Ten Percent Law or for other race neutral admissions policies that aim to increase diversity. Other race neutral policies that might increase diversity include consideration of applicants' socioeconomic background, first generation college status, "marked residential instability" (defined in terms of moving from residence to residence frequently while growing up), geographic residency, enrollment in low-performing schools, a guaranteed percentile admission plan (i.e., Top Ten Percent Law), and admissions preference to all students (regardless of the race) at a school based on the school's socioeconomic or racial composition. *See* "Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education," http://www.justice.gov/crt/about/edu/documents/guidancepost.pdf at 7 (discussing Obama administration's recommendations for implementation of race conscious admissions policies and race neutral alternatives in higher education). The "Guidance" presumes these policies are "race neutral." *But see* supra note 15. Additionally, the "Guidance" recommends that institutions document their compelling interests and unique educational missions and make records of race neutral alternatives that are considered, along with the reasons for rejecting those alternatives. *See* "Guidance" at 7.

the Plaintiffs presented evidence that UT had obtained sufficient diversity via the race neutral Top Ten Percent Law, UT would have to articulate how its race conscious policy adds to the educational benefits beyond the Top Ten Percent Law, and in a manner not practical via the Top Ten Percent Law. UT could do this in at least two different ways:

1. Unique Contribution to Representation of Different Racial Groups

Although it was not addressed in *Fisher*, if UT was employing its race conscious policy to admit more Native American students or any other underrepresented minority group, then that would show that the policy is making a unique contribution to the educational benefits of diversity. UT would also have to show that the Top Ten Percent Law did not admit sufficient numbers of Native American students. This argument was not raised in *Fisher*, as both the Plaintiff and UT focused on Black and Latina/o students; nevertheless, the argument could be relevant in another case with similar facts.

2. Unique Contribution to Diversity Within Racial Groups

UT could also show that its race conscious policy contributed to diversity within racial groups, consistent with the educational benefits of within-group diversity and the notion of "critical mass" advocated in this Article. It could have argued that its race conscious policy was needed to attain more Black and Latino students in certain majors,[274] and presented evidence that the policy was actually used to admit students in those majors.[275] UT did in fact submit evidence conveying the disparate enrollment of minority students in certain majors, although its argument

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[274] The advantage of an individualized, holistic race conscious policy is that it does allow student majors and academic interests to be considered in admissions, and an admissions committee can target those majors that are underrepresented. This would be more difficult with a non-individualized process, such as the Top Ten Percent Law. *See Fisher* at 240 ("While the [Top Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs …").

[275] One possible confound here is that many students switch majors after enrolling in college. UT might also have to show that a significant percentage of students admitted on this basis actually remained in the given majors, so that classroom benefits of diversity are actualized.

focused solely on numbers at the classroom level and did not convey the educational benefits of within-group diversity. Moreover, the Fifth Circuit did not predicate its ruling in *Fisher* on any such showing of evidence, applying a deferential "good faith" standard instead.[276]

Alternatively, UT could have demonstrated that its race conscious policy contributed to socioeconomic, cultural, or geographic diversity among Black and Latino students.[277] This would also show that the race conscious policy made a unique contribution to diversity—perhaps by facilitating the admission of Black and Latino students with different experiences and perspectives than students admitted through the Top Ten Percent Law. If the policy allowed enrollment of Black and Latino students from more competitive, affluent, predominantly White schools, then it would contribute to such within-group diversity and thus to the educational benefits of diversity espoused in *Grutter*.[278] UT would also have to show that the Top Ten Percent Law did not admit significant numbers of these students.

UT could also demonstrate that its race conscious policy contributed to within-group diversity in some other unique way.[279] So long as the educational benefits of diversity obtained

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[276] *See supra* note 266 and accompanying text.

[277] This issue was not raised in *Fisher* at the district court or in the Fifth Circuit argument. However, in its Supreme Court brief, UT did assert that Black and Latino students admitted under its race conscious policy "have great potential for serving as a 'bridge' in promoting cross racial understanding, as well as in breaking down racial stereotypes." Brief of Respondents at 34, *Fisher v. Texas*, No. 11-345 (U.S. *argued* October 10, 2012). Available at http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf. Further, UT asserted "[p]etitioner's position would forbid UT from considering … a [high-achieving, affluent Black or Latino] student's race, even though admission of such a student could help dispel stereotypical assumptions (which actually may be *reinforced* by the top 10% plan) by increasing diversity within diversity." *Id*.(emphasis in original).

[278] *See supra* Parts I.C. and II.C. As noted earlier, one common stereotype of Black and Latino students is that all of these students come from poor, inner city backgrounds, and if UT's race conscious policy does indeed target the noted population, then it serves directly to break down this racial stereotype, and thus to help attain the educational benefits of diversity noted in *Grutter*. *See supra* note 223 and accompanying text.

[279] For example, Professors Kevin Brown and Jeanine Bell advocate for universities to distinguish between different Black groups, such as Black immigrants (from Africa and the Caribbean), multiracial persons, Black Latinos, and African Americans, when implementing their race conscious admissions policies. *See* Brown & Bell, *supra* note 8; Brown, *supra* note 8. Additionally, the Pew Hispanic Center has published reports detailing diversity within Latina/o populations in the U.S. *See, e.g.*, Seth Motel & Eileen Patten, *Hispanic Origin Profiles*, June 27, 2012, http://www.pewhispanic.org/2012/06/27/country-of-origin-profiles/ (noting that "[t]here are differences across [Latina/o] groups in the share of each that is foreign born, holds citizenship (by birth or naturalization) and is proficient in English. They are also of varying age, tend to live in different areas within the U.S. and have varying

by enrolling these students were consistent with those articulated in *Grutter*, and the group of students targeted could not readily be admitted in sufficient numbers via the Top Ten Percent Law or some other race neutral policy, the race conscious policy would be constitutional.

3. What Would be the Result in *Fisher*?

If the Supreme Court adopted the "unique contribution to diversity" test, 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. The eventual result would be an open question, dependent on UT's ability to demonstrate that its race conscious policy makes a unique contribution to diversity, above and beyond the Top Ten Percent Law.[280] Consistent with strict scrutiny, UT's race conscious policy would have to be narrowly tailored to fit the compelling interest of attaining within-group diversity and its educational benefits.

B. Limiting Principle on Race Conscious Policies to Attain Diversity

One question left open by the "unique contribution to diversity" test is what is the limiting principle on race conscious policies to attain diversity? The test itself does not place an upper limit on the use of race conscious admissions policies, because there are an infinite number of diverse viewpoints. In theory, a university could always use race to admit students with

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levels of education, homeownership, income and poverty."). Similarly, the White House Initiative on Asian Americans and Pacific Islanders (AAPI) has emphasized the significance of diversity within AAPI groups. *See* Arelis Hernandez, *Spreading the Word on Asian American Diversity*, DIVERSE ISSUES IN HIGHER EDUC., June 23, 2010, http://diverseeducation.com/article/13904c4/spreading-the-word-on-asian-american-diversity.html ("For Kiran Ahuja, the executive director of the White House Initiative on Asian Americans and Pacific Islanders (AAPI), communicating an accurate picture of Asian American diversity to policymakers across the federal government represents a fundamental task … [.]).

[280] As noted earlier, UT does assert in its Supreme Court brief that its race conscious policy adds to diversity within racial groups. *See supra* notes 180 and 277. This Article argues, however, that UT must go beyond mere assertion and actually demonstrate that it uses race in a manner to actually attain within group diversity and its educational benefits.

different viewpoints, even if vast racial and within-group diversity already exists within the admitted class of students. What then is the limiting principle for the use of race?[281]

There are at least two possible answers to that question: 1. The point of diminishing return for the educational benefits of diversity; and 2. The overall, aggregate weight given to race in the admissions process. Although both are generally consistent with *Grutter*, the latter makes more sense in light of the issues raised in this Article.

1. Point of Diminishing Returns for the Educational Benefits of Diversity

Inclusion of more diverse perspectives can always add to the educational experience. However, there are diminishing returns to educational benefits of diversity. Given the time and space constraints, students cannot experience all perspectives and educational opportunities that might be available in classrooms and on campuses more generally. As noted earlier in Part II, race conscious policies have costs. At some point, the stigmatic harm and other costs associated with race conscious admissions policies begin to outweigh any additional benefits of diversity—and one interpretation of *Grutter* is that beyond this point, it does not allow further consideration of race.[282]

While this analysis is logically consistent with the theory of *Grutter* articulated in this Article, it runs into a practical problem. It would be no easier for a court to determine the point of diminishing returns for the educational benefits of diversity than it would to determine if a "critical mass" is present;[283] either determination is highly subjective and context dependent.

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[281] *See also* City of Richmond v. Croson, 488 U.S. 469, 498 (1989)(rejecting "race-based decisionmaking [that is] essentially limitless … .").

[282] *Cf.* Ayres & Foster, *supra* note 82 at 576-77 (arguing that courts should conduct a cost-benefit analysis of race conscious admission policies). This Article does not contend that the *Grutter* majority itself viewed "critical mass" in terms of such a cost-benefit analysis. Rather, the contention here is that the diversity/stigmatic harm calculus noted here can be inferred from *Grutter*'s narrow tailoring principles and its notion of "critical mass."

[283] In one sense, determining the point of "critical mass" is the same as determining the point of diminishing returns for the educational benefits of diversity. When there is a "critical mass" present, enrolled through the type of admissions process that *Grutter* envisions, the educational benefits of diversity (racial and within-group) can

Moreover, *Grutter* has other provisions which may be more practical and may also create a lower bound for the use of race conscious policies—by limiting the weight that can be placed on race in the admissions process.

2. Aggregate Weight of Race in Admissions

Regardless of the educational benefits of diversity, there may be an upper limit on race conscious admissions policies based on the total aggregate weight that can be given to race in the admissions process. Since *Grutter* mandates that race be used in a flexible, non-mechanical fashion, based on individualized review,[284] there is no systematic weight of race for individual applicants in a constitutional, holistic admissions plan. However, the weight of race in aggregate—for all applicants in a given admissions cycle—can be measured, [285] and this aggregate weight compared to a designated limit that is determined by courts. Two provisions in *Grutter* suggest that there is such a limit. First, the *Grutter* majority opinion notes that "[n]arrow tailoring … requires that a race-conscious admissions program not unduly harm members of any

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outweigh, by the greatest extent possible, the stigmatic harms, reinforcement of stereotypes, and other costs created by race conscious policies necessary to attain that diversity. In this way, one can think of *Grutter*'s "critical mass" concept and narrow tailoring requirements as joint provisions to maximize the breakdown of racial stereotypes and promote cross-racial understanding—taking into account both the educational benefits of diversity and the costs of race conscious policies.

[284] *See supra* Part II.B.1.

[285] In *Grutter*, the Plaintiffs made an argument based on the aggregate weight of race in the admissions process. The *Grutter* Plaintiffs used data on the undergraduate GPAs and Law School Admissions Test (LSAT) scores of accepted and rejected applicants to the University of Michigan School from 1995 to 2000, all sorted by race, and calculated the odds of acceptance for members of each group. Part of the basis for their argument was that after statistically controlling for academic criteria and other variables, Black, Latino, and Native American applicants had a much higher probability of being accepted to the Law School than White and Asian American applicants. *See Grutter v. Bollinger*, 137 F.Supp.2d 821, 838 (E.D.Mich.,2001)(*overruled* 539 U.S. 306(2003))(Plaintiffs' expert witness concluding that "that '[a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value.'"). *But see* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 Mich. L.Rev. 1045, 1049 (2002) (("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.") cited in Gratz v. Bollinger, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting).

racial group."[286] While this provision could be interpreted to limit the weight placed on race,[287] *Grutter* held that "in the context of its individualized inquiry into the possible diversity contributions of all applicants," the [University of Michigan's] Law School's race-conscious admissions program does not unduly harm nonminority applicants."[288] If the Supreme Court follows this standard in *Fisher*, then undue burden will not be an issue: all parties concede that the weight given to race in UT undergraduate admissions is less than that upheld in *Grutter* for the University of Michigan Law School admissions program.[289]

Second, and perhaps more important when *Fisher* goes before the Court and particularly Justice Kennedy, race cannot be the "predominant" factor in the admission of any applicants. As Justice Kennedy stated in his *Grutter* dissent:

> There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure … that race does not become a predominant factor in the admissions decisionmaking.[290]

Nevertheless, while noting that a weight requirement could be read into *Grutter*'s individualized consideration requirement,[291] Professors Ayres and Foster contend that "the *Grutter* Court failed

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[286] *Grutter* at 341.
[287] *See* Ayres and Foster; *supra* note 82, at 558 (contending that "evidence the *Grutter* Court viewed the weight inquiry to be part of the individualized consideration inquiry comes in its discussion of the requirement that the affirmative action plan not unduly burden third parties."). Ayres and Foster further note that "the no-undue-burden requirement …[is]…a requirement that is related to the weight given to race in admissions … ." *Id*.
[288] *Grutter* at 341.
[289] *See Appellee's Br.* At 18, http://www.utexas.edu/vp/irla/Documents/Fisher.v.St.o.Tx-Appellees.Brief.pdf (noting that "UT's consideration of race is even more modest than the policy upheld in *Grutter*."). *See also Fisher*, 645 F. Supp. 2d at 608 (District court opinion noting that UT considers race in its admissions process as a factor of a factor of a factor.").
[290] *Grutter* at 393 (Kennedy, J., dissenting). *See also supra* Part I.C.1. (arguing that perhaps the University of Michigan Law School could not admit more Native American applicants without making race the predominant factor in admissions).
[291] *See* Ayres and Foster, *supra* note 82, at 558.

to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not."[292]

This Article agrees that the allowable weight given to race, in aggregate, needs to be clarified to provide a limiting principle for *Grutter*-like admissions plans. A full consideration of the aggregate weight of race in a holistic admissions process is beyond the scope of this Article.[293] Moreover, although the Supreme Court could address this issue if it revisits *Grutter*, it is not the immediate issue at play in *Fisher* itself.[294] The purpose of the discussion here is just to show how an upper bound on the aggregate weight of race in an admissions process can be a limiting principle for the "unique contribution to diversity" test, and for race conscious admissions more generally.[295]

C. Advantages of a "Unique Contribution to Diversity" Test

The "unique contribution to diversity" test described here has several advantages over a direct assessment of "critical mass." It directly addresses the critiques of the *Grutter* majority presented in Justice Kennedy's dissent and the critiques of the *Fisher* panel opinion presented in Chief Judge Jones's dissent,[296] and it also helps to resolve other dilemmas faced by judges and advocates trying to interpret and apply *Grutter*.

1. Ground for Judicial Review and Application of Strict Scrutiny

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[292] *Id.* Judge Garza's dissent in *Fisher* also contends that the weight of race preferences is a necessary element for meaningful judicial review. *See Fisher* at 251 (Garza, J., specially concurring)(noting that in *Grutter*, "the weight given to race as part of this individualized consideration is purposefully left undefined, making meaningful judicial review all but impossible.").

[293] The *Grutter* Plaintiffs' argument, *supra* note 285, provides some indication of how aggregate weight of race might be measured, notwithstanding Professor Liu's critique, *supra* note 285.

[294] All parties concede that the weight given to race in UT undergraduate admissions is less than that upheld in *Grutter* for the University of Michigan Law School admissions program.*See supra* note 289.

[295] An upper bound on the aggregate weight of race could also be useful in gradually phasing out race conscious policies. Plaintiffs in future cases could argue for reduction of the allowable upper bound, based on demographic changes, development of race neutral admissions strategies, or other developments that increase minority enrollment. *See infra* Part V.C.3.

[296] *See supra* notes 167-169 and accompanying text.

The unique contribution to diversity test directly addresses Justice Kennedy's concern, raised in his *Grutter* dissent, that:

> courts … apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives … [rather than] … be satisfied by … profession of its … "good faith.[297]

It also quells Chief Judge Jones's critique by offering "serious ground for judicial review of terminus of the racial preference policy."[298] The test articulated requires a precise fit between goals and means—characteristic of strict scrutiny. UT or another university could not just claim that underrepresentation of minorities in particular majors justifies its race conscious policy; it would have to show that the race conscious policy in question actually targets and admits minority students in those given majors. The same would be true if the university contended that the race conscious policy contributed to within-group socioeconomic or geographic diversity.[299]

The proposal here balances various interests, giving universities freedom to pursue different admissions strategies which use race in accordance with *Grutter*'s provisions, while also holding them accountable to *Grutter*'s preference for race neutral admissions policies. In doing so, it adopts standard of review similar in stringency to that advocated by the *Fisher* Plaintiffs.[300] However, unlike the "strong basis in evidence" standard, which is a "backward-looking attempt to remedy past wrongs,"[301] the "unique contribution to diversity" test focuses on "working forward from some demonstration of the level of diversity that provides the purported

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[297] *Grutter* at 394 (Kennedy, J., dissenting). *See also id*. (Kennedy, J., dissenting)(noting the "necessity for scrutiny that is real, not feigned, where the … category of race is a factor in decisionmaking.").
[298] *Fisher v. Texas*, 644 F.3d 301, 312 (5th Cir. 2011)(*en banc* denied).(Jones, C.J., dissenting).
[299] Of course, students often change majors while in college, and this could provide a basis for counterargument. Socioeconomic and geographic diversity within racial groups are not malleable after admission in this way and thus might be more viable bases for race conscious policies.
[300] *See supra* notes 190 and 192 and accompanying text.
[301] Fisher at 233.

benefits."[302] The test applies strict scrutiny to review the need for race conscious policies to attain diversity, when a race neutral policy has been or could be effective in increasing diversity. It requires a university to demonstrate the utility of a race conscious policy if: 1. A race neutral policy is in place that significantly increases diversity; or 2. A plaintiff provides sufficient evidence that a race neutral policy would result in levels of diversity comparable to the race conscious policy in question.[303] "Good faith" would apply only when there is not sufficient evidence presented to raise a question about the need for race conscious policies to attain the educational benefits of diversity.[304]

Additionally, while the "unique contribution to diversity" test requires a goals-means fit for race conscious admissions policies, it does not place an overwhelming burden on universities to accomplish this end. Institutions of higher education have or can readily obtain all of the data necessary to demonstrate how their race conscious policies contribute to the educational benefits of diversity. Colleges and universities may need to collect more demographic data on diversity within racial groups, and also to structure their race conscious admissions policies more carefully to make sure those policies make a "unique contribution to diversity." However, there is no barrier that would prevent these institutions from readily doing so.[305]

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[302] Parents Involved at 705.

[303] Such evidence might be data that convincingly show how a race neutral policy would increase diversity at a particular institution. The reason to allow such evidence to invoke more stringent review is to insure that universities have incentive to explore race neutral alternatives to their race conscious admissions policies—a particular concern of Justice Kennedy. See Grutter at 394(Kennedy, J., dissenting)("Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives."). In the absence of convincing evidence, courts would accept universities' "good faith" determination that race conscious policies are necessary, as dictated by *Grutter*.

[304] In such a case, a court would only review if the race conscious policy conformed to *Grutter*'s narrow tailoring principles; it would presume "good faith" on the university's part regarding the need for the race conscious policy.

[305] These measures may cause institutions to incur more costs, but colleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost effective point systems similar to the one struck down in *Gratz*. *See Gratz* at 275 ("Respondents contend that '[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system' upheld by the Court today in *Grutter*. … But the fact that the

2. Assessing the Unique (Even if Minimal) Impact of Race Conscious Policies

The "unique contribution to diversity" test also addresses Chief Judge Jones's contention that the race conscious policy has a minimal impact;[306] in fact, the test focuses on whether the race conscious policy does have a meaningful, unique impact. It is possible that a race conscious policy that admits only a small number of minority students can have a meaningful, unique impact, if those students add to the diversity of viewpoints and experiences in a manner beyond the race neutral policy.[307] The admission of even small numbers of Black and Latina/o students from certain majors, or from more competitive schools, would be justifiable if minority students in those majors were not admitted sufficiently via the Top Ten Percent Law, as would the admission of small numbers of Native American students via a race conscious admissions policy.

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implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.").(internal citation omitted).

[306] *See* text accompanying *supra* note 169.

[307] In its Supreme Court brief, UT also argued that "[t]he nuanced and modest impact of race under UT's holistic review plan is … a constitutional virtue, not a vice." Brief of Respondents at 36, *Fisher v. Texas*, No. 11-345 (U.S. *argued* October 10, 2012). Available at http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf. *But see* Ayres and Foster, *supra* note 81, at 523 n.27 ("At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest."). This contention does not apply to race conscious admissions policies in higher education for two reasons: 1. Even a small increase in diversity could have meaningful educational benefits: having one or two students from a given racial group may be significantly better than having none—particularly if those students are vocal in class or active on campus. In his Constitutional Law course at NYU Law, Professor Derrick Bell jokingly referred to Turquoise Young, a Black female student who always voiced her opinions, as a "critical mass of one." Professor Bell noted that in some of his classes, one or two vocal students had a tremendous impact on class discussions—although he acknowledged that this did not always happen. The variable and unpredictable nature of classroom dynamics is another reason why "critical mass" is difficult to measure. *See supra* Part I.C.3. 2. As a practical matter, in a holistic admissions system that is in compliance with *Grutter* (i.e., which uses race a flexible, unquantified plus factor), such minimal use of race would be difficult to detect. *Cf.* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL L. REV. 1139, 1142 (2008)(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."). There is no way to completely eliminate race from a holistic admissions process, as information about an applicant's race may be present throughout the application—via personal statements, student group membership, and even names which are correlated with group membership. In a "race neutral" legal regime, Plaintiffs might be able to prove significant use of race with statistics, but they would have a very difficult time proving or even detecting minimal usage.

3. Proper Application of *Grutter*'s "Sunset" Requirement

The "unique contribution to diversity" test also provides a reasonable path to apply *Grutter*'s sunset provision and eventually phase out race conscious admissions policies. The *Fisher* litigation and ruling seemed to presume that once a particular "critical mass" is attained, a university would immediately have to stop using race conscious admissions policies. *Grutter* stated that institutions should periodically review whether race conscious admissions policies are necessary, with the goal of phasing them out in favor of race neutral alternatives to attain diversity.[308] However, this cannot occur all at once when a particular "critical mass" is attained; in fact, this Article has argued that neither courts nor universities can precisely define "critical mass" or determine when a "critical mass" is present.[309] Rather, the implementation of race neutral alternatives should be an incremental process. *Grutter*'s "sunset" requirement is best interpreted to require a gradual reduction of race conscious policies in favor of race neutral admission policies "as they develop."[310] The "unique contribution to diversity" test provides a means for universities to gradually phase out use of race in admissions, and for courts to review this process as necessary. Eventually, this process would lead to the elimination of race conscious policies altogether, as espoused by *Grutter*, and the test articulated here provides a means for universities and for courts to assess, at any given time, to what extent their race conscious policies are necessary to attain the educational benefits of diversity.

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[308] *Grutter* at 342 ("[R]ace-conscious admissions policies must be limited in time. … [i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.").
[309] *See supra* Part I.C.3.
[310] *Grutter* at 342. ("Universities … can and should draw on the most promising aspects of … race-neutral alternatives as they develop."). This also reinforces the point in Part V.C.2 that race conscious policies with a small impact can still be constitutional: one would expect a gradual reduction in the use of these policies if indeed universities are seeking to apply race-neutral alternatives.

4. Continued Constitutional Viability of Race Conscious Admissions Policies

Although the "unique contribution to diversity" test holds universities to a more stringent standard to justify their use of race than the Fifth Circuit's "good faith" standard, it will allow race conscious admissions policies to be constitutionally viable for longer. The Supreme Court is likely to narrow *Grutter*'s doctrine on race conscious admissions,[311] and the "unique contribution to diversity" test allows for this without compromising the enrollment of minority students. This is the probably the best that proponents of affirmative action can hope for on the current Supreme Court.[312]

5. Highlighting Justice Kennedy's Values Conflict: Predicating Diversity on Segregation

Finally, the "unique contribution to diversity" test can address an ironic twist in *Fisher*—one that speaks to a values conflict in Justice Kennedy's jurisprudence, and in American society more generally. In *Grutter*, the Supreme Court recognized the educational benefits of diversity as a compelling interest, and even in dissent, Justice Kennedy recognized this interest[313] and reiterated it in *Parents Involved in Community Schools v. Seattle School District No. 1*.[314] Additionally, in *Parents Involved*, Justice Kennedy's concurrence noted that "[a] compelling interest exists in avoiding racial isolation,"[315]—a notion that would presumably be joined by four other Justices.[316] If in *Fisher*, the Court precludes UT from using race conscious admissions, it would essentially be saying that the Top Ten Percent Law—a policy that increases minority

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[311] *See supra* note 7.
[312] Professor Derrick Bell used to warn students in his Constitutional Law course not to "let the perfect be the enemy of the good." For advocates of affirmative action, the proposal in this Article is certainly not perfect, but compared to overturning *Grutter* altogether, it is good.
[313] *See Grutter* at 387-88(Kennedy, J., dissenting)("Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task …").
[314] 551 U.S. 701, 791 (2007)(Kennedy, J., concurring)("As the Court notes, we recognized the compelling nature of the interest in … diversity in higher education in *Grutter*.).
[315] *Parents Involved* at 797 (Kennedy, J., concurring).
[316] Justice Kagan recused herself in *Fisher*, but she along with Justices Breyer, Ginsburg, and Sotomayor would likely agree with Justice Kennedy here. *See supra* note 3.

representation only because of racial isolation in Texas public high schools[317]—prevents UT from using race to pursue the educational benefits of diversity.

This would be an ironic and unfortunate result. The "unique contribution to diversity" test allows Justice Kennedy to impose strict scrutiny—thus satisfying his misgivings in *Grutter*[318]—while still preserving UT's ability to use narrowly tailored race conscious admissions policies.

Conclusion

This Article has analyzed and elaborated upon the role of diversity within racial groups in determining the constitutionality of race conscious admissions policies. It has done so in the context of *Grutter* and *Fisher*, with an eye towards Justice Kennedy's impending vote in the latter. The theory of "critical mass" presented here reflects the compelling interest of breaking down racial stereotypes that is articulated in *Grutter*, and that logically coheres with *Grutter*'s narrow tailoring principles and the need for deference to universities. By analyzing these issues, this Article explicates the principle that race conscious admissions policies can aim not only to increase representation of particular groups of minority students, but also to attain diversity with racial groups.

Further, in its analysis of *Fisher*, this Article addresses the scope of deference given to universities with respect to race conscious admissions policies. It distinguishes deference on three issues: implementation, educational objective, and need and delineates how standards of review are different for each. The Article builds upon its earlier analysis of "critical mass" to

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[317] *See supra* note 220.

[318] *Grutter* at 395(Kennedy, J., dissenting)(" If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity.").

propose a tangible test for courts to evaluate the constitutionality of race conscious admissions policies when race neutral alternatives are in place, or when a Plaintiff convincingly demonstrates that they may work as well as race conscious policies. The "unique contribution to diversity" test proposed here focuses not on whether a "critical mass" is present on campus or in particular classrooms; rather, it centers more immediately on whether the race conscious policy in question makes a tangible, meaningful contribution to the diversity of perspectives and experiences on campus, beyond the race neutral policies that are in place. This test addresses the issues raised by Justice Kennedy in his *Grutter* dissent and the critiques of *Fisher* posed by Chief Judge Jones in her dissent to the en banc denial.[319] The "unique contribution to diversity" test also provides an interpretation of *Grutter* that allows strict scrutiny rather than "good faith" to apply in a case like *Fisher*.

Finally, this Article highlights the values conflict in *Fisher*—the problem of predicating campus diversity on school segregation through the Top Ten Percent Law. This conflict will be one that Justice Kennedy will grapple with when determining his vote in *Fisher*. It is also one aspect of a larger contradiction in America: the desire for an anti-essentialist, colorblind society without the will to tangibly address the rampant racial inequalities that exist in this country. Affirmative action in higher education is just one small manifestation of this dilemma, which is certain to appear again and again in American law and politics. It would be an ironic and unfortunate twist if the Court were to rule in a manner that predicates diversity in higher education on racial segregation in K-12 schooling, which has actually been increasing for the

[319] *See supra* notes 167-171 and accompanying text.

past 25 years.[320] But more immediately, it is important to highlight this conflict in Justice Kennedy's own jurisprudence,[321] as he will likely cast the deciding vote in *Fisher v. Texas*.

[320] *See, e.g.*, Gary Orfield and Chungmei Lee, *Historical Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf

[321] *See* Gerkin, *supra* note 6, for an excellent analysis of Justice Kennedy's evolving race and equal protection jurisprudence.