

West's
**EDUCATION LAW
REPORTER**



Volume 331

Education Cases Decided in the

**UNITED STATES SUPREME COURT
UNITED STATES COURTS OF APPEALS
UNITED STATES DISTRICT COURTS
STATE APPELLATE COURTS
AMERICAN TRIBAL LAW COURTS**



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Mat # 41730896

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COMMENTARY

MUTINY OVER STRICT SCRUTINY? INTERPRETING THE JUDICIAL APPROACH TO RACE-CONSCIOUS HIGHER EDUCATION ADMISSION POLICIES*

by

DAVID H.K. NGUYEN, MBA, JD, LL.M. ADV., PH.D.
AND LAWANDA WARD, JD, PH.D. CAND.**

Introduction

During the United States Supreme Court's 2015-16 term, *Fisher v. University of Texas at Austin*¹ (hereinafter referred to as *Fisher I* and *Fisher II*) was heard for a second time. The main issue in this case centered on the question of whether the University's implementation of its admissions plan, in conjunction with the state's Top Ten Percent Law,² meets the two-prong strict scrutiny standard of first, being a compelling state interest and second, a narrowly tailored means to meet the stated objective. Under the Top Ten Percent Law high school students who graduate in the top ten percent of their class are eligible for automatic admission to any public college or university in Texas.³ In its 2013 ruling in *Fisher I*, the Supreme Court surmised that the Fifth Circuit Court of Appeals failed to properly apply the strict scrutiny analysis to the contested plan. The Fifth Circuit Court of Appeals ruled in the first appearance of *Fisher I* in 2011 and the second in 2014 that the University's admissions format is constitutionally sound based on a strict scrutiny analysis. Since the application of the doctrinal framework for strict scrutiny is at odds between the high court and the Fifth Circuit, the Supreme Court's analysis in *Fisher II* is of great interest.

In this article using colorblind discourse as a theoretical framework, we posit why the Supreme Court accepted *Fisher I* for a second time especially in light of justiciability questions regarding the "troublesome threshold issues relating to standing and mootness,"⁴ analyze the Court's *Fisher II* oral

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 331 Ed.Law Rep. [1] (July 28, 2016).

** David Nguyen is an Assistant Professor of Education Leadership and Affiliate Assistant Professor of Law at the University of North Dakota and can be reached at david.hk.nguyen@und.edu. LaWanda Ward is a Higher Education & Student Affairs doctoral candidate at Indiana University and can be reached at lwward.@iupui.edu. Both research and examine how laws and policies impact and address student access and success in higher education.

1. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 293 Ed.Law Rep. 588 (2013) ("*Fisher I*"); *Fisher v. University of Texas at Austin*, No. 09-50822 (5th Cir. July 15, 2014) ("*Fisher II*"), available at: <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2.pdf>.

2. Tex. Educ. Code Ann. § 51.803 (West 2009) ("Texas Top Ten Percent Law")

3. *Id.*

4. Girardeau A. Spann, *Whatever*, 65 Van. L. Rev. 203, 204 (2012).

arguments, and share best practices on what higher education institutions can legally do to continue admitting and retaining people of color.

Some legal scholars have argued that the Supreme Court has adopted a colorblind constitutionalism,⁵ which is "a collection of legal themes functioning as a racial ideology"⁶ that operates as "treating race as if it were, like eye color, a wholly irrelevant characteristic."⁷ Colorblindness is maintained and perpetuated by the denial of race as a social and cultural definer. If race is reduced to one's imagination or a far-fetched rationale for claims of inequity, candid discussions about race are ignored or relegated to lacking substantive meaning.

This article begins with a brief synopsis of the seminal Supreme Court race-conscious higher education admissions cases dealing with the elimination of affirmative action practices in higher education, such as *Regents of the University of California v. Bakke*,⁸ *Grutter v. Bollinger*,⁹ *Gratz v. Bollinger*,¹⁰ and *Fisher I*. Additionally, legal claims subsequent to *Fisher I*, such as *Fisher II*, *Students for Fair Admissions v. Harvard University*¹¹ and *Students for Fair Admissions v. University of North Carolina-Chapel Hill*,¹² will be explored. In order to provide a foundation for our analysis, this article will also provide a primer on colorblind discourse and apply it to interpret the Supreme Court's race-conscious higher education admissions cases. The article then will briefly expand on the implications of *Fisher II* and best practices for institutions to continue recruiting, admitting, and enrolling students of color.

Legal Background on Race-Conscious Admissions

Opponents of race-conscious admissions programs have argued that they violate the Equal Protection Clause of the Fourteenth Amendment since they consider race in admitting students. Under the Equal Protection Clause of the U.S. Constitution, "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"¹³ or "similar individuals . . . be dealt with in a similar manner by the government."¹⁴ In order to determine the constitutionality of a government act, courts must apply one of three standards of judicial review—strict scrutiny, mid-level scrutiny, or rational basis.¹⁵

Because the use of race is in question in current race-conscious admissions cases, courts must employ the strict scrutiny standard when they decide whether the admissions policy was constitutional. Strict scrutiny is the utmost

5. Neil Gotanda, *A Critique of "Our Constitution is Blind"*, 44 *Stan. L. Rev.* 1, 68 (1991); Girardeau A. Spann, *Whatever*, 65 *Van. L. Rev.* 203, 209 (2012); David A. Strauss, *The Myth of Colorblindness*, *Sup. Ct. Rev.* 99, 134 (1986); Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Colorblind?* 20 *The J. Marshall L. Rev.* 201, 207 (1986).

6. See Gotanda, *supra* note 5 at 2.

7. See Strauss, *supra* note 5 at 114.

8. 438 U.S. 265, 57 L.Ed.2d 750 (1978) ("*Bakke*").

9. 539 U.S. 306, 177 Ed.Law Rep. 801 (2003) ("*Grutter*").

10. 539 U.S. 244, 177 Ed.Law Rep. 851 (2003) ("*Gratz*").

11. No. 1:14-cv-14176 (D. Mass. filed Nov. 17, 2014).

12. No. 1:14-cv-00954-LCB-JLW (M.D.N.C. filed Nov. 17, 2014).

13. U.S. CONST. amend. XIV, § 1.

14. R. ROTUNDA & J. NOWAK, *TREATISE CONSTITUTIONAL LAW* § 18.2 at 208 (3d ed. 1999).

15. See generally, K. SULLIVAN & G. GUNTHER, *CONSTITUTIONAL LAW* (17th ed. 2010).

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stringent standard of review used by the courts and the most demanding of the reviews to satisfy. Strict scrutiny is also required in government acts concerning discrimination based on national origin, religion, and alienage. In order to pass strict scrutiny, the government must first illustrate that its act to treat people differently is justified by a compelling state interest.¹⁶ As the law currently stands, the Supreme Court has found that the promotion of diversity in higher education is a "compelling state interest."¹⁷ Secondly, under the strict scrutiny standard, all courts must also find that race-conscious admissions policies are "narrowly tailored." In order to be constitutional, a government act employing racial classifications must satisfy both prongs.¹⁸ There have been four cases that have established the precedence for this interpretation over the past several decades. These cases are briefly discussed below.

Regents of the University of California v. Bakke

*Regents of the University of California v. Bakke*¹⁹ was the first Supreme Court case that set the foundation for race-conscious admissions. The University of California Davis Medical School considered race in its admissions practices by strictly setting aside sixteen out of 100 seats for "economically and educationally disadvantaged applicants and members of a minority group (Blacks, Chicanos, Asian Americans and American Indians)."²⁰ A White male applicant, Allan Bakke, who was rejected twice by the medical school claimed that he was denied admission because of his race in violation of the Equal Protection Clause.²¹ Bakke argued that the medical school accepted less qualified racial minority applicants since the minority students who filled the sixteen spots had lower GPAs and test scores than otherwise rejected White students.²² While the Supreme Court found the medical school's race-conscious policy unconstitutional because reserving a specific number of seats to be filled only by minorities was not narrowly tailored,²³ the Court reversed the lower court's ruling that race could never be considered a factor in admissions programs as Justice Powell noted that diversity is critical to train future leaders. It is a compelling state interest to have a broader definition of diversity where race and ethnicity are important factors along with other qualifications and characteristics.²⁴ Additionally, an admissions program may consider diversity holistically while examining an admissions application.²⁵ After *Bakke*, some universities were still uncertain how race could be used in admissions.²⁶ Nevertheless, colleges, universities, law

16. See *id.*

17. See *Grutter*, 539 U.S. at 326.

18. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 132 L.Ed.2d 158 (1995).

19. 438 U.S. 265, 57 L.Ed.2d 750 (1978).

20. *Id.*

21. *Id.* at 266.

22. See *id.*

23. Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go from Gratz and Grutter?* 33 J.L. & Educ. 21, 23 (2004); See also *Bakke*, 438 U.S. at 277.

24. *Id.* at 313-320.

25. *Id.* at 318.

26. See, e.g., *Podbejesky v. Kirwan* 38 F.3d 147, 95 Ed.Law Rep. 52 (4th Cir. 1994) (finding that University of Maryland's scholarship program for African-American students was not narrowly tailored); *Hopwood v. Texas* 78 F.3d 932, 107 Ed.Law Rep. 552 (5th Cir. 1996) (finding university's race-conscious admissions policy unconstitutional); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 149 Ed.Law Rep. 347 (9th Cir. 2000) (upholding university's race-conscious admissions policy); *Johnson v. Bd. of Regents*

and medical schools interpreted *Bakke* as the legal standard for creating race-conscious admissions program policies that would pass constitutional muster. Racial diversity had been validated as a compelling state objective by the Supreme Court. So for the next fifteen years, universities would not be subject to federal judicial review of affirmative action measures because the Supreme Court deferred to the judgment of the federal government, states, and institutions of higher education to utilize race as a factor in developing programs for equity purposes; however, in the mid-1990s challenges would emerge and continue to the present.

Grutter v. Bollinger & Gratz v. Bollinger

Over a couple of decades and many lower court decisions, the Supreme Court provided clarity about the appropriate use of race in *Grutter v. Bollinger* and *Gratz v. Bollinger*, both decided in 2003. The 6-3 *Gratz* decision struck down the undergraduate admissions program at the University of Michigan because it held that the automatic designation of twenty points on a 100-point scale to every applicant from an underrepresented minority group was not narrowly tailored nor a holistic approach.²⁷ Quota systems insulate certain applicants from competition with others based on race or ethnicity.²⁸ Unwilling to accept the University of Michigan's indefinite use of race as a consideration factor, Justice O'Connor suggested, "We expect that 25 years from now the use of racial preference will no longer be necessary to further the interest approved today."²⁹ However, in *Grutter*, the University of Michigan law school's admissions program satisfied *Bakke* because it considered each applicant as an individual, looking at how each may contribute to the diversity of the school and using race and ethnicity only as a "plus" in addition to other characteristics.³⁰ In a 5-4 decision, the *Grutter* Court adopted Justice Powell's ruling in *Bakke* finding race could be considered in admissions practices so long as it was one of the many factors considered.³¹ The Supreme Court upheld the reasoning that student body diversity is a compelling state interest.³²

The *Grutter* Court also required admissions programs to consider other criteria beyond grades and test scores, such as the applicant's personal statement, the quality of the undergraduate institution, letters of recommendation, and whether the applicant chose challenging undergraduate courses, among other criteria set by the institution.³³ This holistic review could also examine one's study abroad experiences, language proficiencies, and record of community service.³⁴ The Court found narrow tailoring does not require "exhaustion of every conceivable race-neutral alternative" be attempted before a race-conscious policy is implemented, but it does require that universities consider race-neutral plans in good faith.³⁵ Up until now, this approach to admissions has survived the strict scrutiny test while under

of the Univ. of Ga., 263 F.3d 1234, 156 Ed.Law Rep. 829 (11th Cir. 2001) (finding university's race-conscious admissions policy unconstitutional).

27. *Id.* at 250-60.

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

29. *See Gratz*, 539 U.S. 244, 344-347.

30. *Id.* at 328.

31. *Id.* at 312.

32. *Id.* at 320-25.

33. *See id.* at 339.

34. *See id.* at 340.

35. *Id.*

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review of the U.S. Supreme Court.³⁶ However, recent cases, such as the grant of certiorari of *Fisher II*³⁷ and the filing of cases against Harvard University and the University of North Carolina at Chapel Hill by the Students for Fair Admissions, Inc.,³⁸ suggest that universities may no longer be able to admit students with this approach. This potential change will be discussed later in the article. The *Grutter* Court mentioned "the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . ."³⁹ Given that only over a decade later since the Supreme Court ruled on the constitutionality of race-conscious higher education admission programs and evidence of institutional racism is still embedded in American society,⁴⁰ it is premature for today's U.S. Supreme Court justices to reverse its previously held precedence.

Fisher v. The University of Texas at Austin (Fisher I)

In 2008, Abigail Fisher claimed racial discrimination in violation of the Equal Protection Clause because she was denied admission to The University of Texas at Austin (UTA). Based on current legal precedence, UTA considered race as a factor among many others, and it currently admits students through a two-step process based on state and federal law.⁴¹ First, under the state's Top Ten Percent Law, high school students who graduate in the top ten percent of their class are eligible for automatic admission to any public college or university in Texas.⁴² The Top Ten Percent Law was passed in response to the decline in minority student enrollment after the decision in *Hopwood v. Texas*.⁴³ The law also suggested that public universities consider a variety of other factors in admissions decisions for students not eligible under the law, which included socioeconomic status, bilingual proficiency, and first-generation college student status.⁴⁴

In *Hopwood*, four White applicants who were denied admission to the University of Texas's law school were successful in their reverse discrimination lawsuit against the state of Texas and the law school. The plaintiffs challenged the race-conscious admissions program which allowed admissions officers to consider an applicant's "background, life experiences, and outlook"⁴⁵ in addition to LSAT and undergraduate education.⁴⁶ They alleged a violation of their rights under the Equal Protection Clause because the use of race as a consideration factor resulted in the admittance of students of color

36. See Eckes, *supra* note 15.

37. *Fisher v. University of Texas at Austin*, No. 09-50822 (5th Cir. July 15, 2014), available at: <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2.pdf>.

38. *Students for Fair Admissions v. The President and Fellows of Harvard College, et al.*, No. 1:14-cv-14176-DJC, 2014 WL 6241935, (D.Mass. November 17, 2014); *Students for Fair Admissions v. University of North Carolina, et al.*, No. 1:14-cv-00954, 2014 WL 6386755 (M.D.N.C. November 17, 2014).

39. See *Grutter*, 539 U.S. at 344-347.

40. David H.K. Nguyen, Jessica Ulm, Colleen Chesnut, and Suzanne Eckes, *Strict*

Scrutiny & Fisher: The Court's Decision & Its Implications, 299 Ed.Law Rep. 355 (January 30, 2014).

41. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2413, 293 Ed.Law Rep. 588 (2013).

42. Tex. Educ.Code Ann. § 51.803 (West 2009) ("Texas Top Ten Percent Law").

43. *Hopwood v. Tex.*, 78 F.3d 932, 107 Ed. Law Rep. 552 (5th Cir. 1996).

44. Tex. Educ. Code Ann. § 51.805 (West 2009).

45. See *Hopwood*, 78 F.3d. at 935.

46. *Id.*

while their White peers with comparable profiles were denied admission.⁴⁷ The federal district court ruled in favor of the law school based on its argument that the program addressed the pervasive history of societal racial discrimination so the use of race or ethnicity as a factor in admissions procedures was constitutional.⁴⁸

In contrast, the Court of Appeals for the Fifth Circuit rejected "Justice Powell's Compromise" and ruled race could not be used in the law school admissions process because achieving diversity using race or ethnicity was not deemed a compelling state interest.⁴⁹ The court further reasoned that rectifying past discrimination was not an acceptable reason for the program because the law school had no prior history of discriminatory practices against people of color.⁵⁰ In light of *Hopwood* it was no surprise that race was not a consideration factor. Although students are automatically eligible under the Top Ten Percent Law, it does not necessarily mean that they are automatically admitted to their institution of choice.

Secondly, based upon the *Grutter v. Bollinger* decision, applicants who are not eligible under the state's Top Ten Percent Law could be considered using the *Grutter* standard, which considered race as one of many "plus factors" that each candidate contributes to the learning environment.⁵¹ The University asked students to identify their race among five predefined racial categories, and race was not assigned a numerical value but considered a meaningful factor.⁵² The various plus factors were then plotted on a grid and students above a specific baseline were offered admission while others were not.⁵³ Fisher claimed that she was discriminated against because the University used the *Grutter*-based race-conscious admissions process after admitting students through the Texas-legislated Top Ten Percent Law. The District Court found the University's policy constitutional.⁵⁴ On appeal, the Fifth Circuit Court of Appeals ruled the policy was not akin to an illegal quota or racial balancing and affirmed the District Court's finding.⁵⁵ The Fifth Circuit interpreted *Grutter* to give substantial deference to the University to define the benefits of diversity that provide the compelling state interest and to determine whether its admission plan is narrowly tailored to achieve this goal.

The Supreme Court granted certiorari and held 7-1 that the Fifth Circuit Court failed to properly apply strict scrutiny. Justice Elena Kagan recused herself from participating in the *Fisher* cases because she was Solicitor General when the Department of Justice filed an *amicus curiae* brief in support of the University of Texas while the case was pending before the Fifth Circuit.⁵⁶ The Court vacated and remanded the case back to the Circuit

47. *Id.* at 938.

48. *Id.* at 939.

49. *Id.* at 944.

50. *Id.* at 951.

51. See *Fisher*, 133 S.Ct. at 2413.

52. *Id.*

53. See *id.*

54. See *id.*

55. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 264 Ed.Law.Rep. 564 (5th Cir. 2011).

56. Stephen Wermiel, *Justice Kagan's Recusals*, SCOTUSblog (Oct. 9, 2012), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/>.

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Court.⁵⁷ While the *Fisher I* Court reaffirmed the constitutionality of *Grutter*-based admissions programs that considered "racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body,"⁵⁸ it stressed, as outlined in *Gratz* and *Grutter*, that these admissions processes must undergo the strictest standard of judicial review.⁵⁹ Justice Kennedy in *Fisher I* agreed with the Circuit Court that the University has the expertise and experience to determine the scope of diversity and how it would benefit its campus, students, faculty, and staff. However, Justice Kennedy did not agree to the level of deference that the lower court gave to the University on how it implemented this admissions plan.⁶⁰ Justice Kennedy wrote, "... there must be a further judicial determination that the admission process meets strict scrutiny in its implementation. The University must prove that its chosen means to attain diversity are narrowly tailored."⁶¹ Justice Kennedy stressed on this prong of strict scrutiny the University is to receive no deference.⁶² Complying with this rationale would have required the lower court to test whether there was no other alternative to achieve the benefits of diversity than this admissions plan.

However, the Circuit Court noted that it was "ill-equipped" to make this determination and that it only needed to ensure the University made a good faith effort to consider alternatives.⁶³ Justice Kennedy disagreed stating the Circuit Court deferred the narrow tailoring analysis to the University's good faith without considering evidence sufficiently.⁶⁴ While the Supreme Court in *Fisher I* did not overrule the use of race-conscious admissions policies upheld in the previous *Grutter* decision, dissenting Justices Scalia and Thomas supported the notion for doing so.⁶⁵ In sharp contrast, Justice Ginsburg, argued that under strict scrutiny the University's policy does not require further judicial review, and its use of race as a factor continues to serve an important purpose in helping the university to increase the educational benefits of diversity.⁶⁶ In addition, she argued that colorblind, race-neutral policies, such as Texas' Top Ten Percent Law, which are supposed to be less discriminatory alternatives to race-conscious plans are actually by no means race-neutral.⁶⁷

On remand, the Circuit Court of Appeals heard the case again. The appeals court gave the attorneys a list of questions to consider at this next level. The list of questions addressed everything from whether the case is now moot because Fisher graduated from another institution, Louisiana State University, to whether the appeals court or district court should hear the next round. The Circuit Court had the option of ruling on the constitutionality of the plan or sending the case down to the district court to determine additional facts involving the plan. Attorneys for Fisher urged the appeals

57. *Fisher*, 133 S.Ct. 2411.

58. *Id.* at 2417.

59. *Id.*

60. *Fisher*, 133 S.Ct. 2411.

61. *See id.*

62. *See id.*

63. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231, 264 Ed.Law Rep. 564 (5th Cir. 2011).

64. *Id.*

65. *Fisher*, 133 S.Ct. 2411, 2422.

66. *Id.* at 2433-2435.

67. *Id.*

court to rule on the case while the University requested the case be sent back to the district court in order to gather additional facts about the admissions policy.⁶⁸ The Circuit Court found merit with Fisher's position by stating "there are no new issues of fact that need to be resolved, nor is there any identified need for additional discovery; that the record is sufficiently developed" ...and a remand "would likely result in duplication of effort".⁶⁹

Some scholars suggest the Supreme Court wanted the lower court to make it more challenging for colleges and universities to implement race-conscious admissions plans.⁷⁰ However, the Circuit Court in a 2-1 decision found merit again with the University's plan being constitutionally sound in both prongs of the strict scrutiny analysis by being narrowly tailored to achieve diversity. The court began its discussion by restating the Supreme Court's precedent in *Grutter* that "strict scrutiny must be applied to any admissions program using racial categories or classifications."⁷¹ The court acknowledged that Justice Kennedy's *Fisher* dissent "faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity—whether UT Austin's efforts were narrowly tailored to achieve the end of a diverse student body."⁷² Before proceeding with its analysis, the court declared "our charge is to give exacting scrutiny to these efforts."⁷³ After a detailed discussion of the Top Ten Percent Plan and the University's additional admissions office diversity efforts, the court reiterated the *Grutter* precedent, "narrow tailoring does not require exhaustion of every race neutral alternative" but rather "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."⁷⁴ The court asserted "put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits 80% of the student body with no facial use of race at all."⁷⁵ The court then brought attention to the circumstances under which the plan exists, "the sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system."⁷⁶ The court shared data in a footnote to support its assertion, "the de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race."⁷⁷ The court viewed the Top Ten Percent Plan "nearly indistinguishable from the University of Michigan's Law School's program in *Grutter*"⁷⁸ and "was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores or other unique

68. Lyle Denniston, *Next Round in Fisher Case*, SCOTUSBLOG (Sep. 12, 2013), <http://www.scotusblog.com/2013/09/next-round-in-fisher-case/>.

69. *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 642, 307 Ed.Law Rep. 661 (5th Cir. 2015).

70. See Nguyen, et al., *supra* note 31.

71. See *Grutter*, 539 U.S. at 326.

72. *Fisher*, 758 F.3d 633, 637.

73. *Id.*

74. See *Grutter*, 539 U.S. at 339.

75. See *Fisher*, *supra* note 58, at 649.

76. *Id.* at 650.

77. *Id.* at 651.

78. *Id.* at 653.

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skills.”⁷⁹ Persuaded by the University’s admission plan and its implementation, the court stated “to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of *Bakke* and *Grutter*.”⁸⁰ In its final opinion sentence the court invoked two of the four seminal race-conscious cases, “to reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command-due only a courtesy salute in passing.”⁸¹

In his 26-page dissent, Judge Emilio M. Garza argued the University did not define “critical mass” and therefore “whether the University’s use of racial classifications in its admissions process is narrowly tailored to its stated goal . . . remains unknown.”⁸² He accused the majority of “defer[ing] impermissibly to the University’s claim” and asserted “this deference is squarely at odds with the central lesson of *Fisher*.”⁸³ Ultimately, Judge Garza concluded that the University had not satisfied the narrowly tailored prong and therefore he would have reversed the court’s previous decision and ruled in favor of Fisher. *Fisher* has yet to be concluded. The Fifth Circuit Court of Appeals entered its ruling on July 15, 2014, in favor of the University and the en banc request made by Fisher’s legal team was denied. Fisher filed a second petition for certiorari, which the Supreme Court granted. Now the Court will decide if the strict scrutiny two-prong test was properly applied on remand by the Fifth Circuit in *Fisher I*.

Oral arguments of *Fisher v. The University of Texas at Austin (Fisher II)*

On December 9, 2015, the Supreme Court heard another challenge against the University. The same attorneys for both parties who argued in *Fisher I* on October 10, 2012 did so in *Fisher II* almost three years. Bert Rein, a founding partner of a Washington, D.C. based law firm, Wiley Rein, LLP represented Abigail Fisher. Gregory Garre, the 44th U.S. Solicitor General during the George W. Bush administration and current partner at Latham & Watkins, represented the University of Texas at Austin (UTA) and the current U.S. Solicitor General Donald B. Verrilli, Jr. argued as an *amicus curiae* supporting UTA. During the oral arguments the justices excluding Justice Clarence Thomas posed several questions to attorneys on both sides.

Abigail Fisher’s Argument

Attorney Rein was in the midst of outlining the burden on UTA to show evidence that it met the two-prong strict scrutiny standard when Justices Ginsburg and Sotomayor interrupted him. Justice Ginsburg first inquired whether there would be a case if the Top Ten Percent Plan was eliminated and only the *Grutter*-like plan remained.⁸⁴ Attorney Rein responded that the current plan was not in compliance with *Grutter* because “it’s not aimed at a critical mass” and before he could proceed much further, Justice Sotomayor posed additional questions appearing not be satisfied with Rein’s response.

79. *Id.*

80. *Id.* at 662.

81. *Id.* at 660.

82. *Id.* at 662.

83. *Id.*

84. Oral Argument at 4, *Fisher v. University of Texas at Austin*, No. 14-981, 2015 WL 8482483 (S. Ct. Dec. 9, 2015).

For example, she asked how UTA had improperly used race in conflict with the *Bakke* standard.⁸⁵ Attorney Rein responded that *Bakke* and *Grutter* established a requirement of individual applicant profiles being compared to each other to determine selection based on the "context of the class and the educational experience" which is a stated goal of the institution.⁸⁶

Justice Kennedy entered the discourse by explaining that the Top Ten Percent Law was a result of the decision made by the Fifth Circuit Court of Appeals in *Hopwood v. Texas*.⁸⁷ Justice Kennedy, who has been labeled a swing voter in civil rights related cases, asked attorney Rein to give an example of a concrete criterion that the university would be able to use to achieve diversity.⁸⁸ Rein did not give a direct response to the question instead he argued that the solicitor general would attempt to transform "abstract goals into concrete objectives".⁸⁹ Justice Scalia inquired about whether there had been critical mass studies conducted and how would the university know when it had reached a sufficient number of students of color.⁹⁰ Rein stated the University utilized a good faith approach that passed muster with a majority in the Fifth Circuit but not with the Supreme Court.⁹¹

Justices Kennedy and Alito seemed concerned that additional facts were needed for the Court to make a sound decision, such as if there was information about the number of students of color admitted in the additional holistic review process that considered race versus the admitted students of color in the Top Ten Percent Plan only⁹² and without that data Justice Kennedy said "we're just arguing the same case."⁹³ During the justices' exchanges with attorney Rein, it appeared questions about the process to achieve classroom diversity were not addressed to several justices' satisfaction.⁹⁴ When Justice Kennedy inquired if there was evidence of UTA's holistic review process actually being a quota, attorney Rein asserted Fisher had not raised that claim but he did accuse UTA of using an approach that was "masked and hidden" because the university had a goal that was heavily focused on increasing the numbers of students of color.⁹⁵

In the last few minutes of his time, Justice Ginsburg inquired about what type of relief, if any, Fisher was seeking from the Court since she had graduated and there was not a class action suit.⁹⁶ Attorney Rein responded that Fisher was entitled to her application refund due to being subjected to an unfair review process, transportation costs for attending an out of state institution, and the denial of future earnings since she did not earn a UTA degree.⁹⁷

University of Texas at Austin's Argument

Attorney Garre began his argument on behalf of UTA with an attempt to answer three questions with one being why the holistic review process that

85. *Id.* at 5-6.

86. *Id.*

87. *Id.* at 11 (see *Hopwood v. Tex.*, 78 F.3d 932, 107 Ed.Law Rep. 552 (5th Cir. 1996)).

88. *Id.*

89. *Id.* at 12.

90. *Id.* at 12-13.

91. *Id.* at 13.

92. *Id.* at 18.

93. *Id.* at 20.

94. *Id.*

95. *Id.* at 34-35.

96. *Id.* at 35.

97. *Id.* at 36-37.

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UTA used is constitutionally permissible. He asserted that the Texas legislature concluded "in 2009 that the holistic plan at issue was a necessary complement to the State's Top 10 Percent Law."⁹⁸ He emphasized that "the Fifth Circuit found that without the consideration of race in the mix for those students, admissions would approach an all-White enterprise."⁹⁹ Justices Alito and Kennedy challenged attorney Garre in the same manner as they had with attorney Rein and attorney Garre also did not have data on how many students of color were admitted through the holistic review process but would not have been selected if the holistic review plan that included race was not in effect.¹⁰⁰ Justice Breyer joined the discussion by reading two passages from the Court's *Fisher I* decision. First, "The decision to pursue the educational benefits that flow from student diversity is in substantial measure an academic judgment to which some, but not complete, judicial deference is proper." And second, "The University must provide a, quote, 'reasoned, principled explanation for the academic decision to pursue diversity.'"¹⁰¹ He immediately commented, "Your plan is pursuing diversity among the 25 percent who are not admitted under the top 10 plan."¹⁰² Here Justice Breyer was giving attorney Garre an opportunity to get to the main issue for the Court to consider, whether race can be used as an additional consideration factor to obtain the university's goal of increasing diversity beyond the race neutral Top Ten Percent Law. Attorney Garre responded to Justice Breyer's question by citing the supplement joint appendix and deposition testimony of two UTA admissions officers which supported the university's position that it had clearly outlined why and how "it was pursuing the educational benefits of diversity in a broad sense"¹⁰³ and its procedure had been approved by the Supreme Court's precedence in *Grutter*.

Chief Justice Roberts along with Justices Scalia, Alito, and Kennedy posed questions that reflected a skepticism about whether the University had met its burden of persuasion by providing enough evidence to support its additional use of race in the admissions process. Chief Justice Roberts asked attorney Garre if the 25-year end to affirmative action suggested by Justice Sandra Day O'Connor in *Grutter* would expire within twelve years.¹⁰⁴ Garre responded that systematic problems in K-12, specifically test score disparities along racial lines made a definitive answer difficult.¹⁰⁵

Attorney Garre continued to reiterate that the UTA holistic review plan was in compliance with the *Grutter* and *Bakke* standards. He petitioned the Court not to decide "that University of Texas can't consider race, or . . . that universities that consider race have to die a death of a thousand cuts for doing so."¹⁰⁶ To support his plea, Garre pointed to the lack of diversity that resulted occurred in California and Michigan institutions of higher education after the enactment of state laws that prohibit the use of race by any government actor for employment and education decisions.¹⁰⁷

98. *Id.* at 38.

99. *Id.* at 39.

100. *Id.*

101. *Id.* 45-46.

102. *Id.*

103. *Id.* at 46-47.

104. *Id.* at 49.

105. *Id.*

106. *Id.* at 66-67.

107. *Id.* at 67.

Justice Scalia interrupted attorney Garre's closing arguments by making statements that admission to UTA is more harmful than hurtful to Black students. "There—are there those who contend that it does not benefit African-Americans to—to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less—a slower-track school where they do well."¹⁰⁸ He supported his assertion by referencing an *amicus curiae* brief submitted that stated "most of the black scientists in this country don't come from schools like the University of Texas. . . . They come from lesser schools where they do not feel that they're—that they're being pushed ahead in—in classes that are too—fast for them."¹⁰⁹ Despite attorney Garre's attempt to respond to Justice Scalia, he continued "I'm just not impressed by the fact that—that the University of Texas may have fewer, Maybe it ought to have fewer. And maybe some—you know, when you take more, the number of Blacks, really competent Blacks admitted to lesser schools, turns out to be less. And—and I—I don't think it—it—it stands to reason that it's a good thing for the University of Texas to admit as many Blacks as possible. I just don't think—"¹¹⁰ Attorney Garre was finally able to address Justice Scalia's comments by stating, "This Court heard and rejected that argument, with respect, Justice Scalia, in the *Grutter* case, a case that our opponents haven't asked this Court to overrule. If you look at the academic performance of holistic minority admits versus the top 10 percent admits, over time, they—they fare better."¹¹¹ The Court stated in its *Fisher I* opinion that deference to university's decision making procedures would not be given unbridled deference. Justice Breyer reiterated this position during an exchange with the university attorney Gregory Garre in his final few minutes, ". . . this Court will give some, but not complete, deference to what the University decides."¹¹²

U.S. Solicitor General's Argument Supporting UTA

Solicitor General Verrilli shared time with attorney Garre to present the federal government's position of support for UTA's holistic review program. Chief Justice Roberts specifically asked, "How does the university know when it has achieved its objective?"¹¹³ The solicitor general did not directly answer the question but instead he focused on how the proposed approach by Fisher's counsel of setting a demographic goal was not the solution.¹¹⁴ He informed the Court that UTA's approach of reviewing "concrete evidence" in the form of "well-designed surveys of student attitudes and faculty attitudes. Graduation and retention rates. Are racial incidents going up and down—up or down on—on campus in frequency"¹¹⁵ would determine when the university's diversity goal has been reached. Chief Justice Roberts did not find merit with the solicitor general's response. He voiced concern about the amount of numbers referenced by UTA's attorney Garre and labeled the surveys that were issued to collect information from faculty and students as "kind of sophomoric."¹¹⁶ In a subsequent exchange, Justice Scalia challenged Solicitor

108. *Id.*

109. *Id.*

110. *Id.* at 67-68.

111. *Id.* at 68.

112. *Id.* at 75.

113. *Id.* at 78.

114. *Id.* at 79.

115. *Id.* at 81.

116. *Id.* at 82.

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General Verrilli's assertion that with only 300 to 400 students out of 6,000 there would be a "material risk of racial isolation."¹¹⁷ Justice Scalia interrupted with the questions "600 is going to make a difference?" and "They wouldn't feel isolated with 600?"¹¹⁸ Solicitor General Verrilli responded that a significant difference could be made with an additional 200 students of color admitted to UTA.¹¹⁹

In an effort to move the Court in a different direction, Solicitor General Verrilli referenced briefs submitted by the military in support of the UTA holistic review program and voiced concern that without the consideration of race, the officer corps would lack diversity in its leadership.¹²⁰ Justice Alito immediately challenged this assertion by questioning if the students of color admitted under the Top Ten Percent plan would be inferior officers compared to those admitted under the holistic review process which included race.¹²¹ Solicitor General Verrilli responded that no students admitted to UTA would be inferior to their peers and returned to his advocacy for people of color needed in the ranks to have a diverse environment and troops.¹²² It was a strategic maneuver to discuss briefs submitted by military leaders because they seemed to have influenced Justice O'Connor's vote and the Court's decision in *Grutter*.

Fisher's Rebuttal

In his rebuttal, attorney Rein informed the Court that a constant question throughout the oral argument had not been adequately addressed which was "What impact did the use of race actually have?"¹²³ Attorney Rein referenced Judge Garza's dissenting opinion during the Fifth Circuit Court's initial review of *Fisher I* in which Judge Garza's calculation estimated the consideration of race made an insignificant impact in the admission of students of color.¹²⁴ Justice Sotomayor interrupted attorney Rein and asked if he thought change happened overnight and before he could respond Justice Scalia asked to hear more about the data from Judge Garza's findings.¹²⁵ Attorney Rein questioned UTA's holistic review process and stated since the university could not show how students of color are admitted it should no longer be able to use it.¹²⁶

Fisher II Outcome Possibilities

Based on the questions presented in the oral argument by justices with differing perspectives on the constitutionality of race-conscious admissions policies, a majority of the justices may remand the case back to the district court for additional evidence gathering. However, since there appeared not to be a satisfactory response to the use of race in the holistic review process, a majority may rule the use of race is unconstitutional because the university did not meet both prongs of the strict scrutiny standard as to why race is a consideration factor for the purposes of a diverse student body especially since some students of color are admitted through the Top Ten Percent Plan.

117. *Id.* at 83.

118. *Id.* at 84.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* 85.

123. *Id.* at 89.

124. *Id.*

125. *Id.* at 90.

126. *Id.* at 93-94.

Current Status of Race-Conscious Admissions

The current status of race-conscious admissions is uncertain. With the rehearing of *Fisher II* in the Supreme Court and new legal challenges against Harvard and UNC-Chapel Hill, there is a full-fledged effort to eliminate race as one of the many factors in admissions decisions and the ability of institutions of higher education to shape the diverse make-up of their student bodies. The Supreme Court may either eliminate the use of race-conscious admissions, make it more challenging for institutions to utilize, or heighten the strict scrutiny standard impacting affirmative action programs broadly. The following section provides information on the current challenges against Harvard and UNC-Chapel Hill.

Students for Fair Admissions, Inc. v. Harvard and Students for Fair Admissions v. University of North Carolina-Chapel Hill

On Monday, November 17, 2014, two separate lawsuits were filed against Harvard University and the University of North Carolina-Chapel Hill by a "newly-formed, nonprofit, membership organization whose members include highly qualified students recently denied admissions to both schools, highly qualified students who plan to apply to both schools, and their parents."¹²⁷ The 120-page complaint against Harvard accused the University of "employing racially and ethnically discriminatory policies and procedures in administering the undergraduate admissions program at Harvard College in violation of Title VI of the Civil Rights Act of 1964."¹²⁸ The plaintiffs also claim that Harvard's current program has resulted in a limited number of qualified Asian-Americans admitted yearly to the university.¹²⁹ Project on Fair Representation (POFR)'s executive director, Edward Blum, helped to fund this lawsuit as well as *Fisher v. University of Texas*. Ironically, the suit comes six months after POFR launched a website soliciting "students who claim they were not admitted to Harvard because of their race to participate in a potential lawsuit."¹³⁰ Harvard's general counsel released a statement that referenced Justice Powell's opinion in *Bakke* touting the university's admissions plan being "legally sound" and alleged the University has continued the same practice consistently over the years.¹³¹

Within the group of plaintiffs, there is at least one Asian American who is a first generation college student, graduated top of their high school class, scored a 36 on the ACT, and active in multiple extracurricular activities, who was denied admission to Harvard. This student will seek a transfer to Harvard if it no longer uses race or ethnicity in its admissions preference.¹³² In the UNC-Chapel Hill complaint, the plaintiffs alleged the same violation of Title VI and that the University cannot fulfill the strict scrutiny standard upon constitutional review since in the University's amicus brief submitted in *Fisher I* the University stated it could "... maintain, and actually increase,

127. Delwiche, Theodore R. *Suit Alleges Race-Based Discrimination in Harvard Admissions Practices*, The Harvard Crimson (Nov. 18, 2014), <http://thecrimson.com/article/2014/11/18/law-suit-admissions-alleged-discrimination/>.

128. *Students for Fair Admissions v. The President and Fellows of Harvard College, et al.*,

No. 1:14-cv-14176-DJC, 2014 WL 6241935, (D.Mass. November 17, 2014).

129. *Id.* at 4.

130. See Delwiche, *supra* note 65.

131. *Id.*

132. *Id.*

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racial diversity through race-neutral means if it ends its race-based affirmative action policies".¹³³ To date, no activity has been reported on either case moving forward in the federal district courts. However, institutions of higher education and other stakeholders should continue to monitor these cases.

Colorblind Discourse

Colorblind discourse centers "on managing the appearance of formal equality without worrying over much about the consequences of real-world inequality. Proponents of a colorblind ethos define freedom and equality exclusively in terms of the autonomous—some would say atomized-individual."¹³⁴ This "atomized-individual" is without a history and void of political affiliations or social interactions. This person exists in an abstract world with equal opportunity and preferences rather than a racist, sexist, homophobic and socially stratified structure. We use colorblind discourse to examine these cases in a critical lens to understand the judicial approach in race-conscious admissions.

Colorblindness in legal jurisprudence was first introduced by Justice Harlan in his *Plessy* dissent; "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens".¹³⁵ Considering the preceding text to this infamous statement that has been adopted by so many, provides a complete and accurate understanding of Justice Harlan's viewpoint:

The White race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind. . . .¹³⁶

Colorblind Discourse Applied

In *Bakke*, Justice Powell gives a different interpretation of the colorblind argument that "prohibits the use of race as the sole factor in government decisions absent a compelling justification."¹³⁷ Ironically, each Justice asserted that his colorblind position was based on an interpretation of the Fourteenth Amendment's Equal Protection Clause. A critical distinction in both Justices' interpretations is that "Harlan believed that the Fourteenth Amendment has special relevance for Blacks, while Powell believed that Blacks and Whites must receive the same treatment."¹³⁸ Both interpretations lead to different outcomes and not necessarily either will result in justice for people of color in admission to race-conscious higher education institutions. Justice Powell's version of colorblindness disconnects history and reality from the Court's analysis. It allows White privilege to be unnamed and avoids the

133. *Students for Fair Admissions v. University of North Carolina, et al.*, No. 1:14-cv-00954, 2014 WL 6386755 (M.D.N.C. November 17, 2014), at 26.

134. Lani Guinier & Gerald Torres, *The Ideology of Colorblindness*. In Gallagher, C. (Ed.), *Rethinking the Color Line: Readings in Race and Ethnicity*, 101, 105 (2014).

135. *Plessy v. Ferguson* 163 U.S. 537, 559 (1896).

136. *Id.*

137. Crenshaw, *supra* note 76, at 247.

138. B. K. Fair, *Foreword: Rethinking the Colorblindness Model*. 13 Nat'l Black L.J. 1, 2 (1993).

questioning of White supremacy and social dominance. Colorblind rhetoric distracts our society from dealing with the complex nature of "race" and "racism." It has stalled the discussions and actions of colleges and universities as they have adopted this detrimental Utopian viewpoint.

Whiteness being normal aligns with the rhetoric of innocence which is a concept discussed by legal scholar Ross (1990) as a legal tool used by White rhetoricians, lawyers and judges. He asserts the avoidance of Whites benefiting people of color's oppression is a key component in the rhetoric of innocence because it "obscures this question: 'What White person is innocent, if innocence is defined as the absence of advantage at the expense of others?'"¹³⁹ *Bakke* is an example in which "Justice Lewis Powell introduced the rhetoric of innocence to the Court's affirmative action discourse," which occurred throughout the opinion and the oral argument. In the *Bakke* opinion he stated, "the patent unfairness of 'innocent persons...asked to endure...[deprivation as] the price of membership in the dominant majority... forcing innocent persons...to bear the burdens of redressing grievances not of their making."¹⁴⁰

Derrick Bell voiced four key concerns with diversity and described it as a "distraction" to the achievement of racial justice. First, the focus on achieving diversity as a goal relegates systemic and structural societal barriers that have not been eradicated in our society. Bell stated the "Michigan lawyers and civil rights allies shifted the focus from remediation for past discrimination to the value of diversity to the schools and to society."¹⁴¹

Second, "diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected."¹⁴² Litigation possibilities are increased by the Court's fragmented opinions in both *Gratz* and *Grutter*. Bell argued "the narrowness of this diversity 'victory' in the law school case and its vulnerability in future litigation can be gauged by the *Grutter* dissents."¹⁴³ Heavy criticism from the disagreeing justices of diversity meeting the strict scrutiny standard and the lack of definition for "critical mass" are evidence that the use of race in higher education admissions is not settled. Further proof of this turmoil is the Supreme Court's acceptance of hearing *Fisher* a second time. This decision signals to civil rights allies that the Supreme Court is not in agreement with the Fifth Circuit Court of Appeals application of the strict scrutiny standard to use race as factor in conjunction with Texas's Top 10 Percent Plan. There should be great concern that the decision will be made through a colorblind constitutional analysis which would eradicate the use of race in any form as an admissions consideration factor.

Third, Bell argued the myth of meritocracy continues to prevail with achieving diversity as the forefront of race-conscious admissions discourse. He discussed meritocracy by using Justice Thomas's opinion in *Grutter v. Bollinger* that concurs in part and dissents in part. Thomas explained that he

139. Thomas Ross, *Just Stories: How the Law Embodies Racism and Bias*, 301 (1996).

140. *Id.* at 302.

[16]

141. *Id.* at 1624-25.

142. *Id.* at 1622.

143. *Id.* at 1627.

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is anti-affirmative action because of "his conviction that all such remedies are unconstitutional"¹⁴⁴ and his personal belief that "blacks can achieve in every avenue of American life without the meddling of university administrators."¹⁴⁵ Justice Thomas pointed out the fact of alumni's children being specially admitted is evidence of the lack of merit as a criterion, yet this group does not draw needed attention and has not been included in litigation. Fourth in the diversity distraction argument is the lack of resources devoted to K-12 schools in impoverished areas that produce students who are not equipped to excel in higher education equitable to their peers.¹⁴⁶

With the Court's majority members' change in viewpoint of race-conscious admissions programs between *Bakke* and *Fisher*, the Court has established a challenging set of "doctrinal barriers that must be overcome before a majoritarian affirmative action plan can be upheld."¹⁴⁷ Having determined that strict scrutiny is the analysis tool to determine if a governmental program meets a compelling state interest and is narrowly tailored to achieve the stated interest in race-conscious higher education cases, the benefits of diversity and the Court's analysis has evolved into a position that "equate[s] benign discrimination with invidious discrimination, as if the harms that affirmative action imposes on Whites are equivalent to the harms that Whites have imposed on racial minorities."¹⁴⁸ Additionally, the Court at one-time viewed racial affirmative action solutions as if there was inadequacy with proposed race-neutral measures. Based on the analysis of seven of the nine members of the Court and the lack of differences between *Gratz* and *Grutter*, the concern for a definitive standard is warranted. Ironically, Justice Kennedy stated that strict scrutiny "must not be strict in theory but feeble in fact,"¹⁴⁹ which seems to be the same sentiment of two members of the conservative majority bloc. Justices Scalia and Thomas stated in *Grutter* that they did not find merit with "the educational benefits flowing from student body diversity"¹⁵⁰ meeting the compelling state interest analysis.

Implications of *Fisher II* and the Potential Elimination of Race-Conscious Admissions

The discourse in the *Fisher II* oral argument was focused on the number of students of color admitted through the holistic review process beyond the Top Ten Perce Law plan. Institutions of higher education should not wait for the Supreme Court's *Fisher II* ruling but instead review their admissions policies and criteria. If there is a holistic review utilized, the factors considered should be transparent to potential students via websites, printed materials, and during on-campus recruiting events. Specifically, individual applicant review should consist of evaluating contributions in the form of various backgrounds and characteristics that align with an institution's goals for inclusion.¹⁵¹ Additionally in 2011, the U.S. Department of Justice in conjunction with the Department of Education released a report¹⁵² summarizing the

144. *Id.* at 1629.

145. *See id.*

146. *Id.* at 1622.

147. Spann, *supra* note 4, at 50.

148. *Id.*

149. *See Fisher*, 133 S. Ct. at 2421.

150. *See id.* at 2413.

151. College Board and Education Counsel Report 2014 (n.d.).

152. United States Department of Justice and United States Department of Education, *Guidance on the Voluntary Use of*

Supreme Court's *Grutter/Gratz* decisions and providing examples for admissions practices that would be legal. One of the recommendations included a top percentile program similar to the one challenged in *Fisher I* as well as using non-race factors such as socioeconomic and/or first generation status to potentially draw students from different racial and ethnic backgrounds.¹⁵³ Programs like the Top Ten Percent Plan are in the balance until the Supreme Court decides *Fisher II*. If the Court chooses to find the Top Ten Percent plan unconstitutional there could be negative implications for "economic or geographic diversity to the extent that those factors correlate to race."¹⁵⁴ Institutions of higher education that target students using race-neutral factors may have to cease or restructure their criteria if a connection can be made to race, otherwise a potential for lawsuits alleging reverse discrimination may be imminent.

Race to Achieve Diversity in Postsecondary Education, 2004. 154. Spann, *supra* note 1, at 53.

153. *See id.*

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