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In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in Fisher v. Texas

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IN DEFENSE OF DEFERENCE: THE CASE FOR RESPECTING EDUCATIONAL AUTONOMY AND EXPERT JUDGMENTS IN *FISHER v. TEXAS*

Eboni S. Nelson *

INTRODUCTION

In 2003, following a contentious twenty-five year debate,[1] the Supreme Court sanctioned the use of race-based affirmative action in higher education.[2] However, the Court's decisions in *Gratz v. Bollinger*[3] and *Grutter v. Bollinger*[4] did not quell the debate regarding race-conscious decision making in higher education.[5] In-

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1. The scholarly and political debate regarding the necessity and constitutionality of race-conscious affirmative action in higher education escalated following the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See, e.g.*, Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1753–54 (1996); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 117 (2003); Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1078–79 (2002); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1039–40 (1998); Laurence H. Tribe, *Perspectives on* Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864, 864–65 (1979); Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 697–99 (1998).

2. *See* Gratz v. Bollinger, 539 U.S. 244, 271, 275 (2003) (sanctioning the consideration of race in higher education admissions although finding that the University of Michigan's undergraduate affirmative action plan was unconstitutional); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding the University of Michigan Law School's affirmative action program).

3. 539 U.S. 244.

4. 539 U.S. 306.

5. *See* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199–1201 (2010); Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspec-*

stead, they ignited fervent commentary and discourse on numerous issues,[6] ranging from the constitutionality of minority-targeted financial aid and recruitment programs[7] to the decisions' applicability (or inapplicability) in the context of elementary and secondary education.[8]

Much of the scholarly analyses following the cases have examined the Court's opinions themselves and the rationales relied

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tive, 96 IOWA L. REV. 1549, 1554 (2011).

6. *See, e.g.*, Ward Connerly, *Achieving Equal Treatment Through the Ballot Box*, 32 HARV. J.L. & PUB. POL'Y 105, 108–12 (2009) (discussing post-*Grutter* efforts to pass state ballot initiatives prohibiting the use of racial preferences in government decision making); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1 (2005) (critiquing Professor Sander's research methods and conclusions regarding the harms and benefits of affirmative action for African American law students); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371–72 (2004) (asserting that affirmative action actually harms its beneficiaries more than it helps them); David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1552–58 (2004) (discussing the role that market-based diversity arguments played in *Grutter* and the effect the opinion will likely have on corporate diversity efforts in the future).

7. *See, e.g.*, Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146, 168–70 (2008); Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851 (2010); Helen Norton, *Stepping Through* Grutter*'s Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543, 548–60 (2005); Alexander S. Elson, Note, *Disappearing Without a Case—The Constitutionality of Race-Conscious Scholarships in Higher Education*, 86 WASH. U. L. REV. 975 (2009); Ellison S. Ward, Note, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609 (2009); Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1.

8. *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007) (plurality opinion) ("The present cases are not governed by *Grutter*."), *with id.* at 842 (Breyer, J. dissenting) ("In light of this Court's conclusions in *Grutter*, the 'compelling' nature of these interests in the context of primary and secondary *public education follows here a fortiori*."). *See generally* Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937 (2008) (examining the possible application of *Grutter* to public primary and secondary school desegregation programs, public employment, and government contracting programs); Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need For a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 638, 651–55 (2007) (addressing the application of strict scrutiny to K-12 student assignment programs); Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475 (2009) (arguing that the Justices in *Grutter* overlooked the problems of restricting a community's decision to shape its own racial future); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 329–30, 334–36 (2006) (discussing, in part, *Grutter*'s application in the context of voluntary K–12 integration plans).

upon by the Justices in reaching their holdings.[9] Of particular interest has been Justice Sandra Day O'Connor's majority opinion in *Grutter*, which has spawned criticism from both affirmative action opponents[10] and proponents.[11] Interestingly, both supporters

9. *See, e.g.*, 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 (2004) (analyzing the Court's application of strict scrutiny in both cases); Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 TEX. REV. L. & POL. 63 (2004) (discussing the long-term viability of the diversity rationale); David I. Levine, *Public School Assignment Methods After* Grutter *and* Gratz*: The View from San Francisco*, 30 HASTINGS CONST. L.Q. 511, 514–15 (2003) (discussing Justice O'Connor's acceptance of the University of Michigan Law School's compelling state interest); Joshua M. Levine, *Stigma's Opening:* Grutter*'s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 464–75 (2006) (discussing benefits of the *Grutter* diversity rationale that extend beyond those recognized in *Bakke*); Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in* Grutter v. Bollinger, 38 U.C. DAVIS L. REV. 545 (2005) (arguing that the *Grutter* diversity rationale overlooks Asian Americans); Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in* Grutter v. Bollinger *and* Gratz v. Bollinger, 59 STAN. L. REV. 761 (2006) (examining the social science data considered by the Court).

10. *See, e.g.*, Connerly, *supra* note 6, at 112 (criticizing the *Grutter* majority for "ruling in the interest of racial expediency rather than . . . interpret[ing] the Constitution and the 1964 Civil Rights Act objectively"); 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, 2047 (2004) ("[V]irtually every statement in support of racial preferences in Justice O'Connor's *Grutter* opinion is misleading or false."); Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in* Grutter, 15 TEX. REV. L. & POL. 437, 477 (2011) ("Since the day it was decided, Justice O'Connor's *Grutter* opinion has been under attack.").

11. While supporters of race-conscious admissions programs generally considered *Grutter* to be a victory in the fight for educational equality for minority students, many of them took issue with Justice O'Connor's expectation that the consideration of race in higher education admissions decisions would no longer be necessary in twenty-five years. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1478 (2005) (noting that some have argued that "*Grutter* is a clear victory for proponents of affirmative action and a certain defeat for its opponents"); Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars From* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 809–10 (2005) ("Although civil rights advocates and critical race theorists hail the *Grutter* decision as a legal victory for affirmative action and diversity, *Grutter* is at best a 'split decision' [because it implies that] affirmative action is ultimately dangerous and subject to judicial containment and, eventually, elimination."); Guinier, *supra* note 1, at 117–18 ("The [*Grutter*] opinion is a sweet victory for those who have long championed the need to include underrepresented people of color in the educational elite."); Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191, 191, 193 (2004) (arguing that Justice O'Connor's twenty-five-year time limit is unrealistic due to the detrimental effect of persistent racial inequality). *Compare* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."), *with id.* at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal oppor-

and those opposed to affirmative action have critiqued the opinion for its discussion and application of the constitutional standards necessary to uphold the University of Michigan Law School's ("Law School") plan.[12]

For some, one of the most troubling aspects of the opinion concerns the role that deference played in the Court's decision.[13] In upholding the Law School's plan, the Court deferred to university officials' judgments regarding both the benefits derived from a racially diverse student body[14] and also the most effective means by which to assemble such a student population.[15] Although the

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tunity will make it safe to sunset affirmative action.").

12. *See, e.g.*, Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter & Gratz, 85 TEX. L. REV. 517, 519 (2007) (asserting that the Court deviated from previous narrow tailoring requirements when it failed to inquire if the Law School "use[d] the minimum necessary racial preference" to meet its diversity goals); Brown-Nagin, *supra* note 11, at 1478–79 ("[T]he *Grutter* majority fails to cogently explain under what circumstances race-conscious policies should be considered sufficiently narrowly tailored to avoid offending the Constitution."); Crump, *supra* note 9, at 520–23 (criticizing the Court's narrow tailoring analysis in *Grutter* for failing to articulate and apply a clear meaning of the constitutional standard); Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 720–32 (2008) (critiquing the diversity rationale as relied upon in *Grutter*).

13. *See, e.g.*, Ayres & Foster, *supra* note 12, at 581 n.223 ("The extreme deference that Justice O'Connor showed to state officials is deeply inconsistent with the whole idea of strict scrutiny as an attempt to smoke out unjustified governmental racial preferences."); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2041–42 (2011) (critiquing the *Grutter* opinion for not addressing important factors applicable to a determination to defer to university officials' decision making); Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in* Grutter, 35 PEPP. L. REV. 649, 654–59 (2008) (questioning the *Grutter* Court's presumption of "good faith on the part of the Law School when determining that only a certain kind of racially mixed student body can produce certain educational benefits"); Pamela S. Karlan, *Compelling Interests / Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1621–26 (2007) (arguing the *Grutter* Court attributed institutional deference to the wrong prong of the strict scrutiny inquiry); Thompson & Schiff, *supra* note 10, at 482 ("Deference to a political body is inconsistent with the holdings of the Supreme Court in *Adarand*, *Croson*, and *Wygant*.").

14. *Grutter*, 539 U.S. at 328–29 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."); Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 866–69 (2011); Berger, *supra* note 13, at 2041; Crump, *supra* note 9, at 492–93; Garry, *supra* note 13, at 654; Ann Mallatt Killenbeck, Bakke, *With Teeth?: The Implications of* Grutter v. Bollinger *in an Outcomes-Based World*, 36 J.C. & U.L. 1, 31–33 (2009).

15. *See Grutter*, 539 U.S. at 343 (citation omitted) ("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."); *id.* at 364 (Thomas, J., dissenting) ("The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court."); *id.* at 388 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this

Court has often respected and deferred to educators' academic decision making in the context of public education,[16] some contend that it is inappropriate to grant such deference when considering the constitutionality of race-based admissions[17] and student assignment plans.[18]

This article challenges that contention and argues that affording an appropriate degree of deference to educators' good faith,

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goal."); *see also* Adams, *supra* note 14, at 866 (asserting that the Court deferred to the Law School regarding the means it used to achieve a diverse student body); Berger, *supra* note 13, at 2041 ("[T]he Court deferred to the Law School's judgment that diversity was a compelling governmental interest and that the Law School's affirmative action program was narrowly tailored to the achievement of that interest."); *id.* at 2084 (discussing the Court's deferral to the Law School's admissions program); Crump, *supra* note 9, at 494 (describing Justice O'Connor's evaluation of "the durational aspect of the Law School's program" as "one of deference"); Killenbeck, *supra* note 14, at 36 n.235 (asserting that the Court took the Law School "at its word" when accepting the admissions officers' claims that in efforts to assemble a critical mass of minority students they were not engaged in racial balancing).

16. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (noting that judges should greatly respect and not override faculty decisions "unless it is such a substantial departure from accepted academic norms"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."). *See generally* AMY GAJDA, THE TRIALS OF ACADEME 22–50 (2009) (discussing the rise of academic deference in American institutions of higher education).

17. *See Grutter*, 539 U.S. at 348–49 (Scalia, J., concurring in part and dissenting in part) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)) (internal quotation marks omitted) ("[W]hile the opinion accords a degree of deference to a university's academic decisions, deference does not imply abandonment or abdication of judicial review."); *id.* at 362 (Thomas, J., concurring in part and dissenting in part) (citation omitted) ("The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of 'educational autonomy' grounded in the First Amendment. In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause."); *id.* at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 388 (Kennedy, J., dissenting) ("In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued."); Ayres & Foster, *supra* note 12, at 581 n.223; Garry, *supra* note 13, at 654–57; Graglia, *supra* note 10, at 2047; Thompson & Schiff, *supra* note 10, at 478.

18. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 744–48 (2007) (plurality opinion) (rejecting arguments to defer to local school boards regarding issues related to the need for race-conscious student assignment plans); *id.* at 766 (Thomas, J., concurring) ("To adopt the dissent's deferential approach would be to abdicate our constitutional responsibilities."). *But see id.* at 848–49 (Breyer, J., dissenting) (urging the Court to defer to school officials in light of judges' limitations to effectively "act as school administrators"); Danielle Holley-Walker, *Educating at the Crossroads:* Parents Involved, *No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911, 923–26 (2008) (arguing that the plurality departed from precedent by not deferring to local school districts).

race-based decision making is both consistent with, and called for, under the Court's jurisprudence. This article defends the Court's prior practice of respecting educators' expertise and autonomy, and it urges current Justices to continue this practice when examining future race-based admissions plans, such as that challenged in *Fisher v. University of Texas at Austin.*[19]

In *Fisher*, two students who were denied undergraduate admission into the University of Texas at Austin ("UT"), argue that UT's consideration of race in its admissions decisions constitutes an equal protection violation under the Constitution and federal civil rights laws.[20] Although the UT plan is modeled after the constitutionally-approved plan in *Grutter*,[21] an examination of its constitutionality is potentially complicated by the operation of the Texas Top Ten Percent Plan ("Ten Percent Plan")[22]—an arguably effective, race-neutral alternative.[23]

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19. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 565 U.S. ___, 132 S. Ct. 1536 (2012).

20. *See id.* at 217.

21. *See id.* at 217–18.

22. *See id.* at 216–17.

23. *See* Brief for Petitioner at 10, Fisher v. Univ. of Tex. at Austin, (No. 11-345) (U.S. May 21, 2012), 2012 WL 1882759, at *10 [hereinafter Petitioner Brief] (arguing that the Ten Percent Plan contributed to most of the increase in minority enrollment at UT from 1998 to 2008); Brief for the Cato Institute as Amicus Curiae Supporting the Petitioner at 27, *Fisher*, 565 U.S. ___, 132 S. Ct. 1536 (No. 11-345) (U.S. May 29, 2012), 2012 WL 1961247, at *27 ("In light of the success of the Top 10% Law in achieving diversity, the University has failed to demonstrate that racial preferences are necessary to achieve a 'critical mass' of underrepresented minorities."); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 296 (2001) (noting the Ten Percent Plan initially helped increase black and Hispanic admissions "almost precisely to their pre-*Hopwood* levels"); William E. Forbath & Gerald Torres, *Merit and Diversity After* Hopwood, 10 STAN. L. & POL'Y REV. 185, 185 (1999) (arguing that the Ten Percent Plan is "a first step that may lead to a deepening of diversity at UT"); Gerald Torres, Grutter v. Bollinger/Gratz v. Bollinger*: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1600–03 (2003) (discussing the effectiveness of the Ten Percent Plan in increasing diversity at UT). *But see* Brief for the Black Women Lawyers Ass'n of Greater Chicago, Inc. as Amici Curiae Supporting Respondents at 23, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554400, at *23 ["Ten Percent Plan is] no more 'race-neutral' in effect than any 'race-neutral' plan would be in a country with a history of racial segregation."); Brief for the Harvard Black Law Students Ass'n et al. as Amici Curiae Supporting Respondents at 23–24, *Grutter*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399207, at *23–24 ("Percentage plans' ability to bring meaningful numbers of minority high school graduates to competitive universities has, perversely, depended on the existence of segregated secondary school systems."); Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1730 (2001) (examining the irony that "percentage plans can work if and only if secondary education remains firmly segregated").

Central to the Court's inquiry in *Fisher* will be its willingness, or lack thereof, to respect UT's assessment that despite the gains in diversity achieved by the Ten Percent Plan,[24] the consideration of race in admissions decisions continues to be a necessary tool for achieving its academic mission and goals.[25] While the Court's willingness to defer to "[t]he Law School's educational judgment" undoubtedly influenced its decision to uphold the Law School's plan in *Grutter*,[26] a majority of the current Justices have previously indicated their unwillingness to utilize a deferential approach when assessing the constitutionality of educators' race-based decision making.[27] This unwillingness could detrimentally impact not only the future of the UT plan in particular, but also the future of race-based affirmative action in higher education generally.

Therefore, this article urges the Court to respect educators' good faith decision making, particularly when it involves the development of academic missions, as well as the measures needed to accomplish them. Failure to do so would undermine the Court's prior practice of respecting educators' autonomy as well as the

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24. *See Fisher*, 631 F.3d at 224 (noting the Ten Percent Plan's initial success in increasing minority percentages at UT).

25. *See id.* at 225–26 (acknowledging some undergraduate classes lacked diversity although diversity had increased for the overall student body and noting UT's findings that the Ten Percent Plan did not fully reach UT's educational mission leading it to reinstate its affirmative action plan).

26. *See Grutter*, 539 U.S. at 328, 343–44.

27. Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas have all either personally expressed their disagreement with employing a deferential approach when examining race-conscious admissions and assignment plans or voted to invalidate such plans. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743–44 (2007) (plurality opinion); *id.* at 764–66 (Thomas, J., concurring); *Grutter*, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 361–62 (Thomas, concurring in part and dissenting in part); *id.* at 387–88 (Kennedy, J., dissenting); Vikram David 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*, 65 VAND. L. REV. EN BANC 77, 85 (2012), *available at* www.vanderbiltlawreview.org/content/articles/2012/07/Amar_65_Vand_L_Rev_En_Banc_77.pdf; Girardeau A. Spann, Fisher *v.* Grutter, 65 VAND. L. REV. EN BANC 45, 48 (2012), *available at* www.vanderbilt lawreview.org/content/articles/2012/07/Spann_65_Vand_L_Rev_En_Banc_45.pdf. While Justice Kennedy, who many expect to be a crucial vote in *Fisher*, has acknowledged a role for deference when considering school officials' compelling interests, he has yet to cast a vote to uphold a race-conscious affirmative action plan. *See* Lyle Denniston, *Argument Preview: Is Affirmative Action About to End?*, SCOTUSBLOG (Oct. 9, 2012), www.scotusblog.com/2012/10/argument-preview-is-affirmative-action-about-end/. For discussion of Justice Kennedy's possible stance in *Fisher*, see Amar, *supra* at 85–89; Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U.L. REV. COLLOQUY 74, 77 (2012), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2012/11/LRColl2012n11Rostron.pdf.

Court's call for restrained judicial involvement in complex educational decision making.[28]

This article proceeds in three sections. Section I discusses UT's decision to utilize an affirmative action plan in its attempt to achieve the educational benefits of a diverse student body. This Section analyzes the plan itself as well as the Fifth Circuit's majority and concurring opinions upholding the plan's constitutionality. Although the Fifth Circuit Court of Appeals deferred to the UT administrators' judgments and decision making, as called for by *Grutter*,[29] Judge Emilio Garza's concurring opinion contends that granting such deference when evaluating the constitutionality of an affirmative action plan is inappropriate and "represents a digression in the course of constitutional law."[30]

Section II challenges Judge Garza's contention and argues that when properly viewed as a means by which to inform, rather than to weaken, a strict scrutiny inquiry, affording deference to educators' decision making is an appropriate constitutional principle to apply when examining the constitutionality of race-based admissions plans, such as that employed in *Fisher*. In doing so, the Court does not abdicate its judicial responsibilities. Rather, it appropriately considers the context and circumstances under which a plan has been adopted and implemented. Such consideration can aid the Court in determining if a university, such as UT, was acting in good faith when deciding to employ a race-based admissions policy to accomplish its academic goals.

In light of the expertise and knowledge needed to craft and implement effective measures to carry out a university's educational mission, Section III urges the Court to defer to UT's decision making concerning not only its asserted compelling interests, but also the narrowly tailored means by which to achieve such interests. In other educational contexts, the Court has advocated for educational autonomy and restrained judicial involvement due to courts' general lack of experience and expertise regarding com-

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28. *See infra* Section III.

29. *See Fisher*, 631 F.3d at 231 ("[T]he Supreme Court has held that . . . a university's educational judgment in developing diversity policies is due deference."); *see also* Kimberly A. Pacelli, Note, Fisher v. University of Texas at Austin*: Navigating the Narrows Between* Grutter *and* Parents Involved, 63 ME. L. REV. 569, 587–88 (2011) ("[A]ll three judges on the [Fisher] panel saw the case as squarely governed by *Grutter* . . . .").

30. *Fisher*, 631 F.3d at 247 (Garza, J., concurring).

plex academic matters.[31] The complicated, multifaceted decision making involved in assembling a diverse student body, so as to achieve the benefits of diversity, warrants similar restraint. Therefore, as the Court examines the admissions policy challenged in *Fisher*, this article urges the Court to respect UT's good faith, expert judgment that the consideration of race remains a necessary tool to achieve the benefits of a diverse student body.

I. *FISHER*: THE "TEXAS TWO-STEP" APPROACH TO ACHIEVING DIVERSITY

In the Supreme Court's reexamination of the constitutionality of race-based affirmative action in higher education, UT once again finds itself center stage in the ongoing debate. The Fifth Circuit's decision in *Hopwood v. Texas*, which invalidated the University of Texas School of Law's consideration of race in admissions decisions,[32] served as a catalyst for the Court's decision to grant certiorari in *Grutter*.[33] A decade following the Court's decision in *Grutter*, which effectively reversed the Fifth Circuit's decision in *Hopwood*,[34] the Court will once again determine the constitutionality of a university's affirmative action plan.[35] However, unlike the plans challenged in *Grutter* and *Gratz*, the constitutional inquiry concerning the undergraduate plan challenged in *Fisher* is potentially complicated by UT's simultaneous operation of a state-mandated percentage plan—a plan that arguably succeeds in achieving some level of student body diversity.[36] Although the Fifth Circuit upheld UT's admissions program, albeit somewhat reluctantly,[37] many affirmative action proponents fear that history will repeat itself and the Court will once again reverse the Fifth Circuit's ruling—only this time invalidating, rather than upholding, the challenged plan.[38]

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31. *See infra* Section III.

32. 78 F.3d 932, 934 (5th Cir. 1996).

33. *See* Grutter v. Bollinger, 539 U.S. 306, 322 (2003).

34. *See* James, *supra* note 7, at 861 n.83; Michael A. Olivas, *Foreword: Commemorating the 50th Anniversary of* Hernandez v. Texas, 25 CHICANO-LATINO L. REV. 1, 3–4 (2005); 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, 500 (2005).

35. *See Fisher*, 631 F.3d 213, *cert. granted*, 565 U.S. ___, 132 S. Ct. 1536 (2012).

36. *See infra* Section I.A; *see also supra* note 23 and accompanying text.

37. *See infra* Section I.B.

38. *See* Spann, *supra* note 27, at 47 (opining that the Court will likely invalidate the

A. *UT's Race-Based, Race-Neutral Two-Step*

In accordance with the Fifth Circuit's holding in *Hopwood*[39] and the subsequent interpretation issued by the Texas Attorney General prohibiting the consideration of race in public university admissions decisions,[40] UT terminated its affirmative action admissions plan in 1996.[41] In 2005, following the Supreme Court's sanctioning of race-based admissions policies, UT reinstated its affirmative action plan in accordance with the constitutional standards set forth in *Grutter*.[42] Unlike Texas's other flagship university, Texas A&M, which declined to reestablish its race-based admissions program,[43] the administrators at UT felt that considering race as one admissions factor among many others would best help to ensure fulfillment of its educational mission.[44]

As noted by the Fifth Circuit, the educational goals that UT seeks to accomplish by endeavoring to enroll a critical mass of racially and ethnically diverse students "mirror those approved by the Supreme Court in *Grutter*."[45] Not only does UT seek to foster understanding between students of different races,[46] but it also

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plan in *Fisher*); Gerald Torres, Fisher v. University of Texas*: Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97, 101 (2012) *available at* www.vanderbiltlawreview.org/content/articles/2012/07/Torres_65_Vand_L_Rev_En_Banc_97.pdf (discussing the Court's decision to hear *Fisher*); Lee C. Bollinger, *College Diversity at Risk*, WASH. POST, Jan. 16, 2012, at A15 (discussing the damaging consequences that could result from the Court's invalidation of UT's affirmative action plan); Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1 (discussing affirmative action supporters' reactions to the Court's "ominous" decision to hear the *Fisher* case); Scott Jaschik, *Counting Justices*, INSIDE HIGHER ED. (Feb. 22, 2012, 3:00 AM), http://www.insidehighered.com/news/2012/02/22/colleges-await-supreme-court-review-affirmative-action (detailing university faculty and administrator responses to the Court's decision to grant certiorari in the case).

39. *See* Hopwood v. Texas, 78 F.3d 932, 934–35 (5th Cir. 1996) (finding that the University of Texas School of Law did not have a compelling reason to justify its use of race as a factor in admissions decisions).

40. *See* Tex. Att'y Gen. Op. Letter No. 97-001 (1997).

41. *See* Fisher v. Univ. of Tex. at Austin 631 F.3d 213, 223 (5th Cir. 2011), *cert. granted*, 565 U.S. ___, 132 S. Ct. 1536 (2012).

42. *See id.* at 217–18, 226. *But see* Petitioner Brief, *supra* note 23, at 27–28 (arguing that the UT plan is unconstitutional under *Grutter*).

43. *See* Michael King, *Naked City: How 'bout Them Aggies?*, THE AUSTIN CHRONICLE (Dec. 12, 2003), http://www.austinchronicle.com/news/2003-12-12/190093/; Marc Levin, *Texas A&M Slaps Down Reverse Discrimination*, FRONTPAGEMAG.COM (Dec. 11, 2003), http://archive.frontpagemag.com/readArticle.aspx?ARTID=15044.

44. *See Fisher*, 631 F.3d at 225–26. For a more detailed discussion of UT's admissions process, see *id.* at 226–30.

45. *Id.* at 230.

46. *See id.*

aims to "prepare its students to be the leaders of the State of Texas—a role which, given the state's increasingly diverse profile, will require them to be able to lead a multicultural workforce and to communicate policy to a diverse electorate."[47] The Court in *Grutter* embraced similar social and democratic benefits that are often attributed to diverse learning environments.[48]

UT's admissions policies employ race-based measures in conjunction with the state-mandated Ten Percent Plan.[49] The Ten Percent Plan, which was the Texas legislature's post-*Hopwood* attempt to diversify the state's institutions of higher education,[50] permits Texas high school students who graduate in the top ten percent of their class to receive automatic admission into the state's public colleges and universities.[51] Although enacted as a race-neutral measure to increase diversity,[52] many supporters of race-based affirmative action criticize the Ten Percent Plan and other similar plans, such as those implemented in California and

47. *Id.* at 225–26 (internal quotation marks omitted).

48. *See* Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003) (identifying "'cross-racial understanding,'" preparation of "'students for an increasingly diverse workforce and society,'" and cultivation of "leaders with legitimacy" as three of the educational benefits that can result from creating a diverse academic environment).

49. *See Fisher*, 631 F.3d at 216.

50. *See id.* at 224; *see also* Forbath & Torres, *supra* note 23, at 186; Torres, *supra* note 23, at 1600.

51. TEX. EDUC. CODE ANN. § 51.803 (West 1997).

52. *See Fisher*, 631 F.3d at 224 ("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."); James Blumstein, Grutter *and* Fisher*: A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57, 73 (2012) *available at* www.vanderbiltlawreview.org/content/articles/2012/07/Blumstein_65_Vand_L_Rev_En_Banc_57.pdf (describing the Ten Percent Plan as a "facially race-neutral means to achieve the race-motivated goal of increasing" minority student attendance at UT); *see also* Forbath & Torres, *supra* note 23, at 186–88 (discussing the Ten Percent Plan as a race-neutral alternative to achieve diversity); Spann, *supra* note 27, at 52 (noting that "the Top Ten Percent Plan was treated as if it was race neutral" in *Fisher*); Thompson & Schiff, *supra* note 10, at 465–66 (discussing the Ten Percent Plan as a race-neutral alternative to affirmative action); Brooks H. Spears, Casenote, *"If the Plaintiffs are Right,* Grutter *is Wrong": Why* Fisher v. University of Texas *Presents an Opportunity for the Supreme Court to Overturn a Flawed Decision,* 46 U. RICH. L. REV. 1113, 1134–35 (2012) (citations omitted) ("The Ten Percent Law works 'about as well' as (if not better than) UT's race-conscious admission policy and places no burden on UT because it is already in place and institutionalized."); *supra* note 23 and accompanying text.

Florida,[53] for their perceived dependence on "continued racial segregation at the secondary school level" to be effective.[54]

While this criticism raises a valid concern, the Ten Percent Plan has contributed to increased racial diversity at UT without specifically considering applicants' race or ethnicity.[55] As detailed in the Fifth Circuit opinion:

> In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African-American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African-Americans increased. The entering freshman class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African-American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian-American (1,218 students) in a class of 6,796 students.[56]

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53. California implemented a Top Four Percent Plan following the Board of Regents' termination of race-conscious affirmative action, which was confirmed by ballot initiative Proposition 209. *See* 1996 Cal. Legis. Serv. Prop. 209 (West), Press Release, Univ. of Cal. Office of the President, Board of Regents Adopts New Eligibility Plan (Mar. 19, 1999), *available at* http://www.ucop.edu/news/archives/1999/fourpcsol.html. Florida's Talented Twenty Plan was implemented following former Governor Jeb Bush's executive order prohibiting the consideration of race or ethnicity in university admissions decisions. *See* Deborah Sharp, *Division Greets Jeb Bush's Plan for "One Florida,"* USA TODAY, Feb. 10, 2000, at 04A. For an in-depth comparison and analysis of the California, Florida, and Texas percent plans, see CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT HARVARD UNIV., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (2003), *available at* http://civilrightsproject.ucla.edu/research/college-access/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-three-states2019-experiences/horn-percent-plans-2003.pdf.

54. Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting); *see also* Brief for Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. as Amici Curia Supporting Respondents at 23, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554393, at *23 (asserting that percentage plans "rely on and tacitly condone secondary school segregation"); Spann, *supra* note 27, at 52 ("Because many Texas high schools are de facto segregated, the Top Ten Percent plan had the intent and effect of increasing racial diversity at the University of Texas."); Keith R. Walsh, Book Note, *Color-blind Racism in* Grutter *and* Gratz, 24 B.C. THIRD WORLD L.J. 443, 452 (2004) (reviewing EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS) ("Percentage plans seek to solve one problem, low black enrollment, by relying on the existence of another problem, residential segregation."); *supra* note 23 and accompanying text.

55. *See Fisher*, 631 F.3d at 224. *But see id.* at 243 ("True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense, a 'facially' race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.").

56. *Id.* at 224; *see also id.* at 238–39 (acknowledging that although the Ten Percent Plan has helped to increase both African American and Hispanic enrollment, "changing demographics and other minority outreach programs render it difficult to quantify the increases attributable to the Top Ten Percent Law").

Despite the Ten Percent Plan's contribution to the diversification of the student body as a whole, UT's decision to reintroduce race as an admissions factor was predicated on the failure of the Ten Percent Plan and other race-neutral strategies[57] to successfully enroll a "critical mass" of minority students, as such term was envisioned in *Grutter*.[58] Writing for the Court, Justice O'Connor acknowledged that the Law School conceptualized critical mass in terms of "the educational benefits that diversity is designed to produce," rather than in terms of a specific, numerical goal or target.[59] Therefore, UT's assessment of the Ten Percent Plan's effectiveness in helping UT achieve its academic mission rightfully encompassed more than a consideration of the aforementioned increases in the racial makeup of the student body. Also critical to its examination was whether the increased percentages of minority students successfully brought about the benefits of diversity that UT was seeking.[60] Unfortunately, UT administrators found this not to be the case.[61]

Notwithstanding the operation of the Ten Percent Plan, UT continued to experience a lack of meaningful racial diversity in most of its undergraduate courses.[62] For instance, in 2002, eighty-nine percent of classes enrolling ten to twenty-four students had only one or zero African American students.[63] Forty-six percent of those classes "had one or zero Asian American students, and 43%

57. Following the Fifth Circuit's decision in *Hopwood*, UT implemented several race-neutral alternatives in its attempt to achieve a diverse student body including the establishment of regional admissions centers and the creation of new scholarships targeting first-generation students and students from lower socioeconomic backgrounds. *See* Brief for Respondents at 7, Fisher v. Univ. of Tex. at Austin, No. 11-345 (U.S. Aug. 6, 2012), 2012 WL 3245488, at *7 [hereinafter Respondents Brief].

58. *See* Grutter v. Bollinger, 539 U.S. 306, 316–19 (2003).

59. *See id.* at 329–30. Indeed, the Court held that simply seeking to enroll a particular number or percentage of minority students would amount to an unconstitutional exercise in racial balancing. *See id.*; *see also* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 477–83 (2012) (discussing *Grutter's* funtional definition of critical mass); Sheldon Bernard Lyke, *Catch Twenty-Wu? The Oral Argument in Fisher v. University of Texas and the Obfuscation of Critical Mass*, 107 NW. U. L. REV. COLLOQUY 209, 216–19 (2013), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2013/19/LRColl2013n19Lyke.pdf (asserting that the concept of critical mass encompasses both quantitative and qualitative aspects).

60. *See Fisher*, 631 F.3d at 244–45.

61. *Id.* at 245.

62. *See id.* at 225; Respondents Brief, *supra* note 57, at 10.

63. *See Fisher*, 631 F.3d at 225.

had one or zero Hispanic students."[64] Considering that an important goal of UT's academic mission is to create diverse classroom environments in which students from different cultural, economic, and racial backgrounds can engage in robust, thought-provoking discussions,[65] the homogeneity of UT's smaller enrollment courses significantly impeded its ability to achieve this goal.[66]

Contrary to the petitioner's assertions in *Fisher* that UT's interest in creating diverse classrooms to facilitate such discussions is neither compelling nor contemplated under *Grutter*,[67] Justice O'Connor recognized that many of the educational benefits associated with diverse academic environments are realized in classroom settings. The Court acknowledged that the benefits of diversity ranging from the promotion of "'cross-racial understanding'"[68] to the elimination of racial stereotypes, 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.'"[69] The Ten Percent Plan's failure to enroll a critical mass of minority students prevented such beneficial classroom conversations from taking place, which impeded UT's ability to achieve its educational goals.[70]

The Ten Percent Plan's ineffectiveness in fulfilling UT's academic mission was also evidenced by UT's disturbing research, which found that undergraduate minority students often felt isolated on campus.[71] In addition, a majority of undergraduates felt that there were too few minority students enrolled in courses to fully experience the benefits of diversity.[72]

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64. *Id.*

65. *See id*; Respondents Brief, *supra* note 57, at 5–6, 10.

66. *See Fisher*, 631 F.3d at 225–26; *see also* Respondents Brief, *supra* note 57, at 43 ("[T]he fact that African-American and Hispanic students were nearly non-existent in *thousands* of classes was a red flag that UT had not yet fully realized its constitutional interest in diversity.").

67. *See* Petitioner Brief, *supra* note 23, at 19 ("UT's asserted interest in classroom diversity also is not a compelling interest."); *id.* ("*Grutter* nowhere suggests that every classroom must have a 'critical mass' of minority students.").

68. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

69. *Id.* (emphasis added).

70. *See Fisher*, 631 F.3d at 225–26.

71. *See id.* at 225.

72. *See id.*

When coupled with the aforementioned statistics detailing the lack of diversity in many of its courses, these findings prompted UT to restore its affirmative action plan and to include race as a factor among many others when considering applicants who were not admitted under the Ten Percent Plan.[73] In UT's considered judgment, this decision was necessary if the school hoped to realize the educational benefits that flow from a sufficiently diverse student body.[74] Even though UT's reconsideration of race has helped to further diversify its student body, it is this dual employment of both race-based and race-neutral admissions measures that the plaintiffs in *Fisher* unsuccessfully challenged.[75]

B. *The Role of Deference in the Fifth Circuit's Opinions*

Following their denial of undergraduate admission into UT, Abigail Fisher and Rachel Michaelewicz sued UT, alleging that its consideration of race in admissions decisions violated their equal protection rights.[76] While the Fifth Circuit's three-judge panel upheld the district court's grant of summary judgment in favor of UT,[77] an examination of the majority and concurring opinions reveals the influential, albeit tenuous, role that deference played in the case.

Writing for the majority, Judge Patrick E. Higginbotham began his analysis of the constitutionality of UT's admissions program with the recognition that "a university's educational judgment in developing diversity policies is due deference."[78] As acknowledged by the Fifth Circuit:

> *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

73. *See id.* at 226, 239.

74. *Id.* at 230–31.

75. *See id.* at 216–17. From 2005 to 2008, UT's reconsideration of race helped to increase the number of African American freshmen from 275 to 335 and the number of Hispanic freshmen from 1,024 to 1,228. *See id.* at 226; *see also* THE UNIV. OF TEX. AT AUSTIN, OFFICE OF INFO. MGMT. AND ANALYSIS, FALL ENROLLMENT OF NEW STUDENTS BY GROUP AND ETHNICITY/RACE 19, tbl. 12 (2011), *available at* http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Students.pdf (presenting the number of African American and Hispanic freshman enrolled at UT in Fall 2008).

76. *See Fisher*, 631 F.3d at 217.

77. *See id.* at 217, 247.

78. *Id.* at 231.

> measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.[79]

Judge Higginbotham advanced two rationales for deferring to UT's race-based decision making regarding its admissions decisions: (1) the recognition of educational autonomy in higher education, and (2) the complexity of academic judgments involved in making such decisions.[80] In applying strict scrutiny to the challenged plan, the Fifth Circuit was "mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body."[81] Contrary to assertions advanced by Judge Emilio M. Garza in his concurring opinion, such mindfulness did not result in Judge Higginbotham subjecting UT's affirmative action plan to a "less demanding" level of strict scrutiny.[82] Rather, in accordance with the contextual application of strict scrutiny as set forth in *Grutter*,[83] the Fifth Circuit carefully examined whether UT's decision to implement a race-based measure was narrowly tailored to achieve its compelling educational goals.[84]

Although the plaintiffs argued that UT's consideration of race was not narrowly tailored because of the purported effectiveness of the race-neutral Ten Percent Plan,[85] the Fifth Circuit disagreed.[86] In discussing the Ten Percent Plan's limitations in

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79. *Id.* at 233.

80. *See id.* at 231. As discussed in greater detail in Sections II and III of this article, both rationales are consistent with previous and current Justices' reasoning when examining issues related to academic decision making. *See infra* Sections II and III.

81. *Fisher*, 631 F.3d at 234.

82. *See id.* at 247 (Garza, J., concurring); *see also id.* at 247–54 (citing Grutter v. Bollinger, 559 U.S. 306, 326–29, 333–43 (2003)) (critiquing *Grutter*'s narrow tailoring analysis).

83. As noted by Justice O'Connor:

> Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

Grutter, 539 U.S. at 327 (2003).

84. *Fisher*, 631 F.3d at 231.

85. *See id.* at 234, 239, 242–43.

86. *See id.* at 240 ("The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it."); *id.* at 245 ("If a plaintiff produces evidence that calls into question a university's good faith pursuit of those educational benefits, its race-conscious admissions policies may be found unconstitutional. We are not persuaded, however, that any of the benchmarks suggested by Appellants succeed at calling that judgment into question."); *id.* at 240–42, 245–

achieving the benefits of diversity sought by UT, the Court reasoned that the automatic admission feature of the Ten Percent Plan prevented UT from engaging in the sort of holistic, individualized review of applicants that *Grutter* endorses.[87] The operation of the Ten Percent Plan had also resulted in the concentration of minority students in certain academic programs, which, according to the court, "limit[ed] the beneficial effects of educational diversity" that are achieved through students' varied interactions on a more widespread basis.[88]

In rejecting plaintiffs' contention that UT had achieved a critical mass of diverse students, thereby negating its need to employ a race-based admissions program, the Fifth Circuit held that the plaintiffs failed to offer sufficient evidence to call into question UT's educational judgment that it had not "attain[ed] a critical mass of underrepresented minority students."[89] The court reasoned that absent evidence to the contrary, it was permitted to find that in reintroducing race as an admissions factor, UT had engaged in a constitutionally permissible, good faith pursuit of the educational benefits associated with diverse learning environments.[90]

In his concurring opinion, Judge Garza denounced the majority's *Grutter*-like approach to examining the constitutionality of race-based admissions policies. Although he voted with the majority to uphold UT's plan, Judge Garza wrote separately to express his "belief that *Grutter* represents a digression in the course of constitutional law."[91] Similar to criticisms raised by Supreme Court Justices and legal scholars,[92] Judge Garza argued that the Court in *Grutter* failed to properly apply strict scrutiny when examining the Law School's affirmative action plan.[93] In particular, he took issue with the Court's decision to defer to university ad-

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87. *See id.* at 240.

88. *Id.* at 240–41 ("As UT's 2003 classroom study shows, percentage plans bear little promise of producing the meaningful diverse interactions envisioned by *Grutter*, at least not in the classroom.").

89. *Id.* at 244–45.

90. *See id.* at 245.

91. *Id.* at 247 (Garza, J., concurring).

92. *See infra* Section II.A.

93. *See Fisher*, 631 F.3d at 248 (Garza, J., concurring) (citation omitted) ("Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, what the Court applied in practice was something else entirely.").

ministrators' educational judgments regarding their need to utilize race-based measures to pursue racial diversity.[94] Judge Garza contended the *Grutter* Court erred when "it conflated the deference owed to a university's asserted interest with deference to the means used to attain it."[95] Sections II and III of this article challenge Judge Garza's contention and argue that affording an appropriate degree of deference to a university's academic judgments—regarding both its educational interest and the race-based means by which to achieve it—is both consistent with and called for under the Supreme Court's jurisprudence.

II. DEFERENCE AND STRICT SCRUTINY: THE COEXISTENCE OF COMPLIMENTARY CONSTITUTIONAL PRINCIPLES

Those who disagree with the deferential approach adopted in *Grutter* often view deference as a means by which to supplant or weaken the strict scrutiny inquiry.[96] They appear to consider the affordance of deference and the application of strict scrutiny as an "either or" proposition, thereby foreclosing the possibility that each principle can coexist with the other when both are properly applied.[97] This section advocates for the reconsideration of this position. It argues that rather than as a means by which to weaken or abrogate its strict scrutiny analysis, the Court should view deference as a means by which to inform its inquiry, thereby making it an appropriate constitutional principle to apply when examining educators' race-based decision making, such as that at issue in *Fisher*.

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94. *See id.* at 249.

95. *Id.* at 257; *see also id.* at 250–51 (arguing that *Grutter*'s affordance of deference essentially negates strict scrutiny's narrow tailoring requirement that universities give serious, good faith consideration to feasible race-neutral alternatives); *id.* at 253 (citation omitted) ("[T]he Court's unusual deference to educators' academic judgments that racial diversity is a compelling interest, coupled with the deference allegedly owed to their determination of when the use of race is no longer necessary, would appear to permit race-based policies indefinitely.").

96. *See, e.g.*, *id.* at 247 (contending that the level of scrutiny applied in *Grutter* was "markedly less demanding" than strict scrutiny); Ayres & Foster, *supra* note 12, at 581 n.223 (arguing that the deference shown in *Grutter* is inconsistent with the goals of strict scrutiny); Crump, *supra* note 9, at 492 ("Somewhat oxymoronically, the Court asserted that this deference did not mean that its scrutiny would be any less strict.").

97. *See, e.g.*, Crump, *supra* note 9, at 492.

A. *Grutter's Critique*

In examining the constitutionality of the affirmative action plan challenged in *Grutter*, the Court respected the Law School's academic judgment that a diverse student body was vital to achieving its educational goals[98] and found that the administrators were acting in good faith when utilizing a race-based admissions plan in their pursuit of student body diversity.[99] In so doing, Justice O'Connor deferred to the Law School's judgments and decision making regarding both its educational mission and the means by which to accomplish it.[100] In upholding student body diversity as a compelling interest, the Court relied on arguments presented by both the Law School and its supporting amici curiae detailing the academic, social, and democratic benefits that can be achieved by educating students in a diverse learning environment.[101] In holding that the Law School's admissions plan was narrowly tailored to further this interest, the Court found that the plan utilized race or ethnicity as a permissible "'plus' factor"[102] and afforded "individualized consideration" to each applicant.[103]

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98. *See* Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

99. *See id.* at 329.

100. *See Fisher*, 631 F.3d at 232 (asserting that the majority in *Grutter* held that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment"); *id.* at 257 (Garza, J., concurring) (expressing concern that *Grutter* "conflated the deference owed to a university's asserted interest with deference to the means used to attain it"); Blumstein, *supra* note 52, at 72 (noting that the Court deferred to the Law School "both in terms of determining what constituted a compelling interest (student body diversity) and in terms of analyzing how the narrow-tailoring component of means-ends scrutiny worked under strict scrutiny"); Wendy Parker, *The Legal Cost of the "Split Double Header" of* Gratz *and* Grutter, 31 HASTINGS CONST. L.Q. 587, 604 (2003) ("The Court approached the law school from a stated position of deference on both the question of compelling governmental interest and narrow tailoring."); Ozan O. Varol, *Strict in Theory, But Accommodating in Fact?*, 75 MO. L. REV. 1243, 1253 (2010) (asserting that the Court "deferred to the law school on both prongs of the strict-scrutiny test"); *supra* notes 14–15 and accompanying text.

101. *See Grutter*, 539 U.S. at 330–33 (discussing the benefits of a racially diverse student body); *see also* Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 616 (2005) (discussing Justice O'Connor's application of the diversity rationale). *But see Grutter*, 539 U.S. at 354 n.3 (Thomas, J., concurring in part and dissenting in part) (characterizing the Law School's interest in achieving a diverse student body as "'aesthetic' because . . . it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged"); *id.* at 371–73 (contending that beneficiaries of the Law School's affirmative action plan may in fact be harmed by the plan's operation).

102. *Grutter*, 539 U.S. at 336–37.

103. *Id.* at 337.

Many contend, however, that Justice O'Connor misapplied or abandoned constitutional principles in reaching her conclusions.[104] Scholars such as Ian Ayres and Sydney Foster argue that "[t]he extreme deference that Justice O'Connor showed to state officials is deeply inconsistent with the whole idea of strict scrutiny as an attempt to smoke out unjustified governmental racial preferences."[105] Similarly, Professor Ozan Varol criticized the Court for its "unjustifiable" deference to the Law School's judgments and decision making.[106]

Justice O'Connor's fellow Justices voiced similar criticisms in their dissenting opinions.[107] For Justices Thomas and Kennedy in particular, the Court's affordance of deference was especially disconcerting. Justice Thomas described the Court's grant of deference as "unprecedented" and "inconsistent with the very concept of 'strict scrutiny.'"[108] He argued that the Court deferred to the Law School's judgments "without serious inquiry and without regard to the applicable legal standard."[109]

Justice Kennedy shared these concerns.[110] While he agreed that the Court was permitted to defer to the Law School's educational mission,[111] deference was "not to be given with respect to the methods by which it is pursued."[112] Absent a searching inquiry in-

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104. *See* Martin D. Carcieri, Grutter v. Bollinger *and Civil Disobedience*, 31 U. DAYTON L. REV. 345, 360 (2006) ("Justice O'Connor simply abandoned strict scrutiny in *Grutter*."); Thompson & Schiff, *supra* note 10, at 480 ("*Grutter* upends . . . constitutional law by according extraordinary deference to the determination by officials of the University of Michigan Law School that genuine diversity is essential to its educational mission."); Varol, *supra* note 100, at 1253 ("[T]he *Grutter* Court was not faithful to the tenets of the traditional strict-scrutiny test."); *see also supra* notes 12–13, 17 and accompanying text.

105. Ayres & Foster, *supra* note 12, at 581 n.223.

106. Varol, *supra* note 100, at 1258. *See generally id.* at 1252-60 (critiquing the *Grutter* Court's application of deference).

107. *See Grutter*, 539 U.S. at 348–49 (Scalia, J., concurring in part and dissenting in part); *id.* at 350, 362, 364 (Thomas, J., concurring in part and dissenting in part); *id.* at 379–80 (Rehnquist, C.J., dissenting); *id.* at 387, 395 (Kennedy, J., dissenting).

108. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 362 (describing the Court's "unprecedented deference" as "antithetical to strict scrutiny"); *id.* at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 387 ("The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws.").

109. *Id.* at 366 (Thomas, J., concurring in part and dissenting in part).

110. *See id.* at 387–88 (Kennedy, J., dissenting) (critiquing the Court for not subjecting the Law School's plan to the "rigorous judicial review" that strict scrutiny requires).

111. *See id.*

112. *Id.* at 388.

to the Law School's methodology, argued Justice Kennedy, the Court could not ensure that the administrators' consideration of race met constitutional standards.[113]

Inherent in Justice Kennedy's criticisms, as well as those advanced by others, is the contention that "[d]eference is antithetical to strict scrutiny, not consistent with it."[114] As asserted by Professor James Blumstein, "[t]he critical ingredient of strict scrutiny is the lack of deference given to governmental decisions that trigger strict scrutiny. Strict scrutiny requires 'detailed examination, both as to ends and as to means.'"[115] These assertions seemingly preclude the possibility that a court can simultaneously engage in such a detailed and rigorous examination while affording some degree of deference to educators' decisions and justifications.[116] If courts utilize deference not as a means to engage in an unexamined, automatic approval of universities' race-based admissions policies, but rather as a means to examine the context and circumstances under which schools have adopted and implemented such plans, they can in fact succeed in engaging in a strict scrutiny analysis that is complimented, rather than circumvented, by an affordance of deference.

B. *The Contextualizing Function of Deference*

Those who disagree with courts deferring to a university's race-based decision making suggest that deference allows courts to replace their own judgments and conclusions regarding the constitutionality of a university's actions with those offered by the institution itself.[117] Admittedly, using deference in such a way so as

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113. *See id.* at 388–89.

114. *Id.* at 394.

115. Blumstein, *supra* note 52, at 72 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995)).

116. For examples of similar assertions in the K-12 context, see *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701, 744 (2007) ("In keeping with his view that strict scrutiny should not apply, Justice Breyer repeatedly urges deference to local school boards on these issues."); *id.* at 766 (Thomas, J., concurring) ("To adopt the dissent's deferential approach would be to abdicate our constitutional responsibilities."). *But see id.* at 848 (Breyer, J., dissenting) ("[G]iving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny.").

117. *See, e.g.*, *Grutter*, 539 U.S. at 348–49 (Scalia, J., dissenting) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)) (asserting that *Grutter*'s affordance of deference amounted to an "abandonment or abdication of judicial review"); Paul J. Beard II, *The Legacy of* Grutter*: How the* Meredith *and* PICS *Courts Wrongly Extended the "Educational*

to rubber stamp a university's race-based admission plan would run counter to the detailed examination that strict scrutiny requires. Therefore, this article advocates for a different concept of deference—one that helps courts formulate their *own* conclusions about the constitutionality of administrators' race-based decisions, rather than simply accepting those drawn by the educational institutions themselves.

Courts should defer to educators' race-based decision making when considering the background and circumstances that led to such decisions. Affording deference for this purpose can aid courts in determining if a university, such as UT, was acting in good faith when deciding to employ a race-based admissions policy to accomplish its educational goals. Considering that "context matters"[118] when courts examine the constitutionality of race-based governmental decision making, utilizing deference to assess good faith can be properly understood as a facet of courts' strict scrutiny analysis, rather than its antithesis.

Central to the Supreme Court's Equal Protection jurisprudence is the inherent suspiciousness of race-based governmental decision making.[119] According to the Court, the harms that racial classifications can inflict on individuals and groups necessitate a "searching judicial inquiry into the justification for such race-based measures."[120] While the *Grutter* Court was certainly mindful that injuries can result from race-based decisions,[121] it also

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Benefits" Exception to the Equal Protection Clause in Public Higher Education, 11 TEX. REV. L. & POL. 1, 26 (2006) ("The Grutter Court accepted that diversity was a compelling state interest because, quite simply, the Law School said so."); Varol, *supra* note 100, at 1257 ("The Court should have drawn its independent conclusions from the evidence, rather than deferring to the law school's blanket statements. In the end, the Court's independent conclusions may have been the same as the law school's, but the Court had the constitutional duty to reach them on its own."); *id.* at 1263 ("Thus, allowing universities to play a role in policing the constitutionality of their own actions while the courts take a back seat amounts to constitutional abdication. . . ."). Those advocating for deference in *Fisher* urge courts to "resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." Brief for the American Council on Education, et al. as Amici Curiae Supporting Respondents at 30–31, Fisher v. Univ. of Tex. at Austin, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3418823, at *30–31 [hereinafter Am. Council on Educ. Brief] (quoting Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 2988 (2010)).

118. *Grutter*, 539 U.S. at 327; *see also* Angels N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Marking*, 36 LOY. U. CHI. L.J. 21, 23 (2004) ("Strict scrutiny may be strict in theory, but it is contextual in practice.").

119. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989).

120. *Id.* at 493.

121. *See Grutter*, 539 U.S. at 326–27.

recognized that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[122] As the Court endeavors to ascertain UT's reasons for reintroducing race as an admissions factor, affording a degree of deference to administrators' judgments and rationales can help inform the Court's understanding of the context in which the race-based decision was made.[123]

As noted by the Fifth Circuit, UT has engaged in efforts to assemble a diverse student body to fulfill its educational mission for over twenty years.[124] Considering that the Justices lack experience in developing and implementing effective college admissions strategies, it is difficult for the Court to fully appreciate and understand the multitude of factors impacting such efforts.[125] These factors include demographic changes in high school populations,[126] increased demand for college admission,[127] and minority students' access to financial aid.[128] An institution's reliance on standardized test scores such as the SAT and ACT, which are traditionally lower for minority students, especially African Americans and

122. *Id.* at 327.

123. *See* Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 231 (5th Cir. 2011) ("Considering UT's admissions system in its historical context, it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion.").

124. *See id.* at 222.

125. *See infra* Section III.B.

126. *See Fisher*, 631 F.3d at 226 (suggesting that increases in UT's minority enrollment is likely due, in part, to demographic shifts in Texas' racial composition such that more minorities reside in the state); Brief for the National Education Ass'n et. al. as Amici Curiae Supporting Respondents at 7–8, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012) 2012 WL 3540398, at *7–8 ("By 2025, the year in which children who are entering kindergarten this year will graduate from high school, over half of all children will be Black, Hispanic, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be from these historically minority racial and ethnic groups.").

127. *See* Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 127–29 (2012), *available at* http://www.vanderbiltlawreview.org/content/articles/2012/07/Brown-Nagin_65_Vand_L_Rev_En_Banc_113.pdf.

128. *See Fisher*, 631 F.3d at 223 (discussing UT's implementation of scholarship programs targeting minority students); *see also* Torres, *supra* note 23, at 1599 (acknowledging the importance of targeted financial aid, recruitment, and outreach in assembling a diverse student body).

Latinos,[129] also affects its ability to assemble a diverse student body.[130]

Examining the interplay between these and numerous other factors affecting student body composition enabled UT to gain certain knowledge and expertise regarding student body enrollment that the Court does not possess. UT relied on this knowledge in formulating its judgment that, notwithstanding the Ten Percent Plan, reintroducing race as a factor in admissions decisions was necessary to achieve its academic mission of educating students in a diverse learning environment.[131] In deferring to UT's judgment, the Court should not only acknowledge UT's expertise regarding these multifaceted educational matters,[132] but should also draw upon this expertise to inform its own judgment regarding the constitutionality of UT's race-based decision making.

As instructed in *Grutter*, the Court must examine the sincerity of UT's rationales for considering race in its admissions decisions.[133] It must determine whether UT acted in good faith or with ill intent in adopting a race-based admissions policy.[134] Affording a degree of deference to UT's offered reasons can aid the Court in making this determination, and deference can further the Court's understanding of the educational goals UT is attempting to accomplish by considering race as well as the challenges IT must

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129. *See* Jack Greenberg, *Affirmative Action in Higher Education*, 43 B.C. L. REV. 521, 526 (2002) (noting that African Americans make up less than 1% of the students scoring in the highest percentile on the SAT); Ronald J. Coleman, Note, *Stratification, Inequality, and the SAT: Toward an SAT – Optional Movement*, 18 GEO. J. ON POVERTY L. & POL'Y 507, 511 (2011) ("Using 2006 [SAT] data, it was shown that whites score, on average, 17% higher than blacks, and Asian Americans score 19% higher than blacks."); Walsh, *supra* note 54, at 449–51 (discussing the racial gap between black and white students on standardized tests);). *See generally*, Christopher Jencks & Meredith Phillip, *The Black-White Test Score Gap: An Introduction*, *in* THE BLACK-WHITE TEST SCORE GAP 1, 1 (Christopher Jencks & Meredith Phillips eds., 1998) (noting that African Americans score lower than European Americans on vocabulary, reading, and mathematics standardized tests).

130. *See* Daria Roithmayr, *Direct Measures; An Alternate Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 4–5 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 957 (1996); Torres, *supra* note 23, at 1602.

131. *See Fisher*, 631 F.3d at 225–26; Respondents Brief, *supra* note 57, at 10–11.

132. *See* Am. Council on Educ. Brief, *supra* note 117, at 30 ("Deference is owed educators' educationally derived conceptions of diversity because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified.").

133. *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

134. *See id.* at 335.

face and overcome in order to do so. Having a greater understanding and awareness of the reasons that precipitated UT's race-based decision making will help contextualize UT's decision, which will aid the Court in its strict scrutiny analysis.

Although Justice O'Connor stated that the Court can "presum[e] good faith of university officials in the absence of a showing to the contrary,"[135] the Court should not blindly accept or solely rely on school officials' reasoning when examining the constitutionality of a race-based admissions plan. Rather, it should also consult other sources such as amicus briefs, social science reports, research findings, and the like as it engages in a rigorous examination of the plan's goals and means. The Supreme Court in *Grutter* and the Fifth Circuit in *Fisher* succeeded in conducting such an examination.[136]

Although both courts deferred to the universities' judgments,[137] they also engaged in a thorough and exacting review of both the asserted educational goals and the race-based means by which to achieve them. In *Grutter*, Justice O'Connor relied on amici curiae and expert reports to substantiate the "Law School's assessment that diversity will, in fact, yield educational benefits."[138] While the Court's compelling interest holding was undoubtedly informed by the Law School's judgment,[139] the Court's reliance on arguments presented in amicus briefs and research studies evidences its unwillingness to simply accept the Law School's judgment as its own. In *Fisher*, the Fifth Circuit found UT's compelling interest to be essentially indistinguishable from the diversity rationale approved in *Grutter*.[140] In reaching this conclusion, the court, after a

135. *Id.* at 343 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (plurality opinion)).

136. Although the Fifth Circuit did not cite to any of the nine amicus briefs filed in *Fisher*, it did consider empirical research findings in its examination of the UT's assertion that notwithstanding the operation of the Ten Percent Plan, it had not achieved a critical mass of minority students. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d at 213, 225, 240–41, 245–46 (5th Cir. 2011).

137. *See Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."); *Fisher*, 631 F.3d. at 231 ("[A] university's educational judgment in developing diversity policies is due deference.").

138. *Grutter*, 539 U.S. at 328, 330–32.

139. *See id.* at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission . . . .").

140. *See Fisher*, 631 F.3d at 230–31.

meticulous examination, rejected plaintiffs' claim that UT was motivated by an impermissible interest in racial balancing rather than the benefits of diversity.[141]

With regards to strict scrutiny's narrow tailoring requirement, Justice O'Connor identified and evaluated several features that a race-based plan must have in order to be deemed constitutional.[142] As noted by Professor Tomiko Brown-Nagin, such features include the following:

> 1) does not employ quotas; 2) does not insulate categories of applicants from competition with one another; 3) treats race as a mere plus factor in the evaluative process; 4) does not unduly burden disfavored groups; 5) is implemented after good-faith consideration of race-neutral alternatives; and 6) includes a durational limit.[143]

Judge Higginbotham applied similar criteria[144] in concluding that UT's plan was narrowly tailored.[145] Although one may disagree with the courts' conclusions following their evaluation of the challenged plans, such disagreement should not render the evaluation itself to be insufficiently demanding and contrary to constitutional principles, as Justice Kennedy contended in *Grutter*.[146]

Although Justice Kennedy criticized the majority in *Grutter* for the role that deference played in its narrow tailoring inquiry,[147] perhaps such criticisms mask his and others' fundamental disagreement with the use of racial preferences in governmental decision making.[148] As noted by Professor Girardeau Spann, "Even though Justice Kennedy does not always cast his swing vote with the four other conservative Justices on nonracial issues, Justice Kennedy *has* always voted with the conservative bloc to invali-

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141. *See id.* at 234–38.

142. *See Grutter*, 539 U.S. at 334–43 (citing Regents of Univ. of Cal. V. Bakke, 438 U.S. 265, 315, 317 (1978)).

143. Brown-Nagin, *supra* note 127, at 119 (citing *Grutter*, 539 U.S. at 334, 339, 341–42).

144. *See Fisher*, 631 F.3d at 220–22, 231–32, 234–35, 238–46.

145. *See id.* at 247 ("The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored . . . .").

146. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (contending that the majority in *Grutter* "abandoned" strict scrutiny and failed to apply it in the case).

147. *See supra* notes 107–08 and accompanying text.

148. *See, e.g.*, *Fisher*, 631 F.3d at 252 n.3 (Garza, J., concurring) (citing Gratz v. Bollinger, 539 U.S. 244, 295 (2003)) ("I do not believe the government's use of race in university admissions can ever serve a compelling interest . . . ."); Ayres & Foster, *supra* note 12, at 566–70.

date racial affirmative action."[149] Unlike Justice Thomas, who has openly expressed his contempt for race-based decision making in the educational context,[150] Justice Kennedy subtly alludes to his disapproval of affirmative action plans by blaming the Court's affordance of deference for the loss of "talents and resources of the faculties and administrators in devising new and *fairer* ways to ensure individual consideration."[151] He sends a somewhat stronger message when he speaks of "the necessity for scrutiny that is real, not feigned, *where the corrosive category of race is a factor in decisionmaking*."[152]

If it is true that Justice Kennedy and others subscribe to the view that the use of racial preferences in governmental decision making is per se unconstitutional, then they should refrain from using deference as a constitutional scapegoat by which to invalidate such decisions. Doing so unjustly hinders the recognition of deference as a valid constitutional principle that, when properly applied, can serve as a useful tool by which to illuminate the strict scrutiny framework rather than to dismantle it.

Although deference can further a court's understanding of the contexts in which educators engage in race-based decision making, the question remains whether it is an appropriate principle to apply to both prongs of a strict scrutiny analysis. While jurists such as Justice Kennedy and Judge Garza support the Court's affordance of deference when conducting a compelling interest inquiry,[153] they contend that deference has no place when the inquiry turns to narrow tailoring.[154] The next section challenges this contention and argues that—in light of the expertise and knowledge needed to craft and implement effective measures to carry out a university's educational mission—the Court should defer to UT's good faith decision making concerning not only its

149. Spann, *supra* note 27, at 48.

150. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Thomas, J., concurring); *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part); Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring); *see also* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF . L. REV. 1139, 1174–76 (2008) (describing Justice Thomas's affirmative action jurisprudence).

151. *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (emphasis added).

152. *Id.* at 394 (emphasis added).

153. *See id.* at 387–88; *Fisher*, 631 F.3d at 256–57 (Garza, J., concurring).

154. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *Fisher*, 631 F.3d at 257 (Garza, J., concurring).

asserted compelling interests, but also the narrowly tailored means by which to achieve such interests.

III. THE RELEVANCE OF EDUCATIONAL AUTONOMY AND EXPERTISE IN *FISHER*

Both the Court in *Grutter* and the Fifth Circuit in *Fisher* grounded their willingness to defer to universities' decision making in the Supreme Court's jurisprudence respecting educators' autonomy and expertise in making academic-related decisions.[155] When upholding school officials' decision making in both the K-12 and higher education contexts, the Court has often taken into account educational autonomy and educators' considerable knowledge and experience regarding complicated academic matters.[156] Considering that *Fisher* involves "complex educational judgments in an area that lies primarily within the expertise of the university," the Court should continue this practice when examining UT's educational mission as well as the means employed to achieve it.[157]

A. *Educational Autonomy and Compelling Interest*

As previously discussed, the Court in *Grutter* deferred to the Law School's judgment when examining whether student body diversity constituted a compelling governmental interest.[158] Central to Justice O'Connor's reasoning for doing so was the Court's

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155. *See Grutter*, 539 U.S. at 328–29; *Fisher*, 631 F.3d at 231–32 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Bd. of Curators of Univ. of Mo. v. Horrowitz, 435 U.S. 78, 96 n.6 (1978); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978)).

156. *See Grutter*, 539 U.S. at 343 (holding that the law school's "narrowly tailored use of race in admissions decisions to further the compelling interest in obtaining the educational benefits that flow from a diverse student body" did not violate the Equal Protection Clause of the Fourteenth Amendment); *Ewing*, 474 U.S. at 227–28 (upholding the University of Michigan's decision to dismiss a student for failing to meet academic standards); *Horowitz*, 435 U.S. at 92 (holding that a university's decision to dismiss a student for not meeting academic standards was not arbitrary or capricious). *But see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 765–66 (2007) (Thomas, J., concurring) (declining to afford deference to school officials' race-based decision making in the primary school context); Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (holding that the University of Michigan's race-based admissions plan was not narrowly tailored); *Bakke*, 438 U.S. at 320 (striking down a university's race-based admissions plan for failing to meet narrow tailoring requirements).

157. *Fisher*, 631 F.3d at 231 (citing *Grutter*, 539 U.S. at 328).

158. *See supra* notes 93–95 and accompanying text.

jurisprudence recognizing the importance of educational autonomy and institutional academic freedom.[159]

Although an arguably amorphous concept,[160] the constitutional theory of academic freedom is considered to be rooted in the First Amendment[161] and was born out of the Supreme Court's recognition of the importance of public education institutions to American society.[162] Such recognition is evident in cases such as *Sweezy v. New Hampshire*[163] and *Regents of the University of California v. Bakke*,[164] both of which laid the groundwork for the Court's acknowledgment of educational autonomy in *Grutter*.[165]

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159. The Supreme Court's recognition of academic freedom has encompassed both individual teachers and professors, as well as schools and universities. For a general discussion of the individual and institutional perspectives of academic freedom, see GAJDA, *supra* note 16, at 43–46.

160. *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 946 (2009) ("[T]he Court has not developed a coherent theory to guide constitutional protection of academic freedom."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 252–53, 257 (1989) (arguing that courts have failed to clearly articulate and analyze the parameters of academic freedom); Lauren A. Jeltema, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 235 (2004) ("While the Supreme Court recognizes the importance of professorial and institutional academic freedom, it has offered no clear guidelines for deciding such cases.").

161. *See Bakke*, 438 U.S. at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . ."); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 8 (2009) ("The constitutional law of academic freedom appeals to the First Amendment as a restriction on the capacity of governments to regulate universities and as a constraint on the authority of state universities to control their faculty."); Byrne, *supra* note 160, at 252 ("The First Amendment protects academic freedom."); Paul Horowitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 481–494 (2005) (discussing the historical development of "the constitutional understanding of academic freedom as a First Amendment value").

162. *See Grutter*, 539 U.S. at 329; Sweezy v. New Hampshire, 354 U.S 234, 250 (1957); *id.* at 262 (Frankfurter, J. concurring); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); Areen, *supra* note 160, at 967, 969–71; Horowitz, *supra* note 161, at 496; Matthew Reid Krell, *The Ivory Tower Under Siege: A Constitutional Basis for Academic Freedom*, 21 GEO. MASON U. C.R. L.J. 259, 272 (2011).

163. 354 U.S. at 250.

164. 438 U.S. at 312.

165. *See Grutter*, 539 U.S. at 329; *see also* Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-*Grutter *World*, 51 SANTA CLARA L. REV. 217, 254 (2011); Krell, *supra* note 162, at 278–80; Jeltema, *supra* note 160, at 237–39. *But see* Horowitz, *supra* note 161, at 483 (arguing that the plurality opinion in *Sweezy* should not be read as the Court's general endorsement of governmental deference to university decision making).

In *Sweezy*, the Court reversed a state court's ruling that held a university lecturer in contempt of court for violating a state statute that sought to eradicate "subversive persons," including public school teachers and professors, from state government employment.[166] In his influential opinion, Justice Frankfurter warned "against the grave harm resulting from governmental intrusion into the intellectual life of a university."[167] He agreed with scholars who declared:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*.[168]

In *Bakke*, Justice Powell relied upon these freedoms in affirming the pursuit of student body diversity as a constitutionally permissible goal.[169] In so doing, he not only articulated the diversity rationale,[170] which has served as the cornerstone for race-based decision making in higher education,[171] but also acknowl-

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166. *See Sweezy*, 354 U.S. at 236. For other anti-subversive cases, see *Adler v. Board of Education*, 342 U.S. 485 (1952) and *Wieman*, 344 U.S. at 186.

167. *Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring). While Justice Frankfurter acknowledged that at times there may exist justifiable reasons for the government to infringe upon academic freedom, he concluded that such reasons did not exist in the present case. *See id.* at 261–62.

168. *Id.* at 263 (emphasis added).

169. *See Bakke*, 438 U.S. at 311–12.

170. Justice Powell wrote:

> The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Id. at 312–13. For further discussion of these and other benefits associated with student body diversity, see Brief for Am. Educ. Research Ass'n et al. as Amici Curiae Supporting Respondents at 18, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398292, at *18; Brief for Am. Sociological Ass'n et al. as Amici Curiae Supporting Respondents at 21–22, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398313, at *21–22; Brief for NAACP Legal Defense and Educational Fund, Inc. et al. as Amici Curiae Supporting Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398820, at *2; Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 281–82 (2006); Michael Kaufman, PICS *in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 21 & n.107 (2007) (discussing social science research indicating the benefits of a racially diverse learning environment); Goodwin Liu, Seattle *and* Louisville, 95 CALIF. L. REV. 277, 282–90 (2007).

171. *See Grutter*, 539 U.S. at 323 (2003) ("Public and private universities across the

edged universities' autonomy to determine the composition of their student bodies.[172] Justice Powell stated that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[173]

While universities are permitted to exercise this freedom by establishing student body diversity as an educational goal, this freedom is not unlimited. As Justice Powell noted, "[a]lthough a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."[174] Justice O'Connor heeded this instruction as she examined the challenged plan in *Grutter*.[175] In so doing, she continued the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits"—a tradition that the Court should adhere to in *Fisher*.[176]

Similar to the Law School's compelling interest in *Grutter*, UT seeks to achieve the benefits of a diverse student body.[177] Its educational goals encompass UT's desire "'to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.'"[178] In reasoning that deference is an appropriate principle to apply when examining the constitutionality of this educational mission, Justice Kennedy and Judge Garza both agree that the Supreme Court's jurisprudence calls for such deference.[179]

Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."); Brief for Judith Areen et al. as Amici Curiae Supporting of Respondents at 12–13, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 554398, at *12–13 (noting that many prestigious law schools' use of admissions methods derived from Justice Powell's opinion in *Bakke*); Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1127 (1997) (discussing *Bakke*'s influence on the implementation of affirmative action in higher education).

172. *See Bakke*, 438 U.S. at 312–14 (plurality opinion).

173. *Id.* at 312.

174. *Id.* at 314.

175. *Grutter*, 539 U.S. at 328, 335–38.

176. *Id.*

177. *See* Fisher v. Univ. of Tex., 631 F.3d 213, 230–31 (5th Cir. 2011), *cert. granted*, 565 U.S. ___, 132 S. Ct. 1536 (2012).

178. *Id.* at 230 n.92 (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009)).

179. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *id.* at 247, 251 (Garza, J., concurring).

In Justice Kennedy's dissenting opinion in *Grutter*, he remarked that "[i]n the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us."[180] He approved of Justice Powell's reliance in *Bakke* on "a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission."[181] Similarly, in his concurring opinion in *Fisher*, Judge Garza acknowledged that "[s]tate universities are free to define their educational goals as broadly as needed to serve the public interest. We defer to educators' professional judgments in setting those goals."[182] If deference is an appropriate constitutional principle to apply when evaluating the constitutionality of UT's compelling interest, then so should it also be when determining the constitutionality of the measures employed to achieve such interest; it is *this* work, rather than the formulation of the interest itself, that necessitates the sort of multifaceted judgments that educators, as opposed to judges, are uniquely poised to make.

B. *Educational Expertise and Narrow Tailoring*

Central to the Court's examination in *Fisher* will be whether UT *needs* to employ race-based admissions measures given the amount of racial diversity achieved, in part, by the Ten Percent Plan.[183] While consideration of this issue potentially implicates both the compelling interest and narrow tailoring components of strict scrutiny,[184] the Court is likely to focus its inquiry on whether UT's use of race-based policies is narrowly tailored to further its educational goals.[185] The Court should defer to UT's chosen methods to carry out its academic mission because, more so than

180. *Id.* at 388 (Kennedy, J., dissenting).

181. *Id.* at 387.

182. *Fisher*, 631 F.3d at 256–57 (Garza, J., concurring).

183. *See* Harpalani, *supra* note 59, at 518 ("The substantive question [in *Fisher*] 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 diversity."); *see also supra* notes 55–56 and accompanying text.

184. Although the Court in *Grutter* recognized student body diversity as a compelling interest to justify the use of race-based admissions plans, the Petitioner in *Fisher* argues that UT seeks greater classroom diversity rather than student body diversity, which, according to the Petitioner, is not a permissible compelling interest under *Grutter*. *See* Petitioner Brief, *supra* note 23, at 29–30. *But see* Spann, *supra* note 27, at 53 (arguing that classroom diversity is a constitutionally permissible component of student body diversity).

185. *See* Brown-Nagin, *supra* note 127, at 117–18.

crafting the mission itself, the implementation of effective admissions policies, whereby UT can actually achieve its mission, requires the sort of academic expertise and experience that educators traditionally possess rather than judges.[186]

Due to the inherent limitations of courts to fully understand and evaluate the myriad factors that administrators must consider when making academic decisions, the Supreme Court has advocated for judicial restraint when reviewing such decisions[187] in cases such as *Regents of University of Michigan v. Ewing*[188] and *Board of Curators of University of Missouri v. Horowitz*.[189] In *Ewing*, the Court unanimously agreed to uphold a university's decision to dismiss a medical student from its program due to his poor academic performance.[190] Similarly, in *Horowitz* the Court

186. *See id.* at 132 ("Judges lack the expertise necessary to discern which approaches are necessary and effective in areas related to the core missions of universities and their First Amendment interests."); Harpalani, *supra* note 59, at 496 ("[B]ecause critical mass is a complex entity and 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.").

187. *See* Univ. of Penn. v. E.E.O.C., 493 U.S. 182, 199 (1990) ("Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking."); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."); *id.* at 226 (alteration in original) (quoting Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–90 (1978)) ("[Federal courts are] far less . . . suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'"). The Court's line of desegregation cases encouraging local control of school districts also recognizes educators' ability to effectively evaluate academic policies and their consequences. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems."); *id.* at 131-32 ("State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution."); *see also* Philip T.K. Daniel & Patrick D. Pauken, *The* PICS *Decision—Academic Freedom v. Federalism: Consider the Constitutional Implications*, 18 TEMP. POL. & CIV. RTS. L. REV. 111, 134 (2008) (discussing the interrelatedness of local control and deference to educators' decision making in the K-12 context). However, the Court in *Parents Involved in Community Schools v. Seattle School District Number 1* declined to rely on such reasoning when asked to defer to school districts' judgments that race-based student assignment plans were necessary to achieve the benefits of a diverse student body. 551 U.S. 701, 744–45 (2007). *But see id.* at 845 (Breyer, J., dissenting) ("I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.").

188. *See* 474 U.S. at 225–26.

189. *See* 435 U.S. 78, 107–08 (1978).

190. *See Ewing*, 474 U.S. at 215.

denied a student's appeal of her dismissal from a medical program.[191] In both cases, the Court found that the universities had not acted arbitrarily or in bad faith in deciding to dismiss the students and, therefore, had not violated the students' due process rights.[192]

Inherent in the universities' decisions to dismiss the students were academic judgments regarding merit, performance, and fitness.[193] Arriving at such decisions entails "expert evaluation" of a multitude of issues—issues for which courts may lack requisite information and experience to effectively evaluate.[194]

The *Grutter* Court relied on similar reasoning when deciding to defer to the Law School's judgment that the consideration of race was a necessary measure by which to achieve its educational mission.[195] The Court recognized that educational decisions concerning student body composition involve complex academic judgments that are greatly informed by universities' considerable experience and expertise.[196] As noted by the amici curiae in *Fisher*:

> How, for example, the mix of students affects learning involves considerations educators are best equipped to gauge. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, and ways to nurture students' capacity for moral reasoning, along with other specialized knowledge in which educators are trained. These "complex educational judgments" lie "primarily within the expertise of the university."[197]

Such considerations should inform the *Fisher* Court's decision to defer to UT's considered judgment that the consideration of race,

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191. *See Horowitz*, 435 U.S. at 84–85.

192. *See Ewing*, 474 U.S. at 225–27; *Horrowitz*, 435 U.S. at 85, 91–92.

193. *See Ewing*, 479 U.S. at 225; *Horowitz*, 435 U.S. at 80-82.

194. *See Ewing*, 474 U.S. at 225–26; *Horrowitz*, 435 U.S. at 89–92; *see also* Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 231 (5th Cir. 2011); Brown-Nagin, *supra* note 127, at 132 (suggesting that judicial restraint may be appropriate considering the difficulties encountered by universities when attempting to diversify their student bodies). Interestingly, in *Missouri v. Jenkins*, Justice Thomas relied on similar reasoning as that employed in *Horowitz* and *Ewing* to support the restoration of local control to school districts in the context of desegregation. *See* 515 U.S. 70, 102 (1995).

195. *See Grutter*, 539 U.S. at 328, 333. *But see* Horowitz, *supra* note 161, at 497 (suggesting that the Court's reasoning and holdings in *Ewing* and *Horowitz* may not justify the level of deference applied in *Grutter*).

196. *See Grutter*, 539 U.S. at 328, 333.

197. Am. Council on Educ. Brief, *supra* note 117, at 30 (quoting *Grutter*, 539 U.S. at 328).

as one of many admissions factors, continues to be necessary to achieve its educational mission, notwithstanding the operation of the Ten Percent Plan.

As evidenced by the Fifth Circuit's detailed discussion of UT's admissions policies, crafting and implementing effective admissions procedures are very involved endeavors that are multifaceted and require a great deal of knowledge and skill.[198] For instance, to arrive at an admissions decision, UT administrators employ both Academic Index ("AI") and a Personal Achievement Index ("PAI") computations.[199] The AI score is "based on the student's high school class rank, standardized test scores, and the extent to which the applicant exceeded UT's required high school curriculum."[200] The PAI score considers applicants' "leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances."[201] Prior to UT's reconsideration of race, special circumstances included, among other factors, the socioeconomic status of the applicant's family and school, whether languages other than English were spoken in the home, and whether the applicant lived in a single-parent home.[202] The fact that the PAI score is determined, in part, by "specially trained readers,"[203] who score two essays written by applicants, evidences the knowledge and expertise needed to make informed admissions decisions.[204]

Such skill and experience are also necessary because admissions efforts encompass more than making a decision regarding whether or not to admit a particular student, although such decisions are obviously integral components of all admissions procedures. Assembling a diverse student body that furthers a university's educational goals also involves the development and implementation of effective recruitment strategies to encourage underrepresented students to apply and to persuade admitted students to enroll.[205] As previously discussed, the availability of

198. *See Fisher*, 631 F.3d at 222–30.

199. *See id.* at 222–23.

200. *Id.* at 222.

201. Respondents Brief, *supra* note 57, at 7.

202. *Id.* at 7, 13.

203. *Id.* at 13.

204. *Id.* UT admissions officers also attend annual training regarding admissions procedures. *See Fisher*, 631 F.3d at 228.

205. *See supra* note 7.

scholarships and financial aid for minority students is another crucial element to achieving a diverse student population.[206]

UT has employed several race-neutral admissions measures in their attempt to increase minority student enrollment. Such measures include the establishment of new regional admissions offices in areas with student populations that do not traditionally feed into UT, as well as the awarding of scholarships to students who come from lower socioeconomic backgrounds.[207] The fact that despite these efforts—the consideration of PAI factors and the implementation of the Ten Percent Plan—UT, in its considered judgment,[208] had not produced a sufficiently diverse student body that allowed it to achieve its educational mission evidences the complexities and challenges involved in university admissions.[209]

In deciding to supplement the Ten Percent Plan with a race-based admissions policy, UT seeks to achieve the educational, social, and democratic benefits that are often associated with diverse student bodies.[210] However, UT, like all universities, faces a multitude of challenges when attempting to achieve this educational mission.[211] The scope of such challenges ranges from achievement gap and pipeline issues created, in part, by K-12 inequities[212] to voluntary separation and isolation by students on

206. *See supra* note 128 and accompanying text.

207. *See* Respondents Brief, *supra* note 57, at 7.

208. *See id.* at 6.

209. *See id.* at 7–12.

210. *See supra* notes 45–48 and accompanying text.

211. *See supra* notes 125–30 (discussing factors such as demographic shifts, financial aid, and standardized test scores that can affect a university's ability to assemble a racially diverse student body).

212. *See* JAEKYUNG LEE HARVARD CIVIL RIGHTS PROJECT, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS 58 (2006), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/tracking-achievement-gaps-and-assessing-the-impact-of-nclb-on-the-gaps/lee-tracking-achievement-gaps-2006.pdf; GARY ORFIELD & CHUNGMEI LEE HARVARD CIVIL RIGHTS PORJECT, BROWN AT 50, at 21–22 (2004), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf; John Brittain & Callie Kozlak, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. SOC. JUST. 591, 619–21 (2008); Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 802–05 (2008); Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 396–97 (1991); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 289 (1999); Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205, 213–25 (2011).

college campuses such that there is minimal cross-racial interaction.[213]

School policymakers, not judges, are in the best position to assess such challenges and to craft effective measures, including race-based admissions policies, that are designed to overcome them. As Professor Brown-Nagin has noted, "the *Grutter* Court expressly vested considerable discretion in educational authorities precisely because they are closest to the problems associated with diversifying campus life."[214] The years of study, reconsideration, and modification that UT administrators have engaged in regarding their admissions policies have equipped them with the requisite knowledge and expertise to address these and other challenges that may impede the achievement of their educational goals.[215]

As instructed by *Grutter*, when examining the constitutionality of UT's current admissions plan, the Supreme Court should afford a degree of deference to UT's judgments regarding both its educational goals and the measures needed to achieve them.[216] Doing so would not only be in keeping with the Court's prior recognition of institutional autonomy, but would also greatly enhance the Court's own understanding and judgment regarding UT's continued need to consider race in its admissions decisions to achieve its educational goals.

CONCLUSION

For more than six decades the Supreme Court has played an instrumental role in helping to provide equal educational opportunities for minority students. In cases ranging from *Sweatt v.*

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213. *See* Brown-Nagin, *supra* note 127, at 130–32; Rachel Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2304–05, 2320–21 (2000); Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 379 (1996); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1607–08 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998)).

214. Brown-Nagin, *supra* note 127, at 137.

215. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 222 (5th Cir. 2011) ("Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.").

216. *See* Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003); Brown-Nagin, *supra* note 127, at 137 ("Where the causes of classroom racial stratification are multicausal, and the state's interest in attaining the benefits of cross-racial understanding is compelling, *Grutter* might suggest deference to educators.").

Painter to *Grutter*, the Court has endeavored to ensure that students of color have equal access to institutions of higher education.[217] Considering that universities are often regarded as "gateways to leadership in American institutions,"[218] the *Fisher* Court should defer to UT's autonomy and expert judgments as UT crafts and implements measures to open its doors to a greater number of underrepresented, minority students.

217. *See, e.g.*, *Grutter*, 539 U.S. at 343; Gratz v. Bollinger, 539 U.S. 244, 251 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978); Sweatt v. Painter, 339 U.S. 629 (1950).

218. Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 60 (2004); *see also* Brief for the United States as Amici Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 176635, at *13 ("A university degree opens the doors to the finest jobs and top professional schools, and a professional degree, in turn, makes it possible to practice law, medicine, and other professions."); Torres, *supra* note 23, at 1608 ("[P]articular [educational] institutions serve as historical gateways to state leadership.").