The Road Map to Attaining Diversity in the Workplace: How Race-Conscious Admissions Programs in Education Can Lead the Way

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I. INTRODUCTION

The United States Supreme Court has long recognized that diversity in the classroom is a compelling state interest and, to achieve this goal, the Court has allowed educational institutions to consider race as one of many

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characteristics of its applicants when making admissions decisions.[1] Diversity in the workplace has also been a goal of employers and the determination to reach this goal has never been stronger, given the country's awakened sensibilities to the racial divide, from the criminal justice system, captured by the murder of George Floyd, to the disparities in access to education and health care brought into sharp focus by the ravaging effects of COVID-19. The country's understanding of the benefits of diversity, however, is not new. In 1967, the Supreme Court acknowledged that the "[n]ation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . . .'"[2] The Supreme Court reiterated its understanding of the importance of diversity in the classroom and workplace in 2003, and again in 2016, recognizing the country's "increasingly diverse workforce and society" and noting that the benefits of diversity in both the classroom and workplace "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[3]

Many companies and organizations actively publicize their commitment to diversifying their workforces as, for example, the Grammy Awards organization has done in its announcement that "diversifying our industry is at the core of every decision we make," and to achieve diversity it has committed to recruiting and hiring "more diverse candidates."[4] Law firm clientele have also begun advertising that they will not hire law firms if they do not employ lawyers of color and otherwise fail to prove their commitment to diversity in their workforce.[5] The American Bar Association (ABA), recognizing its "duty to properly represent the legal profession and

1. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2208–10 (2016) (upholding the constitutionality of the University of Texas's race-conscious admissions program); Grutter v. Bollinger, 539 U.S. 306, 323–24 (2003) (upholding the constitutionality of the University of Michigan Law School's race-conscious admissions program).

2. Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (1943)).

3. *Grutter*, 539 U.S. at 330; *accord Fisher II*, 136 S. Ct. at 2210–11.

4. Jonathan Landrum Jr., *Recording Academy to Adopt Inclusion Rider For 2022 Grammy Awards*, FORTUNE (Aug. 4, 2021), https://fortune.com/2021/08/04/grammy-awards-inclusion-rider-diversity-2022-ceremony/ [https://perma.cc/L3UU-5CTA].

5. *See, e.g.*, Sara Randazzo, *Law-Firm Clients Demand More Black Attorneys*, WALL ST. J. (Nov. 2, 2020), https://www.wsj.com/articles/law-firm-clients-demand-more-black-attorneys-11604313000 [https://perma.cc/3URG-5XKD] (noting that companies like Microsoft Corp., U.S. Bancorp., Uber Technologies Inc., and Intel Corp. are asking the law firms they hire "to detail how many diverse lawyers they employ and whether those lawyers are assigned meaningful work" and if they "don't have good answers [they] might lose out on bonuses or not get hired").

the interests of justice,"[6] has implemented a policy requiring all its sponsored or co-sponsored Continuing Legal Education programs to have a specified number of participants who come from a "diverse group," defined as "minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities."[7]

Although supported by the lofty goal "to eliminate bias and enhance diversity and inclusion throughout the Association, legal profession, and justice system,"[8] the ABA's policy may not withstand constitutional challenge, because the Supreme Court, in the seminal case of *Regents of the University of California v. Bakke*, struck down the act of setting aside a specified number of seats for a particular group as a quota.[9] Indeed, the Florida Supreme Court recently reviewed a similar requirement adopted by the Business Law Section of the state bar association and, on its own motion, invalidated it on the grounds that it is "antithetical to basic American principles of nondiscrimination."[10]

In light of the Florida court's decision, the then president of the ABA admitted that the ABA would have to review its "CLE requirements in light of the Florida Supreme Court opinion while maintaining our unwavering commitment to diversity and inclusion in the legal profession."[11] Indeed, all employers may have to review their methods for achieving diversity because, even without establishing quotas, an employer may violate the law when it considers race as even one factor in an employment decision.[12] Thus, the Florida decision and the law's prohibition against considering

6. *Goal III*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/ [https://perma.cc/33VM-KHMX].

7. *Id.*

8. *Diversity and Inclusion Center*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/ [https://perma.cc/9SLP-KU4P].

9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

10. *In re* Amend. to Rule Regulating the Fla. Bar 6-10.3, 315 So. 3d 637, 637 (Fla. 2021).

11. Amanda Robert, *Florida Supreme Court's Order Blocking Diversity Quotas for CLE Instructors Could Impact ABA Programs*, ABA J. (Apr. 19, 2021), https://www.abajournal.com/news/article/florida-supreme-courts-order-may-also-impact-aba-programs [https://perma.cc/S9H6-3MMD].

12. Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(m). *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003) (noting that when an employer has relied on a legitimate reason for taking an adverse employment action against an individual but also on a characteristic of that individual that is protected by Title VII, such as sex or race, then that employer has a "limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff").

race while making employment decisions must serve as a reminder and warning to all employers that achieving diversity cannot be attained without close attention to the limitations placed by the guarantee of equal protection. It also stands in stark contrast to the current standard for making admissions decisions in education that allows a consideration of race, as long as it is considered as one factor of many as part of a holistic consideration of an applicant's traits and characteristics.[13]

This Article, therefore, considers the tension that exists between the goal of achieving diversity in United States' classrooms and workplaces in light of the limitations placed on the consideration of a person's race, color, gender, or ethnicity and the differences in the law that controls employment and education. Section II reviews the constitutional and federal guarantees of equal protection across all sectors of society, focusing specifically on education and the workplace. Section III examines the current standard for the permissible consideration of race in university admissions programs, which stands in stark contrast to the impermissible consideration of race in employment decisions, discussed in Section IV. Section V proposes that the law governing employment may have to change to allow employers to achieve diversity by acknowledging that race is a factor, but only one factor of many, in an employment decision, as it has been upheld in university admission decisions. In Section VI, the Article concludes that the law should change to allow for the open consideration of race in employment, as in education, so that companies and organizations do not "resort to camouflage" to achieve their diversity goals.[14] If the law in employment does not change, then, as Justice Ginsburg warned, employers will be left with no choice but to achieve diversity "through winks, nods, and disguises."[15]

II. CONSTITUTIONAL AND STATUTORY PROHIBITIONS AGAINST DISCRIMINATION IN EDUCATION AND EMPLOYMENT

The Fourteenth Amendment of the United States Constitution guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[16] As first construed, the amendment protected "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over

13. *See Fisher II*, 136 S. Ct. 2198 (2016); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
14. Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).
15. *Id.* at 305.
16. U.S. CONST. amend. XIV, § 1.

him."[17] The text of the Amendment, however, is written "in universal terms, without reference to color, ethnic origin, or condition of prior servitude,"[18] and "the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination."[19] As Justice Powell made clear in *Bakke*, the "guarantees of the Fourteenth Amendment extend to all persons" regardless of race.[20]

After the Civil War, Congress enacted the Civil Rights Act of 1866 to protect people who had, up until then, been enslaved and were now free.[21] Like the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1866 was written in broad terms and, consistent with the constitutional guarantee of equal protection, was intended to protect "[a]ll persons in the United States in their civil rights" and apply to "every race and color."[22] One hundred years later, Congress expanded the prohibition against discrimination with its enactment of the Civil Rights Act of 1964, to cover many facets of society, including public accommodations, employment, education, and all federally funded programs.[23] Indeed, at the time of the law's passage, Congress indicated that it considered the policy of ending discrimination to be of the "highest priority."[24] Title VI and Title VII ban discrimination in education and employment respectively and are addressed separately below.

Title VI of the Civil Rights Act of 1964 bans discrimination across a broad spectrum of society, making clear that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[25] Thus, its reach extends to all public and private colleges

17. *Bakke*, 438 U.S. at 291 (plurality opinion) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 71 (1873)).

18. *Id.* at 293.

19. *Id.* at 292; *see also* Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue to Protect Them*, 12 NE. U. L.J. 56, 64–65 (2020) (reviewing the gradual expansion of the reach of the Equal Protection Clause).

20. *Bakke*, 438 U.S. at 289.

21. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27–30 (1866).

22. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866) (statement of Sen. Lyman Trumbull)).

23. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a).

24. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

25. 42 U.S.C. § 2000d.

and universities that accept financial assistance from the federal government and most do since they accept federal funds by, among other things, accepting tuition money for students receiving federal financial aid.[26] Describing Title VI as "majestic in its sweep," in 1978, Justice Powell examined the "voluminous legislative history" of the statute in *Bakke*.[27] Based on his review, Justice Powell, writing for a plurality of the Supreme Court, concluded that the protections of Title VI are the same as those afforded by the Equal Protection Clause of the Fourteenth Amendment and, thus, reach "all persons" regardless of race.[28] Based on this conclusion, the *Bakke* Court granted standing to a White applicant who challenged the admissions program at the federally funded University of California Davis School of Medicine.[29]

Bakke established not only that the guarantee of equal protection extends equally to White people and people of color but also that the Constitution prohibits a university receiving federal funds from setting aside a prescribed number of seats for one group of applicants to the exclusion of others.[30] "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake," and is, according to the *Bakke* Court, what "the Constitution forbids."[31] Thus, since *Bakke*, the Supreme Court has consistently held that any program that sets a quota for preferring any particular group cannot stand.[32]

Bakke is important for another reason too. While striking down the University of California Davis School of Medicine's quota system, Justice Powell recognized that a university may properly consider the race of applicants to attain a diverse student body, because diversity "clearly is a constitutionally permissible goal for an institution of higher education."[33] He reviewed Harvard College's admissions program, in which race was considered as one factor of many as part of a holistic consideration of an applicant's characteristics and opined that such a consideration of race would not violate the guarantees of equal protection.[34] Twenty-five years

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26. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 184 (1st Cir. 2020) ("Because Harvard accepts federal funds, it is subject to Title VI.").

27. *Bakke*, 438 U.S. at 284 (plurality opinion).

28. *Id*. at 289 (equating Title VI's protection with that of the Equal Protection Clause); *accord Students for Fair Admissions, Inc.*, 980 F.3d at 185 ("Title VI's protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment."); Grutter v. Bollinger, 539 U.S. 244, 343 (2003).

29. *Bakke*, 438 U.S. at 284.

30. *Id.* at 307.

31. *Id.*

32. *Fisher II*, 136 S. Ct. 2198, 2208 (2016); *Grutter*, 539 U.S. at 334.

33. *Bakke*, 438 U.S. at 311–12.

34. *Id.* at 317–18.

later, in *Grutter v. Bollinger*, Justice O'Connor acknowledged that Justice Powell's opinion "has served as the touchstone for constitutional analysis of race-conscious admissions policies" and that "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[35] Writing for the Court in *Grutter*, Justice O'Connor relied on Justice Powell's opinion in *Bakke* and upheld the University of Michigan Law School's race-conscious admissions program.[36] More recently, the Supreme Court relied on Justice Powell's opinion in *Fisher v. The University of Texas at Austin* and again affirmed a race-conscious admissions program designed to achieve student body diversity.[37]

Like Title VI, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex, or national origin, specifically in employment.[38] As originally drafted, Title VII prohibited employers from taking adverse employment actions against employees or prospective employees "because of such individual's race, color, religion, sex, or national origin."[39] Like the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1866, and Title VI of the Civil Rights Act of 1964, Title VII was intended "to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites."[40] Based on "uncontradicted legislative history," the Supreme Court made clear that Title VII prohibits racial discrimination against White victims of discrimination "upon the same standards as would be applicable" to victims of color.[41] As summed up by the Court in *Griggs v. Duke Power Company*, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[42] In contrast to the law as it has developed under Title VI, where race may be considered as part of a college admissions program—discussed in the following section—Title VII, however, forbids any consideration of it. As will be discussed in Section IV below, in 1991

35. *Grutter*, 539 U.S. at 323.
36. *Id.* at 343.
37. *Fisher II*, 136 S. Ct. at 2198.
38. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.
39. *Id.* § 2000e-2.
40. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (citing EEOC Decision No. 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326 (1973)).
41. *Id.* at 280 (first citing 110 CONG. REC. 2578 (1964) (statement of Rep. Emanuel Celler); and then citing 110 CONG. REC. 7218 (1964) (statement of Sen. Joseph Clark)).
42. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Congress amended Title VII to clarify that an employer may be liable in any case where the employer takes race or another protected trait into account, even when the employer has also relied on legitimate factors in making the challenged decision.[43]

III. THE PERMISSIBLE CONSIDERATION OF RACE IN UNIVERSITY ADMISSIONS

Rejecting what amounted to a quota system at the University of California Davis School of Medicine, Justice Powell acknowledged that student body diversity may justify the consideration of race in a university admissions program.[44] He examined several possible justifications for considering the race of applicants to medical school and concluded that the only one that could withstand constitutional muster was "the attainment of a diverse student body."[45] Relying on earlier Supreme Court decisions, Justice Powell noted: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[46] This freedom, according to Justice Powell, "includes the selection of its student body."[47] He echoed Justice Frankfurter's observation, made twenty years earlier, that it is "the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation" and, to accomplish this, a university must be free "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."[48]

The freedom of a university to select who may be admitted is not without limits even if the university considers race to achieve student body diversity. As Justice Powell warned, "[i]t is not an interest in simple ethnic diversity,

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43. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003) (noting that when an employer has relied on a legitimate reason for taking an adverse employment action against an individual but also on a characteristic of that individual that is protected by Title VII, like sex or race, then that employer has a "limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff").

44. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (plurality opinion).

45. *Id.* at 311–12. The other possible justifications that Justice Powell rejected include: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved . . . ." *Id.* at 306 (citations omitted).

46. *Id.* at 312 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)); Keyishian v. Board 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.").

47. *Bakke*, 438 U.S. at 312.

48. *Id.* (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race.[49] Instead, "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[50]

To ensure that an admissions plan comports with equal protection guarantees, Justice Powell acknowledged that "[r]acial and ethnic distinctions of any sort . . . call for the most exacting judicial examination."[51] In cases decided after *Bakke*, the Court interpreted Justice Powell's "most exacting judicial examination" as "strict scrutiny."[52] In *Grutter v. Bollinger*, the Court noted that "precise" tailoring is "narrow" tailoring and "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . ."[53] Rather, to withstand the Court's strict scrutiny, a race-conscious admissions program must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[54] In the first of two cases in which the Court reviewed the University of Texas at Austin's race-conscious admissions program, the Court explained: "Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'"[55]

Highlighting Harvard's race-conscious plan as "an illuminating example" of such a plan,[56] Justice Powell in *Bakke* emphasized the importance of considering all aspects of an applicant, as Harvard did, including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage,

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49. *Id.* at 315.
50. *Id.*
51. *Id.* at 291.
52. *See* Fisher v. Univ. of Texas at Austin (*Fisher I*), 570 U.S. 297, 309 (2013) ("Nothing in Justice Powell's opinion in Bakke signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." (quoting Gratz v. Bollinger, 539 U.S. 244, 275 (2003))).
53. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).
54. *Id.* at 337.
55. *Fisher I*, 570 U.S. at 307–08 (quoting *Bakke*, 438 U.S. at 299 (plurality opinion)).
56. *Bakke*, 438 U.S. at 316 (plurality opinion).

[and the] ability to communicate with the poor" in addition to race.[57] According to Justice Powell, an admissions program that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" is not only permissible under the Constitution but also necessary to place all applicants on "the same footing" in the admissions process.[58]

In addition to proving that it considers race as just one factor of many in an admissions program, a university must also prove that race-neutral alternatives are not sufficient to achieve student body diversity.[59] In the case most recently decided by the Supreme Court, the Court's second review of the University of Texas's race-conscious admissions plan, the University met this burden by demonstrating that, when it was legally prohibited from considering the race of its applicants, its minority enrollment suffered both in actual numbers and in the distribution of diverse students throughout particular classes and areas of study.[60] As the Court noted, the "consistent stagnation in terms of the percentage of minority students enrolling at the [u]niversity" persisted despite the many efforts the university made to increase diversity.[61] These efforts included considering the "special circumstances" an individual applicant may have faced, such as "growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family."[62] The university also "created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools."[63]

The Texas state legislature also responded by enacting the Top Ten Percent Law, which mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state

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57. *Id.* at 317.
58. *Id.*
59. *Fisher I*, 570 U.S. at 312; *accord Grutter*, 539 U.S. at 339.
60. *Fisher II*, 136 S. Ct. 2198, 2212 (2016). Prior to 1996, the University of Texas considered race as part of its review of every applicant for admission, but in that year, it removed race from any part of the admissions decision, because the Fifth Circuit decided that "any consideration of race in college admissions" violates the Equal Protection Clause. Hopwood v. Texas, 78 F.3d 932, 934–35, 948 (5th Cir. 1996). After the Supreme Court decided *Grutter v. Bollinger*, the University reintroduced a consideration of race consistent with the holding in that case. *Fisher I*, 570 U.S. at 297.
61. *Fisher II*, 136 S. Ct. at 2212.
62. *Fisher I*, 570 U.S. at 304.
63. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 223 (5th Cir. 2011), vacated, 570 U.S. 297 (2013).

university.[64] Despite this legislation, and the university's efforts to boost minority enrollment, the university was not able to achieve meaningful student body diversity.[65] "Perhaps more significantly," according to the Court, the university spent seven years "attempting to achieve its compelling interest using race-neutral holistic review" and "none of these efforts succeeded."[66]

It should also be noted, as the *Fisher* Court did, that the Top Ten Percent Law, while neutral on its face, was "adopted with racially segregated neighborhoods and schools front and center stage."[67] Indeed, according to the Court, it "is race consciousness, not blindness to race, that drives such plans."[68] Furthermore, even if the Top Ten Percent Law can be considered race-neutral, it does not allow a university to select students based on a variety of characteristics, because percentage plans select students on the basis of class rank alone, and "like any single metric . . . will capture certain types of people and miss others."[69] Indeed, in the words of Justice Kennedy, writing the opinion for the Court in *Fisher*, this single method for selecting the members of a class "would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students."[70] As he explained:

> A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got

64. TEX. EDUC. CODE ANN. § 51.803 (West 1997). The Top Ten Percent Law was amended, during the course of this litigation, and now caps the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents. *Id.* § 51.803(a–1).

65. *Fisher II*, 136 S. Ct. at 2212. For a more complete review of the Court's analysis of the attempts the University of Texas made to diversify its student body and its conclusion that none of these attempts were successful, see Nancy L. Zisk, *Embracing Race-Conscious College Admissions Programs: How* Fisher v. University of Texas at Austin *Redefines "Affirmative Action" as a Holistic Approach to Admissions that Ensures Equal, Not Preferential Treatment,* 100 MARQ. L. REV. 835, 848–49 (2017).

66. *Fisher II*, 136 S. Ct. at 2213.

67. *Id.* (quoting *Fisher I*, 570 U.S. at 335 (Ginsburg, J., dissenting)).

68. *Id.*

69. *Id.*

70. *Id.*

> herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.[71]

Finally, with respect to the Top Ten Percent Law and others like it, Justice Kennedy noted that they create "perverse incentives" that "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."[72]

Thus, in light of the many efforts the university made to increase minority enrollment and the ramifications of relying on a percentage plan, the Court acknowledged that its efforts "could not be faulted"[73] and that there were no race-neutral plans that were "available and workable" through which it "could have met its educational goals."[74] Notably, what is "available and workable" does not mean that a university has to exhaust "every conceivable race-neutral alternative" to prove that its race-conscious plan is narrowly tailored.[75] In fact, the *Grutter* Court made it explicitly clear that narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[76] Rather, narrow tailoring requires a "holistic review" of applicants, "a system that did not mechanically assign points but rather treat[s] race as a relevant feature within the broader context of a candidate's application."[77]

After the *Grutter* and *Fisher* decisions, it appeared that the law in this area had been settled, but Harvard College and the University of North Carolina (UNC) are currently defending their race-conscious admissions programs in federal court.[78] In both cases, Students for Fair Admissions, the same nonprofit organization that sued the University of Texas at Austin, has sued Harvard and UNC, claiming not only that their particular admissions programs violate Title VI, but also that any consideration of race cannot

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71. *Id.*

72. *Id.* at 2214 (quoting Gratz v. Bollinger, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting)).

73. *Id.* at 2211.

74. *Id.* at 2214 (quoting *Fisher I*, 570 U.S. 297, 312 (2013)).

75. *Fisher I*, 570 U.S. at 312 (quoting Grutter v. Bollinger, 539 U.S. 306, 339–40 (2003)).

76. *Grutter*, 539 U.S. at 339.

77. *Fisher II*, 136 S. Ct. 2198, 2205 (2016) (citing *Grutter*, 539 U.S. at 337, 343–44).

78. *See* Complaint at 1, 4–6, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) [hereinafter Harvard Complaint]; Complaint at 2–7, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14-cv-00954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019), 2014 WL 6386755 [hereinafter UNC Complaint].

pass constitutional muster.[79] The UNC lawsuit is currently awaiting trial after the parties' cross-motions for summary judgment were denied.[80] The case against Harvard was tried, and the United States District Court for the District of Massachusetts ruled that Harvard satisfied strict scrutiny and proved that its race-conscious admissions program was narrowly tailored and permissible under the standard established by the Supreme Court in *Grutter* and *Fisher*.[81] Acknowledging that Harvard's program is "not perfect," the court stated explicitly that "strict scrutiny does not require [perfection]."[82] In fact, the court warned that, while a university must convince a court that its race-conscious plan is narrowly tailored and must prove that with metrics and statistical data, relying too much on admissions statistics might "potentially run afoul of the prohibition on quotas and, more importantly, defeat the purpose of a comprehensive, holistic review process that allows the admission of applicants with virtues that are not always quantifiable."[83]

Additionally, the court acknowledged the Supreme Court's prediction in 2003 in *Grutter* that within the next twenty-five years "it would not be necessary to use racial preferences to achieve a diverse student body,"[84] but noted that the prediction may have been overly optimistic, given that still "the effects of entrenched racism and unequal opportunity remain obvious."[85] Thus, according to the court, "at least for now," race-conscious plans are necessary and pass constitutional muster as long as they satisfy "the dictates of strict scrutiny."[86] Describing Harvard's program as "a

79. *See* Harvard Complaint, *supra* note 78, at 6, 117 ("There simply is no practical way to ensure that colleges and universities will use race in their admissions processes in any way that would meet the narrow tailoring requirement."); UNC Complaint, *supra* note 78, at 6, 63 ("Defendants acted under color of law in developing and implementing race-based policies that led UNC-Chapel Hill to deny Plaintiff's members equal protection of the laws and to discriminate against them . . . .").

80. *Students for Fair Admissions, Inc.*, 2019 WL 4773908, at *13.

81. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 204–05 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022).

82. *Id.* at 204.

83. *Id.*

84. *Id.* at 204–05 (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003)) (predicting that twenty-five years from the date of its decision that race-conscious plans would no longer be necessary to ensure student body diversity).

85. *Id.* at 205.

86. *Id.*

very fine admissions program,"[87] the court concluded that Harvard's plan did, in fact, satisfy those dictates because its "applicants are afforded a holistic, individualized review," and "diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way."[88]

On appeal, the United States Court of Appeals for the First Circuit defined the issue before it as "whether Harvard's limited use of race in its admissions process in order to achieve diversity in the period in question is consistent with the requirements of Supreme Court precedent."[89] After a thorough review of the evidence submitted at trial and a close reading of the district court's 130-page opinion, the court affirmed the decision.[90] Specifically, the appellate court agreed that Harvard's plan was narrowly tailored and complied with Supreme Court precedent that a race-conscious plan is permissible "as long as race is 'considered in conjunction with other aspects of an applicant's background' and is 'but a "factor of a factor of a factor" in the holistic-review calculus.'"[91] The First Circuit also agreed that Harvard had carried its burden of proving that "no workable race-neutral alternatives exist"[92] and that there was no evidence that Harvard intentionally discriminated against any group, including Asian Americans, who were named plaintiffs in the case.[93] The Supreme Court has granted certiorari in this case and will likely consider the case in the fall 2022 term.[94]

The Court has accepted certiorari, and it is possible that it will overturn *Grutter* and *Fisher* to ban any consideration of race in an admissions process, given that multiple Supreme Court Justices have publicly expressed concern about considering race in making education, housing, and employment decisions.[95] The dangers of prohibiting any consideration of race in admissions has been well documented and clearly expressed by sixteen universities—public and private, large and small—that have spoken

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87. *Id.* at 204.
88. *Id.* at 203.
89. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 204 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022).
90. *Id.* at 163–64, 204.
91. *Id.* at 192 (quoting *Fisher II*, 136 S. Ct. 2198, 2207 (2016)).
92. *Id.* at 195.
93. *Id.* at 203.
94. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022).
95. *See* Zisk, *supra* note 19, at 86–92 (discussing the possibility that Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh are likely to vote together and decide that race-conscious admissions programs violate Equal Protection guarantees).

with "one voice" in their amicus brief in the *Harvard* case.[96] In that brief, the educators made clear that "the reality is that race does matter."[97] In fact, according to these universities, "[t]o say that race continues to matter is to acknowledge forthrightly that for many reasons race continues to influence the backgrounds, perspectives, and experiences of many in our society . . . . Unsurprisingly, race and ethnic background may significantly impact applicants' experiences, perspectives, and areas of accomplishment."[98]

Thus, educators from around the country support the continuation of race-conscious admissions programs, because without the ability to consider race, student body diversity in their classrooms will decline.[99] As already recognized by the Court, diversity in the classroom is necessary to prepare "a student body 'for an increasingly diverse workforce and society,'"[100] and is an "important and laudable" goal."[101] The Court should, therefore, uphold race-conscious admissions programs that include race as one factor of many in admissions decisions. As employers seek to achieve diversity in the workplace, it is equally important that they be allowed to consider race openly as part of an employment decision, but any consideration of race is not allowed, as discussed in the following section.

IV. TITLE VII PROHIBITS ANY CONSIDERATION OF RACE IN EMPLOYMENT DECISIONS

In contrast to Title VI governing federally funded education, Title VII leaves no room for any consideration of race or other protected trait in employment decisions. As originally drafted, Title VII made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

96. *See* Brief for Brown Univ. et al. as Amici Curiae Supporting Defendants at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019).

97. *Id.* at 8 (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

98. *Id.* at 11–12.

99. *See* Zisk, *supra* note 19, at 62 n.17 (noting the evidence presented in the *Fisher*, *Harvard*, and *UNC* cases documenting the decline in diversity when race is not considered).

100. *Fisher II*, 136 S. Ct. 2198, 2211 (2016).

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

affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[102] Confronting an allegation of sex discrimination in *Price Waterhouse v. Hopkins*, the Supreme Court construed "because of" to mean that an employee's protected status "must be irrelevant to employment decisions."[103]

The Court in *Price Waterhouse* was faced with the fact that the employer had legitimate reasons for its decision to deny the female plaintiff partnership but also that it had relied on "an impermissibly cabined view of the proper behavior of women."[104] Based on these facts, where "it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives,"[105] the Supreme Court decided that the defendant may avoid a finding of liability "by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[106]

With the Court's holding, the "mixed motive" case was born.[107] For various reasons that are beyond the scope of this Article, lower courts facing mixed motive claims following *Price Waterhouse* found the standard defined by the Court "difficult to apply."[108] Partly in response to the confusion created by *Price Waterhouse*, Congress amended Title VII in an effort to clarify that an employer will face liability any time a protected trait like race is considered in an employment decision.[109] Retaining the fundamental prohibition against taking any job action against an employee

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102. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2) (emphasis added).

103. Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989). Although the Court in *Price Waterhouse* considered a female employee's challenge to her employer's decision denying her partnership status based on her sex, the Title VII prohibition applies equally to all protected traits enumerated including "race, color, religion, sex, or national origin." *Id.* at 239; *see, e.g.*, Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 649 (2012) (applying the mixed-motive analysis to claims of both sex and race discrimination).

104. *Price Waterhouse*, 490 U.S. at 236–37.

105. *Id.* at 232.

106. *Id.* at 258.

107. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (describing *Price Waterhouse* as a "mixed motive case"); Smith v. City of Allentown, 589 F.3d 684, 690 (3d Cir. 2009) (observing that the *Price Waterhouse* holding "has become known as the mixed motive doctrine").

108. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009). *See* Nancy L. Zisk, *What is Old is New Again: Understanding* Gross v. FBL Financial Services, Inc. *and the Case Law That Has Saved Age Discrimination Law*, 58 LOY. L. REV. 795, 804 n.46 (2012) (noting courts cited by the Supreme Court in *Gross* that grappled with the *Price Waterhouse* standard).

109. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). See Desert Palace, Inc. v. Costa, 539 U.S. 90, 93–94 (2003) ("Congress passed the 1991 Act in 'large part as a response to a series of decisions'" including the *Price Waterhouse* decision "by 'setting forth standards applicable in "mixed motive" cases.'" (quoting Landgraf v. USI Film Products, 511 U.S. 244, 250–51 (1994))).

"because of such individual's race, color, religion, sex, or national origin,"[110] the amendment added that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[111] To state a claim under this section, the Supreme Court has made clear that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[112]

In such a case, an employer can now limit its liability by showing that it would have made the same decision "in the absence of the impermissible motivating factor."[113] The employer cannot, however, escape liability even it if makes this showing because, according to the explicit terms of the statute, a court may order "declaratory relief, injunctive relief . . . and attorney's fees and costs."[114] As observed by the Supreme Court in *Desert Palace v. Costa*, the employer in a mixed motive case has a "limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff."[115] The question thus becomes how an employer can actively seek to increase diversity without running afoul of this amendment to Title VII. The next section answers this question by suggesting that the law may have to change.

V. SUPREME COURT PRECEDENT UNDER TITLE VI OFFERS THE ROAD MAP TO DIVERSITY IN EMPLOYMENT UNDER TITLE VII

As a starting point to answer the question of how to achieve diversity in the workplace, it is worthy to note that "[o]ur jurisprudence ranks race a 'suspect' category, 'not because race is inevitably an impermissible classification, but because it is one which usually, to our national shame,

110. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).
111. *Id.* § 2000e-2(m).
112. *See Desert Palace, Inc.*, 539 U.S. at 101 (quoting 42 U.S.C. § 2000e–2(m)).
113. 42 U.S.C. § 2000e-5(g)(2)(B).
114. § 2000e-5(g)(2)(B)(i). If an employer carries its burden to show that it would have made the same decision even without considering race or other protected trait, the statute makes clear that a court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment" as otherwise allowed by the statute for single motive cases. § 2000e-5(2)(B)(ii).
115. *Desert Palace, Inc.*, 539 U.S. at 94.

has been drawn for the purpose of maintaining racial inequality.'"[116] Importantly, however, "where race is considered for the purpose of achieving equality, no automatic proscription is in order."[117] This may be the basis for allowing race to be considered when making employment decisions as many businesses, law firms, and professional organizations openly emphasize their commitment to diversity and inclusion and some have even taken steps to realize it.[118]

Indeed, the American Bar Association (ABA) took a leading role in this area and recognized that it had "a duty to properly represent the legal profession and the interests of justice."[119] To fulfill these responsibilities, the ABA set forth four goals, including one to "eliminate bias and enhance diversity."[120] In 2017, the ABA implemented a policy to reach this goal, which requires all its sponsored or co-sponsored Continuing Legal Education (CLE) programs to have one to three participants, depending on the size of the panel, that come from a "diverse group."[121] The ABA defined a "diverse" group to include "minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities."[122] Failure to adhere to this rule would result in a $2,500 fine or the loss of CLE credit.[123] Although supported by the lofty goal "to eliminate bias and enhance diversity and inclusion throughout the Association, legal profession, and justice system,"[124] it may not withstand constitutional challenge because the setting aside of a specified number of seats for members of a "diverse group" may amount to a quota, as the Florida Supreme Court made clear in its review of the policy adopted by the Business Law Section of the Florida Bar.[125]

Emphasizing its "commitment to diversity," the Business Law Section of the Florida Bar announced in September 2020 the adoption of a new rule that every faculty panel it sponsored as part of its continuing legal education programing beginning on January 1, 2021, would be required to include a specified number of "diverse" members, defined as members of "groups based upon race, ethnicity, gender, sexual orientation, gender

116. Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (quoting Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 931–932 (2d Cir. 1968).
117. *Id.*
118. *See supra* text accompanying notes 4–5.
119. AM. BAR ASS'N, *supra* note 6.
120. *Id.*
121. AM. BAR ASS'N, ABA DIVERSITY AND INCLUSION CLE POLICY: EXHIBIT 3.11, at 1 (2016).
122. AM. BAR ASS'N, *supra* note 6.
123. AM. BAR ASS'N, supra note 121.
124. AM. BAR ASS'N, *supra* note 8.
125. *In re* Amend. to Rule Regulating the Fla. Bar 6-10.3, 315 So. 3d 637, 637 (Fla. 2021).

identity, disability, and multiculturalism," on every CLE panel, depending on the size of the panel.[126] A few months later, on April 15, 2021, on its own motion the Florida Supreme Court struck down that rule.[127] Tipping its hat to the "important contributions to the legal profession in our state" made by the Florida Bar sections and the "objectives underlying the policy," the Florida court nevertheless concluded that the requirement for a particular number of diverse panelists established a quota that is "antithetical to basic American principles of nondiscrimination."[128]

The Florida court's decision reflects the same status of equal protection as established by *Bakke* in 1978: that reserving any number of seats specifically for a particular group "merely because of its race or ethnic origin" is "discrimination for its own sake" and forbidden by the Constitution.[129] The Florida Bar Rules now make clear that any course submitted by a sponsor, which includes a section of the Florida Bar, that uses quotas "based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants" will not be approved.[130] Significantly, the ABA is now reviewing its CLE requirements as well. As stated by the president of the ABA at the time the Florida Supreme Court issued its decision: "We are reviewing our CLE requirements in light of the Florida Supreme Court opinion while maintaining our unwavering commitment to diversity and inclusion in the legal profession."[131] Even without the use of a quota, given the 1991 amendment to the statute an employer may run afoul of Title VII any time it is motivated in any way by the race of an employee or applicant for employment. As noted above in the previous section, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[132]

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126. *See generally* BUS. L. SECTION OF THE FLA. BAR, CONTINUING LEGAL EDUCATION DIVERSITY FORM (2021) (showing the requirements are reflected on the application for receiving CLE credit for programs sponsored by the Business Law Section.).

127. *In re Amend. to Rule*, 315 So. 3d at 637–38.

128. *Id.* at 637.

129. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion).

130. Rules Regulating the Fla. Bar Rule 6-10.3(d).

131. Robert, *supra* note 11.

132. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e–2(m)).

VI. CONCLUSION

To achieve diversity in the workplace, the law may have to change. Instead of forcing employers to "resort to camouflage" by covering up their consideration of race as they move to achieve diversity, the law should be flexible enough to allow employers to openly consider it.[133] In the words of Justice Ginsburg, who consistently supported the consideration of race in university admissions programs, policies encouraging universities to "candidly disclose their consideration of race seem to me preferable to those that conceal it."[134] The law should adopt a policy for employers to do the same.

133. Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).
134. *Id*. at 305 n.11.