Navigating The Unknown: Why SCOTUS Ought to Again Affirm That Achieving True Diversity in Higher Education is a Compelling Interest That Satisfies Strict Scrutiny When It Rehears Fisher

Kenrick Frank Roberts

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NAVIGATING THE UNKNOWN:
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FISHER

Kenrick Frank Roberts*

INTRODUCTION

“Race matters because of the slights, the snickers, the silent judgments
that reinforce that most crippling of thoughts: ‘I do not belong here.”’

In her extremely passionate dissent to the majority opinion in
Schuette v. Coalition to Defend Affirmative Action, Supreme Court
Justice Sonia Sotomayor urged her colleagues to allow institutions to
prioritize diversity as a means to assist with dispelling assumptions
based on skin color thereby effectively preparing students for a more
diverse work force and society. Seemingly, this plea to the other
Justices came from the realization that racial tensions were at a
heightened state across the nation; sadly however, those tensions were

* Communications Editor UDC Law Review, J.D. Candidate, University of
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years of law school.

1 See Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623,
1676 (U.S. 2014).

2 See id. at 1682-83.
neither new nor surprising.

While Schuette did not surround the constitutionality of race-based admissions in higher education, the Court was asked to determine whether Michigan voters could lawfully amend the state constitution to prohibit state officials from granting race-based and other preferences in making government decisions. Thus, a determination in Schuette was nevertheless applicable in the context of race-based admissions decisions because such an amendment would inevitably raise certain implications for the admissions processes at state universities in Michigan. The Court found that Michigan voters, through the very essence of the democratic process, had a right to deliberately debate and determine even a complex issue such as race. This ruling however, posed significant repercussions for minority groups who, historically, were often structurally barred from influencing the political process. This realization ignited Justice Sonia Sotomayor into a ravishing dissent as to the adverse effects of such an amendment and its potential to lead to the further disenfranchisement of racial minorities within higher education.

Despite the numerous benefits of achieving true diversity in all areas of our society, much of our history has been defined by the struggle for racial equality. This struggle, notwithstanding numerous strides, still continues today. One area that has garnered much attention in relation to this topic has been the consideration of race by colleges and universities in making admissions decisions. With advocates on either side of the debate, it appears that regardless of various rulings in favor of allowing race-based considerations in higher education admissions, the debate is not yet over.

The Supreme Court of the United States has more than once affirmed that achieving true diversity in higher education is of the utmost importance and satisfies a compelling interest under the strictest form of constitutional muster. In 2013, the Court decided Fisher v. University of Texas, 133 S. Ct. 2411, 2417 (2013). In Fisher, Abigail Fisher, a Caucasian applicant who was denied admission in 2008, sued the University of Texas (“UT”) alleging that UT’s consideration of race in making admissions decisions was discriminatory and violated her right to Equal Protection. The Court held that the lower courts had

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3 Id. at 1630.
4 Id. at 1629.
5 Id. at 1638.
7 See Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2417 (U.S. 2013).
incorrectly utilized the strict scrutiny standard to grant summary judgment in favor of UT. This decision was based on the reasoning that the lower courts had submitted to the university’s mere assertion that it only considered race in good faith. The lower court’s decision was particularly troubling to the nation’s highest Court because under a strict scrutiny analysis, the lower court should have closely examined the practical workings of the admissions process instead of simply taking the university at its word. Thus, the Court vacated the judgment of the lower courts and remanded the case for a determination of whether UT’s admissions process was sufficiently narrowly-tailored and could satisfy strict scrutiny.

On June 29th, 2015, the Supreme Court agreed to once again hear oral arguments in Fisher. This decision is troubling to supporters of Affirmative Action policies because of the Court’s indistinguishable motivation for hearing the case a second time. This Note argues that the Court must continue to allow race-based considerations in higher education admissions policies. Part I takes a look at the beginnings of affirmative action and the effects of past discrimination on the educational attainment of minorities. Part II charts the case law related to affirmative action in higher education. Part III tracks how the meaning of narrowly-tailored has evolved through the relevant case law. Part IV explores the individual, educational and societal benefits of achieving true diversity in higher education and asserts that these benefits are paramount, especially as our society becomes increasingly heterogeneous. The Note concludes by maintaining that in order to have meaningful minority representation in all areas of society, it is essential that within the context of higher education admissions, the Court’s definition of narrowly-tailored must continue to include certain race-based considerations. Specifically, considering race as a factor, among many, in making an offer of admission must again be deemed constitutionally permissible.

I. BACKGROUND

Even with the Court’s determination in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (U.S. 1978), that colleges and universities could consider race in admissions decisions as long as they did not use quotas,
there remains a split among federal circuit courts regarding the constitutionality of allowing race-based considerations in university admissions policies. Although the Court made a ruling that was relevant to the use of race conscious admissions policies in the summer of 2013, there remains much uncertainty about whether the Court will continue to allow admissions policies that include race-based considerations. Similar contentions regarding affirmative action in higher education exist outside of the courts as well. Advocates for permitting race-based considerations assert that such preferences are imperative to achieving true diversity. Those who are against Affirmative Action policies however, argue that such policies merely allow for discrimination in the reverse. The debate surrounding affirmative action, its legitimacy, its purpose, and its effect is not a new one. Exploration of the reasons that these policies came to be and the significant benefits that result from such policies, undoubtedly point in the direction of continuing to allow Affirmative Action policies in higher education admissions policies and the benefits that flow as a result of these policies.

A. The Beginnings of Affirmative Action

Affirmative action is described as the efforts made to correct injustices of the past; avenues to make right the wrongs of the past; making up for past unfairness; steps taken to correct past discrimination. The notion of affirmative action can be linked to early black scholars such as W.E.B. Du Bois. Du Bois suggested that the color line was the most striking 20th century issue and took a united stance with other scholars like Carter Woodson to influence the creation of organizations such as the National Association for the Advancement

15 See id. (citing Terry Eastland, Ending Affirmative Action: The Case For Colorblind Justice, 6-10 (1996)).
of Colored People ("NAACP"). The purpose of such an organization would be to represent and ensure the civil rights of people of color. In short, affirmative action involves policies and initiatives created to counteract institutional racism and all forms of discrimination. As time progressed, the term grew to encompass specific practices to safeguard against barriers to the employment and education of minorities and members of other protected groups.

Within federal policy, affirmative action first surfaced when President John F. Kennedy, in 1961, via Executive Order 10925, prohibited government employers from discriminating against persons because of race (among other factors) and required that all persons be treated equally, as both employment applicants and as employees, irrespective of their race, creed, color, or national origin. Furthermore, discrimination based on race, color, religion, sex, or national origin was explicitly banned by the Civil Rights Act of 1964; specifically, that act states:

[An act to] enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

In 1965, President Lyndon B. Johnson introduced Executive Order 11246, which prohibited Federal contractors and subcontractors from discriminating in employment based on race, color, religion, and national origin. Following this move, in his speech at a Howard

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18 Id. at 197.
19 Id.
21 Id. at 259.
24 Id.
University commencement ceremony later that year, President Johnson stated, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair." The speech emphasized that the use of affirmative action programs was necessary to attaining equal opportunity in both employment and higher education.

The emphasis is on opportunity: affirmative action programs are meant to break down barriers, both visible and invisible, to level the playing field, and to make sure everyone is given an equal break. They are not meant to guarantee equal results—but instead proceed on the common-sense notion that if equality of opportunity were a reality, African Americans, women, people with disabilities and other groups facing discrimination would be fairly represented in the nation's work force and educational institutions.

Various justifications for affirmative action have developed over the years. Originally, affirmative action was justified by its remedial effects on past discrimination, the result of our country's torrid history of discrimination against minority groups. A diverse student body is a more modern justification for permitting affirmative action policies and practices within higher education today. On the other side of the debate, those who stand in opposition of affirmative action policies assert that such policies create stigma against purported benefactors and run afoul of the Equal Protection Clause. Although contention exists surrounding these justifications, the law of the land, at least for the time being, stands in favor of affirmative action. Although Fisher did not preclude an institution's use of race in admissions decisions generally,
the opinion hinted at the Court’s preference for race-neutral admissions processes.\textsuperscript{31}

A dozen years ago, a 5-4 majority allowed the University of Michigan law school to give a boost to ethnic minority applicants. But since then, Justice Samuel Alito, who generally frowns on affirmative action, has replaced Justice Sandra Day O’Connor, who wrote the Michigan opinion. The new swing vote on this topic is no longer O’Connor, but Kennedy, who has registered strong discomfort with admissions plans that afford racial preferences to individuals.\textsuperscript{32}

This predilection is concerning for many reasons and in what follows, I explain them.

B. Effects of Past Discrimination on Minorities within the Context of Education: The Achievement Gap

\textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (U.S. 1954), is known for setting the foundation for later cases involving affirmative action in higher education and related policies. \textit{Brown} encompassed several cases from Kansas, South Carolina, Virginia, and Delaware. In these cases, African American students sought non-segregated public education.\textsuperscript{33} There were laws in each of these states that supported and perpetuated segregationist ideals by prohibiting African American students from attending the same schools as White students.\textsuperscript{34} Plaintiffs in these cases asserted that the segregated schools allowed by these regulations were not and could not be made equal thus violating the Equal Protection rights of African American students.\textsuperscript{35} The Court found that since education is one of the very pillars that support our

\begin{thebibliography}{99}
\item\textsuperscript{33} \textit{Brown v. Bd. of Educ.}, 347 U.S. 483, 487 (U.S. 1954).
\item\textsuperscript{34} \textit{Id.} at 487-88.
\item\textsuperscript{35} \textit{Id.} at 488.
\end{thebibliography}
government in that it provides the basis for citizens to carry out their civic duties, when providing education to residents, states must do so on an equal basis for all.\textsuperscript{36} Additionally, the Court agreed with plaintiffs and found that segregated schools do, in fact, deprive equal educational opportunities because they promote feelings of inferiority and impede the educational development of African American students.\textsuperscript{37} Furthermore, the Court found that there was no place for “separate but equal” doctrine within public education.\textsuperscript{38} Although this was a definite win, the Court’s landmark decision, dismantling the separate but equal doctrine, did nothing for the negative effects of segregation up to this point. The effects of past discrimination in education continue to plague our society today.

In education, the “achievement gap” is a term used to refer to the disproportion between groups of students as it pertains to their academic performance.\textsuperscript{39} The No Child Left Behind Act was the Federal Government’s attempt to counteract such disparities in the United States’ education system by decreasing the disparity between the academic performance of African American and Hispanic students as compared to their White peers.\textsuperscript{40} Despite, the strides made by No Child Left Behind however, minority students still struggle to catch up to nonminority students in the educational attainment arena.\textsuperscript{41} Similar disparities are manifested in higher education as well.

The National Center for Education Statistics published a study in 2012 which showed that among individuals ages 18-24, Whites had higher college or graduate school enrollment rates (47%) as compared to Blacks (37%) and Hispanics (31%).\textsuperscript{42} The study also identified that in 2004, 45% of White high school students attended a moderately or highly selective postsecondary institution (four-year) while the same was true for only 23% of Black and 18% of Hispanic high school students.

\begin{itemize}
  \item \textsuperscript{36} Id. at 493.
  \item \textsuperscript{37} Id. at 494-95.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id.
\end{itemize}
students. These particular statistics are significant for several reasons. First, evidence suggests that attendance at selective and highly selective institutions increases the likelihood of bachelor’s degree completion. “The positive effect of selective institutions on attainment suggests that they have the potential to increase the graduation rates of minorities while narrowing the persistent college completion gap.” Additionally, numerous researchers have substantiated that in general, graduation rates increase the higher the level of selectivity of the postsecondary institution attended. Furthermore, studies dating as far back as the 1970s have found that the more selective an institution is, the higher the minority student completion rate.

Statistics such as these help us to infer that a lack of affirmative action policies in higher education would lead to an even greater decrease in minority students at selective colleges and universities and increase White enrollment at these institutions. Such results would contribute to the vicious cycle wherein minorities are forced to attend less-selective institutions, face a diminished likelihood of graduating, become less likely to attend graduate school, and ultimately earn less in their lifetime than their White counterparts.

II. AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE CASE LAW

A. DeFunis v. Odegaard

When racial classifications are enacted or enforced by states or the federal government, such policies cannot run afoul of Equal Protection or Due Process; as such, the Court has repeatedly held that

43 Id.
45 Id.
46 Id. at 215.
47 Id. at 217.
any classification based on race is "inherently suspect" and triggers strict scrutiny.\footnote{Derek Black, Comment, The Case for the New Compelling Government Interest: Improving Educational Outcomes, 80 N.C.L. Rev. 923 (2002); See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); See also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).} The Supreme Court heard the first affirmative action in higher education case in 1974: \textit{DeFunis v. Odegaard}, 416 U.S. 312 (U.S. 1974). In this case, Marco DeFunis, Jr. brought an Equal Protection claim against the University of Washington Law School asserting that the school utilized admissions procedures and criteria that subjected him to discrimination on the basis of his race.\footnote{\textit{DeFunis v. Odegaard}, 416 U.S. 312, 314 (1974).} After DeFunis was denied admission to the law school’s incoming class, he petitioned the trial court for admission on the basis that the school’s admission policy was unconstitutionally discriminatory; the trial court granted his petition and DeFunis matriculated at the law school in the fall of 1971.\footnote{\textit{Id.} at 314-15.} The policy employed by the law school included placing applicants into one of two categories—the applicants in one of these categories were given consideration for admission via a separate minority admissions program.\footnote{\textit{Id.} at 320.} The way an applicant answered an optional question asking them about their dominant ethnic origin was the only basis for eligibility into the minority admissions program.\footnote{\textit{Id.} at 320-21.} Applicants who identified as Black, Chicano, American Indian, or Filipino, were treated differently than other applicants; unlike other applicants, despite their averages on the law school’s Predicted First Year Average (an index combining the applicant’s Law School Admission Test score and grades from the last two years of college), the applications of Black, Chicano, American Indian, or Filipino applicants were not given to the Committee Chairman for summary rejection consideration or compared to other applications.\footnote{\textit{Id.} at 323.} In reviewing these particular minority applications, less weight was given to the Predicted First Year Average, which for other applicants was heavily weighted.\footnote{\textit{Id.} at 324-25.} On appeal, the Washington Supreme Court reversed the trial court’s decision upon finding that the law school’s policy was not unconstitutional; by this time however, DeFunis was a second-year
student at the school. DeFunis filed a petition for certiorari, and the Washington Supreme Court decision was stayed until the United States Supreme Court reached a decision. During this time, DeFunis was allowed to continue his studies and was then in his third year of law school. The question before the Court thus became whether DeFunis' discrimination case was now moot since he was on the verge of graduating from law school. The Court found that since DeFunis was now in his final year of law school and already registered for the final term he was on track to complete all degree requirements and assured by the law school that such degree would be awarded regardless of any finding by the Court. Ultimately, it was unnecessary for the Court to reach a determination on the merits of DeFunis' discrimination claim; accordingly, they did not.

B. Regents of the University of California v. Bakke

In 1978, the Court decided Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (U.S. 1978). This was the first case wherein the Court scrutinized the legality of using race-sensitive policies in higher education admissions processes. The Court's decision in Bakke satisfied dual purposes; the decision not only limited the scope of affirmative action, but at the same time, it confirmed the need for such policies. "Bakke provided a basis both for reinforcing affirmative action in college admissions and for unseating such policies." In Bakke, because the Medical School's entering class was sparse with minority students, the faculty created an admissions program (a separate but complimentary program to the school's regular admission program) aimed at increasing minority student enrollment in the entering class each year. By the requirements of the regular admission process, candidates with grade point averages ("GPAs") below a 2.5 were

57 Id. at 315.
59 Id.
60 Id. at 314.
61 Id. at 317.
62 Id.
64 See Robert A. Rhoads et al.
65 Id.
rejected, one out of six applicants were invited for a personal interview, and following the interview, candidates were graded on a scale of 1–100 by the admissions committee and interviewers.  

Under the separate admissions program, a different committee, made up mostly of members of minority groups, reviewed any applications on which the applicant noted that they identified as economically and/or educationally disadvantaged or if the applicant noted that they wished to be considered as a member of a minority group. These applications were next reviewed by the chair of the special committee to ensure qualifications as economically or educationally deprived were met. They were later rated by members of the special committee on similar requirements to the regular process—except, these applicants were not automatically disqualified by not meeting the 2.5 GPA requirement. Approximately one out of five special applicants were invited to an interview, after which, the special committee scored the applicant and presented the highest scoring applicants to the admissions committee for consideration.

Allan Bakke, a White male, filed suit seeking injunctive relief and admission to the Medical School after his application was denied twice and applicants with lower GPAs, Medical College Admission Test (“MCAT”) scores, and committee scores than him were admitted under the special admissions program. He asserted that the special program discriminated against him on the basis of his race in violation of the Equal Protection Clause. The Court found for Mr. Bakke stating that the Medical School did not meet its burden of proof that even without the special admission program; Bakke still would not have been admitted. While the Court further held that the special admissions program was unconstitutional because it used a racial classification (quota system), which the Court has never allowed, the Court also declared that within the context of higher education, attaining a diverse student body is a legitimate goal and is constitutionally permissible.
Twenty-five years later in 2003, the Supreme Court ruled on the right of affirmative action in higher education in two University of Michigan cases: *Gratz v. Bollinger*, 539 U.S. 244 (U.S. 2003) and *Grutter v. Bollinger*, 539 U.S. 306 (U.S. 2003). In *Gratz*, petitioners, both Caucasian residents of Michigan, applied to the University Of Michigan College Of Literature, Science, and the Arts and were denied admission. The University’s admissions guidelines had changed several times during the period in which Petitioner’s applications were filed; the guidelines took into account several factors including the applicant’s high school grades, standardized test scores, high school quality, curriculum strength, leadership, and race. Records also indicated that during the relevant period, the University admitted every qualified applicant who was African-American, Hispanic, or Native American, whom they classified as underrepresented minorities. Petitioners filed a class-action suit asserting a violation of their Equal Protection rights, and a violation of their Civil Rights by racial discrimination. They sought compensatory and punitive damages and declaratory and injunctive relief to preclude the University from discriminating on the basis of race, and an order offering admission to one of the Petitioners as a transfer student. The Court found that because the University’s most recent admissions policy awarded 20 points simply on the basis of race, it was not narrowly-tailored enough to achieving diversity (the policy failed strict scrutiny) and was therefore impermissible.

*Grutter* involved the University of Michigan Law School. Under the recommendation of the dean, the law school’s faculty endeavored to develop a new admissions policy that would enhance the diversity of the entering class and would be compliant to the Court’s ruling in *Bakke*. The new policy focused on academic ability and the applicant’s

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79 Id. at 253.
80 Id. at 253-54.
81 Id. at 252.
82 Id.
83 Id. at 270.
potential to influence the learning of other students.\textsuperscript{85} In addition to considering the applicant’s undergraduate GPA and Law School Admissions Test (“LSAT”) scores, the new policy required that the admissions committee evaluate a personal statement, recommendation letters, and an essay speaking to the applicant’s ability to contribute to diversity at the law school.\textsuperscript{86} While the policy did not explicitly state what types of diversity would garner the most consideration points, it did reflect the law school’s commitment to racial and ethnic diversity as it made special reference to African-Americans, Hispanics, and Native Americans whom it classified as underrepresented minority groups who have been historically discriminated against and who would otherwise not be meaningfully represented at the school.\textsuperscript{87}

Barbara Grutter, a White resident of Michigan, applied for admission with a GPA of 3.8 and an LSAT score of 161; she was originally waitlisted and then denied admission.\textsuperscript{88} Grutter later sued the school and a number of school officials alleging racial discrimination because the law school gave significant weight to race in the admissions process which allowed some minority groups an unfair advantage.\textsuperscript{89} Grutter sought compensatory and punitive damages, an order offering admission, and an injunction to prohibit the law school from continuing its racial discrimination.\textsuperscript{90} The Supreme Court affirmed the District Court’s finding that the law school had a compelling interest in attaining diversity within its student body\textsuperscript{91} and that here, the law school’s use of race was narrowly-tailored enough to further their interest of diversity in education because it took an individualized and holistic look at each applicant to see what benefits the individual would bring to the institution.\textsuperscript{92} The policy was deemed constitutional because of the innumerable benefits of having a diverse learning environment; the Court stated, “These benefits 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.”\textsuperscript{93} In sum, \textit{Grutter} not only reiterated the diversity rationale set forth in

\textsuperscript{85} \textit{Id.} at 315.  
\textsuperscript{86} \textit{Id.}  
\textsuperscript{87} \textit{Id.} at 316.  
\textsuperscript{88} \textit{Id.}  
\textsuperscript{89} \textit{Id.} at 317.  
\textsuperscript{90} \textit{Id.} at 328.  
\textsuperscript{91} \textit{Id.} at 311.  
\textsuperscript{92} \textit{Id.} at 330.  
\textsuperscript{93} \textit{Id.} at 330.
Bakke, it also highlighted the value of diversity in higher education as it pertains to non-minorities, universities, and society at large.94

D. Fisher v. University of Texas

In Fisher v. University of Texas, following the Court’s ruling in Gratz and Grutter, the University of Texas at Austin ("UT") reverted to an earlier admissions process that explicitly considered race as well as a combination of an applicant’s test scores, academic performance in high school, and a personal index which took into account the applicant’s background and what he or she could bring to the university.95 Fisher, a Caucasian applicant, was denied admission in 2008, and subsequently filed suit against the university and several university officials alleging that by considering race in admissions decisions, the school was in violation of the Equal Protection Clause.96 The Court found that the lower courts had utilized an incorrect standard to grant summary judgment in favor of the university because they had submitted to the university’s assertion that it considered race in good faith.97

The Court went on to vacate the judgment of the lower courts and remanded the case for a determination of whether UT’s admissions process was sufficiently narrowly-tailored to satisfy strict scrutiny.98 As a practical matter however, the Court merely reworked the definition of narrowly-tailored and did not affirmatively decide the legality of UT’s use of race in admissions decisions.99 The Court did clearly assert however that the lower courts could not merely defer to UT’s assertions of good faith and instead had to properly analyze the practicality and results of the policy for strict scrutiny compliance.100 With no definitive ruling on the legality of UT’s race-sensitive admissions process, much is left unsettled as to how the Court will rule in future higher education affirmative action cases. This raises several concerns as current race-sensitive admissions policies have worked to the benefit of many minorities in higher education.

94 Levine, supra note 63.
95 Fisher, 133 S. Ct. at 2416.
96 Id. at 2417.
97 Id. at 2421.
98 Id.
100 Fisher, 133 S. Ct. at 2412.
When the United States Court of Appeals for the Fifth Circuit reheard *Fisher* in 2014, UT’s admission policy was again upheld. Opponents argued that because UT could achieve diversity through the state’s Top Ten Percent Plan (provides automatic admission to any public university in Texas to students in the top ten percent of their high school graduating class), allowing race-based considerations in the admissions policy was unnecessary. The appeals court noted however that the mere possibility that UT could achieve some diversity through the Texas Top Ten Percent Plan did not preclude the university from doing more than considering numbers to achieve the aim of increased diversity. This was especially true considering that the plan works as a result of segregation. The court stated specifically, “Indeed, as *Grutter* teaches, an emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint.” Furthermore, by granting automatic admission to students at the top of their graduating class, the Top Ten Percent Plan only superficially yields an increase in minority enrollment because as a practical matter it causes a surge in re-segregation where large numbers of minority students attend schools that have high minority enrollment.

The Supreme Court decided in 2015, to rehear *Fisher*; this concerns some Affirmative Action proponents because it presents an opportunity for the Court to restrict or prohibit altogether any race-based considerations in higher education. That the Court has agreed to rehear the case just a few years after it sent it back to the Circuit Court is not a common practice and thus disconcerts many as this might be an indication of the Justices’ desire to make a significant change to the current law of the land. Affirmative Action supporters take comfort in knowing that Abigail Fisher has graduated from college, and in their view, Fisher, at this juncture, lacks standing to continue to bring the case. Civil and Human Rights activists across the nation continue to

102 Id.
103 Id.
104 *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 656 (5th Cir. 2014).
105 Jaschik, supra note 101.
106 Id.
107 Id.
108 Id.
be bewildered by the Court’s decision to rehear Fisher. The Leadership Conference on Civil and Human Rights had this to say,

Our nation’s colleges and universities play a critical role in preparing our children for a diverse, increasingly competitive global workforce. They need to have every tool at their disposal to create the kind of learning environment that will give our kids the best shot of success in a competitive 21st century economy...The University of Texas’s admissions policy is a carefully crafted one that is designed to create the diverse learning environments that are critical to the educational success of all students.¹⁰⁹

To date, the Court has opined that the definition of narrowly tailored within the context of higher education can include some race-based considerations. Furthermore, without some race-based considerations being allowed in college admission processes, there will never be an equal playing field for minority students, and the benefits of achieving true diversity in higher education, and ultimately in our society, will go unrealized.

III. DEFINING NARROWLY-TAILORED THROUGH THE CASE LAW

The Supreme Court has more than once upheld achieving true diversity in higher education as a compelling interest to allow race-based considerations in college and university admissions. “In all three of the major higher-education affirmative action cases decided by the Supreme Court—Bakke, Grutter, and Fisher—affirmative action managed to endure, though with limitations.”¹¹⁰ Furthermore,

The Supreme Court has adopted a broad notion of the compelling interest in diversity, allowing universities to incorporate race-consciousness in their educational missions in various ways. The Court has given deference to universities in defining their educational

¹¹⁰ Brittain supra note 99, at 977.
missions, while specifically noting educational goals that directly implicated race: lessening racial stereotypes, facilitating cross-racial dialogue, and mitigating feelings of isolation and tokenism among minority students.111

At this juncture, however, that the Court has remained silent as to its reasoning for rehearing Fisher under the current circumstances, it is hard to even attempt to predict the Court’s ruling when it rehears the case in the fall of 2015. What we do have to help guide our predictions however are the past decisions of the Court in describing the parameters of narrowly-tailored for purposes of satisfying strict scrutiny.

In Bakke, the Court blatantly struck down the use of quotas in admissions decisions even where those decisions were based on attempts to remedy the effects of past discrimination. The Court asserted,

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.112

The Court did acknowledge, however, that a university is allowed certain deference in judgment as to whom to accept and cited Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957), which held that,

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

111 Harpalani, supra note 31, at 772.
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.\textsuperscript{113}

The Court further noted that even though a university has some discretion in selecting its student body, the rights of an individual cannot be overlooked in that process.\textsuperscript{114} In essence, the consideration of race alone is unconstitutional, but considering race as one of multiple factors in making an admission determination is permissible, "The 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. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity."\textsuperscript{115}

Similarly, in \textit{Gratz} and \textit{Grutter}, the Court found that automatically awarding points solely for race or ethnicity was not sufficiently narrowly tailored. The Court declared, however, that a holistic view of an applicant, a view based on a variety of factors, including race, satisfied constitutional muster.

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in \textit{Bakke}, truly individualized consideration demands that race be used in a flexible, non-mechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See \textit{id.}, at 315-316, 57 L Ed 2d 750, 98 S. Ct. 2733. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. \textit{Ibid}. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. \textit{Ibid}.\textsuperscript{116}

\textsuperscript{113} \textit{Id.} at 312.
\textsuperscript{114} \textit{Id.} at 314.
\textsuperscript{115} \textit{Id.} at 315.
The *Gratz* Court found that the awarding of points merely for race was unconstitutional because of the amount of weight given to that particular factor. By awarding twenty points just based on the race of an applicant, race became a determining or decisive factor in the university’s decision to make an offer of admission. This was unacceptable in the Court’s view.

The Court determined that the consideration of race in making admissions decisions was different in *Fisher*. In contrast to the *Gratz* policy, the policy in *Fisher* looked at race as one of a multitude of factors as the university attempted to create a student body that could reap the benefits of a diverse learning environment. In making its admissions decisions, the university included in its consideration factors suggesting that an applicant could contribute positively to the overall diversity of the university—these factors stretched beyond race to include whether the applicant spoke multiple languages or was a first-generation college student; additionally, the policy did not allocate a certain percentage of the overall possible points unlike the policy in *Gratz*. The Court found that these distinctions met the requirements of strict scrutiny. “UT Austin’s consideration of an applicants’ unique contribution to the diversity of the university steers away from wholesale notions of diversity that primarily relies on race, as did the scheme upheld in *Grutter.*” The inference from this holding is that, “Race can only be used "as one of many "plus factors"" to determine "the overall individual contribution of each candidate." Holistic, individualized review is thus necessary [to] thoroughly consider all of the contributions of each applicant, not just race,” but this holding did not blatantly bar the use of race in admissions policies.

This stipulation that each applicant be reviewed on an individual basis with the use of race among other factors, are the very crux of race-sensitive admissions policies that have been deemed constitutional. Accordingly, the compelling interest in diversity as established in *Grutter* and *Fisher* compliments the Court’s principles of narrowly tailored—the Court’s validation of admissions policies that are race-conscious and holistic.

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118 Id.
119 Id.
120 Id.
121 Harpalani, *supra* note 31, at 791.
122 Id.
123 Id.
IV. BENEFITS OF ACHIEVING TRUE DIVERSITY

Proponents of affirmative action in college admissions can point to many benefits of diversity to the educational environment; these benefits have been affirmed by the Court in several cases as well.

Additionally, in Bakke, Grutter, and Fisher, the Court also gave deference to universities in defining their own educational missions to incorporate the compelling interest in diversity. This deference, in conjunction with the specific educational benefits of diversity espoused by the Court, allows universities to define and implement their educational missions in a manner that facilitates defense of race-conscious admissions. They can take advantage of the broadly-defined compelling interest in diversity and narrowly tailor their race-conscious policies and programs to various aspects of this diversity interest.\(^{124}\)

There is ample research to support the assertion that racial diversity in an educational context yields several benefits for students at all educational levels.\(^{125}\) These benefits span the areas of better teaching and learning, improved civic values, increased employment opportunities, and higher achievement and more educational opportunities for both minority and non-minority students.\(^{126}\) From a large-scale effect point of view, in order to prepare our emerging generations of leaders for continuing social progress there must be a link between diversity and our educational and civic goals.\(^{127}\) There is theoretical support for the link between college diversity and the development of a student's learning and democratic skills.\(^ {128}\) As such, it is important that we recognize our combined differences as an essential part of democracy, promote working with a diverse array of people and points of view, and readily adapt to our changing society.\(^{129}\) Furthermore, we must encourage college students to become advocates

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\(^{124}\) Id.

\(^{125}\) Black, supra note 49, at 943.

\(^{126}\) Id.


\(^{128}\) Id.

\(^{129}\) Id.
of social justice and representatives of responsible citizenry. "Racial
diversity also furthers another goal of colleges and universities:
preparing students for active participation in our pluralistic and
democratic society." As our country continues to become racially
heterogeneous, the importance of understanding and being able to
operate effectively with racial diversity is vital to education. An
educational setting that is racially diverse aids students in their
understanding and resolving conflict surrounding varying perspectives
and more readily find common ground in the midst of differing
perspectives.

Most people will agree that colleges and universities are
responsible for developing students who are knowledgeable, skilled,
and competent enough to actively participate in society. With the
rapid changing of our society, the value of diversity is evident from an
individual, institutional, and societal standpoint.

Although there has been a nationwide increase in the number of
students of color at colleges and universities, racial diversity in higher
education has decreased as a result of ordinances that work against
affirmative action as well as numerous other roadblocks encountered by
minority students who attempt to navigate higher education. These
barriers that prevent minority students from accessing higher education
can sometimes be foundational and include enrollment in inadequate K-
12 school systems, often leading to poor preparation for college.

Research has substantiated that diversity enhances a student’s
progression in the areas of cognitive, affective, and interpersonal
development. “Engagement in a racially diverse student body is
associated with multiple benefits, including enhanced civic interest, bias
reduction, critical thinking, interracial friendship, and overall
satisfaction with college.” Additionally, the benefits of diversity in

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130 Id.
131 See Black, supra note 50, at 957.
132 Id.
133 Id.
134 Jeffrey F. Milem, The Educational Benefits of Diversity: Evidence from
Multiple Sectors, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL
DYNAMICS IN HIGHER EDUCATION 126 (Mitchell Chang et al. eds., 2003).
135 Julie J. Park, When Diversity Drops: Race, Religion, and Affirmative
136 Id. (citing Massey, Charles, Lundy, and Fischer (2003)).
137 Id.
138 See Park, supra note 135, at 15 (citing Antonio et al. (2004); Bowman
(2012); Chang, Astin, and Kim (2004); Denson (2009); Fischer (2008); J.J. Park
(2012); Tanaka (2003); Villalpando (2002)).

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higher education extend far beyond the benefit to those who receive an advantage as a result of such policies.

This educational benefit is universal in that all students learn from it not just minority students who might have received a "bump" in the admissions process. Indeed, majority students who have previously lacked significant direct exposure to minorities frequently have the most to gain from interaction with individuals of other races. The universality of this benefit distinguishes the diversity rationale from the rationale of remedying discrimination, under which minority students received special consideration to make up for past injustices to their racial group.139

Individuals benefit from interactions with diverse information, ideas, and people while they are in college.140 "Students who have been exposed to greater diversity are more likely to show increases in racial understanding, cultural awareness, and appreciation, engagement with social and political issues, and openness to diversity and challenge. They are more likely to exhibit decreases in racial stereotyping and levels of ethnocentrism." 141 Furthermore, research evidences that diverse interaction in college helps to decrease the cycle of segregation that currently perpetuates American society.142 "In fact, racial diversity in higher education creates the exact variables that research has determined are vital in developing the critical thinking that is expected of students."143

Regarding these educational benefits of diversity, Justice O'Connor stated in Grutter, "These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."144 Justice O'Connor noted similar benefits in contexts outside of education as well, "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can

139 See Milem, supra note 134.
140 Id.
141 Id.
142 Id.
143 See Black, supra, note 50 at 956.
only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

It is also imperative that this form of exposure takes place in college, if not sooner, “Because of the severity of residential segregation, colleges and universities are the only place most people can gain these skills and get exposure to diversity. Thus, it is incumbent upon universities to meet the challenge of engaging students intellectually by providing the diverse setting that students need.”

Organizations (and institutions) stand to benefit from diversity as well. Researchers who have studied the impact of diversity on organizations found that diverse organizations recruit the best human talent, improve their marketing strategies, grow their creativity and innovation, solve problems more efficiently, and have greater flexibility. Similarly, research involving the effects of having a diverse faculty at an institution indicates that female faculty and faculty of color increase institutional capabilities in the areas of research, teaching, and service.

Society at large stands to benefit from increased diversity also. Research indicates that affirmative action in employment has yielded a decrease in job discrimination, lessened wage disparity, minimized occupational segregation, heightened occupational aspirations for women and people of color, and increased organizational productivity. Further research suggests that students of color in particular, pose a benefit to our society as a result of their increased levels of community service and their service to medically underserved populations. “Studies of practice patterns of physicians indicate that doctors of color are more likely to practice medicine in areas with populations that have the greatest need for health services in our society.” These areas include low-income urban and rural locations, locations with high populations of people of color, populations that rely on Medicare, and populations without health insurance. Benefits such as these have also been underlined by the Court in prior opinions, “We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to

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145 Id.
146 Black, supra, note 50 at 956-57.
147 See Milem, supra note 134.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 See Milem, supra note 134.
"sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society”. The Court said further, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

The most obvious benefit of diversity in higher education goes to those who benefit individually from such policies, but the coming generation has a future interest in race-sensitive admissions policies in college and university admissions as well.

Affirmative action... is effective in producing a cadre of black professionals who can form a nucleus of group leaders and serve as role models for other members of the group, especially the young who need to have high aspirations and confidence that others have succeeded despite their common legacy of group disadvantage. This rationale ... applies most strongly to the domain of higher education.

CONCLUSION

Throughout her Schuette dissent, Justice Sotomayor stressed that years of societal perpetuation of racial inequality has produced serious societal disparities. She referenced Justice Ginsburg’s dissent in Gratz, highlighting that centuries of inequality have resulted in disparities in communities, schools, employment, poverty, health care, etc. Additionally, Justice Sotomayor concluded her dissent by tasking the Court to “speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” She went on to remind the Court of its recognition of the great importance of diversity in education, and urged her colleagues to allow institutions to prioritize diversity as a means to assist with dispelling assumptions based on skin color thereby effectively preparing students for a more diverse work environment.

155 Id. at 332.
156 Levine, supra note 63 at 474.
158 Id.
159 Id.
160 Id. at 1682.
force and society.\textsuperscript{161} Today, we must present these same requests to the Court as it rehearses Fisher.

Racial discrimination both past and present has contributed to the educational achievement gap of minority students in higher education. This has led to further minority marginalization in other areas including employment and political influence. The Court has affirmed time and time again that diversity in higher education is of the utmost importance and that universities must be afforded some deference in selecting their student bodies. Therefore, in order to have meaningful minority representation in higher education and in society at large, it is imperative that some race-based considerations continue to be allowed in college admissions policies. The Court must continue to allow race-sensitive admissions policies in higher education for a cadre of important reasons.

Race-sensitive admissions policies will facilitate increased minority access to highly selective institutions, strengthen the graduation probability for minority students, and significantly increase minority earning potential. The reward that will stem from the Court continuing to allow such policies will be multifaceted. Universities will achieve truly diverse student bodies and the learning experience will be enhanced for all students not just those from minority backgrounds or who directly benefit from affirmative action policies. Additionally, the educational environment afforded by diverse classrooms will lead to more engaged citizens who are prepared to meet the demands of our rapidly evolving society.

\textsuperscript{161} \textit{Id.} at 1682-83.