

Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle

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Oracles can be . . . well . . . Delphic, and the great judicial oracle in Washington is no exception. The cryptic opinion in *Fisher v. University of Texas*¹—the first decision on affirmative action in higher education in a decade—is a good example. Predicting what it will mean for the future is not easy.

Nevertheless, for supporters of race neutrality, there may be reason for modest optimism. When compared with the range of realistic alternatives, *Fisher's* actual outcome may be ever-so-slightly encouraging. The Court could have issued a “good for this case only” ticket to Abigail Fisher that would have had no real precedential value. Instead, the Court’s 7–1 majority chose to clarify the applicable standard in a way that ratchets up the pressure on colleges and universities—and sent Abigail Fisher’s case back to the U.S. Court of Appeals for the Fifth Circuit for adjudication based on that more demanding standard.² By requiring that in the future a college or university supply “a reasoned, principled explanation” for its diversity goal and directing courts to use tough-minded “strict scrutiny” in determining whether its admissions policy is narrowly tailored to achieve that goal, the Court inched the country toward a more sensible vision of the Constitution’s requirements in the higher education context. The peculiarly deferential attitude toward colleges and universities found in *Grutter v. Bollinger*,³ the University of Michigan case

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¹ 133 S. Ct. 2411 (2013).

² *Id.* at 2416.

³ 539 U.S. 306 (2003).

from a decade ago, has not yet reached the judicial attic—where it belongs—but it may be on its way.

Still, no one should get carried away by optimism. The fundamental problem is that complete success was never among the alternatives in the *Fisher* case. Even an opinion flatly prohibiting racial preferences in admissions would have been only a step along the road to removing race from consideration in college and university admissions. Making progress down that road is nevertheless imperative.

This essay begins with some policy background on the affirmative action debate, followed by a description of the relevant legal precedents going into *Fisher* litigation, then an explanation of the *Fisher* opinion, and finally some concluding thoughts. *Fisher* itself is a very short and thin opinion—alas we won't know for decades why it took the Court more than eight months to issue a 13-page opinion—so most of the action is outside the four corners of the case.

Why It Matters

There are many reasons to oppose race-preferential admissions policies. Perhaps the most fundamental is this: As Justice Clarence Thomas discussed in his *Fisher* concurrence, for all the good intentions of those who originated these policies, they apparently don't work.⁴ If the mounting empirical evidence is correct, we now have fewer African-American physicians, scientists, and engineers than we would have had using race-neutral methods. We have fewer college professors and lawyers too. Whatever affirmative action's legal and constitutional status, it has backfired on its own terms.⁵

That is not what college and university administrators, many of whom have dedicated their lives to promoting affirmative action, want to hear. But as UCLA law professor Richard Sander and legal journalist Stuart Taylor Jr. discuss in their 2012 book, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why*

⁴ *Fisher*, 133 S. Ct. at 2422–32 (Thomas, J., concurring). The research behind this assertion was brought to the Court's attention by two amicus curiae briefs, including mine. See Amicus Curiae Brief of Gail Heriot et al., in Support of Petitioner *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345); Amicus Curiae Brief of Richard Sander et al., in Support of Petitioner *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

⁵ See Gail Heriot, *The Sad Irony of Affirmative Action*, 14 Nat'l Aff. 78 (2013).

Universities Won't Admit It, it is getting increasingly difficult for these administrators to view themselves as being on the side of the angels.

Sadly, even if a few schools were willing to admit the backfire, it would be difficult for them to do much about it individually. They are caught in a collective-action problem. If just one selective school goes cold turkey on race-preferential admissions, it will enroll few (and in some cases no) members of under-represented minorities. Such a school is unlikely to be willing to go it alone. Even if it wanted to, its federally appointed accrediting agency probably would refuse accreditation.⁶ That's why a judicious push from the Court may be necessary to get the process of winding down race preferences started.⁷

Here's the crux of the problem: One consequence of widespread race-preferential policies is that minority students tend to enroll in colleges and universities where their entering academic credentials put them toward the bottom of the class. While academically gifted under-represented minority students are hardly an endangered species, there are not enough to satisfy the demand of top schools. When the most prestigious schools relax their admissions policies in order to admit more minority students, they start a chain reaction, resulting in a substantial credentials gap at nearly all selective schools. The problem that this credentials gap creates is sometimes referred to as "mismatch."

Fisher itself helps illustrate this. According to data released by the University of Texas, the mean SAT scores (out of 2400) and mean high school grade-point averages (GPAs, on a 4.0 scale) varied widely by race for the regular admittees of the entering class of 2009. This particular set of data does not include those accepted through the so-called Top Ten Percent program, which guarantees admission to all students graduating in the top ten percent (since changed to eight percent) of Texas high schools:⁸

⁶ For an example of the strong pressure that nonacademic accreditors place on sometimes-unwilling schools to increase diversity, see Gail Heriot, *The ABA's "Diversity" Diktat*, *Wall St. J.*, Apr. 28, 2008.

⁷ See Gail Heriot, *The Politics of Admissions in California*, 14 *Acad. Questions* 29 (2001) (noting that after the implementation of California's Proposition 209 racial diversity at some University of California campuses increased while it decreased at others).

⁸ Univ. of Texas Office of Admissions, *Implementation and Results of Texas Automatic Admissions Law (HB 588) at the University of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010*, at 14. For a description of the university's Top Ten Percent program, see *infra* note 53 and accompanying text.

<u>Group</u>	<u>Combined SAT</u>	<u>High School GPA</u>
Asians	1991	3.07
Whites	1914	3.04
Hispanics	1794	2.83
African Americans	1524	2.57

These are, of course, averages. Some students have credentials well above (or well below) the average for their group. For perspective, it is worth noting that the SAT scores for the average Asian student in the above chart were in the 93rd percentile of 2009 SAT-takers nationwide; meanwhile, the average African-American student was in the 52nd percentile.

All this has the predictable effect of lowering the college or professional school grades the average non-Asian minority student earns.⁹ And the reason is simple: While some students will outperform their entering credentials, just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest.¹⁰ This point is so fundamental that admissions officers should be required to recite it aloud at the beginning and end of each workday.

The strongest evidence on why the credentials gap is bad comes from science and engineering. Contrary to what some expect, college-bound African-American and Hispanic students are just as likely to be interested in majoring in science and engineering as

⁹ The average African-American first-year law student has a grade-point average in the bottom 10 percent of his or her class. And while undergraduate GPAs for affirmative action beneficiaries aren't quite as disappointing, that is in part because affirmative action beneficiaries tend to shy away from subjects like science and engineering, which are graded on a tougher curve than other subjects. See Richard Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 *Stan. L. Rev.* 367, 427–28 (2004); Peter Arcidiacono, Esteban Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 *IZA J. Lab. Econ.* 5 (2012).

¹⁰ No serious supporter of race-preferential admissions denies this. In their highly influential defense of affirmative action, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998), former Ivy League university presidents William G. Bowen and Derek Bok candidly admitted that low college grades for affirmative action beneficiaries present a “sobering picture.” For a discussion of how the data presented in *The Shape of the River* actually supports the mismatch theory and not affirmative action policies, see Heriot, *The Sad Irony of Affirmative Action*, *supra* note 5, at 88–91.

white students. Indeed, empirical research shows that they are a little more so.¹¹ But these are more-difficult-than-average majors. Many students abandon them. Significantly, African-American and Hispanic students jump ship at much higher rates than whites. A recent study at Duke University, for example, found that approximately 54 percent of black males switched out of science and engineering majors, whereas only 6 percent of white males did.¹²

It is not surprising that students with lower entering academic credentials disproportionately give up on their ambition to get a science or engineering degree more often than those with higher academic credentials. What some do find unexpected is this: Three in-depth studies have demonstrated that *part of the effect is relative*. An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an *otherwise identical student* attending a more elite school where those same credentials place her toward the bottom of the class. Put differently, affirmative action is a hindrance, not a help, for preference beneficiaries who aspire to earn a degree in science and engineering.¹³

¹¹ See, e.g., Alexander Astin & Helen Astin, *Undergraduate Science Education: The Impact of Different College Environments on the Educational Pipeline in the Sciences* 3–9, Table 3.5 (1992).

¹² Arcidiacono et al., *supra* note 9. These authors also dispelled the common belief that affirmative action beneficiaries “catch up” after their freshman year with their better-credentialed classmates. What happens instead is that many transfer to majors where the academic competition is less intense and where students are graded on a more lenient curve. Their GPAs increased, but their standing relative to their peer group did not. Some argue that what are really needed are more role models for minority students who aspire to be physicians, engineers, lawyers, professors, and so on. But here it is worth noting that the credentials-gap effect is by no means confined to affirmative action beneficiaries. White students who receive legacy preferences have the same experience, earning lower grades than white non-legacies at the end of their first year. Although the gap narrows over time, this is only because legacy students also shift away from science and toward the humanities. It is exceedingly unlikely that anti-legacy bias, lack of legacy role models, or any other argument commonly advanced to explain racial disparities in science explains legacies’ drift toward softer majors. They are thus likely to be the wrong explanations for under-represented minorities.

¹³ Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Educ. 681 (1996); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Educ. 353 (2004); Richard

Each of these three studies used a different database and a different methodology. Yet all came to that same conclusion, and the effect they found was substantial. One of them—by University of Virginia psychologists Frederick Smyth and John McArdle (now at the University of Southern California)—found that among a sample of under-represented minority students at 23 universities who intended to major in science, mathematics, or engineering, 45 percent more of the women and 35 percent more of the men would have succeeded in attaining their goal if they had attended a school where their entering credentials had been about average.¹⁴ To my knowledge, no one has attempted to rebut any of these studies, much less all three of them.

Similar research had found that the same problem is reducing the number of African-American college students who decide to attend graduate school and become college professors. It is no secret that students who get good grades like school better than students whose performance is not so stellar. Given that, a nationwide policy of race-preferential admissions policies—which cannot help but produce disappointing grades for a disproportionate number of under-represented minority students—was always likely to dampen their enthusiasm for an academic career. The only serious question was how strong the effect would be. In *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*, Stephen Cole and Elinor Barber found it was substantial. The authors, whose 2003 book has been unrebutted, noted that among their sample of African-American students with high SAT scores, only 4 percent of those with college GPAs at or near 2.6 wanted to become college professors. Among those with college GPAs at or near 4.0, however, the number was over 20 percent.¹⁵ Naturally, those with higher grades

Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper (Draft July 2009) (“[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers.”).

¹⁴ Smyth & McArdle, *supra* note 13, at 373.

¹⁵ Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* (2003). For an account of tensions between the authors and their funders at the Mellon Foundation that arose on account of these conclusions, see Robin Wilson, *The Unintended Consequences of Affirmative Action*, *The Chronicle of Higher Education*, Jan. 31, 2003.

were disproportionately attending schools where they did not need a preference in order to be admitted.

Finally, research into law students by UCLA law professor Richard Sander has produced similar results: More African-American students would graduate and pass the bar examination if they attended law schools at which their entering credentials put them in the broad middle or upper portion of the class.¹⁶

Some have argued that, owing to shortcomings in the available data, Sander's findings should not be taken as the last word on law school affirmative action.¹⁷ In 2007, the U.S. Commission on Civil Rights agreed that while Sander's research was important and impressive, more research would be useful before his conclusions could be accepted as final.¹⁸ But the story didn't end there. Sander assembled an ideologically diverse team of researchers to continue the research on a different database. But some of the same people who originally argued that more research was necessary then argued successfully that Sander's team should not be permitted access to data that would allow them to supplement the research.¹⁹ For some, defending race-preferential admissions is not about doing what is best for minority students.

Like an out-of-touch emperor dismissing bad news from the battlefield, higher education has ignored this literature for more than a decade. The troops must carry on, regardless of the casualties—or so the emperor has declared. The U.S. Commission on Civil Rights issued two reports on the mismatch topic and distributed them to college and university presidents, provosts, deans, and admissions officers. The response has been silence.

Ordinarily, one would not expect the Court to weigh in on research of this kind. But by permitting state universities to engage in

¹⁶ Richard Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 *Stan. L. Rev.* 367 (2004). See also Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness and School Performance Shape Legal Careers*, 9 *J. Empirical Legal Stud.* 893 (2012) (in predicting income of law school graduates, getting good grades mattered more than getting into a top law school, once entering credentials are controlled for).

¹⁷ See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L. Rev.* 1807 (2005).

¹⁸ U.S. Comm'n on Civil Rights, *Affirmative Action in Law Schools* (2007).

¹⁹ See Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* 233–44 (2012).

racial discrimination in admissions, the Court, in *Grutter*, implicitly took the position that affirmative action has beneficial effects that justify deviating from the usual overwhelming presumption against such practices.²⁰ The least it can do now is provide colleges and universities with an obligation to take a hard look at the data.

With *Fisher*, the Court has arguably done exactly that. It is difficult to see how a college or university can give “a reasoned, principled explanation” for its goal of reaping the educational benefits of diversity (which is the only goal the case law approves) or prove that its race-preferential admissions policy is “narrowly tailored” to achieve that goal without addressing this research.²¹ Although the Commission on Civil Rights could not force colleges and universities to grapple with this issue, maybe the *Fisher* decision can.

Pre-Fisher Decisions: *Bakke*, *Gratz* and *Grutter*

Not everyone agrees with my assessment that advocates of race neutrality have reason for modest optimism. On the day *Fisher* was announced, Columbia University President Lee Bollinger opined with characteristic certainty that the University of Texas would have no trouble on remand showing that its policy complies with the law.²² Of course, Bollinger is a longtime promoter of race-preferential admissions, but some advocates of race neutrality also view the case as a win for him and his allies.²³

They could turn out to be right. But it is important to note that in the days and weeks that have followed the release of previous

²⁰ The Court’s citation to Kenneth and Mamie Clark’s famous doll experiments in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), has been justifiably criticized by legal scholars who rightly argue that school segregation would have been unconstitutional even if the experiment had come out the other way. There is a principle involved—the principle of non-discrimination. One could similarly argue that it shouldn’t matter whether race-preferential admissions are harmful or not; they’re unconstitutional anyway. But it is difficult to argue that a special constitutional exception to the principle of non-discrimination should be made to permit them in the face of extensive evidence that they cause more harm than good.

²¹ *Fisher*, 133 S. Ct. at 2419.

²² See PBS NewsHour (June 24, 2013).

²³ See, e.g., David Bernstein, *Fisher is a Significant Loss for Opponents of Affirmative Action Preferences, The Volokh Conspiracy*, Jun. 25, 2013, <http://www.volokh.com/2013/06/25/fisher-is-a-significant-loss-for-opponents-of-affirmative-action-preferences>.

Supreme Court opinions on race-preferential admissions policies, misinterpretations and mispredictions tended to dominate the commentary. It is going to take a little while to see how this story unfolds. In the meantime, colleges and universities should prepare for more than one contingency.

Consider, for example, the famously fractured decision in *Regents of the University of California v. Bakke* (1978).²⁴ Immediately after that 4–1–4 decision was issued, many affirmative action supporters viewed it as a major loss. But in retrospect it seems screamingly obvious that they had won big.

In *Bakke*, the University of California at Davis Medical School had been reserving a specific number of seats in its class for under-represented minority members.²⁵ As a result, it wound up admitting minority applicants whose entering academic credentials were dramatically lower than those of their fellow admittees.²⁶ Four members of the Court—Chief Justice Warren Burger and Justices William Rehnquist, John Paul Stevens, and Potter Stewart—took the position that Title VI’s plain language prohibited discrimination against whites as well as blacks.²⁷ Another four—Justices Harry Blackmun, William Brennan, Thurgood Marshall, and Byron White—concluded that Title VI’s prohibition was only intended to prohibit race discrimination that would be unconstitutional if practiced by a state actor.²⁸ On the issue

²⁴ 438 U.S. 265 (1978).

²⁵ *Id.* at 272–76.

²⁶ In 1973, the average MCAT scores for regular admittees and special admittees at UC-Davis were as follows:

	<u>Regular</u>	<u>Special</u>
Science	83rd percentile	35th percentile
Verbal	81st percentile	46th percentile
Quantitative	76th percentile	24th percentile
General Information	69th percentile	33rd percentile

Similarly, overall undergraduate GPAs in 1973 averaged 3.49 for regular admittees and 2.88 for special admittees. The science undergraduate GPAs—usually considered the most important aspect of a medical school applicant’s undergraduate record—average 3.51 for regular admittees and 2.62 for special admittees in 1973. *Id.* at 277 n.7.

²⁷ 438 U.S. 265, 408 (Stevens, J., concurring in the judgment in part and dissenting in part). Title VI states, “No person . . . shall, on the ground of race, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act of 1964, title VI, sec. 601, codified at 42 U.S.C. sec. 2000d.

²⁸ *Id.* at 324 (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in the judgment in part and dissenting in part).

of constitutionality, these four justices stated that “where there is reason to believe” that minority under-representation “is a product of past racial discrimination,” race-preferential admissions policies are permissible as a method of helping to place minority members in their rightful position.²⁹ They therefore took the position that the medical school’s policy was constitutional.

The tie-breaking vote was thus Justice Lewis Powell’s. One by one, he rejected the various justifications advanced by the regents for the medical school’s discriminatory policies—including the need to “reduc[e] the historic deficit of traditionally disfavored minorities . . . in the medical profession” and the need to “increas[e] the number of physicians who will practice in [underserved] communities.”³⁰ Most memorably, he objected to the argument that past societal discrimination can justify compensatory discrimination by a state university. “No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups,” he wrote. But the notion that “but for this discrimination by society at large, Bakke ‘would have failed to qualify for admission,’ because Negro applicants . . . would have made better scores” requires “a speculative leap”—a leap he was not willing to take.³¹

Justice Powell was particularly troubled by the expansiveness of the argument that affirmative action can be justified as compensation for past societal discrimination. He opined that “if it may be concluded on this record that each of the minority groups preferred by [the medical school’s] special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered ‘societal discrimination’ cannot also claim it, in any area of social intercourse.”³² Mormons, for example, have been the victims of violence at the hands of state militias.³³ Could that entitle them to demand tax credits? Would anything be left of equal protection if state actors were permitted to make whatever compensatory adjustments they deem appropriate?

²⁹ *Id.* at 366.

³⁰ *Id.* at 306 (opinion of Powell, J.).

³¹ *Id.* at 297 n.36.

³² *Id.*

³³ See Missouri Executive Order No. 44 (October 27, 1838) (“The Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace—their outrages are beyond all description.”).

But Justice Powell left the door open what he probably thought was just a crack. After rejecting most of the regents' justifications, he examined their final Hail Mary: The educational benefits to all students of a diverse student body. Unlike the other reasons they advanced, the diversity justification purported to be for the direct benefit of all students and not a redistribution of benefits from some to others.³⁴ Here Powell was receptive.

That did not, however, dispose of the case for Justice Powell. He was still of the opinion that Allan Bakke must be admitted to the medical school. His concern was that the school had reserved a particular number of seats for targeted racial minorities. He reasoned that the educational benefits of diversity come not just from race but from many kinds of diversity, from political ideology to musical talent. For a school to reserve 16 seats for targeted races—and none for students who might contribute to diversity in other ways—seemed incongruous. Without knowing how many under-represented minority members would be admitted in a particular year without preferential treatment it would be hard to know whether those 16 seats were necessary to foster racial diversity. It would also be hard to know what other kinds of diversity might have to be sacrificed in order to fill those 16 seats based on race.³⁵

After the *Bakke* decision, some affirmative action advocates fixed upon a bottom line that went against them—that Bakke himself must be admitted to the medical school. And they also voiced their frustrations with Powell's rejection of the non-diversity justifications offered for the medical school's policy. For them, Justice Powell left the wrong door ajar. As far as they were concerned, the purpose of race-preferential admissions policies was to confer a benefit on under-represented minority students in particular, not to enhance the general educational experience. For a variety of related reasons, they wanted more minority college graduates, more minority

³⁴ Additionally, Powell apparently was impressed by the fact that Harvard University had been seeking geographical diversity in its students since the 1920s. See 438 U.S. at 321 (appendix to opinion of Powell, J.). He was apparently unaware that this policy was part of an effort to ensure that the number of Jewish students, who were concentrated in the New York City area, would not become "too high." See generally Marcia Graham Synnott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900–1970* (1979).

³⁵ 438 U.S. at 315–20 (opinion of Powell, J.).

professionals, and more minority successes generally, not more robust classroom debate. At best, Justice Powell's opinion seemed to hijack the policies that they had helped formulate.³⁶

But it did not take long for this early reaction to fade and for colleges and universities to see how easily they could accomplish their goals simply by adopting the rhetoric of "diversity." It didn't matter whether they believed in it.³⁷

Sometimes the change in rhetoric was accomplished only awkwardly, as in the following conversation, the gist of which I overheard at my own university in the 1990s:

MY ASSISTANT: Could you tell me what time the affirmative action committee meets with the provost?

PROVOST'S ASSISTANT: We don't have an affirmative action committee.

MY ASSISTANT: We don't? That's funny because

PROVOST'S ASSISTANT: It's a diversity committee, not an affirmative action committee. There's an important difference and I've been told not to mix them up.

MY ASSISTANT: OK, then could you tell me when the diversity committee is meeting with the provost?

PROVOST'S ASSISTANT: Ten o'clock.

³⁶ See Alan Dershowitz, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *Cardozo L. Rev.* 379, 407 (1979).

³⁷ Slowly, the pendulum has swung in other ways too. Not only is *Bakke* no longer considered a loss by advocates of race-preferential admissions, but Powell himself is now lionized as a defender of civil rights. But while Powell was a learned and compassionate man, his defense of civil rights in other contexts was not exactly leonine. As a Richmond school board chairman and a member of the Virginia Board of Education during the crucial years following the Supreme Court's decision in *Brown v. Board of Education*, the gentlemanly Powell did not distinguish himself as an advocate of desegregation "with all deliberate speed." See Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* 496 (2005) (quoting John C. Jeffries Jr., Justice Lewis F. Powell Jr. 2, 234, 172 (2001)). In contrast, California Supreme Court Justice Stanley Mosk, who authored the state court opinion holding that race-preferential admissions policies were unconstitutional, had been an advocate for civil rights throughout his legal and political career. Despite this record, many progressives never forgave him for his stand in *Bakke*—even in death. See Stanley Mosk, 88, *Long a California Supreme Court Justice*, *N.Y. Times*, Jun. 21, 2001, at C13.

Translation: Justice Powell has taken the position that diversity is the only legitimate justification among those commonly advanced for racial preferences. Our university would be well advised to do everything possible to fit its program within the safe harbor he created. That means remedying past discrimination is out and diversity is in—at least rhetorically. Get with the program.³⁸

In theory, at least, it would have been possible to bring an action proving that a university's "diversity policy" was pretextual and not actually based on a concern for diversity's educational benefits. As Columbia law professor Kent Greenawalt, a skeptic of race-preferential admissions, declared soon after *Bakke*, "I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students."³⁹ But in the more practical world of public-interest litigation, it would have been overwhelmingly expensive and pointless. Even if a lawsuit could be won, a defendant university would likely obtain new leadership and assert that the new leadership is motivated by diversity in its admissions policy.

Twenty-five years later, when the Court announced its decisions in the twin cases of *Gratz v. Bollinger*⁴⁰ and *Grutter v. Bollinger*, some of the early media assessments were again off-target. Since Jennifer Gratz was victorious in the former and the University of Michigan was the victor in the latter, some suggested that the result was essentially a tie. By this time, however, even moderately well-informed college and university administrators knew the actual score. They understood that by tracking Powell's rationale in *Bakke*, the Court

³⁸ For a discussion of how the concept of "diversity" took off from Powell's opinion on admissions in *Bakke* and has spread into other areas, see Peter Wood, *Diversity: The Invention of a Concept* (2003).

³⁹ Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979). Similarly, Harvard law professor Alan Dershowitz wrote: "The *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority students in the student body." Dershowitz, *supra* note 36, at 407.

⁴⁰ 539 U.S. 244 (2003).

had hit the ball out of the park on their behalf in *Grutter*. They also understood that their loss in *Gratz* was trivial.

Gratz concerned at most a cosmetic matter, similar to the issue that gave Mr. Bakke his “good for this case only” victory. In *Bakke*, Powell was concerned that the medical school had set aside a specific number of seats in the class for minority students only. In *Gratz*, now-Chief Justice Rehnquist, writing for the six-member majority, could not abide the fact that the University of Michigan had assigned a specific number of points—exactly 20—to African-American, Hispanic, or American-Indian applicants. This advantage was worth an entire letter grade in high school GPA. In other words, an African-American applicant with a high-school record of straight Bs (GPA of 3.0) would be treated the same as an Asian-American student with a high school record of straight As (GPA of 4.0), all other things being equal.⁴¹

Curiously, it was apparently not the size of the preference that disturbed the Court. Extremely large preferences were given to minority applicants at the University of Michigan Law School in *Grutter* too. Indeed, Judge Danny Boggs in his Sixth Circuit dissent in *Grutter* referred to their “staggering magnitude.”⁴² There was something about assigning a particular number of points that offended at least Justices Sandra Day O’Connor and Stephen Breyer (the two whose votes switched from *Grutter* to *Gratz* to form the conflicting results). Was the point system somehow inconsistent with the diversity rationale? Or was it just too in-your-face? Either way, it was enough to swing a narrow (and jurisprudentially unimportant) win for Ms. Gratz.

Grutter on the other hand decided the issue that mattered: whether a state university can, consistently with the Constitution, give preferential treatment to African-American, Hispanic, and American-Indian applicants, thereby disadvantaging white and Asian-American applicants. Here, in one sense, the five-member majority opinion broke little in the way of new ground. Powell’s controlling opinion in *Bakke* had endorsed the diversity rationale as a legitimate justification for race preferences, even very large race preferences. *Grutter* advanced the ball only by putting, for the first time, the Court’s full imprimatur behind Justice Powell’s logic.

⁴¹ Brief for Petitioners at 25, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

⁴² *Grutter v. Bollinger*, 288 F.3d 732, 776 (6th Cir. 2003) (Boggs, J., dissenting).

But in another sense, *Grutter* was a shocker. Contained within the opinion was a passage that should have raised concerns even among adamant supporters of race-preferential admissions policies: It introduced the concept of deference to colleges and universities into the calculation.

As lawyers know, courts ordinarily apply the highest level of scrutiny to state action that involves race discrimination, a standard known as “strict scrutiny.” It has been described as “a searching *judicial* inquiry.”⁴³ As Powell put it in *Bakke*, when government decisions “touch upon an individual’s race . . . 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.”⁴⁴

Yet in *Grutter*, the majority purported to defer to the “educational judgment” of the University of Michigan Law School. Rather than conduct a “searching judicial inquiry” into the matter, the Court deferred in some undefined way to the law school.⁴⁵ But the concept of deference to the judgment of a college or university is wholly foreign to strict scrutiny. One cannot both defer to the judgment of discriminators and strictly scrutinize their actions. The two are opposites. Deference necessarily eviscerates strict scrutiny, leaving only its tough-talking rhetorical shell. Indeed, as Justice Thomas has pointed out, during the Jim Crow era, many Southern school districts insisted, probably sincerely, that all students learn better in segregated settings.⁴⁶ If deference had been accorded these schools, *Brown v. Board of Education* itself would have come out differently.

After *Grutter*, well-informed state actors no longer had to assume that racially discriminatory state action was overwhelmingly likely to be found unconstitutional—at least not in higher education and maybe not in other contexts. Since *Grutter*, one Pennsylvania school experimented with the idea of homerooms segregated by race and sex.⁴⁷ It is unthinkable that they would have even considered this if *Grutter* had not thrown wide the door that *Bakke* cracked open.

⁴³ E.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (emphasis added).

⁴⁴ *Bakke*, 438 U.S. at 299 (opinion of Powell, J.) (emphasis added).

⁴⁵ See *Grutter*, 539 U.S. at 328–29.

⁴⁶ *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

⁴⁷ See, e.g., Monika Plocienniczak, “Pennsylvania School Experiments with ‘Segregation,’” CNN (Jan. 28, 2011).

Grutter-deference ensured that lawsuits against race-preferential admissions policies would be rare—a least for a while. Lawsuits are expensive. Lawsuits against state colleges and universities are especially expensive. For the shoestring operations that ordinarily bring public-interest litigation of this kind, spending that kind of money requires reasonable confidence in victory. It also requires reasonable confidence that the victory will have a significant impact on admissions policies in the future.⁴⁸ For the purposes of long-term strategy, “good for this day only” victories, like those in *Bakke* and *Gratz*, might as well be losses. Adding to any potential plaintiff’s worries, the Court announced that “good faith on the part of a university is presumed absent a showing to the contrary.”⁴⁹ Lawsuits arguing that a university’s concern for the educational benefits of diversity was pretextual were definitely not being encouraged. The country had other concerns at the time—the wars in Afghanistan and Iraq, terrorism, then the Great Recession. Colleges and universities were going to be left to their own devices.

But seemingly invulnerable institutions sometimes get careless. As a result, issues worthy of litigation do come along. After 2003, many colleges and universities expanded their race-preferential admissions policies, secure in their belief that *Grutter*-deference would

⁴⁸ Moreover, quite apart from the financing, all one has to do is spend a minute or two on Google to understand why students do not line up to become plaintiffs in these cases: The Internet is littered with grotesque personal attacks on Ms. Fisher and also on Ms. Gratz and Barbara Grutter. See, e.g., James Taranto, *The Woman Who Fought Racial Preference*, *Wall St. J.*, Jun. 29, 2013, at A15 (reporting violent threats against Gratz).

⁴⁹ 539 U.S. at 329 (internal quotations omitted). What makes this somewhat embarrassing is the wealth of admissions from academics that the educational benefits of diversity are not the motivation for race-preferential admissions. While *Grutter* was under consideration by the Court, Harvard law professor Randall Kennedy wrote: “Let’s be honest: Many who defend affirmative action for the sake of ‘diversity’ are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.” Randall Kennedy, *Affirmative Reaction*, *The American Prospect*, Mar. 1, 2003. See generally Brian Fitzpatrick, *The Diversity Lie*, 27 *Harv. J.L. & Pub. Pol’y* 285 (2003) (giving other examples and pointing out incompatibilities between diversity in theory and race-preferential admissions in practice).

protect them.⁵⁰ The University of Texas, however, did so clumsily. During the pre-*Grutter* period, when it was operating under a court order not to give race preferences, it bragged that it had been able to diversify its student body without them. Later, when it re-adopted preferences pursuant to *Grutter*, it was rather difficult to argue that the reinstated preferences were needed. The university already claimed it had achieved that purpose. Instead, it became obvious that the university had a different goal in mind—moving as close as it could to the demographics of the state of Texas—not bringing in a “critical mass” of minority students in order to obtain for its students the educational benefits of diversity. Such a purpose had been rejected as unconstitutional in *Grutter*.

The Buildup to *Fisher*

In 1996, seven years before *Grutter* and *Gratz*, the U.S. Court of Appeals for the Fifth Circuit decided *Hopwood v. Texas*.⁵¹ In *Hopwood*, the Fifth Circuit, anticipating that the Supreme Court would not adopt Justice Powell’s *Bakke* opinion, held that Texas’s race-preferential admissions policy violated the Fourteenth Amendment’s Equal Protection Clause. This policy was no different from many other admissions policies. Selective colleges and universities in the Fifth Circuit were thus obliged to end their practice of according preferential treatment to members of under-represented races in admissions.

To comply with *Hopwood*, the University of Texas altered its admissions policies to drop direct consideration of race and instead added the consideration of a Personal Achievement Index. The PAI took into account various “special circumstances,” such as the socio-economic status of the student’s family, languages other than English spoken at home, and whether the student was reared in a single-parent home. PAI scores were combined with Academic Index scores,

⁵⁰ See, e.g., Althea Nagai, Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan, Center for Equal Opportunity, Oct. 17, 2006, available at <http://www.ceousa.org/content/blogcategory/78/100> (empirical study finding that the University of Michigan actually increased the average preference level for African Americans after *Gratz*).

⁵¹ 78 F.3d 932 (5th Cir. 1996).

which consisted of high school rank and standardized-test scores to determine whether a student would be admitted.⁵²

In 1997, the Texas legislature took things a step further and adopted what is sometimes called “the 10 Percent Solution.”⁵³ Under this statute, students with grades in the top 10 percent of each Texas high school were automatically admitted, regardless of their SAT scores or other academic credentials. This approach has generally been unpopular with faculty, on the ground that it weakens the academic qualifications of the class as a whole. A student who graduates in the top 10 percent of an uncompetitive high school with weak SAT scores will often not perform as well academically as a student who graduates only in the top 20 percent of a more competitive high school with stronger SAT scores. On the other hand, the 10 Percent Solution did guarantee more racial diversity than the university’s previous policy would have in the absence of explicit race preferences.

In 1996, the last year in which race was directly considered at the University of Texas, the freshman class had been 18.6 percent African American and Hispanic. In 1999, with the combination of the 10 Percent Solution and the “AI + PAI” methods of selecting students, the university announced that “enrollment levels of African American and Hispanic freshmen . . . returned to those of 1996, the year before the *Hopwood* decision.” Indeed, it celebrated the fact that “minority students earned higher grade point averages [in 1999] than in 1996 and ha[d] higher retention rates.”⁵⁴

By 2003, the University of Texas was bringing in higher numbers of African-American, Hispanic, and Asian-American students than it had in the old days of considering race directly, causing the school

⁵² Brief for Petitioner at 3, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (“Abigail Fisher Brief”).

⁵³ Tex. Educ. Code Ann. § 51.803 (West 1997). As Justice Ruth Bader Ginsburg suggests in her dissent, the legal status of the 10 Percent Solution is itself open to question; if its purpose is to increase the number of minority students, it is arguably racially discriminatory too. *Fisher*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting). On the other hand, policies like the 10 Percent Solution have garnered the support of race-neutrality supporters like former University of California Regent Ward Connerly. *Fisher* did not address this issue, but it is worth pointing out, however, that whatever its legal status, it usually will create fewer *race-specific* mismatch problems, since its beneficiaries—students who would not have gotten in under a policy focusing on standardized test scores—are of all races and ethnicities.

⁵⁴ Abigail Fisher Brief, *supra* note 52, at 4.

to declare that it had “effectively compensated for the loss of affirmative action.” In 2004, the entering class was 21.4 percent African American or Hispanic and 17.9 percent Asian American.

But *Grutter* overruled *Hopwood*. After that, other Fifth Circuit selective schools were free to resume their old, race-preferential policies. But in Austin things were different. The 10 Percent Solution was statutory, and hence any internal change in policy would have to be in addition to that law. Nevertheless, within hours of the *Grutter* decision, the University of Texas announced that it would be reintroducing the direct consideration of race into its admissions policy. After studying the matter for a while, it adopted a policy under which African Americans and Hispanics would receive credit for their race in their PAI calculation.⁵⁵

By 2007, the university’s freshman class was 19.7 percent Hispanic, 19.7 percent Asian American, and 5.8 percent African American.⁵⁶ The effect of the direct consideration of race, however, seems to have been small. In 2004, the last year in which race was not considered directly, 15.2 percent of the non-top 10 percent enrollees were African-American or Hispanic. In 2008, when race was considered directly in calculating PAIs, this number increased to 17.9 percent. By far, most minority students—and most students generally—come in through the 10 Percent Solution. If one makes the assumption that the increase from 15.2 percent to 17.9 percent was wholly a result of direct consideration of race—a dubious assumption—race would have been the deciding factor in only 33 cases, or 0.5 percent of the seats in the entering class of 2008.⁵⁷

Abigail Fisher applied for admission to that entering class of 2008. Although a fine student, she did not quite make the top 10 percent of her suburban Houston high school. Her SAT scores were not high enough

⁵⁵ Although most students at the University of Texas are admitted through the 10 Percent Solution, PAI scores matter for all students, since AI + PAI scores are used to determine eligibility for particular programs of study. Abigail Fisher Brief, *supra* note 52, at 8.

⁵⁶ Abigail Fisher Brief, *supra* note 52, at 11.

⁵⁷ *Id.* at 9–10. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court held a school-integration plan that had an effect on only a tiny number of student attendance assignments unconstitutional in part because the racially-discriminatory aspects of the plan had insufficient effect on diversity to justify them. 551 U.S. 701 (2007).

to make up the difference—at least when competing against students who were given priority on account of their race. She ended up going out of state to Louisiana State University but brought a lawsuit against the University of Texas and its officers in federal court, citing the Fourteenth Amendment, 42 U.S.C. Sections 1981 and 1983, and Title VI of the Civil Rights Act of 1964.

Fisher argued that the University of Texas had gone beyond *Grutter* and the Constitution in several ways. For example, she contended that rather than seek a “critical mass” of minority students in order to facilitate a rich and varied discussion of issues, Texas was seeking as far as practicable to approximate state demographics in its entering class. The university countered that it was trying to attain diversity not just in the entering class as a whole, but in each and every major, program and classroom, and that doing so requires high numbers of minority students. Fisher then responded that *Grutter* authorizes only critical mass in the class as a whole and that an open-ended license to discriminate until “critical mass” is established in every nook and cranny of the university is too open-ended to be constitutional. Moreover, she argued that the university itself had already admitted that it had achieved the optimal degree of racial diversity using the 10 Percent Solution, and that race discrimination to obtain higher numbers of under-represented minorities proved that the admissions policy could not be narrowly tailored to serve that interest.

The district court would have none of Fisher’s arguments. On cross-motions for summary judgment on liability, Judge Sam Sparks granted the university’s motion, stating that “as long as *Grutter* remains good law, [the University of Texas’s] current admissions program remains constitutional.”⁵⁸ The Fifth Circuit panel affirmed. Judge Patrick Higginbotham, writing for the court, agreed that *Grutter* controlled the case and that *Grutter*-deference generally protected the decisions made by the University of Texas in the formulation of its admissions policy.⁵⁹

Judge Emilio Garza agreed, but wrote separately to let it be known that he did not consider this a happy result:

⁵⁸ *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009). The proceedings had already been bifurcated into liability and remedy phases.

⁵⁹ *Fisher v. Univ. of Texas*, 631 F.3d 213, 216–17 (5th Cir. 2011), en banc reh’g denied, 644 F.3d 301 (5th Cir. 2011).

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in *Grutter*, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a different level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict scrutiny were properly applied, it should not.⁶⁰

A petition for en banc review produced seven votes in favor and nine against, as well as an opinion by Chief Judge Edith Jones dissenting from the failure to grant an en banc hearing.⁶¹ The University of Texas had won its case, but not without inspiring several distinguished jurists to raise grave concern over *Grutter*-deference.

On February 21, 2012, the Court granted Abigail Fisher a writ of certiorari.

The Long-Awaited Decision

Fisher was argued on October 10, 2012. The decision was not announced until June 24, 2013, and Justice Anthony Kennedy's opinion for the Court is only 13 pages long. Only Justice Thomas's very readable concurrence elaborates at any length.

Eight and a half months is a long time for such a puny Court opinion. This long wait has caused some observers to wonder if there is a backstory—perhaps an earlier draft of the opinion that never saw the light of day. But if there was, we will probably never hear about it, or at least not until all the justices currently serving are dead (as is the standard practice for the release of justices' papers). The opinion that counts is the one the Court issued, which was joined by seven justices.⁶²

⁶⁰ *Id.* at 247 (Garza, J., specially concurring).

⁶¹ *Fisher v. Univ. of Texas*, 644 F.3d 301, 304 (5th Cir. 2011) (en banc) (Jones, C.J., dissenting).

⁶² The opinion was joined by Chief Justice John Roberts as well as Justices Antonin Scalia, Thomas, Breyer, Samuel Alito, and Sonia Sotomayor. Only Justice Ginsburg dissented. Scalia and Thomas each submitted concurring opinions as well. Justice Elena Kagan recused herself because she had worked on the case while she was solicitor general.

The Court did not sweep away *Grutter v. Bollinger* and hold that race-preferential admissions policies are unconstitutional—as advocates of race-neutral admissions had hoped for and advocates of race-preferential policies had come to fear. Some of the latter have argued that this enhances the precedential value of *Grutter*: The more often a Court applies it, the more difficult it is to overrule.⁶³

Such an argument might carry weight if the Court had applied *Grutter* without further comment. But, as Justice Kennedy takes great pains to point out, the Court simply accepted *Bakke*, *Grutter*, and *Gratz* “as given for the purposes of deciding this case.”⁶⁴ Justice Scalia elaborated briefly on this point in his one-paragraph concurring opinion: “The petitioner in this case did not ask us to overrule *Grutter*’s holding that a ‘compelling interest’ in the educational benefits of diversity can justify racial preferences in university admissions.”⁶⁵ Scalia further states that he adheres to the view he expressed in *Grutter* that the “‘Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.’”⁶⁶

Rather than entrench the *Grutter* decision, *Fisher* thus conspicuously reserves the issue of *Grutter*’s viability.⁶⁷ The fact that Justices Scalia and Thomas, both strong advocates of the position that the Constitution mandates race neutrality, concurred in the Court’s opinion is evidence that they believe there is a significant chance that the *Fisher* case will be resolved in favor of Ms. Fisher on remand

⁶³ See, e.g., PBS NewsHour (June 24, 2013) (remarks of Columbia University President Lee Bollinger).

⁶⁴ *Fisher*, 133 S. Ct. at 2417.

⁶⁵ *Id.* at 2422 (Scalia, J., concurring).

⁶⁶ *Id.* (Scalia, J., concurring) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

⁶⁷ *Fisher* *did* request in her brief for the Court to “overrule *Grutter* to the extent needed to bring clarity to the law and restore the integrity of strict scrutiny review in the higher education setting.” Abigail Fisher Brief, *supra* note 52, at 53. At oral argument, however, petitioner’s counsel stated in response to a question by Justice Breyer, “[W]e are not trying to change the Court’s disposition of the issue in *Grutter*. Could there be . . . a compelling interest in . . . using race to establish a diverse class.” Oral Argument at 8, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). But a statement of what the petitioner is “trying to change” is not the same thing as a waiver of an argument explicitly made and discussed in the briefs. What is clear is that petitioner had throughout the litigation emphasized the argument that the University of Texas’s admissions policy violated even *Grutter*.

under the newly clarified standard and that, if not, the issue of *Grutter*'s viability can be brought up again on a second trip to the Court.

Another road not taken would have been to hold flatly that preferential treatment may not be used to drive the numbers of under-represented minorities as high as 20 percent (although race-neutral methods could of course be used in a way that results in such an enrollment): Whatever the *Grutter* Court meant by "critical mass," it did not mean 20 percent. But such a ruling would have been awkward, because both *Bakke* and *Gratz* had condemned rigid quantification. The Court was thus unlikely to want to set a quota-like ceiling on race-preferential admissions, especially given that it would have had precious little useful precedential effect. Texas is a majority-minority state. If a university in a state with more typical demographics were to attempt to approximate its demographics in its freshman class, its goal for under-represented minorities would likely be lower than 20 percent. It would be hard to distinguish such an effort from an attempt to enroll a "critical mass" of under-represented minority students for diversity purposes. Such a ruling would have been a victory for Fisher, but it would not have sparked greater introspection on the part of colleges and universities across the nation—something that the Court's actual opinion has some potential to do.⁶⁸

So what road did the Court take? Rather than render a final judgment on the case, it took the opportunity to clarify the applicable standard in broad terms. In particular, it addressed the most controversial part of *Grutter*—deference to the academic judgment of colleges and universities—and made its limitations clearer.

Strict scrutiny has been the centerpiece of equal-protection doctrine for the better part of a century. It makes clear that laws that discriminate on the basis of race (and of certain other "suspect classifications," such as religion and national origin) will be subjected

⁶⁸ The Court could have taken it upon itself to apply its newly clarified *Grutter* standard to the record and decide the cross-motions for summary judgment too. Instead, it stated that "fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis." It therefore remanded to the Fifth Circuit—explicitly *not* the district court—for a decision on the already-existing record. Fisher, 133 S. Ct. at 2421 ("Whether this record . . . is sufficient is a question for the Court of Appeals in the first instance"). In *Adarand Constructors, Inc. v. Peña*, the Court also remanded to the lower court to apply the strict scrutiny standard it had held applicable to the case. 515 U.S. 200 (1995).

to the utmost scrutiny and upheld only in rare circumstances. The test is usually rendered as having two parts: A state must be able to show that a racially discriminatory law (1) serves a compelling governmental interest, not just a legitimate or important governmental interest; and (2) is narrowly tailored to serve that interest.

Up until the last couple of decades or so, the conventional wisdom was that the strict scrutiny test was virtually insurmountable, and that the only racially discriminatory actions by a state that would be upheld would be those that were so obviously necessary (for example, temporarily segregating prisoners by race during a prison yard race riot) that no one would be foolish enough to litigate them. As Stanford law professor Gerald Gunther famously put it, the Court's strict scrutiny doctrine was "'strict' in theory and fatal in fact."⁶⁹ After *Grutter*, however, it threatened to become a flaccid thing, at least when applied to college and universities.

Grutter was unclear about whether its controversial deference was intended to apply to every aspect of the strict scrutiny test or only to certain aspects of it. In granting summary judgment to the University of Texas, the Fifth Circuit panel interpreted it to be all-encompassing. Interestingly, at the time of the *Grutter* decision, Justice Kennedy seemed to lean toward a broad interpretation too. "The Court confuses deference to a university's definition of its educational objective," he wrote, "with deference to the implementation of this goal."⁷⁰

Ten years later, Kennedy, faced with the task of making sense of *Grutter*'s ill-advised deferential posture, was less inclined to interpret it in a way he believed would create mischief. Instead, he attempted to outline as sensible an approach to questions of race-preferential admissions as possible while staying within the letter and perhaps even the spirit of *Grutter*.

He began by pointing out what *Grutter* actually said on the subject of deference, which was that a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." He then made two points: First, only "some"

⁶⁹ Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). In later years, the Court went out of its way on more than one occasion to deny this. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

⁷⁰ 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

deference is due on this issue, “not complete” judicial deference.⁷¹ Second, there must be a great deal more than a university’s mere assertion that in the educational judgment of its faculty a diverse student body is essential to its educational mission. “A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision.”⁷²

Next, Justice Kennedy made it clear that *Grutter*-deference applies only to the “compelling governmental interest” portion of the strict scrutiny test. As to narrow tailoring, strict scrutiny applies in full force, which presumably requires a “reasoned, principled explanation” from the defendant and more. He wrote:

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored on that goal. *On this point, the University receives no deference.*⁷³

Kennedy’s interpretation of *Grutter* does not contradict any specific language in that opinion. But if the justices signing on to the near-unanimous *Fisher* opinion had only been *Grutter* dissenters, critics, fairly or unfairly, would likely have called it a sleight of hand. Fortunately for the majority, however, Justice Stephen Breyer, who had been part of the *Grutter* majority, was on board, as was Justice Sonia Sotomayor—herself famously a recipient of an affirmative action preference. The only other remaining member of the *Grutter* majority, Justice Ruth Bader Ginsburg, dissented in *Fisher*, but did not argue that the Court’s opinion misrepresents the holding in *Grutter*.⁷⁴

As a result, we have now a two-track strict scrutiny test for campus diversity policies. For compelling governmental interest, “some deference” is appropriate, though the college or university must be prepared with “a reasoned, principled explanation” for its choice. For narrow tailoring, the full force of strict scrutiny is appropriate,

⁷¹ *Fisher*, 133 S. Ct. at 2419.

⁷² *Id.*

⁷³ *Id.* at 2414 (emphasis added).

⁷⁴ Justices Sandra Day O’Connor, David Souter, and John Paul Stevens, the other members of the *Grutter* majority, have since retired.

presumably including “reasoned, principled explanations” for many choices.

Double standards, however, tend to be unstable. Up until the *Fisher* decision, there was no need to patrol the boundary between the “compelling governmental interest” and the “narrow tailoring” portion of the strict scrutiny test. Indeed, many careful lawyers would have scoffed at the notion that a distinct boundary was possible. Consider, for example, how the need to patrol the boundary would have affected the now-discredited *Korematsu v. United States*.⁷⁵ There, the Court allowed clear discrimination on the basis of national origin when it upheld an evacuation order of “all persons of Japanese ancestry” (including many natural-born American citizens) from large portions of the United States—an order that resulted in many persons of Japanese ancestry being placed in internment camps for the duration of World War II. Was the supposed compelling interest national security? Or was it the need to remove nationals of enemy nations and their children or grandchildren from the country’s vulnerable West Coast so as to prevent espionage and to put them in places where they could do little or no harm? If the latter, the actions of the United States were clearly narrowly tailored and the analysis shifts to whether the governmental interest was truly compelling. If the former, the governmental interest is clearly compelling, and the analysis must center on whether the government’s actions are narrowly tailored to serve that purpose. Up until *Fisher*, it didn’t matter which part of the test was being analyzed. Now it does.

How the boundary will be drawn in *Fisher* (and future cases) may depend on what the judges who apply the dual standard think about race-preferential admissions. In the hands of a judge who is sympathetic to the position of the University of Texas as a matter of policy, as much of the analysis as possible may be pushed into the “compelling governmental interest” part of the test. In the hands of a judge who favors race neutrality, however, the bulk of the analysis may be pushed into “narrow tailoring.” It is worth noting, however, that *Fisher* refers simply to “the educational benefits that flow from student body diversity” as the relevant compelling interest.⁷⁶ It is

⁷⁵ 323 U.S. 214 (1944).

⁷⁶ *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330) (internal quotation marks omitted).

also worth noting that if the *Fisher* case makes it back to the Supreme Court in the near future, it is likely to face five justices—Scalia, Kennedy, Thomas, and Alito, and Chief Justice John Roberts—who have a history of skepticism toward race-preferential admissions policies.

So what will be the upshot of the *Fisher* decision? No one has a crystal ball, of course. But colleges and universities have to think about these issues now. If they wait until they are in court to decide how to fashion their policies, they will likely find the task impossible.

I very much doubt that the way colleges and universities have justified their individual policies in the recent past will continue to work. Many schools have operated under the assumption that they can justify their policy in isolation—that all they need to do is show their application and yield rates and thus prove that without preferences they would have fewer under-represented minorities than they regard as minimally necessary. But it is not just the fact of a race-preferential admissions policy that must be defended now, but also the details of the particular policy and its effects on educational outcomes. Just as different forms of diversity must be balanced against each other, different pedagogical problems must be considered against each other. More specifically, the pedagogical advantages of racial diversity must be balanced against the pedagogical disadvantages of gaps in academic credentials.

This evaluation will probably not be easy to do without meticulous work. The Court will be asking questions: If you are really concerned about capturing the educational benefits of diversity, why do you need to admit students whose academic credentials put them two standards below the mean? Why can't you cut it off one-and-three-quarters standard deviations lower than the mean? What is the graduation rate of students in that category? How often do they succeed in their initial major? Are the race preferences at your flagship campus so large that they decrease the level of diversity at your other campuses? If your flagship campus rejected engineering-interested minority students who would need preference to be admitted and instead accepted them to one of your other campuses, would that increase racial diversity in your graduate engineering school in the future since the chances of their success (and thus the chances that they will go on to graduate school) are greater at one of your other campuses? The list of potential questions is very long.

The bottom line, however, is that if capturing the educational benefits of diversity is the goal, the academic judgments that must be made in fashioning an actual policy are numerous and never-ending. Those judgments cannot be simple-minded sentimental ones and they definitely cannot be political in nature. Reason and principle must prevail.

If *Fisher* does nothing else, it should force colleges and universities to confront the research on mismatch in a detached and scientific manner.⁷⁷ That means using ideologically diverse teams of qualified, independent investigators—persons whose job and prestige are not dependent on maintaining the status quo. It means adequately funding and supporting the investigation with access to data. It means following standard scientific procedures by making the data available to qualified researchers who wish to critique the work.

A college that undertakes such research and concludes in good faith that the mismatch research is wrong may well be given the benefit of the doubt. That much of *Grutter*-deference may remain intact post-*Fisher*. But as long as colleges and universities continue to discriminate on the basis of race, they will be called upon to confront new research that tends to show that their policy should be modified or eliminated.

Meanwhile, a legislator who pressures a state college to “improve its diversity numbers” on pain of a budget cut may be setting that school up for a lawsuit. Caving to such pressure may be the practical thing to do in view of the importance of funding. But it is not a principled basis for an academic decision. It is politics.⁷⁸ The same goes

⁷⁷ See *supra* notes 4–21 and accompanying text. The research discussed there was hardly a bolt from the blue. Divorced from the affirmative-action context, the conclusion that preferential treatment in admissions can be against the beneficiary’s interest would be ordinary and unobjectionable. See James Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 *Am. J. Soc.* 17, 30–31 (1966). Writing before affirmative action, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. Davis therefore offered the following advice: “Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a ‘fine’ college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class.”

⁷⁸ More than 23 percent of medical school and 15 percent of law school admissions officers report pressure to engage in race-preferential admissions from state governmental entities. See Susan Welch & John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* 80, Table 3.3 (1998).

for other funding sources—from the federal government to private foundations to wealthy alumni. If a college or university is adjusting its policies in order to qualify for funding, its decision is hard to justify as an academic one and it is not based on principle. Funding sources would thus do well to avoid creating opportunities for lawsuits against their intended beneficiaries.

A fortiori, caving to pressure from student groups cannot form any part of a “reasoned, principled explanation” for an academic decision.⁷⁹ The more agitation that goes on at a particular campus for diversity, the more difficult it will be for that institution to prove that its policy is the product of a reasoned, principled inquiry into matters of pedagogy.⁸⁰

Predictions Are Hard to Make, Especially about the Future

I began by saying that while predictions are difficult to make, I am somewhat optimistic that *Fisher* will have a beneficial effect on the debate over race-preferential admissions. If the Court is steadfast in its insistence on reasoned and principled explanations, and if it does indeed strictly scrutinize race-preferential admissions policies to ensure that they are narrowly tailored to fit authorized goals, *Fisher* may force attention on the downsides of racial preferences.

Nevertheless, I am under no illusion that a mass abandonment of race-preferential admissions policies is imminent. This will take time. There is something in the human soul that doesn’t like to hear that the project it has been working on for 40 years has done more harm than good. At every college and university in the country,

⁷⁹ *Fisher*, 133 S. Ct. at 2419.

⁸⁰ For example, two years ago at the University of Wisconsin, a student mob egged on by the vice provost for diversity and climate, overpowered hotel staff to interrupt a press conference at which the speaker was critical of race-based admissions. See Peter Wood, *Mobbing for Preferences*, *Chronicle of Higher Education*, Sept. 22, 2011. See also Ben LeFebvre, *Wham BAMN: Group Stirs Controversy in Fight for Civil Rights*, *Metro Times*, Jan. 11, 2006. The organization whose tactics are discussed in the Lefebvre article—the Coalition to Defend Affirmative Action, Integration and Immigrant Rights by Any Means Necessary (known as “BAMN”)—will be before the Court next term in *Schuette v. Coalition to Defend Affirmative Action*, 652 F.3d 607 (6th Cir. 2012) (en banc), cert. granted, 133 S. Ct. 1633 (Mar. 25, 2013) (No. 12-682), a case concerning the constitutionality of the Michigan Civil Rights Initiative.

there are many who are irrevocably in the category of true believer.⁸¹ Moreover, since some accrediting agencies act essentially as diversity cartel enforcers, it is difficult for schools where preference-skeptics dominate to eliminate or even decrease preferential treatment.⁸²

But for those who see mismatch as the most troubling aspect of race-preferential admissions, this is not an all-or-nothing game. The smaller the credentials gap between preference beneficiaries and the other students, the smaller the likelihood of harm.⁸³ Puritans may insist that only total victory can be called victory, but I am not a Puritan.

To achieve even modest success along these lines, however, colleges and universities must believe that there is at least a possibility they will wind up in court if they do not take steps to protect themselves. Given that litigation is expensive and the fact-intensive litigation that the Court seems to anticipate is very expensive, one can be certain that there will not be hundreds of lawsuits or even dozens.

⁸¹ Sudden change may be difficult for other reasons too. State colleges and universities have evolved along lines that they may well not have in the absence of affirmative action preferences: Gaining admittance outside the affirmative action track has become more difficult than it was in the 1960s. It is entirely possible that if race preferences had been held to be generally illegal in *Bakke*, the fragile political coalition that supported the “super-competitive/racially diverse” model would never have emerged and the nation’s most elite state universities would be somewhat less competitive. As it stands, the individual school may find it difficult to eliminate race-preferential admissions without making other changes to its admissions structure. Whether there is sufficient political support for the super-competitive model of state universities in the absence of race preferences remains to be seen.

⁸² See Margaret Jackson, *University of Colorado Heals Diversity Gap*, *Denver Post* (April 21, 2012) (“The university has made a concerted effort to improve diversity among its students since its accrediting body . . . cited the school for ‘non-compliance’ in 2010, when just 106 of 614 students were minorities”); Gail Heriot, *The ABA’s “Diversity” Diktat*, *Wall St. J.*, Apr. 28, 2008, at A19. See Susan Welch & John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* 80, Table 3.3 (1998) (when asked whether they felt pressure from any source to engage in preferences, 24 percent of medical schools and 31 percent of law schools volunteered that they felt pressure from accrediting agencies). If courts or other authorities were to make clear that accrediting agencies will not be deferred to and that a school that allows itself to be pressured this way is not making an academic judgment but a political one, that would open up colleges and universities to use their own discretion. I predict that the diversity of approaches that would ensue would surprise many on both sides of the debate.

⁸³ It may also be true that the more colleges and universities avoid credentials gaps for students who plan to major in science and engineering, the smaller the harm.

There will be some. Public-interest litigators will likely target their lawsuits carefully. In the short run, at least, if *Fisher* has the effect of reducing the level of preferential treatment received by under-represented minority students, it will be in part because word has gotten around—not just to colleges and universities, but to students—that the evidence of its failure is persuasive.

In sum, the Court has made an effort to invoke reason and principle in the debate over race-preferential admissions policies. Advocates of race neutrality would have preferred it if the particular principle the Court invoked had been . . . race neutrality. Until it does so, there is unlikely to be sweeping change. But even incremental change is welcome.