

# The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change

*Tomiko Brown-Nagin\**

INTRODUCTION .....	113
I. THE NARROW TAILORING INQUIRY .....	119
A. <i>The Constitutional Significance of “Race-Neutral”         Alternatives</i> .....	121
B. <i>The Critical Mass Conundrum</i> .....	124
II. CROSS-RACIAL UNDERSTANDING ON THE GROUND .....	127
A. <i>The Policymaking Context</i> .....	127
1. Demographic Change and Exploding Educational Demand .....	127
2. The Challenge of Cross-Racial Understanding.....	129
B. <i>Constitutional Implications</i> .....	132
1. Cold Numbers and Cross-Racial Understanding.....	133
2. Cross-Racial Understanding in the Classroom .....	134
CONCLUSION.....	138

## INTRODUCTION

The national project of opening the “path to leadership” to “talented and qualified individuals of every race and ethnicity,” endorsed by a divided court in *Grutter v. Bollinger*,<sup>1</sup> faces an uncertain

---

\* Professor of Law and Professor of History, Harvard University. Thanks to Risa Goluboff, Lani Guinier, Michael Klarman, Daniel Nagin, George Rutherglen and Kim West-Faulcon for reading drafts of this essay.

1. 539 U.S. 306, 332 (2003).

future. The very idea is up for grabs in *Fisher v. University of Texas at Austin*,<sup>2</sup> a case in which a plaintiff challenges efforts to increase racial diversity at the University of Texas.

*Fisher* presents a stark choice. The Court will either permit universities the discretion to craft holistic admissions policies with a modest race-conscious element, consistent with *Grutter*. Or it will repudiate *Grutter* and conclude that, where a race-neutral alternative exists, even holistic admissions systems with a de minimis race-conscious component offend the Constitution.

The Court confronts this question in an atypical case. *Fisher* does not involve the classic scenario: a white plaintiff who can credibly claim—or does claim—that a less deserving black or Latino candidate deprived her of admission to a university. UT’s elaborate admissions process does not easily lend itself to that charge. The University offers three different paths to admission. Fisher proved uncompetitive under each of these admissions streams. These pathways include automatic admission for Texas residents who graduate in the top ten percent of their high school classes. A facially race-neutral “Top Ten Percent” law (“TTPL”) dictates the terms of this pathway to admission.<sup>3</sup> A second possibility is automatic admission based on test scores and high school class rank; it also is a race-neutral pathway. The third possibility is admission after holistic review of an application. Holistic review involves consideration of class rank and test scores, and the possible consideration of seven “special circumstances,” one of which may be race.<sup>4</sup>

The Top Ten Percent admissions pathway dwarfs all others in significance. In 2008, the year Fisher applied for admission, the race-neutral TTPL accounted for eighty-eight percent of Texas residents and eighty-one percent of all freshman enrolled at UT.<sup>5</sup> Fisher cannot and does not claim to have been a superior candidate relative to students of color admitted under the Top Ten Percent Law. The TTPL is a merit-based system. Fisher failed to gain admission because her grades were inferior to those of students admitted through this pathway. Fisher also does not categorically assert that she posted

---

2. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

3. The Top Ten Percent Law guarantees acceptance to any state university for all public high school seniors in Texas who rank in the top ten percent of their classes. TEX. EDUC. CODE ANN. § 51.803 (West 2006).

4. *Fisher*, 631 F. 3d at 224.

5. *Id.* at 227. A 2009 amendment to the TTPL lowered the maximum percentage who can be admitted under the TTPL to seventy-five percent. TEX. EDUC. CODE ANN. § 51.803 (West Supp. 2009).

scores and a class rank superior to students admitted under the second (race-neutral) stream.

Most importantly, Fisher does not claim that racial consideration under the holistic stream—the only avenue through which officials may explicitly consider race—necessarily doomed her prospects. No evidence supports that position. The record shows that a total of 216 black and Latino applicants gained acceptance to UT through holistic review in 2008, when Fisher unsuccessfully applied to UT.<sup>6</sup> The plaintiff concedes that race played no role in the admission of 183 of those 216 students.<sup>7</sup> Race may have been one of seven special circumstances that facilitated admission of the remaining thirty-three students. Or it may not have.<sup>8</sup> The record is inconclusive on whether those thirty-three black and Latino students benefitted from race. Faced with these facts, Fisher concedes that the impact of race on admissions to UT is “infinitesimal.”<sup>9</sup>

Moreover, Fisher does not contest the concept of racial inclusion. The plaintiff accepts UT’s pursuit of a racially diverse student body.<sup>10</sup>

*Fisher v. University of Texas at Austin* does not involve a challenge to diversity in theory; instead, this case is all about “cross-racial understanding” on the ground. Fisher asserts that UT, in its quest for diversity, overdoes it. The university needlessly permits consideration of race in admissions when students of color can compete—successfully—in a race-neutral system.

This diversity-friendly narrative from an aggrieved plaintiff in affirmative action cases is new and fitting to our age. We live in an era

6. Brief for Petitioner at 9, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (No. 11-345), 2012 WL 1882759 (“Notwithstanding UT’s failure to measure the impact of using race on its enrollment numbers, it is clear that impact is negligible. . . . For example, in 2008, when Petitioner applied, 6,322 in-state students enrolled: 5,114 under the Top 10% Law and 1,208 under the race-affected AI/PAI regime. Of the non-Top 10% enrollees, 216 were African American or Hispanic, representing only 3.4% of the enrolled instate [sic] freshman class.” (internal citations omitted)).

7. *Id.* (“[I]t is undisputed that many of the 216 non-Top 10% minority enrollees would have been admitted without regard to their race. Some were admitted based solely on high AI scores. Many more would have been admitted under an AI-PAI system unaffected by race.” (internal citations omitted)).

8. *Id.* at 9–10 (“[E]ven if the entirety of the increase [in African American and Hispanic admissions] between 2004 and 2008 is attributed to race, it would have been decisive for only 2.7% of the 1,208 non-Top Ten enrollees in 2008—or 33 African-American and Hispanic students combined. If so, race would have accounted for 0.5% of the 6,322 instate [sic] freshman class in 2008. . . . UT’s ‘use of race has had an infinitesimal impact on critical mass in the student body as a whole.’” (internal citations omitted)).

9. *Id.*

10. *Id.* at 23 (“Under *Grutter*, UT may be entitled to deference on its ‘decision that it has a compelling interest in achieving racial and other student diversity.’”).

of a diversity paradox. Real racial progress—personified by highly visible of people of color, including the President of the United States—is evident, and many Americans applaud it. At the same time stark racial inequalities persist. Like no other higher education affirmative action case before it, *Fisher* highlights the coexistence of ascendant political and social power of people of color, on the one hand, and, on the other, stubborn educational disparities within these same communities, derived from historical, social, and cultural forces.

Consider these facts. Latinos now comprise the nation's largest “minority” group<sup>11</sup> and the largest “minority” group on college campuses.<sup>12</sup> In Texas, the site of the present legal battle and an earlier one over redistricting, Latinos constitute almost forty percent of the populace.<sup>13</sup> They are an increasingly important political force in the Lone Star state—the “sleeping giant” of the electorate.<sup>14</sup> At the same time, Latinos comprise the single largest group of children living in poverty,<sup>15</sup> and statistics document their poor graduation rates,<sup>16</sup> lagging scores on most standardized tests,<sup>17</sup> and low rates of admission to selective universities.<sup>18</sup> In other words, raw numbers do

11. PEW HISPANIC CTR., CENSUS 2010: 50 MILLION LATINOS—HISPANICS ACCOUNT FOR MORE THAN HALF OF NATION'S GROWTH IN PAST DECADE 1 (2011), available at <http://www.pewhispanic.org/files/reports/140.pdf>.

12. RICHARD FRY, 24% GROWTH FROM 2009 TO 2010—HISPANIC COLLEGE ENROLLMENT SPIKES, NARROWING GAPS WITH OTHER GROUPS 8 (2011), available at <http://www.pewhispanic.org/files/2011/08/146.pdf>.

13. Pew Hispanic Ctr., *Demographic Profile of Hispanics in Texas, 2010*, PEW RES. CTR., <http://www.pewhispanic.org/states/state/tx/> (last visited Jun. 25, 2012).

14. Matt Stiles & Zahira Torres, *Texas Still Waiting for Latinos to Show Power at Polls*, TEX. TRIB. (July 26, 2010), <http://www.texastribune.org/texas-politics/2010-texas-governors-race/texas-still-waiting-for-latinos-to-vote/>. The Court recently issued a decision relating to the dynamic political situation in Texas. *Perry v. Perez*, 132 S. Ct. 934, 943 (2012) (striking down judge-drawn redistricting maps as insufficiently deferential to state legislative process). Notably, demographers predict that whites soon will no longer constitute a racial majority in the United States. See Carol Morello & Ted Mellnik, *Minority Babies Majority in U.S.*, WASH. POST, May 17, 2012, at A1.

15. Pew Hispanic Ctr., *Childhood Poverty Among Hispanics Sets Record, Leads Nation*, PEW RES. CTR., (Sept. 28, 2011) <http://pewresearch.org/pubs/2108/hispanic-children-poverty-recession>; see also Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics: Twenty-to-One*, PEW RES. CTR., (July 26, 2011) <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics>.

16. SUSAN AUD ET AL., THE CONDITION OF EDUCATION 2012, at 82–83, 240–42 tbls.A-33-1, A-33-2 & A-33-3 (2012), available at <http://nces.ed.gov/pubs2012/2012045.pdf>.

17. *Id.* at 203 tbl.A-23-2; see also F. CADELLE HEMPHILL ET AL., ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2011), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf>.

18. See FRY, *supra* note 12, at 3 (as of 2010, Latinos comprised fifteen percent of students at two- and four-year colleges).

not equate with collective power. The data tell a similar story about African Americans. Despite the advent of powerful symbols of racial progress—President Obama is the most obvious—blacks still lag behind whites on all indicators of economic, social, and educational well-being.<sup>19</sup> The facts exemplify the diversity paradox<sup>20</sup>: persistent inequality and social separation despite major racial advancement and egalitarianism.

Enduring questions of inequality, together with matters of educational policy, pedagogy, and demography, deeply intertwine with the constitutional principles at issue in *Fisher*. Constitutionally, the action in *Fisher* will revolve around the narrow tailoring prong of the strict scrutiny inquiry. Means-ends fit likely will dominate discussion even though many people, including four Supreme Court Justices, disagreed with the *Grutter* majority's conclusion that a university's pursuit of the educational benefits of diversity can be a compelling state interest. In *Grutter*'s wake, the Chief Justice expressed deep skepticism of race-conscious state action—"this divvying us up by race."<sup>21</sup> Several sitting Justices concur with Chief Justice Roberts's apparent view that government should never consider race.

But *Grutter*'s recent vintage—and the decisive vote of Justice Anthony Kennedy, who has expressed more moderate views on race-conscious governmental action—likely will preclude repudiation of *Grutter*'s central holding.<sup>22</sup> The Justices instead will ponder whether the race-conscious element of UT's admissions policy is sufficiently

---

19. See, e.g., Kochhar et al., *supra* note 15. See generally KATHERINE MAGNUSON & JANE WALDFOGEL EDS., STEADY GAINS AND STALLED PROGRESS: INEQUALITY AND THE BLACK-WHITE TEST SCORE GAP (2011).

20. These conditions may appear "paradoxical" to many Americans but are not surprising, I should acknowledge, to scholars with deep knowledge of race-relations history; the circumstances are symptomatic of entrenched discrimination and its wide-ranging effects, together with incomplete efforts to remedy it.

21. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

22. For discussions of Justice Kennedy's role on the Court, see, for example, Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 41 (2008) (noting Kennedy's swing status and arguing that during the 2006 term he was a super median, a "Justice[] so powerful that [he was] able to exercise significant control over the outcome and content of the Court's decisions"), and Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007). On Justice Kennedy's more moderate race jurisprudence, see, for example, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (disagreeing with the plurality that race can never be basis for governmental action). Compare *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671–72 (2009), a Title VII case that raised the possibility that a statute's disparate impact may conflict with the Constitution's Equal Protection Clause. Justice Kennedy wrote the opinion for the Court.

narrowly tailored to further its interest in achieving the educational benefits of diversity by seeking a “critical mass” of students of color.<sup>23</sup>

This means-ends fit inquiry intersects with policy and pedagogical issues that typically fall within the control of state and local government. The Justices must weigh efforts by legislators and administrators in one of the nation’s most diverse states to simultaneously come to terms with its racial history, react to demographic change, and respond to the identified educational needs of a variety of constituents. The facts in *Fisher* reveal the state’s earnest efforts to provide a multiracial, polyglot, multicultural mix of taxpayer access to its highly regarded university system. The state engages this project during a time of economic recession, when both the demand for a college degree and the economic return on it have never been greater.<sup>24</sup> These issues, the subject of legislation and debate in several other states, are immediate and vital to states and the nation.

This commentary on *Fisher* seeks to accomplish two objectives. First, it discusses Fourteenth Amendment doctrine: the narrow tailoring inquiry that will dominate the Court’s examination of *Fisher* and the coming debate over “critical mass,” a key but ambiguous concept in *Grutter*. It argues that UT’s reliance on state population figures and classroom- and program-level racial diversity numbers as critical mass metrics is likely to elicit strong objection. I offer an alternative critical mass benchmark: the proportion of underrepresented senior high school students in Texas whom UT deems viable candidates for admission.

The second and larger point made here is that Fourteenth Amendment doctrine, alone, is insufficient to fully appreciate and properly analyze UT’s policy. The *Fisher* narrow tailoring inquiry is closely tied to a thicket of educational policy and pedagogical matters. These issues are directly relevant to the compelling state interest recognized in *Grutter* and tethered to public universities’ First Amendment interest in academic freedom.

The second section examines the findings of educational administrators and experts in the fields of education, sociology, psychology, and political science who have deeply engaged the question of how students—diverse along dimensions including race,

---

23. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

24. On the economic value of a college degree, see AUD ET AL., *supra* note 16, at 34–35, 116–117. Texas fared better than most states during the recession; however, it was not immune from the economic downturn. For an overview, see Tex. State Historical Ass’n, *Texas Economy: Recovery from a Great Recession*, TEX. ALMANAC, <http://www.texasalmanac.com/topics/business/texas-economy-recovery-great-recession> (last visited July 1, 2012).

gender, socioeconomic status, region, religion, sexual orientation, and political affiliation—can flourish in higher education. Their research and on-the-ground experiences reveal that social forces conspire not only to limit the likelihood that racially diverse campuses materialize, but also to diminish the likelihood that cross-racial understanding occurs on college campuses. University administrators who seek to attain the benefits of diversity turn to a broad array of tools to counteract these forces and advance missions that place a premium on cross-racial understanding. Justice Kennedy’s race jurisprudence and its nexus to First Amendment academic freedoms will be critical to the Court’s determination of whether these tools remain available after *Fisher*.

### I. THE NARROW TAILORING INQUIRY

*Grutter v. Bollinger* teaches that UT’s admissions policy will be sustained if it satisfies six major requirements. A narrowly tailored race-conscious plan: 1) does not employ quotas; 2) does not insulate categories of applicants from competition with one another; 3) treats race as a mere plus factor in the evaluative process; 4) does not unduly burden disfavored groups; 5) is implemented after good-faith consideration of race-neutral alternatives; and 6) includes a durational limit.<sup>25</sup>

UT’s policy, modeled on the policy sustained in *Grutter*, satisfies requirements one through four with no apparent difficulty. UT administrators also formulated the current policy in light of *Hopwood v. Texas*, the 1996 Fifth Circuit decision that rendered unconstitutional UT’s former admissions system, a two-tiered program in which officials considered white and non-white applicants separately.<sup>26</sup> The resulting policy, which avoids the *Hopwood* problem and hews to the *Grutter* formula, escapes all the obvious constitutional defects.

Race is “a factor of a factor of a factor of a factor,” the District Court explained in its opinion upholding UT’s current affirmative

---

25. *Grutter*, 539 U.S. at 334, 339, 341, 342.

26. *Hopwood v. Texas*, 78 F.3d 932, 936, 962 (5th Cir. 1996). *Hopwood* itself considered the admissions process of the University of Texas School of Law. The Texas Attorney General applied the prohibition to all undergraduate and graduate programs at Texas state universities. The system found unconstitutional in *Hopwood* yielded 4.1 percent African American student enrollment and 14.7 percent Latino student enrollment in the freshman class of 1996, the final class admitted under this system. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

action policy.<sup>27</sup> Officials may take account of race, but it is just one of numerous other considerations in the evaluative process. Race *may* be one factor among seven “special circumstances,” which in turn are one of six factors that comprise an applicant’s *personal achievement score*. The personal achievement score is one of three factors, along with two essays, that comprise the *personal achievement index*. The personal achievement index is one of two elements that determine whether an applicant (who is not a beneficiary of the state’s race-neutral Top Ten Percent Law) receives an offer of admission. The other element is an *academic index*, which itself is composed of four factors, including test scores and high school class rank.<sup>28</sup> The University does not award points to applicants on the basis of race. Officials do not monitor the admissions pool to ensure that it meets specific diversity goals or targets.<sup>29</sup> Given the many variables involved in UT’s process, it plainly is unlike a mechanistic and presumptively unconstitutional quota system<sup>30</sup> and appears to easily pass muster under the first three narrow tailoring criteria.

The fourth criterion, the undue burden consideration, *Grutter* counseled, should be assessed in terms of a university’s admissions plan overall as well as in view of its definition of diversity.<sup>31</sup> UT defines diversity capaciously, as contemplated in Justice Powell’s opinion in *Bakke*. The special circumstances that admissions officials may consider are not limited to race, and students of color who are not underrepresented in UT’s definition (that is, students who are not African Americans and Latinos) may receive special race-based consideration.<sup>32</sup>

In other words, whites and Asians may benefit from the University’s efforts to achieve the educational benefits of diversity.<sup>33</sup> The white student who attends a school with a majority-minority population might benefit from consideration of race. So too can Asian students who defy the stereotype of the “model minority” and are

---

27. *Fisher*, 645 F. Supp. 2d at 595–99, 608. The mechanics of the policy are usefully detailed by the Fifth Circuit. *Fisher*, 631 F.3d at 223–231.

28. *Fisher*, 645 F. Supp. 2d at 596–98.

29. *Id.* at 597.

30. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (opinion of Powell, J.); *Gratz v. Bollinger*, 539 U.S. 244, 258 (2003).

31. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

32. *Fisher*, 645 F. Supp. 2d at 597.

33. *Id.*



burdened by poverty—the reality for discrete Asian sub-groups in America.<sup>34</sup>

The breadth of UT's admissions policy is tremendously important. The *Grutter* majority rightly counted such a broad definition of diversity as evidence that race-conscious programs are narrowly tailored.<sup>35</sup> The policy's broad understanding of how race can shape opportunity addresses critics' worry that affirmative action programs sometimes are under- and over-inclusive. Deserving Asian Americans, often the children of working-class Americans, are excluded from consideration in many programs because most Asian Americans, often the children of well-heeled immigrant professionals, are not underrepresented at selective institutions. At the same time, white Latinos often receive special consideration because Latinos, as a whole, generally are underrepresented. UT's holistic program mitigates these structural problems and that fact should be important to the *Fisher* Court.<sup>36</sup>

#### A. *The Constitutional Significance of "Race-Neutral" Alternatives*

In the course of scrutinizing the race-sensitive element of UT's admissions program, the Court will examine predicate questions: why did UT return to a race-conscious policy despite the existence of a race-neutral alternative, and was its return to race justified? The alternative approach is the Top Ten Percent Law ("TTPL"). This law guarantees admission to any state university to all public high school seniors in Texas who rank in the top ten percent of their graduating classes.<sup>37</sup> The TTPL preserves only a small pathway for admission to UT through alternate routes. Like the majority of white students, the overwhelming majority of African Americans and Latinos who enroll at UT gain admission through the TTPL.<sup>38</sup>

Fisher's claim turns on the TTPL's success. The TTPL has produced such significant levels of racial diversity in the UT system, the challenger argues, that it is unnecessary for UT to consider any

---

34. See Isao Takei & Arthur Sakamoto, *Poverty Among Asian Americans in the 21st Century*, 54 SOC. PERSPECTIVES 251, 251–52 (2011).

35. 539 U.S. at 341.

36. On these types of critiques, see Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 142–62 (1996).

37. TEX. EDUC. CODE ANN. § 51.803 (West 2006).

38. In 2004 the TTPL accounted for seventy-seven percent of the black and seventy-eight percent of the Latino freshman who enrolled at UT; it accounted for sixty-two percent of white freshman matriculates. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

applicant's race. The admission of comparatively few black and Latino students under the race-conscious policy relative to the numbers admitted under the TTPL demonstrates that a race-conscious program is unnecessary.<sup>39</sup> Thus, the argument goes, UT's use of race is not narrowly tailored to further a compelling governmental interest.<sup>40</sup>

The plaintiff's claim will strike many as ironic. The usual claim is that administrators rely too much on affirmative action. Fisher's case instead argues that a *modest* affirmative action program—one that affects a minimal or indeterminate number of students—creates constitutional peril for UT precisely because of its minimal impact. By using race too little or too vaguely, the University may have proved a bit too much about its need to use race.

The weaknesses of this counterintuitive argument are obvious. If the University admitted greater numbers of underrepresented students through the race-conscious route, it would open itself to the charge that it violated *Grutter* by seeking specific targets or the verboten "racial balance." Greater numbers also might suggest that the University violated *Grutter* by seeking something more than the "critical mass" required to attain the educational benefits of diversity. Referring to this element of the challenger's claim as a "catch-22," the district court flatly rejected it.<sup>41</sup>

The attempt to argue that a race-conscious program is not narrowly tailored based on the availability or effect of race-neutral alternatives is not new. With this move the *Fisher* plaintiff reiterates a claim made by the U.S. Department of Justice in *Grutter* and rejected by the Court's majority. The Court expressly stated that exhaustion of race-neutral alternatives is not a requirement of narrow tailoring.<sup>42</sup> A university must consider race-neutral alternatives,<sup>43</sup> but

---

39. Plaintiff's Motion for Partial Summary Judgment at 19–20, *Fisher v. Univ. of Tex.* at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), (No. A-08-CA-263-SS), 2009 WL 5055458. Given the nebulous role that race may play in admissions at UT, it is not even clear precisely how many underrepresented students actually benefit from the program. This result may be unexpected but it is entirely consistent with *Grutter's* endorsement of holistic admissions programs. *Fisher*, 631 F. 3d at 230. The ambiguity also is responsive to concerns expressed by Justice Kennedy and others in *Grutter* that race played too large of a role—an outcome-determinative role—in the system found constitutional in that case.

40. This argument tracks a point that Chief Justice Roberts made in *Parents Involved*; if diversity is so important, the state would rely on it to greater effect. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733–35 (2007).

41. *Fisher*, 645 F. Supp. 2d at 610 ("[T]he question is not whether the means adopted by UT exceeds some undefined 'minimal effect' on diversity, but rather whether UT has demonstrated 'serious, good faith consideration of workable race-neutral alternatives.'" (quoting *Parents Involved*, 551 U.S. at 734–35)).

42. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) ("Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain

it is not required to forego race-conscious programs if the university deems race-neutral programs inadequate to its mission and objectives.<sup>44</sup> Administrators retain discretion to determine whether race-neutral alternatives are sufficient to achieve their missions.

Presumably, this holding remains good law. If it does not, UT's return to a race-possible holistic system despite a race-neutral alternative will encounter deep resistance. Assuming, however, that *Grutter's* holding regarding exhaustion of race-neutral alternatives remains good law, the Court will carefully consider the decisionmaking process that led to UT's layered approach.

UT reinstated an admissions program with a race-conscious dimension, layering it over the TTPL, after concluding that enrollment of underrepresented students remained short of a critical mass notwithstanding the TTPL.<sup>45</sup> Two specific concerns inspired the University's move to reinstate a race-conscious program: a lack of racial diversity at the classroom and program/major levels, and reports of classroom isolation, revealed in surveys of underrepresented students.<sup>46</sup>

These predicates for UT's return to a race-conscious program appear to satisfy *Grutter's* fifth narrow tailoring criterion. Given the extraordinary level of racial isolation in the classroom, it is said, UT students had little opportunity—in the most pedagogically meaningful context—to actually realize the benefits of the diversity that existed campus wide. Officials reintroduced race as a factor in admissions in hopes that greater overall numbers of underrepresented students on campus would increase classroom and department diversity, which, in turn, would further the University's interest in achieving diversity's educational benefits. Interaction in the classroom would break down stereotypes, promote cross-racial understanding, and prepare students for an increasingly diverse workforce and society, officials hoped, an

---

the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”).

43. *Id.*

44. After all, if the standard were otherwise, it would be tantamount to a holding by the Court that race-conscious programs presumptively are unconstitutional if race-neutral alternatives exist. That is not the law.

45. In 1997, the first year after UT eliminated race-sensitive affirmative action, African American enrollment dropped to 2.7 percent and Latino enrollment to 12.6 percent of the freshman class. By 2004, 4.5 percent of UT's freshman class was African American and 16.9 percent was Latino. *Fisher*, 645 F. Supp. 2d. at 592–93.

46. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). Eighty-nine percent of classes with ten to twenty-four students (the classes in which officials deemed students most likely to participate) had either one or zero African American students; forty-one percent had one or zero Asian American students, and thirty-seven percent had either one or zero Latino students, a survey revealed. *Id.*

especially urgent task given the demographics of Texas.<sup>47</sup> UT also reviews its plan every five years, consistent with *Grutter*.<sup>48</sup>

### *B. The Critical Mass Conundrum*

Despite the care UT took to conform to *Grutter*'s conventions, the University's reintroduction of race into admissions after the TTPL had increased enrollment of underrepresented students is likely to elicit deep concern from some Justices. The difficulty for UT relates to "critical mass." The concept, endorsed in *Grutter*, is conceptually ambiguous. At present, it is unclear whether critical mass is a quantitative concept, a qualitative concept, or both. If critical mass has only, or even includes, a quantitative dimension, a university that seeks to define and pursue it is subject to the charge that it violates *Bakke*'s rule against quotas. It is unclear just how many blacks and Latinos in a classroom should be deemed necessary to satisfy critical mass targets. In other words, the baseline is undetermined and perhaps indeterminate. In the absence of quantitative assessments, however, it is not clear how officials or reviewing courts would know when critical mass has been reached—when the quest for diversity's benefits has been successful. "Critical mass" further begs the question of whether classroom- or program-level numbers should be metrics for assessing critical mass. These inquiries, all legitimate and challenging, are sure to arise at the Court and the questions will be hard to answer.

The record in this case, on my reading, suggests that critical mass is undefined, only vaguely defined, or defined in a manner likely to be viewed skeptically by many on the current Court. UT does not use a particular metric to assess if or when it has reached the critical mass of students who confer the benefits of educational diversity. But UT did look to the percentage of blacks and Latinos in the state's population when it made the determination to reinstate a race-conscious element to its admissions policy. Consequently, Fisher argued in the district court that UT equated critical mass to the proportion of blacks (twelve percent) and Latinos (thirty-eight percent) in the overall population of Texas, though without explicitly saying so.<sup>49</sup> Rejecting this figure as far too expansive, Fisher argued that

---

47. *Id.* at 225–26.

48. *Id.* at 226.

49. Plaintiff's Motion for Partial Summary Judgment, *supra* note 39, at 15–16. These figures are rounded up. The U.S. Census counted 11.8 percent blacks and 37.6 percent Latinos in Texas in 2010. *Texas Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited July 2, 2012).

critical mass is reached when the freshman class is composed of a maximum of twenty percent of underrepresented students—twenty percent in aggregate.<sup>50</sup> The courts below found the contention that Texas pegs critical mass to the proportions of blacks and Latinos in Texas unsupported,<sup>51</sup> and the claim that a critical mass of underrepresented students should be capped at twenty percent of the student population unsupportable.<sup>52</sup>

The Roberts Court, I suspect, will be more interested in Fisher's argument that UT now attains an adequate number of underrepresented students through race-neutral means. The Court granted certiorari, one would presume, to mediate Fisher's request for a concrete concept and the University's reach for a more abstract idea. The challenger's definition of critical mass turns on the bottom line: it is a zero-sum argument about the numbers. The University, by contrast, offers a theory of educational diversity that blends quantitative and qualitative concerns. In order to remain within doctrinal conventions, the University has not and cannot indicate that it hopes to attain a certain magic number of underrepresented students. UT arguably had some quantitative reference point in mind. Otherwise, there would have been no need to reinstate a race-conscious element after the TTPL resulted in increased enrollment of underrepresented students. Numbers—explicit or not—are not all there is to critical mass. UT's conception of critical mass also turns on qualitative considerations—on educational, sociological, and pedagogical insights about what it actually takes to achieve “cross-racial understanding” on college campuses, as I explain below.

The critical question is how the Roberts Court will shape the contours of critical mass.

---

50. Plaintiff's Motion for Partial Summary Judgment, *supra* note 39, at 18.

51. *Fisher*, 631 F.3d at 236; *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 604 (W.D. Tex. 2009), *aff'd*, 631 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). Officials noted the percentages of underrepresented Latinos and African Americans in Texas when deciding whether to pursue critical mass but did not then admit students in proportion to those percentages. *See Fisher*, 645 F. Supp. 2d at 613 n.10 (noting that African Americans comprised twelve percent of the Texas population and six percent of UT's 2008 freshman class; Caucasians (non-Latino) were 47.9 percent of the Texas population and fifty-two percent of UT's 2008 freshman class; and Asian-Americans made up 3.4 percent of the Texas population and nineteen percent of UT's 2008 freshman class); *see also Fisher*, 645 F. Supp. 2d at 613 n.11 (“If defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it, since Hispanic enrollment is less than two-thirds of the Hispanic percentage of Texas' population and African-American enrollment is only half of the African-American percentage of Texas' population, whereas Asian-American enrollment is more than five times the Asian-American percentage of Texas' population.”).

52. *Fisher*, 645 F. Supp. 2d at 604.

Those on the Roberts Court who otherwise are skeptical of “quotas” for diversity might find the appellant’s plea for an upper limit on critical mass—a ceiling and a firm endpoint—appealing. Without some concrete foundation for critical mass, Texas’s pursuit of the right mix of underrepresented students arguably is limitless and would permit consideration of race in perpetuity (or until the *Grutter* sunset date).<sup>53</sup> On this view, critical mass is a concept at war with itself.

If the Court wishes to make the quantitative dimension of critical mass more concrete, however, it must do so without seeming to endorse quotas in reverse. Universities cannot set aside seats for a specific number of students of color; nor can the Court endorse limiting the number of seats available to students of color to a fixed number when whites fail to gain admission under holistic programs in which race is not outcome determinative. The Court will avoid the quotas in reverse problem, I suspect, by deciding not what critical mass is but by holding what it is not. Some metrics, it may indicate, cannot be used as critical mass baselines.

The *Grutter* Court’s statements about critical mass should also constrain the Roberts Court’s interpretation of the term. The *Grutter* majority made two notable statements about the concept. First, critical mass must be “defined by reference to the educational benefits that diversity is designed to produce.”<sup>54</sup> That is, critical mass must relate to the objectives of viewpoint diversity, professional development, and civic involvement. Second, the majority rejected dissenting Justices’ arguments that officials’ consultation of reports indicating admission figures by race amounted to a quota system; some attention to numbers, the majority insisted, is only logical.<sup>55</sup> *Grutter* imbued critical mass with dual meanings, qualitative and quantitative, much the same as UT does.

Such qualitative factors related to campus dynamics traditionally have fallen outside of the Court’s purview. These dimensions require the Court to consider the state’s interest in education and the university’s constitutionally-protected discretion over educational administration, grounded in the First Amendment.

The next section considers the intersections of Fourteenth and First Amendment interests and educational theory and pedagogy in *Fisher*, and how this mixed bag of law and policy might shape the case.

---

53. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

54. *Id.* at 330.

55. *Id.* at 336.

## II. CROSS-RACIAL UNDERSTANDING ON THE GROUND

“Context matters” when interpreting the Equal Protection Clause, Justice O’Connor wrote for the majority in *Grutter v. Bollinger*.<sup>56</sup> If Justices on the current Court embrace that perspective, which of many contextual factors might influence how they approach the task of judicial review in *Fisher v. University of Texas at Austin*? This section examines two factors that the Court might contemplate. First, the Court might take note of the demographic and economic contexts in which Texas and other states are formulating admissions policies today. Second, the Justices might consider how sociocultural dynamics on multiracial college campuses shape universities’ policies on student life, academic advising, and admissions.

A. *The Policymaking Context*

## 1. Demographic Change and Exploding Educational Demand

Higher education is pinched. Demographic growth and change, alongside economic recession and the increasingly great economic value of higher education, are the main culprits. Selective institutions such as the University of Texas, in particular, are facing increased demand for access as the demography of the country rapidly changes. The U.S. Department of Education reports that between 2000 and 2010 undergraduate enrollment nationwide increased by thirty-seven percent, from 13.2 to 18.1 million students. The demand for access to higher education is expected to continue to rise in coming years as the economic return on a college degree also continues to rise.<sup>57</sup>

More Americans are seeking college degrees at the same time that the population is becoming less white; in recent decades, the college population, too, has grown multiracial. The white share of the overall college population has declined since 1980. In 1980 whites comprised eighty-three percent of undergraduates; by 2010, that figure had declined to sixty-two percent. Over the same period black undergraduates increased from ten to fifteen percent of total student population. Phenomenal rates of growth occurred among Latinos and Asian/Pacific Islanders. In 1980, Latinos and Asians/Pacific Islanders represented four and two percent of enrollment, respectively, compared to fourteen and sixteen percent in 2010.<sup>58</sup>

---

56. *Id.* at 327.

57. AUD ET AL., *supra* note 16, at 34–35.

58. *Id.* at 35.

The trend toward racial diversification is less apparent in the upper echelons of higher education. At selective universities—the institutions whose degrees translate into the highest economic return and greatest access to social and political power—whites outnumber students of color by large margins. Whites comprised seventy-eight percent of matriculates at selective universities in recent years; Asians (eleven percent), blacks (eight percent) and Latinos (four percent) all trailed whites.<sup>59</sup>

The changing racial and ethnic composition of student bodies creates opportunities as well as challenges for universities. The advent of the multiracial campus has coincided with battles over admissions policies, academic standards, curricular content, resources, and personnel decisions. In recent years, the movement of political majorities against affirmative action occurred in this context. Arizona, California, Michigan, Nebraska, and Washington banned consideration of race in higher education admissions.<sup>60</sup>

These trends have long been manifest in Texas. Some of the state's responses to these issues have placed it on the leading edge of policy reform. In 2001, Texas became the first state in the country to enact a law permitting undocumented immigrants to obtain access to in-state tuition rates. The move generated controversy in some quarters, but others followed the state's example.<sup>61</sup> The Texas state legislature's adoption of the race-neutral TTPL also marked it as an innovator. Texas joined California and Florida, two other racially and ethnically diverse states, when it embraced a race-neutral policy guaranteeing admission to high-performing high school students after race-conscious affirmative action fell out of judicial and political favor.<sup>62</sup> Given the constituency and demographic projections, legislators scarcely could avoid confronting the problem of unequal

---

59. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 139–40, 174–75 (2009).

60. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, REV. ECON. & STAT. (forthcoming) (manuscript at 1), available at [http://www.mitpressjournals.org/doi/pdf/10.1162/REST\\_a\\_00170](http://www.mitpressjournals.org/doi/pdf/10.1162/REST_a_00170); Richard Kahlenberg, *Arizona's Affirmative Action Ban*, CHRON. OF HIGHER EDUC. (Nov. 3, 2010 4:48 p.m.), <http://chronicle.com/blogs/innovations/arizona's-affirmative-action-ban/27794>.

61. See Katherine Leal Unmuth, *Number of Illegal Immigrants Getting In-state Tuition for Texas Colleges Rises*, DALL. MORNING NEWS (Mar. 15, 2010), <http://www.dallasnews.com/news/education/headlines/20100314-Number-of-illegal-immigrants-getting-in-9925.ece>.

62. U.S. Dep't of Educ., Office for Civil Rights, *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, ED.GOV (March 2003), <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html>.



access to the flagship university. These demographic and educational realities shape the issues in *Fisher*.<sup>63</sup>

## 2. The Challenge of Cross-Racial Understanding

These background dynamics—high demand and growth set against lingering racial strife—make efforts to achieve “cross-racial understanding”—one of the touted benefits of educational diversity sanctioned in *Grutter*—a test of creativity, skill, and will. As on college campuses nationwide, University of Texas administrators are familiar with the foregoing trends, yet engage the project with more effort and less success than is commonly acknowledged. Diverse experiences—along lines of race, ethnicity, age, region, religion, gender, language, income, and sexual orientation—shape the lives of collegians. Students’ backgrounds influence who applies to college and who matriculates; the courses that students enroll in and the majors that they choose; who ultimately earns college degrees and the professions that individuals pursue.<sup>64</sup> Moreover, students’ varied backgrounds can produce social silos and build walls. It is a tall order for administrators to successfully bring together cross sections of students who are accustomed to living apart.<sup>65</sup>

One would never know this judging from appearances. Websites and promotional brochures for America’s finest colleges and universities all feature smiling faces of students of every imaginable hue. But appearances can be deceiving. The scholarly literature tells a different, more complicated story about the multiracial campus, one that mirrors the nation’s struggles with racial division and unequal opportunity.

---

63. See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 594 (2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (“[D]emographics in the state of Texas have changed substantially in recent years, indicating that increases in minority enrollment may be at least partially attributed to population shifts.”).

64. See, e.g., AUD ET AL., *supra*, note 16, at 94–95 (discussing characteristics of postsecondary students); Sara Goldrick-Rab, *Following Their Every Move: An Investigation of Social-Class Differences in College Pathways*, 79 SOC. EDUC. 61 (2006); Michael B. Paulsen & Edward P. St. John, *Social Class and College Costs: Examining the Financial Nexus Between College Choice and Persistence*, 73 J. HIGHER EDUC. 189 (2002); William E. Sedlacek, *Issues in Predicting Black Student Success in Higher Education*, 43 J. NEGRO EDUC. 512 (1974).

65. On admissions systems, see generally DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2009); and JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* (2003). On diversity and how it shapes the college experience, see generally ESPENSHADE & RADFORD, *supra* note 59; DOROTHY H. EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION* (2011); and JENNY M. STUBER, *INSIDE THE COLLEGE GATES: HOW CLASS AND CULTURE MATTER IN HIGHER EDUCATION* (2011).

Multiracial campuses that feature students from a wide range of socioeconomic backgrounds are the product of deliberation and planning. Selective universities have moved toward assessment systems in which a wide range of talents are valued partly to counteract the impact of the so-called “performance gap”—the on-average underperformance of blacks, Latinos, and lower-income students on standardized tests as compared to the on-average performance of whites, Asians, and higher-income students.<sup>66</sup> Universities restructure opportunity consistent with new knowledge that standardized predictors of academic success exclude many talented students.

Nevertheless, the multicolored array of students that results does not necessarily engage in sustained cross-racial contact on campus.<sup>67</sup> Meaningful relationships develop—if they materialize at all—as a result of cultivation by administrators.<sup>68</sup>

If left to their own devices, students tend to congregate among people like themselves. This “self-segregation” occurs frequently among all sorts of people in all sectors of American society, which is highly spatially segregated. The phenomenon is especially noticeable on college campuses, however, given the conscious effort that administrators make to connect students from all walks of life. Social distance between groups before college breeds social discomfort in cross-cultural situations on campus.

Whites are the least likely to comfortably interact with those from different racial backgrounds because they are the least likely of all college matriculates to have interacted with other racial groups prior to arriving on campus.<sup>69</sup> Blacks, Latinos, and Asians all grow up in more integrated areas, and by virtue of their racial “minority status,” these groups tend to attain white cultural literacy. To the extent that cross-cultural interactions occur between whites and blacks, Latinos, or Asians, the students of color typically are the cultural teachers; whites typically are on the receiving end of the exchange, learning about the culture of color.<sup>70</sup>

---

66. For a discussion of the controversies surrounding reliance on these criteria, known to produce racially disparate impact, see, for example, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

67. See ESPENSHADE & RADFORD, *supra* note 59, ch. 5.

68. *Id.*; Julie R. Ancis, William E. Sedlacek & Jonathan C. Mohr, *Student Perceptions of Campus Cultural Climate by Race*, 78 J. COUNS. & DEV. 180, 181–84 (2000).

69. See MELANIE E.L. BUSH, BREAKING THE CODE OF GOOD INTENTIONS: EVERYDAY FORMS OF WHITENESS 145 (2011); ESPENSHADE & RADFORD, *supra* note 59, ch. 5.

70. BUSH, *supra* note 69; ESPENSHADE & RADFORD, *supra* note 59, ch. 5.

Yet, it is the tendency of students of color on majority-white campuses to “self-segregate” that has received disproportionate attention. Initial discussion of this phenomenon centered on black students.<sup>71</sup> The book “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” captured the disbelief and confusion with which observers greeted black affinity groups on campus.<sup>72</sup> More recently, articles have appeared commenting upon Asian students’ culturally distinct approaches to collegiate life.<sup>73</sup> Separation is counterproductive to integration and undermines the objectives of affirmative action admissions policies, critics argue.<sup>74</sup>

The “separation” is telling of struggles that universities confront in the quest for healthy cross-racial interaction inside and outside of the classroom. What looks to some like “separation” is actually an effort on the part of these students to find community and seek relief from the burdens of “one-way” integration. Students of color come together around meals, in dorms, and at special events to seek respite from skeptical, unwelcoming, and even discriminatory campus environments where they perceive less equitable treatment by faculty, staff, and other students.<sup>75</sup> In co-ethnic groupings, students of color can find affirmation and exist without being representatives of their race.<sup>76</sup>

Same-group affiliation may offer social and even academic benefits, but many commentators insist that the costs outweigh the benefits. If students are to reap the full rewards of attending selective institutions populated by diverse groups of students, they must reach across familiar boundaries and get to know each other.<sup>77</sup>

Universities promote such interracial contact in a variety of ways. They encourage social outreach programs, intergroup liaisons, support groups, interaction in residence halls, information-sharing sessions on campus climate, and workshops on the significance of race

---

71. See BUSH, *supra* note 69; ESPENSHADE & RADFORD, *supra* note 59, ch. 5; BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 52 (2003) (discussing high schools).

72. See TATUM, *supra* note 71, at 77–80.

73. See Timothy Egan, *Little Asia on the Hill*, N.Y. TIMES (Jan. 7, 2007), <http://www.nytimes.com/2007/01/07/education/edlife/07asian.html?pagewanted=all>.

74. See, e.g., ARTHUR MEIER SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 106–112 (1998).

75. See TATUM, *supra* note 71, at 72–73; Ancis et al., *supra* note 68, at 180; E. Michael Sutton & Walter M. Kimbrough, *Trends in Black Student Involvement*, 39 NASPA J. 30, 37–38 (2001).

76. ESPENSHADE & RADFORD, *supra* note 59, ch. 4.

77. Sutton & Kimbrough, *supra* note 75.

and ethnicity in peoples' lives.<sup>78</sup> All of these approaches are designed to create a sense that all students are "full members" of the community even though the campus is composed of "communities of difference."<sup>79</sup> These qualitative approaches focus on sociocultural relations outside of the classroom. Universities also turn to numbers, a quantitative dimension, to relieve intergroup tension. Greater numbers of underrepresented students on campus, it is hoped, mitigate the burdens of integration.

Only the quantitative aspects of the pursuit of the project of diversifying students on campus crystallize into legal controversies in cases such as *Grutter* and *Fisher*. In reality, however, the larger sociocultural dynamics play a large role in the formulation and implementation of policies to promote cross-racial understanding. When the University of Texas and other colleges seek the educational benefits of diversity, they must, as a precondition to attaining those benefits, address the underlying sociocultural forces at work. UT must counter the entrenched social patterns, cultural norms, and stereotypes that can stir discomfort with cross-racial contact.<sup>80</sup>

### *B. Constitutional Implications*

The literature about the challenges involved in diversifying universities speaks to the constitutional questions surrounding critical mass in *Fisher*. This store of knowledge can assist the Court in two ways.

First, it might inspire judicial restraint. The literature suggests, after all, that the basic contours of *Grutter's* compelling interest should be defined by university administrators who rely on insights from education, sociology, psychology, and political science as they promote intergroup contact. Judges lack the expertise necessary to discern which approaches are necessary and effective in areas related to the core missions of universities and their First Amendment interests.<sup>81</sup>

Second, in-the-trenches knowledge can enrich the Court's effort to define and analyze the critical mass concept. On-the-ground knowledge of the challenges that administrators confront sheds light

---

78. Ancis et al., *supra* note 68, at 183–84.

79. C. CARNEY STRANGE & JAMES H. BANNING, EDUCATING BY DESIGN: CREATING CAMPUS LEARNING ENVIRONMENTS THAT WORK 159 (2001).

80. On stereotypes and how they impact the educational experience of students of color, see CLAUDE STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2011).

81. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957); see also discussion *infra*.

on whether UT's critical mass metrics—state population figures and classroom- and program-level diversity numbers—actually pass constitutional muster.

### 1. Cold Numbers and Cross-Racial Understanding

Cold numbers—and large numbers—are an important tool for university administrators seeking to counteract the social forces that push different campus communities apart. The greater the number of students of color on campus, the greater the likelihood that they will find social and academic success. The success of these students, in turn, will increase the likelihood that contact across racial lines will yield benefits to all students on campus.

It is therefore unsurprising that UT would consult general population figures in assessing critical mass. There are large proportions of people of color in Texas, and this metric therefore constitutes a friendly baseline for a quantitative conception of critical mass.

The percentage of underrepresented students of color in Texas senior high schools (eleventh and/or twelfth grades) is more closely related to UT's recruitment objective. It is thus a more logical starting point for assessing whether further efforts are necessary to attain critical mass. At present in Texas, the proportions of blacks and Latinos among high school students happen to be larger than the proportions of blacks and Latinos in the general population. For 2010-11, Latinos constituted 44.5 percent of twelfth graders, while blacks constituted 13.5 percent, and whites 36.4 percent.<sup>82</sup> In any given year, however, the pool of high school students who are *viable candidates to UT*—those with grade point averages and/or test scores sufficient to convince officials that they can achieve passing grades at UT—would be smaller than the gross numbers of underrepresented students of color among eleventh and/or twelfth graders in Texas high schools. It is this number—the proportion of underrepresented senior high school students who are plausible candidates for admission to UT—that should serve as the critical mass baseline.

This alternative baseline and the logic behind it are consistent with precedent that requires racial imbalance to be assessed in terms of requisite qualifications. *Hazelwood School District v. United States* and related public employment cases teach this lesson. Where a job requires special skills, the Court held in *Hazelwood*, the pool of

---

82. TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2010-11 16-19 (2011), available at [http://www.tea.state.tx.us/acctres/Enroll\\_2010-11.pdf](http://www.tea.state.tx.us/acctres/Enroll_2010-11.pdf).

candidates with relevant qualifications constitutes the proper baseline for determining whether a racial imbalance exists.<sup>83</sup> The alternative critical mass baseline suggested here also is consistent with *Grutter*. Although the question of the appropriate baseline for critical mass assessments did not arise directly in that case, the Court did sustain a law school policy that permitted special affirmative action consideration of black, Latino, and Native American applicants who met threshold test score and grade point averages.<sup>84</sup> In so doing, the Justices implicitly approved this pool of minimally qualified applicants as the proper baseline. In *Fisher*, high school students who meet threshold qualifications are the critical mass analogue. (Note, however, that if UT concerned itself too much with this pool of viable high school candidates—by consulting daily reports to ascertain how many underrepresented students had been offered admission, for instance—it would be vulnerable to the charge that its critical mass target had morphed into a quota.<sup>85</sup>)

If the Roberts Court rejects UT's current critical mass target—general population proportions—it would not be fatal to the University's overall effort to pursue its compelling interest. Consideration of the pool of viable high school students instead of general population figures would better advance the University's pursuit of the educational benefits of diversity. Under this scenario, UT would retain the freedom to determine which students are “qualified” under its holistic rubric.

## 2. Cross-Racial Understanding in the Classroom

Given the unique challenges associated with the pursuit of cross-racial understanding, UT's turn to classroom- and program-level data to anchor critical mass also makes sense. It bespeaks the institution's commitment to actual cross-racial interaction, as opposed to a mere diversity “aesthetic.”<sup>86</sup> Nevertheless, the literature about the

---

83. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (comparing percentage of blacks on employer's teaching staff with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions); *see also Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987) (“Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.”).

84. *Grutter v. Bollinger*, 539 U.S. 306, 315–16 (2003).

85. In *Grutter*, the majority noted that some reference to numbers was only logical. *Id.* at 336. The composition of the Court has changed since that time, however, making it more important for universities to walk the thin line between a critical mass target that is not too amorphous but not too definite either, and therefore able to satisfy *Bakke*, *Gratz*, and *Grutter*. *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003); *Grutter*, 539 U.S. at 334–36.

86. *See Grutter*, 539 U.S. at 361–62, 370 (Thomas, J., concurring in part and dissenting in part).

daunting forces that hamper administrators' diversity efforts also contains findings that suggest why this metric might prove constitutionally suspect.

The scholarship that explores these obstacles documents racial stratification in majors, courses, and occupations. Blacks are overrepresented in certain majors: education, the humanities, and the social sciences.<sup>87</sup> Along with Latinos, blacks are underrepresented in natural sciences, engineering, and technology majors.<sup>88</sup> This stratification has negative labor market implications for these students. Because college graduates in the fields where blacks and Latinos are overrepresented typically garner lower starting salaries than those who graduate with degrees in the natural sciences and technical fields, students' choices of major perpetuate occupational and income inequality.<sup>89</sup> Consequently, government and advocacy groups have long promoted recruitment and retention of underrepresented students in majors that lead to more lucrative positions.<sup>90</sup>

However, the causes of racial stratification are complex. Recent scholarship focuses on student preparation and preference as explanations for the distribution. Some scholars argue that underprepared students of color choose less demanding academic fields because those are the ones in which they are competitive.<sup>91</sup> Satisfactory performance in more challenging subjects and professions can be especially acute when the disadvantages of race are layered atop class-based disadvantages.<sup>92</sup>

87. ESPENSHADE & RADFORD, *supra* note 59, at 242–43. *But see* Lisa Dickson, *Race and Gender Differences in College Major Choice*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 111–13 (2010).

88. Darnell G. Cole & Araceli Espinoza, *When Gender Is Considered: Racial Ethnic Minority Students In STEM Majors*, 15 J. WOMEN & MINORITIES SCI. & ENGINEERING 263, 263–64 (2009).

89. Gail E. Thomas, *College Major and Career Inequality: Implications for Black Students*, 54 J. NEGRO EDUC. 537 (1985).

90. *See, e.g.*, EUGENE ANDERSON & DONGBIN KIM, INCREASING THE SUCCESS OF MINORITY STUDENTS IN SCIENCE AND TECHNOLOGY 15–16 (2006), *available at* <http://www.acenet.edu/AM/Template.cfm?Section=Publications&Template=/CM/ContentDisplay.cfm&ContentID=28222>; *About NAMEPA*, NAMEPA, Inc., <http://www.namepa.org/about> (last visited July 3, 2012) (“NAMEPA is a national network of educators and representatives from industry, government, and nonprofit organizations who share a common commitment to improving the recruitment and retention of African Americans, Hispanics, and American Indians earning degrees in engineering.”).

91. Peter Schmidt, *Federal Panel Seeks Cause of Minority Students' Poor Science Performance*, CHRON. HIGHER EDUC. (Sept. 15, 2008), <http://chronicle.com/article/Panel-Examines-Minority/1155/> (discussing “mismatch” theory).

92. On how class and race shape the college and professional school experience, see GARY A. BERG, *LOW-INCOME STUDENTS AND THE PERPETUATION OF INEQUALITY* (2010); DOROTHY H.

Other scholars offer multi-dimensional explanations. An important recent book argues that the dearth of black students in fields such as science, technology, financial management, academia, and engineering and their concentration in education, social work, and related fields partly reflects strategic decisionmaking on the part of the highest-ability blacks. These students choose careers based on a desire to advance their communities and to avoid encounters with racism.<sup>93</sup> This work also argues that major and career choices are shaped by the overrepresentation of the small black professional class in the government and social service sector, the dearth of mentors available to them in the fields where they are underrepresented, and enduring institutional racism in universities and workplaces.<sup>94</sup> The “preferences” of these students are shaped by complex sociohistorical forces.

So is course selection. If preparation and preference are thought to explain racial and ethnic stratification by major, they also are said to explain course selection practices. Ethnic studies courses would seem a logical setting for cross-racial understanding to occur. It turns out, however, that whites seldom enroll in them. The groups who are the subject of inquiry disproportionately enroll in ethnic studies courses.<sup>95</sup> While the quality of cross-racial interaction may be high in these contexts, the quantity of it generally will be low. Moreover, course selection is influenced by overall campus climate, including experiences of racial isolation, stereotyping, and hostility; all of these factors can, in turn, have an adverse impact on achievement.<sup>96</sup>

All of which is to say, it is exceedingly difficult to end traditional patterns of over- and underrepresentation in programs and courses. Administrators concerned about racial stratification in these areas employ a variety of approaches to influence the major and course choices of students. These include outreach efforts, mentoring programs, supplemental course work, and programs to build the non-cognitive skills (psychosocial) crucial to academic success.<sup>97</sup>

---

EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN-AMERICANS ENTERING THE LEGAL PROFESSION* (2012); and STUBER, *supra* note 65.

93. MAYA A. BEASLEY, *OPTING OUT: LOSING THE POTENTIAL OF AMERICA'S YOUNG BLACK ELITE* 4, 7 (2011).

94. *Id.* at 8–9.

95. ESPENSHADE & RADFORD, *supra* note 59, at 178–79.

96. The negative effects can be particularly acute given the tendency of whites to discredit discrimination, whether due to a lack of awareness or denial. *Id.* at 183.

97. See William Sedlacek, *Black Students on White Campuses: Twenty Years of Research*, 40 J. C. STUDENT DEV. 538, 550 (1999).



This research holds important implications for *Fisher*. Some of the factors that affect the major and course selection of students of color can be addressed on college campuses, after students matriculate; others cannot. Policymakers must focus on academic preparation—one cause of racial stratification in major and course selection—at the K–12 level, well before students enter college. Other factors, such as the on-campus climate and its relationship to course and major selection, can be addressed during college.

Still other variables may be outside the immediate control of college administrators. If the course and program choices of certain underrepresented students are shaped by identity, prior experiences, or strategic decisionmaking, then these variables may be salient to the outcome of a case like *Fisher*. These factors might affect the Court's assessment of whether it is realistic for universities to expect to attain a critical mass of underrepresented students at the classroom level or in specific majors, or even desirable.

On the other hand, the *Grutter* Court expressly vested considerable discretion in educational authorities precisely because they are closest to the problems associated with diversifying campus life. Where the causes of classroom racial stratification are multi-causal, and the state's interest in attaining the benefits of cross-racial understanding is compelling, *Grutter* might suggest deference to educators.

Deference might well be deemed proper because of the university's interest in academic freedom. The *Grutter* Court repeatedly invoked academic freedom in support of its outcome, reaffirming Justice Powell's reliance on the First Amendment in his embrace of diversity in *Bakke*.<sup>98</sup> “[U]niversities occupy a special niche in our constitutional tradition,” the *Grutter* majority wrote.<sup>99</sup> The First Amendment confers autonomy on educational authorities to pursue student bodies that exchange diverse viewpoints in pursuit of cross-racial understanding, professional development, and civic involvement.<sup>100</sup>

A university's First Amendment interests are not unrestricted; but *if Grutter's* holding stands and *if Bakke* remains good law, then UT can argue that academic freedom enables educational authorities to confront the challenges that accompany the pursuit of diversity's benefits. The Court can escape this conclusion, it seems to me, only by

---

98. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

99. *Id.*

100. *Id.* at 330. The Fifth Circuit, in sustaining UT's policy in *Fisher*, also turned to academic freedom in support of the results. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (2011), *cert. granted*, 132 S. Ct. 1536 (2012).

explicitly or implicitly overruling the compelling interest aspect of *Grutter*'s holding.

Justice Kennedy's jurisprudence will greatly influence whether educators retain the ability to confront the on-the-ground challenges outlined above and secured under *Grutter* and *Bakke*. The resonance of First Amendment arguments for Justice Kennedy,<sup>101</sup> coupled with his view, articulated in *Parents Involved*, that the Constitution does entitle educational authorities to take holistic actions in pursuit of diverse student bodies, will be critical to his perspective on UT's layered policy. Justice Kennedy found inadequate Chief Justice Roberts's admonition in *Parents Involved* that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>102</sup> "Diversity, depending on its meaning and definition, is a compelling educational goal" under the Constitution, Kennedy wrote in *Parents Involved*.<sup>103</sup> Furthermore, he argued, educational institutions "can seek to reach *Brown*'s objective of equal educational opportunity."<sup>104</sup> Kennedy also signaled his openness to an objective that inspired UT's decision to layer race-conscious individualized consideration over the race-neutral TTPL. "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools," Justice Kennedy wrote, "it is, in my view, profoundly mistaken."<sup>105</sup> In fact, Justice Kennedy's *Parents Involved* opinion offers three different rationales in support of integrated education: attaining diversity,<sup>106</sup> achieving equal educational opportunity,<sup>107</sup> and ameliorating racial isolation.<sup>108</sup> Universities across the nation may retain the academic freedom necessary to implement a commitment to educating cross-racially literate students if Kennedy's viewpoints on diversity hold in *Fisher* and prevail.

## CONCLUSION

Nationwide, states and localities have responded to both Justice Thomas's demand for race-neutral alternatives to affirmative action and Justice Kennedy's plea for nuance in cases involving race

---

101. See Gerken, *supra* note 22, at 107-112.

102. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

103. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment).

104. *Id.* at 788.

105. *Id.*

106. *Id.* at 783.

107. *Id.* at 788.

108. *Id.*

and equal educational opportunity. Texas is an example of a state that is pursuing both approaches. Through a combination of the facially race-neutral TTPL and the race-conscious policy under review—a program that apparently has a minimal impact—the legislature seeks to afford access to higher education to all Texas students. Under the circumstances, it may be prudent for the Court to tread lightly. Perhaps the Court will embrace the judicial modesty that several Justices—including Chief Justice John Roberts<sup>109</sup>—have vigorously endorsed.

---

109. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of John G. Roberts, Jr.) (discussing aspiration to be known as a judge who embraced modesty and restraint).