

Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ's America

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I.	INTRODUCTION	97
II.	THE UNIVERSITY OF TEXAS ADMISSIONS PLAN—CRITICAL MASS AND NARROW TAILORING AS THE CONSTITUTIONAL STANDARD FOR DIVERSITY.....	102
III.	CRITICAL MASS AND THE ROLE OF UNIVERSITIES	105
IV.	CONCLUSION.....	111

I. INTRODUCTION

On March 18, 1996, the Fifth Circuit outlawed the use of race in University of Texas admissions procedures in the case of *Hopwood v. Texas*.¹ Texas Attorney General Dan Morales then applied the reasoning in *Hopwood* to all admissions and scholarship programs at all state colleges and universities.² The number of black and Mexican-American students plunged dramatically.³ At the University of Texas Law School black enrollment in the first-year class dropped from thirty-eight to four. The number of enrolled Mexican-American first year law students fell from sixty-four to twenty-six. There were declines of similar magnitude at the undergraduate level. The effort to

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1. 78 F.3d 932, 934 (5th Cir. 1996).

2. Effect of *Hopwood v. State of Texas* on Various Scholarship Programs of the University of Houston, Op. Att’y Gen. LO-97-001 at 24 (1997), available at <https://www.oag.state.tx.us/opinions/opinions/48morales/lo/1997/pdf/lo1997001.pdf>.

3. *Hopwood v. Texas: Effects of Hopwood*, UNIV. TEX. TARLTON L. LIBR. (Feb. 23, 2012), <http://tarltonguides.law.utexas.edu/content.php?pid=98968&sid=742830>.

desegregate Texas higher education, barely a generation old, was stopped dead in its tracks.

There things sat until Irma Rangel, a member of the Texas House of Representatives from Kingsville, Texas and the first Mexican-American woman elected to the Texas legislature, introduced a plan to offer automatic admission to the flagship public universities to all students at accredited Texas high schools who finish in the top ten percent of their graduating class.⁴ This became known as the Texas Top Ten Percent Plan (“TTP”). It was an effort to leverage the legacy of segregation into opportunity.

Despite initial internal resistance to the plan, the University of Texas under President Larry Faulkner made the most of the opportunity it presented by creating a race-neutral algorithm that identified low socioeconomic status (SES) schools that had traditionally sent few applicants to the University and by creating what were called “Longhorn Opportunity Scholarships” for the top graduates of those schools. Faulkner also directed the restructuring of the freshman year to include a small group experience for all incoming students. He relied on data that showed that the most secure anchor for new students was a chance to interact intellectually in a small group. These initiatives, combined with the TTP and the obdurate residential segregation of Texas, meant the University of Texas was saved from complete resegregation. Perhaps just as importantly, the socioeconomic class integration of Texas was expanded by the TTP. Texas had not, perhaps, made a silk purse out of the sow’s ear of *Hopwood*, but it made do with the materials it had been handed.

Yet, despite the success of the TTP in preventing a complete racial retrenchment at the flagship state university, it was an incomplete remedy. The reason it was incomplete is that it did not produce the kind of critical mass necessary to achieve the diverse learning environment that was important to the mission of the University. Without the additional tool of individuated assessment, the educational mission of the University and its commitment to “many options, diverse people and ideas, one University” would remain compromised.⁵ The evidence indicated that, despite the success of the TTP in increasing the number of students from diverse racial and ethnic and class backgrounds to rates just below those achieved prior to the *Hopwood* decision, there was still substantial racial isolation on campus. A study undertaken by the University indicated that ninety percent of the classes with five to twenty-four students

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

5. See *infra* note 15 and accompanying text.

offered in any semester had one or fewer students of color enrolled.⁶ This was not because of a clumping of black and brown students into just a few majors; it was because the TTP did not produce a sufficient number of students to enable many classes to be integrated in a way that would overcome the pedagogical and educational deficiencies that existing racial isolation produced.⁷

Just seven years later in *Grutter v. Bollinger* in a case involving the admissions policies of the University of Michigan Law School the Supreme Court reaffirmed the importance of the diversity interest established in 1978 by Justice Powell in *Regents of the University of California v. Bakke*.⁸ In Justice Powell's vision, race was but a single, albeit important, element in the complex of individual applicant characteristics contributing to crafting a diverse student body.⁹ With Justice Powell's vision in mind, the University of Michigan Law School admitted students of various racial and ethnic backgrounds and experiences in order to fashion a learning environment that would better equip all students to fully participate in the legal profession.¹⁰ To achieve this goal, the Law School sought to enroll a "critical mass" of students of color to promote increased minority engagement in the classroom, to reduce identity interference, and to help ensure minority contributions to the mission and character of the law school.¹¹ The Supreme Court in *Grutter*

6. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 593 (2009), *aff'd*, 631 F.3d 213 (2011), *cert. granted*, 123 S. Ct. 1536 (2012).

7. *See infra* text accompanying note 15. *See also* N.R. Kleinfield, "Why Don't We Have Any White Kids?", N.Y. TIMES, May 13, 2012, at MB1, which captured the ways in which cognitive diversity suffers without sociological diversity. Racial isolation produces many harms and educational harm is among them. The students themselves noted the lack of racial diversity:

Trevon Roberts-Walker, a sixth grader, responded, "When we are in high school and college, it's not going to be all one race."

Jahmir: "Yeah, in my school there will be predominantly white kids, and I think this school will [sic] be so much better if it were more diverse."

Kenny Wright, in eighth grade, piped in, "You could have more discussion instead of all the same thoughts."

Ashira Mayers, in seventh grade, said: "We'd like to hear from other races. How do they feel? What's happening with them?"

Id.

8. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.).

9. *See Grutter*, 539 U.S. at 325 (citing *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

10. *Id.* at 314.

11. That mission was to prepare students to become lawyers who did well financially, enjoyed their work professionally, and participated in public service by making contributions to their community. *See* Richard O. Lempert, David L. Chambers, & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 396 (2000) ("The University of Michigan Law School, for example, looks for students likely to become 'esteemed practitioners, leaders of the American bar, significant contributors to legal

sanctioned this goal and the University's means of achieving it, holding that diversity, including seeking a critical mass of minority students, is "a compelling state interest that can justify the use of race in university admissions."¹²

Viewed from a purely legal perspective, it is difficult to understand why the Supreme Court decided to hear the case of *Fisher v. University of Texas at Austin*.¹³ The holistic review process put in place by the University of Texas is clearly within the University of Michigan Law School admissions framework that the Supreme Court approved nine years ago in *Grutter v. Bollinger*.¹⁴ As was true of the University of Michigan Law School approach, the University of Texas admissions process did not give dispositive weight to race. The admissions procedure adopted by the University of Texas was narrowly tailored to achieve important pedagogical goals. The University of Texas also subjected its program to systematic periodic review to ensure that it was still fitted to the ends for which it was designed. Like the admissions procedure used by the University of Michigan Law School, the admissions plan adopted by the University of Texas was designed to satisfy the core values of the educational mission of the flagship campus in the state university system.¹⁵ The University of Texas and the Texas state legislature determined that the mission of higher education depends on the presence of a critical mass of diverse students within the classroom, not just on the campus

scholarship and/or selfless contributors to the public interest.' It expects that all those it admits will, 'have a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.' " (quoting the 1992 University of Michigan Law School Faculty Admissions Policy)). See also *infra* notes 24–26 and accompanying text for a definition of critical mass and its relationship to the law school's mission.

12. 539 U.S. at 325. While some have viewed *Grutter* as an extension of the rationale in *Bakke*, O'Connor merely made plain the necessary foundation of Powell's analysis. *But see* Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003) ("Although *Grutter* casts itself as merely endorsing Justice Powell's opinion in *Bakke*, *Grutter*'s analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualized diversity as a value intrinsic to the educational process itself. He regarded diversity as essential to 'the quality of higher education,' because education was a practice of enlightenment, 'of speculation, experiment, and creation,' that thrived on the 'robust exchange of ideas' characteristically provoked by confrontation between persons of distinct life experiences. . . . [*Grutter*] instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership. . . . *Grutter*'s justifications for diversity thus potentially reach far more widely than do Powell's." (footnotes omitted) (internal quotation marks omitted)).

13. 631 F.3d 213 (2011), *cert. granted*, 132 S. Ct. 1536 (2012).

14. 539 U.S. at 333–43.

15. In its "Compact With Texans" the University signals the importance of diversity to learning. See *Compact With Texans*, U. TEX. AT AUSTIN, <http://www.utexas.edu/about-ut/compact-with-texans> (last visited July 15, 2012) (acknowledging the importance of "many options, diverse people and ideas, one University").

as a whole.¹⁶ Because the admission plan is aimed at serving *all* of the people of the state (consistent with its educational mission) and improving the delivery of education, what goes on in the classroom is of signal importance. In fact, concern with classroom diversity is what demonstrates that the admissions program is both narrowly tailored and supported by a compelling state interest and is not about racial balancing, to the extent it is about race at all.

The purpose of the narrowly tailored admissions process at issue in *Fisher* was to permit a greater attention to the admission deficiencies not remedied by the TTP. For example, there are some admission decisions that by their nature cannot be accounted for by any single-factor admissions procedure. How does an SAT or ACT score or class rank predict the quality of an oboe player or the capacity of that particular player to contribute to ensemble assembly and quality? Does a standardized test or class rank predict who brings the requisite skills to a graphic design major? But, apart from these obvious examples,¹⁷ what those who study education tell us is that constructing cognitively diverse groups improves the educational outcomes across all fields of study.

However, the Supreme Court *did* take *Fisher*, and what they seem to be asking for is a do-over of *Grutter*. But what exactly do they want to do over? The fear is that the Court is seeking to undo diversity as a rationale for any kind of individuated assessment that permits the race or racialized experience of the applicant to be taken into account in order to promote more educational diversity in the classroom, a condition that improves the learning environment for all students.¹⁸ Most thought that *Grutter* had settled the issue of whether there could be constitutional cognizance of the role of racial diversity in promoting a university's educational mission for at least twenty-five years.¹⁹ Those who would leave universities free to construct a class

16. Many of the background ideas on which justifications for creating diverse groups to increase the cognitive complexity of groups were first outlined by sociologist Georg Simmel more than a century ago. *See generally*, GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* (Kurt H. Wolff ed. and trans., 1950). *See also infra* text accompanying notes 33–35.

17. In fact, the University of Texas had already made adjustments for those majors that required specific aptitudes that could only be assessed by individual portfolio or performance review. Admission is actually a two-step process, the TTP gets the applicant into the University, but certain majors require additional reviews of individual portfolios or performance. *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

18. *See* Samuel R. Sommers, Lindsey S. Warp & Corrine C. Mahoney, *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1129 (2008); *infra* notes 33–34 and accompanying text.

19. 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

that best suits their educational goals fear that the do-over is to dismantle not just *Grutter*, but *Bakke* as well.

II. THE UNIVERSITY OF TEXAS ADMISSIONS PLAN—CRITICAL MASS AND NARROW TAILORING AS THE CONSTITUTIONAL STANDARD FOR DIVERSITY

In *Bakke*, Justice Powell counter-balanced the general prohibition on governmental use of race in decision-making by rooting the university's argument for the need for a diverse class in its academic freedom protected by the First Amendment.²⁰ The mission of the university is to construct an educational environment that will produce a place where a multitude of ideas can flourish and compete, where students will have to test their preconceptions and beliefs, and where complex and creative problem solving can occur. To achieve this mission, Justice Powell said that admissions officers ought to be trusted to use their best good-faith judgment, which may, on occasion, require that they take race or ethnicity into account in assessing the qualifications of individual applicants.²¹ While race *alone* cannot be the determinative factor, it is an irreducible factor in the complex make-up of any applicant, and it is one that suggests some of the assets individual applicants bring to the school. Moreover, race, ethnicity, gender, and class bring the complexity of the society into the classroom in important ways that deepen the learning environment and promote first amendment values that the university is serving. According to Justice Powell:

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. . . . [T]he "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," [the universities invoke] a countervailing constitutional interest, that of the First Amendment. In this light, [universities] must be viewed as seeking to achieve a goal that is of paramount importance to the fulfillment of its mission.²²

If doing away with *Bakke* is what is on the agenda, then *Fisher* appears to some as an exceptionally good case rather than a curious one to use as a lever to pry loose the hold that *Grutter* provided on the constitutional use of race. *Fisher* is a "good case" because it challenges one of the key concepts only loosely defined in the *Grutter* opinion—

20. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 311–12 (1978) (opinion of Powell, J.).

21. *Id.* at 317–19.

22. *Id.* at 312–13 (footnote omitted).

namely, what the relationship of diversity as a constitutionally acceptable goal is to the idea of critical mass as it affects what goes on in the classroom. That diversity would be permissible constitutional grounds for justifying efforts to improve the educational environment seemed to be well settled. Where remedial action for past discrimination is not at issue, at least as far back as *Bakke*, the diversity rationale has been the linchpin of constitutional affirmative action. However, critical mass is seen by the *Fisher* plaintiffs as both unnecessary and objectionable, despite Justice O'Connor's reliance on the concept in her opinion for the Court in *Grutter*.²³

Although critical mass was very briefly mentioned by Justice Ginsburg in the 1996 *United States vs. Virginia* case,²⁴ concerning the admission of women to Virginia Military Academy, it was not until Justice O'Connor's opinion in *Grutter* that the term and idea of critical mass truly entered the Supreme Court's diversity discussion. In *Grutter*, the University of Michigan Law School linked diversity to the concept of "critical mass" rather than relying on a set number or percentage quota. The Director of Admissions for the Law School defined critical mass as a "meaningful representation," or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."²⁵ Similarly the Dean of the University of Michigan Law School testified that critical mass reflected the school's effort to ensure that "underrepresented minority students do not feel isolated or like they are spokespersons for their race."²⁶

Critical mass, for the plaintiffs, destabilizes the diversity rationale in a context where a race-neutral alternative exists to provide *some*, even if small, cosmetic changes to the appearance of the student body at America's universities. In the mind of the *Fisher* plaintiffs, the concept of critical mass shifts the burden to the university to show that the limited racial, ethnic, gender, and class diversity achieved through race-neutral means is insufficient to achieve the educational goals of the University of Texas. In the plaintiff's view, the mission of the University of Texas (and all public and private universities) is what is actually on trial. The mission of the University of Texas is to educate and graduate leaders who can excel in an increasingly diverse society and workforce and it is in the

23. *Grutter*, 539 U.S. at 333.

24. 518 U.S. 515, 523 (1996) (noting that the district court recognized that VMI could reach an enrollment of ten percent women, "a sufficient 'critical mass' to provide the female cadets with a positive educational experience").

25. *Grutter*, 539 U.S. at 318 (citing to the district court record).

26. *Id.* at 318–19.

dock. The plaintiff seems to be seeking the prohibition of any mission that considers racial, ethnic, gender, or class diversity in the classroom as important to the learning environment.²⁷ Yet in contemporary America, demographic complexity is one of the elements that the idea of diversity requires.

In short, the plaintiff is challenging the educational mission of Texas' flagship public university because of its reliance on the idea of critical mass within the classroom. This, in the argument of the plaintiff, is a deviation from Justice Powell's opinion in *Bakke*. The plaintiff seems to be arguing that where the use of critical mass could exclude someone from a state benefit on the basis of race, its use would violate Title VI as well as the Constitution. Justice Powell said that Title VI of the Civil Rights Act of 1964 (and the prohibitions contained within it) is to be interpreted according to the constitutional standards used in evaluating any state use of racial criteria.²⁸ In Powell's view, the fact that Title VI (to say nothing of the Fourteenth Amendment) was enacted to dismantle systems of racial discrimination and oppression is of no constitutional moment. If the university uses race in a way that can exclude someone from state-provided benefits, including benefits that are derived from federal funding, then that use of race will be subject to strict scrutiny.²⁹ This would extend any decision in *Fisher* to private schools that receive any federal funds, but as I will show, this argument is a misreading of the subtle link between the educational mission of the university and the ideas of diversity and critical mass that Justice O'Connor advanced in *Grutter*.

For the plaintiff, any use of race will have to be narrowly tailored in the service of compelling state interests. Diversity has been that compelling state interest for higher educational institutions. However, if the university has a race-neutral program that achieves the goals that a program of individuated assessment might achieve, there is no way that the whole-person review could survive strict scrutiny.³⁰ What is at issue, then, is the relationship between diversity

27. As both of the plaintiffs in *Fisher* were women, perhaps their complaint was misplaced since it is now a poorly concealed fact that in college and university admissions there is a preference given to objectively less qualified men. See, e.g., Nancy Gibbs, *Affirmative Action for Boys*, TIME (Apr. 3, 2008), <http://www.time.com/time/magazine/article/0,9171,1727693,00.html>.

28. 42 U.S.C. §§ 2000d-2000d-7 (2006); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.).

29. *Bakke*, 438 U.S. at 287 (opinion of Powell, J.).

30. See generally Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007) (suggesting that the Court replaced narrow tailoring's conventional "least restrictive means" requirement in favor of programmatic opacity that limits judicial review).

and critical mass where those concepts are the key components of the educational goals of an admission program.

The problem caused by the *Grutter* opinion is that it tied diversity, and with it the pedagogical justifications of the universities, to the idea of critical mass without explicitly saying what the connection was.³¹ The hard question, or at least one that this Court will have to answer, is what the meaning of critical mass is for the University of Texas.

The Court in *Grutter* determined that critical mass has to be tied to the constitutionally permissible goals of the university and not linked to an underlying referent like the percentage of the population that is made up of one racial or ethnic group or another.³² If the school is not to be seen to be engaged in racial balancing or some other kind of racial engineering, then the percentage of the entering class that is made up of a racial or ethnic subgroup has to be justified by the pedagogical values that are contained in the idea of diversity. What are those values?

III. CRITICAL MASS AND THE ROLE OF UNIVERSITIES

Those values are actually well developed and they don't rely on racial balancing or any other constitutionally infirm reason. To a large extent, they don't rely on racial or ethnic identity at all, but because of the nature of the society upon which universities are built and in whose interest they exist (this is true of public or private schools of global, regional, or local reach), the diversity that schools construct will, of necessity, include poor people and people of color who bring a different perspective but who often feel unwelcome or silenced if they are the only people with such experiences in the classroom. Without a critical mass of such students in the classroom—meaning more than one or two—these students are often subjected adversely to “stereotype threat” with its attendant physiological conditions.³³ An effective admissions program will produce a sufficiently large number of members of these groups to be able to achieve the benefits that creating a diverse learning environment can provide.³⁴

31. *See supra* notes 25–26 and accompanying text.

32. *Grutter v. Bollinger*, 539 U.S. 306, 334–36 (2003).

33. *See generally*, CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2011). It is thus part of the University's educational mission to promote diversity in the classroom to benefit white students as well as students of color. *See supra* text accompanying note 18.

34. *Id.*; *see generally* SIMMEL, *supra* note 16.

For example, Scott E. Page, a professor of complex systems at the University of Michigan, suggested a number of compelling reasons for maintaining a diverse student body.³⁵ When looking at the ways groups solve problems, Professor Page noticed something we all intuitively understand: if you approach a problem with a wide variety of tools, the chances of achieving an optimal solution are increased. When people with diverse perspectives work together and capitalize on their individual expertise, they are more likely to produce innovative solutions to complex problems than do lone thinkers, even those with enormous IQs.³⁶ Page argues that diversity of viewpoints rather than individual excellence plays the most important role in solving complex problems. The key to Professor Page's analysis is the concept of cognitive diversity. What Professor Page means by cognitive diversity is the recognition that people have different knowledge sets, perspectives, and problem solving styles. He calls it "toolbox diversity."³⁷ And a group with "toolbox diversity" is more likely to solve complex problems and yield superior outcomes.

The most standardized tests or class rank tell you is whether a particular applicant has achieved the baseline level of academic preparedness for success at a particular institution. Neither test scores nor class rank by themselves tell you anything about the cognitive diversity of the applicants. To find that out, admissions officers have to look at the other attributes applicants bring to the table. That inquiry is the essence of the university's holistic evaluation. Identity diversity, that is race, ethnicity, class, or gender, may contribute to cognitive diversity, but admissions officials can only know that by looking at the applicant as a whole person. Because of the complexity and heterogeneity of the society within which we live, those types of identities (race, ethnic, class, gender, geographic)—when considered holistically—may be among the many clues to the cognitive diversity of the applicants. Holistic assessment thus enables admissions offices to make individualized judgments that take these identities into account in service of the pedagogical mission of the university. To prohibit taking such knowledge into account would disable the universities in one of their most basic tasks consistent

35. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

36. *Id.* at xxv–xxvi. According to Nobel Prize winning economist Kenneth J. Arrow, Page's work demonstrates that, "Diversity among a group of problem solvers is more important than individual excellence." *Additional Reviews and/or Endorsements for Page, S.E.: The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*, PRINCETON U. PRESS, <http://press.princeton.edu/quotes/q8353.html> (last visited June 12, 2012).

37. PAGE, *supra* note 35, at 22.

with their First Amendment goals, as identified by Justice Powell in *Bakke*.³⁸ The constitutional constraint within the current jurisprudence of race relations forbids any kind of racialized shorthand that reduces the individual applicant to a single part of his or her complex identity. But such a constraint does not prohibit universities from considering race as a window into a complex identity; it merely prohibits its use as a stand-alone proxy for that identity.

In other words, race often does matter in the construction of any individual identity, especially within the context of evolving American history (and perhaps even more so in specific, localized parts of our nation, say Texas or the University of Texas, for example).³⁹ This isn't always true, of course, but it does provide clues as to how a particular applicant might contribute to a diverse learning environment. Having to negotiate racial, ethnic, class, or gender differences creates differences in perspective that will often yield differences in interpretations. Divergent interpretations can produce an increase in the varieties of the rules of thumb that applicants apply to solve problems or to make predictions about outcomes, what Professor Page calls "toolbox diversity." This information about individual persons is what a holistic evaluation reveals that a standardized test or single factor evaluation cannot. But race and other identity categories matter in other ways as well, and this is why *Grutter* linked the diversity rationale with critical mass.

Why is critical mass important? It is important because it frees the applicants who are admitted to further the university's goal of educational or pedagogical diversity from the pressure of always being reduced to a token representative of the racial, ethnic, or gender group of which he or she is a part.⁴⁰ Moreover, the evidence shows that

38. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (opinion of Powell, J.).

39. *See, e.g.*, Jody Serrano, *Malcolm X Lounge Offers Safe Haven to Students of All Races*, *Daily Texan* (Apr. 27, 2012), <http://www.dailytexanonline.com/university/2012/04/27/malcolm-x-lounge-offers-safe-haven-students-all-races> ("[E]ven today many black students do not feel welcome in all parts of [the University of Texas] campus.").

40. In fact, Chief Justice Rehnquist cited this as one of the principal justifications for sustaining the idea of critical mass even though he ultimately rejected it as a sham. *Grutter v. Bollinger*, 539 U.S. 306, 380–81 (2003) (Rehnquist, C.J., dissenting). *See also* STEELE, *supra* note 33, at 135–36, which quotes an interview with Justice O'Connor by NPR's Nina Totenberg conducted prior to the issuance of the *Grutter* opinion:

Then Totenberg asked O'Connor, "When Justice Ginsberg (the second woman appointed to the Court) arrived, it made things better?" O'Connor replied, "Oh, it was just night and day. The minute Justice Ginsberg arrived, the pressure was off. . . . We just became two of the nine Justices. . . . It was such a welcome change." . . . [T]his statement revealed that O'Connor understood the concept of "critical mass," the basis of Michigan's defense.

critical mass (as a sociological category) is necessary to actually produce the educational benefits that the diversity rationale is designed to serve. For example, in order for women to participate in class in an ongoing and effective manner, it is often necessary to have at least thirty to forty percent of the classroom be composed of women students. The same data holds true for racial and ethnic minorities.⁴¹

In fact, the *Fisher* opinion in the Fifth Circuit pointed to the lack of critical mass as an impediment to the full participation of racial and ethnic subgroups.⁴² When there are few, if any, students of color in a classroom, the lone student of color tends to feel inhibited from speaking because his or her voice will not be individuated, but will be stereotyped instead. What critical mass as a concept does is not only protect the First Amendment interests of the universities in constructing an effective learning environment, it also, and perhaps more importantly, protects the expressive interests of the students

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When O'Connor retired and left Ginsberg as the sole woman on the Court, Ginsberg lost critical mass, and her contingencies began to resemble those O'Connor had faced earlier. "I didn't realize how much I would miss her until she was gone," Ginsberg said recently of O'Connor's departure. "We divide on a lot of important questions, but we have had an experience growing up women and we have certain sensibilities that our male colleagues lack."

41. Professor Woolley made the following observations in an email exchange with my co-author Professor Lani Guinier:

In our research we find that things "take off" in groups when the proportion of women reaches 30-40%. When the proportion is only 10-20%, the groups actually struggle a little bit and perform worse than when there are no women. This is consistent with other work on the integration of women in traditionally male settings. Richard Hackman, in the psych dept [sic] at Harvard, studied the integration of women in symphony orchestras and found a similar pattern—they struggled when there were a few "token" women, but people stopped focusing on it once their representation approached about 40%.

Denise Lewin Loyd at MIT also does a lot of interesting work on how proportions of minority group members in a larger group affect how the majority group members view and treat the minority group members. I believe she has done this with both women and African Americans. She finds that having only two minority members is worse than just one, but once you get up to three members they become more accepted by the majority. This works [sic] is done in groups of less than 10, so the proportions are similar to the numbers I mention above in our work.

Email from Anita Williams Woolley, Assistant Professor of Organizational Behavior & Theory, Carnegie Mellon Tepper Sch. of Bus., to Lani Guinier, Bennett Boskey Professor of Law, Harvard Law Sch. (May 10, 2012) (on file with author). For additional support for these conclusions, see Jutta Allmendinger & J. Richard Hackman, *The More, the Better? A Four-Nation Study of the Inclusion of Women in Symphony Orchestras*, 74 SOC. FORCES 423 (1995) (showing that outcome measures decline as women's representation increases until the proportion of women approaches fifty percent), and Lisa M. Amoroso, Denise Lewin Loyd & Jenny M. Hoobler, *The Diversity Education Dilemma: Exposing Status Hierarchies Without Reinforcing Them*, 34 J. MGMT. EDUC. 795 (2010) (discussing classroom dynamics that reinforce status hierarchies).

42. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 230 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

who get to participate as individuals and not as representatives of a group. The constitutional goal, as articulated in *Bakke*,⁴³ *Grutter*,⁴⁴ and *Parents Involved*,⁴⁵ is to create sufficient social space where the importance of the race of the individual applicant and individual student can be reduced to insignificance. That was the meaning of Justice O'Connor's lament, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁴⁶

There is, however, another way of understanding Justice O'Connor in light of Justice Powell's opinion in *Bakke*, especially since Justice Powell rooted the permissibility of affirmative action programs, those that explicitly took race into account, in the pedagogical goals of the universities. The First Amendment justification for the pedagogical mission of the university was the compelling state interest that permitted deviation from a color-blind ideal.⁴⁷ Under this reasoning, it was left to the admissions experts to decide how to construct a class to best achieve the educational missions of universities. In order to better prepare students for life in a complex world, the experts decided that the pedagogical mission could best be achieved through the construction of a racially, ethnically, and socioeconomically diverse class.⁴⁸ To the extent, however, that admissions officials are required to cut this justification adrift from the educational goals of schools, plaintiff's argument gains some credibility. Admissions decisions, from the plaintiff's perspective, appear to be just so much social engineering, in which taking race into account, a constitutionally impermissible category in most cases, becomes the central determinant for the distribution of educational benefits. Of course, the University of Texas insisted that the individual assessment in which the whole person is evaluated is crucial to its freedom in constructing a university of the first rank that provides the optimal learning environment for all of the students.⁴⁹ But the University's concern that it be allowed to use its First Amendment interest in academic freedom in service of its educational mission is not the only constitutional interest at stake.

43. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312–14 (1978) (opinion of Powell, J.).

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

45. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722–23 (2007).

46. *Grutter*, 539 U.S. at 343.

47. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

48. *Id.* at 312–14.

49. Brief of Appellees at 41–50, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822), 2010 WL 2624785.

The other First Amendment concern is the First Amendment interest of the applicant. Unless the admissions process is restricted to numbers alone (scores on standardized tests, class rank, or some combination of the two), a university will, of necessity, have to consider other aspects of the applicant's background. This is typically accomplished by requiring some form of personal statement or essay. Most schools have such an application requirement, and Texas explicitly requires two essays.⁵⁰ Where applicants are asked to write a personal essay, presumably the First Amendment protects their freedom to say what is important to them. Moreover, universities encourage applicants to use the statements to distinguish themselves and to demonstrate "that their potential contributions to the school extend beyond the . . . numbers."⁵¹ "Applicants . . . employ the personal statement as a way to quite literally inscribe themselves into and personalize [their] application[s]."⁵² Can the applicant be prohibited from mentioning anything that might reveal his or her race (this includes all races, not just minority group members) or gender? Is there any First Amendment interest in being able to communicate freely in a process that directly requests a personal statement? It seems unlikely that the state through the university officials would want to restrict the content of the applicants' statement to "approved subject matter."

Assume, for example, the following hypothetical: The admissions office did not restrict the content of the personal statement, but instructed the reviewers to eliminate all references to race or gender before they were evaluated. Those people, of any race, who somehow adverted to their racial background would be subjected to an additional censorious process before their applications could be reviewed. This in itself is a form of racial discrimination, and admissions officials are subjecting their statements to a form of viewpoint discrimination. This raises a further First Amendment interest. To the extent that the university can justify its desire for a multifaceted class in order to achieve its educational mission by rooting it in the First Amendment,⁵³ that interest is both free standing and dependent on the First Amendment interests of the applicants.

50. *Fisher*, 631 F.3d at 227–28.

51. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1144 (2008) (footnote omitted).

52. *Id.*

53. *See Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

Put another way, the university has an interest in hearing, and the applicant has an interest in speaking.⁵⁴

IV. CONCLUSION

If Justice O'Connor's prediction in *Grutter* is to be borne out, it will be because she recognized the limitations of abstraction. Thus, whether the Supreme Court has chosen the correct path for achieving the goal identified in *Grutter* remains at issue. It will not be answered, however, by arguing over doctrine. It will be answered by what actually happens in the world. Thus, even Justice O'Connor's characterization of the problem as one of "racial preferences"⁵⁵ mischaracterizes both what is at stake as a social matter and what is at stake in the *Fisher* case.

This is what the University of Michigan was aiming at in its law school admissions process. Not only would its individuated inquiry permit the best class to be assembled, but it would be assembled expressly to improve the overall quality of the legal education each admitted student was receiving.⁵⁶ More than that, however, in the case of the Michigan Law School as with every law school, legal education is ethically tied to a profession, and the profession to the service of a community. Because of this concatenation, there was an obligation on admissions officials not to willfully blind themselves to data that enabled them to do their job in the most competent and ethical way possible. Though this is perhaps most easily seen in the professional schools, similar obligations pervade education. Each school may have its own expression of these obligations, but each must be permitted to tailor its admissions process to the mission it has undertaken or which has been placed upon it. That this tailoring must be done consistently with the Constitution does not mean that it must be done in the dark. Neither must it be done in a way that denies the dignity of individuated assessment that takes account of the whole person, even with the recognition that such an assessment must account for all of the things that make a person who he or she is. And

54. See Carbado & Harris, *supra* note 51, at 1150 (making a version of this argument); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1, at 932 (3d ed. 2006) ("The Supreme Court has frequently declared that the very core of the First Amendment is that the government cannot regulate speech based on its content."). Content neutrality stands for the proposition that government "cannot regulate based on the ideology of the message." *Id.*

55. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

56. See Lempert et al., *supra* note 11, at 401 (survey indicates that minority graduates are no less successful than white graduates, whether success is measured by the log of current income, self-reported satisfaction, or an index of service contributions).

for many applicants that includes how race has affected who they are, as the reasoning in *Grutter* and *Bakke* allowed, whether it be growing up white or black or otherwise.

What the position of the plaintiffs in *Fisher* would have the University of Texas do is to enforce a kind of historical amnesia. But it is a peculiar kind of idea because it would force the University as well as the state to deny the reality that produced it. As Professor Gene Burd, who has been teaching at UT for over forty years, said when interviewed in the campus newspaper, *The Daily Texan*:

UT-Austin was rather late in becoming a part of the modern civil rights movement That affected enrollment here, it affected courses and it hurt UT's reputation.

. . . .
If you're not willing to accept that your past is still a part of you, you're lost You can't just erase it. In order to understand the present and what's going on now, you have to know what all has happened.⁵⁷

Of course, the case is not just about the history of the University of Texas, but about its future. The mission of the University is summarized by its statement of its core purpose: "To transform lives for the benefit of society" and its core values:

Learning – A caring community, all of us students, helping one another grow.

Discovery – Expanding knowledge and human understanding.

Freedom – To seek the truth and express it.

Leadership – The will to excel with integrity and the spirit that nothing is impossible.

Individual Opportunity – Many options, diverse people and ideas, one University.

Responsibility – To serve as a catalyst for positive change in Texas and beyond.⁵⁸

Rather than permitting a narrowly tailored approach to reaching the goals defined by the University, one that is regularly subject to scrutiny to test its consistency with the compelling interests of the state and the University, the plaintiffs would require a single inflexible approach to reaching a goal defined by those outside of the institution. Without even demonstrating a harm, the plaintiff/petitioner asks the Supreme Court to assert a peculiar kind of heckler's veto on the statement of academic values of the University and the voice of fellow Texans.

57. David Leffler, *Fixtures Symbolize UTs Complicated Racial Past, Present and Future*, DAILY TEXAN (May 1, 2012), <http://www.dailytexanonline.com/university/2012/05/01/fixtures-symbolize-uts-complicated-racial-past-present-and-future>.

58. *Compact with Texans*, *supra* note 15.