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# The More Things Change, The More They Stay The Same: Why *Fisher v. University of Texas at Austin* Will Not Fundamentally Alter the Affirmative Action Landscape

Adam Lamparello

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# The More Things Change, The More They Stay The Same: Why *Fisher v. University of Texas at Austin* Will Not Fundamentally Alter the Affirmative Action Landscape

Adam Lamparello\*

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>1</sup>

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<sup>1</sup> *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

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## I. INTRODUCTION

In *Fisher v. University of Texas at Austin* (“*Fisher II*”), the United States Supreme Court will decide the constitutionality of the University of Texas’s (“University”) affirmative action policy, and the potential impact of the Court’s decision on affirmative action programs nationwide is being widely debated. Some commentators fear that the Court is poised to end affirmative action altogether, thus causing a drastic reduction in the number of minorities who are admitted to universities across the country.<sup>2</sup> Others believe that the Court should use *Fisher II* to invalidate all race-conscious admissions policies and endorse a color-blind process.<sup>3</sup> Such concerns, along with the expectations of those who would like to see affirmative action eliminated, miss the mark. A careful analysis of the issues in *Fisher II*, including the Justices’ comments during oral argument, the Court’s affirmative action jurisprudence, and the unique aspects of the University’s race-conscious admissions policy, suggest that although the University’s policy will likely meet its constitutional demise, the impact on affirmative action policies nationwide will not be substantial.<sup>4</sup>

<sup>2</sup> See, e.g., Amicus Brief of Society of American Law Teachers in favor of Respondent, p. 32, available at <http://www.scotusblog.com/wp-content/uploads/2015/11/SALT-14-981-bsac-Society-of-Am-Law-Teachers.pdf> (“Indeed, ‘[k]nocking out’ the University of Texas’s ‘present system in favor of a strictly enforced color-blind norm would cause a huge upheaval in a system that’ can be better adjusted ‘by administrators on campus’”) (quoting Richard A. Epstein, *The Classical Liberal Constitution* 539 (2013)).

<sup>3</sup> See, e.g., Amicus Brief of The Cato Institute in Support of Petitioner, p. 32, available at <http://www.scotusblog.com/wp-content/uploads/2015/09/fisher-cover.pdf> (“[a] decision that responds only to Texas’s unique circumstances—that it has no conceivable need for racial preferences to achieve broad diversity—could perversely have little impact on the practices of schools that subject all applicants to race-based holistic review”).

<sup>4</sup> See, e.g., Amicus Brief of Harvard University in Support of Respondent, p.4 available at [http://www.scotusblog.com/wp-content/uploads/2015/11/2015.11.02-bsac-Harvard-University-Amicus-Brief\\_149289219\\_1.pdf](http://www.scotusblog.com/wp-content/uploads/2015/11/2015.11.02-bsac-Harvard-University-Amicus-Brief_149289219_1.pdf) (“[m]any of the specific arguments made by petitioner are unique to the admissions policy of the University of Texas at Austin”).

By way of background, the University's undergraduate admissions policy consists of three components. First, the University enrolls nearly three-quarters of its entering class by granting automatic admission to applicants who graduate in the top ten percent of their high school class ("Top Ten Program").<sup>5</sup> Second, the University maintains an Academic Achievement Index ("AAI") that results in the admission of applicants who did not graduate in the top ten percent of their class, but who nonetheless have extremely high SAT scores and grade point averages.<sup>6</sup> Third, the University uses a holistic review process that combines an applicant's AAI and Personal Achievement Index ("PAI"). Until 2005, the PAI was calculated based on weighted scores on two required essays and factors including, but not limited to, leadership qualities, extracurricular activities, work experience, community service, socioeconomic status, and family responsibilities.<sup>7</sup>

In 2005, two years after the Court's decision in *Grutter v. Bollinger*,<sup>8</sup> the University decided to include race in the holistic review process. In the University's holistic review process that year, only 216 African-American and Hispanic students—0.9% and 2.4% of the total applicant pool—gained admission to an incoming class of 6,322.<sup>9</sup> Conversely, in 2005 and other years, the majority of the University's minority students, some of whom graduate from largely segregated high schools, were admitted through a *race-neutral process* (the Top Ten Program).<sup>10</sup> For example, in 2008, 21.5% of the students admitted through the University's Top Ten Percent Program were minorities. In light of these facts, the question before the Court in *Fisher II* is whether the inclusion of race in the University's holistic review process is narrowly tailored to achieve educational diversity.<sup>11</sup> The answer to this question will likely be no.

As discussed below, the University's decision to include race in holistic review is neither narrowly tailored nor necessary to enroll a diverse student body. To begin with, an infinitesimal number of minority students are admitted through holistic review, thus underscoring its

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<sup>5</sup> See *Fisher v. University of Texas at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).

<sup>6</sup> See *id.* at 638.

<sup>7</sup> See *id.* at 644.

<sup>8</sup> 530 U.S. 306 (2003) (upholding the University of Michigan Law School's race-conscious admissions policy); see also *Bakke v. Regents of the University of California*, 539 U.S. 306 (2003) (holding that achieving a diverse student body is a compelling state interest).

<sup>9</sup> *Fisher*, 758 F.3d at 668 (Garza, J., dissenting).

<sup>10</sup> See *id.* at 650-51.

<sup>11</sup> See *Bakke*, 438 U.S. at 311-12; see also *Grutter*, 539 U.S. at 330.

ineffectiveness in attracting a “critical mass” of minority applicants.<sup>12</sup> Additionally, the University’s inclusion of race in holistic review is predicated on a stereotypical assumption that minority students admitted through the Top Ten Program are less qualified than minorities admitted through the PAI.<sup>13</sup> As revealed at oral argument, the University has failed to provide any factual basis to support this assumption, or to rebut the argument that it is based on precisely the type of pernicious stereotypes that the Equal Protection Clause forbids.<sup>14</sup> For these reasons, the Court will likely hold that the University’s decision to include race in the holistic review process is unconstitutional.

However, the effect on affirmative action policies across the country will be virtually non-existent. First, the Court’s decision will not—and should not—mean that race can *never* be considered in university admissions. In fact, the Court has on many occasions reaffirmed the principle that achieving a diverse student body is a compelling state interest, and that race may be one of many factors that universities consider when making admissions decisions. In *Fisher I*,<sup>15</sup> for example, the Court explained that a university’s “educational judgment that . . . diversity is essential to its educational mission is one to which we defer,” thus approving of race-conscious admissions policies *that satisfy strict scrutiny*.<sup>16</sup> Second, the constitutional infirmities in the University’s admissions policy are unlike most, if not all, affirmative action programs. As a result, the Court will likely decide *Fisher II* on narrow grounds and hold that, although the University’s policy fails to withstand constitutional scrutiny, race may be included in the admissions process where necessary to obtain the educational benefits of diversity.

Part II discusses the Supreme Court’s landmark affirmative action decisions and the themes that have emerged from the Court’s jurisprudence. Part III applies the Court’s precedent to the University’s holistic review process and argues that it violates the Equal Protection

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<sup>12</sup> See *Grutter*, 539 U.S. at 330 (holding that “the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce”).

<sup>13</sup> See *Fisher*, 758 F.3d at 670 (Garza, J., dissenting) (stating that “[t]he majority’s discussion of numerous ‘resegregated’ Texas school districts is premised on the dangerous assumption that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish a meaningful campus diversity”).

<sup>14</sup> See U.S. Const., Amend. XIV, Cl. 1 (“[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

<sup>15</sup> 133 S. Ct. 2411 (2013) (*Fisher I*).

<sup>16</sup> *Id.* at 2419 (quoting *Grutter*, 530 U.S. at 328).

Clause. Part IV asserts that the Court's holding in *Fisher II* will be narrowly crafted and negligibly impact other affirmative action programs. In addition, Part IV asserts that the Court's affirmative action jurisprudence should be fundamentally altered because it fails to adequately guide lower courts, legislatures, and litigants concerning the permissible use of race in the admissions process. As discussed in Part IV, a more effective—and honest—approach would be to acknowledge that: (1) diversity is an essential part of ensuring inclusion in higher education and the workplace; (2) remedying past discrimination is a compelling state interest; and (3) in limited circumstances, race may be a dispositive factor in the admissions or hiring process. The Court's current framework, although well-intentioned, ignores these realities and tries to quantify the role of race in admissions – a task that is impossible, unnecessary, and unwise.

## II. THE SUPREME COURT'S JURISPRUDENCE LEADING TO *FISHER II*

Race-conscious admissions policies (and affirmative action programs generally) are subject to strict scrutiny. This standard requires universities to demonstrate that the inclusion of race furthers a compelling governmental interest and is narrowly tailored to achieve that interest.<sup>17</sup> Of particular importance to the Court is whether “the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”<sup>18</sup> Simply put, universities must demonstrate that including race in the admissions process is necessary to enroll a diverse student body, and that diversity is achieved through means that are reasonably calculated to obtain the educational benefits of diversity.

Over the last few decades, the Court's decisions regarding race-conscious admissions policies have embraced three broad principles: (1) education diversity is a compelling state interest; (2) universities may consider race when making admissions decisions for the purpose of achieving educational diversity, *provided* that universities conduct an individualized review of every applicant; and (3) universities may not place disproportionate weight on race in the admissions process.<sup>19</sup>

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<sup>17</sup> See *Grutter*, 539 U.S. at 326.

<sup>18</sup> *Id.* at 333 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

<sup>19</sup> See *Bakke*, 438 U.S. at 311-12, 315.

A. *Bakke v. Regents of the University of California—Achieving a Diverse Student Body is a Compelling State Interest*

It is well-settled that the interest in achieving a diverse student body is unquestionably compelling. In *Bakke*, Justice Powell wrote for a plurality of the Court, holding that “the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education.”<sup>20</sup> Justice Powell emphasized that the “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.”<sup>21</sup>

However, the plurality concluded that educational diversity was the *only* permissible justification for including race in the admissions process. Justice Powell rejected the proposition that “reducing the historic deficit of traditionally disfavored minorities” constituted a compelling state interest, describing it “as an unlawful interest in racial balancing.”<sup>22</sup> Furthermore, universities may not strive to remedy past discrimination “because such measures would risk placing unnecessary burdens on innocent third parties ‘who bear no responsibility for whatever harm the beneficiaries of the special admissions policy are thought to have suffered.’”<sup>23</sup> Based on these considerations, the plurality adopted a relatively narrow rule governing the constitutionality of race-conscious admissions policies, holding that “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file,” provided that it does not “insulate the individual from comparison with all other candidates for the available seats.”<sup>24</sup>

B. *Grutter v. Bollinger—Reaffirming the “Plus Factor” Framework*

In *Grutter*, the Court reaffirmed the “plus factor” approach that *Bakke* embraced by upholding the University of Michigan Law School’s affirmative action policy. The policy strived to “enroll a ‘critical mass’ of minority students,”<sup>25</sup> while eschewing any attempt to “assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>26</sup> Writing for the majority, Justice O’Connor promoted the educational benefits of diversity, explaining that

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<sup>20</sup> *Id.* at 311-12.

<sup>21</sup> *Id.* at 313 (stating that “tradition and experience lend support to the view that the contribution of diversity is substantial”).

<sup>22</sup> *Grutter*, 539 U.S. at 323.

<sup>23</sup> *Id.* at 324.

<sup>24</sup> *Bakke*, 438 U.S. at 317.

<sup>25</sup> *Grutter*, 539 U.S. at 329 (internal citations omitted).

<sup>26</sup> *Id.* (quoting *Bakke*, 438 U.S. at 307).

“classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when students have “the greatest possible variety of backgrounds.”<sup>27</sup> However, relying on *Bakke*, Justice O’Connor noted that diversity encompasses “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>28</sup> Accordingly, although race may be considered “a ‘plus’ in a particular applicant’s file,”<sup>29</sup> it “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”<sup>30</sup>

The Law School’s policy comported with the “plus factor” rule because many factors beyond race were considered when making admissions decisions.<sup>31</sup> As a result, the Law School maintained “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>32</sup> For example, the Law School included factors such as fluency in foreign languages, overcoming of adversity, community service, and successful professional careers,<sup>33</sup> and afforded individualized consideration to all applicants, regardless of race.<sup>34</sup>

Additionally, the Law School did not quantify race in a manner that gave minority applicants an unfair advantage in the admissions process. Justice O’Connor noted that the Law School did not award “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,” and did not “limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity.”<sup>35</sup> Justice O’Connor also emphasized that the Law School “frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected.”<sup>36</sup> Consequently, because the Law School sought to “assemble a student body that is diverse in ways broader than race,”<sup>37</sup> the

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<sup>27</sup> *Id.* at 330.

<sup>28</sup> *Bakke*, 438 U.S. at 315 (Justice Powell stated that “[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups”).

<sup>29</sup> *Id.* at 317.

<sup>30</sup> *Id.* at 314.

<sup>31</sup> *Grutter*, 539 U.S. at 338.

<sup>32</sup> *Id.* at 337.

<sup>33</sup> *Id.* (Justice O’Connor explained that the Law School placed substantial weight on an applicant’s “promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background”). *Id.* at 340.

<sup>34</sup> *See id.*

<sup>35</sup> *Id.* at 338.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 340 (brackets added).



Court concluded that “[t]here is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single ‘soft’ variable.”<sup>38</sup>

*C. Gratz v. Bollinger—Universities May Not Place Disproportionate Emphasis on Race in the Admissions Process.*

The Court has invalidated race-conscious policies that place excessive emphasis on race or ethnicity. For example, in *Gratz*, which was the companion case to *Grutter*, the Court invalidated the University of Michigan’s undergraduate admissions policy, “which automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race.”<sup>39</sup> Writing for the majority, former Chief Justice Rehnquist held that, to withstand constitutional scrutiny, universities must ensure that each applicant is considered “as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”<sup>40</sup>

Thus, universities may not give preference to applicants solely on the basis of race or ethnicity, which itself constitutes discrimination.<sup>41</sup> For this reason, universities cannot adopt quota systems, which would “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.”<sup>42</sup> Rather, race-conscious admissions policies must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”<sup>43</sup> This approach reflected *Bakke*’s core holding, particularly the principle that race alone, or any single characteristic, cannot contribute to the diversity of a student body.<sup>44</sup>

Against this backdrop, Chief Justice Rehnquist held that the University of Michigan’s undergraduate admissions policy ran afoul of *Bakke*’s prescriptions:

The . . . policy automatically distributes 20 points to every single applicant from an “underrepresented

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<sup>38</sup> *Id.* at 337 (emphasis added).

<sup>39</sup> *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

<sup>40</sup> *Id.* at 271.

<sup>41</sup> *See Bakke*, 438 U.S. at 307.

<sup>42</sup> *Id.* at 315.

<sup>43</sup> *Grutter*, 539 U.S. at 334.

<sup>44</sup> *See id.* (stating that *Bakke* did not “contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity”).

minority” group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell’s example, where the race of a “particular black applicant” could be considered without being decisive, see the LSA’s automatic distribution of 20 points has the effect of making “the factor of race . . . decisive” for virtually every minimally qualified underrepresented minority applicant.<sup>45</sup>

Simply put, the university’s excessive emphasis on race precluded a truly individualized consideration of each applicant. For example, “[e]ven if student C’s ‘extraordinary artistic talent’ rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA’s system,” whereas “every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application.”<sup>46</sup> As such, “[i]nstead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors . . . simply award both A and B 20 points because their applications indicate that they are African–American, and student C would receive up to 5 points for his ‘extraordinary talent.’”<sup>47</sup> For these

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<sup>45</sup> *Gratz*, 539 U.S. at 271-72. In support of this holding, Justice Rehnquist cited Harvard University’s Admissions policy as an example of a permissible affirmative action policy:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*” *Id.* at 272-73 (emphasis in original).

<sup>46</sup> *Id.* at 273.

<sup>47</sup> *Id.*

reasons, University of Michigan's admissions policy ran afoul of *Bakke's* prescriptions.

The themes emerging from the Court's jurisprudence suggest that race-conscious admissions policies are evaluated along a continuum that, at one extreme, permits color-blind admissions, and at the other, prohibits quotas. The vast majority of cases fall into a nebulous gray area in which the Court analyzes whether a university's consideration of race is encompassed within a holistic admissions process that retains individualized consideration of all applicants and considers a wide array of factors unrelated to race.

### III. WHY THE COURT WILL LIKELY FIND THAT THE UNIVERSITY'S HOLISTIC REVIEW PROCESS FAILS TO WITHSTAND CONSTITUTIONAL SCRUTINY, AND WHY IT WILL NOT AFFECT MOST AFFIRMATIVE ACTION POLICIES

The Court will likely invalidate the University's admissions policy for three reasons. First, it is not narrowly tailored. Second, the Policy is based on stereotypical assumptions about the quality of applicants admitted through the Top Ten Program. Third, the University did not set forth a sufficient factual basis demonstrating that the addition of race to the PAI was necessary to enroll a diverse student body.

#### A. *The Holistic Review Process is Not Narrowly Tailored to Achieve the Educational Benefits of Diversity*

Race-conscious affirmative action policies are permissible only when "necessary and narrowly tailored to further a compelling governmental interest."<sup>48</sup> Courts must examine whether there is "a close 'fit' between this goal [achieving a "critical mass" of diversity] and the admissions policy's consideration of race."<sup>49</sup> In conducting this analysis, courts "must give 'no deference,' to a state actor's assertion that its chosen 'means. . . to attain diversity are narrowly tailored to that goal.'"<sup>50</sup>

The University's holistic review process is not narrowly tailored. As stated above, in 2008, the year in which the University denied admission to Petitioner, 21.5% of applicants admitted through the Top Ten Percent Program were African American and Hispanic. Conversely, the University's holistic review process, which since 2005 had included race as a factor in calculating the PAI, only accounted for 2.4% and 0.9% of

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<sup>48</sup> *Fisher*, 758 F.3d at 664 (Garza, J., dissenting).

<sup>49</sup> *Id.* at 666 (brackets added).

<sup>50</sup> *Id.* at 665 (quoting *Fisher I*, 133 S. Ct. at 2420).

Hispanic and African American enrollment, or 216 African-American and Hispanic students out of an entering class of 6,322.<sup>51</sup> Consequently, the vast majority of incoming minority students, many of whom come from largely segregated high schools, are chosen through *race-neutral means*.<sup>52</sup> Furthermore, “the minimal impact of . . . racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”<sup>53</sup> The University’s inclusion of race in holistic review creates such doubt because its use of race has only a *de minimis* impact on minority admissions.<sup>54</sup>

Ultimately, to hold that the University’s affirmative action policy is narrowly tailored would require this Court to countenance the stereotyping of African-American and Hispanic applicants *based* on their socio-economic status, *based* on the fact that they graduated from segregated schools, and *based* on the disadvantages they face due to past discrimination.

*B. The Addition of Race in Holistic Review is Based on Impermissible Stereotyping*

The University’s affirmative action policy, although well-intentioned, is predicated on the impermissible stereotyping of minority applicants admitted through the Top Ten Program. At oral argument, Justice Alito stated as follows:

[O]ne of the things I find troubling about your argument is the suggestion that there is something deficient about the African-American students and the Hispanic students who are admitted under the top 10 percent plan. They’re not dynamic. They’re not leaders. They’re not change agents. And I don’t know what the basis for that is.<sup>55</sup>

As Justice Alito argued, “[i]t’s kind of the assumption that . . . if a black student or a Hispanic student is admitted as part of the top 10 percent plan, it has to be because that student didn’t have to compete

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<sup>51</sup> See *id.* at 668 (Garza, J., dissenting).

<sup>52</sup> See *id.* at 650-51.

<sup>53</sup> *Seattle School District Number 1*, 551 U.S. at 734.

<sup>54</sup> See *Fisher*, 758 F. 3d at 668 (Garza, J., dissenting) (questioning how “a small, marginal increase in minority admissions is necessary to achieving its diversity goals”); *Seattle School Dist. No. 1*, 551 U.S. at 790 (Kennedy, J., concurring) (“the small number of assignments affected suggests that the schools could have achieved their stated ends through different means”).

<sup>55</sup> *Fisher II*, Oral Argument Transcript, p. 41, lines 5-11.

against very many white—and Asians.”<sup>56</sup> For Justice Alito, this assumption constituted “a really pernicious stereotype.”<sup>57</sup>

Judge Emilio Garza echoed these sentiments in his dissenting opinion below, stating that the majority “firmly adopt[ed]” the University’s assumption that “minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University’s vision of a diverse student body.”<sup>58</sup> Additionally, the Fifth Circuit’s reliance on the re-segregation of some Texas school districts as indicative of lesser-qualified students was “premised on the dangerous assumption that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish meaningful campus diversity.”<sup>59</sup> In this way, the Fifth Circuit “engage[d] in the very stereotyping that the Equal Protection Clause abhors.”<sup>60</sup> This is precisely why racial

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<sup>56</sup> *Id.* at p. 42, p. 19-25.

<sup>57</sup> *Fisher*, 758 F.3d at 669 (Garza, J., dissenting).

<sup>58</sup> *Id.* at 670. Judge Garza stated:

The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent [Policy]. That is, the University does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats. The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite “change agents” are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes. There is no such evaluation despite the fact that Top Ten Percent Law admittees also submit applications with essays, and are even assigned PAI scores for purposes of admission to individual schools. *Id.* at 669 (brackets added).

<sup>59</sup> *Id.* (internal citations omitted); *see also Richmond*, 488 U.S. at 500 (unless classifications based on race are “strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility”); *cf. J.E.B v. Alabama*, 511 U.S. 127, 139 (1994) (“We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (invalidating a stereotype-based classification even though the underlying generalization did not, on its face, discriminate against a particular gender).

<sup>60</sup> *Id.* *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . .”); *Richmond*, 488 U.S. at 493 (there must be “little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype”); *cf. U.S. v. Virginia* 518 U.S. 515, 541 (1996) (states may not enact laws that rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females,” particularly when the states control the “gates to opportunity”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“We are beyond the day when an

classifications are “too pernicious to permit any but the most exact connection between justification and classification.”<sup>61</sup>

The stereotypical assumptions underlying the inclusion of race in holistic review actually fuels the fire generated by the already existing racial tensions between African-Americans and Caucasians by promoting intra-racial stereotyping and validating an insidious notion of intra-racial inferiority—all under the guise of affirmative action. This is certainly not the way to stop discriminating on the basis of race. On these facts, to hold that the University’s holistic review process is narrowly tailored would be to render strict scrutiny “strict in theory but feeble in fact.”<sup>62</sup>

*C. The University Failed to Offer Factual Support  
Demonstrating the Need to Include Race in the PAI*

The University never examined the backgrounds and personal characteristics of students admitted through the Top Ten Program. Instead, the University simply assumed that those admitted through the Top Ten Program were less qualified than minorities admitted through holistic review. As Judge Garza noted in his dissent, the “record [did] not indicate that the University evaluate[d] students admitted under the Top Ten Percent [Program], checking for indicia of qualitative diversity . . . before determining that race should be considered in the holistic review process to fill the remaining seats in the class.”<sup>63</sup> Petitioner’s counsel, Bert Rein, emphasized this point during oral arguments:

When you really look at what the Fifth Circuit said, they said it’s based on two assumptions: One, the Top Ten are drawn from these minority high schools. Where did they come up with that? They [the University] never studied the pattern of the Top Ten admits. How do you know that a Hispanic or an African-American student can’t be in the Top Ten at what they might call an integrated, high-performing school? That’s a stereotypical assumption.<sup>64</sup>

Thus, “even accepting the University’s broad and generic qualitative diversity ends,” the University failed to demonstrate that its race-

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employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”).

<sup>61</sup> *Seattle School Dist. No. 1*, 551 U.S. at 720 (quoting *Gratz*, 539 U.S. at 270 (2003)) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)) (Stevens, J., dissenting).

<sup>62</sup> *Fisher I*, 133 S. Ct. at 2421.

<sup>63</sup> *Id.* at 670-71 (brackets added).

<sup>64</sup> *Fisher II*, Transcript of Oral Argument, p. 91, lines 7-15.

conscious policy is *necessary* to produce a diverse student body.<sup>65</sup> Moreover, even if the University's holistic review process "allows it to select for 'other types of diversity' beyond race alone," what possible justification supports *including* race as a factor in that process, particularly when the University admits a substantial number of minority applicants through its Top Ten Percent Program?<sup>66</sup> The belief—rooted in impermissible racial and ethnic stereotyping—that minorities from segregated schools are not as qualified as those attending predominantly white high schools and living in affluent neighborhoods. Even the most ardent supporters of affirmative action would not countenance such a blatant example of masking racial and ethnic stereotyping with "benign" motives.<sup>67</sup>

#### IV. THE IMPLICATIONS OF *FISHER II* ON EXISTING AFFIRMATIVE ACTION POLICIES

One of the odd aspects of *Fisher II* was the amicus briefs filed in support of the University, many of which emphasized the importance of diversity and argued that a decision in Petitioner's favor would result in the invalidation of affirmative action policies across the country.<sup>68</sup> This concern is overstated. If the Court invalidates the University's admissions policies, the impact on universities and business organizations across the country will be *de minimis*, and would be consistent with the three themes that characterize the Court's affirmative action jurisprudence.

With respect to business organizations, the impact will be virtually non-existent because the justifications for affirmative action programs are fundamentally different. In limited circumstances, businesses are permitted to implement quote-based affirmative action policies that strive to remedy past discrimination. Regarding universities, the impact will be insubstantial; universities will be required to ensure that race-conscious admissions policies are narrowly tailored, likely by providing a sufficient

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<sup>65</sup> See *Fisher*, 758 F.3d at 669 (Garza, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> See *Fisher I*, 133 S. Ct. at 2421 ("the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9 (1982)); see also *Richmond*, 488 U.S. at 500 ("the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable").

<sup>68</sup> See, e.g., Amicus Brief of Society of American Law Teachers in favor of Respondent, *supra* note 2, available at <http://www.scotusblog.com/wp-content/uploads/2015/11/SALT-14-981-bsac-Society-of-Am-Law-Teachers.pdf>.

factual basis demonstrating the need to consider race in the admissions process. Otherwise, the principles enunciated in *Grutter* will remain good law.

*A. Fisher II Will Not Impact Business Organizations Because The Justifications for Affirmative Action in Hiring and Admissions are Fundamentally Different.*

The justifications for affirmative action programs in the admissions and hiring process are fundamentally different. In the hiring context, remedying past discrimination is constitutionally permissible. In *Wygant v. Jackson Board of Education*<sup>69</sup> the Court held that “although societal discrimination alone is sufficient to justify a racial classification,” the “some showing of prior discrimination by the governmental unit involved” is permitted “in order to remedy such discrimination.”<sup>70</sup> In stark contrast to its affirmative action jurisprudence, the majority acknowledged that “in order to remedy the effects of prior discrimination, it may be necessary to take race into account,” and that “[a]s part of this [n]ation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”<sup>71</sup> For example, in *United Steelworkers of America v. Weber*,<sup>72</sup> the Court upheld a private affirmative action program that was designed “to eliminate traditional patterns of racial segregation,” and that “reserve[d] for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craft-workers in the plant is commensurate with the percentage of blacks in the local labor force.”<sup>73</sup>

The Court’s decisions permit private businesses to prefer race in a manner that universities cannot. Quotas such as the one at issue in *United Steelworkers of America* would never pass constitutional muster under *Bakke* and *Grutter*, and the justification for such a system—remedying past discrimination—has been specifically rejected in the admissions context. For these reasons, *Fisher II* will have no impact on businesses who adopt race-conscious hiring policies *unless* the Court holds that race can *never* be a factor in either admissions or hiring decisions. For the reasons discussed above, such an unprecedented holding is highly unlikely. As Justice Breyer stated during oral argument:

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<sup>69</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

<sup>70</sup> *Id.* at 274.

<sup>71</sup> *Id.* at 280-81.

<sup>72</sup> *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979).

<sup>73</sup> *Id.* at 197.



[P]eople in the universities and elsewhere are worried that we will, to use your colleague's expression, kill affirmative action through death by a thousand cuts. We promised in *Fisher I* that we wouldn't. *That opinion by seven people* reflected no one's views perfectly. But that's what it says: [Strict in theory,] [n]ot fatal in fact.<sup>74</sup>

Justice Breyer's sentiments, coupled with the Court's decisions in *Bakke*, *Grutter*, and *Fisher I*, suggest that the holding in *Fisher II* will likely be narrow and confined to the unique infirmities in the University's policy. Those infirmities are two-fold: the University cannot explain why the inclusion of race in holistic review is *necessary* to achieve the educational benefits of diversity, and the stated reason for including race—increasing the quality of minority students—is predicated, consciously or subconsciously, on impermissible racial stereotypes.

*B. Universities Must Provide a Factual Basis Supporting the Use of Race in the Admissions Process.*

*Fisher II* will alter race-conscious admissions policies in one significant respect. Universities will be required to demonstrate that there is a sufficient factual basis justifying the inclusion of race in the admissions process. In *Fisher II*, the Petitioner's primary argument was that the University has failed to make such a showing, which led the University to make an impermissible assumption—rooted in racial stereotyping—about the quality of minorities admitted through the Top Ten Program:

When you really look at what the Fifth Circuit said, they said it's [the decision upholding the University's policy] based on two assumptions. One, the Top Ten are drawn from these minority high schools. Where did they come up with that? *They never studied the pattern of the Top Ten admits.* How do you know that a Hispanic or an African-American student can't be in the Top Ten at what they call an integrated, high-performing high school? *That's a stereotypical assumption.*<sup>75</sup>

Ultimately, requiring universities to set forth a sufficient factual basis demonstrating that “no workable race-neutral alternatives would

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<sup>74</sup> *Fisher II*, Transcript of Oral Argument, p. 87, lines 4-11 (brackets added).

<sup>75</sup> *Id.*, p. 91, lines 715 (emphasis added).

produce the educational benefits of diversity,” will ensure that all applicants receive individualized consideration.<sup>76</sup>

*C. The Reality—The Court’s Affirmative Action Jurisprudence Lacks Cohesion*

The Court’s jurisprudence fails to appropriately guide lower courts and university administrators concerning the permissibility of affirmative action policies. The Court has been clear that race-neutral admissions practices are constitutional, and that a policy establishing quotas for specific minority groups is unconstitutional.<sup>77</sup> Within these two extremes, however, is a large gray area encompassing policies that consider race to varying degrees and for different purposes. The Court’s precedent offers little guidance on whether these policies are constitutional, and while *Fisher II* will likely bring some clarity by requiring universities to provide a more detailed factual basis for race-conscious admissions policies, it will not adequately guide universities regarding when race is “disproportionately” weighed, or what “individualized consideration” truly means.

The reason is due in substantial part to the limited lens through which the Court evaluates race-conscious admissions policies. By permitting universities to consider race solely to achieve educational diversity, the Court is disregarding in the admissions process what it acknowledges in the hiring context: a disproportionate reliance on race is sometimes necessary to remedy past discrimination, particularly where a university has a history of discriminating against minority groups. If universities were permitted to adopt admissions policies that strove in part to remedy past discrimination, educational opportunities would be provided to a larger percentage of minority applicants, and the structural and economic inequality that over two centuries of slavery and segregation has engendered would be more effectively addressed. To deny that the country’s long history of discrimination has not disadvantaged minorities, or that remedial measures are necessary to address the deleterious effects of slavery and segregation, betrays the Constitution’s guarantee of equal liberty for all citizens.

Put differently, because this country has never lived in a color-blind society, it cannot do so now or in the near future. If a university adopts an affirmative action policy providing that twenty percent of its incoming class will be Africa-American, twenty-percent Hispanic, and twenty

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<sup>76</sup> *Fisher I*, 133 S. Ct. at 2420.

<sup>77</sup> See *Schuette v. Coalition to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (upholding a state referendum that prohibited the use of race in the admissions process); *Bakke*, 438 U.S. at 315.

percent Asian, why should that be problematic, particularly given the changing demographics of the United States? And if the stated reason for doing so is to remedy past discrimination, why should that be considered a violation of the Constitution? This approach would more effectively bridge the inequality gap that past discrimination has produced, and that prevents many minority applicants from accessing the same opportunities or having a fair chance to achieve successful outcomes.

The fact remains that, until the Court develops a simpler, clearer, and more intellectually honest affirmative action jurisprudence, universities and businesses will likely go to great lengths to represent that their affirmative action policies embrace a holistic and individualized review of all applicants. The reality, however, is that these institutions will, at least in some cases, admit or hire minority applicants primarily or even solely on the basis of race. Universities should not be forced to conceal this fact any more than courts should not conceal the fact that racism and prejudice have been—and continue to be—pervasive forces denying many citizens equal liberty under the law.

#### V. CONCLUSION

The fear among some commentators that the Court may eliminate affirmative action in *Fisher II*, or the expectation that the Court will end affirmative action altogether, is misplaced. The Court's holding will likely be confined to the uniquely unconstitutional aspects of the University's admissions process, and will have little, if any, impact on race-conscious admissions policies or hiring practices in other contexts. However, *Fisher II* does provide the Court with an opportunity to reaffirm a core principle: race-based stereotypes offend the very justifications underlying affirmative action. Even if, as is the case in *Fisher II*, such assumptions further salutary objectives, the message they send to members of minority groups—the very individuals that affirmative action strives to benefit—is demeaning. Indeed, it should be offensive to any African-American or Hispanic applicant who has overcome adversity and graduated in the Top Ten Percent of his or her class. Thus, invalidating the University's affirmative action program will send a message that achieving a diverse student body is a compelling state interest, provided that the process by which education diversity is achieved is as egalitarian as the ends such programs promote.