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**FISHER V. TEXAS:
THE LIMITS OF EXHAUSTION AND THE FUTURE OF RACE-
CONSCIOUS UNIVERSITY ADMISSIONS**

john a. powell and Stephen Menendian*

INTRODUCTION

Following the *Hopwood* decision, which struck down the University of Texas's affirmative action policy, the University of Texas ("UT") and the State of Texas sought new ways to promote diversity in higher education that were consistent with the prevailing interpretation of the United States Constitution.¹ The Texas State Legislature narrowly passed a law granting the top ten percent of each graduating high school class in the state automatic admission to UT.² Known as the Texas Top Ten Percent Plan (TPP), it both recognized underlying patterns of racial residential segregation and relied on them to generate diversity in the UT undergraduate student body.³ A few years later, UT adopted a race-conscious

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1. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

2. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 73 (2003). For a brief synopsis of the effects of the *Hopwood* decision and a discussion of the background of the Ten Percent Plan, see NICHOLAS WEBBER, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *ANALYSIS OF THE TEXAS TEN PERCENT PLAN*, (2007), available at http://kirwaninstitute.osu.edu/reports/2007/08_2007_DemMerit_AnalysisofTXTenPercent.pdf. It should be noted that the plan is a misnomer. At the urging of the University of Texas, the Texas State Legislature amended the percent plan law to cap the number of students admitted under this policy to no more than seventy-five percent of the total undergraduate admissions for that year. *The University of Texas at Austin to Automatically Admit Top 8 Percent of High School Graduates for 2011*, U. TEX. AT AUSTIN (Sept. 16, 2009), http://www.utexas.edu/news/2009/09/16/top8_percent/. Therefore, the exact percentage changes from year to year. Each fall, ascending high school juniors are notified exactly what percentile of the ascending class will qualify for automatic admission under the Ten Percent Plan. In 2011, that was the top eight-percent. See *Automatic Admission*, U. TEX. AT AUSTIN (last updated Sept. 16, 2013), <http://bealonghorn.utexas.edu/freshmen/decisions/automatic-admission/>; TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *THE TOP TEN PERCENT PLAN: ESSENTIAL FACTS FOR PARENTS, STUDENTS, SCHOOL ADMINISTRATORS AND COUNSELORS*, available at http://www.lulactx.org/TTP_essential_facts_NP_FINAL.pdf.

3. Residential segregation is the underlying structural feature that allows the Ten Percent Plan to generate student body diversity. See Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 *ECON. OF EDUC. REV.*

admissions policy modeled after the University of Michigan Law School's admissions program, which the Supreme Court upheld in *Grutter v. Bollinger*.⁴

Consequently, UT currently employs two pools as part of its undergraduate admissions process. The first pool includes applicants automatically admitted by law under the TPP. The second pool includes applicants not admitted under the TPP. These applicants are subject to a holistic application review that, in an effort to create a more diverse student body, considers the race of the individual applicant as one of many factors.

The University of Texas denied admission to Abigail Fisher, a white woman who fell outside of the top ten percent of her graduating high school class. Ms. Fisher sued the University of Texas, arguing that UT's limited consideration of race in undergraduate admissions violates the equal protection clause of the Fourteenth Amendment. Specifically, she claimed that UT discriminated against her on the basis of race because she had academic credentials that were superior to some non-white applicants admitted under the holistic admissions review.⁵ She also argued that the

1100, 1113–14 (2010) (Figure 1 shows the location of Texas Higher Education Opportunity Project (THEOP) Universities and Minority Populations and illustrates that the Hispanic population in Texas is concentrated on the western and southern part of the state and that the Black population is concentrated on the eastern part of the state); *id.* at 1111–12 (“Proponents of the plan believed the new admissions policy would restore campus diversity because of the high degree of segregation among high schools in Texas. . . .”); *see also* GUINIER & TORRES, *supra* note 2, at 70–74 (describing the formulation of various proposals, including the introduction of the Ten Percent idea by UT professor David Montejano); J. Phillip Thompson and Sarah Tobias, *The Texas Ten Percent Plan*, 43 AM. BEHAV. SCIENTIST 1121, 1125–29 (2000); Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas Top Ten Percent Plan*, 97 J. PUB. ECON. 32, 33 (2013) (“The admission guarantee ensures that students at low-achieving high schools, who tend to be disproportionately poor and minority, are equally represented among those automatically granted admission.”).

4. *Grutter v. Bollinger*, 539 U.S. 306 (2003); Alison Schmauch Somin, *A Lady or a Tiger?: Thoughts on Fisher v. University of Texas and the Future of Race Preferences in America*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY PRACTICE GROUPS, Vol. 14, Issue 3 (Oct. 2013) *available at* <http://www.fed-soc.org/publications/detail/a-lady-or-a-tiger-thoughts-on-fisher-v-university-of-texas-and-the-future-of-race-preferences-in-america>.

5. Brief for Petitioner at 2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). UT disputes Ms. Fisher's claims regarding the strength of her academic credentials relative to students admitted through the second admissions pool. According to UT's brief to the Fifth Circuit, Abigail Fisher “would not have been admitted to the Fall 2008 freshman class even if she had received a perfect [Personal Achievement Index] score,” a score that is used during the holistic review process and for candidates who fall below the top 10% of their high school class. Brief for Respondents at 15, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345). Moreover, only one African-American and four Hispanic applicants with lower combined application scores were offered admission to UT's summer program, compared to forty-two white applicants with equal or lower scores to Abigail Fisher's. *Id.* Finally, 168 African-American and Hispanic applicants with identical or higher scores than Abigail Fishers were denied admission to the program. *Id.* at 16.

success of the TPP in generating student body diversity at UT rendered further consideration of race unnecessary.⁶

Both the District Court and the Fifth Circuit denied her claims. They held that UT's holistic admissions policy satisfied the constitutional standards announced or clarified in *Grutter* regarding the use of race in admissions in higher education and that UT's policy was "narrowly tailored" to serve a "compelling interest in attaining a diverse student body."⁷ Ms. Fisher appealed to the Supreme Court, which granted certiorari to hear her case in the 2012 term.⁸

In the spring of 2013, affirmative action advocates and opponents braced for the Supreme Court's *Fisher* ruling with anticipation and apprehension.⁹ Those opposed to affirmative action hoped that the Court would use *Fisher* to overturn or severely limit *Grutter*, as the Court's composition had since changed. Five conservative Justices controlled the Court in its 2012 term, with *Grutter*-dissenter Justice Anthony Kennedy holding the decisive vote. Justice Alito, viewed by many as hostile to affirmative action, replaced Justice O'Connor, the author of the Court's *Grutter* decision. Furthermore, the recusal of Justice Elena Kagan because of her prior involvement in the case as Solicitor General hampered the Court's liberal wing. Justice Kagan holds the seat previously held by Justice John Paul Stevens, a member of the *Grutter* majority.

Advocates of affirmative action hoped for a narrow ruling. In previous cases, Justice Kennedy rhetorically rejected colorblindness ("The enduring hope is that race should not matter; the reality is that too often it does"¹⁰) and expressly supported Justice Powell's

6. See Brief for Petitioner, *supra* note 5, at 38–42. The undergraduate student body of the UT in the Fall of 2010 was 50.4% white, 20.0% Hispanic, 17.9% Asian, and 4.6% African-American, although those numbers vary by gender. For example, the ratio of Black females to males is roughly 2-1. Updated reports on the demographics of enrolled first-time freshmen are available from UT at *Top 10% Reports*, U. TEX. AT AUSTIN (last updated Jan. 2, 2014), http://www.utexas.edu/student/admissions/research/admission_reports.html.

7. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608, 612 (W.D. Texas 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011).

8. Petition for a Writ of Certiorari, *Fisher*, 133 S. Ct. 2411 (No. 11-345); *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit).

9. *Fisher*, 133 S.Ct. at 2411; Jeffrey Toobin, *The Other Big Supreme Court Case*, THE NEW YORKER (May 1, 2012), <http://www.newyorker.com/online/blogs/comment/2012/05/the-other-big-supreme-court-case.html>; Lyle Denniston, *Argument preview: Is affirmative action about to end?*, SCOTUSBLOG (Oct. 9, 2012, 12:02 AM), <http://www.scotusblog.com/2012/10/argument-preview-is-affirmative-action-about-to-end/>.

10. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 11 No. 1*, 551 U.S. 701, 787 (2007). Justice Kennedy's rhetoric reflects his concern that a formalism and dogmatic interpretation of a colorblind constitution may ignore and insulate the realities of unequal educational provision. He refused to join passages of the plurality in *Parents Involved* on this basis, noting:

legal conclusion in *Regents of the University of California v. Bakke*¹¹ that there is a compelling governmental interest in the “attainment of a diverse student body.”¹² Since Justice Powell’s opinion in *Bakke* also formed the basis of Justice O’Connor’s opinion in *Grutter*,¹³ it seemed unlikely that Justice Kennedy would vote to overturn *Grutter*, despite his dissent in that case.¹⁴ Furthermore, Justice Kennedy staked ground beyond Justice Powell’s *Bakke* opinion when he more recently asserted that “[a] compelling [government] interest exists in avoiding racial isolation . . . [and] achiev[ing] a diverse student population.”¹⁵ Although Justice Kennedy had never voted to uphold a particular affirmative action plan, his previous opinions indicate an appreciation of not only the empirical reality of unequal educational opportunities by race, but also the moral dimension of affirmative action. In *Parents Involved*, Justice Kennedy

The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 788.

11. 438 U.S. 265 (1978). Allan Bakke, a white male, had twice applied for admission to the University of California Medical School at Davis. He was rejected twice. The school reserved sixteen places in each entering class of one hundred for “qualified” minorities, attempting to redress persistent and unfair minority exclusions from the medical field. Bakke argued that he was excluded from admission solely on the basis of race. *Id.* at 265–66. The Court in *Bakke* was deeply divided and no opinion gained majority support. Justice Powell’s opinion was considered, under some tests, controlling, and announced the judgment of the court. In *Grutter*, Justice O’Connor did not resolve the issue of how to determine binding precedent in fractured opinions, but did endorse Justice Powell’s opinion as the correct statement of law. *Grutter*, 539 U.S. at 325.

12. *Bakke*, 438 U.S. at 311, 314. In his *Grutter* dissent, Justice Kennedy stated that “[t]he opinion by Justice Powell [in *Bakke*], in my view, states the correct rule for resolving this case.” *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

13. See discussion *supra* note 11. The Court’s opinion in *Grutter* draws heavily from Justice Powell’s opinion in *Bakke*, with thirty-one references and citations in the majority opinion alone. 539 U.S. at 311–44.

14. See *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). The reason for Justice Kennedy’s dissent in *Grutter* was not disagreement with the majority’s endorsement of the standard of law announced by Justice Powell in *Bakke*, but rather his disagreement over the Court’s application of that standard with respect to narrow tailoring, and what he viewed as a flawed narrow tailoring analysis.

15. *Parents Involved*, 551 U.S. at 797–98 (2007) (Kennedy, J., concurring). For more on the importance of Justice Kennedy’s assertion that a compelling interest exists in avoiding racial isolation, see John A. Powell & Stephen Menendian, *Parents Involved: Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 632 (2007) (“Justice Kennedy’s opinion is also significant because of his holding that there exist compelling government interests in the [sic] avoiding racial isolation and in achieving a diverse student population in primary education. Along with the four dissenting Justices, a majority of the Justices on the Court have now voiced approval of a new compelling interest that may sustain race-conscious policies under the strict scrutiny framework.”).

proclaimed that “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”¹⁶

Supporters of UT’s admissions policy feared that even a narrow decision—one that upheld the principles first announced in *Bakke*, left *Grutter* undisturbed, but overturned UT’s race-conscious admissions plan—would chill the already sparse race-conscious admissions plans still in operation. Even if universities could successfully defend such plans under the legal standards announced in *Fisher*, the overturning of a major university policy would ultimately receive more press and invite more litigation than the subtle doctrinal silver linings or nuanced parsing of that decision. TPP supporters could point to the consequences of previous decisions as examples. Following the Supreme Court’s decisions in *Parents Involved* and *Meredith v. Jefferson County Board of Education*,¹⁷ which struck down voluntary integration plans in Louisville, Kentucky and Seattle, Washington, school districts around the nation seemed more reticent about integration and less willing to pursue that goal as educational policy.¹⁸

Ultimately, the terse 7–1 decision in *Fisher* is more remarkable for what it did *not* say than for what it did. The Court did not strike down UT’s holistic admissions policy, did not overrule *Grutter*, did not purport to revise or otherwise alter the constitutional standards announced in *Grutter*, did not hold that UT’s admissions policy failed the narrow tailoring test, did not suggest deficiencies in the UT policy, and barely mentioned the TPP. One reading of *Fisher* is that it introduced no new law, but that it was merely a black letter restatement of *Bakke*, *Grutter*, and *Gratz v. Bollinger*.¹⁹ This reading is not only suggested by the Court itself,²⁰ but is also advanced by defenders of affirmative action and UT’s admissions policies, who

16. *Parents Involved*, 551 U.S. at 797.

17. *Meredith*, 548 U.S. 938 (2006), was argued in tandem with *Parents Involved*.

18. Indeed, the Seattle School District abandoned its integrative efforts following the *Parents Involved* decision. *Parents Involved in Cmty. Sch. IV*, 377 F.3d 949, 958 (9th Cir. 2004). See also SEATTLE PUBLIC SCHOOLS, STUDENT ASSIGNMENT PLAN (2009), available at <http://district.seattleschools.org/modules/groups/homepagefiles/cms/1583136/File/Departmental%20Content/enrollment%20planning/New%20Student%20Assignment%20Plan.pdf?sessionid=64c033b3ac6b7e05be38f2b0be2f8d18>.

19. *Gratz v. Bollinger*, 539 U.S. 244 (2003)

20. See *Fisher*, 133 S. Ct. at 2421 (“In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’ As noted above, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.”) (internal citations omitted).

would prefer to avoid weakening *Grutter*.²¹ This reading is unpersuasive, though appealing. Upon a closer reading, *Fisher* is a departure from settled law in a number of critical respects.

This Article investigates the potential ramifications of *Fisher v. Texas* and the future of race-conscious university admissions. Although one cannot predict the ultimate significance of the *Fisher* decision, its brief and pregnant statements of law portends an increasingly perilous course for traditional affirmative action programs. Part I explores the opinions filed in *Fisher*, with a particular emphasis on Justice Kennedy's opinion on behalf of the Court. We focus on the ways in which the *Fisher* decision departs from precedent, proscribes new limits on the use of race in university admissions, and tightens requirements for narrow tailoring.

Part II investigates the limits of the exhaustion requirement as a matter of logic, law, and policy. We focus on the necessity and exhaustion prongs of narrow tailoring with respect to the use of race in admissions. We will complicate the necessity analysis by illustrating the practical difficulties of employing race-neutral alternatives and by highlighting how this inquiry is fraught with administrative and conceptual challenges.

Part III underscores the challenges presented in Part II by attempting to navigate the distinction between general race-consciousness and the use of individual racial classifications. We will explore the possibilities for university admissions committees to pursue racial and socio-economic diversity, including the opportunity-enrollment model. As a reference, we will survey integrative alternatives used in the wake of the *Parents Involved* decisions and suggest how colleges and universities could apply a similar set of principles and methods. We will also note the challenges facing such approaches on the scale of university admissions.

We will conclude by arguing that race-conscious admissions are necessary, yet increasingly administratively challenging. The standards for narrow tailoring demand expertise beyond the skills and the resources of university admissions committees and call for more administratively cumbersome university standards. Given the extant realities of our educational system, courts should provide more leeway, not less, to universities pursuing the compelling interests of promoting student body diversity and reducing racial isolation. In the absence or relative unavailability of such resources and technical expertise, and until such deference from courts is forthcoming,

21. See, e.g., Elise Boddie, *Commentary on Fisher: In with a Bang, Out with a Fizzle*, SCOTUS-BLOG (June 24, 2013, 11:05 PM), <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle>.

universities should rely on the Supreme Court's safe harbor by aggressively pursuing viable race-neutral alternatives with promising outcomes.

I. NEW DEPARTURES IN *FISHER V. TEXAS*

The Supreme Court's opinion in *Fisher* purports to do little more than to correct the Fifth Circuit's error in applying established law. However, the Court's terse opinion departs from established precedent in several important ways while creating new law. This Part will explore these departures. The Court ultimately remanded the case to the Fifth Circuit for reconsideration under the standards announced in its decision.²² The Court explained that because the case arose from cross-motions for summary judgment, rather than appeal after a trial, the lower courts in the first instance must assess whether UT offered evidence "sufficient . . . to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."²³

Justice Kennedy delivered the opinion of the Court, Justices Scalia and Thomas authored concurring opinions, and Justice Ginsburg delivered a brief dissenting opinion. Justice Scalia's opinion merely notes that he joined the Court's opinion in full, despite his objection to *Grutter*, because Petitioner did not ask the Court to overrule *Grutter*.²⁴ Justice Thomas' lengthy concurrence, in contrast, calls for the Court to overturn *Grutter*.²⁵ Justice Thomas also parts with the opinion of the Court by asserting that the interest in racial diversity is not compelling, comparing so-called "benign" intentions to those of slaveholders and Jim Crow segregationists.²⁶

22. *Fisher*, 133 S.Ct. at 2421 ("[B]ut fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis."). Following the Court's decision, the Fifth Circuit denied the University of Texas's request that it remand the case to the District Court for further proceedings. See Appellee's Statement Concerning Further Proceedings on Remand at 7, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822, (5th Cir. July 23, 2013), available at <http://tarltonguides.law.utexas.edu/loader.php?type=d&id=812884>; Proposed Schedule for Supplemental Briefing and Response to Appellee's Statement Concerning Further Proceedings on Remand at 9, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822, available at http://lgdata.s3-website-us-east-1.amazonaws.com/docs/971/812890/PROPOSED_SCHEDULE_FOR_SUPPLEMENTAL_BRIEFING_AND.pdf

23. See *Fisher*, 133 S.Ct. at 2414.

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

25. *Id.* (Thomas, J., concurring).

26. *Id.* at 2430 (Thomas, J., concurring) (arguing that "segregationists similarly asserted that segregation was not only benign, but good for black students. . . . Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign.").

Perhaps the most surprising aspect of the Court's *Fisher* decision is that the members of the Court split by a 7–1 vote, with only Justice Ginsburg dissenting. In *Parents Involved*, Justices Souter, Ginsburg, and Stevens joined Justice Breyer's eighty-page dissent, which not only argued that the school district's limited use of race to promote integration should survive strict scrutiny but also that efforts to promote educational diversity should be subject to a less stringent standard of review.²⁷

By noting the legal and ethical difference between segregative and integrative efforts Justice Breyer echoed Justice Stevens' famous admonition that subjecting both "invidious" and "benign" racial classifications to the same standard of review is akin to equating a "welcome mat" and a "no trespassing sign".²⁸ As Justice Breyer wrote, "no case . . . has ever held that the test of 'strict scrutiny' means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same."²⁹ He explained that "a more lenient standard than 'strict scrutiny' should apply in the present context" and that doing so "would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need."³⁰ Although protesting the plurality's use of strict scrutiny review, Justice Breyer acquiesced to the realities of the Court's jurisprudence and nonetheless applied strict scrutiny review in his analysis. He concluded that the voluntary integration plans under review in *Parents Involved* survive constitutional scrutiny under strict scrutiny or any lesser standard.³¹

Given the length, intensity, and logic of his dissenting opinion in *Parents Involved*, it is puzzling that Justice Breyer would join Justice Kennedy's opinion in *Fisher*. Justice Kennedy's statement of law is inconsistent with Breyer's equal protection jurisprudence. Similarly, it is puzzling that Justice Sonia Sotomayor, a more recent appointee and Justice Souter's replacement, would join Justice Kennedy's opinion. In her autobiography, Justice Sotomayor stressed the value of affirmative action in higher education, citing herself as

27. *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting).

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

29. *Parents Involved*, 551 U.S. at 832 (Breyer, J., dissenting). In his view, the purpose of the Equal Protection Clause was to "forbid[] practices that lead to racial exclusion." *Id.* at 829.

30. *Id.* at 836.

31. *Id.* at 863 ("To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length.").

an example.³² Her pointed questions during oral argument, often critical of the Petitioner, reinforce that reading.³³ By joining Justice Kennedy's opinion, Justices Breyer and Sotomayor establish, for the first time, that seven Justices endorse the proposition that the use of racial classifications in university admissions is subject to strict scrutiny review and that strict scrutiny demands the kind of tailoring set out in Justice Kennedy's opinion. Although not a change in law, this represents a symbolic departure and appears to consolidate the re-orientation of equal protection jurisprudence announced in *Bakke* away from the principles announced in *Carolene Products*.³⁴ The tenuous hold of strict scrutiny over all racial classifications, invidious or remedial, by just five Justices appears to have given way to broader support, at least insofar as the votes of the Justices in *Fisher* are predictive.

Given their support for the use of racial classifications in remedial and integrative public policy, it is not evident why Justices Breyer and Sotomayor would join Justice Kennedy's opinion and further entrench the view that strict scrutiny applies to all racial classifications. Possibly, these Justices were able to secure a narrower ruling by joining Justice Kennedy's opinion.³⁵ For this to be true, Justice Kennedy or the other conservative Justices must have been willing or have indicated a willingness to announce a more stringent standard of law, or even to strike down UT's policy on the merits unless Justices Breyer or Sotomayor joined them. Another possibility is that Justices Breyer and Sotomayor were persuaded to

32. See SONIA SOTOMAYOR, MY BELOVED WORLD 119 (2013) (describing a conversation she had during the admissions process and after she received an acceptance letter from Princeton); *id.* at 145–46, 191 (discussing the need for affirmative action to open doors). Further, in an interview with TIME magazine while *Fisher* was pending, Justice Sotomayor was asked whether affirmative action is working today. Although she declined to speak specifically about her views on affirmative action, Justice Sotomayor expressed her belief that the country will not reach “complete equality” unless “employers and everyone else are sensitive to the fact that it is a valuable goal for society.” Belinda Luscombe, *10 Questions for Sonia Sotomayor*, TIME, Feb. 11, 2013, at 60.

33. See Transcript of Oral Argument at 81–82, *Fisher* 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter *Fisher* Oral Argument] (*Justice Sonia Sotomayor*: “So you don’t want to overrule Grutter, you just want to gut it.” *Fisher’s attorney*: “Excuse me?” *Justice Sonia Sotomayor*: “You just want to gut it. You don’t want to overrule it, but you just want to gut it.” *Fisher’s attorney*: “Well—” *Justice Sonia Sotomayor*: “Now you want to tell universities that once you reach a certain number, then you can’t use race anymore.”).

34. See Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 6–7 (2013). See generally, John A. Powell, *Constitutionalism and the Extreme Poor: Neo-Dred Scott and the Contemporary “Discrete and Insular Minorities,”* 60 DRAKE L. REV. 1069, 1075–79 (2012) (discussing the importance of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938) and its function).

35. In other words, Justice Kennedy may either have expressed or implied a willingness to strike down UT's plan unless other Justices joined a narrower opinion.

join the Court majority in the interests of preserving the Court's institutional legitimacy by avoiding another deeply divided and politically contentious Court decision near the end of the term. Muting the *Fisher* decision may have been a tactical concession by both wings of the Court in a volatile term with looming victories and defeats for both progressives and conservatives in landmark marriage equality and voting rights cases.³⁶ The liberal Justices may also have been more willing to acquiesce since Justice Kagan's recusal weakened their position.

If these were considerations, their joining the majority may have little predictive significance. Regardless, their decision to join the majority helped deepen the precedent that all racial classifications—regardless of intent—are subject to strict scrutiny review.³⁷ Furthermore, by joining Justice Kennedy, Justices Breyer and Sotomayor have lent their imprimatur to the proposition that consideration of race requires exhaustion of race-neutral alternatives. This is the second way in which *Fisher* departs from previous case law.

The most important aspect of *Fisher* is the Court's holding regarding the exhaustion of "workable race-neutral alternatives."³⁸ *Grutter* instructed that narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives."³⁹ However, *Grutter* also cautioned that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."⁴⁰ To the contrary, Justice Kennedy's *Fisher* opinion asserts that "the reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."⁴¹ He explained that consideration of race-neutral alternatives is necessary, but insufficient to satisfy strict scrutiny.⁴²

36. See *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013) (holding that key provisions of the Voting Rights Act were unconstitutional); *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (holding that the Defense of Marriage Act's definition of marriage was unconstitutional).

37. Again, this is the first time that seven Justices have clearly endorsed the proposition that all race-based classifications, whether benign or invidious, are subject to strict scrutiny review.

38. *Fisher*, 133 S. Ct. at 2420 ("But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.").

39. *Grutter*, 539 U.S. at 339.

40. *Id.* at 309.

41. *Fisher*, 133 S. Ct. at 2420. Admittedly, there is a difference between "every conceivable" and "every workable" alternative, but it seems clear that the *Grutter* and *Fisher* decisions are in tension in this respect. *Fisher*'s more stringent exhaustion standard now replaces *Grutter*'s "good faith consideration."

42. *Id.* ("Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny. . . .").

The exhaustion requirement represents a departure from *Grutter*. *Fisher* appears to have re-written *Grutter*'s requirement of good faith *consideration* of race-neutral alternatives into a more stringent *exhaustion* requirement.⁴³ Justice Kennedy does, however, temper the exhaustion requirement with the caveat that a non-racial approach must produce the educational benefits of diversity "about as well and at tolerable administrative expense."⁴⁴

In addition to mandating exhaustion rather than mere consideration of race-neutral alternatives, the requirement that universities seriously consider workable race-neutral alternatives has been superseded by the requirement that reviewing *courts* be satisfied that these alternatives will not suffice. This represents a third departure from *Grutter*. In *Fisher*, the Court shifts responsibility for assessing the viability of workable race-neutral alternatives from the university to the courts. In *Grutter*, this element of narrow tailoring was to be conducted in "good faith" by the university.⁴⁵ In *Fisher*, however, the "reviewing court" must be "satisfied" that "no workable race-neutral alternative" would suffice.⁴⁶

The Court also tightened narrow tailoring in other critical respects. The primary error the Supreme Court found with the Fifth Circuit's decision in *Fisher* is that it accorded too much deference to the university in evaluating whether the program was narrowly tailored. The Court in *Grutter* suggested that courts offer some deference, grounded in First Amendment interests, to a University's pursuit of its pedagogical goals, including the selection of its own student body.⁴⁷ Drawing from Justice Powell's *Bakke* opinion,

43. This re-writing is semantically plausible depending on the meaning or construction of the words "serious, good faith consideration." "Serious" could be given more weight than the Court may have suggested in *Grutter*. In that reading, "serious" carries some of the work that is now being offloaded to other words in a revised standard. See *Grutter*, 539 U.S. at 339.

44. *Fisher*, 133 S. Ct. at 2420. (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)).

45. *Grutter*, 539 U.S. at 339–40 ("Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.").

46. *Fisher*, 133 S. Ct. at 2420.

47. See *Grutter*, 539 U.S. at 329. "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.* The Court continued: "In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.'" *Id.* (citing *Bakke*, 348 U.S. at 312).

the Court in *Grutter* reiterated that “good faith” in that judgment will be presumed.⁴⁸ Although *Grutter*’s language of deference is found in passages discussing the compelling interest prong of strict scrutiny,⁴⁹ it is not evident that *Grutter* distinguished between the deference in the narrow tailoring and compelling interest prongs as finely as *Fisher*.⁵⁰ This observation is bolstered by Justice Kennedy’s dissent in *Grutter*, in which he complained that “[t]he Court confuses deference to a university’s definition of its educational objective [of student body diversity] with deference to the implementation of this goal.”⁵¹

In its narrow-tailoring analysis, the *Grutter* Court only demanded “good faith” consideration of race-neutral alternatives by the university.⁵² While purporting not to challenge “the correctness of that

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we *defer*. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of *deference* to a university’s academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6 (1978); *Bakke*, 438 U.S. at 319, n. 53 (opinion of Powell, J.).

... .

. . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” [*Bakke*,] 438 U.S. at 318–19.

Id. at 328–29 (emphasis added).

It should also be remembered that the *Grutter* dissenters strongly criticized the Court’s language of deference more generally, viewing it as “inconsistent” with the “concept of strict scrutiny.” See 539 U.S. at 350 (Thomas, J., dissenting) (“Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”); *cf. id.* at 328 (O’Connor, J., majority opinion) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

48. *Id.* at 308.

49. *Id.* at 308, 329.

50. See *infra* Part II. The responsibility to consider race-neutral alternatives in good faith rested with universities in *Grutter*. In *Fisher*, the courts, not the academic institution, must be satisfied about the viability of race-neutral alternatives. This shift in responsibility underscores the degree of deference *Grutter* accorded universities, even in the narrow-tailoring prong.

51. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). “In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.” *Id.* Justice Kennedy is drawing a distinction between deference in the compelling interest and narrow tailoring prongs. His reference to empirical data is presumably regarding social science evidence on the benefits of diversity that would inform a university’s judgment.

52. *Id.* at 339. The language of “good faith” also suggests or implies some deference. After all, as described *supra* at note 50, the court, not the university, must be satisfied about

determination,” Justice Kennedy’s opinion on behalf of the Court in *Fisher* adroitly excises this element out of the prevailing standard.⁵³ As he explains, “*Grutter* did not hold that good faith would forgive an impermissible consideration of race.”⁵⁴ Yet, whether such consideration of race is permissible or not depends, in large part, on whether it is narrowly tailored. Demanding a permissible use of race in the first instance introduces a circular logic that effectively eliminates or minimizes the good faith element in this aspect of narrow tailoring. The *Grutter* Court sanctioned “good faith consideration of workable race-neutral alternatives. . . .”⁵⁵ The *Fisher* Court countenances neither mere ‘consideration’ nor simple ‘good faith’ but demands more.⁵⁶

The tendency to conflate standards for the narrow tailoring and compelling interest prongs, evident in Justice Kennedy’s critique of the Fifth Circuit, inheres in the structure of strict scrutiny itself. The required tailoring must account for the interest pursued and cannot be acontextually analyzed. The Court, however, sometimes conducts its narrow tailoring analysis entirely removed and abstracted from the interest being evaluated. The exhaustion requirement illustrates this deeper flaw in the Court’s narrow tailoring analysis. Narrow tailoring, by definition, tailors to the interest asserted. To determine whether a university’s use of race is narrowly tailored to serve a compelling governmental interest requires a careful understanding of that interest. The exhaustion requirement is not tailored to the interests asserted but appears to be acontextually imported. Chief Justice Roberts’ plurality opinion in *Parents Involved* is illustrative.

In *Parents Involved*, Chief Justice Roberts’ plurality opinion side-stepped analyzing the racial diversity interest advanced by the defendant-respondent school districts by asserting that, regardless of the interest at stake, the plans were not narrowly tailored. Roberts stated, “[t]he debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored. . . .”⁵⁷ This makes little sense as a

the viability of workable race-neutral alternatives after *Fisher*, whereas in *Grutter*, the university was responsible for considering alternatives, and then only in good faith.

53. *Fisher*, 133 S. Ct. at 2421.

54. *Id.*

55. *Grutter*, 539 U.S. at 339.

56. Good faith only applies, in the view of the *Fisher* Court, if the use of race is already narrowly tailored. Requiring that good faith only apply if the use of race is narrowly tailored in the first place effectively writes the good faith requirement out of the narrow tailoring test.

57. *Parents Involved*, 551 U.S. at 726.

matter of logic.⁵⁸ After all, the interest asserted or accepted defines the scope of narrow tailoring. The question of whether the interest at issue was a broader or narrower concept of diversity necessarily affects whether the means used to pursue that end are properly tailored. Narrow tailoring is not an analysis without context, and yet that is how the Chief Justice treated it in *Parents Involved*.

The Chief Justice's handling of the relationship between the compelling interest and narrow tailoring prongs in *Parents Involved* is inconsistent with his questioning during oral argument in *Fisher*. Chief Justice Roberts pressed Respondents to define the term "critical mass" so that he could determine whether the use of race was narrowly tailored:

I understand my job, under our precedents, is to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won't tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?⁵⁹

In *Parents Involved*, Roberts did not merely fail to follow the Court's precedents. He failed to do the job he adamantly suggested was required.

One of the sources of confusion in narrow tailoring analysis is the subtly shifting purposes of strict scrutiny over time. This is yet another departure evident in *Fisher*. Strict scrutiny's varied purposes may individually suggest differing legal standards designed to serve those ends. As those purposes change or shift in emphasis, so do the legal standards that arise from them. *Fisher*'s articulation of narrow tailoring reflects a larger, mostly implicit, shift in the underlying rationale for strict scrutiny.

In earlier racial classification cases, the Court explained that the primary function of strict scrutiny was to screen for illegitimate motives.⁶⁰ In contesting the application of strict scrutiny to all racial

58. See Powell & Menendian, *supra* note 15, at 650–54 (providing a more detailed parsing of Chief Justice Robert's narrow tailoring analysis in *Parents Involved*).

59. *Fisher* Oral Argument, *supra* note 33, at 46. Chief Justice Roberts's inconsistency suggests a results-oriented jurisprudence. He either demands a precise definition of the compelling interest or sidesteps such an inquiry entirely, depending on whether it serves his presumed objective of striking down or limiting race-conscious policies.

60. See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (explaining that heightened scrutiny applies because the Court must examine the statute's purpose and justification to ensure that the purpose is not "invidious discrimination."). Many cases reiterated this basic rationale, albeit in slightly different formulations. In *Loving v. Virginia*, the Court explained that "[t]he equal protection clause requires the consideration of whether the classifications

classifications, various parties and several Justices argued that the use of racial classifications in pursuit of remedial objectives or on behalf of benignly motivated legislation should be subject to a lower standard of review.⁶¹ By arguing that the purpose of strict scrutiny was to screen for illegitimate motives and saying that good intentions cannot be presumed, conservative jurists applied strict scrutiny even to ostensibly 'benign' or 'remedial' legislation.⁶² As the Court explained in *Croson*, "[a]bsent searching judicial inquiry into the justification for such race-based measures," courts have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."⁶³ However, in more recent cases, another ground or rationale for strict scrutiny is increasingly evident.

In *Grutter*, the Court explained its rationale for strict scrutiny: "We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by *assuring that [the government] is pursuing a goal important enough* to warrant use of a highly suspect tool."⁶⁴ In other words, the Court introduced an additional rationale for strict scrutiny: balancing the costs of a racial classification against its benefits. The Court's assertion that the government's use of race is "important enough" to justify its service on behalf of a compelling interest suggests an explicit cost/benefit rationale. The Court's anti-classification jurisprudence has rested more prominently on the latter rationale, while it often frames its analysis in terms of the

drawn by any statute constitutes an arbitrary and invidious discrimination." 388 U.S. 1, 10 (1967). Two decades later, a similar parsing was found in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

61. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Souter, Ginsberg and Breyer dissenting) ("The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. [. . .] The Court's explanation for treating dissimilar race based decisions as though they were equally objectionable is a supposed inability to differentiate between 'invidious' and 'benign' discrimination."). More precisely, in cases before *Croson* and *Adarand*, the Court was deeply divided on whether strict scrutiny review applied to all racial classifications. Previous cases had established that strict scrutiny was reserved for cases involving invidious discrimination but that 'benign' or 'remedial' legislation employing racial classifications was subject to a lesser standard of review, at least with respect to Congressional authority to pass remedial legislation through the enforcement clause of the Fourteenth Amendment. See *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 638 (1990) overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 480-93 (2000).

62. For an insightful analysis of these shifting rationales, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

63. *Croson*, 488 U.S. at 493.

64. *Grutter*, 539 U.S. at 326 (internal quotations omitted; emphasis added).

former. The decisive role of Justice Kennedy on the Court may explain this shift.

A careful reading of Justice Kennedy's jurisprudence reveals a deep concern for individual dignity and autonomy, which he believes racial classifications impugn.⁶⁵ His emphasis on dignity may be characterized as part of a broader jurisprudence of individualism.⁶⁶ Justice Kennedy, like Justice O'Connor, is committed to the preservation of elite institutions, but is troubled by the fact that admissions (the allocation of a societally important and scarce resource) may be reduced to a single or a few factors rather than looking at an individual as a whole. Justice Kennedy's jurisprudence suggests that he is attracted to policies and plans that view people as individuals rather than as a single metric, whether that be SAT scores *or* race.

Typical of his description of the harms of racial classification, Justice Kennedy asserted in *Parents Involved* that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."⁶⁷ Yet, in *Fisher*, he asserts, quoting *Crosby*, that the rationale for strict scrutiny rests on the ground that the government must prove that "the reasons for any [racial] classifications [are] clearly identified and unquestionably legitimate."⁶⁸ Despite his assertion to the contrary, neither "clear identification"

65. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

66. In some cases, Justice Kennedy's individualism acquires romantic overtones. In *Planned Parenthood v. Casey*, Justice Kennedy famously wrote: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and *of the mystery of human life*. . . ." 505 U.S. 833, 851 (1992). This core value finds expressions not only in his race cases but was also prominent in his *Windsor* opinion. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). It undoubtedly informed his decision to join the dissenters in the landmark 2012 term decision, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, in which the Court narrowly upheld the Affordable Care Act from constitutional challenge. 132 S. Ct. 2566. In oral argument, Kennedy posed a question to the Solicitor General that suggested his concern over the ways in which the law may infringe individual liberty: "Here the government is saying that the Federal Government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the Federal Government to the individual in a very fundamental way." *Kennedy: Individual Mandate Fundamentally Changes Relationship of Gov't*, REAL CLEAR POLITICS (March 27, 2012), http://www.realclearpolitics.com/video/2012/03/27/kennedy_individual_mandate_fundamentally_changes_relationship_of_govt.html (quoting Justice Kennedy).

67. *Parents Involved*, 551 U.S. at 797. Journalists and Court observers have increasingly noted Justice Kennedy's "rhetoric of dignity." See, e.g., Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, NPR (June 28, 2013), <http://www.npr.org/blogs/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor>; Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG (May 30, 2011), <http://www.bloomberg.com/news/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman.html> ("Kennedy started with what is undoubtedly his favorite constitutional concept: dignity.").

68. *Fisher*, 133 S. Ct. at 2413 (internal quotations omitted).

nor “legitimacy” is the overriding concern for Justice Kennedy. The lack of clarity for strict scrutiny produces a confusing analysis, especially with respect to narrow tailoring, which depends on both an understanding of the interest being evaluated as well as the rationale for strict scrutiny.

Without clearly understanding the rationale for strict scrutiny, assessing the logic of narrow tailoring or its requirements is difficult. Narrowly tailored efforts must not only be tailored to the interest asserted, but must also be comprehensible within the framework of strict scrutiny. If the purpose of strict scrutiny were simply to ensure benign motivation, then narrow tailoring would not be necessary, let alone a critical inquiry. This is because narrow tailoring itself has little bearing on the motives or interests asserted but primarily ensures that the use of race is as limited as possible.⁶⁹ Narrow tailoring’s primary work is not to screen for or “smoke out” illegitimate motives but to minimize what the Justices perceive as the burden or cost to innocent parties.⁷⁰ Understanding narrow tailoring’s function in this way helps explain the exhaustion requirement as well as the Court’s increasing emphasis on narrow tailoring in its strict scrutiny analysis in this context.

II. THE LIMITS OF EXHAUSTION

As noted, the Court’s holding that narrow tailoring requires the “reviewing court . . . be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity . . . about as well and at tolerable administrative expense”⁷¹ is the most important statement of law arising from *Fisher*. This articulation of narrow tailoring appears to be a departure from precedent. Although seeming to clarify narrow tailoring requirements, this holding instead may shift ambiguity from one area to another. While exhaustion of race-neutral alternatives is now a mandatory exercise, the precise meaning and scope of the exhaustion requirement remains unclear.

69. As noted *supra* note 66, the conservative Justices’ emphasis on narrow tailoring in recent cases suggests the more important function of strict scrutiny to minimize the harms of even sanctioned or compelling uses of race.

70. At times, the Court is more candid about this fact. As it explained in *Grutter*, “Even remedial race-based governmental action generally remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.” 539 U.S. at 341 (internal quotations omitted).

71. *Fisher*, 133 S. Ct. at 2420.

Although Justice O'Connor famously explained that strict scrutiny is not "strict in theory, but fatal in fact,"⁷² Justice Kennedy countered with the rhetorical rejoinder that strict scrutiny should not be "feeble in fact" either.⁷³ What facts must be presented to satisfy a court that no workable race-neutral alternatives are viable? What degree of certainty is called for in order to satisfy the reviewing court? How are we to understand the standard of 'tolerable administrative expense'? Where is the threshold for tolerable expense or the line between tolerable and intolerable expense?

The exact meaning and scope of the exhaustion requirement will be a focus of inquiry on remand.⁷⁴ Although the University of Texas issued a statement that the Supreme Court's decision would not affect their admissions policies following the ruling,⁷⁵ on remand UT will be called upon to present evidence as to why race-neutral alternatives are insufficient to achieve its pedagogical objectives. In particular, the university will be pressed to explain why the TPP is insufficient to achieve its goals, especially given the ways in which the TPP has evidently increased the levels of racial diversity in the undergraduate student body after *Hopwood*.⁷⁶

Establishing the necessity of the additional race-conscious, holistic admissions procedure is not an impossible showing, but it will be arduous and fact-intensive. Specific findings regarding the limitations of the TPP in producing student body diversity in a variety of settings will be critical. Moreover, any social scientific research that

72. *Adarand*, 515 U.S. at 237.

73. *Fisher*, 133 S. Ct. at 2421.

74. At the time of this writing, the briefing in the Fifth Circuit has not yet been completed, but Plaintiff-Appellant has already argued that race-neutral alternatives (such as the TPP) promote racial diversity as well, or about as well, as race-conscious efforts. See Plaintiff-Appellant's Supplemental Brief at 34-35, *Fisher v. Univ. of Tex. at Austin* (5th Cir. argued Nov. 13, 2013) (No. 09-50822), 2013 WL 5603455 ("Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% law, UT's use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322.").

75. See *University of Texas President Responds to Supreme Court Ruling*, THE UNIV. OF TEX. AT AUSTIN (June 24, 2013), <http://www.utexas.edu/news/2013/06/24/university-of-texas-at-austin-president-responds-to-supreme-court-ruling/> (last visited Nov. 13, 2013).

76. See *Enrollment of First-Time Freshman Minority Students Now Higher than Before Hopwood Court Decision*, THE UNIV. OF TEX. AT AUSTIN (Jan. 29, 2013), http://www.utexas.edu/news/2003/01/29/nr_diversity/ ("A report by the university's Office of Institutional Research for the 2002 fall/summer enrollment shows there were 266 African Americans, 932 Hispanics and 942 Asian Americans enrolled as first-time freshmen at the [UT] in 1996. The numbers of African Americans and Hispanics dropped after the Hopwood ruling, although the figures for Asian Americans increased. In 1997, the numbers for first-time freshmen were down to 190 African Americans, 892 Hispanics and 1,130 Asian Americans.") Not until 2002—and many years after TPP became law in 1997—did first-time freshman enrollment for all three ethnic groups increase to a level above the 1996 pre-Hopwood figures. In the Fall of 2002, enrollment included 272 African Americans, 1,137 Hispanics and 1,452 Asian Americans. *Id.*

can be advanced on what may constitute a critical mass to create a diversity of viewpoints, so that minority students are not tokenized, may be relevant inquiries on remand.⁷⁷ The sociological complexity of race underscores the limits of exhaustion.

Race is best understood as a socio-cultural location in American society.⁷⁸ As a social construction, race is not an essential or static characteristic but a dynamic one.⁷⁹ Swedish sociologist Gunnar Myrdal, in his epic treatise *An American Dilemma: The Negro Problem and Modern Democracy*, was the first to understand that race was visible in almost every domain of American life but wholly explainable by none. What bound race together and made it comprehensible as an independent variable was the effects of each domain on the others.⁸⁰ It is the interaction of domains such as housing, education, employment, and health, to take but a few, that explains racialized outcomes.⁸¹ The attempt to explain or measure the effects of racial discrimination in any particular domain is necessarily incomplete.

If race is a socio-cultural location, then the more factors one considers that correlate to race, the closer one may approximate race. Conversely, a single-factor approach will fail to capture the disadvantage experienced by marginalized racial groups.⁸² Nonetheless, if race (both measured outcomes along racial categories and the

77. See Plaintiff-Appellant's Supplemental Brief *supra* note 74, at 25–33.

78. See JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 54 (2012) (“Because of its socially constructed nature, the meaning attributed to a racially identified group or characteristic depends to a great extent on the sociohistorical context in which the racing occurs, and racial meaning varies across time and space.”).

79. Although race was perceived, like sex, to be an immutable, inherited characteristic, race as a social construction is no longer viewed that way. Rather, racial categories are folk taxonomies and are better understood as dynamic and fluid. A careful history of race illustrates this. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); AUDREY SMEDLEY & BRIAN D. SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW (4th ed. 2012).

80. See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 75-79 (1944). Myrdal explains, “The unity is largely the result of cumulative causation binding them all together in a system and tying them to white discrimination. It is useful, therefore, to interpret all the separate factors from a central vantage point—the point of view of the Negro problem.” *Id.* at 77. “In an interdependent system of dynamic causation there is no ‘primary cause’ but everything is cause to everything else.” *Id.* at 78.

81. See LIVING AND LEARNING: LINKING HOUSING AND EDUCATION POLICY 15 (john a. powell et al. eds. 2001); see also STEPHEN MENENDIAN & CAILIN WATT, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, DRAFT: *Systems Thinking and Race* (Dec. 2008), available at http://www.kirwaninstitute.osu.edu/reports/2008/12_2008_SystemsThinkingandRace_Primer.pdf.

82. MYRDAL, *supra* note 80, at 1069 (“This conception of a great number of interdependent factors, mutually cumulative in their effects, disposes of the idea that there is *one* predominant factor, a ‘basic factor.’ . . . [T]his one-factor hypothesis is not only theoretically unclear, but is contradicted by easily ascertainable facts and factual relations.”).

social construction of the categories or racial classification schemes themselves) is the emergent property of interacting factors, it is conceivable that race could be deconstructed into its constituent parts and retain much of the same analytic and explanatory force. Race may not be explainable in terms of any single variable, but if we disaggregate all of the variables that explain race, in theory we could employ those factors, in lieu of race, as race-proxies or correlates to accomplish the same ends that race is serving.

The argument that using race as a factor is necessary to achieve racial diversity or reduce racial isolation and, further, that race-neutral alternatives are insufficient, is not a conceptual or theoretical claim but primarily a practical one. The relative disadvantage of certain racialized populations results from dozens of demographic, social, and economic factors that vary across geographic areas and local conditions.⁸³ The convergence of these factors with race makes race a particularly useful consideration in understanding life chances, but this clustering also makes it vexing to untangle and analyze the various factors that explain race. Given the number of the variables that contribute to racial disadvantage and complexity of their interaction, an admissions policy limited to race-neutral factors cannot easily capture their cumulative effect on educational opportunity.⁸⁴ While there may be administrative reasons to view at race as the sum of its parts, this approach ignores the relationships between the parts, and the emergent properties of complex systems that result and constitute race itself.

Following the Supreme Court's decision in *Parents Involved*, the Jefferson County School Board, under the leadership of Superintendent Pat Todd, adopted a revised student assignment policy designed to maintain student body diversity.⁸⁵ The successfully

83. *Id.* at 75–79. See also Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

84. See Rebecca Blank, *Tracing the Economic Impact of Cumulative Discrimination*, 95 AM. ECON. REV. 99 (May 2005) (“Current social science efforts to measure discrimination at a decision-point within a specific domain may seriously understate the impact of discrimination.”). *Id.* at 99–100. For a more comprehensive study of the cumulative effects of neighborhood conditions, see ROBERT SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 100 (2013) (“I argue that disadvantage is not encompassed in a single characteristic but rather is a synergistic composite of social factors that mark the qualitative aspects of growing up in severely disadvantaged neighborhoods.”).

85. See Sarah Diem, *The Relationship Between Policy Design, Context, and Implementation in Integration Plans*, ED. POL'Y ANALYSIS ARCHIVES, Aug. 13, 2012, at 19 [hereinafter Diem, *The Relationship Between Policy Design, Context, and Implementation in Integration Plans*], available at <http://epaa.asu.edu/ojs/article/view/958/993>; see also Erica Frankenburg & Sarah Diem, *School Board Leadership and Policymaking in Changing Political Environments*, 45 THE URBAN REV. 117 (2013), available at <http://link.springer.com/article/10.1007%2Fs11256-012-0211-8>; Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, at A38; Richard Day, *JCPS*

challenged assignment policy had used individual racial classifications.⁸⁶ Rather than relying on the race of individual students, the revised student assignment policy looked at three geographic factors to devise new attendance zones: median household income, the percentage of non-white students, and the average educational attainment of adults.⁸⁷ The idea of using multiple indicators in the construction of attendance zones was based on research that suggests a relationship between certain indicators and educational opportunity.⁸⁸ Single indicator approaches have also proven successful, but they are less effective at creating racial diversity.⁸⁹ These factors were used to draw attendance zones that would then be used in deciding student assignments and transfer requests. Elementary schools would be required to meet the district's guidelines. Although this formula looked at race, it did so only at the neighborhood or aggregate level in drawing attendance boundaries. Thus, Jefferson County's School Board sought to comply with the Supreme Court's ruling by not employing individual racial classifications.⁹⁰ These efforts, while maintaining some level of

Board Oks Revised Student-Assignment Plan, KENTUCKY SCHOOL NEWS AND COMMENTARY (January 12, 2012, 1:52 PM), <http://theprincipal.blogspot.com/2012/01/jcps-board-oks-revised-student.html>.

86. See *Parents involved*, 551 U.S. at 715–18 (describing the Jefferson County Public Schools plan).

87. Diem, *The Relationship Between Policy Design, Context, and Implementation in Integration Plans*, *supra* note 85, at 19.

88. See generally MI-KYUNG BAEK ET AL., KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, K-12 DIVERSITY STRATEGIES FOR DIVERSE AND SUCCESSFUL SCHOOLS (July 2007), available at <http://www.educationjustice.org/assets/files/pdf/Resources/Policy/Integration/K12%20Diversity.pdf>. See also Erica Frankenburg, *Voluntary Integration After Parents Involved: What does research suggest about available options?* 8–20, (Harvard Law Sch., Working Paper, Dec. 2007), available at <http://www.charleshamiltonhouston.org/wp-content/uploads/2013/11/Frankenburg-Voluntary-Integration-After-PICS.pdf> (detailing various race-neutral alternatives).

89. *Id.* The degree to which SES indicators may generate racial diversity depends on a number of factors, including the strength of the regional correlation between race and class. One notable successful example is the Wake County student assignment plan, which adopted a race-neutral diversity policy based on income alone. See Bazelon, *supra* note 85, at 42 (“In 2000, after the U.S. Court of Appeals for the Fourth Circuit began to frown on the use of race in student assignment — a harbinger of the Supreme Court’s stance last year — the district began assigning kids to schools based on the income level of the geographic zone they lived in. The aim was to balance the schools so that no more than 40 percent of the students at each one come from a low-income area.”). In the first 2 years of the policy, 75% of schools complied with both academic and FRL caps, and just less than two-thirds were racially diverse. Kathryn McDermott et al., *Diversity, Race-Neutrality, and Austerity: The Changing Politics of Urban Education* 35–39 (Working Paper, Aug. 24, 2010), available at <http://ssrn.com/abstract=1664683>. See also Frankenburg & Diem, *supra* note 85, at 129.

90. A lawsuit against the District under the revised policy was dismissed for that reason. See *Jefferson County Bd. of Educ. v. Fell*, 391 S.W. 3d 713 (Ky. 2012) (reinstating the ruling of the Jefferson Circuit Court dismissing the complaint). Dakarai Aarons, *Jefferson Co. Schools Sued Over Student-Assignment Plan*, EDUCATION WEEK (June 17, 2010, 9:49 AM), <http://blogs>

diversity, have not proved as successful as the individual use of race.⁹¹

While multi-factor approaches may better capture particular forms of disadvantage, they are less effective at producing raw numerical racial diversity than individual racial classifications. The reason for this is self-evident: although race-neutral factors may correlate to race, they are necessarily less precise than race itself. In addition, the use of race at the neighborhood level may help compensate for the deficiencies in socio-economic considerations alone because socioeconomic status is an imprecise channeling mechanism for producing a diverse student body. For example, some white students residing in hyper-segregated and predominantly non-white neighborhoods are likely to be channeled through the consideration of neighborhood demographics that would otherwise not be re-assigned under a more direct assignment policy. To compensate for these deficiencies, more factors are needed to ensure greater precision in terms of desired outcomes. Consequently, while approximating race, these approaches are far more complex and resource intensive than using a simple race criterion, and require additional expertise or outside consultants.⁹²

Other districts have followed suit and developed similar multi-factor approaches. The Berkeley Unified School District implemented a plan that manages parental choice for elementary schools using a similar diversity index that calculates the percentage of students of color, parental income level, and parental education

.edweek.org/edweek/District_Dossier/2010/06/jefferson_co_schools_sued_over.html; *JCPS Student Assignment Plan Lawsuit Dismissed*, WHAS11 (Oct. 6, 2009, 6:46 PM), available at <http://www.whas11.com/news/local/64442732.html>.

91. The initial data suggests some wide variances in race enrollments that were not experienced in the original voluntary integrative assignment plan. In the 2008–09 operation, almost fifty percent of the elementary schools, for example, were outside of the desired range. See Sarah Diem, *Design Matters: The Relationship Between Policy Design, Context, and Implementation in Integration Plans Based on Voluntary Choice and Socioeconomic Status* (May 2010) (unpublished Ph.D. dissertation, The University of Texas at Austin), at 145–46, Figure 8, available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-05-909/DIEM-DISSERTATION.pdf?sequence=1>. Part of the problem is that the plan was only phased in for K–2nd grades, but the plan still showed much greater variances than expected.

92. See Diem, *The Relationship Between Policy Design, Context, and Implementation in Integration Plans*, *supra* note 85, at 5. (“Whether or not a SES-based integration can succeed depends on a number of factors including: (a) the strength of association between race and income; (b) the policies defining socioeconomic integration; (c) the relationship between racial and income residential segregation in a school district; (d) the factors determining the school assignment; and (e) the effect of the SES-based integration policy on families’ decisions as to where to enroll their child, which includes within the neighborhood school district, outside of the neighborhood district, or in private or public schools.”).

level.⁹³ The California State Court of Appeal upheld this plan under California's Proposition 209 on the grounds that it did "not consider an individual student's race at all when assigning the student to a school" and therefore did not employ any racial classifications.⁹⁴

The Chicago Public Schools adopted a multi-factor plan that, in contrast, does not rely on race, even at the neighborhood level.⁹⁵ Previously, the Chicago Public Schools had been under a desegregation mandate as part of a consent decree.⁹⁶ After the decree was lifted in 2009, the school district abandoned the use of individual racial classifications.⁹⁷ Subsequently, the Chicago Board of Education adopted a new system as a new way of creating social and economic diversity in the city's selective schools. The key to the new system is the creation of four non-contiguous zones or "tiers." The district evaluated its nearly 900 census tracts based upon five indicators: median income, adult education, percentages of single-family homes and homeowners, and the percentage of children living in non-English-speaking households. A sixth criterion was added for the 2011–12 school year: the performance of schools in that census tract.⁹⁸ The increasing complexity of these plans in terms of number and sophistication of factors considered suggests the relative difficulty of promoting racial diversity without resorting to individual racial classifications, let alone race at the neighborhood level.

These plans have been laboriously developed using available demographic data with the help of consultants and student assignment experts. The question of whether a race neutral alternative

93. See *BUSD Student Assignment Plan/Policy*, BERKELEY PUBLIC SCHOOLS (last visited Mar. 2, 2014), <http://www.berkeleyschools.net/information-on-berkeley-unifieds-student-assignment-plan/>. The plan uses these factors to create "composite diversity averages" derived from the planning areas students live in. Using three composite diversity categories, students are then assigned proportionately to elementary schools.

94. *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 211 (Cal. Ct. App. 2009).

95. See Noreen S. Ahmed-Ullah, *Kids from Areas with Low-Performing Schools Get Boost from CPS*, CHICAGO TRIBUNE, (Nov. 04, 2010), http://articles.chicagotribune.com/2010-11-04/news/ct-met-cps-admissions-new-20101104_1_magnet-schools-worst-elementary-schools-low-performing-schools.

96. See Consent Decree Memorandum Opinion, *United States v. Board of Educ.* (No. 80-C-5124, N.D. Ill., Sept. 24, 2009), available at http://www.cps.edu/About_CPS/Departments/Law/Documents/ConsentDecree.pdf.

97. CHICAGO PUBLIC SCHOOL TIERS, <http://cpstiers.opencityapps.org/about.html> (last visited Nov. 13, 2013); see Sarah Karp, *Federal Judge Ends Chicago Schools Desegregation Decree*, CHICAGO CATALYST (Sept. 24, 2009), <http://www.catalyst-chicago.org/notebook/2009/09/24/federal-judge-ends-chicago-schools-desegregation-decree>.

98. HOW THE TIERS ARE CALCULATED - CHICAGO PUBLIC SCHOOL TIERS, <http://cpstiers.opencityapps.org/tier-calculation.html#footnote-2> (last visited April 5, 2014).

would perform “about as well and at tolerable administrative expense” is critical, as the efficacy of these plans and others like them has borne out. The administrative expense of developing race-neutral plans goes far beyond the resources of most admissions committees, let alone school boards and administrative staff, when compared to the cost of using racial classifications in either student assignment or admissions review.⁹⁹ Race-neutral alternatives are far more complex in design and operation, and the initial data from the Jefferson County Public School plan suggests that they may not be as effective as programs based on the individualized consideration of race.¹⁰⁰ The other plans modeled on the JCPS plan have not yet been in operation long enough to be fairly evaluated.

The question of allowable tolerances and administrative expense and difficulty is a significant practical issue and may well loom larger on remand in *Fisher* and in future cases than members of the Court may have envisioned. Scaling multi-factor approaches to the university level requires not only far more data collection and analysis than is needed in other contexts, but at a much larger geographic scale, often state-wide or beyond. The practical consequence of exhaustion may well mean the abandonment of any effort to promote racial inclusion. It will be politically difficult to return to race-specific approaches once race-neutral alternatives have proven less effective or administratively intolerable.¹⁰¹

III. BEYOND RACE UNCONSCIOUSNESS

In her brief dissent, Justice Ginsburg sarcastically noted that “only an ostrich could regard the supposedly neutral [ten-percent plan] as race unconscious.”¹⁰² As she accurately observed, “Texas’s percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.”¹⁰³ Since none of the

99. The Kirwan Institute was able to provide pro bono consulting to districts such as Jefferson County on account of the fact that it received generous grant support from the Ford Foundation.

100. Kathryn McDermott et al., *supra* note 89, at 20–22. The new policy has faced various challenges, particularly regarding issues of transportation and transfer requests. Some students have had to travel longer distances to school. Transfer requests from parents with students in Kindergarten and first grade significantly increased in 2009–10 school year and has continued to grow.

101. Experience suggests that the political will needed to implement a race-conscious student assignment plan is usually difficult to reassemble once it has dissipated.

102. *Fisher*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting).

103. *Id.*

other Justices argued or held that the TPP was race-blind, these remarks may appear non sequitur. However, Justice Ginsburg is addressing the characterization of the TPP as race-neutral by Abigail Fisher and her amici,¹⁰⁴ and her dissent underscores the fact that the TPP is only race-neutral in the narrow sense that it does not employ racial classifications. Indeed, it was designed and adopted to accomplish the same ends and yet evade heightened judicial scrutiny.¹⁰⁵

Beyond rebutting the notion that the TPP is colorblind, Justice Ginsburg's dissent also draws attention to the incongruity of strictly scrutinizing a race-conscious plan that uses race as one of many factors in admissions while tacitly endorsing another race-conscious plan designed to achieve the same goals without using race at the individual level. Although these plans share the same objective, the TPP represents a less direct means.¹⁰⁶ To highlight this incongruence, Justice Ginsburg asserts her preference for policies that are explicit: "I remain convinced, those that candidly disclose consideration of race [are] preferable to those that conceal it."¹⁰⁷ This, of course, runs contrary to the Court's usual treatment of race, which incentivize government actors to conceal the extent of their race-consciousness in order to avoid heightened judicial scrutiny.¹⁰⁸

Justice Ginsburg is not suggesting that the Court subject the TPP to heightened review but rather, in a common sense manner, drawing attention to the paradox of subjecting different forms of race-conscious policymaking to such disparate standards. In this way, she carries the argument four dissenters advanced in *Parents Involved* and stakes out a position that appreciates the difference between invidious and integrative policies. This is a position that the Court jettisoned in *Bakke*, which rejected the longstanding assumption explicated in *Carolene Products* footnote 4 that heightened scrutiny should be reserved for those processes that burden "discrete and

104. See Brief for Petitioner, *supra* note 5, at 5 ("Despite the success of its race-neutral system in increasing minority enrollment. . . ." (referring to the TPP)); see also Brief For the Cato Institute as *Amicus Curiae* in Support of the Appellant Urging Reversal at 26, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2013) (No. 09-50822) ("[T]he University enrolls more than 'meaningful numbers,' *Grutter*, 539 U.S. at 338, of both black and Hispanic students under Texas's race neutral Top 10% Law.").

105. *Fisher*, 133 S.Ct. at 2433.

106. This is because the TPP only accounts for race at the district level, a larger unit than either individual racial classification, as were used pre-*Hopwood*, or neighborhood classifications, as were used in Jefferson County post-*Parents Involved*.

107. *Id.* at 2433 (Ginsburg, J., dissenting) (citing *Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting)) (Internal quotations omitted).

108. See Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*. 120 *YALE L. J.* 1279, 1359 (2011) (arguing that the Court is concerned with the expressive nature of the use of race).

insular minorities.”¹⁰⁹ By preserving this distinction, Justice Ginsburg’s dissent indicates a willingness to fight another day.

The exhaustion requirement introduces a circular irony into strict scrutiny analysis. If the use of race requires the exhaustion of workable race-neutral alternatives to satisfy strict scrutiny, then the use of those alternatives would not trigger strict scrutiny in the first place. Consequently, in the case of race-neutral alternatives, the government interest being pursued need only be legitimate rather than ‘compelling’ or even ‘important’ as strict or intermediate scrutiny require. In addition, the means to achieve that objective need not be precise but only ‘rationally related’ to that interest.¹¹⁰

If narrow tailoring requires the exhaustion of race-neutral alternatives, then the interest those alternatives serve need not be compelling because strict scrutiny would not apply. Rational basis review would then presumably apply to race-neutral alternatives (such as socio-economic status), even though they are race-conscious. In *Bakke*, the Court rejected the argument that “remedying societal discrimination” was a compelling governmental interest that justified the use of racial classifications.¹¹¹ Yet, that interest may well be (and probably would be) considered legitimate under rational basis review.¹¹² That interest could be pursued relentlessly through the use of race-neutral alternatives because race-neutral alternatives would not trigger strict scrutiny review. In other words, the exhaustion requirement demands evaluation of approaches that would not be subject to strict scrutiny review and, therefore, narrow tailoring.

Justice Ginsburg’s *Fisher* dissent underscores the strange gulf between the scrutiny applied to race-conscious policies that employ racial classifications and the scrutiny applied to race-conscious policies that do not employ individual racial classifications. With respect to the latter, Justice Kennedy’s concurrence in *Parents Involved* is perhaps the most illuminating statement on the range of

109. See generally Ian Haney Lopez, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1034–39 (2007) (arguing that *Bakke* represented a rejection of the *Carolene Product* footnote 4 constitutional framework).

110. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”). This is an example of rational basis review and the standard for rational basis review.

111. *Bakke*, 438 U.S. at 307 (referring to societal discrimination as “an amorphous concept of injury that may be ageless in its reach into the past.”).

112. See generally *id.* at 307 (The Court in *Bakke* held that remedying societal discrimination was not “compelling”); *Parents Involved*, 551 U.S. at 789 (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

permissible race-neutral alternatives, because it provides a functional guidance checklist of permissible race-conscious, but simultaneously race-neutral, possibilities:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.¹¹³

How might we apply these ideas to a post-*Fisher* environment? Within the parameters of the law set out in *Grutter*, universities enjoy wide latitude to fashion student bodies best suited to their pedagogical goals. Since virtually all universities, even elite private colleges, include the service and improvement of the society as part of their mission,¹¹⁴ as well as the development the next generation of leaders, admissions criteria may logically emphasize the role of universities as a ladder of economic and social mobility. An opportunity index methodology is one method for accomplishing this.

Multi-factor approaches are compelling because they not only paint a more vivid portrait of the underlying structural conditions but are also more narrowly tailored to particular forms of disadvantage. As described in Part II, a single indicator cannot capture the myriad factors that influence an individual's life chances. For this reason, all admissions processes rely on more than one indicator to

113. *Parents Involved*, 551 U.S. at 789. Illustrating the guidance function of Justice Kennedy's concurrence, the Departments of Justice and Education issued joint guidance that quotes and relies on Justice Kennedy's statement. See U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (last modified 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>.

114. See generally Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003) (describing the incongruence between university and professional schools' mission statements—which are very public-oriented—and their admissions policies).

select admitted students.¹¹⁵ However, traditional forms of merit-based selection typically reward socioeconomically advantaged students.¹¹⁶ SAT scores, for example, correlate more strongly to grandparent wealth than any other factor, even IQ.¹¹⁷ Affirmative action programs and similar attempts to identify historically disadvantaged students seek to compensate for the limitations present in traditional admissions criteria. Opportunity scoring is a sophisticated multi-factor methodology that better captures disadvantage than a single indicator.¹¹⁸

Opportunity scoring creates an index of factors which correlate to and causally explain life outcomes and projected life chances.¹¹⁹ Over time, this methodology has become more sophisticated and refined as additional indicators are added under key opportunity domains. The opportunity mapping methodology seeks to understand the distribution of opportunity over space. Given this geographic dimension, these indices can be represented using geographic information technology in the form of opportunity maps.¹²⁰

This methodology has been applied in numerous contexts: siting for low-income housing, targeting areas for employment and infrastructure investment, deployment of social services, and, following *Parents Involved*, creating attendance zones for K–12 student assignment policies.¹²¹ At the Kirwan Institute, we assisted in developing a

115. Most universities, at a minimum, look at applicants' grades and test scores and frequently consider additional factors. See, e.g., *Freshman Admission*, THE OHIO STATE UNIV. (last visited Mar. 2, 2014), <http://undergrad.osu.edu/admissions/freshman/index.html>.

116. Seventy-four percent of the students at the 146 most selective four-year colleges and universities in the US come from the top socioeconomic quarter of American families, compared to only three percent who come from the bottom quarter. Robert Haveman and Timothy Smeeding, *The Role of Higher Education in Social Mobility*, OPPORTUNITY IN AMERICA, VOL. 16, NO. 2 (Fall 2006), available at <http://futureofchildren.org/publications/journals/article/index.xml?journalid=35&articleid=90§ionid=550>.

117. Mary Beth Marklein, *SAT Scores Show Disparities by Race, Gender, Family Income*, USA TODAY (Aug. 26, 2009), http://usatoday30.usatoday.com/news/education/2009-08-25-SAT-scores_N.htm. In 2009, the highest average score on the SAT was posted by students who reported their family income as greater than \$200,000 annually. *Id.*

118. Opportunity scoring is an example of the kinds of sophisticated and expensive approaches the Court is demanding, as noted in Part II.

119. See generally *Opportunity Mapping Initiative and Project Listing*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (last visited Mar. 2, 2014), <http://kirwaninstitute.osu.edu/opportunity-communities/mapping/>. The opportunity scoring process is the predicate for the development of maps. "Opportunity mapping is a research tool used to understand the dynamics of 'opportunity' within metropolitan areas. The purpose of opportunity mapping is to illustrate where opportunity rich communities exist (and assess who has access to these communities) and to understand what needs to be remedied in opportunity poor communities. Opportunity mapping builds upon the rich history of using neighborhood-based information and mapping to understand the challenges impacting our neighborhoods." *Id.*

120. For a list of initiatives, see *id.*

121. See *id.* See also KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (last visited April 5, 2014), <http://kirwaninstitute.osu.edu/school-assignment-planning-montclair-new>

sophisticated opportunity index that was implemented in Montclair, New Jersey.¹²²

The Superintendent of Montclair schools, Dr. Frank Alvarez, reached out to the Kirwan Institute after *Parents Involved* and requested technical support and expert advice to ensure the district's magnet school student assignment policy complied with the decision. The district convened a subcommittee to begin reviewing the magnet school assignment plan. The committee worked with the Kirwan Institute to develop recommendations for a new school assignment policy that would reduce economic and racial isolation, guarantee a high quality education for every child, and comply with the law.

The Kirwan Institute's research on census and district level data suggested that a neighborhood schools policy would produce dramatic resegregation within the district, particularly at schools in the northern and southern areas of town.¹²³ In addition, a longitudinal review of the district's enrollment patterns under the magnet school plan revealed that although the district wide magnet school system had succeeded in producing elementary schools that are far more racially integrated than the district as a whole, Montclair had experienced slippage over time on account of changing demographics.

The Kirwan Institute recommended that the district use four opportunity indicators along with neighborhood racial demographics to develop geographic zones that would inform magnet school assignments.¹²⁴ These opportunity factors were weighted into a composite index, which divided the district into either two, three,

jersey/; KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (last visited April 5, 2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2011/10/85-102-Kirwan-AP-Final-10-10-for-singles-1.pdf>; KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY (last visited April 5, 2014), <http://kirwaninstitute.osu.edu/opportunity-communities/education/student-assignment-plans/>.

122. For our presentation to the Board of Education, see KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY & MPS SCHOOL INTEGRATION TASK FORCE, PRESENTATION: PRESERVING STRONG AND INTEGRATED SCHOOLS IN MONTCLAIR (Dec. 2009) [hereinafter PRESENTATION: PRESERVING STRONG AND INTEGRATED SCHOOLS IN MONTCLAIR], available at <http://www.montclair.k12.nj.us/ArticleFiles/537/kirwan.pdf>. For a broader look at our work, see KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, FINAL REPORT: MONTCLAIR PUBLIC SCHOOLS: FOCUS GROUPS, OCT. 23RD-25TH 2009 (2010), available at <http://kirwaninstitute.osu.edu/school-assignment-planning-montclair-new-jersey/>.

123. See PRESENTATION: PRESERVING STRONG AND INTEGRATED SCHOOLS IN MONTCLAIR, *supra* note 122, at 15–16 (neighborhood schools map).

124. After careful review, the opportunity indicators selected were median household income, parental education levels, free or reduced lunch, and poverty concentration.

or four zones.¹²⁵ The school district could use these opportunity zones to approximate student profiles, ensuring that students from different backgrounds are distributed throughout the school system. Such a plan was intended to ensure equitable educational opportunities for each child and maximize student achievement.

Using zones, as opposed to requesting individual data, is also less intrusive since it would not require any additional data collection from parents.¹²⁶ The opportunity index does not displace the use of other factors, such as special needs, siblings, or ESL (English as Second Language), and functions within the context of a parental choice mechanism.¹²⁷ Parents would rank their preferred school choices, and those choices would be maximized to the extent possible within the zone assignment ranges. The district would use the opportunity index to create zones that would have both a floor and a ceiling on student representation from each zone within each school and would pursue parental choice within those limits. Students from underrepresented zones would then have an advantage in assignment to those schools. In this way, integration would work in all directions. Students from low opportunity zones would be given preference for schools that have a disproportionate number of students from higher opportunity neighborhoods and vice versa.

The Kirwan Institute mapped a two-zone, three-zone, and four-zone plan, both with and without race as a factor, and presented these plans to both the district's subcommittee and selected school board members.¹²⁸ That committee adopted our recommendation to use the opportunity zone plan¹²⁹ and forwarded the "three-zone plan with race included" to the school board, which then approved this plan.

125. For map of the zones, see *Freedom of Choice School Selection and Assignment Policy Explained*, MONTCLAIR PUBLIC SCHOOLS (last visited Nov. 13, 2013), <http://www.montclair.k12.nj.us/Article.aspx?Id=671>.

126. The data used to create opportunity index scores may be sensitive personal data derived from aggregate census sources. A school district's request for individual data on information such as race, education, and income may be perceived as intrusive and unnecessary when it can be obtained from census or other data sources.

127. Siblings, special needs, and ESL students would all be given priority placement above diversity assignment within the opportunity zone methodology. Sibling placement ensures that siblings attend the same schools. Students with special needs may require access to special needs programs located in specific schools.

128. The "with race" plan refers to a plan in which race at the neighborhood level was used as one of the index factors.

129. *Board Weighing School Assignment By "Zone"*, MONTCLAIR PUBLIC SCHOOLS (Jan. 13, 2010), <http://www.montclair.k12.nj.us/Article.aspx?Id=537>; *Freedom of Choice School Selection and Assignment Policy Explained*, MONTCLAIR PUBLIC SCHOOLS (May 9, 2011), <http://www.montclair.k12.nj.us/Article.aspx?Id=671>.

Universities can use opportunity index scoring to target the most educationally disadvantaged students and generate racial and other forms of diversity. Applicants can be given an opportunity score based on a mixture of individual and geographic characteristics. For example, given an index of a particular region, universities could go so far as to set a firm quota that 20% of their admittees are accepted from low opportunity census tracts. Opportunity indices are generally divided into quintiles: very high, high, moderate, low, and very low. The school could also award a mechanical bonus in the admissions process to students who were raised or currently reside in neighborhoods in low or very low opportunity census areas. This would not violate the Court's prohibition against racial quotas or mechanical use of race, because such bonuses are based on geographic residence, not race. This process employs a mixture of geographic and socio-economic diversity. Yet, because the vast majority of African American families reside in low or very low opportunity census areas, this would have a positive effect on racial diversity.¹³⁰ In addition, the intense hyper-segregation of Black and Latino families increases the probability that a geographic diversity plan would work.

The primary restriction on race-conscious admissions is in using racial classifications; that is, admitting or denying admission to an

130. Research at the Kirwan Institute suggests that African-Americans and Latinos tend to be disproportionately located within the lower opportunity areas, even after controlling for income level. The Kirwan Institute's two-year research study of Ohio found that Black Ohioans are disproportionately concentrated into the lowest opportunity neighborhoods. See KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *THE STATE OF BLACK OHIO: AT A CROSSROADS ON THE PATHWAY TO OPPORTUNITY* 47 (2010), available at http://gis.kirwaninstitute.org/reports/2010/03_2010_TheStateofBlackOhio.pdf. Nearly three in four Black Ohioans, one in two Latino Ohioans, and one in four Asian and White Ohioans were found in the State's very low and low opportunity neighborhoods (which represent two-fifths of the State's total census tracts). *Id.* at 48–49. In Massachusetts, ninety-percent of African-American and Latino households in 2000 were isolated in the lowest opportunity neighborhoods in the State. See JASON REECE & SAMIR GAMBHIR, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *THE GEOGRAPHY OF OPPORTUNITY: BUILDING OPPORTUNITY IN MASSACHUSETTS 2* (2009), available at http://www.kirwaninstitute.osu.edu/reports/2009/01_2009_GeographyofOpportunityMassachusetts.pdf. By contrast, only 31% of White, Non-Latino households were found in low-opportunity neighborhoods. Low-income Whites were not as concentrated in low-opportunity communities as other races. Only 42% percent of low-income White households were living in low-opportunity communities, compared to more than ninety-five percent of low-income Latinos, and ninety-three percent of low-income African-Americans. *Id.* at 3. In a study of Florida's four major metropolitan regions, Miami-Dade, Orlando, Tampa, and Jacksonville, seven out of ten African Americans and half of all Latinos live in low opportunities areas, while only three out of ten non-Hispanic Whites live in such areas. JASON REECE ET AL., KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *HOW FAIR IS FLORIDA? RECESSION, RECOVERY, EQUITY AND OPPORTUNITY IN FLORIDA 9* (2009), available at http://www.kirwaninstitute.osu.edu/reports/2009/10_2009_FL_RecessionRecoveryEquity.pdf.

individual when that individual's race is a factor in the decision matrix. There is no presumption against using race in a nondiscriminatory and non-individualistic ways, such as considering the racial composition or demographics of an applicant's neighborhood or high school. Universities that seek to promote racial diversity are not only free to create recruitment programs targeting non-white neighborhoods or communities or to use opportunity enrollment as either a bonus or a quota, but they may also target predominantly non-white educational environments.¹³¹

Race and class increasingly segregate K–12 educational environments. One out of every six Black and one out of every nine Latino students attend a hyper-segregated school—one in which the student population is 99–100% racially or ethnically homogenous.¹³² Roughly two out of every five Black or Latino students in the United States attend “intensely segregated schools,” where 90–100% of the student body is racially homogenous, a percentage that is up from one out of three in 1988.¹³³ More than three quarters of these schools are high-poverty schools.¹³⁴

According to a 2012 report from The Civil Rights Project, 74% of Black students attend majority nonwhite schools (50–100% minority) and 38% of Blacks attend intensely segregated schools (those with only 0–10% of whites students) across the nation. 15% of Black students attend “apartheid schools” across the nation, where whites make up 0–1% of the enrollment. Apartheid schools are even more pervasive in areas with large concentrations of Black and brown residents. For example, in Chicago and the surrounding metropolitan area, half of the Black students attend apartheid schools. In New York, one third of Black students attend such schools.

It is important to recognize that these patterns reflect re-segregation by both race and class. Latino students attending intensely

131. See, e.g., UNIV. OF CAL., BERKELEY, BUILDING ON EXCELLENCE: GUIDE TO RECRUITING AND RETAINING DIVERSE GRADUATE STUDENTS AT UC BERKELEY, available at http://diversity.berkeley.edu/sites/default/files/Graduate_Diversity_Guide.pdf (emphasizing going “beyond the ‘usual’ range of institutions from which you recruit to include minority serving institutions such as historically black colleges and universities.”)

132. ERICA FRANKENBERG ET AL., HARV. UNIV. CIVIL RIGHTS PROJECT, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 28 (2003), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenber-multiracial-society-losing-the-dream.pdf>.

133. *Id.* at 31.

134. GARY ORFIELD & CHUNGMEI LEE, HARV. U. CIVIL RIGHTS PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 31 (2006), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/racial-transformation-and-the-changing-nature-of-segregation/orfield-racial-transformation-2006.pdf>.

segregated schools rose fourfold to 43% in 2008 from 12% in 1968 in the west.¹³⁵ Similarly, Latino students are concentrated among low-income students, and now nearly two-thirds of their classmates are low-income, compared to one-third in the early 1990s.¹³⁶ Moreover, this segregation is more pronounced across and between school districts than within them.¹³⁷ Since inter-district segregation is now more salient than intra-district segregation, this presents an opportunity for approaches like state or university “percent plans” to generate the student body diversity reflected in their states. Similarly, it is also an opportunity to use other forms of geographic diversity. For example, universities could set a hard quota for predominantly non-white school districts. This would channel isolated student populations into diverse educational environments.

Given extant patterns of racial and socioeconomic segregation, which appear to be accelerating as income inequality drives more refined neighborhood differentiation,¹³⁸ percentage plans will be an effective means of ensuring that all students have an opportunity to compete for admission to public universities for the foreseeable future. However, opportunity methodology may answer some of the concerns critics of percentage plans raise.

Some opponents of the TPP argued and continue to argue that less qualified students are admitted through the TPP, as students who fall outside of the top ten percent of more competitive school districts may be better prepared and qualified than students from the top ten percent of less competitive districts.¹³⁹ Opportunity indexing acknowledges the differential educational opportunities primary and secondary education afforded students and emphasizes redressing those disadvantages as a public policy rather than as a matter of college competitiveness or individual merit. Other critics of the TPP argue that it is flawed because it relies on underlying patterns of segregation, which we should be working to integrate,¹⁴⁰ and that we should not abandon racial diversity as an explicit goal even as we pursue other forms of diversity. Opportunity indexing acknowledges the differential access different racial groups enjoy.

135. *Id.* at 12.

136. *Id.* at 10.

137. See CHARLES T. CLOTFELTER, AFTER “BROWN”: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2004).

138. See SEAN F. REARDON & KENDRA BISCHOFF, US2010 PROJECT, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970-2009 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report111111.pdf>.

139. See, e.g., Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

140. See, e.g., LANI GUINIER & GERALD TORRES, THE MINERS CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2003).

This methodology would continue to produce racial diversity, even as integrative efforts are pursued at the local level, by providing a more granular portrait of each applicant's educational opportunity. Such a portrait would not rely on underlying patterns of segregation, as the TPP does, to define that opportunity.

CONCLUSION

Purporting to extend or affirm existing precedent, *Fisher* marks a departure in both substance and form. This Article explored the ways in which *Fisher* departed from precedent and proscribed new limits on the use of affirmative action in higher education. In doing so, this Article investigated the limits of the exhaustion requirement in both theory and practice and suggested an alternative methodology for fostering student body diversity and achieving the benefits of racial diversity in lieu of individual racial classifications.

Fisher may preserve affirmative action in theory but will increasingly burden such approaches in practice. The narrow tailoring standards announced in *Fisher* are nearly impossible to satisfy and, if satisfied by establishing the infeasibility of race-neutral alternatives and necessity of race-explicit means, may foreclose the possibility of returning to race-explicit measures as a political matter. Local communities rarely adopt race-explicit measures except as part of a settlement and, once such measures are abandoned, they are even less likely to be reinstated.

One way to address the Court's narrow tailoring concerns is to demand that both lower courts and educational institutions clarify and more deeply investigate the nature of the interests being pursued. As noted, narrow tailoring is a context sensitive inquiry and cannot be conducted or assessed beyond the interest being pursued. Determining whether a university's use of race is narrowly tailored to serve a compelling governmental interest requires a careful understanding of that interest. If the interest being pursued is racial diversity or a critical mass of non-white students, the educational entity must have some role in defining that interest and assessing tolerable expenses. *Grutter* recognized this and accorded educational institutions some deference in this regard. The degree of deference and whether such deference is strictly limited to the compelling interest prong or extends to the narrow tailoring prong is a debate between the Supreme Court and the Fifth Circuit in *Fisher*, but it is largely beside the point. The inherent relationship between the compelling interest and narrow tailoring prongs renders such a debate irrelevant at best and semantics at worst.

The narrow tailoring and exhaustion requirements pose severe administrative and technical challenges for admission committees seeking racial diversity. This problem is a manifestation of a deeper error that began in *Bakke*: heightened review for integrative measures. This error began when Justice Powell abandoned the framework established under *Carolene Products* footnote four.¹⁴¹ *Carolene Products* set out the framework for heightened scrutiny.¹⁴² The predicate for footnote four's heightened judicial scrutiny for minority groups is not race or religion, but a "discreteness" and "insularity."¹⁴³ *Plessy* had demanded only rational basis review for race-based equal protection claims, and that extended only to legislation 'intended to oppress or stigmatize.'¹⁴⁴ *Carolene Products* overturned that framework with its famous footnote four. *Bakke* broke with that framework by disconnecting heightened scrutiny from either discreteness or insularity, declaring us a "nation of minorities" and rejecting the view that either discreteness or insularity were preconditions for strict scrutiny.¹⁴⁵ Justices Breyer and Ginsburg established in previous cases that they would not subject integrative measures to strict scrutiny review.

Racial classifications should not trigger strict scrutiny unless they are connected to discrete and insular minorities, because it is those conditions that warrant special constitutional solicitude. Unfortunately, seven Justices have lent their imprimatur to strict scrutiny for all racial classifications. Consequently, universities should explore the possibilities for race-conscious approaches that do not run afoul of the Court's racial classification jurisprudence. An opportunity-enrollment model is an alternative or complementary admissions policy, despite the administrative challenges to develop and implement this model on the scale of university admissions. Pursuit of policies such as these will illustrate for the courts the limits of a strict exhaustion requirement. But it may also spur the development of admissions processes that can better measure forms of advantage relative to discrete and insular minorities for those willing to incur the administrative expense.

141. See *Bakke*, 438 U.S. at 293–95.

142. *Id.* at 1075.

143. See Powell, *supra* note 34, at 1075–76.

144. See Powell & Menendian, *supra* note 15, at 690 ("The Court asks if the legislation mandating segregation is oppressive or stigmatizing.")

145. See *Bakke*, 438 U.S. at 92 ("During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.")