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**The Double-Consciousness of Race-Consciousness
and the Bermuda Triangle of University Admissions**

IHELG Monograph

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**THE DOUBLE-CONSCIOUSNESS OF RACE-CONSCIOUSNESS
AND THE BERMUDA TRIANGLE OF UNIVERSITY ADMISSIONS**

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I would like to thank the editors of the University of Pennsylvania Journal of Constitutional Law for inviting me to participate in their 2014 symposium, “Educational Equality and the Constitution in the 21st Century.” It was an excellent event with many distinguished speakers, and I am proud to contribute to this symposium issue. My Essay is part of a series of works I have written about race-conscious admissions policies, and the ideas herein are the product of feedback from a variety of forums. In addition to the Journal, I would like to thank participants in the 2013 Houston Higher Education Law Roundtable, the Fourth Annual John Mercer Langston Black Male Law Faculty Writing Workshop, 2013 Chicago Junior Faculty Workshop, the Latina/o Critical Theory, Inc. (LatCrit) 2013 conference, the Fourth Annual Loyola (Chicago) Constitutional Law Colloquium, and the faculty of Savannah Law School for their insightful commentary. Additionally, Professors Christopher Buccafusco, Richard Epstein, Wendy Netter Epstein, Michael Green, Stacy Hawkins, Helen Hershkoff, Darryl Levinson, Deborah Malamud, Mark Rosen, Christopher Schmidt, Carolyn Shapiro, along with Brian Burgess, also provided helpful feedback on earlier versions. Also, Professors Paulette Caldwell, Devon Carbado, Robert Chang, Richard Delgado, Norman Dorsen, Sylvia Law, Michael Olivas, Angela Onwuachi-Willig, Cristina Rodríguez, and Margaret Beale Spencer have consistently supported my scholarly endeavors. IIT Chicago-Kent College of Law provided financial and logistical support for my work from July 2012 to June 2014, and the Fred T. Korematsu Center for Law and Equality provided similar support from August 2010 to May 2012, while I was the Korematsu Teaching Fellow at Seattle University School of Law. The W.E.B. Du Bois College House at the University of Pennsylvania initiated my interest in Du Bois’s writings, while I was a graduate resident advisor there from 1999-2003, and later an interim faculty fellow in 2005-06. Finally, the late Professor Derrick Bell and Ms. Janet Dewart Bell have supported my work in immeasurable ways, while I was the Derrick Bell Fellow at NYU School of Law from September 2009 to June 2010. In Fall 2006, Professor Bell and I faced each other in an appellate oral argument, as a demonstration for the first class of his Current Constitutional Issues seminar. The case we argued, chosen by Professor Bell, was Fisher v. Texas, which had been recently decided in the U.S. District Court for the Western District of Texas. I thus began formulating the ideas that resulted in two law review articles prior to the Supreme Court’s Fisher ruling, and now this one after the ruling, and another one which is forthcoming. It is thus particularly fitting that Professor Bell’s life and work are the inspiration for this Essay.

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ABSTRACT

This Essay draws upon the thought of W.E.B. Du Bois and the late Professor Derrick Bell to analyze race-conscious university admissions today. The Essay has three main points. First, it argues that there is a “double-consciousness” to race-consciousness. In other words, there are two different understandings of diversity, of race-neutrality, and of individualized review—the key tenets of Supreme Court doctrine on race-conscious admissions. The double-consciousness of diversity, race-neutrality, and individualized review was prominent in the *Fisher* litigation and the legal discourse around *Fisher* more generally, leading to much confusion.

Second, in addition to double-consciousness, this Essay argues that there is another source of confusion and contradiction in the Supreme Court’s doctrine on race-conscious admissions policies. Together, the three prongs of diversity, race-neutrality, and individualized review form a “Bermuda Triangle” for university admissions. Currently, admissions plans cannot have these three features together, but the Supreme Court requires universities to simultaneously strive for all three.

Finally, this Essay revisits the idea of double-consciousness and contends that advocates of race-conscious admissions policies are, in the words of Professor Bell, “serving two masters”—freedom universities to be diverse and elite, and social justice for poor people of color. The Essay contends that rather than a broad pronouncement by the Supreme Court, political process and lower court rulings will determine the fate of race-conscious admissions, at least in the near future. The concluding section also discusses the Orwellian irony of “post-racial” America, where victory for racial justice is hard to distinguish from defeat.

I. INTRODUCTION: SERVING TWO MASTERS

Slightly over a decade ago, when the Supreme Court upheld diversity as a compelling interest to justify race-conscious admissions policies in Grutter v. Bollinger,¹ activists for racial justice—including me²—claimed to have won a huge victory. However, one of our most cherished and respected role models had a very different reaction.

In trademark iconoclastic fashion, the late Professor Derrick Bell wrote an essay entitled Diversity’s Distractions,³ where he called diversity a “serious distraction in the ongoing efforts to achieve racial justice”⁴ Professor Bell predicted that the Court’s approval of race-conscious

¹ 539 U.S. 306 (2003) (upholding holistic, individualized race-conscious admissions policy at the University of Michigan Law School because of compelling state interest in attaining educational benefits of diversity). Grutter affirmed the diversity rationale as a compelling interest and the use of race as a flexible “plus” factor—both of which the Supreme Court had first articulated in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). On the same day Grutter was decided, the Supreme Court struck down the University of Michigan College of Letters, Arts, and Sciences’ race-conscious admissions plan, which automatically awarded 20 points on a 150 point scale to applicants from designated minority groups. See Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that because the points system was not narrowly tailored to achieve the University’s compelling interest in diversity, the admissions policy violated the Fourteenth Amendment).

With occasional exception for word variety, this Article uses the terms “race-conscious admissions” rather than “affirmative action,” because the latter refers to a broader range of programs and policies than university admissions, even though it is commonly used to refer specifically to race-conscious admissions policies. Also, this Article uses the term “university” to refer to selective institutions of higher education generally, including colleges and professional schools that are not technically “universities.” Unless otherwise indicated, the arguments herein apply broadly to selective institutions of higher education.

² While at the University of Pennsylvania, I founded the CALL TO ACTION Project, a student initiative to defend race-conscious admissions policies, leading up to the Supreme Court oral arguments in Gratz and Grutter. See Vinay Harpalani, Ambiguity, Ambivalence, and Awakening: A South Asian Becoming “Critically” Aware of Race in America, 11 Berkeley J. Afr.-Am. L. & Pol’y 71, 80 (2009) (noting that the CALL TO ACTION project was founded in response to the right wing assault on affirmative action and to promote racial justice through scholarship and activism). See also Vinay Harpalani, Activism with the pen, not the sword, Daily Pennsylvanian, Apr. 23, 2003, at 6 (discussing how the author formed the CALL TO ACTION project to mobilize the Penn community in defense of affirmative action).

³ Derrick Bell, Diversity’s Distractions, 103 Colum. L. Rev. 1622 (2003).

⁴ Id. at 1622 (arguing that “the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice”). Professor Bell was one of my mentors, and this Article draws its title from his work. For other, similar critiques of diversity, see Derrick Bell, What’s Diversity Got to Do With It? 6 Seattle J. for Soc. Just. 527, 529 (2008) (“We must even consider that racial diversity is a snare, and not an efficient means of achieving effective schooling for children who are poor or minority group members.”); Eboni S. Nelson, Examining the Costs of Diversity, 63 U. Miami L. Rev. 577 (2009) (arguing that the pursuit of diversity has come at a cost to the provision of equal opportunities to minority students); Osamudia R. James, White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation, 89 N.Y.U. L. Rev. 425, 450-53 (2014) (noting that the diversity rationale has been criticized for failing to advance racial justice, for mainly benefiting white institutions instead of

admissions policies, with diversity as the compelling interest to constitutionally justify them, would merely invite further litigation; and simultaneously, would divert attention from race and class-related inequalities and from universities' reliance on admissions criteria that benefit more privileged applicants, such as grades and test scores.⁵ He also forecasted that in the long run, “this latest civil rights victory” would be “hard to distinguish from defeat.”⁶

Many years later, after working with Professor Bell and getting to know him well, his prediction reminds me of W.E.B. Du Bois's classic metaphor of “double-consciousness”: that “peculiar sensation . . . of . . . two-ness . . . two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body”⁷ Professor Bell knew plenty about such “warring ideals”—captured eloquently in his classic article, Serving Two Masters.⁸ Here, he analyzed the

minority students, for legitimizing admissions policies that favor the privileged, and for pitting minority students against each other).

⁵ Bell, supra note 3, at 1622. Professor Bell also referred to the race-conscious admissions policies approved in Grutter as “litigation-prompting compensation for admissions criteria that benefit the already privileged and greatly burden the already disadvantaged.” Id. at 1631. Ironically, in spite of their vast ideological differences, Professor Derrick Bell and Justice Antonin Scalia did agree that Grutter would invite more litigation. See Grutter, 539 U.S. at 348 (Scalia, J., dissenting) (“Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s Grutter-Gratz split double header seems perversely designed to prolong the controversy and the litigation.”).

Grutter also provided an interesting point of confluence between Professor Derrick Bell and Justice Clarence Thomas. Justice Thomas devoted one section of his Grutter dissent largely to critiquing the use of standardized tests in admissions. See id. at 367-71 (Thomas, J., dissenting) (“The Law School’s continued adherence to measures [like the LSAT that] it knows produce racially skewed results is not entitled to deference by this Court.”). Additionally, Justice Thomas was critical of universities’ elitism. Id. at 355-56 (Thomas, J., dissenting) (“[T]he [University of Michigan] Law School seeks . . . [to enroll a racially diverse student body] . . . without sacrificing too much of its exclusivity and elite status.”).

⁶ Bell, supra note 3, at 1622.

⁷ **William Edward Burghardt Du Bois**, The Souls of Black Folk 3 (3d ed. 1903) (“It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.”).

⁸ Derrick A. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976) (describing tension between the goals of civil rights advocates and those of their clients). Professor Bell derived the “serving two masters” metaphor from the New Testament. Luke 16:13 (King James) (“No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.”). For an interesting analysis of parallels between the work of Professor Bell and W.E.B. Du Bois, see James R. Hackney, Derrick Bell’s Re-sounding: W.E.B. Du Bois, Modernism, and Critical Race

conflict between “integration ideals and client interests in school desegregation litigation”⁹ after Brown v. Board of Education.¹⁰ Professor Bell’s implicit use of the double-consciousness metaphor could just as easily apply to Grutter, where civil rights advocates felt similarly conflicted about serving two masters: universities’ freedom to be diverse and elite,¹¹ and their own ideals of racial equality and justice, which extended far beyond the elite.¹² And with my ties to Professor Derrick Bell¹³ and to W.E.B. Du Bois,¹⁴ I see double-consciousness as a very fitting metaphor to understand race-conscious university admissions today.

Scholarship, 23 Law & Soc. Inquiry 141, 142 (1998)(analyzing how W.E.B. Du Bois’s ideas “are taken up, transformed, and re-sounded by later generations[.]” of scholars, including Professor Derrick Bell).

⁹ Bell, supra note 8, at 470.

¹⁰ 347 U.S. 483 (1954) (holding that racially segregated schools were unconstitutional); Brown v. Bd. of Educ. (II), 349 U.S. 294, 301 (1955) (ordering racial integration of segregated public schools “with all deliberate speed.”). W.E.B. Du Bois and Professor Derrick Bell expressed a similar ambivalence about racial integration of schools. See W.E.B. Du Bois, Does the Negro Need Separate Schools? 4 J. Negro Educ. 328, 335 (1935) (arguing that quality of education is more important than whether schools are separate or integrated); Derrick Bell, And We Are Not Saved 102-122 (1987) (arguing that “[n]either separate nor mixed schools” necessarily provide Black children with better education); Bell, supra note 8, at 516 (“[A] single minded commitment to racial balance . . . [is] all too often educationally impotent.”).

¹¹ See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., concurring) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”); Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (noting a “constitutional dimension, grounded in the First Amendment, of educational autonomy[,]” for universities); cf. id. at 339 (“Narrow tailoring does not require . . . a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”); id. at 340 (rejecting “the suggestion that . . . [universities] . . . simply lower admissions standards for all students, [because this is] a drastic remedy that would require . . . [universities] . . . to become . . . much different institution[s] and sacrifice a vital component of . . . [their] . . . educational mission[s].”); id. at 355-56 (Thomas, J., dissenting) (“[T]he [University of Michigan] Law School seeks . . . [to enroll a racially diverse student body] . . . without sacrificing too much of its exclusivity and elite status.”).

¹² See Vinay Harpalani, Diversity and Community Upliftment, Daily Pennsylvanian, Mar. 13, 2013, <http://www.thedp.com/article/2013/03/vinay-harpalani-diversity-and-community-upliftment> (noting that “elite, private universities like Penn . . . prefer[] minority students from privileged schools over those who are less privileged.”); Vinay Harpalani, A Long Legacy of Activism at Penn, Daily Pennsylvanian, Apr. 9, 2003, http://www.thedp.com/article/2003/04/vinay_harpalani_a_long_legacy_of_activism_at_penn (“[D]iversity was not the original motivation behind affirmative action. Affirmative action programs in higher education began as radical desegregation measures; they were demanded by people of color who were fighting for equality. . . . Unfortunately, while the current Penn administration embraces ‘diversity,’ it has forgotten how Penn became diverse in the first place.”).

¹³ I served as the Derrick Bell Fellow at New York University (NYU) School of Law in 2009-10, sharing an office with Professor Bell for my first job out of law school and assisting him with teaching his classes. See Vinay Harpalani, From Roach Powder to Radical Humanism: Professor Derrick Bell’s “Critical” Constitutional Pedagogy, 36 Seattle U. L. Rev. xxiii (2013) (describing Professor Derrick Bell’s teaching and life philosophies and his impact on students).

¹⁴ I served as a graduate resident advisor (1999-2003) and faculty fellow (2005-06) in the W.E.B. Du Bois College House at the University of Pennsylvania and spent many hours analyzing and discussing Du Bois’s writings.

Supreme Court jurisprudence on the constitutionality of race-conscious admissions is confusing and convoluted, to say the least. The Court's 2013 decision in Fisher v. Texas illustrated this.¹⁵ After granting certiorari and deliberating for eight months after oral argument, the Court did very little that was new.¹⁶ Seven Justices signed on to Justice Anthony Kennedy's majority opinion, agreeing essentially to make no major alteration to the Court's 2003 framework from Grutter v. Bollinger—even though three of them, including Justice Kennedy, had dissented in Grutter.¹⁷ The only new tenet from Fisher was that courts must review compliance with Grutter more stringently.¹⁸ Race-conscious admissions policies are constitutionally permissible in the manner prescribed by Grutter: they must be necessary to

See Vinay Harpalani, Ambiguity, Ambivalence, and Awakening: A South Asian Becoming “Critically” Aware of Race in America, 11 Berkeley J. Afr.-Am. L. & Pol’y 71, 81 (2009) (“Looking at myself through the eyes of Du Bois College House became part of my own ‘double-consciousness[.]’”).

¹⁵ 133 S.Ct. 2411 (2013).

¹⁶ In Fisher, the Court vacated the Fifth Circuit's ruling that the University of Texas at Austin (UT) had a constitutionally permissible race-conscious admissions policy, but it did not deem UT's policy to be unconstitutional. Rather, it remanded the case for more stringent review, holding that the District Court for the Western District of Texas and Fifth Circuit had “confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications[.]” Id. at 2421. Justice Ruth Bader Ginsburg dissented. Id. at 2432. Justice Elena Kagan did not take part in the decision.

My prior Article in the Journal of Constitutional Law partially foreshadowed the result in Fisher. See Vinay Harpalani, Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions, 15 U. Pa. J. Const. L. 463, 526 (2012) (“If the Supreme Court adopted . . . [the test that I propose] . . . it would vacate the Fifth Circuit ruling in Fisher, but it would not declare UT's race-conscious policy to be unconstitutional. Rather, it would remand the case for review based on the more stringent standard proposed here.”). Compare Fisher, 133 S.Ct. at 2421 (stating that UT has to “prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”), with Harpalani, supra at 526 (stating that UT should have to prove that its race-conscious policy is “narrowly tailored to fit the compelling interest of attaining within-group diversity and its educational benefits.”). The Supreme Court called for the same standard as my Article, although not for the same reasons: it did not address the issue of within-group diversity, which was the specific focus of my Article.

Upon remand, the Fifth Circuit has once again affirmed the District Court's ruling upholding UT's race-conscious admissions policies. Fisher v. Texas (II), 758 F.3d 633, 637 (5th Cir. 2014). A petition for rehearing en banc was filed and denied on November 12, 2014. See <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Fisher-en-banc-denial-11-12-14.pdf>. Nevertheless, the case could still be heard again by the U.S. Supreme Court. See Lyle Denniston, Fisher case on way back to the Court, SCOTUSblog (Nov. 12, 2014, 3:58 PM), <http://www.scotusblog.com/2014/11/fisher-case-on-way-back-to-the-court/>.

¹⁷ See 539 U.S. at 346 (Scalia, Thomas, J.J., dissenting); id. at 387 (Kennedy, J., dissenting).

¹⁸ Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013) (“The reviewing court must be ultimately satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense.’”); see also Grutter, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time . . . [I]n the context of higher education, the durational requirement can be met by sunset

fulfill the compelling interest in diversity,¹⁹ and they must involve individualized review of applicants.²⁰ But courts must now closely assess whether a university can use race-neutral policies instead and achieve the same diversity result.²¹ Read together, Grutter and Fisher create a perplexing nexus between diversity, individualized review, and race-neutrality. The Court's more recent decision in Schuetz v. BAMN (2014) does not shed any light on the issue, as Justice Kennedy's controlling opinion here clearly stated that Schuetz—which upheld Michigan's state constitutional ban on race-conscious policies—was “not about the constitutionality, or the merits, of race-conscious admissions policies in higher education.”²²

This Essay has three main points. First, it argues that there is a “double-consciousness” to race-consciousness. In other words, there are two different understandings of diversity, of race-

provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”)

¹⁹ Fisher, 133 S. Ct. at 2417 (recognizing that there is at least “one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body”); id. at 2420 (“The reviewing court must be ultimately satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense.’”).

²⁰ Id. at 2418 (“To be narrowly tailored, a race-conscious admissions program . . . must ‘remain flexible enough to ensure that each applicant is evaluated as an individual. . . .’”) (quoting Grutter, 539 U.S. at 334, 337). See also Grutter, 539 U.S. at 336–37 (“When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52 (1978) (considering the “denial . . . of th[e] right to individualized consideration” to be the “principal evil” of the medical school’s admissions program).

²¹ Fisher, 133 S. Ct. at 2420 (calling for “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications”). See also id. at 2420 (“The reviewing court must be ultimately satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense.’”). The Fisher ruling was consistent with the “Kennedy Template” for Grutter’s demise articulated by Professor Ellen Katz prior to the decision. See Ellen D. Katz, Grutter’s Denouement: Three Templates From the Roberts Court, 107 Nw. U.L. Rev. 1045, 1051, 1053 (2013) (describing Justice Kennedy’s opinions as “policing means, not ends” and noting that Fisher could “examine with rigor the distinct ways . . . [UT and other universities] . . . use racial criteria to pursue their goal of diversity . . . [but] . . . would nevertheless leave undisturbed Grutter’s recognition that the goal of diversity is a compelling objective that [universities] may lawfully pursue.”).

²² Schuetz v. BAMN, 572 U.S. ____ (2014), No. 12-682, slip op. at 4 (Apr. 22, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-682_8759.pdf. Rather than the merits of race-conscious admissions policies, Schuetz was about “whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions” Id. In other words, Schuetz was “not about how the debate over racial preferences should be resolved. It is about who may resolve it.” Id. at 18.

neutrality, and of individualized review—the key tenets of Supreme Court doctrine on race-conscious admissions.²³ The double-consciousness of diversity, race-neutrality, and individualized review was prominent in the Fisher litigation and the legal discourse around Fisher more generally. Litigants, commentators, and the courts have all proffered different views of these key tenets, leading to much confusion.

Second, in addition to double-consciousness, this Essay argues that there is another source of confusion and contradiction in the Supreme Court’s doctrine on race-conscious admissions policies. The three prongs of diversity, race-neutrality, and individualized review form a “Bermuda Triangle” for university admissions. An admissions plan cannot currently have these three features together, but the Supreme Court requires universities to simultaneously strive for all three.²⁴

Finally, this Essay revisits the idea of double-consciousness and the notion of serving two masters. It contends that at least in the near future, political process and lower court rulings will determine the fate of race-conscious admissions by locality, rather than a broad, national pronouncement by the Supreme Court. This concluding section also examines Professor Bell’s prediction and discusses how advocates of race-conscious policies continue to grapple with their own double-consciousness, and more generally with the irony of “post-racial” America—where it is hard to distinguish between victory and defeat for racial justice.

II. THE DOUBLE-CONSCIOUSNESS OF RACE-CONSCIOUSNESS

The Supreme Court has always had its own internal dissent over race-conscious admissions policies, due to its growingly conservative composition since their advent. Ever since their

²³ See supra notes 18-21 and accompanying text.

fractured 1978 ruling in Bakke—where Justice Lewis Powell’s controlling opinion espoused diversity as a compelling interest, struck down racial set-asides in higher education, but upheld the use of race as a “plus factor” in admissions²⁵—the Justices have been very divided in their views of race-conscious admissions. Over four separate dissents, Justice Sandra Day O’Connor authored a 5-4 Grutter majority opinion that affirmed all the central tenets of Bakke, and in conjunction with Gratz v. Bollinger,²⁶ established individualized review of applicants as a necessary condition of any race-conscious admissions policy. Grutter also required universities to give “good faith consideration”²⁷ to race-neutral alternatives, and to eventually phase-out race-conscious admissions policies when feasible.²⁸

Unlike Bakke and Grutter, Fisher was not a fractured ruling in the usual sense. Seven of the eight Justices who heard the case signed on to Justice Kennedy’s majority opinion.²⁹ Nevertheless, Fisher’s reaffirmation of the diversity interest—without any further clarification of it—and its emphasis on stringent review of race-neutral alternatives—all reinforce the Court’s divisions on this charged issue. Diversity, race-neutrality, and individualized review all have their own double-consciousness—due to the Supreme Court’s internal disagreements, and due to varying understandings of these tenets at large.

²⁴ See supra notes 18-21 and accompanying text.

²⁵ Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (Powell, J., concurring)(finding that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education”). Justice Powell stated that while racial set-asides were unconstitutional, race could be used as an individual “plus” factor for applicants, in order to achieve the compelling interest of attaining the educational benefits of diversity. Id. at 317 (“[R]ace or ethnic background may be deemed a ‘plus’ in a particular applicant’s file [and] . . . does not insulate the individual from comparison with all other candidates for the available seats.”).

²⁶ 539 U.S. 244, 275 (2003)(striking down University of Michigan undergraduate race-conscious admissions policy because it involved a fixed point system rather than flexible, individualized review of applicants).

²⁷ Grutter, 539 U.S. at 339 (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

²⁸ Id. at 342 (“[R]ace-conscious admissions policies must be limited in time . . . [i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”).

²⁹ Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2414 (2013).

A. Diversity’s Double-Consciousness: It’s More than the Numbers

Diversity is of course fundamental to the constitutionality of race-conscious admissions policies: it is the compelling state interest that justifies them.³⁰ But what exactly is this compelling interest and how do we determine if a race-conscious admissions policy is necessary to attain it? These are difficult questions, in part because of diversity’s double-consciousness.

On the one hand, the language of Grutter and Fisher highlights the educational benefits of diversity in higher education settings as the compelling interest.³¹ Professor Devon Carbado identifies eight benefits of diversity that Justice O’Connor espoused in her Grutter majority opinion: diversity serves to “promote speech and the robust exchange of ideas . . . effectuate the inclusion of underrepresented students . . . change the character of the school . . . disrupt and negate racial stereotypes . . . facilitate racial cooperation and understanding . . . create pathways to leadership . . . ensure democratic legitimacy [and] . . . prevent racial isolation and alienation[.]”³² The Fisher opinion itself focused on “the educational benefits that flow from a diverse student body”³³ as the “one compelling interest that could justify consideration of race”³⁴ in admissions. Through its Grutter and Fisher majority opinions, the Supreme Court has framed the diversity interest in terms of educational activities and exchanges between diverse groups of students—intangibles that improve the quality of education for all involved.

On the other hand, however, because the educational benefits of diversity are difficult to measure and review, litigants in Fisher framed diversity in terms of numerical representation:

³⁰ See supra notes 1, 19, and 25.

³¹ See supra notes 1, 19, and 25.

³² Devon Carbado, Intraracial Diversity, 60 UCLA L. Rev. 1130, 1145-46 (2013).

³³ Fisher, 133 S. Ct. at 2417.

³⁴ Id.

numbers of various groups of minority students. Because the Supreme Court in Bakke prohibited the use of numerical goals or quotas for race-conscious admissions,³⁵ the Fisher litigation focused on the presence of a “critical mass” of underrepresented students—a concept that attempts to combine numerical representation with the educational benefits of diversity.³⁶ And as we saw in Fisher, “critical mass” turns out to be a rather vague concept.³⁷

The Plaintiffs in Fisher based their claim on “critical mass”: they argued that the 21.4% minority (Black and Latina/o combined) enrollment at the University of Texas at Austin (UT), attained in 2004 with the race-neutral Top Ten Percent Law³⁸ alone, was a “critical mass” and

³⁵ 438 U.S. 265, 315 (1978) (Powell, J., concurring).

³⁶ See Grutter, 539 U.S. at 319 (“[C]ritical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”). See also I. Bennett Capers, Flags, 48 How. L.J. 121, 122-23 (2004) (“[C]ritical mass is not solely numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group. It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard.”). For more discussion of different definitions of “critical mass” in the context of race-conscious admissions policies, see Harpalani, supra note 16, at 471-85; Vinay Harpalani, Fisher’s Fishing Expedition, 15 U. Pa. J. Const. L. Height. Scrutiny 57, 58-66 (2013).

³⁷ See generally id. (discussing the various ways of defining “critical mass”). But see William C. Kidder, Misshaping the River: Proposition 209 and Lessons for the Fisher Case, 39 J.C. & U.L. 53, 63 (2013) (“The benefits associated with ‘critical mass’ are highly context-dependent and not amenable to a one-size-fits-all admissions target, but these benefits are no less real and measurable because they are manifest in the complex ecosystem of higher learning.”). Chancellor Kidder’s assertion about critical mass here also distinguishes between two different uses of the concept: 1. Universities’ campus-specific determinations of diversity’s benefits and minority students’ needs, which this Essay endorses; and 2. Courts’ use of critical mass as a generalizable standard to review the constitutionality of race-conscious admissions policies, which this Essay critiques. See also William C. Kidder, The Salience of Racial Isolation: African Americans’ and Latinos’ Perceptions of Climate and Enrollment Choices with and without Proposition 209, Report of the Civil Rights Project at UCLA, at 13, available at http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder_Racial-Isolation_CRP_final_Oct2012.pdf (“The data lend support to the concept of ‘critical mass’ while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass.”).

³⁸ Tex. Educ. Code Ann. § 51.803 (1997). The Top Ten Percent Law guarantees admission to UT to the top students (originally top 10 percent of each graduating class) in all Texas public high schools. The law was passed by the Texas legislature in response to Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that UT Law could not use race as an admissions factor), abrogated by Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that universities could use race as a plus factor in admissions). In 2011, the Top Ten Percent Law was amended to limit guaranteed admission at UT to 75% of the seats designated for Texas residents. See Tex. Educ. Code Ann. § 51.803(a-1)(2010). This limit begins with admissions to the entering class of Fall 2011 and continues until the entering class of Fall 2015. See Fisher v. Texas, 631 F.3d 213, 224 n.56 (5th Cir. 2011), vacated, 133 S.Ct. 2411 (2013).

The Fisher litigation and ruling assumed that the Top Ten Percent Law is “race-neutral.” But see infra note 68.

fulfilled the constitutionally permissible compelling interest in diversity. Consequently, they contended that UT was not justified in using a race-conscious admissions policy, in addition to the Top Ten Percent Law.

UT's response to this also focused on numerical representation. It pointed to low percentages of Black and Latina/o students in many small classes to show that it had not attained a "critical mass."³⁹ Although UT did allude to the linkage between "critical mass" and the educational benefits of diversity, its emphasis was also on numbers sufficient (or insufficient) to constitute a "critical mass."⁴⁰

But neither the Fisher Plaintiffs nor UT could provide a measurable definition of "critical mass." Ironically, both parties agreed that "critical mass" implied numbers such that minority students "do not feel isolated and like spokespersons for their race,"⁴¹ but neither could say how to determine when this occurs. The Plaintiffs contended it was UT's burden to define and measure critical mass.⁴² UT offered that surveys of student isolation, along with other campus data including numerical representation of various groups, could help determine whether a critical mass was present,⁴³ but it did not provide any guidance on how to do this—much less on how to determine whether race-conscious policies are necessary to achieve the "critical mass."

³⁹ See Harpalani, Diversity Within Racial Groups, *supra* note 16, at 504-06 and sources cited therein.

⁴⁰ Id.

⁴¹ Transcript of Oral argument at 16, Fisher v. Texas, 133 S.Ct. 2411 (2013)(No. 11-345)(Plaintiff's counsel Bert noting that question to consider when determining if a critical mass exists is whether underrepresented minority students are "isolated. . . [and]unable to speak out[.]"); id. at 47 (UT counsel Gregory Garre noting that to determine if critical mass is present, "we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race.").

⁴² Id. at 16-17 (Plaintiff's counsel noting that it is "not [the Plaintiff's] burden to establish the number" that constitutes critical mass).

⁴³ Id. at 47-49 (UT's counsel noting that critical mass is determined via "feedback [via surveys] directly from students about racial isolation that they experience," "enrollment data, . . . [d]iversity in the classroom[,]. . . [and] the racial climate on campus.").

This led Justice Antonin Scalia to say, derisively, “[w]e should stop calling it “critical mass” . . . call it a cloud or something like that.”⁴⁴

The only reliably measurable diversity-related outcome in the Fisher litigation was the numerical representation of minority students itself—on campus and in various classes. And focus on numerical representation poses its own conundrum: Bakke, Grutter, and Fisher clearly stated that numerical goals for race-conscious admissions policies are unconstitutional.⁴⁵ Justice Sonia Sotomayor recognized this at the Fisher oral argument, when she said to Plaintiffs’ counsel: “Boy, it sounds awfully like a quota to me that you shouldn’t be setting goals, that you shouldn’t be setting quotas”⁴⁶

In spite of the focus on numerical representation by litigants in Bakke, Grutter and Fisher, the controlling opinions in all of these cases indicate that the goal of a race-conscious admissions policy is more nuanced than attaining any numerical index of diversity:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that

⁴⁴ Id. at 71-72. The courtroom erupted in laughter after Justice Scalia made this statement.

⁴⁵ Grutter 539 U.S. at 329-30 (noting that “[t]he Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin’ . . . [t]hat would amount to outright racial balancing, which is patently unconstitutional.”) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)); Fisher 133 S.Ct. at 2418 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system[.]”)(quoting Grutter 539 U.S. at 334); Fisher (II)(on remand) at 656 (“[A]n examination that looks exclusively at the percentage of minority students fails before it begins.”).

⁴⁶ Transcript of Oral argument at 19, Fisher v. Texas, 133 S.Ct. 2411 (2013)(No. 11-345). But see Sheldon Lyke, Catch Twenty-Wu? The Oral Argument in Fisher v. University of Texas and the Obfuscation of Critical Mass, 107 Nw. U. L. Rev. Colloquy 209, 216 (2013), available at <http://www.law.northwestern.edu/lawreview/colloquy/2013/19/LRColl2013n19Lyke.pdf> (arguing that “critical mass has both quantitative and qualitative elements” and that “contrary to Justice Sotomayor’s claim[.] . . . goals and quotas are [not] synonymous.”).

further a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.⁴⁷

Diversity is thus caught between “two unreconciled strivings”⁴⁸: the educational benefits of nuanced, individualized race-conscious admissions—emphasized in the language of all major Supreme Court cases—and the numerical representation of minority groups, which provide the main data used to make arguments for and against race-conscious admissions policies.⁴⁹ Fisher did not resolve this double-consciousness, and lower courts will have to grapple with the issue and decide how to assess diversity.

B. Individualized Review’s Double-Consciousness: Is It Just the Numbers?

Individualized review of applicants is a requirement for any constitutionally-permissible race-conscious admissions policy under Grutter and Fisher⁵⁰—a requirement that, in a sense, also has a double-consciousness of its own. The Grutter and Fisher majority opinions describe holistic admissions policies that consider race in a flexible, nuanced, and individualized manner, in conjunction with other admissions factors, and the Fifth Circuit’s opinion in Fisher on remand emphasized that individuals of any race could benefit in the admissions process.⁵¹ Individualized review in this vein is discretionary, subjective, and above all flexible. However, critics of race-

⁴⁷ Fisher, 133 S.Ct. at 2418 (quoting Bakke, 438 U.S. at 315).

⁴⁸ Du Bois, supra note 7 (“One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.”).

⁴⁹ Justice Clarence Thomas critiques this double-consciousness of diversity in his Grutter dissent. Grutter, 539 U.S. at 355 (Thomas, J., dissenting)(“ A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably.”).

⁵⁰ See supra note 20.

⁵¹ Fisher v. Texas (II) - on remand (2014) at 4 (“No numerical value is ever assigned to . . . race . . . [which] is a factor considered in the unique context of each applicant’s entire experience . . . [and] . . . may be a beneficial factor for a minority or a non-minority student.”); id. at 40 (“Race is relevant to minority and non-minority, notably when candidates have flourished as a minority in their school—whether they are white or black.”). See also Fisher v. Texas, 631 F.3d 213, 236 (5th Cir. 2011)(vacated by Fisher v. Texas, 133 S.Ct. 2411 (2013)(noting that in

conscious admissions contend that this is a smokescreen: that elite universities merely institute a thin veneer of individualized review and holistic admissions to cover much larger systematic “race preferences” for particular groups—usually African Americans, Latina/os, and Native Americans. To these critics, the university admissions game is still numbers-centered and only three factors really matter: GPA, standardized test scores, and race.⁵² Thus, there is a discord between how Supreme Court doctrine describes individualized review and how some perceive that elite university admissions use it in practice.⁵³

framework of UT’s race-conscious admissions policy, “race can enhance the personal achievement score of a student from any racial background, including whites and Asian-Americans.”)

⁵² See, e.g., **Richard H. Sander & Stuart Taylor, Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It** 18-19 (2012) (“At most large schools ... descriptions [such as “holistic”] are completely fanciful; admissions are driven by fairly mechanical decision rules. ... [E]ven at schools that truly do make decisions on a case-by-case basis ... implicit weight given to ... [an] applicant’s race ... is generally very large indeed.”)

⁵³ There is a school of thought suggesting that it is better not to know the particulars of race-conscious policies, to avoid stigmatization. See Paul Mishkin, The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action, 131 **U. Pa. L. Rev.** 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply ‘another factor’ among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.”). See also Daniel Sabbagh, Judicial Uses of Subterfuge: Affirmative Action Reconsidered, 118 **Pol. Sci. Q.** 411, 412 (2003) (“[T]he very nature of what may be conceived as the ultimate goal of affirmative action—namely, the deracialization of American society, insofar as racial identification remains inextricably bound up with a constellation of inegalitarian assumptions—would make it counterproductive to fully disclose that policy’s most distinctive and most contentious features—its nonmeritocratic component and the extent to which some of these programs take race into account. ... [I]n several Supreme Court decisions ... judges have made a significant, yet underappreciated, contribution to that rational process of minimizing the visibility and distinctiveness of race-based affirmative action.”); Heather Gerkin, Justice Kennedy and the Domains of Equal Protection, 121 **Harv. L. Rev.** 104, 104 (2007) (characterizing Justices Powell and O’Connor’s views as “something akin to a ‘don’t ask, don’t tell’ approach to race-conscious decisionmaking: use race, but don’t be obvious about it.”) (internal citation omitted). But see Cass R. Sunstein, Problems with Minimalism, 58 **Stan. L. Rev.** 1899, 1902 (2006) (critiquing Grutter because “[i]t is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment. . . .”); David Crump, The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion, 56 **Fla. L. Rev.** 483, 528 (2004) “One can argue that the undergraduate Michigan program at issue in Gratz, involving a fixed-point system, should have been regarded as constitutionally superior to the unlimited discretion model in Grutter At least in such a system the invidious exercise of discretion has been structured, confined, and checked The point system used in the undergraduate program struck down in Gratz should instead have been preferred because it makes the racial remedy visible”)

Beyond this double-consciousness, individualized review affects our understanding of both diversity and race-neutrality. It is through individualized review that a university admissions committee can use race in a flexible, nuanced manner, in conjunction with other admissions factors,⁵⁴ and thus fulfill the compelling interest in diversity articulated in Bakke, Grutter, and Fisher.⁵⁵ Both Grutter and Fisher specifically noted the breakdown of racial stereotypes as one of the educational benefits of diversity,⁵⁶ and universities can use individualized review to identify applicants who help to accomplish this end.⁵⁷ At the Fisher oral argument, Solicitor General Donald Verrilli—arguing in favor of UT’s race-conscious admissions policy—contended that purpose of such a policy was to identify individuals who defy racial stereotypes, such as “the African American fencer.”⁵⁸ If identifying and admitting individuals who break down racial stereotypes is part of the compelling interest in diversity, then there is a conundrum for race-neutrality: there is no race-neutral policy that can identify and admit African American fencers. By definition, one must consider race in order to do so.

⁵⁴ See supra note 20.

⁵⁵ Id.

⁵⁶ Grutter, 539 U.S. at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”); id. at 330 (“[T]he educational benefits that diversity is designed to produce . . . are substantial [and include] . . . break[ing] down racial stereotypes[.]”); Fisher 133 S.Ct. at 2418 (noting that educational benefits of diversity include “lessening of racial isolation and stereotypes[.]”).

⁵⁷ See Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 236 (5th Cir. 2011)(vacated by Fisher v. Univ. of Texas at Austin, 133 S.Ct. 2411 (2013))(noting that in framework of UT’s race-conscious admissions policy, “a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school . . . [J]ust as in Grutter, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.”).

⁵⁸ Transcript of Oral argument at 61, Fisher v. Univ. of Texas at Austin, 133 S.Ct. 2411 (2013)(No. 11-345)(“[U]niversities . . . are looking . . . to make individualized decisions about applicants who will directly further the educational mission. For example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has . . . mastered classical Greek.”).

But even if such nuanced use of race is not necessary to fulfill the diversity interest, individualized review has broader consequences for our understanding of race-neutrality—as the next section on the double-consciousness of race-neutrality will show.

C. Race-Neutrality’s Double-consciousness: It Is the Numbers!

Unlike diversity and individualized review, race-neutrality is not part of the constitutional requirement for race-conscious admissions. It is actually the opposite: the absence of viable race-neutral policies that can attain the compelling interest in diversity is a constitutional requirement for any university using race-conscious admissions.⁵⁹ But like diversity and individualized review, race-neutrality also suffers from its own double-consciousness—and perhaps even more so. It can have at least two different meanings, and the Supreme Court has not even acknowledged these disparate understandings of race-neutrality, much less addressed them in any meaningful way.

One definition of race-neutrality is “colorblindness”: information about an applicant’s race is completely absent in the admissions process—or at least that it cannot be considered by admissions reviewers. In Fisher, the Supreme Court and the litigants held to this view.⁶⁰ But race-neutrality in this formal sense can occur only in an admissions process that is mechanistic—that is, without individualized review or discretion by admissions officers. In such a process, admissions decisions occur automatically, based on academic criteria such as GPAs, class rank, and/or standardized test scores. UT’s Top Ten Percent plan is one example of such an admissions plan, which is why Fisher held to this definition.

⁵⁹ Fisher, 133 S.Ct. at 2420 (“The reviewing court must be ultimately satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity . . . ‘at tolerable administrative expense . . .’”).

⁶⁰ See Harpalani, supra note 36, at 69-71 (discussing how race was a trivial factor in the UT admissions process).

But this type of formal race-neutrality is difficult to achieve in a holistic admissions process, where race is not as simple as a box that applicants can check. Individualized review inherently provides admissions officers with discretion, along with plenty of other information about each applicant. Applicants' personal statements and essays, extracurricular activities,⁶¹ and even their names⁶² may reveal clues to their racial/ethnic background. Admissions officers' unconscious biases may come into play during their individualized review of applications, and conscious biases can also come into play: those reviewers who desire to increase the numbers of admitted minority students already have access to the information to do so. Even in states with constitutional bans on race-conscious admissions, there have been accusations that admissions officers consider race subversively, as individualized review and holistic admissions plans allow them to do so.⁶³ Moreover, there is no practical way to fully eliminate this phenomenon.⁶⁴

⁶¹ See UC Berkeley Office of Undergraduate Admissions - Freshman Selection Process, <http://admissions.berkeley.edu/selectsstudents> and <http://admissions.berkeley.edu/personalstatement> (last visited Nov. 10, 2014)(application and personal statement weblinks for the University of California at Berkeley). Prompt #1 for freshman applicants is “[d]escribe the world you come from—for example, your family, community or school—and tell us how your world has shaped your dreams and aspirations.” *Id.* Applicants can readily allude to their racial background in response to this prompt, and members of underrepresented minority groups can self-identify here.

⁶² See generally Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 *Q. J. of Econ.* 767 (2004) (discussing the shift from similarities between black and white names in the 1960s to distinctly African American names in the 1970s); *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting)(noting that without affirmative action, “applicants may highlight . . . Hispanic surnames . . .”).

⁶³ See Harpalani, *supra* n.36, at 71. See also Sander & Taylor, *supra* n.52 at 169-70 (2012) (contending that as of 2012, “the University of California system is still, formally race-neutral, but in practice it has come very close to a form of racial proportionality . . . [and that] . . . neither voters nor state officials can end university racial preferences by a single stroke.”); *id.* at 158 (contending that after Proposition 209 (California’s constitutional ban on race-conscious policies) was passed in 1996, faculty in University of California system “spoke of the feasibility of evasion” for “small programs,” where “[t]he number of students was so small, and the criteria for selection so subjective, that outside investigators could not easily detect racial discrimination.”). Professors Sander and Taylor also note that “[f]or larger programs, such as law schools or business schools, that [subversive use of race] would obviously be more difficult.” *Id.* But see Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-up*, August 28, 2008, (available at <http://images.ocreger.com/newsimages/news/2008/08/CUARSGrosecloseResignationReport.pdf>). One article on the UCLA controversy was entitled “Is ‘Holistic’ Admissions a Cover for Helping Black Applicants?” Scott Jaschik, “Is ‘Holistic’ Admissions a Cover for Helping Black Applicants?” *Inside Higher Ed* (Sept. 2, 2008, 4:00 am) (<http://www.insidehighered.com/news/2008/09/02/ucla>).

⁶⁴ See Jaschik, *supra*. See also Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 *Cal. L. Rev.* 1139, 1146 (2008) (exploring unconscious racial biases in admissions and raising “the question of whether race

Most elite universities—and particularly private universities—use holistic admissions plans with individualized review. Grutter and Fisher endorsed this type of admissions plan and went as far as to require it if race is to be an admissions factor.⁶⁵ As such, if race-neutrality is understood in formal terms, Grutter and Fisher's narrow tailoring principles are self-contradictory: their requirement for holistic, individualized review undercuts their espoused goal of race-neutrality.

A second definition of race-neutrality, which is more compatible with holistic admissions plans, is rooted in statistical disparities rather than formal absence of race. Here, we can define race-neutrality as the lack of any significant statistical disparities between minority and non-minority admittees on academic criteria such as grades, class rank, and standardized test scores. Under this view, it does not matter that admissions reviewers can access and even consider information about an applicant's race, so long as doing so does not lead to significant statistical disparities in admitted applicants' academic criteria by race.

Such statistical disparities are the major concern of critics of race-conscious admissions policies. Plaintiffs in Bakke and Grutter (but not Fisher) relied heavily on such statistical disparities to make constitutional arguments against race-conscious admissions policies.⁶⁶ Also,

can in fact be eliminated from admissions processes.”); Daniel N. Lipson, Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management At UC-Berkeley, UT-Austin, and UW-Madison, 32 **L. & Soc. Inquiry** 985, 1015 (2007) (noting that “the line between race-based and race-blind policy making can be quite blurry.”).

⁶⁵ See *supra* n.20.

⁶⁶ See Bakke, 438 U.S. at 277-78 note 7 (comparing Plaintiff Alan Bakke's GPA and MCAT scores with those of all admitted applicants and those admitted via the special admissions program); See also Grutter v. Bollinger, 137 F.Supp.2d 821, 838 (E.D.Mich.,2001)(overruled by Grutter v. Bollinger, 539 U.S. 306 (2003))(discussing how Plaintiffs' expert witness concluded that “that [a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value.”). But see Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 **Mich. L.Rev.** 1045, 1049 (2002) (cited in Gratz v. Bollinger, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting))(“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber

proponents of “mismatch theory” focus on those disparities to contend that race-conscious policies can harm minority students.⁶⁷ In this vein, it makes sense to effectively deem an admissions process as race-neutral if there are no academic disparities between admitted minority and non-minority applicants, regardless of whether the process itself takes race into account. While they are not enough to define diversity, the numbers really should be at the core of race-neutrality.

We should also note that under this second definition, Texas’s Top Ten Percent plan is not race-neutral: there are disparities in standardized test scores between minority and non-minority students admitted under the Top Ten Percent plan.⁶⁸

minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”).

⁶⁷ In its critiques of race-conscious admissions, “mismatch theory” also focuses on statistical academic disparities between admitted students of different racial groups. See generally Sander and Stuart, *supra* note 52. For a critique of mismatch theory, see Stacy L. Hawkins, Mismatched Or Counted Out? How Mismatch Theory Is Incomplete, What’s Missing, and Why It Matters 17 **U. Pa. J. Const. L.** (2015).

⁶⁸ For the UT entering class of 2009, among students automatically admitted via the Top Ten Percent Law, White students (n=2508) had a mean SAT score of 1864; African American students (n=297) had a mean SAT score of 1584; Asian American students (n=1101) had a mean SAT score of 1874; and Hispanic students (n=1256) had a mean SAT score of 1628. **Univ. of Tex. at Austin Office of Admissions, Implementation and Results of Tex. Aut. Admissions Law (HB 588) at Univ. of Texas at Austin**, at 14.

Others have contended that the Top Ten Percent plan is not even formally race-neutral. See Gratz v. Bollinger, 539 U.S. 244, 303-04 note 10 (2003)(Ginsburg, J., dissenting)(“Calling . . . 10% or 20% plans ‘race-neutral’ seems to me disingenuous, for they ‘unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.’”); see also *id.*, at 298 (Souter, J., dissenting) (“[P]ercentage plans’ are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it.”); and Fisher, 133 S.Ct. at 2433 (Ginsburg, J., dissenting) (“[O]nly an ostrich could regard the supposedly neutral alternatives [referring to Texas’s Top Ten Percent Law] as race unconscious. . . . [T]he vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.’”) (quoting Gratz at 298 (Souter, J., dissenting)). See also Fisher, 631 F.3d at 242 n.156 *rev’d by*, Fisher v. Univ. of Texas at Austin, 133 S.Ct. 2411 (2013) (“A court considering the constitutionality of the [Top Ten Percent Law] would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects.”). See Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)(holding that granting an absolute lifetime preference does not unfairly discriminate against women); *cf.* Brief for Social Scientists Glenn C. Loury et al. as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)(Nos. 02-241), available at 2003 WL 402129, at *6, *8(noting that ‘it is not clear that [percentage] plans are actually race-neutral’ and that some amici counsel in Grutter ‘have signaled interest in moving on after this case to challenge these aspects of the Texas program’). But see Eboni S. Nelson, What Price Grutter? We May Have Won the Battle, but Are We Losing the War? 32 **J.C.&U.L.** 1, 8 (2005) (arguing that “in order to be considered race-neutral . . . [i]t is only necessary that [programs] do not allow applicants to be classified and/or selected based on their race or ethnicity.”). See also Leslie Yalof Garfield, The Paradox Of Race-Conscious Labels, 79 **Brook. L. Rev.** 1523, 1567 (2014)(“By

One can also combine the two definitions of race-neutrality posited here: an “either-or” definition is plausible. Under this view, we can deem an admissions policy as “race-neutral” if:

1. It is mechanistic rather than discretionary and does not formally access information about an applicant’s race; or
2. Regardless of whether the admissions process accesses information about an applicant’s race, there are no statistical disparities on academic criteria between admitted applicants of different racial groups.

The Supreme Court, however, has stuck to a formal definition of race-neutrality—one that is focused on the absence of race from the admissions process. The Court has acted as if diversity and its educational benefits, holistic, individualized review of applicants, and formal race-neutrality are all compatible. But as the next Section shows, they are not—they form a “Bermuda Triangle” for university admissions.

III. THE BERMUDA TRIANGLE OF UNIVERSITY ADMISSIONS

By itself, the double-consciousness of diversity, race-neutrality, and individualized review—the varying understandings of these terms in Supreme Court litigation and opinions—creates enough confusion about the future of race-conscious admissions policies. But even beyond this confusion, these three core tenets of the Supreme Court’s doctrine on race-conscious admissions are incompatible. They cannot all be attained at the same time—they form a “Bermuda Triangle” for university admissions.

categorizing the Texas [Top Ten Percent] Law as race-neutral, the Court turns a blind eye to the segregation that serves as the foundation for assembling diverse student bodies in the State’s post-secondary schools. . . . On the other hand . . . [l]abeling the Top Ten Percent Law as race-conscious demands that courts subject it to rigorous strict scrutiny review; making it a likely candidate for constitutional demise.”).

A. Fisher and the Bermuda Triangle: Still a Fishing Expedition

From one perspective, Fisher v. Texas illustrated well the Bermuda Triangle of university admissions. The Fisher litigation framed diversity largely in terms of numerical representation of minority groups, even if the language of the litigants' briefs alluded to educational benefits and the like. With changes in racial demographics—increasing numbers of Black and Latino/a residents in Texas—the Top Ten Percent plan might yield numerical representation of minority students equivalent to most holistic admissions plans—if not now, then in the near future. Also, the Top Ten percent plan is also formally race-neutral:⁶⁹ race does not play any direct role in admission of students. So two of the three tenets could be fulfilled.

But the Top Ten Percent plan is not a holistic admissions policy and does not include individualized review of applicants. Students admitted to UT under the Top Ten Percent plan did not have anyone exercise discretionary review over their applications: they were admitted via an automatic formula that considered only their class rank.⁷⁰ Fisher was an unusual case: the only reason it came in to being was that the Texas state legislature voluntarily adopted the Top Ten Percent Law, and then Governor George W. Bush signed it into law. This has not happened in most states and could not practically apply to private universities or graduate and professional schools. Grutter even stated that percentage plans such as the Top Ten Percent plan were not adequate substitutes for race-conscious holistic admissions policies: they cannot consider race and other diversity factors in nuanced fashion, as endorsed by Justice O'Connor majority

⁶⁹ But see Sander and Taylor, supra n.52.

⁷⁰ See Tex. Educ. Code Ann. § 51.803(a-1)(2010).

opinion.⁷¹ Grutter thus suggests that courts cannot compel universities to adopt percentage plans, even if they can attain numerical diversity similar to race-conscious holistic admissions.

Fisher was a very limited case to begin with, and it was never a good venue for the Court to make a broad pronouncement on race-consciousness. Rather, it is and always has been a “fishing expedition.”⁷²

B. Holistic Admissions and the Bermuda Triangle: The Numbers Still Don’t Add Up

Looking beyond Fisher, if a university employs a holistic admissions process with individualized review, then in most cases, it cannot achieve both diversity and race-neutrality—regardless of how we define those tenets. As noted earlier, if the diversity interest incorporates admission of individuals who specifically defy racial stereotypes, then there is no race-neutral admissions process that can attain it.⁷³ And if race-neutrality is defined in formal terms—as the absence of information about race in the admissions process—then it cannot be attained in a holistic admissions process with individualized review.⁷⁴ But what if we measure diversity solely by numerical representation, and what if we define race-neutrality in statistical terms—as the absence of disparities on academic criteria between minority and non-minority admitted students?

In theory, it may be possible to have a holistic admissions plan, attain the desired numerical representation of minority groups, and have no statistical disparities on academic criteria

⁷¹ Grutter, 539 U.S. at 340 (noting that percentage plans “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”). The Grutter majority also questioned how percentage plans could work for admission to graduate and professional schools. Id. (noting failure to explain how “‘percentage plans,’ recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State . . . could work for graduate and professional schools.”).

⁷² See Harpalani, supra note 36.

⁷³ See text accompanying and following supra notes 56-58.

⁷⁴ See supra notes 61-64 and accompanying text.

between racial groups. In practice, however, it is not currently possible most of the time.⁷⁵ The underlying reason that universities need to use race-conscious admissions policies is not to attain diversity per se, but because the magnitude of academic disparities between minority and non-minority applicants would not allow them to attain this diversity absent consideration of race.⁷⁶ For the most part, the Fisher litigation ignored the most significant reason that most universities use race-conscious admissions policies—because of disparities on academic admissions criteria between minority and non-minority applicants.⁷⁷ In her Grutter majority opinion, Justice O'Connor acknowledged this reality:

⁷⁵ See Richard D. Kahlenberg, **A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences** 26-61, (available at <http://tcf.org/assets/downloads/tcf-abaa.pdf> (discussing impact of state university bans on race-conscious admissions policies on minority student enrollment). Mr. Kahlenberg finds that through a combination of recruitment and use of socioeconomic criteria and proxies for race as admissions factors, universities in Washington, Florida, Georgia and Nebraska have been able to recover to prior levels of Black and Latina/o enrollment, after experiencing initial drops in minority enrollment after bans on race-conscious admissions. However, it is unclear how much this recovery is due to demographic changes in the states (particularly the growing Latina/o populations), rather than the efficacy of race-neutral alternatives. Additionally, state universities in Washington and Nebraska had low numbers of Black and Latina/o students even before enacting their bans (owing to the low percentage of minorities in the state population overall), and recovery using recruitment and race-neutral factors in those states did not require much. These universities may never have approached a “critical mass” of minority students to begin with. Even Justice Scalia agreed that regardless of a state’s demographics, very low percentages of minority students on campus does constitute a critical mass. See Transcript of Oral Argument, supra note 41, at 15 (Justice Scalia stating “Why don’t you seriously suggest that demographic—that the demographic makeup of the state has nothing to do with whether somebody feels isolated, that if you’re in a state that is only 1 percent black that doesn’t mean that you’re not isolated, so long as there’s 1 percent in the class? . . . I wish you would take that position because it seems, to me, right.”).

Moreover, in 15 years, the flagship public universities in California (UC Berkeley and UCLA) have not recovered to the levels of minority enrollment that they had before California’s ban on race-conscious admissions, in spite of a significant increase in the minority population of California. See Kahlenberg, supra at 36, 38.

⁷⁶ Thomas J. Espenshade & Alexandria Walton Radford, **No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life** 10, 92-93 (2009)(reporting that in sample of 9,100 student respondents from eight highly-selective public and private institutions of higher education, compared to White admittees, race-related admissions plus factors were equivalent to 310 points (out of 1600 total) for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points). For projected effects of eliminating race-conscious admissions on minority enrollments, see id. at 464-65 (private institutions) and 480-81 (public institutions).

⁷⁷ Justice Thomas did make mention of academic disparities in his concurrence. Fisher, 133 S.Ct. at 2431 (noting that “Blacks and Hispanics admitted to the University [of Texas at Austing] . . . are, on average, far less prepared than their white and Asian classmates. . . . [T]he University . . . has [not] presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University.”)(Thomas, J., concurring).

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁷⁸

Justice O'Connor's statement implies that the need for race-conscious admissions policies is contingent upon racial disparities on academic criteria. Moreover, in spite of their vast ideological differences, both Justice Ginsburg and Justice Thomas acknowledged that racial disparities on academic criteria are the underlying reason why universities need to use race-conscious admissions policies to attain diversity, and they both questioned Justice O'Connor's aspiration here that racial disparities on academic criteria could be eliminated by 2028.⁷⁹

⁷⁸ Grutter 539 U.S. at 343 (emphasis added). Ironically, in 2003, Justice O'Connor was all too willing to suggest a time limit for race-conscious admissions policies, one-half century after the Supreme Court refused to do so with school desegregation. See *Brown v. Board of Education (II)*, 349 U.S. 294 (1955) (ordering racial integration of segregated public schools "with all deliberate speed."). But see infra notes 85-86 and accompanying text (arguing that Supreme Court is now also content to end affirmative action "with all deliberate speed.").

Nevertheless, Justice O'Connor herself later suggested that 25 years was not a binding time limit on race-conscious admissions. See **Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* 58, 62** (David L. Featherman, Martin Hall & Marvin Krislov, eds., 2010) (stating "that 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028."). Both parties in *Fisher* also agreed that the 25 year limit was not binding. See Transcript of Oral argument at 11, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Plaintiff's counsel Bert Rein answering "No, I don't" to Justice Scalia's question, "do you think that *Grutter* held that there is no more affirmative action in higher education after 2028?"); *id.* at 50 (UT counsel Gregory Garre noting that "we don't read *Grutter* as establishing that kind of time clock."). However, at the *Fisher* oral argument, Justices Antonin Scalia and Stephen Breyer at least hinted that the 25 year period was legally significant. *Id.* at 49 (Justice Scalia stating that *Grutter* "holds for . . . only . . . sixteen more years[.]"); *id.* at 8 (Justice Breyer noting that "*Grutter* said it would be good law for at least 25 years[.]"). Later in oral arguments, Justice Breyer stated that he "agree[d] it might" be the holding of *Grutter* that there can be no race-conscious admissions policies after 2028. *Id.* at 11.

⁷⁹ See *Grutter v. Bolinger*, 539 U.S. 306, *id.* at 346 (2002) (Ginsburg, J., concurring) ("[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."); *Id.* at 375-76 (Thomas, J., dissenting)

As such, even if we accepted a purely numerical definition of the diversity interest, it is not possible in most cases to attain appreciable numbers of minority students, unless universities use race as a flexible “plus factor” to compensate for academic disparities between groups. The “logical end point”⁸⁰ of race-conscious admissions will occur when such disparities no longer exist. At that time, it will be possible for universities to simultaneously use a holistic admissions process with individualized review, attain sufficient numerical diversity, and achieve statistical race-neutrality on academic criteria among admitted applicants of all racial groups. But that time is still far off.⁸¹

C. Summing Up the Bermuda Triangle: Two Out of Three Ain’t Good Enough

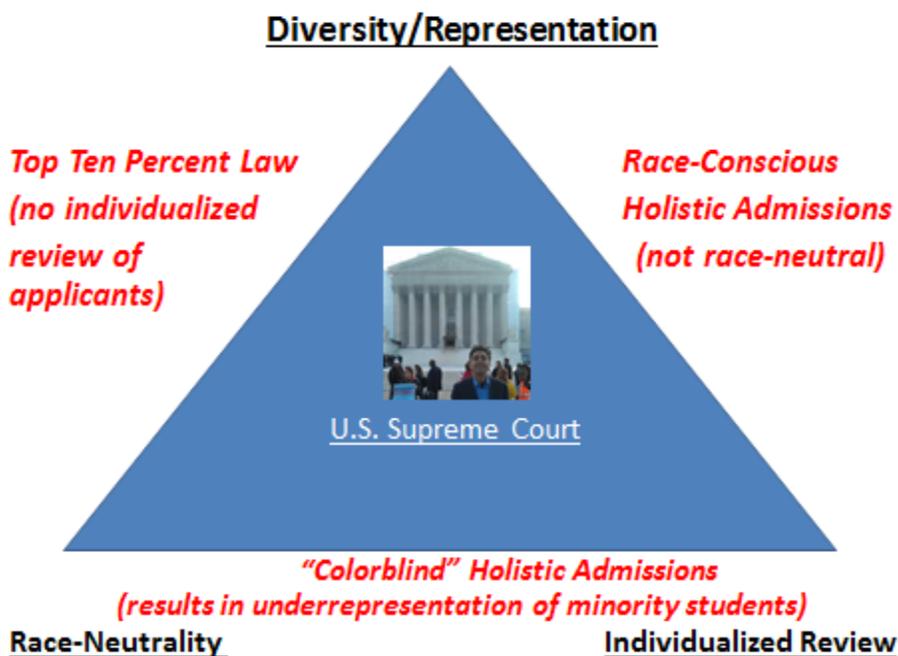
For the foreseeable future, diversity, race-neutrality, and individualized review will form a Bermuda Triangle for university admissions. Universities might be able to attain diversity (in terms of numerical representation) and formal race-neutrality, but not through a holistic admissions plan with individualized review. They could use individualized review and have a statistically race-neutral admissions policy, but that will compromise diversity (in terms of educational benefits and numerical representation). And they can and do attain diversity (in terms of educational benefits and numerical representation) and have individualized review, but the holistic admissions plans they use to do so—currently the norm at elite universities—are not race-neutral.

(“The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. . . . No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.”). As noted, Justice O’Connor herself later backtracked from the 25 year timing for an end to race-conscious admissions. See supra note 78.

⁸⁰ Grutter v. Bollinger, 539 U.S. 306, 342 (2002) (“[R]ace-conscious admissions policies must be limited in time. . . . [A]ll governmental use of race must have a logical end point.”).

⁸¹ See supra note 79.

The Bermuda Triangle of University Admissions



IV. CONCLUSION: STILL SERVING TWO MASTERS

The double-consciousness of race-consciousness and the Bermuda Triangle of university admissions leave much uncertainty about the future of race-conscious admissions policies. The Supreme Court has taken W.E.B. Du Bois's proverbial "problem of the color line"⁸² and tied it into a complex, doctrinal Gordian knot.⁸³ About the only things we can be sure of are that: 1. Race-conscious policies will continue to generate much controversy and debate—albeit mainly in lower courts and state governments rather than the U.S. Supreme Court; and 2. Advocates of race-consciousness will continue to face their own double-consciousness, reconciling the fight

⁸² See Du Bois, *supra* note 7.

⁸³ The "Gordian knot" metaphor derives from associated with Alexander the Great and refers to an intractable problem that requires an unorthodox solution. See William Shakespeare, *Henry V*, act 1, scene 1. 45–47 ("Turn him to any cause of policy, The Gordian Knot of it he will unloose, Familiar as his garter").

for racial equity in higher education and the confusing and convoluted doctrine that we must navigate to get there.

A. “With All Deliberate Speed”: The Future of Race-Conscious Admissions

While a majority of Justices on the Supreme Court would like to see an end to race-conscious admissions policies, we still have them. Fisher suggests that the Justices are not willing to end race-conscious policies in one fell swoop, and Schuette indicates they are content for state-level politics to resolve the issue.⁸⁴ In an ironic twist—*déjà vu* right amidst Brown’s diamond anniversary⁸⁵—the Supreme Court seems content to let race-conscious admissions slip away gradually—”with all deliberate speed.”⁸⁶

How might this happen? It will probably involve both law and politics. While the Supreme Court punted in Fisher, the case still has a legal impact: it allows lower courts do the dirty work. District and circuit courts can interpret ambiguities in definitions of diversity and race-neutrality to either uphold or to strike down specific race-conscious admissions programs. In particular, Fisher’s call for stringent review, with “no deference” to universities on the implementation of race-conscious policies,⁸⁷ may invite district court judges to strike down these policies—especially where the link between race-consciousness and the educational benefits of diversity is not clearly articulated or demonstrated. Lower courts may well differ in their application of the law, based on specific attributes of admissions policies and on political leanings of judges.

⁸⁴ See *supra* note 22 and accompanying text.

⁸⁵ The Supreme Court decided Fisher in June 2013; Brown v. Board of Education 347 U.S. 483 (1954) (holding that racially segregated schools were unconstitutional); Brown v. Board of Education (II), 349 U.S. 294 (1955) (ordering racial integration of segregated public schools “with all deliberate speed.”). Note, it is now right between Brown I and Brown II’s diamond anniversaries.

⁸⁶ *Id.* The Court’s vague and tenuous language, embodied by the phrase, “with all deliberate speed,” allowed Southern states to resist desegregation for many years—another twist of irony.

The result is likely to be a very fractured jurisprudence. Lower courts may come to various conclusions about the meaning and measurement of the diversity interest; about how much can be inferred from numerical representation; about whether universities bear the burden to show educational benefits of diversity in addition to numerical representation; and about how universities must link the two.⁸⁸ Courts might also view race-neutrality in different ways, and they may have different standards for evaluating the efficacy of race-neutral alternatives in producing diversity. Eventually, another case will make it back to the Supreme Court. We cannot predict the timing of said case: twenty-five years elapsed between Bakke (1978) and Gratz and Grutter (2003). We also cannot predict the result, which will depend, more than anything else, on the composition of the Court at the given time.

But it might not even come to that, if the political aspect predominates. With its 2014 ruling in Schuette, the Court upheld the ability of states to pass constitutional bans on race-conscious policies. This has already occurred in California, Washington, Michigan, Nebraska, Arizona, and Oklahoma.⁸⁹ Additionally, race-conscious policies have been banned via executive action in Florida,⁹⁰ and state legislative action in New Hampshire.⁹¹ Political process at the state level may continue to eliminate race-conscious admissions policies in many states,⁹² before the

⁸⁷ See Fisher at 2414 (“[A] University must prove that the [race-conscious] means it chose to attain . . . diversity are narrowly tailored to its goal. On this point, the University receives no deference.”).

⁸⁸ This debate has already started with Judge Emilio Garza’s dissent in Fisher on remand. See Fisher (II) at 61 (Garza, J., dissenting) (“[A]ssuming that the University’s diversity goal is establishing classroom diversity, it is the University that bears the burden of proving that the use of race . . . is necessary to furthering this goal.”). Judge Garza critiqued the Fisher (II) majority opinion for “continu[ing] to defer impermissibly to the University’s claims . . . deference [which] is squarely at odds with the central lesson of Fisher [Supreme Court ruling].” Id. at 44 (Garza, J., dissenting).

⁸⁹ **National Conference of State Legislators, Affirmative Action: State Action** (2014) (available at <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>).

⁹⁰ Fla. Exec. Order No. 99-281 (Nov. 9, 1999).

⁹¹ H.B. 623, 2011 Leg. (N.H. 2011) (codified as amended in scattered sections of **N.H. Rev. Stat. Ann.** § 187 and 188).

⁹² It is also possible that voters in some states will reject referenda to eliminate affirmative action, as occurred in Colorado in 2008. See Colleen Slevin, Colorado Voters Reject Affirmative Action Ban, **USA Today** (Nov. 7,

Supreme Court takes up the constitutionality of such policies again. By then, if most states have already banned race-conscious policies, a Supreme Court ruling on eliminating race-conscious admissions might be a mere rubber stamp, reeling in any outlier jurisdictions that still allow them.

Law and politics could also fold back on each other. In jurisdictions with state constitutional bans on race-conscious policies, such as California and Michigan, there could be legal challenges contending that universities still use race surreptitiously.⁹³ As noted earlier, there have been such accusations in California, and Justices Souter and Ginsburg have warned us about this phenomenon.⁹⁴ If such legal challenges come to bear, they would be different from Bakke, Gratz, Grutter, and Fisher. The universities involved would deny any intentional use of race in admissions: to do otherwise would be an admission of unlawful activity. Plaintiffs in such cases would have the higher burden of proving intent,⁹⁵ which would prove to be quite a quandary.⁹⁶

2008), http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800_x.htm. Additionally, a recent poll in California indicated that a majority of residents of each racial group supported “affirmative action programs designed to help blacks, women, and other minorities get better jobs and education.” See Karthick Ramakrishnan & Taeku Lee, Views of a Diverse Electorate: Opinions of California Registered Voters in 2014, Nat’l Asian Am. Surv., at 8 (Aug. 2014), <http://www.naasurvey.com/resources/Home/NAAS-Field-2014-final.pdf>.

⁹³ See *supra* note 63.

⁹⁴ See Gratz v. Bollinger, 539 U.S. at 304-5 (Ginsburg, J., dissenting) (“One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans . . . Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished . . . If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”). Justice Ginsburg reiterated this concern in her Fisher dissent. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“As for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’” (quoting Gratz, 539 U.S. at 304 (Ginsburg, J., dissenting))). See also Gratz, 539 U.S. at 298 (Souter, J., dissenting) (“Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”).

⁹⁵ See Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that the Supreme Court has “not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”); Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs “because of, not merely in spite of, its adverse effects upon an identifiable group.”).

In short, the double-consciousness of race-consciousness and the Bermuda Triangle of university admissions pervade the Supreme Court's rulings and render them a convoluted mess open to highly varying interpretations. Lower courts will have to deal with this mess until the Supreme Court gives further guidance, and it is likely that political actors—be they district court judges with strong feelings about the issue or state politicians seeking affirmative action bans—will decide the foreseeable future of race-conscious admissions policies.

B. Double-Consciousness or Doublethink?: Victory is Defeat

Finally, in the wake of the Supreme Court's recent decisions and the Bermuda Triangle of university admissions, it is important to highlight the continuing double-consciousness of advocates of race-consciousness. Like the late Professor Derrick Bell, many such advocates are not huge fans of the diversity interest.⁹⁷ Although we may value diversity, we would prefer more social-justice oriented rationales for race-conscious admissions, such as remediation for the effects of racial discrimination.⁹⁸ We also fear that many of the risks that Professor Bell warned of a decade ago have come to bear: diversity distracts attention from important issues of race and class justice, from efforts to reform universities' reliance on admissions criteria such as grades and test scores, and from elite universities' tendency to admit the most privileged

Alternatively, a federal constitutional claim might rest on “a clear pattern, unexplainable on grounds other than race,” even if proof of intent is lacking. *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). The question would then become: what constitutes a “clear pattern”?

⁹⁶ Of course, where there are state constitutional bans on race-conscious admissions policies, state courts could apply a different standard to allow disparate impact to serve as a basis for claims under those constitutional bans.

⁹⁷ See *supra* notes 3-6.

⁹⁸ See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 *Yale L. & Pol'y Rev.* 1, 34 (2002) (“[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.”); Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 *Wash. U. L. Rev.* 907, 913-14 (2010) (“The problem with the diversity rationale . . . is that it has come to serve as a de facto proxy for remedial concerns.”). The Supreme Court has rejected “the remedying of the effects of ‘societal discrimination,’” as a compelling interest, stating that societal discrimination constitutes “an amorphous concept of injury that may be ageless in its reach into the past.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-98 (1989)(quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

members of minority groups.⁹⁹ In Professor Bell’s words, affirmative action advocates feel like we are still “serving two masters”—freedom for elite universities and social justice for poor people of color¹⁰⁰—and trying to make sense of a confusing and convoluted doctrine to do so.

Despite his warnings, Professor Bell acknowledged that confronting the real issues would “not be easy and [would] be resisted fiercely.”¹⁰¹ Indeed, they constitute a direct confrontation not only with mismatch theorists and other affirmative action opponents, but also with university administrators.¹⁰² The ground of diversity—now thrice reinforced by the Supreme Court,¹⁰³ and tied to individualized review and holistic admissions—appears much safer. But Professor Bell still preferred those tougher battles to diversity’s distractions,¹⁰⁴ because those battles confronted the real issues that can lead towards racial equality. From a strategic perspective, it is debatable whether Professor Bell was correct—but regardless, he was well-known for challenging the civil rights orthodoxy;¹⁰⁵ and for confronting authority more generally.¹⁰⁶ In W.E.B. Du Bois’s words, Professor Bell was truly “gifted with a second-sight,”¹⁰⁷ and his insights influenced several generations of legal scholars and social activists,¹⁰⁸ including the

⁹⁹ See *supra* notes 3-5 and accompanying text.

¹⁰⁰ See *supra* text accompanying notes 8-12.

¹⁰¹ See Bell, *supra* note 3, at 1633.

¹⁰² See *id.* (contending that “[t]he long overdue reform of admissions standards . . . will be resisted fiercely by many if not most of those colleges and graduate schools with whom civil rights advocates joined in the effort to save minority admissions . . .”).

¹⁰³ See *supra* notes 1, 19, and 25.

¹⁰⁴ See Bell, *supra* note 3, at 1633 (Professor Bell noting that “the long-overdue reform of admissions standards will not be easy . . .”).

¹⁰⁵ See Bell, *supra* note 3, at 1633 (arguing that reforms initiated to remedy racial barriers often provide more advances for whites than blacks).

¹⁰⁶ See **Derrick A. Bell, Jr., *Confronting Authority: Reflections of an Ardent Protester*** xi (1994) (encouraging readers to confront the wrongs that afflict them).

¹⁰⁷ See **Du Bois, *Souls of Black Folk***, *supra* note 7, at 3 (“After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world.”) (emphasis added).

¹⁰⁸ See, e.g., Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle that Famous House?* 75 **N.Y.U. L. Rev.** 283, 284 (2000) (“Derrick Bell . . . conducted me to intellectual realms hitherto unknown and unimagined, opening

author of this Essay.¹⁰⁹ By expressing his own double-consciousness, Professor Bell gave voice to the profound ambivalence felt by many advocates of racial justice in the years after the civil rights movement.

When the Supreme Court issued its opinion in Fisher in June 2013, my immediate reaction was that it was “the best realistic outcome for proponents of affirmative action (I consider myself to be a strong one)” and that “proponents of affirmative action should declare victory for now,”¹¹⁰ in spite of the fact that the Court had ruled against UT by vacating its lower court victory.¹¹¹ And one year later, when Schuette upheld Michigan’s state constitutional ban on race-conscious admissions,¹¹² right on Grutter’s original victory ground, my commentary on HuffPost Live similarly spun a defeat positively.¹¹³ I focused on the fact that Colorado voters had rejected a state referendum to ban race-conscious policies not too long ago,¹¹⁴ demonstrating that social activism could convince voters to reject these bans.¹¹⁵ My forthcoming piece in the Seton Hall Law Review also charges forward: it argues that the Court’s broad definition of the

up vistas I never knew existed. ... [H]e never charged me a nickel, and left me secure, as a reader and now a friend, that I was always in good hands.”)

¹⁰⁹ See Vinay Harpalani, From Roach Powder to Radical Humanism: Professor Derrick Bell’s “Critical” Constitutional Pedagogy, 36 Seattle U. L. Rev. xxiii, xxviii (2013) (describing Professor Derrick Bell’s teaching and life philosophies and his impact on students); Vinay Harpalani, Tribute in Memory of Professor Derrick Bell, Derrick Bell Official Site (Oct. 16, 2011), <http://professorderrickbell.com/tributes/vinay-harpalani/> (same).

¹¹⁰ Vinay Harpalani, Affirmative Action Survives—For Now, IIT Chicago-Kent Faculty Blog, (June 24, 2013) <http://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/> (also posted on ACSblog (American Constitution Society), SALT LAW Blog (Society of American Law Teachers), and Education Law Prof Blog; and hyperlinked to SCOTUSblog).

¹¹¹ See *supra* note 16 and accompanying text.

¹¹² See *supra* note 22 and accompanying text.

¹¹³ Vinay Harpalani, Discussion of Schuette v. Coalition to Defend Affirmative Action, Huffington Post (Apr. 22, 2014), <http://live.huffingtonpost.com/r/segment/affirmative-action-scotus-uhpolds-michigan-ban/5353ba20fe34449b6f00024e>.

¹¹⁴ See Slevin, *supra* note 92.

¹¹⁵ See *id.* (noting that opponents of the Colorado’s proposed ban on affirmative action “launched a door-to-door campaign ... [and] ... ran radio ads in English and Spanish against the amendment[.]”).

diversity interest allows universities to defend race-conscious admissions policies, and it proposes novel strategies for universities to do so.¹¹⁶

Most recently, UT prevailed in Fisher on remand.¹¹⁷ I could conclude this Essay by once again claiming a victory for affirmative action, as I did after Grutter,¹¹⁸ and on several occasions since.¹¹⁹ But double-consciousness is indeed a “peculiar sensation”¹²⁰—it is fraught with Orwellian irony and often feels more like doublethink: “holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”¹²¹ The Fisher remand appeal still looms,¹²² and recently an anti-affirmative action organization (ironically named “Students for Fair Admissions”)¹²³ filed two new lawsuits, challenging race-conscious admissions policies at Harvard University and at the University of North Carolina at Chapel Hill.¹²⁴ I can only

¹¹⁶ Vinay Harpalani, Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher, 45 Seton Hall L. Rev. 2 (forthcoming 2015) (“This Article argues that Fisher v. Texas does not spell doom for race-conscious admissions policies, in spite of its call for universities to seriously examine whether race-neutral alternatives can attain the educational benefits of diversity.”).

¹¹⁷ See supra note 16 and accompanying text.

¹¹⁸ See supra note 2 and accompanying text.

¹¹⁹ See supra notes 110-116 and accompanying text.

¹²⁰ Du Bois, supra note 7, at 3 (“It is a peculiar sensation, this double-consciousness . . .”).

¹²¹ George Orwell, Nineteen Eighty-Four 32 (1949) (defining “doublethink” as “[t]he power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”). Nineteen Eighty-Four’s dystopian world also gives the ironic Party slogans of “War is Peace,” “Freedom is Slavery,” and “Ignorance is Strength.”). Id. at 32. Nineteen Eighty-Four is in many ways reminiscent of Professor Derrick Bell’s own dystopian narratives in And We Are Not Saved: The Elusive Quest for Racial Justice (1987) and Faces at the Bottom of the Well: The Permanence of Racism (1992).

¹²² See supra note 16 and accompanying text.

¹²³ Organizations that focus on eliminating race-conscious university admissions often choose such ironic names, such as the Center for Equal Opportunity (see <http://www.ceousa.org/>), and the Project on Fair Representation (see <http://www.projectonfairrepresentation.org/>)—which organized these most recent lawsuits by “Students for Fair Representation.” Anti-affirmative action ballot initiatives are also given ironic names: California’s Proposition 209 is called the California Civil Rights Initiative (see <http://www2.law.ucla.edu/volokh/ccri.htm>); Washington’s Initiative 200 is called the Washington Civil Rights Initiative (see <http://www.washingtonpolicy.org/publications/brief/citizens-guide-initiative-200-washington-state-civil-rights-initiative>), and Michigan’s Proposal 2 is called the Michigan Civil Rights Initiative (see http://www.adversity.net/michigan/mcric_mainframe.htm). All of these names are again reminiscent of George Orwell’s Nineteen Eighty-Four, supra n.121,—where the Ministry of Peace focused on perpetuating warfare, the Ministry of Truth focused on propaganda and distortion of history, and the Ministry of Love focused on torturing dissidents and forcing them to comply with Big Brother’s directives. Id.

¹²⁴ Nick Anderson, Lawsuits allege unlawful racial bias in admissions at Harvard, UNC-Chapel Hill, Wash. Post, Nov. 17, 2014, <http://www.washingtonpost.com/local/education/lawsuits-allege-unlawful-racial-bias-in-admissions->

conclude with Professor Bell's prophetic admonition that "civil rights victory" would be "hard to distinguish from defeat."¹²⁵

at-harvard-unc-chapel-hill/2014/11/17/b117b966-6e9a-11e4-ad12-3734c461eab6_story.html; Lyle Denniston, *Direct new challenges to Bakke ruling (FURTHER UPDATE)*, SCOTUSblog (Nov. 17, 2014, 10:17 AM), <http://www.scotusblog.com/2014/11/direct-new-challenges-to-bakke-ruling/>

¹²⁵ Bell, *supra* note 3, at 1622.