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MICHAEL A. OLIVAS
William B. Bates
Distinguished Chair in Law
Director, IHELG
molivas@uh.edu
713.743.2078

DEBORAH Y. JONES
Program Manager
dyjones@uh.edu

The End of Indeterminacy in Affirmative Action

IHELG Monograph

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Carla D. Pratt
Associate Dean for Academic Affairs
Nancy J. LaMont Faculty Scholar and Professor of Law
Pennsylvania State University
Dickinson School of Law
333 W. South Street
Carlisle, PA 17013
Office: (717) 240-5295
cdp10@psu.edu

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THE END OF INDETERMINACY IN AFFIRMATIVE ACTION

Carla D. Pratt[*]

I. INTRODUCTION

After bracing for a decision overruling *Grutter v. Bollinger*,[1] the proponents of race-conscious affirmative action in higher education were relieved by the Supreme Court's most recent decision in *Fisher v. University of Texas at Austin*.[2] To the surprise of many, a seven justice majority[3] left most of *Grutter* intact and issued an opinion that allowed race-conscious affirmative action to continue.[4] However, the Court's opinion in *Fisher* does alter *Grutter* as precedent and will constrain the ability, and perhaps willingness, of colleges and universities to use race in admissions and other processes moving forward. This Essay urges higher education administrators to view *Fisher* as signaling the need for change in the manner in which higher education admissions are conducted. *Fisher*'s retreat from balancing First Amendment interests against Fourteenth Amendment interests in the application of the strict scrutiny standard will

[*] Associate Dean for Academic Affairs and Nancy J. LaMont Faculty Scholar, The Pennsylvania State University, Dickinson School of Law. I would like to thank the Valparaiso Law Review for hosting this Symposium to examine the role of diversity in the legal profession and for inviting me to participate. I would also like to thank my research assistant Susanna Bagdasarova for her able research assistance.

[1] 539 U.S. 306 (2003).

[2] 133 S. Ct. 2411 (2013).

[3] *Id.* at 2414. Justice Ginsburg dissented, reasserting her argument in *Gratz v. Bollinger* that because the Ten Percent Plan is specifically designed to produce racial diversity, it is race consciousness that drives the Ten Percent Plan. *Id.* at 2433 (Ginsburg, J., dissenting) (citing *Gratz v. Bollinger*, 539 U.S. 244, 303–04 & n.10 (2003) (Ginsburg, J., dissenting)). Therefore, it is not a "race neutral" plan. *Id.* She stated "only an ostrich could regard the supposedly neutral alternatives [such as the Ten Percent Plan] as race unconscious." *Id.* (citing *Gratz*, 539 U.S. at 303–04 & n.10 (Ginsburg, J., dissenting)). She warned that, if the Court does not permit the consideration of race as a factor in higher education admissions, many universities might "'resort to camouflage' to 'maintain their minority enrollment.'" *Id.* (quoting *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting)). Justice Kagan recused herself and did not participate in consideration of the case or writing the decision. *Id.* at 2422; *see* Eboni S. Nelson, *Reading Between the Blurred Lines of* Fisher v. University of Texas, 48 VAL. U. L. REV. XXX, XXX n.11 (201X) (discussing the composition of the Court when it decided *Fisher*).

[4] *See Fisher*, 133 S. Ct. at 2419, 2421 (asserting that the Court would not revisit *Grutter* and remanding for the lower court to determine whether the university's plan satisfied strict scrutiny requirements).

increase the cost of doing race-conscious work in higher education. The result is that colleges and universities will have to do substantial work to justify their decision to use race-conscious admission processes.

Schools will be asked to demonstrate that race-neutral alternatives do not yield the educational benefits of diversity that the use of race can achieve.[5] In this vein, it is foreseeable that courts might demand that universities prove that race-neutral types of diversity, such as geographic and socio-economic background, are inadequate proxies for achieving the educational benefits that racial diversity delivers. In other words, universities might be asked to prove exactly what unique work race does in the diversity calculus that is distinct from other forms of diversity, many of which are closely correlated with race-, such as socio-economic status (SES), geography, English as a second language, single parent household, and other race-neutral social variables. Courts will likely view universities' efforts to isolate the unique contribution of race to the diversity calculus as being based on stereotypes or essentialist notions of race.[6]

Because *Fisher* mandates that schools engage in '"serious, good faith consideration of workable race-neutral alternatives,'"[7] and show that "no workable race-neutral alternatives would produce the educational benefits of diversity,"[8] courts will ask: Can't universities achieve the educational benefits of diversity without considering race? The Court in *Fisher* stated that "[i]f 'a nonracial approach . . . could promote the substantial interest [in diversity] about as well

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[5] *Id.* at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.").

[6] For an explanation of racial essentialism, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV.. 581, 608–12 (1990).

[7] *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003)).

[8] *Id.*

and at tolerable administrative expense,' then the university may not consider race."[9] Accordingly courts will ask: "Wouldn't the use of race-neutral measures, some of which may be proxies for race,[10] produce the educational benefits of diversity about as well as the consideration of race?" If a university has students from all segments of the socio-economic strata; students from rural areas as well as urban and suburban areas; students from homes where English is not the primary language spoken in the home; students from single-parent households; students who are the first generation in their family to attend college; students who are the first in their family to complete high school; and students who are first generation U.S. citizens, students who are not U.S. citizens, and students who possess talents other than academics such as art, music, or athletics, then shouldn't that university be able to achieve the educational benefits that flow from diversity without considering anyone's race in the admissions process? If the answer is "no" then the question becomes: What does race get you that these other facially race neutral factors do not?

In light of this shift in the demand for justification of the use of race in admissions, some colleges and universities may decide that the resources necessary for compliance with *Fisher* are too great or that the risk of improperly administered race-conscious admissions is too high to continue the practice of race-conscious affirmative action in admissions. However, if racial diversity truly enhances the education we deliver to all students, as *Grutter* seems to

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[9] *Id.* (citation omitted) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (internal quotation marks omitted).

[10] Interestingly, the Court in *Fisher* seemed to have no problem with the fact that the facially race-neutral Ten Percent Plan used in Texas was designed with the purpose of operating as a proxy for race. *See id.* at 2416 (describing the facially neutral Ten Percent Plan and how it "resulted in a more racially diverse environment at the University").

acknowledge,[11] those of us concerned with delivering the best possible education to students will invest the resources necessary to maintain the educational benefits that flow from a racially diverse student body.

II. WHERE *FISHER* DEVIATES FROM *GRUTTER*

Grutter applied equal protection's strict scrutiny framework but took account of the First Amendment interest that colleges and universities have in maintaining academic freedom, which necessarily encompasses the ability to decide who to admit to the student body.[12] In applying the equal protection framework, the *Grutter* Court balanced that interest in academic freedom against the individual applicant's Fourteenth Amendment right to be free from racial discrimination.[13] In doing so, *Grutter* permitted courts to afford deference to the judgments of higher education institutions on both prongs of the strict scrutiny test.[14] Legal scholars generally interpreted *Grutter* as affording deference to the University of Michigan Law School on both the issue of whether diversity was a compelling governmental interest and whether the use of race was narrowly tailored to achieve that compelling governmental interest.[15] In the years following *Grutter*, legal scholars argued for and against the application of deference on both prongs of the

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[11] Grutter v. Bollinger, 539 U.S. 306, 330, 343 (2003) (recognizing the benefits that flow from a diverse student body).

[12] *Id*. at 326, 329.

[13] *Id*. at 326, 329–30.

[14] *Id*. at 343 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.").

[15] *See, e.g.*, Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 519 (2007) (interpreting *Grutter* and *Gratz* as affording deference on the narrow tailoring prong of the strict scrutiny test and asserting that the Court deviated from equal protection precedent when it failed to scrutinize whether the law school used the "minimum necessary racial preference" to meet its educational goal of a diverse student body).

strict scrutiny test.[16] Some argued that the deference afforded to institutions of higher education in admission decision-making was appropriate in light of the institutions' First Amendment interest in academic freedom.[17]

Balancing the constitutional interests of the First Amendment against those of the Fourteenth Amendment was not a novel approach to constitutional interpretation at the time that *Grutter* was decided.[18] Contrary to Justice Thomas's assertion in his concurrence in *Fisher* that "*Grutter* was a radical departure from [the Court's] strict-scrutiny precedents,"[19] *Grutter* properly took account of the fact that universities have First Amendment interests in academic freedom and appropriately incorporated those constitutional interests into the Fourteenth Amendment strict scrutiny test by calling for deference to educational judgments when strict scrutiny is applied to an academic institution's activities that fall within the penumbra of academic freedom.[20] Even after *Grutter*, the Court acknowledged that universities should be treated somewhat differently

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[16] *See, e.g.*, Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in* Fisher v. Texas, 47 U. RICH. L. REV. 1133, 1136–38 (2013) (asserting that courts should afford academic institutions deference on both prongs of the strict scrutiny test).

[17] *See, e.g.*, Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post*-Grutter *World*, 51 SANTA CLARA L. REV. 217, 222–23 (2011) ("[C]ourts should apply academic freedom only to legitimately academic, ideologically neutral decisions of a university, and should afford different amounts of deference based on how much academic expertise the decision required and whose rights the decision places at stake.").

[18] *See* Carla D. Pratt, *Should Klansmen Be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV 857, 867–77 (2003) (arguing that the admission of racists to the bar privileges the First Amendment right of free speech of whites over the Fourteenth Amendment right of people of color to be free from racial discrimination in the administration of justice). *See generally* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17 (1993) (asserting that extending the First Amendment to protect racist hate speech privileges the constitutional interests of whites over the interests of people of color in being free from harm imposed by racially harmful speech).

[19] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2423 (2013) (Thomas, J., concurring).

[20] Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

than other government actors in an equal protection analysis.[21] In explaining why K–12 public school administrators' decisions to assign children to schools in part based on race were unconstitutional, the Court distinguished the case involving K–12 public school children from the higher education context by stating that "in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'"[22]

Nonetheless, the Court's decision in *Fisher* repositions public universities by aligning them more with other government actors that lack a first amendment interest in the performance of their governmental function. This repositioning of public universities and collegesdiminishes their special position in constitutional jurisprudence.[23] *Fisher* resolves the deference debate by rejecting an application of strict scrutiny that affords deference to higher education institutions on both prongs of the strict scrutiny test.[24] Instead, *Fisher* constrains judicial deference to the first prong of the test—specifically whether achieving the educational benefits of student body diversity is a compelling governmental interest.[25] Moreover, the Court in *Fisher* makes clear that some—but not total—deference is appropriate in determining whether the institution of higher education has asserted a compelling governmental interest.[26] As a result of *Fisher*'s

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[21] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 770–71 (2007) (Thomas, J., concurring) (explaining that features unique to higher education justified the compelling nature of the university's interest in attaining a diverse student body).

[22] *Id.* at 724 (quoting *Grutter*, 539 U.S. at 329).

[23] *See Fisher*, 133 S. Ct. at 2421 (explaining that the higher education context does not have any bearing on the strict scrutiny analysis).

[24] *See id.* at 2419 (reasoning that *Grutter* supports deference only to the university's judgment regarding whether "a diverse student body would serve its educational goals").

[25] *Id.*

[26] *Id.*

interpretation of *Grutter*, courts are now permitted to afford some—but not total—deference to a school's educational judgment that racial diversity is essential to its educational mission, but a court is not permitted to afford deference to a school's judgment that its consideration of race in admissions is narrowly tailored to achieve its diversity goal. *Fisher* therefore constrains and narrows *Grutter*'s holding by rejecting its more nuanced analysis of strict scrutiny in favor of mandating that institutions of higher education demonstrate that the consideration of race is necessary to achieve "the educational benefits that flow from a diverse student body" and that the methodology used by the school in its race-conscious admissions program is narrowly tailored so that the consideration of race is no greater than what is necessary to achieve the educational benefits that flow from a diverse student body.[27] *Fisher* mandates that courts second-guess the judgments of educational administrators by delving not only into whether the consideration of race is necessary in a given circumstance, but also whether the consideration given to race was too great or too attenuated from its goal to be constitutionally permissible.

Higher education administrators who wish to continue considering race as "a 'factor of a factor of a factor' in the calculus"[28] for determining admission must now be prepared to articulate with specificity why they are considering race in their admissions processes, how they are defining race,[29] why they are choosing to be conscious of particular races over others in

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[27] *Id.* at 2417, 2421.

[28] *Id.* at 2434 (Ginsburg, J., dissenting) (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

[29] Many schools that practice race-conscious affirmative action generally apply it to blacks, Latinos, Native Americans, and sometimes some disadvantaged Asian ethnicities. Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807, 809 n.17 (2011). However, these are not the only non-white minority groups that have small numbers of students who may confront "racial isolation" on campus. Middle Eastern students, for example, may also find themselves suffering isolation due to their race, ethnicity, and religion but are generally not the beneficiaries of affirmative action policies. Schools will need to be prepared to articulate a rationale for adopting policies aimed at alleviating "racial isolation" for some minority student groups but not others.

admissions, to what extent race is being considered in the admissions process, and whether the consideration of race in admissions is actually advancing the asserted institutional goals that are animating it. Accordingly, *Fisher* invites more probing judicial inquiry into exactly how admissions committees manage considerations of race.[30] It asks whether the work of those admissions committees is closely related to the institution's asserted constitutional goals, and when, if ever, will an institution know whether its continued use of race conscious admissions is unnecessary. It is no longer sufficient for higher education institutions to invoke a general state interest in "diversity" because that generic assertion does not tell the Abigail Fishers of the world, or the courts, exactly which of the state's diversity interests are the actual reason for using a race-conscious admissions process that admits some students, in part, due to their racial identity.

III. *FISHER* AND THE INDETERMINACY OF DIVERSITY

To many, the diversity rationale rings especially hollow in the context of a state like Texas where the state legislature has enacted a law mandating admission to the state's public colleges and universities for all students graduating in the top ten percent of their high school class.[31] Because of racially segregated housing patterns, *de facto* racial segregation[32] persists in Texas

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[30] *Fisher*, 133 S. Ct. at 2419–20.

[31] *See id.* at 2416 (describing the Top Ten Percent Law implemented by the Texas legislature). Racial diversity of enrolled students at the University of Texas at Austin declined between 1996 and 2003, when the university relied exclusively on the Top Ten Percent Law to guide its admissions process. Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 38 (Office of Population Research Princeton Univ., Working Paper No. 2003-01). The percentage of African American students enrolled fell from 4.0% to 3.3% and the percentage of Hispanic Americans fell from 15.8% to 13.7%. *Id.*

[32] Unlike *de jure* segregation, which was racial segregation imposed by law, *de facto* racial segregation occurs in public schools because of racially segregated housing patterns that emerged during Jim Crow and persist today. *See* Maurice C. Daniels & Cameron Van Patterson, *(Re)considering Race in the Desegregation of Higher Education*, 46 GA. L. REV. 521, 544 n.119 (2012) ("[R]acial segregation in schools is a function of residential segregation, which is inextricably linked to socioeconomic inequalities that are related to the legacy of Jim Crow laws, policies, and practices."); Lino A. Graglia, *Solving the* Parents Involved *Paradox*, 31 SEATTLE U. L. REV. 911, 913 & n.15 (2008) (explaining the distinction between *de jure* and *de facto* race segregation).

high schools. This *de facto* racial segregation was leveraged by the Texas legislature when it enacted a law mandating that students in the top ten percent of their graduating high school class be offered admission to state universities, including the state's flagship university—the University of Texas at Austin.[33]

If an acceptable level of diversity that encompasses racial diversity can be achieved in Texas public higher education without resorting to the consideration of race in admissions processes, then the consideration of race is not necessary to achieve the compelling governmental interest of the educational benefits that flow from diversity in higher education. Once the consideration of race becomes unnecessary to achieve the educational benefits of racial diversity, the consideration of race is no longer permissible under the current constitutional test of strict scrutiny.[34] In other words, the use of race in higher education admissions must be necessary to achieve the constitutionally permissible goal of deriving educational benefits from diversity in order for the consideration of race to be constitutionally permissible. To decide whether the use of race is necessary to achieve the constitutionally permissible goal of securing the educational benefits of diversity, one must know exactly what government interests are embedded in the "diversity" goal. In other words, what exactly does diversity mean for purposes of race-conscious affirmative action in higher education?[35] Does the definition of diversity change from

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[33] *See* TEX. EDUC. CODE ANN. § 51.803 (West 2012) ("[E]ach general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission . . . .").

[34] *See Fisher*, 133 S. Ct. at 2420 ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.").

[35] There has been much discussion in the literature regarding the meaning of diversity. For a primer on diversity in the legal profession generally, see Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011) (asserting that understanding diversity requires paying attention to context, and that like equality, we can think of diversity as having both formal and substantive forms).

state to state? Is it related to the demographics of a particular state's population? Does diversity extend to ethnicity or merely race, and where exactly is the line between ethnicity and race? How many racial categories are there and which ones are or should be included in the definition of diversity? Do the relevant racial categories included in the definition of diversity vary depending upon the state or jurisdiction in which the institution of higher education is operating or depending upon whether that racial group is underrepresented in higher education or some particular discipline, such as engineering, computer science, or agriculture?

These questions crystallize the indeterminate nature of the concept of diversity that the Supreme Court embraced in *Grutter* as a compelling governmental interest sufficient to justify the use of race in higher education admissions decisions.[36] The indeterminacy of the diversity interest was a significant concern for the justices during the Supreme Court oral argument in *Fisher*,[37] and the Court indirectly addressed that concern in the *Fisher* decision.[38] By eliminating deference to educational administrators on the narrow tailoring prong of the strict scrutiny test, the Court mandated exacting judicial inquiry into whether the use of race in admissions processes is narrowly tailored to achieve the asserted educational benefits of diversity.[39] Because narrow tailoring requires a close fit between the use of race and the goal sought to be achieved, an inquiry into whether the use of race is narrowly tailored to achieve the diversity goal will necessarily become an inquiry into the nature of the diversity interest itself.

A. The Path to Diversity

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[36] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[37] Transcript of Oral Argument at 34–35, 39–40, 51–52, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

[38] *See Fisher*, 133 S. Ct. at 2418 ("[T]his interest in securing diversity's benefits, although a permissible objective, is complex.").

[39] *Id.* at 2420.

Diversity was not always the compelling governmental interest asserted by states that used race-conscious affirmative action policies to administer scarce state resources, such as public education. The state's interest in considering race in allocating finite state resources was initially remedial in nature, aimed at remedying past racial discrimination that had shut people of color—particularly African Americans—out of opportunities for work and education. Affirmatively seeking to admit students from racial groups that had been excluded from the benefits of higher education by law and social custom seemed like an appropriate remedial measure at the time, aimed at correcting the racial imbalance in education and employment that racial discrimination had so firmly entrenched. However, public sentiment disfavoring affirmative action grew as more and more people of color became publicly visible in positions of leadership in corporate America, the military, the government, and academia. Moreover, public debate framed affirmative action policies as "reverse discrimination," a practice that systematically excluded innocent deserving whites from opportunity, making it even more distasteful to the racial majority.[40] In fact, it was in the context of a claim that a university's affirmative action policy constituted unconstitutional race discrimination that the Supreme Court first articulated the diversity rationale as the constitutionally permissible compelling governmental interest sufficient to justify the consideration of race in higher education admission.[41]

In *Regents of the University of California v. Bakke*, the Court found that the race-conscious admissions program at the Medical School at University of California at Davis ("the University"), was an unconstitutional quota because the school set aside a certain number of

[40] *See* Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 533–43 (1982) (providing an in-depth discussion of the reverse discrimination argument against affirmative action); Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627, 628 (1985) ("'Equal protection' has . . . come to mean 'reverse discrimination' . . . .").

[41] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12, 314 (1978).

seats in the entering class for certain disadvantaged minority groups that were underrepresented in the field of medicine.[42] The Court rejected the University's asserted state interests that were remedial in nature but accepted that a diverse student body encouraged a "robust exchange of ideas" and was therefore a sufficiently compelling governmental interest to justify the consideration of race if the consideration of race was necessary to achieve that interest.[43] The Court held that a totally separate admissions program for racial minorities was not a necessary means of achieving the compelling governmental interest of diversity and pointed institutions of higher education to the Harvard admissions program, which considered race as one of several factors but did not impose an admission quota in connection with race.[44] Hence, after *Bakke*, lawyers advocating for the continuation of race-conscious affirmative action have had to tread carefully to avoid defining the diversity interest with such specificity that it could be deemed an unconstitutional quota.

The concern of the white majority about the fairness of affirmative action grew during the 1990s[45] with race-conscious affirmative action in higher education being viewed as "race-based preferences"[46] rather than race-conscious action aimed at alleviating the lock-in market effects of generations of white racial preference in higher education.[47] At the turn of the millennium, race-

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[42] *Id.* at 274–76, 379.

[43] *Id.* at 307–14 (internal quotation marks omitted).

[44] *Id.* at 316–17.

[45] Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2253 (2000); *see* Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1040 (1998) ("A political backlash against affirmative action dates back at least to the shift of working-class white Democrats to the Republican Party in the first Reagan election.").

[46] Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 832 (2004). Flagg asserts that racial "'preferences' and 'harms to whites' are of the essence of affirmative action discourse." *Id.* at 846.

[47] *See* Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 32–33 (2003) (arguing that the practice of charging private fees to finance public education exemplifies the "market lock-

conscious affirmative action had lost even more support from the white majority, and even some people of color began to openly challenge it, lodging concerns that it stigmatized its beneficiaries as incompetent, undeserving beneficiaries of a government handout.[48]

B. The Problem with Diversity

While it would come as no surprise that legal scholars who oppose affirmative action have criticized the diversity rationale for race-conscious higher education admissions, it may surprise some to learn that even scholars who favor affirmative action and racial inclusion have critiqued the diversity rationale. Some have argued that the diversity rationale is flawed because it is dislodged from the historical mooring that generated the concept of race-conscious affirmative action.[49] These scholars argue that affirmative action is properly defined and used as a remedial tool to remedy the present effects of past discrimination.[50] Others have argued that the diversity

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in") [hereinafter Roithmayr, *Locked in Inequality*]. For an in depth discussion of the lock-in model of racial inequality, see Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000) [hereinafter Roithmayr, *Barriers to Entry*]; Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191 (2004) [hereinafter Roithmayr, *Tacking Left*].The lock-in model of racial inequality Roithmayr developed is used to explain how white racial monopolies formed historically and became self-reinforcing over time such that they became a persistent and permanent part of the American economic landscape, thereby creating the supremacy of whites in wealth, housing, education, healthcare, and other areas of life. *Id.* at 193, 201. These early mover advantages afforded to whites are now locked into the marketplace such that they can reproduce racial inequality indefinitely unless there are laws and public policies specifically aimed at dismantling white advantage. *Id.* at 193–94. Roithmayr does not see the current crumbs-off-the-table, small-scale model of affirmative action in higher education as sufficient in scope to disrupt white racial privilege in education or any other area. *Id.* at 192–93. Nonetheless, she acknowledges that something is better than nothing, especially for the few people of color who are direct beneficiaries of race conscious affirmative action in higher education. *Id.* at 192.

[48] Perhaps the most visible proponent of the stigma concern is Justice Clarence Thomas. *See* Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part) (advancing the stigma argument).

[49] *See, e.g.*, Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. ILL. L. REV. 691, 721 ("The diversity rationale is ambiguous in concept and unconvincingly executed in practice; it sanctions the use of race for instrumental reasons nominally divorced from the historical conditions that made race so toxic a criterion for allocating governmental benefits and burdens.").

[50] *See, e.g., id.* at 694 (advocating for the elimination of the diversity rationale and adoption of a "suitably constrained remedial justification"); *see also* Derrick Bell, *Diversity's Distractions,* 103 COLUM. L. REV. 1622, 1627 (2003) ("The benefit of recognizing the value of diversity rather than the need to remedy continuing discrimination in the business and employment fields comes at a substantial cost.").

conception of affirmative action is flawed because diversity, as articulated in *Grutter*, is a compelling governmental interest only so long as there is what Derrick Bell would label "interest convergence"[51] between whites and students of color—meaning that diversity is a compelling governmental interest only to the extent that it benefits white students as well as the few students of color who are the beneficiaries of race-conscious admissions policies in higher education.[52] Still others have argued that legal conceptions of diversity have focused exclusively on "contact diversity"—the frequency and quality of contact between individuals of different backgrounds—rather than "content diversity"—student exposure to diverse minority issues in an academic context.[53]

The Court's decision in *Fisher* suggests that the primary problem with the diversity rationale is its indeterminacy.[54] Although indeterminacy is no stranger to constitutional jurisprudence, it does present challenges.[55] It is clear that the lawyers who invoked the diversity rationale for affirmative action in higher education embraced indeterminacy as a way to avoid the trap of having their client's affirmative action policies labeled a "quota" or "racial balancing" that would render the consideration of race in admissions unconstitutional. However, the effort to

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[51] Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[52] *See, e.g.*, Bell, *supra* note 50, at 1624 (noting that *Grutter* and *Gratz*, read together, exemplify the Interest-Convergence theory); *see also* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 149 (2004) (referring to *Grutter* as a prime example of the Interest-Convergence theory at work).

[53] Deirdre M. Bowen, *American Skin: Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 U. PITT. L. REV. 339, 347–48 (2011).

[54] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418 (2013) (highlighting the complexity of the diversity interest).

[55] Perhaps the most vivid example of the Court's struggle with indeterminacy is in its jurisprudence surrounding pornography. *See, e.g.*, Miller v. California, 413 U.S. 15, 20–22, 24–25 (1973) (discussing the "somewhat tortured history of the Court's obscenity decisions" and formulating obscenity to "standards more concrete than those in the past"). However, we also see the Court's struggle with indeterminacy in other areas of the law as well.

avoid having an affirmative action policy deemed a quota pushed affirmative action advocates toward argumentation with higher levels of abstraction. Diversity is a highly abstract concept, and the use of it as the compelling governmental interest that justifies the use of race in higher education admissions has left those seeking to defend affirmative action in a double bind: either define it with more specificity and risk being labeled as racial balancing or an unconstitutional quota, or leave diversity as a relatively abstract concept and risk having the Court find that the state has not demonstrated that the use of race is necessary to achieve the educational benefits of diversity.

Use of the general concept of educational diversity as a compelling government interest has facilitated the ability of affirmative action jurisprudence to adapt to changes in facts and circumstances in higher education, as well as the evolving sentiments of the public surrounding race-conscious admissions in higher education. When empirical evidence or social change outpaces existing understandings of law, the use of general or abstract legal concepts reserves room for judges to mold legal jurisprudence so that it evolves consistent with society's understandings and concerns.[56] By avoiding analytical precision in articulating the state's diversity interest, educational diversity in the abstract served to provide a generic rationale for the maintenance of race-conscious higher education admissions while giving higher education institutions time to conduct the empirical research to measure the need for race-conscious intervention as well as to gather evidence regarding the manner and degree of intervention that is necessary and appropriate.

[56] *See, e.g.*, Dov Fox, *Interest Creep and Potential Life*, 82 GEO. WASH. L. REV. (forthcoming 2014) (explaining that applying the general legal concept of "child protection" may lead judges to question whether they should turn to empirical evidence or conventional social norms to determine the term's application).

Rather than add clarity to the diversity rationale, the case for educational diversity was weakened when courts found themselves with competing evidence about the benefits and harms of race-conscious affirmative action.[57] Until Richard Sander's controversial work on affirmative action, it was simply assumed that, aside from the stigma argument,[58] race-conscious affirmative action policies generally benefit racial minorities while burdening some individuals from the white racial majority. Sander's work has challenged that assumption by asserting that race-conscious affirmative action actually harms African American students more than it helps them by mismatching them with academic institutions that do not teach toward their level of preparation, but rather above their level of preparation, thereby making it more difficult for African American students to succeed academically.[59] This mismatch theory is further

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[57] *Compare* Brief Amici Curiae for Richard Sander & Stuart Taylor, Jr. in Support of Neither Party at 3–4, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345), 2012WL 1950266 (asserting that among freshmen admitted to the University of Texas at Austin in 2009, not including those within the Top Ten Percent system, the mean SAT score of Asians were "at the 93rd percentile of 2009 SAT takers nationwide, whites at the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile"), *with* Brief of the Asian American Legal Defense and Education Fund et al. as Amici Curiae in Support of Respondents at 20, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3308203 ("Although the[] amici attribute the[] differences to [the university's] race-conscious admissions policy, their claim is fatally undermined by the fact that similar variations in SAT scores existed throughout [the university's] *race-neutral* admissions between 1997 and 2004.").

[58] *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (noting that affirmative action stigmatizes its beneficiaries and fosters the view that they are less able to compete); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (noting that affirmative action is "racial paternalism" that stigmatizes blacks and renders them suspect as undeserving and unqualified). *But see* Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1343 (2008) (reporting the findings of an empirical study concluding that "there is *no* statistically significant difference in internal stigma between students of color" at law schools with affirmative action and law schools without affirmative action in admissions, which suggests that stigma operates and exists independently of affirmative action).

[59] *See generally* RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) [hereinafter Sander, *A Systematic Analysis*]; Richard Sander, *Mismatch and the Empirical Scholars Brief*, 48 VAL. U. L. REV. XXX (201X) (reiterating and defending the mismatch theory) [hereinafter Sander, *Empirical Scholars Brief*]. *But see, e.g.*, DOROTHY H. EVENSEN & CARLA D. PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION (2012) (reporting the findings of a qualitative study of African American lawyers who entered the profession since the new millennium). No participants of Evensen and Pratt's study viewed affirmative action as a policy that harmed them. Preston Green, *Affirmative Action: A Tool for Rebuilding the K–12 Segment of the Pipeline*, *in* THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION, *supra*, at 139, 139.

intensified, Sander asserts, when the academic institution imposes a curve in grading, thereby making students compete against one another for a grade.[60] Sander's work suggests that the educational benefits derived from diversity achieved through race-conscious affirmative action may be outweighed by the harms of race conscious-affirmative action; harm to not only those whose race is not affirmatively sought by admissions policies, but harm to the intended beneficiaries of race-conscious affirmative action.[61] Sander's work suggests that race-conscious affirmative action may actually hinder or hurt the educational achievement of the racial minorities that it is intended to help.[62] If Sander's thesis is correct,[63] and the use of race-conscious affirmative action policies in higher education admissions causes an academic mismatch that results in more minority students either failing or underperforming academically, then the asserted educational benefits for all students that are derived from a diverse student body are arguably no longer sufficient to serve as a compelling governmental interest that satisfies the first prong of the strict scrutiny test.

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[60] *See* SANDER & TAYLOR, *supra* note 59, at 51 ("Once, when a student told me about his course load, I observed that he was in a lot of tough classes graded on mandatory curves. That was true, he responded, but a couple of them were 'safeties.' I asked him what that meant. A little embarrassed, he said that was a term for a class that had enough black and Hispanic students to absorb the low grades on the curve.").

[61] Sander, *A Systematic Analysis*, *supra* note 59, at 371.

[62] *Id.*

[63] Many argue that Sander's mismatch thesis is not correct. *See, e.g.*, David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1868 (2005) (refuting the mismatch theory by claiming "Sander misinterprets his own results and vastly overstates what his data show"); andré douglas pond cummings, "*Open Water": Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 801–02 (2006) (arguing that "the manner, logic and number of criticisms levied against [Sander's] statistical analysis that his study is numerically, methodologically and mathematically flawed" highlights the inaccuracies of his study); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, 46 J. BLACKS HIGHER EDUC. 102, 102 (2005) (stating that the basic premise of the mismatch theory has been refuted "[t]ime and time again"); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.- AM. L. & POL'Y REP. 1, 15 (2005) (suggesting the academic performance of African-American law students results from their learning environment rather than the mismatch effect); Onwuachi-Willig & Fricke, *supra* note 29, at 830 (arguing that "a differential in LSAT score . . . does not harm the student due to a 'mismatch effect'").

The *Fisher* decision's prohibition of affording deference on the narrow tailoring prong of the strict scrutiny test will push lawyers to unpack the content of diversity and articulate its meaning with more specificity. The demand for specificity in the articulation of the diversity interest will arise because the need to consider race, the degree to which it is considered, and the manner in which it is considered are all closely tied to the diversity goal that the higher education institution articulates. In other words, now that the Court is requiring exacting judicial inquiry into the narrow tailoring prong of the strict scrutiny test, judicial assessment of whether the consideration of race is narrowly tailored will become even more closely connected to the asserted compelling governmental interest of achieving the educational benefits of racial diversity. If a school's consideration of race in admissions weighs so heavily that the academic dismissal rate for black students at the school is significantly higher than the dismissal rate of whites at the school or the dismissal rate of blacks at schools that do not use race-conscious affirmative action, it could indicate that the use of race is not achieving the desired educational benefits for this group of students. While debunking racial stereotypes and preventing racial isolation are important educational goals, those goals are not so compelling when pitted against the paramount goals of minimizing academic attrition and maximizing graduation rates. The Court in *Fisher* asserted that the pursuit of "diversity for its own sake" is the equivalent of unconstitutional racial balancing.[64] This means that diversity will only serve as a compelling governmental interest if it is the means by which a school achieves certain educational benefits. Embedded in the diversity interest are several different types of state interests,[65] including:

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[64] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2424 (2013).

[65] Although these interests sometimes overlap and are interconnected, I articulate them separately for clarity.

1) The state's interest in debunking racial stereotypes;[66]

2) The interest in preventing racial isolation and racial representation of racial minorities where minority students feel pressure to speak on behalf of their entire race in class;[67]

3) The state's interest in teaching cultural competence and "cross-racial understanding;"[68]

4) The state's interest in including diverse perspectives in classroom dialogue;[69]

5) The state's interest in creating a racially diverse workforce for the labor market;[70]

6) The interest in creating diverse leadership for America's military, which promotes the state's interest in security;[71]

7) The state's interest in enhancing democracy by preparing persons from all segments of the American polity for citizenship and leadership in American democracy;[72]

8) The state's interest in maintaining the institutional legitimacy of the state's educational institutions and in not being viewed as maintaining institutions that perpetuate elitism and white supremacy;[73]

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66 Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

67 *Id.* at 319.

68 *Id.* at 330.

69 *Id.*

70 *Id.*

71 *Id.* at 331.

72 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

73 *See* Helen Norton, *Stepping Through* Grutter's *Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543, 566–68 (2005) (discussing legitimacy-enhancing as a rationale for racial diversity).

9) The state's interest in providing equal access to education and in achieving racial equality in educational outcomes;[74]

10) The state's interest in improving interracial relations and facilitating racial cooperation;[75]

11) The state's interest in having the institutional culture of its universities reflect the diversity of the state;[76]

12) The state's interest in promoting colorblindness;[77]

Fisher's narrow articulation of the diversity interest suggests that only the state's interests in diversity, which yield a significant educational benefit to the student body, will suffice as a compelling government interest under the strict scrutiny test. Under this narrow conception of constitutionally permissible diversity, the state's interest in making public-funded higher education equally accessible to all races or achieving racial equality in educational outcomes arguably would not be a sufficient state interest in diversity to constitute a compelling governmental interest because that interest does not generate *educational benefits* for the school's student body.

By ignoring the notion that public institutions of higher education have a duty to the public as well as a duty to the students they enroll, the Court has overlooked one of the core missions of

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[74] *Brown*, 347 U.S. at 493; *see also* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 14–26 (1994) (arguing that affirmative action should be discussed within the context of affording equal opportunities for minorities rather than affording preferences as compensation for past injustice).

[75] Brief for Respondents at 6, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

[76] Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity? Silence at Boalt Hall: The Dismantling of Affirmative Action*, 91 CALIF. L. REV. 1149, 1162-63 (2003) (positing seven ways of conceptualizing the utility of diversity in affirmative action argumentation).

[77] *Id.* at 1157. Carbado and Gulati argue that racial diversity on college campuses "promotes colorblindness by rendering the racial identities of non-White students less salient." *Id.*

public colleges and universities, which is to provide education to the diverse citizenry of the state.[78] By constraining the diversity interest to only the interest in using diversity to achieve educational benefits, the Court has created an unnecessary disjuncture between public and educational interests in diversity in higher education. In particular, the concern is that the Court has invaded academic freedom by redefining and restricting the educational mission of public higher education. By narrowing the mission of public higher education to the interests of what happens in classrooms and to educational outcomes such as graduation and attrition rates, the Court minimizes the other roles of public colleges and universities. In reality, many public educational institutions have a mission to conduct research, participate in community and economic development in the state, and educate individuals from all segments of the state's population.[79] By constraining the diversity interest of universities to the *educational benefits*

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[78] For example, as a "state related" university, Pennsylvania State University:

> has awarded more than a half-million degrees, and has been Pennsylvania's largest source of baccalaureate degrees at least since the 1930s. Although the University is privately chartered by the Commonwealth, it was from the outset considered an "instrumentality of the state," that is, it carries out many of the functions of a public institution and promotes the general welfare of the citizenry.

Mission and Character, PENN STATE, http://www.psu.edu/this-is-penn-state/leadership-and-mission/mission-and-character (last visited Sept. 5, 2013). Penn State articulates its mission as follows:

> Penn State is a multicampus public research university that educates students from Pennsylvania, the nation and the world, and improves the well being and health of individuals and communities through integrated programs of teaching, research, and service. Our instructional mission includes undergraduate, graduate, professional, and continuing education offered through both resident instruction and online delivery. Our educational programs are enriched by the cutting edge knowledge, diversity, and creativity of our faculty, students, and staff. Our research, scholarship, and creative activity promote human and economic development, global understanding, and progress in professional practice through the expansion of knowledge and its applications in the natural and applied sciences, social sciences, arts, humanities, and the professions. As Pennsylvania's land-grant university, we provide unparalleled access and public service to support the citizens of the Commonwealth. We engage in collaborative activities with industrial, educational, and agricultural partners here and abroad to generate, disseminate, integrate, and apply knowledge that is valuable to society.

Id.

[79] Penn State embraces this mission, which is why it has twenty-four campuses spread across the Commonwealth of Pennsylvania. *Id*. This geographic diversity in the location of campuses indicates a recognition that not everyone who desires higher education has the privilege of being able to relocate to state college and ensures that a Penn State education is accessible to people all across the Commonwealth of Pennsylvania.

derived from diversity, the Court improperly constrains the academic freedom of universities to define their missions much broader. Educators in the higher education arena have a responsibility for the quality of education, which includes instruction, research, and outreach. Quality education implies a responsibility for inclusive education, but the Court in *Fisher* unfortunately overlooked this obligation.

IV. CONCLUSION

With increasing public hostility toward race-conscious affirmative action, it comes as no surprise that the Court would seek to sharpen and refine the parameters surrounding the use of race in higher education admissions. As a result of *Fisher*, the strict scrutiny test, as applied to institutions of higher education, has become more exacting in its demands. The Court now expects colleges and universities to be able to articulate—and prove[80]—exactly what educational benefits flow from the racial diversity a school aims to achieve. Moreover, the Court expects colleges and universities to be able to articulate how the schools know when they have achieved sufficient racial diversity or "critical mass" such that the educational benefits of racial diversity are achieved and further consideration of race would be unnecessary and therefore unconstitutional.[81] By subordinating the First Amendment interests of institutions of higher education, *Fisher* sharpens the double bind for educators and affirmative action practitioners

[80] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417–18, 2420 (2013) (making clear that schools bear the burden of proving what educational benefits flow from diversity and that they cannot achieve those benefits without considering the race of applicants). Moreover, once a school proves that it cannot achieve the benefits of racial diversity through race-neutral means, the school must still show that it cannot achieve the level of racial diversity necessary to derive the benefits of diversity without the consideration of race. *Id.* at 2420.

[81] *See id.* at 2418 ("Strict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'" (quoting Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265, 305 (1978)).

who assert that critical mass is necessary[82] but at the same time must avoid asserting a numerical range that would equate to an unconstitutional quota or unconstitutional racial balancing which the Court found to be present in *Parents Involved in Community Schools v. Seattle School District No. 1*.[83]

If race-conscious affirmative action is to survive as a constitutionally permissible policy, lawyers will have to become more specific in the articulation of the diversity interest. To enable lawyers to do that, educators will have to rethink the way they conduct admissions. While "'[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,"'[84] future courts may hold that it does require trying at least one plausible race-neutral alternative before resorting to race-conscious measures for achieving diversity. Trying a colorblind approach in admissions would also arm a school with data to help prove that a colorblind approach does not come close to achieving the same educational benefits derived from race-conscious diversity. Colleges and universities will certainly need to define the educational goals that they seek to achieve through racial diversity and should give some thought to how they

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[82] *See* Bowen, *supra* note 53, at 344 (supporting affirmative action and functional diversity in higher education and arguing that "institutional over-reliance on [critical mass] may actually stymie" the achievement of the educational benefits sought from racial diversity). Bowen's empirical research reveals that, of those studied, "only about a third of [minority] students encountered the benefits of increased racial understanding and decreased racial stereotyping." *Id.* at 340. Bowen urges institutions of higher education to make better use of racial diversity on campus by becoming race-conscious and abandoning the over-reliance on critical mass to do the work of diversity. *Id.* at 344. Dorothy Brown made a similar call to colleges and universities soon after *Grutter* was decided by urging universities, law schools in particular, to put diversity to work in classrooms. Dorothy A. Brown, *Taking* Grutter *Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 4 (2006); *see* Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 59 (2006) (urging law schools to put diversity to work by embracing a mission that recognizes not only the goal of student education, but also the role of the law school in diversifying the legal profession and the law school's goal in advancing racial diversity in the profession); *see also* Camille deJorna, *Deaning in a Different Voice: Not the Same Old Song*, 48 VAL. U. L. REV. XXX, XXX–XXX (201X) (discussing the positive impact of diversity in the realm of deans in higher education).

[83] *See* 551 U.S. 701, 709–10, 732 (2007) (plurality opinion) (holding that a school assignment plan that sought to achieve a certain measure of racial diversity in each of the respective public schools in the district was unconstitutional racial balancing).

[84] *Fisher*, 133 S. Ct. at 2420 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

would define and defend the goal of achieving critical mass. Colleges and universities must be able to connect their educational missions to the need for racial diversity, show that race-neutral measures yield insufficient racial diversity, and provide data that shows the educational benefits derived from racial diversity that cannot be achieved through a colorblind approach. Universities will need to track and record the effectiveness of race-conscious strategies and compare the outcomes those strategies produced to the outcomes achieved in a race-neutral context. Finally, universities will need to develop policies regarding the frequency with which they will re-evaluate the need to use race; every four years might be an adequate starting point, since that is the typical duration for the pursuit of undergraduate degrees; every seven years might be appropriate for law schools that undergo a process of self-study in anticipation of sabbatical inspections by accrediting bodies. In making these modest changes to admissions policies and processes, perhaps universities can explain to the Abigail Fishers of the world, and ultimately the courts, precisely what educationally relevant state interests are embedded in the diversity interest thus justifying the consideration of race in any given context of higher education admissions.