Supplementary Material

Chapter 11: The Contemporary Era—Equality/Race/Affirmative Action

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Fisher v. University of Texas at Austin, 631 F. 3d 213 (5th Cir. 2011)

Abigail Fisher was rejected when she applied for admission to the undergraduate program at the University of Texas. She promptly filed a lawsuit, claiming that the undergraduate admissions policies at Texas used race in ways that violated the equal protection clause of the Fourteenth Amendment. That admissions policy has two elements. First, all Texas high school students in the top ten percent of their class have the right to attend the Texas state university of their choice. Second, Texas combines an academic index that measures class rank, test scores, and high school curriculum with a personal achievement index, which includes demonstrated leadership ability, community service, socioeconomic status, and race, among other factors. The local federal district court rejected Fisher's claim, finding that the Texas system was identical in all constitutionally relevant respects to the race-conscious program the Supreme Court approved in Grutter v. Bollinger *(2003). Fisher appealed to the Court of Appeals of the Fifth Circuit.*

The Fifth Circuit unanimously held that the Texas admissions program was constitutional. Judge Higginbotham declared that the Texas admissions program satisfied the principles the Supreme Court handed down in Grutter. *What were the most important differences between the Texas admissions program and the admissions program in* Grutter? *Why did the court think those differences were not legally significant? Do you agree? Judge Garza in dissent agreed that* Grutter *covered this case, but called on* Grutter *to be overruled? Was this proper judicial behavior for a lower federal court judge?*

JUDGE PATRICK E. HIGGINBOTHAM, delivered the opinion of the Court.

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. . . We begin with *Grutter v. Bollinger* (2003) because UT's race-conscious admissions procedures were modeled after the program it approved. . . . *Grutter* held that the Equal Protection Clause did not prohibit a university's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." . . . In granting summary judgment to UT, the district court found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*," and "as long as *Grutter* remains good law, UT's current admissions program remains constitutional." Laying aside the Top Ten Percent Law, that observation is indisputably sound.

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[W]e find at least three distinct educational objectives served by the diversity [Justice O'Connor in *Grutter*] envisioned:

1. Increased Perspectives. Justice O'Connor observed that including diverse perspectives improves the quality of the educational process because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." . . . Indeed, diversity often brings not just excitement, but valuable knowledge as well. "[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."

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2. Professionalism. The majority pointed to "numerous studies" showing that "student body diversity . . . better prepares [students] as professionals." . . . Indeed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." A diverse student body serves this end by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races."

3. Civic Engagement. The Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." A diverse student body is crucial for fostering this ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.". . . Further, efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national fabric.

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As we read the Court, a university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races. Such consideration does not define an applicant by race but instead ensures that she is valued for all her unique attributes. Rather than applying fixed stereotypes of ways that race affects students' lives, an admissions policy must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" . . .

Because a race-conscious admissions program is constitutional only if holistic, flexible, and individualized, a university may not establish a quota for minority applicants, nor may it evaluate minority applications "on separate admissions tracks." The "racial-set-aside program" rejected by Justice Powell in *Bakke* ran afoul of these related prohibitions because it reserved 16 out of 100 seats for members of certain minority groups. A university also may not award a fixed number of bonus points to minority applicants. That was the lesson of *Grutter*'s companion case, *Gratz v. Bollinger* (2003), in which the Court struck down the University of Michigan's undergraduate admissions program because it automatically awarded a fixed number of admissions points to all underrepresented minority applicants, resulting in a group-based admissions boost.

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UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions . . . mirror those approved by the Supreme Court in *Grutter*. The district court found that both the UT and Grutter policies "attempt to promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." Like the law school in *Grutter*, UT "has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." UT has made an "educational judgment that such diversity is essential to its educational mission," just as Michigan's Law School did in *Grutter*.

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It is a given that as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring. At the same time, the Supreme Court has held that "[c]ontext matters" when evaluating race-based governmental action, and a university's educational judgment in developing diversity policies is due deference.

Judicial deference to a university's academic decisions rests on two independent foundations. First, these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university," far outside the experience of the courts. Second, "universities occupy a special niche in our constitutional tradition," with educational autonomy grounded in the First Amendment.

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[T]here is no indication that UT's *Grutter*-like plan is a quota by another name. It is true that UT looks in part to the number of minority students when evaluating whether it has yet achieved a critical mass, but "[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota." Whereas a quota imposes a fixed percentage standard that cannot be deviated from, a permissible diversity goal "'require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself.'"

UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas's African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans.

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The University's policies and measured attention to the community it serves are consonant with the educational goals outlined in *Grutter* and do not support a finding that the University was engaged in improper racial balancing during our time frame of review. . . . UT properly concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms. Identifying which backgrounds are underrepresented, in turn, presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.

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UT is correct that so-called "percentage plans" are not a constitutionally mandated replacement for race-conscious admissions programs under *Grutter*. The idea of percentage plans as a viable alternative to race-conscious admissions policies was directly advocated to the *Grutter* Court by the United States, arguing as amicus curiae. In response, the Court held that although percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because "they 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." In addition, the Court emphasized existing percentage plans—including UT's—are simply not "capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission."

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[T]he Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American. It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by *Grutter* gives UT that discretion, but the Top Ten Percent Law, which accounts for nearly 90% of all Texas resident admissions, does not.

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Grutter pointedly refused to tie the concept of "critical mass" to any fixed number. The *Grutter* Court approved of the University of Michigan Law School's goal of attaining critical mass even though the school had specifically abjured any numerical target. The Court recounted how school officials had described "critical mass" only through abstract concepts such as "meaningful numbers," "meaningful representation," and "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." The type of broad diversity *Grutter* approved does not lend itself to any fixed numerical guideposts.

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The Court [in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)] did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small. To the contrary, Justice Kennedy—who provided the fifth vote in Parents Involved—wrote separately to clarify that "a more nuanced, individual evaluation . . . informed by *Grutter*" would be permissible, even for the small gains sought by the school districts.

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A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity. The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored—procedures in some respects superior to the Grutter plan because the University does not keep a running tally of underrepresented minority representation during the admissions process. We are satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported by the "serious, good faith consideration" required by *Grutter*.

JUDGE KING, specially concurring:

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JUDGE EMILIO M. GARZA, specially concurring:

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. . . I concur in the majority opinion, because, despite my belief that *Grutter v. Bollinger* (2003) represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws. One of the Amendment's "core principles" is to "do away with all governmentally imposed discriminations based on race," and to create "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." This is why "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." It matters not whether the racial preference is characterized as invidious or benign: strict scrutiny applies regardless of "the race of those burdened or benefitted by a particular classification." To survive such exacting scrutiny, laws classifying citizens on the basis of race must be "narrowly tailored to achieving a compelling state interest."

In *Grutter*, the majority acknowledged these fundamental principles, but then departed and held, for the first time, that racial preferences in university admissions could be used to serve a compelling state interest. Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, what the Court applied in practice was something else entirely.

The *Grutter* majority asserts that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.' But since the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand. . . . In those rare cases where the use of race properly furthered a compelling state interest, the Court has emphasized that the means chosen must "work the least harm possible" and be narrowly tailored to fit the interest "with greater precision than any alternative means." Moreover, the failure to consider available race-neutral alternatives and employ them if efficacious would cause a program to fail strict scrutiny.

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Grutter changed this. . . . The Court replaced narrow tailoring's conventional "least restrictive means" requirement with a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny. Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity, and courts

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are required to defer to their educational judgments on how best to achieve it. What is more, the deference called for in Grutter seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. . . .

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[I]t is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz v. Bollinger* (2003). If two applicants, one a preferred minority and one nonminority, with application packets identical in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

Grutter's new terminology like "individualized consideration" and "holistic review" tends to conceal this result. By obscuring the University of Michigan's use of race in these diffuse tests, the Court allowed the Law School to do covertly what the undergraduate program could not do overtly.

Even assuming the Court's "educational benefits of diversity" justification holds true, there are far more effective race-neutral means of screening for the educational benefits that states like Michigan and Texas ostensibly seek. To the degree that state universities genuinely desire students with diverse backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays. These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same. Moreover, these markers represent the kind of life experiences that reflect industry. Race cannot. While race inevitably colors an individual's life and views, that facet of race and its impact on the individual can be described with some precision through an admissions essay. We should not presume that race shapes everyone's experiences in the same ways and award preference (or a bonus, or a "plus") accordingly. Such a policy, however labeled, is not narrowly tailored.

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Grutter's "educational benefits of diversity" discussion is that it remains suspended at the highest levels of hypothesis and speculation. And unlike ordinary hypotheses, which must be testable to be valid, *Grutter*'s thesis is incapable of testing. Justice O'Connor's majority opinion rests almost entirely on intuitive appeal rather than concrete evidence.

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[A]llowing viewpoint diversity's alleged benefits to justify racial preference is that viewpoint diversity is too theoretical and abstract. It cannot be proved or disproved. Sure, the *Grutter* majority cited to expert reports and amicus briefs from corporate employers as evidence that student body diversity improves educational outcomes and better prepares students for the workforce. But this support can be easily manipulated. If all a university "need do is find . . . report[s]," studies, or surveys to implement a race-conscious admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."

Grutter and *Regents of the University of California v. Bakke* (1978) err by simply assuming that racial diversity begets greater viewpoint diversity. This inference is based on the assumption that members of minority groups, because of their racial status, are likely to have unique experiences and perspectives incapable of expression by individuals from outside that group. But as the Court has recognized elsewhere, the Constitution prohibits state decisionmakers from presuming that groups of individuals, whether classified by race, ethnicity, or gender, share such a quality collectively.

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There is one aspect of the Court's "improved professional training" rationale that I find especially troubling. While *Grutter* made much of the role that educational institutions play in providing professional training, the cases the Court relied on involved primary and secondary schools. I question whether these cases apply with equal force in the context of higher education, where academic goals are vastly different from those pursued in elementary and secondary schools. Moreover, a university's self-

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styled educational goals, for example, promoting "cross-racial understanding" and enabling students "to better understand persons of different races," could just as easily be facilitated in many other public settings where diverse people assemble regularly: in the workplace, in primary and secondary schools, and in social and community groups. I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals. Notwithstanding an institution's decision to expand its educational mission more broadly, the university's core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.

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If a significant portion of a minority community sees our nation's leaders as illegitimate or lacks confidence in the integrity of our educational institutions, as *Grutter* posits in the block quote above, I doubt that suspending the prevalent constitutional rules to allow preferred treatment for as few as 15–40 students is likely to foster renewed civic participation from among that community as a whole.

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[A]ssume that the University's use of race is truly holistic; that given the multitude of other race-neutral variables the University considers and values sincerely, race's significance is limited in any individual application packet. Lastly, assume that in this system, the University's use of race results in a but-for offer of admission in one-quarter of the decisions. A twenty-five percent but-for admissions rate seems highly improbable if race is truly limited in its holistic weighting, but the unlikelihood of the assumption proves my point. Even under such a system, the University's proper use of race holistically would only yield 15 (0.24%) African-American and 40 (0.62%) Hispanic students. African-American students, for example, admitted and enrolled by way of this holistic system would still only constitute two-tenths of one percent of the University of Texas's 2008 entering freshman class. Such a use of race could have no discernable impact on the classroom-level "educational benefits diversity is designed to produce" or otherwise influence "critical mass" at the University of Texas generally. Such a plan exacts a cost disproportionate to its benefit and is not narrowly tailored. This is especially so on a university campus with, for example, 4,448 classes (out of 5,631) with zero or one African-American students, and 1,689 classes with zero or one Hispanic students.

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In contrast, Top Ten Percent was responsible for contributing 305 and 1,164 African–American and Hispanic students, respectively, to the entering 2008 freshman class using entirely race-neutral means. These students represent 4.8% and 18.4% of the entering in-state freshman class. In addition, of the 58 African–American and 158 Hispanic enrolled students evaluated on the basis of their AI and PAI scores, if the University's use of race was truly holistic, the percentage of these students for whom race was a decisive factor (i.e., but-for admits) should be minimal. In other words, the vast majority of these 58 and 158 students were admitted based on objective factors other than race. That is, the University was able to obtain approximately 96% of the African–American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means. And although the University argues that this number still does not qualify as critical mass, one thing is certain: the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole. As such, the University's use of race can be neither compelling nor narrowly tailored.

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. . . Government-sponsored discrimination is repugnant to the notion of human equality and is more than the Constitution can bear. There are no de minimis violations of the Equal Protection Clause, and when government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think alike or have common life experiences. . . . I do not see how racial discrimination in university admissions is any less repugnant to the Constitution. If anything, government-sponsored discrimination in this context presents an even greater threat of long-term harm.

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Yesterday's racial discrimination was based on racial preference; today's racial preference results in racial discrimination. Changing the color of the group discriminated against simply inverts, but does

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address, the fundamental problem: the Constitution prohibits all forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.

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