AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Equality/Race

**Fisher v. University of Texas, \_\_ U.S. \_\_** (2016)

*Abigail Fisher was rejected by the University of Texas at Austin when she applied for admission into the undergraduate program in 2008. She sued the university, claiming that the university violated her rights under the equal protection clause of the Fourteenth Amendment by making unconstitutional use of race when making admissions decisions. The University of Texas offered admission to all Texas residents who graduated in the top 10 percent of their high school class (this was sometimes reduced to the top seven or eight percent of the class).. Before* Grutter v. Bollinger *(2003), Texas filled out the rest of the class by relying on an Academic Index score and a Personal Achievement Index (PAI) score. The latter focused on leadership abilities and “special circumstances that give insight into a student’s background.” Although the use of the PAI increased minority representation at the university to 4.5% African American and 16.9% Hispanic, Texas officials believed the school lacked a “critical mass” of students of color. To remedy this deficiency, Texas after* Grutter *explicitly included race as one of the factors used in the PAI. The federal district court on a motion for summary judgment ruled that such a use of race was constitutional under* Grutter *and that decision was sustained by the Court of Appeals for the Fifth Circuit. Fisher appealed to the Supreme Court of the United States. The Supreme Court by a 7–1 vote remanded the case to the lower federal courts. Justice Kennedy’s majority opinion maintained that race-conscious admissions programs passed constitutional muster only if no race-neutral alternative existed. The Court of Appeals for the Fifth Circuit on remand maintained that the race-conscious admissions program satisfied Justice Kennedy’s conception of strict scrutiny. Fisher again appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States by a 4-3 vote (Justice Kagan recused herself) sustained the Texas program. Justice Anthony Kennedy’s majority opinion maintained that Texas had demonstrated a compelling need for a race conscious program and that no feasible race neutral alternative existed. On what basis does Kennedy make that claim? Why does Justice Alito disagree? Who has the better of the argument? How do you explain Justice Kennedy’s first vote to sustain a race-conscious program? Is his opinion in* Fisher *consistent with his separate opinions in* Grutter v. Bollinger *(2003), and* Parents Involved in Community Schools v. Seattle School District No. 1 *(2007), or even his opinion in* Fisher I. *Might Kennedy have decided in light of the strong possibility that liberals would have a 5-4 majority on the court in the very near future or at least that any judicial majority striking down affirmative action would be very unstable that the best course of action would be to write a very technical opinion confined to the specific facts of the case? If Justice Scalia was still on the Court (or Republicans heavily favored to win the 2016 presidential election, might Kennedy have voted differently?*

*Note, as has become common practice (see* Obergefell v. Hodges *(2015), no liberal wrote a concurring opinion. Why do the other liberals note write separately? What might a more liberal opinion in* Fisher *look like?*

JUSTICE KENNEDY delivered the opinion of the Court.

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*Fisher* I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, ‘because racial characteristics so seldom provide a relevant basis for disparate treatment, ‘[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.’ . . .   Second*, Fisher* I confirmed that ‘the decision to pursue 'the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.’ Third, *Fisher* I clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals.  A university, *Fishe*r I explained, bears the burden of proving a ‘nonracial approach‘ would not promote its interest in the educational benefits of diversity ‘about as well and at tolerable administrative expense.‘

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The University's program is sui generis. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in Grutter.

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Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.

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As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. . . .

. . . . As this Court's cases have made clear, . . . the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining ‘the educational benefits that flow from student body diversity.‘  As this Court has said, enrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.‘  Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

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The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 ‘Proposal to Consider Race and Ethnicity in Admissions,‘the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the ‘'promot[ion of] cross-racial understanding,’ ‘ the preparation of a student body ‘ 'for an increasingly diverse workforce and society,’ ‘ and the ‘ 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’ ‘Later in the proposal, the University explains that it strives to provide an ‘academic environment‘ that offers a ‘robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.‘ All of these objectives, as a general matter, mirror the ‘compelling interest‘ this Court has approved in its prior cases.

The University has provided in addition a ‘reasoned, principled explanation‘ for its decision to pursue these goals.  The University's 39-page proposal was written following a year-long study, which concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful‘ in ‘provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society.‘ . . . .

. . . . Before changing its policy the University conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data,‘ and concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful in achieving‘ sufficient racial diversity at the University. . . . The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. . . . In addition to this broad demographic data, the University put forward evidence that minority students . . . experienced feelings of loneliness and isolation. This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996.  Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

. . . . In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. Supp. App. 157a. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Ibid. Those increases--of 54 percent and 94 percent, respectively--show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class. . . . The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

. . . . A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. . . . [T]he University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application. . . . [T]he University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. . . . [T]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more--if not all--the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are ‘adopted with racially segregated neighborhoods and schools front and center stage. ‘ ‘It is race consciousness, not blindness to race, that drives such plans. ‘ Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

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A university is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness.‘  Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

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The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

JUSTICE THOMAS, dissenting.

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I write separately to reaffirm that ‘a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.‘  I would overrule *Grutter* [v. *Bollinger* (2003)] and reverse the Fifth Circuit's judgment.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking ‘the educational benefits of diversity’ is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request. To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in administering the ‘holistic‘ component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented. . . .

At times, UT has claimed that its plan is needed to achieve a ‘critical mass‘ of African-American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. This is a plea for deference--indeed, for blind deference--the very thing that the Court rejected in *Fisher* I.

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‘The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.‘ . . . ‘[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny.‘ Under strict scrutiny, the use of race must be ‘necessary to further a compelling governmental interest,‘ and the means employed must be ‘ 'specifically and narrowly’ ‘ tailored to accomplish the compelling interest.

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Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.

\*23 When UT adopted its challenged policy, it characterized its compelling interest as obtaining a ‘ 'critical mass' ‘ of underrepresented minorities. Id., at \_\_\_ (slip op., at 1). . . . But to this day, UT has not explained in anything other than the vaguest terms what it means by ‘critical mass.‘ In fact, UT argues that it need not identify any interest more specific than ‘securing the educational benefits of diversity.‘ . . . [W]ithout knowing in reasonably specific terms what critical mass is or how it can be measured, a reviewing court cannot conduct the requisite ‘careful judicial inquiry‘ into whether the use of race was ‘ 'necessary.’ ‘

. . . . According to the majority, however, UT has articulated the following ‘concrete and precise goals‘: ‘the destruction of stereotypes, the promot[ion of ] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.‘ Ibid. (internal quotation marks omitted). These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.

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. . . . [N]either UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass. Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African-Americans and Hispanics in Texas, where African-Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African-American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)?

. . . . To the extent that UT is pursuing parity with Texas demographics, that is nothing more than ‘outright racial balancing,‘ which this Court has time and again held ‘patently unconstitutional.‘ . . . The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms. . . .

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. . . [T]he evidence cited in support of that interest is woefully insufficient to show that UT's race-conscious plan was necessary to achieve the educational benefits of a diverse student body. As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out.

Moreover, if UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study--which the majority touts as the best ‘nuanced quantitative data‘ supporting UT's position,--demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic. But the UT plan discriminates against Asian-American students. UT is apparently unconcerned that Asian-Americans ‘may be made to feel isolated or may be seen as . . . 'spokesperson [s]’ of their race or ethnicity.‘ . . .

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This reasoning, which the majority implicitly accepts by blessing UT's reliance on the classroom study, places the Court on the ‘tortuous‘ path of ‘decid[ing] which races to favor.‘  And the Court's willingness to allow this ‘discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.‘ . . . . Perhaps the majority finds discrimination against Asian-American students benign, since Asian-Americans are ‘overrepresented‘ at UT. . . . Where, as here, the government has provided little explanation for why it needs to discriminate based on race, ‘ 'there is simply no way of determining what classifications are ‘benign‘ . . . and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ‘ . . .

In addition to demonstrating that UT discriminates against Asian-American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories. Under the UT plan, both the favored and the disfavored groups are broad and consist of students from enormously diverse backgrounds. . . . For example, students labeled ‘Asian American,‘ Supp. App. 26a, seemingly include ‘individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population,‘ It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against Asian-American students because they are ‘overrepresented‘ in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, ‘Filipino Americans‘ or ‘Cambodian Americans.‘ . . .

. . . . As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010.[7](https://1.next.westlaw.com/Document/I7816efc3394e11e6a795ac035416da91/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad74012000001557e80a7f4aea6fab6%3FNav%3DCASE%26fragmentIdentifier%3DI7816efc3394e11e6a795ac035416da91%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=9f53a188a5700856ccb0f860ea8095bb&list=CASE&rank=1&grading=na&sessionScopeId=bde1d44f95988036343a26338aa90b80792718d6680549a6e8b768fee27a99cd&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00872039223800) A recent survey reported that 26% of Hispanics and 28% of Asian-Americans marry a spouse of a different race or ethnicity. UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student's classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? . . .

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On appeal to the Fifth Circuit and in *Fisher* I, . . . UT began to emphasize its intraracial diversity argument. UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools. These students, UT argued, tend to come from poor, disadvantaged families, and the University would prefer a system that gives it substantial leeway to seek broad diversity within groups of underrepresented minorities. In particular, UT asserted a need for more African-American and Hispanic students from privileged backgrounds. . . . .The Fifth Circuit embraced this argument on remand, endorsing UT's claimed need to enroll minorities from ‘high-performing,‘ ‘majority-white‘ high schools.  According to the Fifth Circuit, these more privileged minorities ‘bring a perspective not captured by‘ students admitted under the Top Ten Percent Law, who often come ‘from highly segregated, underfunded, and underperforming schools.‘ . . .

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Ultimately, UT's intraracial diversity rationale relies on the baseless assumption that there is something wrong with African-American and Hispanic students admitted through the Top Ten Percent Plan, because they are ‘from the lower-performing, racially identifiable schools. In effect, UT asks the Court ‘to assume‘--without any evidence--‘that minorities admitted under the Top Ten Percent Law . . . are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review.‘  And UT's assumptions appear to be based on the pernicious stereotype that the African-Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian-Americans. These are ‘the very stereotypical assumptions [that] the Equal Protection Clause forbids.‘ [Miller, 515 U. S., at 914](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995137594&pubNum=0000780&originatingDoc=I7816efc3394e11e6a795ac035416da91&refType=RP&fi=co_pp_sp_780_914&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_914). . . .

In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. . . .

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. . . . [I]t is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees. . . . Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African-American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. The same is true for Hispanic students. . . .

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To the extent that intraracial diversity refers to something other than admitting privileged minorities and minorities with higher SAT scores, UT has failed to define that interest with any clarity. UT ‘has not provided any concrete targets for admitting more minority students possessing [the] unique qualitative-diversity characteristics‘ it desires.  Nor has UT specified which characteristics, viewpoints, and life experiences are supposedly lacking in the African-Americans and Hispanics admitted through the Top Ten Percent Plan. In fact, because UT administrators make no collective, qualitative assessment of the minorities admitted automatically, they have no way of knowing which attributes are missing. . . .

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If UT is seeking demographic parity to avoid isolation, that is impermissible racial balancing. And linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African-American student attends a university that is 20% African-American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37.0% African-American) than if it is located in Montana (which is 0.4% African-American). In reality, however, the student may feel--if anything--less isolated in Mississippi, where African-Americans are more prevalent in the population at large. . . . UT never explains why the Hispanic students--but not the Asian-American students-- are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian-Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian-Americans.

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. . . . [T]he majority devotes only a single, conclusory sentence to the most obvious race-neutral alternative: race-blind, holistic review that considers the applicant's unique characteristics and personal circumstances. Under a system that combines the Top Ten Percent Plan with race-blind, holistic review, UT could still admit ‘the star athlete or musician whose grades suffered because of daily practices and training,‘ the ‘talented young biologist who struggled to maintain above-average grades in humanities classes,‘ and the ‘student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school.‘ . All of these unique circumstances can be considered without injecting race into the process. Because UT has failed to provide any evidence whatsoever that race-conscious holistic review will achieve its diversity objectives more effectively than race-blind holistic review, it cannot satisfy the heavy burden imposed by the strict scrutiny standard.

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Because racial classifications are ‘ 'a highly suspect tool,’ ‘ they should be employed only ‘as a last resort,‘ Where, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result. . . .

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