

Race Discrimination Rationalized Again

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Introduction

Fisher v. University of Texas was a Fourteenth Amendment challenge to UT-Austin's use of racial preferences in admissions. The seeds of the current round of litigation were sown in a 1996 decision by the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*.¹ The court in that case held that UT could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body. The Supreme Court declined to review that holding. In response, the university adopted a purportedly race-neutral policy that ensured admission to the top 10 percent of graduates from each Texas high school. But in 2003, *Hopwood* was overturned by *Grutter v. Bollinger*, which established that diversity can indeed be a compelling governmental interest that might justify discrimination in favor of selected minorities.² UT then reintroduced race-specific criteria as part of a supposedly "holistic" approach that considered multiple factors.

Abigail Fisher, a white woman who alleged that the university had discriminated against her on the basis of race, challenged the new program. The Fifth Circuit rejected Ms. Fisher's challenge, but the Supreme Court, in round one of *Fisher*, remanded the case for reconsideration because the appellate court's review of the UT scheme had not applied strict scrutiny as required by *Grutter*.³ A year later

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¹ 78 F.3d 932 (5th Cir. 1996).

² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³ *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) ("Fisher I").

the Fifth Circuit ostensibly applied the requisite level of scrutiny but nonetheless reaffirmed its prior holding. That led to round two of *Fisher*, to which we now turn.

Justice Anthony Kennedy's June 2016 opinion in *Fisher v. University of Texas (Fisher II)*⁴ was a deplorable misfire inconsistent with his opinion in *Fisher I* and with his previous opinions in cases involving race-based decisionmaking.

The decision missed the opportunity to enforce the narrow tailoring prong of strict scrutiny on which Justice Kennedy appeared so keen in *Fisher I*. Indeed, he writes in *Fisher II*, "*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."⁵ Unfortunately, Justice Kennedy then proceeded to give *enormous* deference to the University of Texas in regard to whether the use of race is narrowly tailored. All is not lost, however, for opponents of racial preferences. Although *Fisher II* failed to fulfill the promise of *Fisher I*, the law governing racial preferences in higher education is at least somewhat more stringent than after *Grutter*.

I. *Fisher I* Plainly Said That Use of Racial Preferences Must be Narrowly Tailored

In *Fisher I*, Justice Kennedy wrote:

The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . .

Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. . . . Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.⁶

⁴ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) ("*Fisher II*").

⁵ *Id.* at 2208 (emphasis added).

⁶ 133 S. Ct. at 2420 (citation omitted).

Kennedy went on to criticize the court of appeals and district court for insufficiently applying strict scrutiny and instead “deferring to the University’s good faith in its use of racial classifications.”⁷ The Court remanded the case to the Fifth Circuit for application of the more muscular strict scrutiny standard set forth in the opinion.⁸

Supporters and opponents of racial preferences alike recognized Justice Kennedy’s emphasis on meaningful application of strict scrutiny and reinvigorated examination of narrow tailoring as a serious challenge to the use of racial preferences. Indeed, two proponents of racial preferences lamented: “The *Fisher* [I] majority’s *coup de grace* against race-conscious measures is aptly captured in the court’s conclusion that strict scrutiny must *not* be ‘strict in theory but feeble in fact.’ In other words, strict scrutiny should be potent and not feeble in its application.”⁹ An opponent of racial preferences noted with cautious optimism that the Court’s remand of *Fisher I*, “is a strong signal that the Supreme Court means *Fisher* scrutiny to be something tighter than *Grutter* scrutiny as conventionally understood.”¹⁰

Yet *Fisher*’s second trip to the Fifth Circuit yielded results disappointingly similar to its first trip. Curiously, the Fifth Circuit described the facially race-neutral Top Ten Percent Plan as “narrow tailoring in implementation of [the state’s] goal of diversity.”¹¹ But the constitutionality of the facially race-neutral Top Ten Percent Plan was not at issue in the *Fisher* litigation. Although its existence could be taken as evidence of the university having exhausted race-neutral alternatives to achieve diversity, there was no reason to examine whether the Top Ten Percent Plan *itself* was narrowly tailored.

⁷ *Id.* at 2421.

⁸ *Id.* at 2422.

⁹ Joseph O. Oluwole and Preston C. Green III, Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans, *Parents Involved* and *Fisher*, 14 Wyo. L. Rev. 705, 762 (2014).

¹⁰ Alison Schmauch Somin, A Lady or a Tiger?: Thoughts on *Fisher v. University of Texas* and the Future of Race Preferences in America, 14 *Engage* 17, 21 (2013). (*Engage* was the old name of the Federalist Society’s law review, which is now known simply as the *Federalist Society Review*.)

¹¹ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 651 (5th Cir. 2014).

The Fifth Circuit stated that UT-Austin's program was almost indistinguishable from that in *Grutter*, and thus "was a necessary and enabling component of the Top Ten Percent Plan."¹² As far as the Fifth Circuit was concerned, that resemblance—and two paragraphs accepting the university's contention that it *must* use racial preferences to obtain a critical mass of minority students (although the university categorically insisted that it did *not* have a quota system, but rather looked at individuals)—was sufficient to settle the constitutionality of that use of racial preferences.¹³

Surely if the resemblance was that strong, and if the application of strict scrutiny used in *Grutter* was unchanged by *Fisher I*, the Supreme Court itself would have noted this resemblance and settled the issue. Yet aside from lip service, *Fisher I* seemingly made no difference in the Fifth Circuit's analysis of the holistic review program.¹⁴

In his dissent, Judge Emilio Garza argued as much, writing, "*Fisher* effected a change in the law of strict scrutiny, and corrected our understanding of that test as applied in *Grutter v. Bollinger*."¹⁵ Judge Garza believed that the Fifth Circuit had failed to meaningfully apply strict scrutiny because it had stolen a base, simply deferring to the university's assertion that it needed to engage in racial preferences in order to achieve a "critical mass" of minority students—a critical mass that the university was unwilling or unable to define with any specificity.¹⁶ But without knowing the university's end with some specificity, it is impossible to know if its chosen means are narrowly tailored to achieve that goal.¹⁷

II. *Fisher II* Deferred to the University in Regard to Narrow Tailoring

After the Fifth Circuit barely went through the motions of applying an acceptably demanding form of strict scrutiny, one would

¹² *Id.* at 653.

¹³ *Id.* at 653–55.

¹⁴ *Id.* at 657 ("We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by [*Regents of Univ. of California v. Bakke*] and *Grutter*.").

¹⁵ *Id.* at 663 (Garza, J., dissenting).

¹⁶ *Id.* at 666–69.

¹⁷ *Id.* at 667.

have expected Justice Kennedy to insist on it doing so.¹⁸ Instead, he punted.

In *Fisher II*, Justice Kennedy interpreted *Fisher I* as establishing three principles for the use of racial preferences in higher education: First, the university's use of race in admissions must withstand strict scrutiny.¹⁹ Second, the judiciary should defer to the university's academic judgment regarding the benefits of [racial] diversity.²⁰ Third, the judiciary should not defer when evaluating whether the university's use of race is narrowly tailored to achieve the goal of racial diversity.²¹

Kennedy does not look at the university's asserted compelling interest with any specificity. He nowhere engages the question of what constitutes a critical mass, wanly admonishing that the university should "remain mindful that diversity takes many forms" and that "[f]ormalistic racial classifications may sometimes fail to capture diversity in all its dimensions."²² What is a critical mass? Who knows? It is a question that apparently does not interest the majority. In failing to require UT Austin to *define* "critical mass," Justice Kennedy has given universities broad license to engage in racial discrimination in pursuit of the elusive critical mass. One can claim that one is seeking to attain quantitative diversity, or "classroom-level diversity," or "diversity within diversity" in pursuit of this goal.²³ But until and

¹⁸ See Richard Sander, Symposium: Once More, with Substance—How the Supreme Court Should Approach *Fisher II*, SCOTUSblog, Sept. 9, 2015, <http://www.scotusblog.com/2015/09/symposium-once-more-with-substance-how-the-supreme-court-should-approach-fisher-ii> ("The most likely outcome, unfortunately, is that the Court will simply reiterate *Fisher I* with somewhat more forceful language, explain why the Fifth Circuit did not follow its instructions (see the excellent dissent by Judge Garza) and tell it to try again.").

¹⁹ *Fisher II*, 136 S. Ct. at 2207–08.

²⁰ *Id.* at 2208.

²¹ *Id.*

²² *Id.* at 2210.

²³ Justice Kennedy explained this perspective:

[T]he 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 forth evidence that minority students enrolled under the *Hopwood* regime 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.

Id. at 2212.

unless students are mechanically sorted into universities, majors, and classrooms based on their race so that the racial demographics of those universities, majors, and classrooms precisely mirror the racial demographics of American society, there is always more that can be done to achieve “diversity.”

Justice Kennedy writes, “A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them,” yet the goals he approvingly cites are by their very nature insusceptible to measurement.²⁴ UT Austin’s stated goals, which passed muster with Justice Kennedy, include “the destruction of stereotypes, the “promot[ion of] cross-racial understanding,” the preparation of a student body “for an increasingly diverse workplace and society,” and the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.”²⁵ These are nothing more than fuzzy obfuscations. If these goals are considered sufficiently specific to constitute a compelling interest, almost any goal short of “We want to engage in blatant racial balancing” will constitute a compelling interest. In dissent, Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas, writes that what UT asks for—and receives from the majority—is not merely deference, but “blind deference.”²⁶ He adds that UT’s asserted compelling interest relies on “unsupported and noxious racial assumptions.”²⁷ Justice Alito’s depiction is blunt but accurate.

In a separate dissent, Justice Thomas is even more blunt. He writes that the Constitution “abhors classifications based on race” and that UT has embraced a “faddish theory” that racial discrimination might produce educational benefits.²⁸ Notably, Justice Antonin Scalia’s untimely death did not affect the outcome. Because Justice Elena Kagan had served as solicitor general when the Justice Department filed an amicus brief in *Fisher* before the Fifth Circuit, she recused herself from the Supreme Court’s deliberations. As a result, only

²⁴ *Id.* at 2211.

²⁵ *Id.*

²⁶ *Id.* at 2216 (Alito, J., dissenting).

²⁷ *Id.* at 2243.

²⁸ *Id.* at 2215 (Thomas, J., dissenting) (citations omitted).

seven justices considered *Fisher II*, which was decided 4-3. An eighth vote by Justice Scalia, assuming it had favored Fisher, would have yielded a 4-4 tie—still affirming the Fifth Circuit’s decision in favor of the UT program, albeit without an opinion.

Strangely, Justice Kennedy spent little effort analyzing whether the university’s use of race was narrowly tailored. Although he writes that *Fisher I* establishes that no deference is owed to administrators regarding whether a particular race-conscious program is narrowly tailored, he then proceeds to defer to them almost completely regarding whether their program is narrowly tailored. His dismissal of Fisher’s argument that the plan is not narrowly tailored because there are race-neutral alternatives takes only four paragraphs and adopts the university’s arguments wholesale.²⁹ He seems tired of the case, questions the wisdom of the Top Ten Percent Plan, and states that a remand would merely waste the parties’ time and money. Justice Kennedy’s apparent frustration with the case’s reappearance may have affected the cursory nature of the narrow-tailoring analysis.

III. *Fisher II* Is Inconsistent with Justice Kennedy’s Previous Rulings Regarding Race-Based Decisionmaking

As noted, one of the more puzzling aspects of *Fisher II* is that Justice Kennedy’s opinion is inconsistent not only with *Fisher I*, but also with his previous opinions regarding race-based decisionmaking. Justice Kennedy’s dissent in *Grutter* was, until *Fisher I*, his most recent opinion regarding racial preferences in higher education. In *Grutter*, Justice Kennedy wrote, “If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way.”³⁰ At the time, Justice Kennedy believed that the *Grutter* majority had indeed “abandoned or manipulated” strict scrutiny. The *Grutter* majority deferred to the University of Michigan in regard to what constitutes a “critical mass” of underrepresented minority students and blithely dismissed the argument that strict scrutiny required using race-neutral means to achieve diversity.³¹

²⁹ See *id.* at 2212–14 (majority op.).

³⁰ *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

³¹ *Id.* at 339 (O’Connor, J.) (“Narrow tailoring does not require exhaustion of every race-neutral alternative.”).

Justice Kennedy protested, “Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives.”³² Nonetheless, 13 years later, Justice Kennedy himself applied only a cursory strict scrutiny analysis to UT-Austin’s admissions program. He summarily dismissed Fisher’s contention that the university must attempt to use race-neutral means to achieve its goal of critical mass, essentially reasoning that UT had tried hard enough.³³ Reading the two cases together, it seems at times as if 2003 Justice Kennedy is dissenting from 2016 Justice Kennedy.

It is also difficult to reconcile Justice Kennedy’s 2007 concurring opinion in *Parents Involved* with his *Fisher II* opinion.³⁴ Admittedly, Kennedy considers institutions of higher education to have First Amendment interests not present at the K–12 level.³⁵ And unlike the *Parents Involved* plurality, Justice Kennedy considered racial diversity a compelling interest even at the K–12 level—and remained open to the use of race as a consideration in a more individualized assessment of a student.³⁶ Even so, he maintained that the Jefferson County school assignment plan did not survive strict scrutiny. The plan purportedly assigned students to schools based solely on the location of their parents’ residence, but also would not assign a student to his local school if the racial demographics were not what the school district desired. In Justice Kennedy’s view, the plan was too ambiguous and convoluted to determine whether it was narrowly tailored to achieve the goal of racial diversity. Although it was possible to conceive of the plan in a way that would withstand strict scrutiny, “[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.”³⁷ Notably, in

³² *Id.* at 394 (Kennedy, J., dissenting).

³³ *Fisher II*, 136 S. Ct. at 2212–13.

³⁴ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

³⁵ *Id.* at 792 (Kennedy, J., concurring in part and concurring in the judgment) (“[P] recedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity.”).

³⁶ *Id.* at 783, 790.

³⁷ *Id.* at 786.

Parents Involved Justice Kennedy wrote that the small number of students affected by the racially conscious school policies indicated that those particular policies were unnecessary. Yet when Fisher made a similar argument, he rejected it, writing, “it is not a failure of narrow tailoring for the impact of racial consideration to be minor. 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.”³⁸ Preferences may be minor on Mondays and Thursdays, but not on Tuesdays or Fridays.

IV. Academic Mismatch Emphatically Shows That the University’s Use of Race Is Not Narrowly Tailored

A. What Is Mismatch?

In Justice Lewis Powell’s *Bakke* opinion, Justice Sandra Day O’Connor’s *Grutter* opinion, Justice Kennedy’s *Fisher II* opinion, and the public imagination, racial preferences are used merely as a small “plus” factor.³⁹ It is clear, however, that UT-Austin and other schools do not use race in such a narrow way, but rather grant substantial racial preferences. How can a race-based decision be narrowly tailored when the size of the preference is extraordinarily large? The Fifth Circuit answered that question in its second look at *Fisher*: “Given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual’s contribution to UT’s diversity, including those that stem from race, holistic admissions would approach an all-white enterprise.”⁴⁰ (As is often the case, the significant disadvantages that Asian students experience under the racial preferences system are simply ignored.)

³⁸ *Fisher II*, 136 S. Ct. at 2212.

³⁹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.) (“In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”); *Grutter*, 539 U.S. at 334 (O’Connor, J.) (“[A] university may consider race or ethnicity only as a ‘plus’ in a particular applicant’s file.”); *Fisher II*, 136 S. Ct. at 2207 (“[T]here is no dispute that race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”).

⁴⁰ *Fisher*, 758 F.3d at 647.

In our amicus briefs in *Fisher II* at both the certiorari stage and the merits stage, my colleague Gail Heriot and I discussed how narrow tailoring should be applied in *Fisher II*.⁴¹ We wrote:

In applying the narrow tailoring requirement to race-preferential admissions policies, courts must take a tough-minded, independent look at whether those policies are narrowly tailored to reap the pedagogical benefits of diversity for all students. If on close examination a policy appears to be tailored to achieve some other goal instead, then it must fall.⁴²

Research increasingly makes clear that whatever benefits racial preferences are supposed to confer, they generally do not confer those benefits upon the supposed beneficiaries. The problem is that racial preferences are almost never a small “plus” factor. There are substantial gaps in academic credentials between students who receive racial preferences and those who do not. As Richard Sander and Stuart Taylor wrote in their book *Mismatch*:

Nationwide, the academic index of whites taking the SAT is about 140 points higher than the academic index for blacks (corresponding to a 300-point black-white gap on the current SAT I test, and a 0.4 GPA gap in high school grades), and it has hovered in that range for the past twenty years. Hispanics, in contrast, have an average academic index that is about 70 points lower than that of whites. The gap for American Indians is very similar to the black-white gap, and the academic index of Asians is about thirty points higher than that of whites. Something close to these differences will show up in most college applicant pools, and with racial preferences, similar gaps will carry over to the college’s enrolled student body.⁴³

⁴¹ See Brief of Gail Heriot and Peter Kirsanow, Members of the U.S. Commission on Civil Rights, as Amici Curiae in Support of Petitioner (cert-stage), *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/31035-pdf-Hepp-4.pdf>; Brief of Gail Heriot and Peter Kirsanow, Members of the U.S. Commission on Civil Rights, as Amici Curiae in Support of Petitioner (merits-stage), *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), available at <http://www.scotusblog.com/wp-content/uploads/2015/09/14-981-tsac-Gail-Heriot-et-al.pdf>.

⁴² *Id.* (cert-stage) at 3 (citation omitted).

⁴³ Richard Sander and Stuart Taylor Jr., *Mismatch* 17 (2012).

It may at first seem counterintuitive, but this actually works to the detriment of the student who receives the substantial preference. In 2010, the U.S. Commission on Civil Rights issued a report on encouraging minority students in science, technology, engineering, and mathematics (STEM) careers that addressed this issue.⁴⁴

A gap in academic credentials reflects a gap in academic preparation. Almost everyone has had the experience of finding himself in a class for which his level of preparation was below that of the median student. You struggled to keep up with the material and with the rest of the class. Had you been in the regular physics class rather than the AP physics class, you would have been fine. Now imagine that occurring in *every* class your freshman year of college. Even though you are a strong student, you are not as academically prepared as your classmates who did not receive a preference. Meanwhile, your white or Asian peers whose level of preparation is similar to yours are at a school that is a bit less competitive, but where their credentials match those of the median student. They aren't struggling. *You* wouldn't be struggling if you were at that school with them, but you were thrown into the deep end at a more demanding university because of an administrator's perhaps well-intended but misguided desire to achieve racial diversity without considering the cost. The late Justice Scalia found himself ridiculed when he suggested as much during the oral argument for *Fisher II*,⁴⁵ but the political incorrectness of a view does not change its truth.

Academic mismatch has had a profoundly negative effect on the supposed beneficiaries of racial preferences. In 2010, the U.S. Commission on Civil Rights found that black and Hispanic students were just as interested in majoring in STEM as were white students. Black and Hispanic students were more likely to receive a preference in college admissions, however, thereby being "mismatched" into colleges

⁴⁴ U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers* (2010), <http://www.usccr.gov/pubs/EncouragingMinorityStudentsinScienceCareers.pdf>.

⁴⁵ See, e.g., Janell Ross, Antonin Scalia's Strange Idea That Blacks Might Do Better in 'Less Advanced Schools,' *Wash. Post: The Fix*, Dec. 10, 2015, <https://www.washingtonpost.com/news/the-fix/wp/2015/12/10/justice-scalias-strange-but-all-too-familiar-theory-on-the-victims-of-affirmative-action>.

where they were less prepared than the average STEM major.⁴⁶ This, in turn, caused such black and Hispanic students to be more likely to leave the STEM field.⁴⁷ On the other hand, “when black and white students have the same academic index scores, black students are more likely than white students to receive a STEM degree.”⁴⁸

We see this dynamic in law schools as well. Students who are given racial preferences—which again, are almost always substantial—struggle to excel in law school and struggle to pass the bar.⁴⁹ These students are not struggling because they are black or Hispanic, or because they are not objectively good students. Students who receive preferences for other reasons also struggle.⁵⁰ The problem, quite simply, is that the student who is less academically prepared is unable to keep up with his classmates. Alert the media.

Furthermore, there is real-life evidence that ending racial preferences in admissions has a salutary effect on black and Hispanic performance in colleges and universities. After Proposition 209 outlawed racial preferences in public colleges and universities, the number of black students admitted to institutions that belonged to the prestigious University of California (UC) system dropped. But those who were admitted to UC institutions had dramatically better

⁴⁶ See U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, at 3 (2010), <http://www.usccr.gov/pubs/EncouragingMinorityStudentsinScienceCareers.pdf>.

⁴⁷ See *id.* (“[D]espite these initially high levels of interest, black and Hispanic students are less likely to major in or obtain a doctoral degree in STEM disciplines than are whites and Asians.”).

⁴⁸ *Id.*

⁴⁹ See Gail Heriot, A “Dubious Expediency”: How Race-Preferential Admissions Policies on Campus Hurt Minority Students, Heritage Foundation Special Report No. 167, at 22–24 (Aug. 31, 2015), <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/04/SR167.pdf>.

⁵⁰ See Sander and Taylor, *supra* note 43, at 61:

[O]ne of my students wondered whether older white students (whom law schools often gave admissions to in pursuit of a different kind of diversity) might also encounter mismatch problems. The [Bar Passage Study] allowed us to identify the age of students and confirm that, indeed, a larger percentage of older white students were attending schools with credentials a good deal lower than their classmates. Yes, they had disproportionate trouble on the bar. And yes, when we controlled for mismatch, the difference in performance disappeared. Poor outcomes were not a function of age, race, or any other group characteristic—it was about large preferences.

outcomes in terms of both GPAs and graduation rates, than those who had been admitted on the basis of a preference.⁵¹

B. How Does Mismatch Affect the Narrow Tailoring Analysis?

The detrimental effect of preferences on the purported beneficiaries affects the narrow tailoring analysis. As Gail Heriot and I wrote in our amicus brief, one purpose of narrow tailoring is to ensure that the stated reason for engaging in racial preferences is sincere.⁵² Another purpose is to ensure that it is necessary to engage in racial preferences to achieve the stated interest.

The overwhelming evidence of academic mismatch should have been enough to demonstrate that UT's use of racial preferences is not narrowly tailored. UT is almost certainly not immune to the perils of mismatch. "At the University of Texas . . . the typical black student receiving a race preference placed at the 52nd percentile of the SAT; the typical white was at the 89th percentile."⁵³ It is unlikely that a student whose academic preparation puts him at the 52nd percentile is in a position to successfully compete with a student who is at the 89th percentile.

This evidence severely undermines the claim that UT's use of racial preferences is narrowly tailored to achieve its goal. That goal, as stated by the university, is to achieve the "educational benefits of diversity," which requires a "critical mass" of black and Hispanic students.⁵⁴ The educational benefits include "[promoting] learning outcomes and better [preparing] students for an increasingly diverse work force, for civic responsibility in a diverse society, and for entry into professions, where they will need to deal with people of different races, cultures, languages, and backgrounds."⁵⁵ Unstated but

⁵¹ See Heriot, *supra* note 49, at 26–28.

⁵² See Brief of Gail Heriot and Peter Kirsanow (cert-stage and merits-stage), *supra* note 41, at 5.

⁵³ Richard Sander and Stuart Taylor Jr., *The Painful Truth about Affirmative Action*, *The Atlantic*, Oct. 2, 2012, <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122>.

⁵⁴ Brief for Respondents at 24–27, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), available at http://www.scotusblog.com/wp-content/uploads/2015/10/Fisher2.SCOTUS.Respondent.Brief_.pdf.

⁵⁵ *Id.* at 26.

implied is that black and Hispanic students who receive racial preferences will receive these benefits as well as the white and Asian students who did not receive racial preferences. But given the mounting evidence that large preferences in fact *harm* learning outcomes and make it *less* likely that the purported beneficiaries will enter high-status professions, any dispassionate observer must conclude that UT's program is unlikely to achieve its stated goal—unless, of course, the real goal is merely to expose white and Asian students to black and Hispanic students, regardless of the cost to the latter in time, money, and wasted opportunity. Why should promising black and Hispanic students have their potential sacrificed so white students can sit next to them, or so the admissions office can put a black face on the latest brochure?

Moreover, one of the stated goals of educational diversity is to “break down stereotypes.”⁵⁶ How likely is it that stereotypes will be broken down—as opposed to confirmed—when black and Hispanic students conspicuously cluster at the bottom of the class? Students notice the star performers, the workhorses, and those who are struggling. Minority students themselves may notice this most of all.⁵⁷ As Justice Kennedy wrote in *Parents Involved*, “To make race matter now so it might not matter later may entrench the very prejudices we seek to overcome.”⁵⁸

Let us give the administrators of UT-Austin the benefit of the doubt: They are aware of the mismatch research and they are aware of the large credentials gap between those admitted without regard to race and those who receive a preference. Let us also assume that

⁵⁶ *Id.* at 25.

⁵⁷ See Heriot, *supra* note 49, at 26:

But it is one thing for an individual student to find himself at the bottom of the class. It is quite another for an African-American student to find himself toward the bottom of the class and to find half his African-American friends and acquaintances there too.

It is easy to develop a sour-grapes attitude under those circumstances. “It’s all politics,” or “getting good grades isn’t really a black thing.” Culture comes from shared experiences, and affirmative action had been giving too many California minority students the shared experience of feeling unsuccessful at academic pursuits.

⁵⁸ *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

they are not malicious, and are not admitting black and Hispanic students who will largely be unable to reach their full potential at UT solely so they can pass white and Asian students in the cafeteria. Why, then, do they persist in engaging in racial preferences when they will be unable to achieve their stated goals?

The answer likely is, “*Because that is not their real goal.*” As Professor Heriot and I noted in our amicus briefs, “Lurking beneath the pretext of concern for the educational value of diversity is often one or more of the motives explicitly rejected by Justice Powell in *Regents of Univ. of Cal. v. Bakke*.”⁵⁹ One such forbidden motive is the desire to remedy societal or historical discrimination.⁶⁰ Yet this is a much more powerful motive and one that has from time to time been espoused by prominent academics.⁶¹ Another motive may be responding to financial or political pressures, or even pressure from the federal government or accreditors. But state engagement in racial discrimination, even if that is what is desired by an influential segment of the population, was tried earlier in our country’s history. Many of those now promoting racial preferences are deeply—and correctly—opposed to those earlier practices. Constitutional color-blindness cannot depend upon whose ox is being gored. Furthermore, if any of these forbidden goals is a public university’s real goal, its racial preferences program must be struck down.

C. The Bright Side for Opponents of Racial Preferences

An opponent of racial preferences may be tempted to view *Fisher II* as an unmitigated disaster. That would be an unnecessarily gloomy

⁵⁹ Brief of Gail Heriot and Peter Kirsanow (cert-stage and merits-stage), *supra*, note 41 at 6 (citation omitted).

⁶⁰ See, e.g., *Bakke*, 438 U.S. at 310 (Powell, J.):

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.

⁶¹ See Brief of Gail Heriot and Peter Kirsanow (cert-stage and merits-stage), *supra* note 41, at 6–9.

conclusion. The law governing racial preferences after *Fisher II* is (a little) better than it was after *Grutter*.

Although Justice Kennedy did not apply the rigorous strict scrutiny observers expected after *Fisher I*, the analysis is more rigorous than that applied by the majority in *Grutter*. Unlike the *Grutter* majority, Justice Kennedy seems to expect universities that want to engage in racial preferences to jump through some hoops. He notes approvingly that before UT reinstated the use of racial preferences, it wrote a 39-page report to justify its actions, and “conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data.’”⁶²

The idea that Justice Kennedy will allow colleges and universities to use racial preferences only if they perform studies establishing their need to use such preferences and establish a process to do so is consistent with his concurring opinion in *Parents Involved*. As mentioned above, Kennedy considers racial diversity a compelling educational goal at both the K–12 and postsecondary education levels. It appears, however, that he believes race may be employed on an individualized basis only, not in a systemic manner.⁶³ In *Parents Involved*, Justice Kennedy faulted Jefferson County for using a seemingly contradictory school assignment system that made it difficult for the judiciary to ascertain how race was being used.⁶⁴ In the same opinion, however, he faulted the Seattle school district for relying on “crude racial categories of ‘white’ and ‘non-white,’” rather than considering racial and ethnic diversity at a more precise level.⁶⁵ Strangely, just a few years later in his controlling opinion in *Schuetz v. Coalition to Defend Affirmative Action*, Justice Kennedy warned of the dangers of dividing people into ever-smaller racial

⁶² *Fisher II*, 136 S. Ct. at 2211–12.

⁶³ See *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). This could explain some of his apparent hostility to the Top Ten Percent Plan, which he seems to view as a ham-handed attempt to achieve racial diversity through a facially neutral program. However, his hostility to the Top Ten Percent Plan also seems to be at odds with some of his statements in *Parents Involved*. See *id.* at 789–90.

⁶⁴ *Id.* at 784–86.

⁶⁵ *Id.* at 786–87 (“[T]he school district does not explain how, in the context of its diverse student population, a blunt distinction between ‘white’ and ‘non-white’ furthers these [diversity] goals.”).

and ethnic groups.⁶⁶ Apparently in Justice Kennedy's mind there exists a golden mean of racial categorization that lies somewhere between the ham-fisted "white" and "non-white" and the excruciating precision of the 13 racial categories in *Ho v. San Francisco Unified School District*.⁶⁷

In short, the bad news is that Justice Kennedy has given colleges and universities a fairly bright green light to use racial preferences in the pursuit of racial diversity. As long as their stated goal passes the laugh test, the Court will not question whether it constitutes a compelling interest or require them to define it with any specificity. Justice Kennedy also passed up the opportunity to put teeth into the narrow tailoring prong.

Unfortunately, the Supreme Court has repeatedly decided that as far as it is concerned, "benign" racial discrimination, when adequately camouflaged, does not violate the Fourteenth Amendment. But the Court's decisions do not mean that state universities *must* engage in racial discrimination. Although there may be little that can be done in the federal courts at this time, voters still have the power to ban government-sponsored racial discrimination within their states. California's voters prohibited state-sponsored racial discrimination, including in university admissions, by approving Proposition 209 in 1996.⁶⁸ The Ninth Circuit held that the voters' decision did not violate the Fourteenth Amendment.⁶⁹ In 2006, Michigan passed

⁶⁶ See *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1634–35 (2014):

[I]f it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Cf. *Ho v. S. F. Unified Sch. Dist.*, 147 F.3d 854, 858 (9th Cir. 1998) (school district delineating 13 racial categories for purpose of racial balancing).

⁶⁷ 197 F.3d 854 (9th Cir. 1998).

⁶⁸ Anthony T. (Tom) Caso, *California's SCA 5 and Racial Preferences in Education*, 16 *Engage* 13 (2015).

⁶⁹ *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.").

a similar ballot initiative. The Supreme Court, with Justice Kennedy writing the plurality opinion, likewise approved broad state bans of racial discrimination in its 2014 decision in *Schuetz*. Kennedy was careful to note that the decision did not touch on whether state participation in racial preferences was *permitted* under the Fourteenth Amendment, but whether the preferences were constitutionally *required*.⁷⁰ A majority of the Court concluded that racial preferences are not constitutionally required.⁷¹

Opponents of racial preferences should now shift their resources toward combating racial discrimination on the state level. If they do so by pursuing actions that bar the consideration of race in state decisionmaking generally, those actions could have the salutary effect of barring racial discrimination in other areas, such as government contracting. A favorable outcome in *Fisher II* would not have hindered the use of minority set-asides in government contracting. Putting on rose-colored glasses, it is possible that shifting to a state-level approach will ultimately have a greater effect on the use of racial preferences generally than would the desired outcome of *Fisher II*.

There is some good news, as well: It may be marginally more troublesome and expensive for colleges and universities to engage in racial preferences. It seems likely that courts will require that colleges and universities provide evidence of their need to engage in racial preferences. This is not necessarily a small thing. Such analyses will provide road maps for plaintiffs challenging the subject preferences. It also seems likely that colleges and universities must show that they made at least vague gestures in the direction of using race-neutral means to achieve racial diversity. These requirements may seem like little more than speed bumps on the road to racial preferences, but they are speed bumps that did not exist post-*Grutter*. From the perspective of opponents of racial preferences, this is a small but real improvement.⁷²

⁷⁰ See *Schuetz*, 134 S. Ct. at 1630.

⁷¹ *Id.* at 1637–38.

⁷² From the perspective of the taxpayers who will pay for these studies, perhaps not so much.

Conclusion

In 2003, Justice Kennedy wrote in regard to race-conscious admissions, "The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences."⁷³ The same can be said today of Justice Kennedy's opinion in *Fisher II*. In a nation increasingly riven along racial lines, it is vital that the government maintain strict race-neutrality. Each individual should stand or fall on his own merit. This is no less true in the realm of higher education. Race-conscious admissions breed resentment among those whose race is a strike against them.⁷⁴ Nor do race-conscious admissions, on the whole, help the purported beneficiaries, who quickly realize that they are unable to compete with their better-prepared classmates. Ironically, those who are denied admission based on their race may suffer *less* long-term injury than those who are *admitted* because of their race. The former likely attend a slightly less selective university, but still excel compared to their peers who did not suffer a racial disadvantage in admissions. The latter may well struggle academically and eventually switch to an easier major they did not want.

As a practical matter, it is possible that colleges and universities will sort applicants into increasingly granular racial and ethnic categories. On one hand, this reflects reality, given that America can no longer be divided merely into "black" and "white." On the other, such granularity will only foment more interracial jockeying for the privileges associated with victimhood. And how will we determine who is entitled to belong to a favored group? How much minority ancestry must an applicant possess to be considered a worthy contributor to racial diversity? Should having two African-American grandparents provide an applicant with twice as much of a preference as an applicant who has only one African-American grandparent? What if the latter student also has a Chinese-American grandparent? Should that be considered even more diverse than the student who has only African-American and white grandparents? What if a student lies on his application and passes himself off as

⁷³ Grutter, 539 U.S. at 393 (Kennedy, J., dissenting).

⁷⁴ See, e.g., Douglas Belkin, Asian-American Groups Seek Investigation into Ivy League Admissions, Wall St. J., May 23, 2016, <http://www.wsj.com/articles/asian-american-groups-seek-investigation-into-ivy-league-admissions-1464026150>.

a member of a preferred race?⁷⁵ Should he be expelled from the university for lying on his application, even though his academic qualifications were sufficient to gain entry as a preferred minority? What if a student with a white parent and Chinese-American parent only checks “white” on a college application, either in hopes of boosting his chances of admission or simply because he considers himself white?⁷⁶ Should he be *required* to acknowledge both aspects of his ethnic heritage for purposes of college admissions? This is not merely idle speculation about the world that may come—this is the world we inhabit already.

The worst effect of *Fisher II* would be if it signals a relaxation of societal tolerance for racial classifications generally. A casual acceptance of “benign” racial preferences across society can be justified in the same terms as in the higher education context—“leaders who reflect society,” “breaking down stereotypes”—but doing so would tear at our increasingly fragile social fabric.⁷⁷ It is also unlikely to succeed in diminishing racism, but will instead breed resentment.⁷⁸ Perhaps Justice Kennedy’s blessing of racial preferences will be cabined to the higher-education context, given the importance he places upon deferring to academic judgment. But to paraphrase Chief Justice Roberts in *Parents Involved*, the best way to stop racial discrimination is to stop discriminating on the basis of race.

⁷⁵ See, e.g., Vijay Chokal-Ingam, *Why I Faked Being Black for Medical School*, N.Y. Post, Apr. 12, 2015, <http://nypost.com/2015/04/12/mindy-kalings-brother-explains-why-he-pretended-to-be-black>.

⁷⁶ See Associated Press, *Some Asians’ College Strategy: Don’t Check ‘Asian,’ USA Today*, Dec. 4, 2011, <http://usatoday30.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1>.

⁷⁷ See, e.g., Grutter, 539 U.S. at 330–31 (O’Connor, J.).

⁷⁸ See Tessa L. Dover, Brenda Major, and Cheryl R. Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, *Harv. Bus. Rev.*, Jan. 4, 2016, <https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened>.