FISHIN' WITH *FISHER*: DETERMINING THE DEPTH OF DEFERENCE DOES NOT DEMAND DAMNING DEFERENCE TO A DASTARDLY DEATH

INTRODUCTION

Although the Supreme Court did not examine the merits of *Fisher v. University of Texas at Austin*,[1] Justice Kennedy's interpretation of strict scrutiny and deference, while narrow in many respects, leaves room for the Fifth Circuit to determine the future of affirmative action—more specifically, the future of courts affording deference to a university's academic judgment in making academic decisions.[2]

While in *Regents of the University of California v. Bakke* the Court never specifically mentioned deference, Justice Powell, understanding the importance of academic freedom, found that a university is entitled to "wide discretion" in determining academic judgments, including who makes up its student body.[3] Justice Powell also suggested that strict scrutiny and deference should be applied as a unitary standard—a unitary standard requiring a university to show its use of race is "necessary" to accomplish diversity.[4]

Twenty-five years later, in *Grutter v. Bollinger*,[5] the Court expressly stated that courts should defer to a university's judgment that diversity constitutes a compelling interest.[6] Writing for the majority in *Grutter* and building on the foundation established in *Bakke*, Justice O'Connor further constructed the "framework" created by the *Bakke* Court.[7] By outlining principles, guidelines, and boundaries that courts should respect in reviewing academic decisions and by requiring "good faith consideration" of race-neutral alternatives, the *Grutter* Court provided the "framework" by which courts should use in reviewing a university's judgment.[8]

In applying this "framework," the *Grutter* Court reviewed and examined the university's reasons and decisions under both prongs of the strict scrutiny analysis, noting that, while the Court

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1 133 S. Ct. 2411 (2013).
2 *See infra* Part II.D.
3 438 U.S. 265, 314 (1978).
4 *Id.* at 315-16.
5 539 U.S. 306 (2003).
6 *Id.* at 328.
7 *See infra* Part II.B.
8 *See Grutter*, 539 U.S. at 328-29, 333-37.

adheres to a "tradition of . . . deference" to a university's judgment, strict scrutiny is equally as strict for considering "complex educational judgments"—deference does not weaken strict scrutiny.[9] Thus, again, indicating a unitary standard of strict scrutiny and deference.[10]

Then in *Gratz v. Bollinger*,[11] decided on the same day as *Grutter*, the Court struck down an admissions program awarding an automatic diversity bonus based on race.[12] Evident in *Gratz* were the implicit limitations courts must abide by in deferring to a university's academic judgment.[13] Thus, after reviewing the University's reasoning and decisions behind its admissions program, the Court invalidated the program, as it resembled a racial quota.[14]

Implicit in *Grutter*'s framework are the limitations on judicial deference to a university's judgment—*Bakke*, *Grutter*, and *Gratz* all recognized that courts must carefully review a university's decisions while still considering the university's experienced academic judgment.[15] Seemingly well established after sister cases *Grutter* and *Gratz*, affirmative action is, once again, back in the spotlight.[16] But, in what arguably constitutes a "break" from *Grutter*, *Gratz*, and *Bakke*, the *Fisher* Court instantly struck deference: Acting on his first opportunity to narrow deference, Justice Kennedy restricted deferring to a university's judgment concerning its compelling interest to "some" deference.[17] Then, in

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[9] *Id.* at 308, 328, 333-37; *see also Bakke,* 438 U.S. at 319 n.53.

> Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is *no warrant for judicial interference in the academic process*. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

Id. (emphasis added).

[10] *See Grutter*, 539 U.S. at 333-37.

[11] 539 U.S. 244 (2003).

[12] *Id.* at 276.

[13] *See infra* Part II.C.

[14] *Gratz*, 539 U.S. at 271-72.

[15] *See infra* Part II.

[16] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

[17] *Id.* at 2419.

a total one-eighty from anything held by *Bakke*, *Grutter*, or *Gratz*—and ignoring all notions of the implicit boundaries inherent in granting deference—Justice Kennedy stated that a university receives "no deference" when a court reviews its admissions program used to achieve diversity.[18] This is new; neither courts nor educational institutions will know what to do.

Furthermore, Justice Kennedy stressed that "higher education" does not change the narrowly tailoring inquiry and suggested that deferring to a university's judgment cancels out any meaningful judicial review.[19] Thus, in a break from precedent, Justice Kennedy may have split the Court's strict scrutiny analysis into two standards, possibly dealing deference and, thus, race-based affirmative action a deathly blow.[20]

In *Fisher*, the Court added substance to the limitations on deference already implicit in the *Grutter* and *Gratz* combination.[21] Following *Bakke*'s foundation, the *Grutter* Court firmly established the "framework" of applying strict scrutiny, both outlining principles, guidelines, and boundaries directing courts on how to apply strict scrutiny and stressing the importance of, when determining "complex academic decisions," supplementing the Court's review with a university's good-faith judgment.[22]

Even more, the limits of deference were evident in *Gratz*, i.e., because the means used by the University were not narrowly tailored to be the least restrictive, strict scrutiny killed the admissions program.[23] Yet, unlike *Grutter* and *Gratz*—which limited these implicit limitations to policies using some form of racial "quota"—the *Fisher* Court expressly used such limitations for policies, which could have easily been upheld under the *Grutter* and *Gratz* combo.[24] Considering Justice Kennedy appeared to both follow *Grutter*'s "framework," yet also broke away from the Court's "tradition" of deference, problems will

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[18] *Id.* at 2420.
[19] *Id.* at 2421.
[20] *See infra* Part II.D.
[21] *See infra* Parts II.B-D.
[22] *See infra* Part II.B.
[23] *See infra* Part II.C.
[24] *See infra* Parts II.B-D.

inevitably arise for courts, schools, and the future of affirmative action.[25]

Not only will this new standard cause confusion for lower courts, but it may also significantly impact the future of both race-based and race-neutral affirmative action plans.[26] What's more, *Fisher*'s fallout will likely affect schools across the country, causing further confusion in constructing and implementing programs to achieve diversity.[27] Consequently, work and needless expenditure of school resources will likely grow, thus, impairing the educational mission of universities across the nation.[28]

I. BUILD UP & BACKGROUND: FROM *BAKKE* TO *FISHER*

Laying down the foundation for university affirmative action plans, in *Regents of the University of California v. Bakke* a white male was rejected from the University of California's Medical School.[29] The School's "special admissions" program reserved sixteen out of one hundred seats for Underrepresented Minorities ("URM"s).[30] Finding that the admissions program constituted a racial "quota," Justice Powell invalidated the University's admissions program, yet upheld public universities' ability to consider race as part of admissions.[31] Justice Powell held that in evaluating an individual's application, a university may consider race along with a number of other factors if such consideration served a compelling interest, such as diversity.[32]

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[25] *See infra* Parts II-III.

[26] *See infra* Parts III.B-C.

[27] *See infra* Part IV.

[28] *See infra* Part IV.

[29] 438 U.S. 265, 276-77 (1978). Bakke, a white male, was actually rejected twice; both times, underrepresented minority candidates with lower qualification scores were admitted. *Id.* at 277.

[30] *See id.* at 275-76. More specifically, the School reserved the sixteen seats for specific races—Blacks, Asians, and Mexican-Americans. *Id.* Under the School's "special admissions" program, the school admitted sixty-three minority students between the years of 1971-1974. *Id.*

[31] *Id.* at 318-20. The University's "special admissions program" was essentially a quota system, requiring a certain number of spots in the University's accepted class be reserved for URMs—e.g., reserving sixteen out of one hundred seats. *Id.* at 275-76.

[32] *Id.* at 320; *see also* Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 596-98, 608 (W.D. Tex. 2009) (stating race is "a factor of a factor of a factor of a factor"). Examples of failed compelling interest include reducing the historic deficit of URMs in

Not two decades after *Bakke*, the Fifth Circuit struck down the University of Texas School of Law's admissions program for considering race in *Hopwood v. Texas*;[33] thus paving the way for the Supreme Court to grant certiorari in *Grutter v. Bollinger*.[34] In *Grutter*, a white woman was rejected by the University of Michigan School of Law under a race-based admissions program that considered race as a "plus factor" alongside many other factors.[35] Justice O'Connor, writing for the Court, found that, because the School considered race as a "plus" factor in an "individualized inquiry," the School's admissions program was narrowly tailored to achieve diversity.[36]

But, on the same day that the Court upheld the Law School's admissions program in *Grutter*, the Court invalidated the University of Michigan's undergraduate admissions program in *Gratz v. Bollinger*.[37] A white man and white woman were rejected by the University of Michigan under an admissions program that awarded an automatic "diversity bonus" of twenty out of 150 possible points to URMs, thus, admitting virtually every qualified URM.[38] Because automatic bonuses based on race contradict any concept of an "individualized consideration," the Court found the School's admissions program was not narrowly tailored to achieve diversity.[39]

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the medical field, countering social discrimination, and increasing the amount of doctors in poor communities. *Bakke*, 438 U.S. at 305-06.

[33] 78 F.3d 932, 955 (5th Cir. 1996).

[34] 539 U.S. 306 (2003). *Grutter* eventually overturned the Fifth Circuit's decision in *Hopwood v. Texas*. *See id.* at 322, 345-46.

[35] *Id.* at 316-17, 321, 341.

[36] *Id.* at 341.

> Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants[, and] . . . so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant will not be considered unduly harmed due to the school's consideration of race.

Id. (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

[37] 539 U.S. 244, 275-76 (2003).

[38] *Id.* at 251, 255.

[39] *Id.* at 270-71 (finding "that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity").

Most recently, Abigail Fisher and Rachel Michaelewicz, both white women,[40] were rejected by the University of Texas ("UT") under a dual-plan admissions program: a race-neutral plan combined with a race-based plan.[41] Both women sued UT, arguing that UT's consideration of race in admissions violated their Fourteenth Amendment equal protection rights.[42] Here, however, the admissions programs were apparently not examined strictly enough; finding the lower court misapplied strict scrutiny by deferring to UT's judgment regarding academic decisions under the narrowly tailored inquiry, the Supreme Court vacated and remanded the case back down to the Fifth Circuit.[43]

In an effort to achieve a "critical mass" of diversity within its student body, UT has cycled through three different admissions plans in the past two decades.[44] Invalidated by the Fifth Circuit's decision in *Hopwood*[45] and fearing the Texas Attorney General's Opinion prohibiting state universities from considering race in evaluating applicants for admission,[46] UT terminated its first race-based plan in 1996.[47] Attempting to save diversity after *Hopwood*, the Texas Legislature passed the Top Ten Percent Plan ("Ten Percent Plan").[48] And while percentage plans appear

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[40] After being rejected from UT, Fisher was accepted into and recently graduated from Louisiana State University. Adam Liptak, *Race and College Admissions*, *Facing a New Test by Justices*, N.Y. TIMES, Oct. 8, 2012, http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html. Rachel Michaelewicz dropped the case before it reached the Supreme Court. Gene Demby, *Fisher v Texas: University of Texas Affirmative Action Briefs Support Student Diversity*, HUFFINGTON POST (Aug. 13, 2012, 10:17 PM), http://www.huffingtonpost.com/2012/08/13/fisher-v-texas-texas-affirmative-action-case_n_1774334.html.

[41] Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217, 247 (5th Cir. 2011).

[42] *Id.* at 217.

[43] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421-22 (2013).

[44] *Id.* at 2415.

[45] Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir. 1996).

[46] Tex. Att'y Gen. Letter Op. No. 97-001 (1997).

[47] *Fisher,* 133 S. Ct. at 2415. Under UT's first program—before *Hopwood*—UT considered two factors in admissions: (1) a numerical score reflecting a combination of test scores and high-school performance, and (2) race. *Id.*

[48] H.B. 588, 75th Leg., Reg. Sess. (Tex. 1997). The Ten Percent Plan guaranteed admission into state-funded universities to Texas high-school students graduating in the top ten percent of their class. *Id.* The bill was passed in 1997. *Id.*

racially neutral on their face, many criticize such plans.[49] Such criticism is likely justified to some degree,[50] but Texas's Ten Percent Plan also significantly contributes to diversity without directly considering race—this much is irrefutable.[51]

Yet, the Ten Percent Plan, by itself, failed to enroll a "critical mass" of diverse students.[52] Most of UT's smaller undergraduate classes lacked a "critical mass" of minority students as contemplated by *Grutter*, and, therefore, were not diverse.[53] Furthermore, according to a survey conducted by UT, minority students felt "isolated, and a majority of all students felt there was insufficient minority representation in classrooms."[54] Without directly considering race, the benefits of diversity were slipping away.

Accordingly, shortly after the Court's decision in *Grutter*, UT re-implemented its race-based admissions program, adjusted to

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[49] Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) (noting how percentage plans are insufficient at the graduate and professional school level and noting their dependence on "racial segregation" in secondary education).

[50] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 243 (5th Cir. 2011) ("True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense, a 'facially' race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.").

[51] *See id.* at 224.

> In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African–American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African–Americans increased. The entering freshman class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African–American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian–American (1,218 students) in a class of 6,796 students.

Id.

[52] *Id.* at 225-26.

[53] *Id.* According to a study commissioned by UT,

> 90% of . . . smaller classes in Fall 2002 had either one or zero African–American students, 46% had one or zero Asian–American students, and 43% had one or zero Hispanic students. A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African–American students, 41% had one or zero Asian–American students, and 37% had either one or zero Hispanic students.

Id. at 225.

[54] *Id.* at 225 (internal quotation marks omitted).

conform to the constitutional standards set forth in *Grutter*.[55] Unlike most university admissions programs, UT currently uses a dual-plan admissions program.[56] And while UT's dual-admission plan—utilizing both a race-based and a race-neutral plan—has undeniably increased diversity,[57] it is precisely this dual-plan that Abigail Fisher is challenging.[58]

II. BREAK IN DEFERENCE: TRICKLING THROUGH THE ICE CREAM CONE

Deference—initially broadly portrayed in *Bakke*, expounded upon in *Grutter*, and tested by *Gratz*—has now been tapered down to its substance by the Court in *Fisher v. University of Texas at Austin*, if not almost terminated. While, in some respects, Justice Kennedy seemed to conform to the "framework" outlined by the *Grutter* Court, he also seemed to bounce all around the perimeters of deference, perhaps unnecessarily adding substance to limitations already implicit in the Court's analysis.

A. Rocky Bakke, Laying the Foundation for Deferring all the Things

In *Bakke*, Justice Powell held that to survive strict scrutiny, a "State must show that its purpose, [diversity] . . . is both constitutionally permissible and substantial, and that its [admission program] us[ing] . . . the classification is necessary . . . to the accomplishment of [diversity]":[59] thus, indicating that strict scrutiny and deference should be applied as a unitary standard—both considering a university's judgment and reviewing a

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[55] *See id.* at 217-18, 226. *But see* Brief for Petitioner at 15-16, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (arguing UT's plan is invalid under *Grutter*). Under UT's race-based plan, students were asked to classify themselves as one of five races; however, although race was certainly a "meaningful factor," race wasn't assigned a numerical value. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2416 (2013).

[56] *See Fisher*, 631 F.3d at 227-28.

[57] *See id.* at 226.

[58] *See id.* at 230-31.

[59] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (internal quotation marks omitted); *cf. Fisher*, 133 S. Ct. at 2420 (appearing to apply this standard of strict scrutiny to only the second-prong—means narrowly tailored).

university's decisions when examining whether a university's means are narrowly tailored to achieve its compelling interest.[60]

Justice Powell did not specifically mention judicial deference in *Bakke*.[61] He did, however, establish an initial foundation for courts to build upon by elaborating on the importance of considering a university's judgment when determining academic decisions.[62] Under the First Amendment, "academic freedom" constitutes a special constitutional niche,[63] comprised of "four essential freedoms": "[1] who may teach, [2] what may be taught, [3] how it shall be taught, and [4] who may be admitted to study."[64]

And according to Justice Powell, a university is allowed to "make its own judgments," including who is admitted into its student body—universities, moreover, have "wide discretion" in making this determination.[65] While a university is entitled to "wide discretion," however, Justice Powell also emphasized the importance of staying within the confines of the Fourteenth Amendment—the "most rigid" of confines.[66] Under the *Bakke* Court's understanding, the relationship between respecting academic freedom and deciding academic decisions is crucial to a court's review of a university's decisions.[67] And Justice Powell concluded, stating that a university's "good faith . . . [is] presumed . . . absen[t] . . . a showing to the contrary."[68] A certain

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[60] *See generally Bakke*, 438 U.S. at 305-15.

[61] *Id.*

[62] *See id.* at 312-13; *see also* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (citing *Bakke,* 438 U.S. at 319 n.53) (recognizing a "tradition of giving a degree of deference" regarding academic decisions).

[63] *Bakke*, 438 U.S. at 312. America is "deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned." *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[64] *Id.* at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)). The Court noted that the "Nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[65] *Id.* at 312, 314.

[66] *Id.* at 291, 314.

[67] *See id.* at 312-13.

[68] *Id.* 318-19 (noting that courts should not assume that a university's admissions program is a "cover" for a "quota" system) (citations omitted).

degree of deference to a university's judgment is inherently rooted in *Bakke*'s initial foundation.[69]

B. The Grutter Router—Carving out the "Framework" for Review—Constructing Principles, Guidelines & Implicit Boundaries

Building on *Bakke*'s foundation, Justice O'Connor also held that a university admissions program must be narrowly tailored to achieve diversity.[70] Without this "judicial inquiry," there is no way to know whether considering race in admissions is justified.[71] Thus, similar to Justice Powell in *Bakke*, Justice O'Connor also hinted at a unitary standard of judicial review.

Justice O'Connor stated that it is the Court's job to determine the "validity" of using race.[72] As strict scrutiny lays out a "framework for carefully examining the importance and the sincerity" underlying a university's decision to consider race, Justice O'Connor outlined principles and guidelines courts must adhere to in conducting a strict scrutiny review, including a certain amount of deference to a university's judgment, limited by boundaries implicit in the courts review.[73]

As a threshold matter, courts should remain mindful that strict scrutiny is "not strict in theory, but fatal in fact."[74] Not every consideration of race is "equally objectionable"; "context matters"; and courts must consider "relevant differences."[75] More importantly, strict scrutiny "is no less strict" for "complex educational judgments in an area that lies primarily within the expertise of a university."[76] Justice O'Connor confirmed that this holding conforms to a "tradition of giving a degree of deference" to a university's judgment in determining academic decisions.[77]

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[69] *See id.*

[70] Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

[71] *Id.* at 326.

[72] *Id.* at 327 (citation omitted).

[73] *Id.* at 327, 334-35.

[74] *Id.* at 326 (citation omitted).

[75] *Id.* at 308, 327 (citations omitted).

[76] *Id.* at 328.

[77] *Id.*; *see also Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 96 n.6 (1978); Regents of Univ. of Cal. v. *Bakke,* 438 U.S. 265, 319 n.53 (1978).

In determining whether diversity constituted a compelling interest, the *Grutter* Court held that a university's "judgment that . . . diversity is essential to its educational mission is one to which we *defer*."[78] Yet, do not misinterpret this as blind deference. Justice O'Connor ensured compliance with strict scrutiny by examining the University's reasoning in deciding that diversity served a "compelling interest."[79]

Highlighting the importance of "academic freedom," Justice O'Connor recognized that "educational autonomy" under the First Amendment "includes the selection of its student body."[80] Diversity is at the "heart of [a university's] . . . institutional mission," and schools need students that will contribute to a "robust exchange of ideas."[81] Additionally, the Court found that diversity promotes "cross-racial understanding" and helps "break down racial stereotypes," thus promoting understanding among different races.[82] Such racial cohesion results in "livelier, more spirited, and simply more enlightening and interesting" classroom discussion.[83] The Court noted that studies indicate that diversity in academic environments better prepares students to be professionals in the workforce.[84] The Court also recognized that the benefits stemming from diversity in education were similar to the benefits stemming from diversity in the marketplace, the military, and the workforce—thus resulting in productive citizens who contribute to a successful society.[85]

Finally, the Court found the concept of diversity essential to America achieving its "dream of one Nation."[86] Thus, Justice O'Connor, adhering to the principles of strict scrutiny in an academic environment, strictly scrutinized the school's reasoning

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[78] *Grutter,* 539 U.S. at 328 (emphasis added). *But see* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (stating that when reviewing diversity as a compelling interest, a university is afforded "some, but not complete" deference).

[79] *See generally Grutter*, 539 U.S. at 329-33.

[80] *Id.* at 329; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

[81] *Grutter*, 539 U.S. at 329.

[82] *Id.* at 330.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 330-31.

[86] *Id.* at 332 ("Effective 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.").

for choosing diversity as its compelling interest while simultaneously deferring to the University's experienced judgment; thus, supplementing the Court's judgment with the University's judgment, confirming that diversity does, in fact, constitute a compelling governmental interest.[87]

Contrary to the Supreme Court's recent interpretation in *Fisher*, in *Grutter*, the Court applied the same standard of review under both the compelling interest prong and the narrowly tailored prong.[88] Although Justice O'Connor did not mention deference verbatim as part of the narrowly tailoring inquiry, the depth and limitations of deference are implicit in the Court's analysis.[89] Justice O'Connor outlined the principles, guidelines, and boundaries a court must conform to in determining whether a university's admissions program is narrowly tailored to achieve diversity.[90]

Admission programs must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[91] Therefore, race must be used in a "flexible, nonmechanical way," individualized review is "paramount," and all factors must be "meaningfully considered alongside race."[92] Additionally, universities are permitted, if necessary, to grant race a greater degree of weight than other soft factors, and some consideration of "numbers" is allowed.[93]

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[87] *Id.* at 329-33.

[88] *See supra* notes 70-77 and accompanying text. *But see* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013) (implying the standard is more strict when analyzing a school's admissions program).

[89] *See Grutter*, 539 U.S. at 333-36.

[90] *Id.*

[91] *Id.* at 334 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

[92] *Id.* at 334, 337.

[93] *See id.* at 335 (noting that in *Bakke*, "Justice Powell flatly rejected the argument that Harvard's program was the functional equivalent of a quota merely because it had some plus for race, or gave greater weight to race than to some other factors, in order to achieve student body diversity" (quoting *Bakke*, 438 U.S. at 318) (internal quotation marks omitted)).

On the other hand, race cannot be a "defining feature" in selecting particular applications.[94] This means that universities are not allowed to use racial "quotas," are not allowed to "insulate" certain candidates from competition with other candidates, and are not allowed to award automatic "diversity bonuses."[95] In addition, courts must all ensure that considering race in admissions is "necessary."[96] Universities prove it's necessary to consider race through "serious, good faith consideration of workable race-neutral alternatives."[97] Finally, admissions programs also cannot "unduly harm" other races, and all affirmative action programs "must be limited in time."[98]

In examining the appropriate amount of deference, Justice O'Connor opined that "permissible goal[s] . . . require[] only a good-faith effort . . . to come within a range demarcated by the goal itself."[99] Similar to Justice Powell's opinion in *Bakke*, Justice O'Connor also stated that the Court "take[s] the [University] at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable."[100] Hence, although the term "deference" was not directly mentioned, Justice O'Connor clearly outlined the boundaries implicit in deferring to a university's judgment concerning its admissions program.[101]

Similar to reviewing the University's reasons for considering diversity a compelling interest, Justice O'Connor went on to review the University's reasons behind deciding on its admissions program to ensure it was narrowly tailored to achieve diversity.[102] Admissions officials testified, "without contradiction," that they

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[94] *See id.* at 337.

[95] *Id.* at 334, 337 (internal quotation marks omitted).

[96] *Id.* at 342.

[97] *Id.* at 339.

[98] *Id.* at 341-42. "We are mindful, however, that [a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Accordingly, race-conscious admissions policies must be limited in time." *Id.* at 341-42 (citation omitted) (internal quotations marks omitted).

[99] *Id.* at 335 (quoting Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

[100] *Id.* at 343 (citation omitted) (internal quotation marks omitted).

[101] *See id.* at 333-36.

[102] *See id.* at 336-39.

did not grant race greater weight than any other "soft" factor.[103] And upon examining the University's student body composition, the Court noted that (1) the percentage of URMs admitted over multiple years varied in a range inconsistent with anything resembling a "quota," and (2) the number of URMs enrolled substantially differed from their representation in the applicant pool—confirming the University avoided racial "quotas," racial balancing, and any "mechanical" consideration of race.[104]

The Court also recognized that the admitted URMs were all well qualified, were all likely to have personal life experiences that contribute to the School's academic mission, and were all *less* likely to be admitted in "meaningful numbers" on criteria that ignored their individual experiences.[105] Even more, each applicant had an equal opportunity to highlight such experiences through his personal application.[106] And in examining the various diversity factors the University considered, the Court found that the school did not limit the experiences that may be considered, and that the School gave substantial weight to several other diversity factors aside from race—assuring the University undertook an "individualized consideration."[107]

Next, the Court examined alternative race-neutral plans to verify that considering race was "necessary."[108] In examining three alternatives—lottery systems, percentage plans, and reducing emphasis on academic performance—the Court found that all three alternatives would harm the University's academic mission.[109] Such alternatives make an "individualized," "nuanced

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[103] *Id.* at 336-37.

[104] *Id.* at 336-38.

[105] *Id.* at 338.

[106] *Id.*

[107] *Id.* at 337.

> [P]olicy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.

Id. at 338 (citation omitted).

[108] *Id.* at 339-40, 342.

[109] *Id.* at 340.

judgment impossible," and lowering the academic performance requirement undermines the mission of education.[110]

Both adhering to and building upon Justice Powell's foundation in *Bakke*, Justice O'Connor sketched the "framework" to be used in applying strict scrutiny and in verifying that a university's admissions program is narrowly tailored to achieve diversity.[111] Both Justices recognized the importance of granting a degree of deference to a university's judgment concerning academic decision.[112] But, both Justices also recognized the importance of confirming that racial classification is justified.[113] By establishing principles, guidelines, and implicit boundaries of deference for applying strict scrutiny, which courts should follow in reviewing admission programs, Justice O'Connor firmly established a unitary "framework" for applying strict scrutiny.[114]

C. Gratz: Uncharted Depths of Deference Explored

Decided on the same day as *Grutter*, *Gratz* could not have come at a better time. Identifying the boundaries of deference tested in *Gratz* is vital to understanding *Grutter*'s "framework" of strict scrutiny. In reviewing the University's program under *Grutter*'s principles, guidelines, and boundaries, the *Gratz* Court identified the implicit boundaries at which point courts should cease deference.[115] In *Gratz*, the Court held that awarding automatic diversity bonuses based on race lacked the required "individualized consideration," thus, amounting to nothing more than a "factual review."[116] The Court found that automatic diversity bonuses were a "decisive" factor in admission, as virtually every single qualified URM applicant was admitted.[117]

Even more, the University's second program—the "flagging" system—actually accentuated flaws inherent throughout the entire program, as officials could look at the whole application

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[110] *Id.*

[111] *See generally id.* at 333-40.

[112] *See id.* at 329; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978).

[113] *See Grutter*, 539 U.S. at 333; *Bakke*, 438 U.S. at 291, 305.

[114] *See generally Grutter*, 539 U.S. at 333-40.

[115] *See generally* Gratz v. Bollinger, 539 U.S. 244, 270-76 (2003).

[116] *Id.* at 271-72.

[117] *Id.* at 272. Race was awarded 300% more points than other "soft" factors constituting "extraordinary talent." *Id.* at 273, 279 (O'Connor, J., concurring).

individually once "flagged," yet could no longer consider points.[118] And there was no evidence showing how particular applicants were flagged—as noted by the Court, with flagging, individual consideration is "the exception and not the rule."[119] The limited individual consideration, moreover, came after diversity bonuses were awarded.[120]

Justice Rehnquist stated that "[n]othing in . . . *Bakke*" gives a university authority to ignore the confines of strict scrutiny, thus granting admissions officials free-range to use whatever programs they prefer:[121] again, implying courts should use a unitary standard—both reviewing a school's decisions and considering its experienced judgment—when reviewing academic decisions.[122] The scrutiny is just as strict whether reviewing diversity or an admissions program.[123] And, in conducting that review, courts should defer to a university's experienced judgment.

Evident in *Gratz* are the limitations of just how far courts may venture in deferring to a university's judgment.[124] After acknowledging *Bakke*'s foundation and reviewing the University's admissions program under a unitary standard of strict scrutiny, the Court clearly identified the University's automatic diversity bonuses as a quota-esque invalid consideration of race.[125] Accordingly, the Court considered, and refused to defer to the University's good faith judgment regarding its academic decisions, as the University's decisions failed strict scrutiny.[126]

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[118] *Id.* at 273-74.

> Under the new system, counselors may, in their discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography.

Id. at 256-57.

[119] *Id.* at 274.

[120] *Id.*

[121] *Id.* at 275.

[122] *See id.*

[123] *See id.*

[124] *See id.* at 270-76.

[125] *Id.* at 270.

[126] *See id.* at 275-76.

D. The Ole Fisher Constrictor: Diving Through the Depths of the Cone

While the principles, guidelines, and boundaries concerning a courts application of strict scrutiny and deference were seemingly well defined after *Bakke*, *Grutter*, and *Gratz*, Justice Kennedy's recent narrow interpretation of deference—which both adds unprecedented substance to the analysis and completely ignores many important aspects of a university's judgment—may prove fatal to both deference and race-based affirmative action plans.

While Justice Kennedy did not kill deference, he may have weakened it past the point of relevance. Initially in line with *Bakke*, *Grutter*, and *Gratz*, Justice Kennedy agreed that a university's judgment warrants a degree of deference regarding academic decisions.[127] Yet, Justice Kennedy quickly constricted that deference.[128] In reviewing a university's decision that the benefits flowing from diversity serve a compelling governmental interest, Justice Kennedy stated that a university is afforded "some, but not complete" deference, consequently tightening down the Court's strict scrutiny application and sacrificing valuable academic judgment.[129]

On the other hand, ostensibly in line with the "framework" established by *Grutter*, Justice Kennedy also found that courts must "ensure that there is a reasoned, principled explanation for the academic decision."[130] While Justice Kennedy seems to recognize the importance of deferring to a university's judgment and seems to understand how to apply the framework of strict scrutiny in an academic context, he also immediately acted on his first opportunity to gouge deference—limiting deference concerning diversity as a compelling interest.[131] More importantly, contrary to *Bakke*, *Grutter*, and *Gratz*, in *Fisher*, Justice Kennedy seemed to split strict scrutiny into a dual-standard review,

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[127] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (stating "a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer'" (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003))).

[128] *See id.*

[129] *See id.*

[130] *Id.*

[131] *See id.*

affording a university "some deference" in reviewing diversity as a compelling interest, yet affording a university "*no* deference" in reviewing whether the admissions program is narrowly tailored to achieve diversity—possibly a complete "break" from anything held by *Bakke*, *Grutter*, or *Gratz*.[132]

Yet, while Justice Kennedy, arguably, departed from the Court's precedent in abandoning deference when reviewing admissions programs, he also seemed to partially stay in line with the foundation established by such precedent—bouncing all around the boundaries of deference.[133] Similar to Justice O'Connor's opinion in *Grutter*, Justice Kennedy stated "courts, not . . . university administrators" must ensure the "means chosen" are "narrowly framed."[134] This means that the school must show and the court must confirm that race is not a "defining feature" in admissions—a similar obligation to that required under *Bakke*, *Grutter*, and *Gratz*.[135] But Justice Kennedy also strongly suggested that courts were under no obligation to consider a university's experienced judgment in determining academic decisions.[136]

Even more, Justice Kennedy found that courts must verify that it is "necessary" to use race through reviewing "race-neutral alternative[s]" but only applied such language to the narrowly-tailored prong of strict scrutiny—*Grutter* and *Bakke*, on the other hand, required that courts verify that using race is necessary under both prongs of strict scrutiny.[137] Although exhaustion of "every *conceivable* race-neutral alternative" isn't required, Justice Kennedy stated strict scrutiny requires courts to "examine with

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[132] *Id.* at 2419-20 (emphasis added).

[133] *See id.* at 2419-21.

[134] *Id.* at 2420; *cf.* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (stating that determining whether a university's means are narrowly tailored to achieve a compelling interest is "the job of the court" (citation omitted)).

[135] *Fisher*, 133 S. Ct. at 2420; *cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978); *Grutter*, 539 U.S. at 326-27; Gratz v. Bollinger, 539 U.S. 244, 270-71 (2003).

[136] *Fisher*, 133 S. Ct. at 2420 (finding a court "*can* take [into] account . . . university's experience and expertise" (emphasis added)).

[137] *Id. But see Grutter*, 539 U.S. at 334-36, 340; *Bakke*, 438 U.S. at 306 (requiring courts to verify that it's necessary to use race in reviewing both diversity and the admissions program; thus, indicating a unitary standard of review, supplemented by a university's good-faith judgment).

care, and *not defer* to" a university's judgment.[138] In *Grutter*, however, Justice O'Connor did not say anything about abandoning a university's good-faith judgment.[139] And hinting at a stricter review, Justice Kennedy interpreted strict scrutiny as requiring the "reviewing court . . . be satisfied that *no* workable race-neutral alternatives would produce the educational benefits of diversity."[140] Universities must prove that race-neutral alternatives fail to produce diversity; if a race-neutral alternative can be achieved without excessive expense, however, the university "may not consider race."[141]

Justice Kennedy is correct: *Grutter* never claimed that good-faith may forgive an "impermissible consideration of race"; nor claimed that reciting legitimate purposes is sufficient; nor claimed that courts should simply "accept a school's assertion . . . without . . . close analysis."[142] But *Grutter* also did not completely abandon considering a university's good-faith judgment.[143] In *Grutter*, Justice O'Connor, in outlining the "framework" for strict scrutiny, conformed to strict scrutiny by reviewing the university's academic decisions, the reasons behind such decisions, and its consideration of alternative decisions.[144] Although Justice Kennedy hinted at a similar judicial inquiry, he partially terminated deference under such inquiry—leaving many wondering exactly where he landed.[145]

In a final blow to deference, Justice Kennedy stressed that the "higher education dynamic does not change the narrow tailoring analysis of strict scrutiny."[146] What's more, Justice Kennedy also insinuated that deferring to a university's judgment contradicts any meaningful judicial review,[147] thus, possibly

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[138] *Fisher*, 133 S. Ct. at 2420 (emphasis added).

[139] *See Grutter*, 539 U.S. at 339 ("[n]arrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives").

[140] *Fisher*, 133 S. Ct. at 2420 (emphasis added).

[141] *Id.*

[142] *Id.* at 2421.

[143] *See Grutter*, 539 U.S. at 339.

[144] *See supra* Part II.B.

[145] *See Fisher*, 133 S. Ct. at 2419-21.

[146] *Id.* at 2421.

[147] *See id.* (stating that "for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve" diversity). This suggests that, under Justice Kennedy's new narrow interpretation of deference, courts will not

separating the two standards of strict scrutiny, resulting in a new dual-standard of strict scrutiny: one with limited deference combined with one with zero deference—again, a huge "break" from anything mentioned in *Bakke*, *Grutter*, or *Gratz*.

The admissions program reviewed in *Fisher* was similar to the program reviewed in *Grutter*—both considered race as a "plus" factor, alongside many other factors, as part of an "individualized consideration," and neither constituted a "racial quota"—in addition, both admissions programs are, arguably, valid under *Grutter*'s strict scrutiny "framework."[148] Justice Kennedy, however, amplified the Court's application of strict scrutiny, unnecessarily adding substance to the implicit boundaries of deference highlighted by *Grutter* and *Gratz*,[149] thus, leaving many confused as to exactly where the Court landed after its constant bouncing around the perimeters of strict scrutiny and deference.

III. *FISHER* & THE FIFTH CIRCUIT—MAPPING THE UNMAPPED—DIRECTION OF DEFERENCE AFTER JUSTICE KENNEDY'S CONSERVATIVE STANDARD

A. Fisher Prior to Justice Kennedy

Writing for the Fifth Circuit, Judge Higginbotham previously found that "a university's educational judgment in developing diversity policies is due deference."[150] Judge Higginbotham explained that the importance of deferring to a university's judgment regarding academic decisions rest on two rationales: (1) universities are experienced with complex educational judgments—courts are not; and (2) the First Amendment guarantees public universities some degree of academic freedom,[151] which includes "selection of its student body."[152]

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be conducting a strict scrutiny standard unless they partially eliminate deference, just as Justice Kennedy did here. *See id.*

148 *See supra* Parts I-II.

149 *See supra* Parts II.B-C.

150 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 231 (5th Cir. 2011).

151 *Id.* at 231.

> *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve

Courts, moreover, must be "mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body."[153] Judge Higginbotham opined that limiting deference to the compelling interest prong of strict scrutiny "in its full flower is contradicted by *Grutter*['s]" analysis.[154]

Although perhaps a bit generous in affording deference and a tad under inclusive in review, Judge Higginbotham's previous opinion appeared to be in line with the "framework" outlined by *Bakke*, *Grutter*, and *Gratz*.[155] Yet, under the Supreme Court's new narrow standard of deference, the Fifth Circuit and other lower courts may feel constrained in applying strict scrutiny, causing confusion in the lower courts, thus, affecting the future of race-based and race-neutral admissions plans.[156]

B. Between Charybdis & Scylla—Confusion in the Courts

This dual-standard is new, and courts won't know what to do. *Fisher*'s ambiguous break from *Bakke*, *Grutter*, and *Gratz* will certainly result in confusion for lower courts.[157] It's not clear just how strict strict scrutiny actually is.[158] We don't know if deference is alive, injured, or dead.[159] Lower courts will likely be confused concerning how to act in the period immediately following the Fifth Circuit's upcoming decision in *Fisher*.[160] Justice Kennedy's interpretation of deference was conservative, narrow, and a departure from precedent.[161] Understandably, lower courts, too,

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> the educational benefits of diversity, including attaining critical mass in minority enrollment.

Id. at 233.

[152] *Id.* at 231 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

[153] *Id.* at 234.

[154] *See id.* at 232 (contradicting the appellants claim that "*Grutter* deferred *only* to the university's judgment" regarding diversity (emphasis added)).

[155] *See id.* at 231-35.

[156] *See supra* Part II.D.

[157] *See supra* Part II.

[158] *See supra* Part II.

[159] *See supra* Part II.

[160] *See supra* Part II.

[161] *See supra* Part II.

may be hesitant to approve of anything resembling a race-based plan, thus placing lower courts between Charybdis and Scylla.[162]

Considering Justice Kennedy's new analysis, adding substance to the implicit boundaries of deference, lower courts will likely be confused as to the amount of deference that should be given to a university's judgment.[163] Justice Kennedy only required courts to give "some" deference in reviewing diversity, yet stated "no deference" should be given in reviewing admissions programs used to achieve diversity.[164] Courts aren't going to know what this means—no one knows what this means. Justice Kennedy did not, however, forbid courts from continuing to consider a university academic judgment.[165] Given the complex nature of academic decisions in higher education, courts choosing to ignore well-reasoned judgment and experience are wasting resources and time, increasing the burden for all.[166]

Less deference may mean that courts will experience an increase in the amount of work involved in determining whether a university's means chosen are narrowly tailored to achieve its compelling interest.[167] Considering the numerous potential avenues for future constitutional challenges post-*Fisher*, affirmative action litigation is sure to increase.[168] Consequently, as the courts' obligations under judicial review were amplified by Justice Kennedy's opinion, courts' duties are sure to increase.[169] Essentially, courts may end up performing strict scrutiny as interpreted under *Grutter* while simultaneously performing what was previously a university's job—proving the university acted in

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[162] *See supra* Part II.D.

[163] *See supra* Part II.D.

[164] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419-20 (2013).

[165] *See id.* at 2420 (suggesting courts "can" consider a university's judgment, but are not required to).

[166] *See infra* Part IV.A (discussing the increased burden placed on universities in meeting strict scrutiny).

[167] *See infra* Part IV.A.

[168] *See* RICHARD D. KAHLENBERG, A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 1-10 (2012), *available at* http://tcf.org/assets/downloads/tcf-abaa.pdf. For example, challenging diversity as a compelling interest, challenging critical mass, challenging strict scrutiny, and challenging deference are all potential avenues for constitutional challenges. *Id.* In addition, the public generally frowns upon affirmative action. *See id.* 4-5.

[169] *See supra* Part II.D.

good faith in both determining its compelling interest and determining the means chosen to achieve such an interest. Just how labor intensive the court's inquiry will be, however, will be determined by how much consideration the courts give to a university's good faith judgment.

Instead of ignoring a university's judgment, courts would benefit from continuing to follow the principles, guidelines, and implicit boundaries laid out in *Bakke*, *Grutter*, and *Gratz*.[170] Using a university's judgment in conjunction with the court's judgment produces well-informed, well-researched, and well-examined, objective decision-making, as well as streamlines the court's review.[171] Assuming a "rigid" review, courts cannot lose by continuing to consider a university's judgment.[172]

C. Race-Neutral & Race-Based Plans

1. Race-Neutral Plans

Whether examined under *Grutter*'s old standard or *Fisher*'s new standard, race-neutral plans, including percentage plans, will likely survive strict scrutiny for the immediate future. Race-neutral plans increase diversity without directly considering race.[173]

Data shows that, in some instances, using a socioeconomic plan combined with percentage plans actually achieves higher levels of diversity than using race-based plans.[174] For example, California banned race-based admissions programs in 1996, yet the University of California increased racial and ethnic diversity under race-neutral plans.[175] And UT Austin achieved higher levels

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[170] *See* Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in* Fisher v. Texas, 47 U. RICH. L. REV. 1133, 1150 (2013) (stating "rather than as a means by which to weaken or abrogate its strict scrutiny analysis, the Court should view deference as a means by which to inform its inquiry, thereby making it an appropriate constitutional principle to apply when examining educators' race-based decision making, such as that at issue in *Fisher*").

[171] *See id.* at 1153.

[172] *See generally id.*

[173] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 224 (5th Cir. 2011); Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[174] KAHLENBERG, *supra* note 168, at 12-14.

[175] Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION:

of URM students under its Ten Percent Plan than it did using its race-based plan prior to 1997.[176] Likewise, Texas A & M also raised its URM population with race-neutral plans after terminating its race-based plan in 1996.[177] Flagship universities in Washington, Florida, and Georgia were all also able to achieve higher levels of diversity after exchanging race-based plans for race-neutral plans.[178] But, it's important to note, several states also saw a decline in diversity after exchanging their race-based plans for race-neutral plans.[179]

On the other hand, while percentage plans increase diversity, many question whether such plans actually achieve a "critical mass" of diversity: percentage plans appear to be racially neutral on their face, but many argue that is not the case.[180] Affirmative action in secondary level education is scarce.[181] High schools throughout the United States are primarily comprised of either a majority of white students or a majority of URM students—a product of social and geographic discrimination—which results in percentage plans admitting a majority of either white or URM students based largely on residence and school location.[182] Many

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THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209 88-89 (Eric Grodsky & Michal Kurlaender eds., 2010). For example, in using a percentage plan along with considering other race-neutral factors, the University of California increased its URM population from eighteen percent under the race-based plan to twenty-four percent under the race-neutral program. *Id.* It's important to note, however, that elite schools—e.g., Berkeley and UCLA—have not yet recovered from the race-based plan ban, but are close. *Id.*

[176] KAHLENBERG, *supra* note 168, at 12.

[177] *Id.*

[178] *Id.* at 14.

[179] *Id.* For example, the University of Michigan saw a decline of 1.2 percentage points in Blacks and a decline of 0.3 percentage points in Latinos. *Id.* The University of Nebraska also saw a slight decline. *Id.*

[180] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 225 (5th Cir. 2011); *see also supra* notes 49-51 and accompanying text.

[181] *See generally* Harvard Sch. Of Pub. Health, *Composition of Public School Enrollment by Race/Ethnicity*, DIVERSITYDATA.ORG, http://diversitydata.sph.harvard.edu/Data/Rankings/Show.aspx?ind=27 (last visited Feb. 28, 2014).

[182] *Id.* For example, the public school composition in Los Angeles, California is 59.9% Latino, 7% Black, and 18.7% White; the composition in Memphis, Tennessee is 30.4% White, 61.4% Black, and 5.8% Latino; the composition in Asheville, North Carolina is 77% White, 6% Black, and 11.4% Latino. *Id.* In addition, 56% of America's Latino students attend schools with a majority Latino population, and "the nation's majority-black schools, which educate nearly 50% of black students, educate just 4% of the nation's Hispanic students." RICHARD FRY, PEW HISPANIC CTR., THE CHANGING

students who both need affirmative action and who may have experiences that could significantly contribute to diversity are often overlooked, thus, such plans may be failing to achieve a "critical mass" of diversity as contemplated by *Grutter*.

It's undisputed that race-neutral plans, such as percentage plans, can and do achieve diversity at the institutional level;[183] however, data also shows that such plans fail to achieve a "critical mass" of diversity within smaller classrooms.[184] This may require diversity to be split into diversity at the institutional level and diversity at the classroom level.[185] Ascertaining diversity at the classroom level presents quantitative problems, which could lead to affirmative action outliving its "limited duration;" thus, splitting diversity could signal a bleak future for diversity as a compelling interest.[186] On the other hand, to terminate diversity for fear of numbers is lazy—hence, an illustration of why courts benefit from deferring to a university's academic judgment.

Race-neutral plans aren't perfect, but they work—as mentioned above, race-neutral plans increase diversity without specifically considering race.[187] Such plans will probably survive the Fifth Circuit's upcoming application of Justice Kennedy's new standard and will likely survive lower courts' application of the new standard—for the foreseeable future at least. Affirmative action is still necessary in society. Race-neutral admissions programs are the final fortification—banning race-neutral plans

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RACIAL AND ETHNIC COMPOSITION OF U.S. PUBLIC SCHOOLS ii (2007), *available at* http://www.pewhispanic.org/files/reports/79.pdf.

183 *See, e.g.*, *supra* notes 173-78.

184 *See, e.g.*, *Fisher*, 631 F.3d at 225. UT conducted a study focusing on classrooms with under twenty-four students. *Id.* These classes

> included most of the undergraduate courses, [and] they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. . . . A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of [these smaller] classes had either one or zero African–American students, 41% had one or zero Asian–American students, and 37% had one or zero Hispanic students.

Id.

185 KAHLENBERG, *supra* note 168, at 9.

186 *Id.* at 10.

187 *See supra* notes 51, 173-78.

would effectively kill affirmative action, thereby impacting much more than education.

2. Race-Based Plans

UT's race-based plan would likely survive strict scrutiny under the original "framework" of review established by *Grutter* and *Gratz*—as demonstrated by the *Grutter* Court's review of a similar plan.[188] Diversity is essential to every university's educational mission.[189] Race appears to be considered as a legitimate "plus" factor alongside many other factors in an "individualized consideration."[190] Nothing in UT's plan hints at racial "quotas" or automatic diversity bonuses; there's no insulation from competition; and no other race is unduly harmed by UT's consideration of race.[191] Most importantly, UT's dual-plan appears to achieve a "critical mass" of diversity.[192] Under the Supreme Court's new standard, however, the future of race-based plans is much more uncertain.

As mentioned above, studies suggest that race-neutral plans, by themselves, do not achieve a "critical mass" of URMs; therefore, race-based plans may still be necessary in today's society.[193] The majority of URMs admitted under percentage plans are the first in their families to attend higher education, coming from lower-socioeconomic statuses, thereby ignoring URMs in the middle and upper classes.[194] Rich URMs, however, don't really need affirmative action; poor URMs do; to hold otherwise is contrary to

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188 *See supra* Part II.B.

189 *See infra* Part IV.B.

190 *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 260-61 (5th Cir. 2011); *see also supra* Part II.D.

191 *See Fisher*, 631 F.3d at 250.

192 *See id.* at 226.

> In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African–American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian–American enrollment also increased nearly 10%, from 1,034 students to 1,126 students. By contrast, in 2004, the last year the Top Ten Percent Law operated without the *Grutter* plan, fall enrollment included only 275 African–Americans and 1,024 Hispanics.

Id.

193 *See supra* notes 168, 174, 176, 181 and accompanying text.

194 KAHLENBERG, *supra* note 168, at 9-10.

the goals of affirmative action.[195] Accordingly, percentage plans' failure to achieve class-based diversity may indicate the need for race-based plans.[196]

Proponents also claim that percentage plans only work because the URM population is growing at an unprecedented rate, especially in states like Texas; therefore, they argue, race-based plans are still necessary.[197] Yet, this is largely a matter of public policy.[198] Considering courts have rejected this argument in the past, the argument is even more likely to fail under Justice Kennedy's new conservative standard.[199]

But in the end, the Court's unprecedented abandonment of deference is what truly threatens race-based plans.[200] Confusion in the courts stemming from Justice Kennedy's ambiguous interpretation of strict scrutiny in deference is likely to have consequences for both race-neutral and race-based admissions programs.

IV. *FISHER*'S FALLOUT—PRACTICAL IMPLICATIONS FOR SCHOOLS

Despite Justice Kennedy's narrow interpretation of deference, both race-based and race-neutral affirmative action plans will likely survive the Fifth Circuit's strict scrutiny, for both race-neutral and race-based plans seem to fall within the confines established by the Courts in *Grutter* and *Gratz*.[201] But, this does not suggest that Justice Kennedy's tapered deference standard will be flawlessly implemented. Similar to courts, universities will likely be confused as to their obligations and authority under this narrower standard. And, indubitably, a heavier workload will follow.

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[195] *Id.* at 22. Wealthy URMs are generally among the candidates most likely to qualify for admission based on academic performance alone. UCLA Law Professor Richard Sander stated, "only one out of every 20 people I've talked to in the legal academy attach value to the idea of economic diversity." *Id.*

[196] *See id.*

[197] *Id.* at 9-10. In 2003, UT's URM population did not keep up with Texas's URM population growth. *Id.* at 10.

[198] *Id.*

[199] *Id.*

[200] *See supra* Part II.D.

[201] *See supra* Parts I-II.D.

A. Confusion in the Intuitions—Increased Work for School—Courts Don't Believe it be Like it is, but it do

Justice Kennedy's opinion in *Fisher* jumped around.[202] The Court's interpretation of strict scrutiny was both allegedly in line with *Grutter*, yet also appeared to contradict *Grutter*.[203] Schools won't know how to deal with this. Public educational institutions—from secondary education to higher education—will inevitably be confused.[204] Universities must show, and courts must verify, that admission programs conform to the Supreme Court's recent decision in *Fisher*—a tedious inquiry for both universities and courts. Deferring to a university's judgment concerning academic decisions lessens this burden.[205] But under Justice Kennedy's recent interpretation of strict scrutiny, universities will certainly encounter a much more demanding workload.[206] Schools aren't going to know how much they must prepare for future challenges to their admissions programs.[207]

If courts shy away from deference, universities may also get nervous, abandoning race-based admissions policies, thus, foregoing the benefits stemming from diversity. Drawing deference too narrow may scare universities, as the schools won't be certain whether they're violating someone's constitutional rights. As a result, admissions plans may similarly be constricted,

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[202] *See supra* Part II.D.

[203] *See supra* Parts II.B-D.

[204] *See, e.g.*, Eric Hoover, Katherine Mangan & Peter Schmidt, *After 'Fisher,' Colleges Face New Burdens of Proof*, 59 CHRON. OF HIGHER EDUC. 41, 18-20, *available at* http://chronicle.texterity.com/chronicle/20130705a?pg=18#pg18. Larry White, general counsel for the University of Delaware stated, "[i]t's pretty clear what [universities] have to do. What's not clear is how we have to do it, and when we have to do it." *Id.*

[205] *See supra* notes 130-31, 170-71 and accompanying text.

[206] *See supra* Part II.D.

[207] *See, e.g.*, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ABOUT *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* (2013), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.pdf. For example, under Justice Kennedy's recent interpretation, schools aren't sure whether they may continue implementing admissions programs to achieve diversity; whether they may still consider race to achieve diversity; whether the strict scrutiny standard is, now, even more strict; whether they have no obligations in demonstrating their admissions programs are narrowly tailored; and even whether the Court struck down UT's dual admissions program. *Id.*

possibly ending all direct consideration of race. Diversity would, in turn, dwindle away.

In anticipation of the Fifth Circuit's ruling in *Fisher*, universities are presumably collecting data, attempting to affirm their need for race-conscious admissions policies, including assessing the impact that race-neutral alternatives would have on their underrepresented minority population.[208] Constructing a diverse student body is complex work, which includes admissions decisions, recruitment and retention policies, and financial aid and scholarship decisions, among many others.[209] Educational administrators and professionals in various fields have comprehensively studied how students—students from diverse backgrounds—can best succeed in higher education and what benefits higher education derives from a diverse student body.[210]

Different universities will need to customize their academic decisions and policies to their specific academic environments—remember, "context matters" and courts must consider "relevant differences."[211] Achieving and ascertaining diversity is time consuming work.[212] Justice Kennedy's recent interpretation of *Grutter* may lead to a significant increase in the amount of work universities must conduct to justify admissions programs.[213]

On the other hand, if courts simply abandon deference, in turn relying on their own academic judgment, universities may see their work as futile, thus, losing incentive to expend time, labor, and resources in conducting detailed research examining the merits and justifications of affirmative action plans. After all, a university's opinion only "technically" matters concerning one

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[208] *See* ROBERT CHAO ROMERO & MARCIA V. FUENTES, *FISHER V. TEXAS*: A HISTORY OF AFFIRMATIVE ACTION AND POLICY IMPLICATIONS FOR LATINOS AND HIGHER EDUCATION 4 (2013), *available at* http://www.chicano.ucla.edu/files/RR17.pdf.

[209] COLL. BD. ADVOCACY & EDUC. COUNCIL, ACCESS & DIVERSITY TOOLKIT: A RESOURCE FOR HIGHER EDUCATION PROFESSIONALS 10-11 (2009), *available at* http://advocacy.collegeboard.org/sites/default/files/09b_588_DiversityToolkit_WEB_091123.pdf.

[210] Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 118-19, 127-38 (2012), http://www.vanderbiltlawreview.org/content/articles/2012/07/Brown-Nagin_65_Vand_L_Rev_En_Banc_113.pdf.

[211] *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[212] *See generally* Brown-Nagin, *supra* note 210.

[213] *See supra* Part III.B.

issue: diversity as a compelling interest.[214] If, however, courts are too generous with deference, universities may go wild, enacting bush-league admissions programs thereby disregarding the purpose of the Fourteenth Amendment—to eliminate discrimination based on race.

Therefore, courts must continue to use their ability to consider a university's judgment while still "verifying" that the university's decisions pass strict scrutiny, thereby assuring compliance with the Fourteenth Amendment and giving universities an incentive to continue researching affirmative action programs.[215] Universities will continue persevering towards the point where diversity is achieved and where affirmative action is no longer necessary.

B. Harms the Heart of Universities' Mission

In the most general terms, the mission of every educational institution is to promote achievement, foster excellence, and ensure equal access.[216] Diversity—in one form or another—is at the heart of every educational mission of practically every single public university in the United States.[217] Yet, narrowing deference and construing strict scrutiny in a way that makes it "fatal in fact" will certainly harm the educational mission of institutions of higher learning.[218]

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[214] *See supra* note 136 and accompanying text.

[215] *See supra* notes 170-72 and accompanying text.

[216] *See* U.S. Dep't of Educ., *Overview: Mission*, ED.GOV, http://www2.ed.gov/about/overview/mission/mission.html (last modified Oct. 20, 2011). For example, UT's educational mission focuses on advancing society through "research, creative activity, scholarly inquiry and the development of new knowledge." *See About UT: Mission, Core Purpose and Honor Code*, UNIV. OF TEX. AT AUSTIN, http://www.utexas.edu/about-ut/mission-core-purpose-honor-code (last visited Feb. 28, 2014) (listing six core values: learning, discovery, freedom, leadership, individual opportunity, and responsibility). The University of Michigan's mission focuses on serving the world through "preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future." *See Visions and Goals: Mission Statement*, UNIVERSITY OF MICH., http://president.umich.edu/mission.php (last visited Feb. 28, 2014).

[217] *See supra* note 216.

[218] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013); *see also supra* notes 216-17 and accompanying text.

Diversity is essential to education—plain and simple.[219] Data shows that prioritizing diversity has "positive effects on students' cognitive development, satisfaction with the college experience, and leadership abilities."[220] Moreover, diversity in the classroom produces the "greatest engagement in active thinking, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[221]

Lack of diversity in education will effectively cripple diversity in professional fields, which just starts the cycle all over again.[222] Higher education is the path of least resistance to the professional world.[223] A college degree is all but a prerequisite to professional jobs.[224] URM students are, by definition, already underrepresented in secondary education, higher education, and the professional world.[225] As institutions of higher education are breeding-grounds for success in society, cutting off efforts to achieve diversity at the educational level will, certainly, affect diversity at the professional level. Consequently, lack of diversity would also harm society. Minds are molded in academia. Those same minds go on to be leaders of society. Producing ignorant minds undoubtedly results in ignorant policies. And producing well-rounded leaders yields rationale judgments, which, in turn, leads to a productive, successful society.

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[219] *See supra* notes 216-17 and accompanying text.

[220] EVE FINE & JO HANDELSMAN, WOMEN IN SCI. & ENG'G LEADERSHIP INST., BENEFITS AND CHALLENGES OF DIVERSITY IN ACADEMIC SETTINGS 2 (2d ed. 2010), *available at* http://wiseli.engr.wisc.edu/docs/Benefits_Challenges.pdf (citations omitted).

[221] *Id.* (internal quotation marks omitted).

[222] *See supra* notes 83-85 and accompanying text.

[223] *See generally* Makeda Amelga, *College and Career Readiness: A Quick Stats Fact Sheet*, NAT'L HIGH SCH. CENTER AT THE AM. INSTS. FOR RES. (Oct. 2012), http://www.betterhighschools.org/pubs/documents/NHSC_CollegeCareerReadinessFactSheet_Oct12.pdf. "Research predicts that within the next 10 years, 63% of all jobs in the United States will require some postsecondary education and that 90% of new jobs in growing industries with high wages will require some postsecondary education." *Id.* at 3 (citation omitted).

[224] *Id.* at 4. "The unemployment rate for high school graduates is 9.4%. For those with a bachelor's degree, the unemployment rate is only 4.9%. Individuals with four-year degrees also earn more, with a median weekly earnings average 65% higher than those with only a high school diploma." *Id.* (citation omitted).

[225] *Id.* "While 70% of white high school graduates entered college immediately upon graduation in 2010, only 66% and 60% of African-American and Hispanic graduates, respectively, did the same." *Id.* (citation omitted).

CONCLUSION

Until *Fisher*, the "framework" for applying both strict scrutiny and deference appeared to be well established: *Bakke*, beginning the initial foundation, highlighted the importance of "academic freedom" and of deferring to a university's judgment concerning academic decisions; *Grutter* built upon *Bakke*'s foundation, outlining principles, guidelines, and implicit boundaries, which courts must follow in determining the appropriate amount of deference to afford; then *Gratz* examined the parameters of those principles, guidelines, and implicit boundaries, thereby outlining the limitations of a court's permitted deference.

In *Fisher*, perhaps the Court added superfluous substance to the limitations that were already implicit in this "framework" by expressly using it for an admissions program that could have easily been upheld under *Grutter* and *Gratz*'s "framework." Considering the Court is ignoring academic "experience and expertise" in making "academic decisions," such a conservative standard of strict scrutiny and deference may prove to be ignorant, wasteful, and needlessly burdensome.

Notwithstanding the Fifth Circuit's upcoming application of Justice Kennedy's new standard, admissions programs, courts, and universities will all face grave consequences that could have been easily avoided. Ignoring the brightest academic minds in this country when deciding academic issues seems counterproductive at best. Perhaps everyone would benefit if courts worked with universities—not against them.

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