

## FISHER'S FISHING EXPEDITION

Vinay Harpalani\*

On October 10, 2012, I attended the U.S. Supreme Court oral arguments in *Fisher v. University of Texas at Austin*,<sup>1</sup> the much anticipated case about race-conscious undergraduate admissions at the University of Texas at Austin (UT). Abigail Fisher claims that she was treated unfairly in UT's admissions process, because UT employs a race-conscious holistic admissions policy to admit a small percentage of its undergraduate entering class, in addition to the 80 percent that is automatically admitted via the Top Ten Percent Law.<sup>2</sup> Fisher's contention is not that she would have been admitted but for the race-conscious policy, but rather that the Top Ten Percent Law itself generates a "critical mass" of minority students—thus precluding UT from using a race-conscious policy under *Grutter v. Bollinger*.<sup>3</sup>

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\* Copyright © 2012 by Vinay Harpalani, Visiting Assistant Professor of Law at Chicago-Kent College of Law. J.D., 2009, New York University School of Law; Ph.D., 2005, University of Pennsylvania. I would like to thank Professor Todd Haugh for arranging for me to attend the Supreme Court oral arguments in *Fisher v. University of Texas at Austin*, and Professor Jerry Goldman and Matt Gruhn for helping me incorporate the *Fisher* oral argument audio links from the Oyez Project. My conversation with Professor Ian Haney-Lopez was also helpful in framing this article. Additionally, the Fred T. Korematsu Center for Law and Equality provided financial and logistical support for this work from August 2010 to May 2012, while I was the Korematsu Teaching Fellow at Seattle University School of Law, and Chicago-Kent College of Law has provided similar support since July 2012.

1 *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *rehearing en banc denied*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (No. 11-345). Oral arguments in *Fisher* occurred on October 10, 2012. Transcript of Oral Argument at 1, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Oct. 10, 2012), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-345.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf); Oral Argument, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Oct. 10, 2012), *available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345](http://www.oyez.org/cases/2010-2019/2012/2012_11_345).

2 Tex. Educ. Code Ann. § 51.803 (2009). In 2011, the Top Ten Percent Law was amended "to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents." *Fisher*, 631 F.3d at 224 n.56. In prior years, the Top Ten Percent Law had accounted for the admission of over 80 percent of UT undergraduates.

3 539 U.S. 306, 343 (2003) (holding that a school may use race in admissions decisions if the use is narrowly tailored to further a compelling interest in creating a "critical mass" of minority students to obtain the benefits of a diverse student body).

Building on my observations and my recent article in the *University of Pennsylvania Journal of Constitutional Law*,<sup>4</sup> this Essay examines the *Fisher* oral argument, focusing on two important issues: the meaning of “critical mass” and the quest for race neutrality in admissions. Ultimately, this Essay argues that *Fisher* is a fishing expedition, because neither of these issues is resolvable, or even needs to be resolved to decide the case.

The question of what constitutes a “critical mass” of minority students came up several times during the *Fisher* oral arguments. Justice Sonia Sotomayor first asked Bert Rein, Plaintiffs’ counsel, “[C]ould you tell me what a critical mass was?”<sup>5</sup> Mr. Rein responded that the question to consider when determining if a critical mass exists is whether underrepresented minority students are “isolated. . . [and] unable to speak out[.]”<sup>6</sup> Further, Mr. Rein argued that as a predicate, *Grutter* requires “a range, a view as to what would be an appropriate level of comfort, critical mass . . . [which] . . . allows you to evaluate” whether race-conscious policies are still necessary.<sup>7</sup> To support the Plaintiffs’ argument that UT had attained a critical mass with the Top Ten Percent Law alone, Mr. Rein emphasized the “21 percent admission percentage of . . . underrepresented minorities”<sup>8</sup> at UT in 2004 (the last year before the race-conscious policy was implemented)—implying that this was sufficient for a critical mass. Thus, the Plaintiffs argued that critical mass can be defined by the combined per-

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4 Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012). This article was cited in the Society of American Law Teachers (S.A.L.T.) amicus brief to the U.S. Supreme Court in *Fisher*. See Brief for Society of American Law Teachers as Amicus Curiae Supporting Respondents at 14, 22–23, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012), 2012 WL 3418833.

5 See Transcript of Oral Argument, *supra* note 1, at 14, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=693/697](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=693/697).

Justice Samuel Alito also asked Mr. Rein, Plaintiffs’ counsel, “[D]o you understand what the University of Texas thinks is the definition of a critical mass? Because I don’t.” *Id.* at 20, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1114/1120](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1114/1120).

6 See *id.* at 15, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=808/826](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=808/826); see also *Grutter*, 539 U.S. at 319 (noting that at the trial phase, Dean Jeffrey Lehman of the University of Michigan Law School testified that “critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race”).

7 Transcript of Oral Argument, *supra* note 1, at 19, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1059/1070](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1059/1070).

8 *Id.* at 15–16, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=825/844](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=825/844).

centage of Black and Latina/o students in an entering class.<sup>9</sup> They also contended that specific numerical criteria for critical mass, such as a range or target enrollment where minority students are no longer isolated,<sup>10</sup> should be defined *ex ante* by the University.<sup>11</sup> Mr. Rein stated that lack of such criteria for critical mass was “a flaw in . . . *Grutter*,”<sup>12</sup> and he asked the Court to require criteria for critical mass.<sup>13</sup> These criteria would presumably be subject to judicial review to determine whether race-conscious policies were necessary to attain that target.<sup>14</sup> However, when Justice Sotomayor pressed Mr. Rein on the “standard of critical mass” and asked him what “fixed number” would be sufficient, Mr. Rein replied only that it was “not [the Plaintiffs’] burden to establish the number.”<sup>15</sup>

Chief Justice Roberts essentially asked the same question of UT’s counsel, Gregory Garre: “when will we know that you’ve reached a critical mass?”<sup>16</sup> Mr. Garre responded that “we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race.”<sup>17</sup> On the surface, Mr. Garre’s response was similar to that of Mr. Rein: both implied that a critical mass would be present when minority students no longer felt isolated. However, the parties disagreed sharply on how to determine whether minority students feel isolated. In contrast to the predetermined numerical range/target advocated by Mr. Rein and the Plaintiffs, Mr. Garre argued for a holistic set of criteria with no specific *ex ante* goal: “feedback [via surveys] directly from students about racial isolation that they experience,”<sup>18</sup> “enrollment data, . . . [d]iversity in the classroom[,] . . . [and] the racial climate on cam-

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9 *See id.*; *see also* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 223 (5th Cir. 2011). This approach ignores other minority groups such as Native Americans. *See* Harpalani, *supra* note 4, at 514–15.

10 *See* Transcript of Oral Argument, *supra* note 1, at 13.

11 *See id.* at 19. Justice Sotomayor compared this to a quota, and in response, Mr. Rein tried to distinguish between a “quota” and an “operative . . . range.” *Id.*, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1069/1075](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1069/1075).

12 *Id.* at 13, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=664/671](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=664/671).

13 *Id.*

14 *Id.*

15 *Id.* at 16–17, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=892/920](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=892/920). Justice Sotomayor used the term “fixed number” to illustrate how the Plaintiffs’ view of “critical mass” is similar to a quota. *See infra* note 24 and accompanying text.

16 Transcript of Oral Argument, *supra* note 1, at 45–46, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2649/2660](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2649/2660).

17 *Id.* at 46, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2698/2699](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2698/2699).

18 *Id.*

pus.”<sup>19</sup> Based on these criteria, Mr. Garre argued that both universities and courts could review *ex post* whether a critical mass of minority students had been attained.<sup>20</sup>

Both of these positions show the flaws in defining “critical mass” primarily by whether minority students encounter feelings of isolation and tokenism,<sup>21</sup> and in using critical mass as a test for whether race-conscious admissions are permissible.<sup>22</sup> It is difficult to understand the Plaintiffs’ view of critical mass as “a range” in terms other than a numerical goal/target (even if it is a flexible one). *Grutter* proscribed such numerical goals,<sup>23</sup> and Justice Sotomayor recognized this when she said to Mr. Rein: “[b]oy, it sounds awfully like a quota to me that Grutter said you should not be doing, that you shouldn’t be setting goals, that you shouldn’t be setting quotas.”<sup>24</sup> Although the other Justices did not seem to be bothered by this,<sup>25</sup> the Plaintiffs’ position on critical mass is inconsistent with *Grutter* and *Bakke*.<sup>26</sup> Moreover, how would a university know *ex ante* whether any number or percentage of minority students would mitigate feelings of isolation on campus? Feelings of isolation and tokenism are not just contingent on minority student numbers; student support resources, minority faculty and staff mentors, and many other factors contribute to whether minority students “feel isolated or like spokespersons for their race.”<sup>27</sup>

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<sup>19</sup> *Id.* at 48.

<sup>20</sup> *Id.*

<sup>21</sup> See Harpalani, *supra* note 4, at 474–76.

<sup>22</sup> See *id.* at 484–85.

<sup>23</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (noting that “[t]he Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ That would amount to outright racial balancing, which is patently unconstitutional” (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.))).

<sup>24</sup> See Transcript of Oral Argument, *supra* note 1, at 19, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1089/1103](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1089/1103).

<sup>25</sup> For example, Justice Anthony Kennedy later made a comment which assumed that UT could have “a numerical category a numerical standard [sic], a numerical designation for critical mass: It’s X percent.” *Id.* at 52.

<sup>26</sup> See *supra* note 23.

<sup>27</sup> *Grutter*, 539 U.S. at 319. See also, e.g., William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. (forthcoming) at 6, available at <http://ssrn.com/abstract=2123653> (“The benefits associated with ‘critical mass’ are highly context-dependent and not amenable to a one-size-fits-all admissions target, but these benefits are no less real and measurable because they are manifest in the complex ecosystem of higher learning.”); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1233 (2010) (acknowledging “the power of creating critical mass and a diverse classroom” but noting that “stigma and racism . . . were still present”); Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDUC. REV. 659, 660

UT's view of critical mass is also problematic: it does not offer any concrete standard for when minority students no longer feel isolated, which could serve as a stopping point for race-conscious admissions.<sup>28</sup> Chief Justice Roberts pressed this point repeatedly,<sup>29</sup> and Justice Sotomayor also raised it.<sup>30</sup> Mr. Garre only offered that critical mass is attained when “underrepresented minorities . . . do not feel like spokespersons for their race, . . . [where] an environment where cross-racial understanding is promoted, . . . [and] educational benefits of diversity are realized”<sup>31</sup>—an explanation which did not appear to satisfy Chief Justice Roberts.<sup>32</sup> Even if these criteria could be reliably assessed,<sup>33</sup> Mr. Garre did not suggest how universities or courts could determine whether race-conscious policies were still necessary to attain them. It is likely that some percentage of minority students would “feel isolated and like spokespersons” for the foreseeable future, even if minority enrollment increased significantly.<sup>34</sup> Moreover, if, say in 2013, UT had reached a point where enough minority students no longer felt isolated, it would still have done so in part by using race-conscious admissions policies. Eliminating consideration of race might lead to a drop in minority student enrollment, such that minority students once again “feel isolated or like spokespersons.”<sup>35</sup> Thus, neither Mr. Rein nor Mr. Garre provided an answer to Chief

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(2009) (examining the ways in which Latinas/os respond to racial microaggressions and confront hostile campus racial climates).

<sup>28</sup> For an elaboration of this critique, see Harpalani, *supra* note 4, at 510.

<sup>29</sup> See Transcript of Oral Argument, *supra* note 1, at 46–47, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2698/2699](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2698/2699).

<sup>30</sup> *Id.* at 48–49, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2790/2806](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2790/2806).

<sup>31</sup> *Id.* at 49, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2826/2853](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2826/2853).

<sup>32</sup> *Id.* at 46–47 (“[Y]ou conduct a survey and ask students if they feel racially isolated. . . . And that’s the basis for our Constitutional determination?”), *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2699/2708](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2699/2708).

<sup>33</sup> See William C. Kidder, *The Salience of Racial Isolation: African Americans’ and Latinos’ Perceptions of Climate and Enrollment Choices With and Without Proposition 209*, CIVIL RIGHTS PROJECT AT UCLA, 13 (Oct. 9, 2012), [http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder\\_Racial-Isolation\\_CRP\\_final\\_Oct2012.pdf](http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder_Racial-Isolation_CRP_final_Oct2012.pdf) (“Notwithstanding the complexities of campus climate and critical mass, . . . data from leading research universities show that higher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate.”); *id.* at 6 (“The data lend support to the concept of ‘critical mass’ while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass.”).

<sup>34</sup> See *supra* note 27 and accompanying text.

<sup>35</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

Justice Roberts's and Justice Sotomayor's questions about a stopping point for race-conscious admissions. "Critical mass" cannot adequately provide such an answer.<sup>36</sup>

The idea that critical mass entails "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race"<sup>37</sup> derives from the University of Michigan's argument during the trial phase of *Grutter*.<sup>38</sup> However, while the *Grutter* majority cited this language, it further defined "critical mass" in functional terms, noting that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."<sup>39</sup> According to this view, critical mass involves having a "variety of viewpoints among minority students,"<sup>40</sup> as such diversity within racial groups helps to break down racial stereotypes—and thus to actualize the educational benefits of diversity.<sup>41</sup>

Unfortunately, UT did not raise the "diversity within racial groups" argument until its Supreme Court brief,<sup>42</sup> and UT did not tie this argument directly to the concept of critical mass or to the com-

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<sup>36</sup> See Harpalani, *supra* note 4, at 484–85.

<sup>37</sup> *Grutter*, 539 U.S. at 319. See also Harpalani, *supra* note 4, at 474–75 n.34. The Plaintiffs in *Fisher* also defined "critical mass" in similar terms. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 243 (5th Cir. 2011) (noting that the Plaintiffs-Appellants contend that "the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race"); Brief of Plaintiffs-Appellants at 6, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (2009) (No. 09-50822) (arguing that "critical mass" is defined as "a sufficient number of underrepresented minority students such that such minority students would 'not feel isolated or like spokespersons for their race'" (quoting *Grutter*, 539 U.S. at 318–19)). See also I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 122–23 (2004) ("[C]ritical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group. It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard.").

<sup>38</sup> See *supra* note 6.

<sup>39</sup> *Grutter*, 539 U.S. at 319–20. See also *id.* at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." (citation omitted) (quoting Brief for Respondent Bollinger et al. at 30, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241))).

<sup>40</sup> *Id.* at 320.

<sup>41</sup> See also Harpalani, *supra* note 4, at 477–78.

<sup>42</sup> See Brief of Respondents at 33, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (2012) (No. 11-345), 2012 WL 3245488 (asserting that "[h]olistic review permits the consideration of diversity within racial groups"). However, UT does not elaborate upon this idea or analyze it in any depth. See also Harpalani, *supra* note 4, at 505 n.183 and accompanying text.

pellent interest in *Grutter*.<sup>43</sup> UT had already built its argument about critical mass around classroom isolation of minority students<sup>44</sup>: as a consequence, the reference to diversity within racial groups was cursory and seemed like a last-minute addition.<sup>45</sup> When Mr. Garre raised this reference in the *Fisher* oral argument, several of the Justices retorted sharply. Mr. Garre argued that UT “would want representatives and different viewpoints from individuals within the same . . . racial group,”<sup>46</sup> such as “the minority candidate who has shown that . . . he or she has succeeded in an integrated environment.”<sup>47</sup> Justice Samuel Alito replied that UT’s argument was essentially that “[t]he top 10 percent plan . . . [is] faulty, because it doesn’t admit enough African Americans and Hispanics who come from privileged backgrounds.”<sup>48</sup> And after Mr. Garre reiterated his point about the educational benefits of within-group diversity,<sup>49</sup> Justice Anthony Kennedy—whose vote will likely be decisive in *Fisher*<sup>50</sup>—seemed dismayed that “what counts is race above all. . . . You want underprivileged of a certain race and privileged of a certain race. So that’s race.”<sup>51</sup> Mr. Garre again noted that “it’s members of the same racial group . . . bringing different experiences,”<sup>52</sup> but Justice Kennedy seemed unmoved.<sup>53</sup>

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43 *Id.*

44 *See id.* at 504–05.

45 *See id.* at 505 n.183 and accompanying text.

46 Transcript of Oral Argument, *supra* note 1, at 41, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2394/2411](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2394/2411).

47 *Id.* at 42, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2426/2452](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2426/2452). *See also* Harpalani, *supra* note 4, at 512–13 (noting that the Top Ten Percent Law serves largely to admit Black and Latina/o students from highly segregated public schools).

48 Transcript of Oral Argument, *supra* note 1, at 43, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2502/2548](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2502/2548).

49 *Id.* at 44 (noting that UT “want[s] minorities from different backgrounds”). *See also id.* at 45, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2563/2634](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2563/2634) (noting that for “any racial group, . . . [UT] would want people from different perspectives”).

50 *See* Harpalani, *supra* note 4, at 464 n.3.

51 Transcript of Oral Argument, *supra* note 1, at 44, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2563/2634](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2563/2634).

52 *Id.* at 45, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2563/2634](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2563/2634).

53 I base this assertion on the comments noted in the text, on my observations during the oral argument, and on the audio clip of the oral argument, available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2563/2634](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2563/2634). Also, in examining Justice Kennedy’s concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 782 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (concurring with majority in striking race-conscious school assignment plans, but noting that certain race-conscious strategies are permissible), Professor Reva Siegel argues that Justice Kennedy objects to “individualized racial

Solicitor General Donald Verrilli tried to reframe the argument about diversity within racial groups directly in terms of the educational benefits noted in *Grutter*, such as breaking down racial stereotypes. Mr. Verrilli argued that

universities . . . are looking . . . not to grant a preference for privilege, but to make individualized decisions about applicants who will directly further the education mission. For example, they will look for individuals who will play against racial stereotypes . . . : [t]he African American fencer; the Hispanic who has . . . mastered classical Greek.<sup>54</sup>

However, neither Mr. Garre nor Mr. Verrilli tied these ideas directly to the notion of critical mass. This link is clear in *Grutter*, which defines “critical mass” in terms of the educational benefits of diversity (including within-group diversity), such as breaking down racial stereotypes.<sup>55</sup> Moreover, even the Plaintiffs’ and UT’s notion of critical mass—numbers such that minority students do not “feel isolated and like spokespersons for their race”<sup>56</sup>—is related to diversity within racial groups. One possible reason to have a mix of minority students from high and low socioeconomic backgrounds is that the former, who have often attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust socially to elite, predominantly White universities. This argument was raised by Shanta Driver, a lawyer for the student intervenors in *Grutter*, at a debate on affirmative action shortly after the Supreme Court’s ruling in *Grutter*.<sup>57</sup> In addition to their surveys on feelings of isolation, universi-

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classification of applicants” which can “affront individual dignity and . . . exacerbate group division.” Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1308 (2011). Professor Siegel further contends that “[h]ad the school districts simply relied on race-conscious but facially neutral attendance zones to promote integration—rather than using race to evaluate individual student applications to magnet schools—Justice Kennedy emphasizes that he would have upheld the policy.” *Id.* But see Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 117 (2007) (observing that in *Parents Involved*, “Justice Kennedy . . . makes a remarkably similar argument [to Justice O’Connor’s argument in *Grutter*], even observing that public schools could use a *Grutter*-like admissions policy as a last resort”); see also *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in the judgment) (“[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”).

<sup>54</sup> See Transcript of Oral Argument, *supra* note 1, at 60, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=3448/3464](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=3448/3464).

<sup>55</sup> See *supra* notes 39–41 and accompanying text.

<sup>56</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003). See also *supra* notes 6, 17 and accompanying text.

<sup>57</sup> See Harpalani, *supra* note 4, at 513 n.226. I was in attendance at the debate which included Ms. Driver. She was asked why affirmative action is justified if it primarily benefits more privileged minorities. Ms. Driver responded by stating that at the University of Michigan, about one-half of the Black undergraduate students come from relatively privi-



ties would be wise to investigate whether such intragroup social support does occur, and whether diversity within racial groups helps to ensure that minority students adjust well and do not feel isolated. Universities can use such data to bolster arguments for race-conscious admissions policies.<sup>58</sup>

There were a few other points raised with respect to critical mass, none of which clarified the concept any further. When Mr. Rein stated that the Plaintiffs “don’t believe that demographics [of the state of Texas] are the key to . . . critical mass,”<sup>59</sup> Justice Sotomayor retorted that the Plaintiffs “can’t seriously suggest that demographics aren’t a factor to be looked at” in conjunction with feelings of isolation among minority students.<sup>60</sup> But Justice Antonin Scalia suggested otherwise, noting that the “right” position in his view is “that the demographic makeup of the State has nothing to do with whether somebody feels isolated . . . in a State that is only 1 percent Black that doesn’t mean [Black students are] not isolated so long as there’s 1 percent in the class.”<sup>61</sup> Ironically, UT seemed to agree with Justice Scalia, and with Mr. Rein and the Plaintiffs. When Justice Alito asked Mr. Garre if “the critical mass for the University of Texas [is] dependent on the breakdown of the population of Texas,”<sup>62</sup> Mr. Garre replied “[n]o, it’s not at all. . . . It’s looking to the educational benefits of diversity on campus.”<sup>63</sup> Mr. Garre tried to frame this answer as a point that he and Mr. Rein “actually agree on”<sup>64</sup>—but neither of them defined these educational benefits in any tangible sense.

Justice Alito also asked Mr. Garre whether critical mass could “vary from group to group”<sup>65</sup> and “from State to State”<sup>66</sup>—to which UT’s

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leged families, while the other half come from inner-city Detroit, and that the “reason [Black students from the inner-city] survive on campus is because of the [more privileged Black students].” I cannot verify the numbers or the assertion by Ms. Driver, but it is a well-founded hypothesis and worthy of more investigation.

58 *Id.*

59 Transcript of Oral Argument, *supra* note 1, at 14, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=728/734](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=728/734).

60 *Id.*, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=741/742](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=741/742).

61 *Id.* at 15, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=772/794](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=772/794); *see also id.* at 48, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2760/2769](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2760/2769) (Justice Alito asking Mr. Garre “would 3 percent [black student population] be enough in New Mexico . . . where the African American population is around 2 percent?”).

62 *Id.* at 40, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2287/2332](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2287/2332).

63 *Id.*

64 *Id.*

65 *Id.* at 39, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2287/2332](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2287/2332).

counsel replied that “[i]t certainly is contextual” and “it could vary.”<sup>67</sup> But this also did not clarify the concept further.

In the end, Justice Scalia’s comment that “[w]e should probably stop calling it critical mass . . . . Call it a cloud or something like that” resonated the most.<sup>68</sup> Although my view of *Fisher* and race-conscious admissions is quite different from Justice Scalia’s view, I do agree with him that *Fisher*’s search for “critical mass” is a fishing expedition.

Nevertheless, defining “critical mass” is not necessary to resolve *Fisher*. The Supreme Court could resolve the case by focusing directly on the educational benefits of diversity (and specifically on diversity within racial groups), rather than on the presence or absence of a critical mass. The Court could require UT to demonstrate that its race-conscious policy contributes to the educational benefits of diversity above and beyond the Top Ten Percent Law, by facilitating admission of students who are different in some meaningful way.<sup>69</sup> UT might do this by showing that its race-conscious policy allows admission of Black and Latina/o students from different socioeconomic backgrounds (who have different viewpoints and experiences from those admitted under the Top Ten Percent Law),<sup>70</sup> or minority students in different majors,<sup>71</sup> or perhaps a different group of minority students, such as Native Americans.<sup>72</sup> If UT could not demonstrate satisfactorily that its race-conscious policy does indeed make such a “unique contribution to diversity,”<sup>73</sup> then the policy would no longer be constitutional. Thus, this approach offers the stopping point for race-conscious admissions policies that the Justices were searching for during oral arguments.<sup>74</sup> Moreover, by employing such a “unique contribution to diversity” test, the stopping point would be directly contingent on the success of the policy in contributing to the educational benefits of diversity, not on some numerically or contextually vague definition of “critical mass.”

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66 *Id.*

67 *Id.* See also Harpalani, *supra* note 4, at 479–83 (discussing reasons why “critical mass” may vary from group to group).

68 Transcript of Oral Argument, *supra* note 1, at 70–71, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=4060/4085](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=4060/4085). The courtroom erupted in laughter after Justice Scalia made this statement. *Id.*

69 Harpalani, *supra* note 4, at 523–26.

70 *Id.* at 525.

71 *Id.*

72 *Id.* at 524.

73 *Id.* at 523.

74 See *id.* at 526.

Of course, this leaves open another question: how much diversity is enough?<sup>75</sup> A university can always admit different students to increase the overall diversity of its student body, and *Grutter* stated that race-conscious policies should be phased out eventually. But UT's race-conscious policy is already much more modest than the University of Michigan School of Law's policy in *Grutter*.<sup>76</sup> In that sense, UT is much further along in phasing out the use of race than most universities (which do not have a Top Ten Percent Law to help diversify the student body), and the Court should recognize this.

In fact, in their Supreme Court brief, the *Fisher* Plaintiffs even argued that race was too small of a factor for UT's policy to be constitutional.<sup>77</sup> At oral argument, Justice Kennedy first questioned this logic,<sup>78</sup> and then suggested that the rationale for this argument might be that UT "shouldn't impose this hurt or this injury [of using

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75 A full answer to this question is beyond the scope of this Essay. However, I consider it in greater depth in my prior Article. *See id.* at 527–30.

76 *See* Brief of Appellees at 18, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822), *available at* <http://www.utexas.edu/vp/irla/Documents/Fisher.v.St.o.Tx-Appellees.Brief.pdf> (noting that "UT's holistic consideration of race is even more modest than the policy upheld in *Grutter*"). At oral argument, Justice Ruth Bader Ginsburg also noted that UT's race-conscious policy is "more modest" than the policy upheld "in *Grutter*." Transcript of Oral Argument, *supra* note 1, at 10, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=440/458](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=440/458); *see also* *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009) (noting that "UT considers race in its admissions process as a factor of a factor of a factor of a factor").

77 *See* Brief for Petitioner at 38, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. filed May 21, 2012), *available at* <http://www.utexas.edu/vp/irla/Documents/Fisher-%27s%20Merits%20Brief%205%2021%202012.pdf> (arguing that "where racial classifications have only a 'minimal impact' in pursuing a compelling interest, it 'casts doubt on the necessity of using racial classifications' in the first instance" (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007); *id.* at 790 (Kennedy, J., concurring))); *see also* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 523 n.27 (2007) ("At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest."). *But see* Harpalani, *supra* note 4, at 532 n.311, 532–33 (explaining how even a small number of minority students could have a meaningful impact on educational benefits of diversity).

78 *See* Transcript of Oral Argument, *supra* note 1, at 22, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1266/1341](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1266/1341) (Justice Kennedy asking Plaintiff's counsel "what's the problem" with "the University's race-conscious admission plan . . . admit[ting] . . . so few minorities" and noting that he "had trouble with that [argument] reading the brief"). Justice Ginsburg asked a similar question of Mr. Garre. *See id.* at 50, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2898/2922](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2898/2922) (asking UT's counsel if "the game is just too small to warrant using a racial criteria").

race] . . . for so little benefit,”<sup>79</sup> and Mr. Rein agreed.<sup>80</sup> However, there are several problems with this reasoning.

First, nothing in *Grutter* suggests that a race-conscious policy can be too small to be constitutional: in fact, *Grutter* implies the opposite with its sunset principle<sup>81</sup> for such policies. Universities cannot eliminate race-conscious policies all at once, when some magic “critical mass” is obtained.<sup>82</sup> Rather, *Grutter* contemplates that universities will gradually phase out race-conscious policies and use race neutral alternatives “as they develop.”<sup>83</sup> A logical consequence of this is that at some point, a university’s use of race will be very small but still constitutional.

Second, even modest use of race can facilitate the admission of students who add new perspectives and thus contribute to the educational benefits of diversity.<sup>84</sup> This is the crux of the “unique contribution to diversity” test noted earlier<sup>85</sup> and described in detail in my prior Article.<sup>86</sup> At the *Fisher* oral argument, Justice Alito noted that UT has “over 5,000 classes that qualified as small and the total number of African Americans and Hispanics who were admitted under [UT’s race-conscious policy] was just a little over 200,”<sup>87</sup> and asked “how can that possibly do more than a tiny, tiny amount to increase classroom diversity.”<sup>88</sup> Mr. Garre’s response focused on the “shocking isolation” of minority students in classes.<sup>89</sup> But the educational benefits of diversity also occur outside classrooms. There is far more student interaction in campus dorms, student organizations, and in social events on campus than there is in the classroom. A small number of minority students may readily form a student organization and spon-

79 See *id.* at 23, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=1266/1341](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=1266/1341).

80 See *id.*

81 *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (“[R]ace-conscious admissions policies must be limited in time. . . . In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”).

82 See Harpalani, *supra* note 4, at 533–34.

83 539 U.S. at 342 (“Universities . . . can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop.”).

84 See Harpalani, *supra* note 4, at 532 n.311, 532–33 (explaining how even a small number of minority students could have a meaningful impact on educational benefits of diversity).

85 See *supra* notes 69–73 and accompanying text.

86 See *supra* notes 69–73.

87 See Transcript of Oral Argument, *supra* note 1, at 36–37, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2149/2150](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2149/2150).

88 See *id.*

89 See *id.* at 37, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=2159/2175](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=2159/2175).

sor events related to diversity, thus educating the entire campus (or at least all students who are interested). Although Mr. Garre noted that UT's asserted compelling interest is not limited to classroom diversity, UT would have done better to emphasize and elaborate upon campus diversity and its educational benefits.

Finally, it is impossible to eliminate the use of race altogether.<sup>90</sup> Even if UT's race-conscious policy is struck down in *Fisher*, the University could still use race in the application process—albeit not as a box to be checked on the front of each application. Chief Justice Roberts underscored the fact that “race is the only one of [UT's] holistic factors that appears on the cover of every application,”<sup>91</sup> but this point is trivial, especially when the use of race is very modest, as it is in UT's policy.<sup>92</sup> Even if it is not on the front of the application, race may be discerned in other ways—via an applicant's personal statement, student group membership, and other sources on the application,<sup>93</sup> including names which are highly correlated with racial group membership.<sup>94</sup> Larger scale use of race might be detectable statistically: for example, in both *Regents of the University of California v.*

<sup>90</sup> See Harpalani, *supra* note 4, at 532 n.311 (“There is no way to completely eliminate race from a holistic admissions process, as information about an applicant's race may be present throughout the application via personal statements, student group membership, and even names which are correlated with group membership.”). See also *infra* notes 95, 100.

<sup>91</sup> See Transcript of Oral Argument, *supra* note 1, at 53, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=3037/3059](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=3037/3059).

<sup>92</sup> See *supra* notes 76–77 and accompanying text.

<sup>93</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 304–05 (2003) (Ginsburg, J., dissenting) (“One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans . . . . Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. . . . If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”); see also, e.g., *Admissions*, UC BERKELEY, <http://admissions.berkeley.edu> (last visited Feb. 14, 2013); *The Personal Statement*, UC BERKELEY, <http://admissions.berkeley.edu/personalstatement> (last visited Feb. 14, 2013) (application and personal statement weblinks for the University of California at Berkeley). Prompt #1 for freshman applicants is “[d]escribe the world you come from—for example, your family, community or school—and tell us how your world has shaped your dreams and aspirations.” *Id.* Applicants can readily allude to their racial background in response to this prompt, and members of underrepresented minority groups can self-identify here.

<sup>94</sup> See Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. OF ECON. 767 (2004); *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting) (noting that without affirmative action, “applicants may highlight . . . Hispanic surnames”).

*Bakke*<sup>95</sup> and *Grutter v. Bollinger*,<sup>96</sup> the Plaintiffs submitted statistical evidence of disparities in test scores between admitted minority and non-minority students. However, no such evidence was presented in *Fisher*—possibly because race was such a small factor that such evidence would not prove anything. In fact, in their Supreme Court brief, the *Fisher* Plaintiffs themselves note that “UT is unable to identify any students who were ‘ultimately offered admission due to their race who would not have otherwise been offered admission.’”<sup>97</sup>

Even if UT does not endorse such use of race, individual reviewers—at least some of whom will be interested in increasing racial diversity among the undergraduate student body—will still be aware of applicants’ racial background and still be able to use this information.<sup>98</sup> Under *Grutter*, the use of race in holistic admissions is already required to be flexible and discretionary<sup>99</sup>: it is already up to individual reviewers whether to consider an applicant’s race and how much weight to give it.<sup>100</sup> Even if it is not “on the cover of every appli-

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95 438 U.S. 265, 277 n.7 (comparing Plaintiff Alan Bakke’s GPA and MCAT scores with those of all applicants and of underrepresented minority applicants).

96 See Harpalani, *supra* note 4, at 528 n.289 (“The *Grutter* Plaintiffs used data on the undergraduate GPAs and Law School Admissions Test (“LSAT”) scores of accepted and rejected applicants to the University of Michigan School from 1995 to 2000, all sorted by race, and calculated the odds of acceptance for members of each group. Part of the basis for their argument was that after statistically controlling for academic criteria and other variables, Black, Latino, and Native American applicants had a much higher probability of being accepted to the Law School than White and Asian American applicants.”).

97 Brief for Petitioner, *supra* note 77, at 38–39. The *Fisher* Plaintiffs used this argument to bolster their claim that race had too small of an impact to be constitutional. See *supra* notes 77–80 and accompanying text. *But see* Transcript of Oral Argument, *supra* note 1, at 63, *audio available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=3591/3642](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=3591/3642) (Chief Justice Roberts asking the Solicitor General if he “agree[s] that [race] makes a difference in some cases,” to which the Solicitor General responded “[y]es, it does”).

98 See *supra* note 93; Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146 (2008) (raising “the question of whether race can in fact be eliminated from admissions processes”); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985, 1015 (2007) (noting that “the line between race-based and race-blind policy making can be quite blurry”).

99 See *Grutter v. Bollinger*, 539 U.S. 306, 337 (“[T]he [University of Michigan] Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single ‘soft’ variable.”).

100 This point came up in oral arguments when Justice Scalia asked Mr. Verrilli that if two applicants “are identical in all other respects. . . . what does the racial preference mean if it doesn’t mean that in that situation the minority applicant wins and the other one loses?” See Transcript of Oral Argument, *supra* note 1, at 62. Mr. Verrilli responded that “[t]here may not be a racial preference in that situation. It’s going to depend on a holis-

cation,”<sup>101</sup> race might still be as much of a factor in UT admissions as it has been since 2004, when UT began its current race-conscious policy.<sup>102</sup>

In fact, a similar issue arose in California, where the state constitution bans explicit consideration of race in public education.<sup>103</sup> In August 2008, Professor Tim Groseclose of the University of California at Los Angeles (UCLA) authored an 89-page report, in which he accused university admissions committee members of using applicant personal statements and other sources of information to give preferential treatment to minority applicants, specifically African Americans, in spite of the California Constitution's proscription.<sup>104</sup> Others, such as anti-affirmative action organizer Ward Connerly, have also accused the UC system of using race informally.<sup>105</sup>

The larger point is that as a practical matter, such minimal use of race is difficult to detect and prove in a holistic admissions system

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tic, individualized consideration of the applicant.” *Id.* Justice Kennedy seemed dismayed, stating that he “thought that the whole point is that sometimes race has to be a tie-breaker . . . [and if] it isn't . . . then we should just say you can't use race.” *Id.* Mr. Verrilli responded that “[race] functions more subtly than that.” *Id.*

101 See *supra* note 91 and accompanying text.

102 Of course, it may cost more for universities to review applications if race is not on the cover. However, universities have adjusted to similar cost increases in the past. See Harpalani, *supra* note 4, at 532 n.309 (“[C]olleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems similar to the one struck down in *Gratz*.”); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [the undergraduate college] to use the . . . admissions system’ upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.” (internal citation omitted)).

103 CAL. CONST. art. 1, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

104 Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-Up* (Aug. 28, 2008), <http://images.oregister.com/newsimages/news/2008/08/CUARSGrosecloseResignationReport.pdf>. One article on the UCLA controversy was entitled *Is “Holistic” Admissions a Cover for Helping Black Applicants?* See *Is “Holistic” Admissions a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 2, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/09/02/ucla>.

105 Lipson, *supra* note 98, at 1015 (noting that “Ward Connerly . . . put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were ‘slipping’ race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements”).

with individualized consideration of applicants.<sup>106</sup> There is no way to completely eliminate race from such a holistic admissions process, and the search for total race neutrality is another fishing expedition.

Nevertheless, the Court is likely to rule against UT: the question is just how much it will limit the scope of race-conscious admissions.<sup>107</sup> One possibility is a narrow holding: the Court could rule simply that UT reached a “critical mass” (however that is defined) with the Top Ten Percent Law alone, or at least that it did not adequately demonstrate the need for its race-conscious policy. If this happens, it will limit UT’s use of race but leave *Grutter* largely in place for other universities.<sup>108</sup> Alternatively, the Court could issue a broader ruling that

106 This issue did not arise in *Fisher* and prior affirmative action cases because the institutions in question admitted that they used race intentionally in their admissions process. But if race-conscious policies are formally struck down by the Court, this would not happen: use of race would not be formally sanctioned by the institutions. In that case, Plaintiffs would have the higher burden of proving intentional use of race. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that the Supreme Court has “not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

107 See, e.g., Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 117 (2012) (noting that in *Fisher*, “the decisive vote of Justice Anthony Kennedy . . . likely will preclude repudiation of *Grutter*’s central holding”); Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. COLLOQUY 74, 78 (2012) (contending that in *Fisher*, “the most likely outcome is that Kennedy will . . . refus[e] to put a complete stop to affirmative action, but insist[] . . . that rigorous strict scrutiny really and truly will apply”); see also Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* *Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC. 77, 88 (2012) (contending that “the most likely *Fisher* result” is one in which “[t]he window for race-based affirmative action in higher education will be narrowed, but left ever-so-slightly open” (footnote omitted)).

Nevertheless, there are a couple of possibilities for the Court upholding UT’s race-conscious policy. There is a slight chance that Justice Kennedy could vote to uphold UT’s race-conscious policy because it is so modest. See *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting) (“There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity . . . .”); see also *supra* note 76 and accompanying text (noting how modest UT’s race-conscious policy is). However, this seems unlikely given Justice Kennedy’s consternation at UT’s focus on race. See *supra* notes 51–53 and accompanying text. Additionally, there is a slight chance that *Fisher* could be dismissed by the Court on procedural grounds. For arguments in favor of such dismissal, see Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85 (2012), <http://yalelawjournal.org/2012/10/01/chandler.html>.

108 In response to Justice Stephen Breyer’s question about whether the Plaintiffs were asking the Justices to “overrule *Grutter*,” Mr. Rein stated that “we have said very carefully we were not trying to change the Court’s disposition of the issue in *Grutter* [that] there [could] be a . . . compelling interest . . . in using race to establish a diverse class.” Transcript of



displaces critical mass and articulates a different standard for the constitutionality of race-conscious admissions policies. For example, *Fisher* might preclude individualized consideration of race altogether but allow facially neutral policies which take racial demographics into consideration, such as the Top Ten Percent Law.<sup>109</sup> If the Court does this, it will limit the scope of race-conscious admissions broadly, which would affect universities across the nation. However, it will not be able to completely eliminate individualized consideration of race from the admissions process. Universities may not be able to consider race as a separate factor, but it will still enter the calculus through applicants' personal statements and essays and the other sources noted above.<sup>110</sup> Moreover, while significant use of race could be detected statistically, application reviewers who are sympathetic will still be able to employ modest race consciousness in decision-making, even if this is not endorsed in university policy.

Functionally, this may be no different from UT's current, modest use of race in admissions: it will just add another dimension to the stealth that is inherent in holistic admissions.<sup>111</sup> The entire *Fisher* case may just be a fishing expedition: a futile search for critical mass and total race neutrality in UT's admissions system. Nevertheless, if the ruling limits *Grutter* significantly, then *Fisher's* fishing expedition might reel in race-conscious admissions at other universities.

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Oral Argument, *supra* note 1, at 8, audio available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_345/argument?clip=308/372](http://www.oyez.org/cases/2010-2019/2012/2012_11_345/argument?clip=308/372).

109 See Siegel, *supra* note 53, at 1308 (contending that Justice Kennedy is skeptical of individualized consideration of race but would uphold race-conscious but facially neutral policies if they serve a compelling interest).

110 See *supra* notes 90–106 and accompanying text.

111 See Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply ‘another factor’ among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.”).

