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A COLORBLIND DISCOURSE ANALYSIS OF HIGHER EDUCATION RACE-CONSCIOUS ADMISSIONS IN A “POST-RACIAL” SOCIETY

DAVID H. K. NGUYEN* & LAWANDA WARD**

ABSTRACT

While the United States Supreme Court *held* in *Fisher v. University of Texas at Austin* that the University’s admissions plan was constitutional and that race-conscious admissions policies are still permissible, the movement to eliminate the consideration of race in college and university admissions is still going strong in current litigation against the University of North Carolina – Chapel Hill and Harvard University. Many argue that we are living in a “post-racial” society and no longer need race-conscious admissions; however, this Article argues through colorblind discourse that there has been a sustained and continual effort to eliminate the consideration of race. This Article provides an understanding of colorblind discourse, the legal background on race-conscious admissions, it applies colorblind discourse while examining current litigation, and it proposes best-practices for recruiting and retaining diversity on college campuses.

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I.	INTRODUCTION	552
II.	POST-RACIALISM	554
III.	COLORBLIND DISCOURSE.....	555
IV.	RACE-CONSCIOUS ADMISSIONS: SETTING THE LEGAL BACKGROUND	557
	A. REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE	558
	B. GRUTTER V. BOLLINGER & GRATZ V. BOLLINGER	559
	C. FISHER V. THE UNIVERSITY OF TEXAS AT AUSTIN ("FISHER I").....	561
	D. FISHER V. THE UNIVERSITY OF TEXAS AT AUSTIN ("FISHER II")	566
V.	COLORBLIND DISCOURSE APPLIED	567
VI.	TODAY'S CONTESTS AGAINST RACE-CONSCIOUS ADMISSIONS	573
	A. STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD & STUDENTS FOR FAIR ADMISSIONS V. UNIVERSITY OF NORTH CAROLINA-CHAPEL HILL.....	573
VII.	IMPLICATIONS AND BEST-PRACTICES FOR RECRUITING AND RETAINING DIVERSITY	574
VIII.	CONCLUSION.....	576

I. INTRODUCTION

On December 9, 2015, during the 2015 – 2016 term, the United States Supreme Court (the “Supreme Court”) heard for a second time, *Fisher v. University of Texas at Austin* (*Fisher I* and *Fisher II*). The main question centered on whether the University of Texas at Austin’s (“UTA”) implementation of its admissions plan in conjunction with Texas’s Top Ten Percent Plan met the two-prong strict scrutiny standard of being a compelling state interest and narrowly tailored means to meet the stated objective.¹ In its 2013 *Fisher I* ruling, the Supreme Court found the Fifth Circuit Court of Appeals (“Fifth Circuit”) failed to properly apply the strict scrutiny analysis to the

1. *Fisher v. Univ. Tex. at Austin*, 136 S. Ct. 2198 (2016).

contested plan.² In 2011 and 2014, the Fifth Circuit ruled that the University's admissions format is constitutionally sound based on the strict scrutiny standard.³ Because the application of the doctrinal framework for strict scrutiny is at issue between the high court and the Fifth Circuit, the Supreme Court's analysis in *Fisher II* is of great interest, along with the various contests against race-conscious admissions.

This Article uses colorblind discourse to analyze post-racialism arguments in today's legal contests against race-conscious admissions in current litigation against Harvard University and the University of North Carolina – Chapel Hill and efforts at the state level to ban affirmative action. This Article will first define the concept of post-racialism and present arguments that opponents of race-conscious admissions believe racism is no longer embedded in our education systems. This Article then examines colorblind discourse and its intersection with education. Some legal scholars have argued that the Supreme Court has adopted a colorblind constitutionalism,⁴ which is “a collection of legal themes functioning as a racial ideology”⁵ that operates as “treating race as if it were, like eye color, a wholly irrelevant characteristic.”⁶ Colorblindness is maintained and perpetuated by the denial of race as a social and cultural definer.⁷ If race is reduced to one's imagination or a far-fetched rationale for claims of inequity, candid discussions about race are ignored or relegated to “nonsense.” Intentionally and inadvertently, the colorblind legal rhetoric has and continues to be used to enfranchise while simultaneously disenfranchising people of color.⁸

Second, this Article will provide a background of race-conscious admissions cases, such as *Bakke*,⁹ *Grutter*,¹⁰ *Gratz*,¹¹ and *Fisher I*,¹² before using the understanding of colorblind discourse to posit why the Supreme Court

2. *Fisher v. Univ. Tex. at Austin*, 133 S. Ct. 2411 (2013).

3. *Fisher v. Univ. Tex. at Austin*, No. 09-50822 (5th Cir. January 18, 2011; 5th Cir. July 15, 2014), available at: <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2.pdf>.

4. Neil Gotanda, *A Critique of "Our Constitution is Blind"*, 44 STAN. L. REV. 1, 68 (1991); see also Girardeau A. Spann, *Whatever*, 65 VAND. L. REV. 203, 209 (2012); see also David A. Strauss, *The Myth of Colorblindness*, SUP. CT. REV. 99, 134 (1986); see also Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Colorblind?*, 20 J. MARSHALL L. REV. 201, 207 (1986).

5. Gotanda, *supra* note 4, at 2.

6. Strauss, *supra* note 4, at 114.

7. *Id.*

8. David G. Holmes, *Affirmative Reaction: Kennedy, Nixon, King and the Evolution of Color-Blind Rhetoric*, 26 RHETORIC REV. 24, 26 (2007).

9. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

10. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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

12. *Fisher*, 133 S. Ct. at 2411.

accepted *Fisher I* for a second time, especially in light of justiciability questions regarding the “troublesome threshold issues relating to standing and mootness.”¹³ In this portion, the Article will also analyze the Supreme Court’s *Fisher II* oral arguments and ruling. Third, current litigation and efforts to ban race-conscious admissions, such as *Students for Fair Admissions v. Harvard University*¹⁴ and *Students for Fair Admissions v. University of North Carolina-Chapel Hill*,¹⁵ are discussed. And finally, this Article discusses implications and best practices for institutions to continue recruiting, admitting, and enrolling students of color. Given that the Supreme Court’s ruling in *Fisher II* continues to uphold race-conscious admissions and there are two other lawsuits in litigation, this Article revisits the Supreme Court’s race-conscious admission decisions as a precursor to examining challenges involving race-conscious admissions again if the matter reaches the Supreme Court with a President Trump appointed justice.

II. POST-RACIALISM

Following the first election of President Barack Obama, individuals with various political ideologies touted that America was now a “post-racial” society.¹⁶ This mythical assertion permeated not only everyday discourse, but it also became a useful legal tool in race-conscious admissions debates. Specifically in a legal context, “[r]ace-based affirmative action, race-based admissions or redistricting in school-desegregation plans . . . all come under scrutiny in a post racial-world.”¹⁷

Given the vacancy on the Supreme Court as a result of Justice Scalia’s sudden death in 2016, his successor, President Trump’s nominated Neil Gorsuch, most likely will be an advocate of post-racial measures, which will cloak the continued advancement of White supremacy. “In short, post-racialism insulates white normativity from criticism and opens the floodgates of white resentment when confronted with previously accepted and unquestioned civil rights inequities.”¹⁸ A post-racial society rebuts history and context in lieu of the belief that equal opportunity is afforded to all Americans without any discriminatory barriers. Coupled with colorblind discourse, post-racial society rhetoric impedes persuasive legal arguments.

13. Spann, *supra* note 4, at 204.

14. *Students for Fair Admissions v. Harvard Univ.*, No. 1:14-cv-14176 (D. Mass. filed Nov. 17, 2014).

15. *Students for Fair Admissions v. Univ. of N.C.-Chapel Hill*, No. 1:14-CV-00954-LCB-JLW (M.D.N.C. filed Nov. 17, 2014).

16. Michael C. Dawson & Lawrence D. Bobo, *One Year Later and the Myth of a Post-Racial Society*, DU BOIS REV. 6:2, 247, 247-49 (2009).

17. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1649 (2009).

18. Cho, *supra* note 17, at 1596.

III. COLORBLIND DISCOURSE

Colorblind discourse centers “on managing the appearance of formal equality without worrying overmuch about the consequences of real-world inequality. Proponents of a colorblind ethos define freedom and equality exclusively in terms of the autonomous—some would say atomized—individual.”¹⁹ This “atomized-individual” is without a history and void of political affiliations or social interactions.²⁰ This person exists in an abstract world with equal opportunity and preferences, rather than a racist, sexist, homophobic and socially stratified structure.²¹ Ultimately, the atomized person is a fictitious creation of non-Whites that masks White supremacy and frustrates the realities of people of color as they seek higher education admission.²² Colorblind discourse is used to examine these cases from a critical perspective to understand the judicial approach in race-conscious admissions.

This colorblind universe that has embedded itself into our society is substantiated by social and legal systems. First, race and skin tone are viewed as synonymous.²³ The reduction of race to pigmentation allows people to argue that categorizing by perceived phenotype is discriminatory.²⁴ However, the historical, but silenced, racial stratification saturated with privileges for Whites, is absent.²⁵ Second, acknowledging race as a scientifically flawed project by depraved-hearted White men versus a powerful and dominating societal construction, frames race as taboo to recognize and those who do are “implicitly manifesting racial enmity or racial preference.”²⁶ Third, presenting racism as a “personal problem” and offending behavior only being exhibited by Ku Klux Klan (“KKK”) members, erroneously leaves out liberal card-carrying Whites.²⁷ This erroneous disconnection of racism from subtle everyday acts masks power and subordination.

Absent from the Supreme Court Justices’ questions regarding allegations of reverse discrimination by White plaintiffs is the acknowledgement and validation of the systematic, cyclical, and long-standing underrepresentation of students of color in university settings due to racism, specifically at selective institutions, such as Michigan, Texas, North Carolina-Chapel Hill, and

19. Lani Guinier & Gerald Torres, *The Ideology of Colorblindness*, in RETHINKING THE COLOR LINE: READINGS IN RACE AND ETHNICITY 101, 105 (Charles A. Gallagher ed., 5th ed., 2014).

20. *See id.*

21. *Id.*

22. *Id.*

23. Guinier & Torres, *supra* note 19, at 101.

24. *See id.*

25. *Id.*

26. *Id.* at 102.

27. *Id.*

Harvard. Studies show students of color are more likely to attend resource-poor schools, tracked away from academic programs that lead to college, and placed in vocational programs.²⁸ If the K-12 pipeline is stalled and filled with more obstacles for students of color to succeed than their White peers, the Supreme Court should find merit with arguments that present data evidencing how inequities prohibit all students from accessing higher education on the same level. That White applicants have been historically privileged with access to higher education is a key consideration missing within the Supreme Court's current race-conscious admissions jurisprudence.²⁹

Neil Gotanda asserts the idea of a "formal race" analysis used by the Supreme Court in which it views individuals "as neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin."³⁰ Formal-race is unrelated to ability, disadvantage, or moral culpability.³¹ Therefore, in reverse discrimination lawsuits involving White plaintiffs, courts dismiss the "connections between the race of the individual and the real social conditions underlying a litigation or other constitutional dispute."³² Without the acknowledgement of historical or social factors, the interests of Whites are made supreme in intentionally not recognizing race.³³ Ultimately, colorblind legal rhetoric "allows the Supreme Court to be blind to the law's role in sustaining white supremacy and to preserve the myth of the law's innocence."³⁴

As a legal strategy, colorblindness is appealing to the judiciary, but for litigants suing for justice, "it has now become an impediment in the struggle to end racial inequality."³⁵ Using a formal race approach to decisions gives justices a non-complicated task.³⁶ If the veiled realities of racism are not acknowledged, the judiciary's decision making process can be performed in a manner in which abstraction prevails and intellectually sound rulings are

28. Patricia Gándara, *Addressing Educational Inequities for Latino Students: The Politics of "Forgetting,"* 4 J. HISPANIC HIGHER EDUC. 295 (2005); see also THE FIRST-YEAR EXPERIENCE MONOGRAPH SERIES, TRANSFORMING THE FIRST-YEAR OF COLLEGE FOR STUDENTS OF COLOR (Laura I. Rendón et al. eds., 2004).

29. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 676 (1938); see also *Sipuel v. Board of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948); see also *McLaurin v. Okla. State Regents for Higher Education*, 339 U.S. 637 (1950); see also *Sweatt v. Painter*, 339 U.S. 629 (1950).

30. Gotanda, *supra* note 4, at 4. Western State College of Law Professor, Neil Gotanda, has litigated, taught, and published deeply on discrimination and civil rights; he is one of the nation's foremost scholars on critical race theory. *Full Time Faculty*, WESTERN STATE COLLEGE OF LAW <https://www.wsulaw.edu/faculty-and-staff/full-time-faculty#neil-gotanda> (last visited July 13, 2017).

31. Gotanda, *supra* note 4, at 4.

32. *Id.* at 7.

33. *Id.*

34. Carrie Crenshaw, *Colorblind Rhetoric*, 63 S. COMM. J. 244, 254 (1988).

35. T. Alexander Aleinikoff, *A Case for Race-Consciousness*. 91 COLUM. L. REV. 1060, 1062 (1991).

36. *Id.*

issued based on the Supreme Court's creation of doctrinal tests that cannot be invalidated unless the Court acquiesces.³⁷

Colorblindness in legal jurisprudence was first introduced by Justice Harlan in his *Plessy* dissent, where he stated, “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.”³⁸ Considering the preceding text to this infamous statement that has been adopted by so many, provides a complete and accurate understanding of Justice Harlan's viewpoint:

The white race deems itself to be the dominant race in this country. *And so it is*, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind. . .³⁹

Highly critical of the Supreme Court's decisions in both *Plessy* and *Brown*, an Associate Professor of English and Humanities, David Holmes, asserts there was “rhetorical maneuvering around color consciousness and back toward a racist consciousness in vogue during those historical moments. This is why the defenders of both decisions could claim to be following the letter of the Fourteenth Amendment.”⁴⁰ The use of legal rhetoric around equality masks the systemic issues of “how we engage or ignore race as an ideology so as to reproduce said material inequalities,”⁴¹ which results in the maintenance of the status quo and in reality, continued inequality.

IV. RACE-CONSCIOUS ADMISSIONS: SETTING THE LEGAL BACKGROUND

Opponents of race-conscious admissions programs have argued that the programs violate the Equal Protection Clause of the Fourteenth Amendment, because they consider race in admitting students.⁴² Under the Equal Protection Clause of the United States Constitution, “no State shall . . . deny to any

37. *Id.*

38. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

39. *Id.* (emphasis added).

40. Holmes, *supra* note 8, at 36.

41. *Id.*

42. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. Tex. at Austin*, 133 S. Ct. 2411 (2013).

person within its jurisdiction the equal protection of the laws,”⁴³ and “similar individuals . . . be dealt with in a similar manner by the government.”⁴⁴ To determine the constitutionality of a government act, courts must apply one of three standards of judicial review—strict scrutiny, mid-level scrutiny, or rational basis.⁴⁵

Because race is at question in these race-conscious admissions cases, courts must employ the strict scrutiny standard when deciding whether the admissions policy is constitutional.⁴⁶ Strict scrutiny is the most stringent standard of review used by the courts, and the most demanding of the reviews to satisfy.⁴⁷ Strict scrutiny is also required in government acts concerning discrimination based on national origin, religion, and alienage.⁴⁸ To pass strict scrutiny, the government must first illustrate that its act to treat people differently is justified by a compelling government interest.⁴⁹ As the law currently stands, the Supreme Court has found that the promotion of diversity in higher education is a “compelling governmental interest.”⁵⁰ Second, under the strict scrutiny standard, the Supreme Court must find that race-conscious admissions policies are “narrowly tailored.”⁵¹ To be constitutional, a government act employing racial classifications must satisfy both prongs.⁵² Cases have established the Supreme Court’s interpretation of constitutionally aligned programs over the past several decades. Next, these cases are briefly discussed.

A. REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

Regents of the University of California v. Bakke was the first Supreme Court case that set the foundation for race-conscious admissions.⁵³ The University of California Davis Medical School considered race in its admissions practices by strictly setting aside sixteen out of one hundred seats for “economically and educationally disadvantaged applicants and members of a minority group (Blacks, Chicanos, Asian Americans and American Indians).”⁵⁴

43. U.S. CONST. amend. XIV, § 1.

44. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, 208 (3d ed. 1999).

45. See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 500-92 (17th ed. 2010).

46. *Id.* at 519.

47. *Id.* at 500.

48. *Id.*

49. See *id.* at 501.

50. See *Grutter*, 539 U.S. at 326.

51. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

52. *Id.*

53. *Bakke*, 438 U.S. at 265.

54. *Id.* at 289.

A White male applicant who was rejected twice by the medical school claimed that he was denied admission because of his race in violation of the Equal Protection Clause.⁵⁵ Allan Bakke argued the medical school accepted less qualified racial minority applicants because the minority students who filled these sixteen spots had lower GPAs and test scores than otherwise rejected White students.⁵⁶ While the Supreme Court found the medical school's race-conscious policy unconstitutional because reserving a specific number of seats to be filled only by minorities was not narrowly tailored,⁵⁷ the Supreme Court reversed the lower court's ruling that race could *never* be considered a factor in admissions programs.⁵⁸ In this opinion, Justice Powell noted that diversity is critical to train future leaders.⁵⁹ It is a compelling government interest to have a broader definition of diversity where race and ethnicity are important factors along with other qualifications and characteristics.⁶⁰ Additionally, an admissions program may consider diversity holistically while examining an admissions application.⁶¹ After *Bakke*, some universities were still uncertain how race could be used in admissions.⁶²

B. GRUTTER V. BOLLINGER & GRATZ V. BOLLINGER

After a couple of decades and many lower court decisions, in 2013, the Supreme Court provided clarity about the appropriate use of race in *Grutter v. Bollinger* and *Gratz v. Bollinger*.⁶³ The six-to-three *Gratz* decision struck down the undergraduate admissions program at the University of Michigan, because it held the automatic designation of twenty points to every applicant from an underrepresented minority group was not narrowly tailored nor a

55. *Id.* at 278.

56. *See id.*

57. Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go from Gratz and Grutter?*, 33 J.L. & EDUC. 21, 23 (2004); *see also Bakke*, 438 U.S. at 277.

58. *Bakke*, 438 U.S. at 313-20.

59. *Id.*

60. *Id.* at 313-20.

61. *Id.* at 318.

62. *See generally* Podberesky v. Kirwan 38 F.3d 147, 158 (4th Cir. 1994) (finding that the University of Maryland's scholarship program for African-American students was not narrowly tailored); *see also* Hopwood v. Tex., 78 F.3d 932, 962 (5th Cir. 1996) (finding the University's race-conscious admissions policy unconstitutional); *see also* Smith v. U. of Wash. L. Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) (upholding the University's race-conscious admissions policy); *see also* Johnson v. Bd. of Regents of the U. of Ga., 263 F.3d 1234, 1237(11th Cir. 2001) (finding the University's race-conscious admissions policy unconstitutional).

63. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

holistic approach.⁶⁴ Quota systems insulate certain applicants from competition with other applicants based on race or ethnicity.⁶⁵ However, in *Grutter*, the law school's admissions program satisfied *Bakke*, because it considered each applicant as an individual, looking at how each may contribute to the diversity of the school and using race and ethnicity only as a "plus" in addition to other characteristics.⁶⁶ In a five-to-four decision, the *Grutter* Court adopted Justice Powell's ruling in *Bakke*, finding that race could be considered in admissions practices, so long as it was one of the many factors considered.⁶⁷ The Supreme Court upheld the reasoning that student body diversity is a compelling state interest.⁶⁸

The *Grutter* Court also required admissions programs to consider other criteria beyond grades and test scores, such as the applicant's personal statement, the quality of the undergraduate institution, letters of recommendation, and whether the applicant chose challenging undergraduate courses, among other criteria set by the institution.⁶⁹ This holistic review could also examine one's study abroad experiences, language proficiencies, and record of community service. The Supreme Court found narrow tailoring does not require that "exhaustion of every conceivable race-neutral alternative" be attempted before a race-conscious policy is implemented, but it does require that universities consider race-neutral plans in good faith.⁷⁰ Up until now, this approach to admissions has survived the strict scrutiny test while under review of the Supreme Court.⁷¹ However, recent cases, such as the grant of certiorari of *Fisher II*⁷² and the filing of cases against Harvard University and the University of North Carolina - Chapel Hill by the Students for Fair Admissions, Inc.,⁷³ suggest that universities may no longer be able to admit students with this approach. This potential change will be discussed later in the Article. While the *Grutter* Court mentioned "the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter[.]"⁷⁴ Justice

64. *Gratz*, 539 U.S. at 250-60.

65. *See Grutter*, 539 U.S. at 327.

66. *Id.* at 328.

67. *Id.* at 312.

68. *Id.* at 320-25.

69. *Id.* at 312.

70. *Id.*

71. *See Eckes*, *supra* note 57, at 28.

72. *Fisher v. Univ. Tex. at Austin*, No. 09-50822 (5th Cir. July 15, 2014), available at: <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2.pdf>.

73. *Students for Fair Admissions v. The President and Fellows of Harvard Coll., et al.*, No. 1:14-cv-14176-DJC, 2014 WL 6241935, (D.Mass. Nov. 17, 2014); *see also* *Students for Fair Admissions v. U. of N.C., et al.*, No. 1:14-cv-00954, 2014 WL 6386755 (M.D.N.C. Nov. 17, 2014).

74. *See Grutter*, 539 U.S. at 344-47.

O'Connor suggested "the use of racial preferences will no longer be necessary"⁷⁵ in twenty-five years from its ruling in 2003.⁷⁶ Given that only over one decade later since the Supreme Court ruled on the constitutionality of race-conscious higher education admission programs and evidence of institutional racism is still embedded in American society,⁷⁷ it is premature for today's Supreme Court Justices to reverse its previously held precedence.

C. FISHER V. THE UNIVERSITY OF TEXAS AT AUSTIN ("FISHER I")

In 2008, Abigail Fisher claimed racial discrimination in violation of the Equal Protection Clause because she was denied admission to UTA.⁷⁸ Based on current legal precedent, UTA considered race as a factor among many others, and it currently admits students through a two-step process based on state and federal law.⁷⁹

First, under the state's Top Ten Percent Plan, high school students who graduate in the top ten percent of their class are eligible for automatic admission to any public college or university in Texas.⁸⁰ The Top Ten Percent Plan was passed in response to the decline in minority student enrollment after the decision in *Hopwood v. Texas*.⁸¹ The law also suggested that public universities consider a variety of other factors in admissions decisions for students not eligible under the law, which included socioeconomic status, bilingual proficiency, and first-generation college student.⁸² Not surprisingly, race was not one of these factors.⁸³ Although students are automatically eligible, it does not necessarily mean that they are automatically admitted to their institution of choice.⁸⁴

Second, based on the *Grutter v. Bollinger* decision, applicants that are not eligible under the state's Top Ten Percent Plan could be considered using the *Grutter* standard, which considered race as one of many "plus factors" that each candidate contributes to the learning environment.⁸⁵ UTA asked students to identify their race among five predefined racial categories, and race was not assigned a numerical value, but was considered a meaningful

75. *Id.*

76. *See Gratz*, 539 U.S. at 344-347.

77. David H. K. Nguyen, et al, *Strict Scrutiny & Fisher: The Court's Decision & Its Implications*, 299 EDUC. L. REP. 355, 371-372 (2014).

78. *Fisher v. U. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

79. *Id.*

80. *See generally*, Texas Top Ten Percent Law, TEX. EDUC. CODE ANN. § 51.803 (West 2009).

81. *Hopwood*, 78 F.3d at 932.

82. *See generally* TEX. EDUC. CODE ANN. § 51.805 (West 2009).

83. *Id.*

84. *Id.*

85. *Fisher*, 133 S. Ct. at 2413.

factor.⁸⁶ The various plus factors were then plotted on a grid and students above a specific baseline were offered admission, while others were not offered such admission.⁸⁷ Fisher claimed that she was discriminated against because UTA used the *Grutter*-based race-conscious admissions process after admitting students through the Texas-legislated Top Ten Percent Plan.⁸⁸ The District Court found UTA's policy constitutional.⁸⁹ On appeal, the Fifth Circuit ruled the policy was not akin to an illegal quota or racial balancing and affirmed the District Court's finding.⁹⁰ The Fifth Circuit interpreted *Grutter* to give substantial deference to UTA to define the benefits of diversity that provide the compelling government interest and to determine whether its admission plan is narrowly tailored to achieve this goal.⁹¹

The Supreme Court granted certiorari and held seven-to-one that the Fifth Circuit failed to properly apply strict scrutiny.⁹² The Supreme Court vacated and remanded the case back to the Fifth Circuit.⁹³ While the *Fisher I* Court reaffirmed the constitutionality of *Grutter*-based admissions programs that considered "racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body,"⁹⁴ it stressed, as outlined in *Gratz* and *Grutter*, that these admissions processes must undergo the strictest standard of judicial review.⁹⁵ Justice Kennedy, in *Fisher I*, agreed with the Fifth Circuit that UTA has the expertise and experience to determine the scope of diversity and how it would benefit its campus, students, faculty, and staff.⁹⁶ However, Justice Kennedy did not agree on the level of deference that the lower court gave to UTA regarding how it implemented this admissions plan.⁹⁷ Justice Kennedy wrote, "there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation."⁹⁸ The University must prove that its chosen means to attain diversity are narrowly tailored.⁹⁹ Justice Kennedy stressed on this prong of

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.*

90. *Fisher v. U. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

91. *See id.* at 232.

92. *Fisher*, 133 S. Ct. at 2411.

93. *See id.* at 2422.

94. *Id.* at 2417.

95. *Id.* at 2413.

96. *Id.*

97. *Id.* at 2421.

98. *Fisher*, 133 S. Ct. at 2419-20.

99. *See id.*

strict scrutiny that the University is to receive no deference.¹⁰⁰ Complying with this rationale would have required the lower court to test whether there was no other alternative to achieve the benefits of diversity than this admissions plan.

However, the Fifth Circuit noted that it was “ill-equipped” to make this determination and that it only needed to ensure UTA made a good faith effort to consider alternatives.¹⁰¹ Justice Kennedy disagreed stating that the Fifth Circuit deferred the narrow tailoring analysis to UTA’s good faith without considering evidence sufficiently.¹⁰² While the Supreme Court, in *Fisher I*, did not overrule the use of race-conscious admissions policies upheld in the previous *Grutter* decision, dissenting Justices Scalia and Thomas supported the notion for doing so.¹⁰³ In sharp contrast, Justice Ginsburg, argued that under strict scrutiny UTA’s policy does not require further judicial review, and its use of race as a factor continues to serve an important purpose in helping UTA to increase the educational benefits of diversity.¹⁰⁴ Additionally, she argued that colorblind, race-neutral policies, such as Texas’ Top Ten Percent Plan, which are supposed to be less discriminatory alternatives to race-conscious plans are actually by no means race-neutral.¹⁰⁵

On remand, the Fifth Circuit heard the case again.¹⁰⁶ The Fifth Circuit gave the attorneys a list of questions to consider at this next level.¹⁰⁷ The list of questions addressed everything from whether the case is now moot because Fisher graduated from another institution, Louisiana State University, to whether the appeals court or district court should hear the next round.¹⁰⁸ The Fifth Circuit had the option of ruling on the constitutionality of the plan or sending the case down to the district court to determine additional facts involving the plan. Attorneys for Fisher urged the Fifth Circuit to rule on the case, while the University requested the case be sent back to the district court in order to gather additional facts about the admissions policy.¹⁰⁹ The Fifth Circuit found merit with Fisher’s position by stating “there are no new issues of fact that need to be resolved, nor is there any identified need for additional

100. *See id.*

101. *Fisher*, 631 F.3d at 231.

102. *Fisher*, 133 S. Ct. at 2421.

103. *Id.* at 2421-22.

104. *Id.* at 2433-35.

105. *Id.*

106. Lyle Denniston, *Next Round in Fisher Case*, SCOTUS BLOG (Sept. 12, 2013, 3:31 PM), <http://www.scotusblog.com/2013/09/next-round-in-fisher-case/>.

107. *Id.*

108. *Id.*

109. Lyle Denniston, *Next Round in Fisher Case*, SCOTUS BLOG (Sept. 12, 2013, 3:31 PM), <http://www.scotusblog.com/2013/09/next-round-in-fisher-case/>.

discovery; that the record is sufficiently developed . . . remand would likely result in duplication of effort.”¹¹⁰

Some scholars suggest the Supreme Court wanted the Fifth Circuit to make it more challenging for colleges and universities to implement race-conscious admissions plans.¹¹¹ However, the Fifth Circuit in a two-to-one decision found merit again with UTA’s plan being constitutionally sound in both prongs of the strict scrutiny analysis by being narrowly tailored to achieve diversity.¹¹² The Fifth Circuit began its discussion by restating the Supreme Court’s precedent in *Grutter* that “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’”¹¹³ The court acknowledged that Justice Kennedy’s *Fisher* dissent “faulted the district court’s and this Court’s review of UT Austin’s means to achieve the permissible goal of diversity – whether UT Austin’s efforts were narrowly tailored to achieve the end of a diverse student body.”¹¹⁴

Before proceeding with its analysis, the Fifth Circuit declared “our charge is to give exacting scrutiny to these efforts.”¹¹⁵ After a detailed discussion of the Top Ten Percent Plan and the University’s additional admissions office diversity efforts, the court reiterated the *Grutter* precedent, which mandates that “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative” but rather “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”¹¹⁶ The court asserted “put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all.”¹¹⁷

The Fifth Circuit then brought attention to the circumstances under which the plan exists by stating that “the sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system.”¹¹⁸ The court shared data in a footnote to support its assertion that “the de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions

110. *Fisher v. U. of Tex. at Austin*, 758 F.3d 633, 641-42 (5th Cir. 2015).

111. See Nguyen, et al., *supra* note 77.

112. *Fisher*, 758 F.3d 633 (5th Cir. 2015).

113. See *Grutter*, 539 U.S. at 326.

114. *Fisher*, 758 F.3d at 642.

115. *Id.*

116. *Grutter*, 539 U.S. at 339.

117. *Fisher*, 758 F.3d at 649.

118. *Id.* at 650.

to diversity beyond race.”¹¹⁹ The court viewed the Top Ten Percent Plan as “nearly indistinguishable from the University of Michigan’s Law School’s program in *Grutter*” and “was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores or other unique skills.”¹²⁰ Persuaded by UTA’s admission plan and its implementation, the Fifth Circuit stated “to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of *Bakke* and *Grutter*.”¹²¹ In its final opinion sentence, the Fifth Circuit invoked two of the four seminal race-conscious cases, “to reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing.”¹²²

In his twenty-six-page dissent, Judge Emilio M. Garza argued UTA did not define “critical mass” and, therefore, “whether the University’s use of racial classifications in its admissions process is narrowly tailored to its stated goal . . . remains unknown.”¹²³ Judge Garza accused the majority of “defer[ing] impermissibly to the University’s claims,” and he asserted “this deference is squarely at odds with the central lesson of *Fisher*.”¹²⁴ Ultimately, he concluded that UTA had not satisfied the narrowly tailored prong and, therefore, would have reversed the court’s previous decision and ruled in favor of *Fisher*.¹²⁵ The en banc request made by *Fisher*’s legal team was denied, and now the Supreme Court will decide if the strict scrutiny two-prong test was properly applied on remand by the Fifth Circuit in *Fisher I*.¹²⁶

The Fifth Circuit entered its ruling on July 15, 2014, in favor of UTA, and *Fisher* filed a petition for certiorari, which the Supreme Court granted.¹²⁷ On December 9, 2015, the Supreme Court heard another challenge against UTA.¹²⁸

119. *Id.* at 650-51, 650 n.98.

120. *Id.* at 653.

121. *Id.* at 659-60.

122. *Id.* at 660.

123. *Fisher*, 758 F.3d at 661-62.

124. *Id.* at 662.

125. *Id.* at 676.

126. *Fisher v. U. of Tex. at Austin*, 771 F.3d 274 (5th Cir. 2014).

127. *Fisher v. U. of Tex. at Austin*, 135 S. Ct. 2888 (2015).

128. *Fisher v. U. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

D. FISHER V. THE UNIVERSITY OF TEXAS AT AUSTIN (“FISHER II”)

During oral arguments, the Justices, excluding Justice Clarence Thomas, posed several questions to attorneys on both sides.¹²⁹ Justices Ginsburg and Sotomayor interrupted Fisher’s attorney, Bert Rein, early into his argument.¹³⁰ Justice Ginsburg inquired whether there would be a case if the Top Ten Percent Plan was eliminated and only the *Grutter*-like plan remained.¹³¹ Justice Sotomayor joined the questioning, appearing not to be satisfied with Rein’s response, and asked how UTA had improperly used race in conflict with the *Bakke* standard.¹³² Justice Scalia inquired about critical mass studies and how UTA would know when it had reached a sufficient number of students of color.¹³³ Rein stated UTA utilized a good faith approach that passed muster with a majority in the Fifth Circuit but not with the Supreme Court.¹³⁴

Justice Kennedy, who has been labeled a swing voter in civil rights related cases, asked Fisher’s attorney to give an example of a concrete criteria that UTA would use to achieve diversity.¹³⁵ He and Justice Alito seemed concerned that additional facts were needed, and without them, Justice Kennedy said “we’re just arguing the same case.”¹³⁶ Rein did not give a response that was sufficient to the question in that he argued the solicitor general would attempt to transform “abstract goals into concrete objectives.”¹³⁷ It appeared questions about the process to achieve classroom diversity were not addressed to some Justices’ satisfaction.¹³⁸ The Supreme Court stated in its *Fisher* opinion that unbridled deference would not be given to UTA’s decision making procedures.¹³⁹ Justice Breyer reiterated this position during an exchange with UTA’s attorney, Solicitor General Donald B. Verrilli, Jr., in which Justice Breyer stated, “this Court will give some, but not complete, deference to what the University decides.”¹⁴⁰ Chief Justice Roberts and Solicitor General Verrilli, who argued in support of UTA’s program, had an exchange in which Chief Justice Roberts specifically asked “how does the

129. Transcript of Oral Argument, *Fisher v. U. of Tex. at Austin*, 136 S. Ct. 2198 (2015) (No. 14-981).

130. *Id.* at 4-5.

131. *Id.* at 4.

132. *Id.* at 6-7.

133. *Id.* at 12-13.

134. *Id.* at 13.

135. Transcript of Oral Argument, *supra* note 129, at 11.

136. *Id.* at 20.

137. *Id.* at 12.

138. *Id.* at 20-22.

139. *Fisher*, 758 F.3d at 642.

140. Transcript of Oral Argument, *supra* note 129, at 75.

University know when it has achieved its objective?”¹⁴¹ The solicitor general did not directly answer the question; instead, he focused on how the proposed approach by Fisher’s counsel of setting a demographic goal was not the solution.¹⁴² Chief Justice Roberts along with Justices Scalia, Alito, and Kennedy, posed questions that reflected a skepticism about whether UTA had met its burden of persuasion by providing enough evidence to support its additional use of race in the admissions process.¹⁴³ Chief Justice Roberts asked UTA’s attorney if the twenty-five-year end to affirmative action, suggested by Justice Sandra Day O’Connor in *Grutter*, would be done in twelve years.¹⁴⁴ Gregory G. Garre responded that systematic problems in K-12 education, specifically test score disparities along racial lines, made a definitive answer difficult.¹⁴⁵ Based on the Justices’ questions, it seemed as though a majority might have remanded the case back to the district court for additional evidence gathering. Alternatively, the majority might find the use of race unconstitutional because UTA did not meet both prongs of the strict scrutiny standard as to why race is an additional factor when considering the diversity of the student body.¹⁴⁶ However, no remand occurred and on June 23, 2016, by a four-to-three decision, the Supreme Court upheld UTA’s race-conscious admissions plan.¹⁴⁷ Justice Kennedy wrote the majority opinion that was supported by Justices Breyer, Ginsburg, and Sotomayor.¹⁴⁸ Justices Alito, Roberts, and Thomas dissented.¹⁴⁹ The Supreme Court reasoned that Fisher had not met her burden of proof to show that UTA’s plan violated the Equal Protection Clause and UTA had provided a detailed account of its current application review process and the nonracial measures taken that did not meet its diversity goals.¹⁵⁰

V. COLORBLIND DISCOURSE APPLIED

In *Bakke*, Justice Powell gave a different interpretation of the colorblind argument that “prohibits the use of race as the sole factor in government decisions absent a compelling justification.”¹⁵¹ Ironically, each Justice asserted that his colorblind position was based on an interpretation of the Fourteenth

141. *Id.* at 78.

142. *Id.* at 78-81.

143. *Id.* at 78-86.

144. *Id.* at 49-50.

145. *Id.*

146. Transcript of Oral Argument, *supra* note 129, at 34.

147. *Fisher*, 136 S. Ct. at 2204.

148. *Id.* at 2198.

149. *Id.*

150. *Id.* at 2203.

151. *Crenshaw*, *supra* note 34, at 247.

Amendment's Equal Protection Clause.¹⁵² A critical distinction in both Justices' interpretations is that "Harlan believed that the Fourteenth Amendment has special relevance for Blacks, while Powell believed that Blacks and Whites must receive the same treatment."¹⁵³ Both interpretations lead to different outcomes and not necessarily either will result in justice for people of color regarding admission to race-conscious higher education institutions. Justice Powell's version of colorblindness disconnects history and reality from the Court's analysis. It allows "white privilege"¹⁵⁴ to be unnamed and avoids the questioning of white supremacy and social dominance. Colorblind rhetoric distracts our society from dealing with the complex nature of "race" and "racism." It has stalled the discussions and actions of colleges and universities as they have adopted this detrimental Utopian viewpoint.

Whiteness being normal aligns with the rhetoric of innocence, which is a concept discussed by legal scholar, Thomas Ross, as a legal tool used by White rhetoricians, lawyers, and judges.¹⁵⁵ He asserts that the avoidance of Whites benefitting people of color's oppression is a key component in the rhetoric of innocence, because it "obscures this question: What white person is 'innocent' if innocence is defined as the absence of advantage at the expense of others?"¹⁵⁶ *Bakke* is an example in which "Justice Lewis Powell introduced the rhetoric of innocence to the Court's affirmative action discourse," appearing throughout the opinion and the oral argument.¹⁵⁷ In the *Bakke* opinion, Justice Powell stated that "the patent unfairness of 'innocent persons . . . asked to endure [deprivation as] the price of membership in the dominant majority . . . forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."¹⁵⁸

Racial arrogance fuels conservatives to seek out ideal litigants for reverse discrimination lawsuits. In *Bakke*, neither the university, Justices, nor Bakke "contested the legitimacy of medical school admissions standards that

152. *Bakke*, 438 U.S. at 326-327.

153. B. K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1, 2 (1993).

154. White privilege is an institutional (rather than personal) set of benefits granted to those of us who, by race, resemble the people who dominate the powerful positions in our institutions. One of the primary privileges is that of having greater access to power and resources than people of color do; in other words, purely on the basis of our skin color doors are open to us that are not open to other people. Francis E. Kendall, *Understanding White Privilege*, (2002), <http://www.cpt.org/files/Undoing%20Racism%20-%20Understanding%20White%20Privilege%20-%20Kendall.pdf>.

155. See generally THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS (1996).

156. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. R. 297, 301 (1990).

157. *Id.*

158. ROSS, *supra* note 155, at 47.

reserved five seats in each class for children of wealthy donors to the university or that penalized Bakke for being older than most of the other applicants.”¹⁵⁹ The Center for Individual Rights (“CRI”), a public interest group founded by Ward Connerly, a mixed race man of color, born and raised during segregation who advocates for the eradication of affirmative action measures, including race-conscious admissions in higher education, intentionally and strategically seeks out locations and people to challenge equity focused practices. Connerly, being a person of color, gives credence to racial arrogance and serves as a poster child for post-racial society rhetoric. Barbara Grutter, Jennifer Gratz, and Abigail Fisher, all white women with innocent and hardworking narratives, set the stage for arguing violation of their Equal Protection rights under the Fourteenth Amendment. In the context of higher education, Whites view themselves as having a right to obtain a degree, and therefore, should be entitled to a “seat” in undergraduate, graduate, and professional schools.¹⁶⁰ This sense of entitlement has been reinforced in higher education since its inception, and it has resulted in lawsuits filed against policies supporting the inclusion of people of color and not including legacies, athletes, or other Whites with lower scores.¹⁶¹ People of color are easy targets because of their marginalized “place” in society that has been politically, socially, and legally framed as unworthy of being admitted to a university over a White person.¹⁶²

In higher education and society, master narratives using “diversity” exist within the race-conscious admissions debate.¹⁶³ Two ideologies of the construct “diversity” have become institutionalized in the public’s rhetoric about equality efforts.¹⁶⁴ One is that “diversity ideology represents white elites’ taming of what began as a radical fight for African-American equality” and the other is “the ideology of ‘diversity’ was a neoliberal response to the reactionary blowback against affirmative action.”¹⁶⁵ Both ideologies of diversity are flawed because neither has substantially moved society in a direction of inclusion and equality.

159. George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy*, in *RETHINKING THE COLOR LINE: READINGS IN RACE AND ETHNICITY* 139, 146 (Charles A. Gallagher ed., 5th ed. 2012).

160. *Id.* at 146.

161. See *id.*

162. Cheryl I. Harris, *Whiteness as Property*. 106 HARV. L. REV. 1707, 1761 (1993).

163. Ellen C. Berrey, *Why Diversity Became Orthodox in Higher Education, and How It Changed the Meaning of Race on Campus*. 37 CRIT. SOCIOLOGY 573, 573 (2011).

164. CEDRIC HERRING & LOREN HENDERSON, *DIVERSITY IN ORGANIZATIONS: A CRITICAL EXAMINATION*, 14 (2014).

165. *Id.*

Derrick Bell voiced four key concerns with diversity and described it as a “distraction” to the achievement of racial justice.¹⁶⁶ To support the four reasons, Bell gave specific examples for each one based on the *Gratz* and *Grutter* cases.¹⁶⁷ First, “diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants.”¹⁶⁸ Bell argued that his interest convergence thesis in which people of color only receive benefits when Whites are not disenfranchised by the benefits, is manifested through the Justices’ and lawmakers’ lack of recognition for a history of discrimination that continues to impact people of color’s advancement, specifically in higher education.¹⁶⁹ Bell stated the “Michigan lawyers and their civil rights allies shifted the focus from remediation for past discrimination to the value of diversity to the schools and to society.”¹⁷⁰

Second, “diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected.”¹⁷¹ Litigation possibilities are increased by the Supreme Court’s fragmented opinions in both *Gratz* and *Grutter*. Bell argued “the narrowness of this diversity ‘victory’ in the law school case and its vulnerability in future litigation can be gauged by the *Grutter* dissents.”¹⁷² Heavy criticism from the disagreeing Justices of diversity meeting the strict scrutiny standard and the lack of definition for “critical mass” are evidence that the use of race in higher education admissions is not settled.¹⁷³ Further proof of this turmoil is the Supreme Court’s acceptance of hearing *Fisher* a second time. This decision signals to civil rights allies that the Supreme Court is not in agreement with the Fifth Circuit’s application of the strict scrutiny standard to use race as a factor in conjunction with Texas’s Top Ten Percent Plan. There should be great concern that the decision will be made

166. Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003). Derrick Bell, the first Black professor to be tenured at Harvard University Law School, is often credited as a founder of Critical Race Theory, a school of thought and scholarship that critically engages questions of race and racism in the law, investigating how even those legal institutions purporting to remedy racism can more profoundly entrench it. Bell’s work provides the reader with a perspective that challenges the status quo rationale for inequity in the race-conscious admissions discourse. *Derek Bell Official Site*, <http://professorderrickbell.com/about/> (last visited July 13, 2017).

167. *Id.* at 1622.

168. *Id.* at 1622.

169. *Id.*

170. *Id.* at 1624-25.

171. *Id.* at 1622.

172. Bell, *supra* note 166, at 1627.

173. *Id.*

through a colorblind constitutional analysis, which would eradicate the use of race in any form as an admissions consideration factor.

Third, “diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants.”¹⁷⁴ Bell discussed meritocracy by using Justice Thomas’s opinion in *Grutter v. Bollinger*¹⁷⁵ that concurs in part and dissents in part.¹⁷⁶ Justice Thomas explained that he is anti-affirmative action because of “his conviction that all such remedies are unconstitutional” and his personal belief that “blacks can achieve in every avenue of American life without the meddling of university administrators.”¹⁷⁷ Justice Thomas pointed out that alumni’s children being specially admitted is evidence of the lack of merit as a criterion, yet this group does not draw needed attention and has not been included in litigation.¹⁷⁸ Bell provided data that was collected to show how financial disparities disproportionately impact the ability of students of color to afford resources that can enhance their standardized test scores.¹⁷⁹ “[T]he standardized tests are retained for the convenience of the schools even though they privilege applicants from well-to-do families, alumni children, and those born into celebrity.”¹⁸⁰ Limited resources to afford tutors for college preparation tests or access to the “best performing” schools is disproportionately weighted against students of color in comparison to the White peers.¹⁸¹

Fourth, Bell points out that “[t]he tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty that exclude far more students entering college than are likely to gain admission under an affirmative action program.”¹⁸² To support this view, he gave examples about the economic hardships of people of color that have an impact on all areas of their lives, including quality education in the K-12 setting.¹⁸³ He concluded with a harsh criticism of diversity as not being an effective practice for the admission of students of color, but rather, “it is a shield behind which college administrators can retain policies of admission that are woefully poor measures of quality, but convenient vehicles for admitting the children of wealth and privilege.”¹⁸⁴

174. *Id.* at 1622.

175. *Grutter*, 539 U.S. at 306.

176. *Id.* at 350-395.

177. Bell, *supra* note 166, at 1629.

178. *Grutter*, 539 U.S. at 368.

179. Bell, *supra* note 166, at 1629-1631.

180. Bell, *supra* note 166, at 1631.

181. *Id.* at 1630.

182. *Id.* at 1622.

183. *See generally* Bell, *supra* note 166.

184. *Id.* at 1632.

Building on Bell's assertion that diversity is a distraction, legal scholar, Kenneth Nunn, argued that "diversity fails as a social justice tool" and "provides no mechanism for addressing ongoing racial inequities."¹⁸⁵ Because the Supreme Court ruled quotas, set-asides, and "racial balancing" methods as unconstitutional, the process of colleges and universities intentionally assessing their campuses for students, faculty, and administrators of color is a risky decision and any numerical measures implemented to address "low" numbers could result in lawsuits.¹⁸⁶

With the change of the Supreme Court's majority viewpoint of race-conscious admissions programs between *Bakke* and *Fisher*, it has established a challenging set of "doctrinal barriers that must be overcome before a majoritarian affirmative action plan can be upheld."¹⁸⁷ Having determined that strict scrutiny is the analysis tool to determine if a governmental program meets a compelling state interest and is narrowly tailored to achieve the stated interest in race-conscious higher education cases, the benefits of diversity and the Supreme Court's analysis has evolved into a position that "equate[s] benign discrimination with invidious discrimination, as if the harms that affirmative action imposes on Whites are equivalent to the harms that Whites have imposed on racial minorities."¹⁸⁸ Additionally, at one time, the Supreme Court viewed racial affirmative action solutions as if there was inadequacy with proposed race-neutral measures.¹⁸⁹ Based on the analysis of seven of the nine Justices and the lack of differences between *Gratz* and *Grutter*, the concern for a definitive standard is warranted. Ironically, Justice Kennedy stated that strict scrutiny "must not be strict in theory but fatal in fact,"¹⁹⁰ which seems to be the same sentiment of two members of the conservative majority bloc. In *Grutter*, Justices Scalia and Thomas stated that they did not find merit with "the educational benefits flowing from student body diversity" meeting the compelling state interest analysis.¹⁹¹ At no time in history has the number of people of color been substantial enough to disrupt the homogenous environments of predominantly White institutions of higher education. These are still very "White spaces" and many are not welcoming to people of color, be it students, staff, faculty, or administrators.

185. Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 720 (2008).

186. *Id.* at 717.

187. Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. (En Banc) 45, 50 (2012).

188. *Id.*

189. *Id.* at 51.

190. *See Fisher*, 133 S. Ct. at 2421.

191. *See id.* at 2413.

VI. TODAY'S CONTESTS AGAINST RACE-CONSCIOUS ADMISSIONS

The current status of race-conscious admissions is uncertain. With the movement to ban affirmative action, the new legal challenges against Harvard University and the University of North Carolina-Chapel Hill, and an upcoming anticipated conservative appointment to the Supreme Court, there is a full-fledged effort to eliminate race as one of the many factors in admissions decisions and the ability of institutions of higher education to shape the diverse make-up of their student body. The Supreme Court may either eliminate the use of race-conscious admissions, make it more challenging for institutions to utilize, or heighten the strict scrutiny standard impacting affirmative action programs broadly. The following section provides an analysis of current litigation.

A. STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD & STUDENTS FOR FAIR ADMISSIONS V. UNIVERSITY OF NORTH CAROLINA-CHAPEL HILL

On Monday, November 17, 2014, two separate lawsuits were filed against Harvard University and the University of North Carolina-Chapel Hill by a “newly-formed, nonprofit, membership organization whose members include highly qualified students recently denied admissions to both schools, highly qualified students who plan to apply to both schools, and their parents.”¹⁹² The 120-page complaint against Harvard accused the University of “employing racially and ethnically discriminatory policies and procedures in administering the undergraduate admissions program at Harvard College in violation of Title VI of the Civil Rights Act of 1964.”¹⁹³ The plaintiffs also claimed that Harvard’s current program has resulted in a limited number of qualified Asian-Americans admitted yearly to the University.¹⁹⁴ Project on Fair Representation’s (“POFR”) executive director, Edward Blum, helped to fund this lawsuit as well as *Fisher v. University of Texas*.¹⁹⁵ Ironically, the

192. Theodore R. Delwiche, *Suit Alleges Race-Based Discrimination in Harvard Admissions Practices*, THE HARV. CRIMSON (Nov. 18, 2014), <http://www.thecrimson.com/article/2014/11/18/law-suit-admissions-alleged-discrimination/>.

193. Complaint at 9, *Students for Fair Admissions v. The President and Fellows of Harvard Coll.*, et al., No.1:14-cv-14176-DJC (D.Mass. Nov. 17, 2013), 2014 WL 6241935.

194. *Id.* at 4.

195. See Krissah Thompson, *Edward Blum defies odds in getting cases to Supreme Court*, WASH. POST (Feb. 25, 2013), https://www.washingtonpost.com/lifestyle/style/edward-blum-defies-odds-in-getting-cases-to-supreme-court/2013/02/25/2d6e06ac-7b8e-11e2-a044-676856536b40_story.html?utm_term=.bf1567b4886a. see also Joan Biskupic, *A litigious activist's latest cause: ending affirmative action at Harvard*, REUTERS (June 8, 2015), <http://www.reuters.com/investigates/special-report/usa-harvard-discrimination>.

suit comes six months after POFR launched a website soliciting "students who claim they were not admitted to Harvard because of their race to participate in a potential lawsuit."¹⁹⁶ Harvard's general counsel released a statement that referenced Justice Powell's opinion in *Bakke*, touting the University's admissions plan as being 'legally sound' and alleged the University has continued the same practice consistently over the years.¹⁹⁷

Within the group of plaintiffs, there is at least one Asian-American who is a first-generation college student, graduated top of his high school class, scored a 36 on the ACT, and was active in multiple extracurricular activities, that was denied admission to Harvard.¹⁹⁸ This student will seek a transfer to Harvard if it no longer uses race or ethnicity in its admissions "preference."¹⁹⁹ In the University of North Carolina-Chapel Hill's complaint, the plaintiffs alleged the same violation of Title VI and that the University cannot fulfill the strict scrutiny standard upon constitutional review since in the University's amicus brief submitted in *Fisher I* the University stated it could ". . . maintain, and actually increase, racial diversity through race-neutral means if it ends its race-based affirmative action policies."²⁰⁰ To date, no rulings have been made on either case to impact the future of affirmative action.²⁰¹ However, institutions of higher education and other stakeholders should continue to monitor these cases.

VII. IMPLICATIONS AND BEST-PRACTICES FOR RECRUITING AND RETAINING DIVERSITY

The discourse in the *Fisher II* oral argument was limited to the attention being brought to structural racism within the Texas K-12 school system.²⁰² UTA attorney Garre argued that without the use of race as an additional factor, the Top Ten Percent Plan did not yield a sufficient number of Blacks or Hispanics for classroom diversity.²⁰³ Colorblindness was evident in Chief Justice Roberts' assertion that the Supreme Court has given the University "the extraordinary power to consider race in making important decisions . . . and so it was important in *Grutter* to say, look, this can't go on forever, 25

196. See Delwiche, *supra* note 192.

197. *Id.*

198. See Complaint, *supra* note 193, at 8.

199. *Id.* at 9.

200. *Project on Fair Representation Announces Lawsuits Challenging Admissions Policies at Harvard University & University of North Carolina-Chapel Hill*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org> (last visited Apr. 26, 2017).

201. The cases are moving through the district and circuit courts, but no ruling impacting affirmative action in higher education have been made.

202. Transcript of Oral Argument, *supra* note 129.

203. *Id.*

years. And when do you think your program will be done?"²⁰⁴ Here Chief Justice Roberts appears to have dismissed the University's assertion that race still matters, instead focusing on a deadline for ending measures that have been implemented to address centuries of subjugation, which minimizes the reality of racism not only in our society, but also in higher education practices.

Institutions of higher education should take note of the Supreme Court's *Fisher II* ruling in which review of admissions policies and criteria are expected to happen periodically.²⁰⁵ If there is a holistic review utilized, the factors considered should be transparent to potential students via websites, printed materials, and during on-campus recruiting events.²⁰⁶ Specifically, individual applicant review should consist of evaluating contributions in the form of various backgrounds and characteristics that align with an institution's goals for inclusion.²⁰⁷ Additionally in 2011, the Department of Justice, in conjunction with the Department of Education, released a report, *Guidance on the Voluntary use of Race to Achieve Diversity in Postsecondary Education*, summarizing the Supreme Court's *Grutter/Gratz* decisions and providing examples for admissions practices that would be legal.²⁰⁸ One of the recommendations included a top percentile program similar to the one challenged in *Fisher I*, as well as using non-race factors such as socioeconomic and/or first generation status to potentially draw students from different racial and ethnic backgrounds.²⁰⁹ Programs like the Top Ten Percent Plan are constitutional based on the *Fisher II* decision. However, institutions of higher education that target students using race-neutral factors should maintain data on the ways in which their use of race continues to align with the Supreme Court's analysis of the Texas plan, otherwise the potential for lawsuits alleging reverse discrimination may be imminent.

204. *Id.* at 50.

205. David H. K. Nguyen & LaWanda Ward, *Mutiny Over Strict Scrutiny? Interpreting the Judicial Approach to Race-Conscious Higher Education Admissions Policies*, 331 ED. LAW REP. 1, 17 (2016).

206. *Id.*

207. EDUCATION COUNSEL, LLC AND COLLEGE BOARD, THE FIFTH CIRCUIT COURT OF APPEAL'S SECOND RULING IN FISHER V. UNIVERSITY OF TEXAS: THE DECISION AND ITS IMPLICATIONS (2014), <https://professionals.collegeboard.org/sites/default/files/adc-summary-and-analysis-of-5th-circuits-june-2014-decision-in-fisher-v.pdf>.

208. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION, <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html> (last modified Oct. 28, 2015).

209. *Id.*

VIII. CONCLUSION

With the prevalence of a “post-racial society” ideology being dominant in our culture and the Supreme Court’s jurisprudence, scholars and other stakeholders inside and outside the academy should work towards “demonstrat[ing] the harmful effects of racially isolated learning environments for minorities and society at-large.”²¹⁰ Grassroots organizations that can politically influence local, state, and national lawmakers to defeat and repeal legislation designed to re-segregate education at all levels is critical in light of the recent movement of using the ballot initiatives to further a colorblind agenda.

210. Laura McNeal, *Schuetz v. Coalition to Defend Affirmative Action: The Majority’s Tyranny Toward Unequal Educational Opportunity*, 59 ST. LOUIS UNIV. L. REV. 385, 407 (2015).