

GOOD FAITH AND NARROW TAILORING IN *FISHER V. UNIVERSITY OF TEXAS*

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In *Grutter v. Bollinger*,¹ the Supreme Court held that all racial classifications, including those used in the University of Michigan Law School's admissions processes, are subject to strict scrutiny.² Accordingly, "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."³ The *Grutter* Court also held that broad-based diversity, one aspect of which is racial diversity, is a compelling interest that a university may seek.⁴ Thus, the Court found that the law school's admissions program was narrowly tailored to further that compelling interest.⁵

In *Fisher v. University of Texas*, a case currently pending at the Supreme Court, the petitioner is challenging the admissions system utilized by the University of Texas since 1997.⁶ She is not asking the Court to overrule *Grutter*,⁷ and she agrees that strict scrutiny is the appropriate standard of review.⁸ Nor does she contest—at least in the abstract—that broad-based diversity is a compelling interest that the university may pursue.⁹ This essay, therefore, assumes that the *Fisher* Court will continue to deem

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

2. *Id.* at 326-27.

3. *Id.* at 326.

4. *Id.* at 325.

5. *Id.* at 333-41.

6. Brief for Petitioner at 3, *Fisher v. Univ. of Texas*, No. 11-345 (S. Ct. argued Oct. 10, 2012).

7. *Id.* at 56; Oral Argument at 8:17-19, *Fisher v. Univ. of Texas*, No. 11-345 (S. Ct. argued Oct. 10, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.

8. Brief for Petitioner, *supra* note 6, at 24.

9. Instead, *Fisher* argues that the University of Texas is pursuing other objectives that the Court has not approved. *See id.* at 19.

broad-based diversity, one element of which is racial diversity, a compelling interest. It focuses instead on how the *Fisher* Court might conduct the narrow tailoring analysis given the operation and effect of the University of Texas's admissions program.

Let me begin with a brief reminder of how the various justices in *Grutter* approached narrow tailoring. The *Grutter* majority, written by Justice O'Connor, said that for a program to be narrowly tailored, it "must be specifically and narrowly framed to accomplish [the state's compelling] purpose."¹⁰ The Court identified three principal factors in its narrow tailoring inquiry: First, whether the admissions plan engaged in "highly individualized, holistic review" or instead pursued a racial quota.¹¹ Second, whether the law school had demonstrated "serious, good faith consideration of workable race-neutral alternatives."¹² And, third, whether the admissions program "unduly harm[ed] members of any racial group."¹³

Two of the dissents in *Grutter*—those of then-Chief Justice Rehnquist and Justice Kennedy—criticized the Court's narrow tailoring analysis on two main factual grounds. First, they argued that the "good faith consideration" standard was inconsistent with strict scrutiny.¹⁴ While courts might properly defer to a university's definition of its educational objective, courts should not defer to the methods by which the university seeks to implement its goal.¹⁵ Second, they argued that, in

10. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

11. *Id.* at 334-38.

12. *Id.* at 339.

13. *Id.* at 341.

14. As Chief Justice Rehnquist stated:

Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in good faith because [m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. We likewise rejected calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that constitutional limitations protecting individual rights may not be disregarded.

Id. at 379-80 (Rehnquist, C.J., dissenting) (internal citations omitted).

15. *Id.* at 388 (Kennedy, J., dissenting):

(The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.)

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operation, Michigan's program had mutated into a quota system in which race was, in fact, outcome determinative.¹⁶

Despite his criticism of Michigan's admissions program, Justice Kennedy expressed confidence that some diversity-focused admissions programs could in fact survive strict scrutiny.¹⁷ Indeed, he provided a helpful guide for creating a system that would survive strict scrutiny, at least in his view. He said that such a system must safeguard individual assessment through the entire process and use race as one modest factor among many others.¹⁸ A constitutional system would not produce statistical correlations that suggest fixed quotas, and admissions officers would not track the racial composition of the incoming class on a regular basis.¹⁹

Now, ten years later, we have *Fisher*—a case that in many ways puts Justice Kennedy's optimism to the test. The University of Texas, by at least most accounts, has operated in good faith and has created essentially the system Justice Kennedy described in his *Grutter* dissent.²⁰ Yet, it is under heavy fire.

Three general questions arise: First, when performing a narrow tailoring inquiry, should the Court give any deference to the university with respect to the university's choice of means by which it seeks to diversify its class? Second, how should the relatively modest impact of the university's racial preference impact the Court's assessment of narrow tailoring? Third, what is the constitutional relevance of Texas's Top Ten Percent Program? That program, under which the university admits the top ten percent of each Texas public high school's graduating class, has substantially increased the population of

16. *Grutter v. Bollinger*, 539 U.S. 306, 386 (2003) (Rehnquist, C.J., dissenting): ([T]he Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional.")

See id. at 390 (Kennedy, J., dissenting) ("[T]he Law School's pursuit of critical mass mutated into the equivalent of a quota.")

17. *See id.* at 392-93.

18. *See id.* (describing a system "where individual assessment is safeguarded through the entire process" and where "race does not become a predominant factor").

19. *See id.* at 391.

20. *See* Brief for Respondents at 7, *Fisher v. Univ. of Texas*, No. 11-345 (S. Ct. argued Oct. 10, 2012). *See also infra* text accompanying notes 37-39.

underrepresented minorities at the university.²¹ Does the relative success of the program make it a workable race-neutral alternative that constitutionally precludes the school from adding additional race-conscious diversity-seeking measures?

HOW DOES DEFERENCE RELATE TO NARROW TAILORING

The first, and most fundamental, question is whether it is possible to reconcile *Grutter's* use of deference with strict scrutiny generally, and narrow tailoring, specifically. After *Grutter*, the concern was that lower courts would take the majority's search for "good faith consideration of workable race-neutral alternatives" as license to apply a more lenient standard of review to diversity-focused admissions programs.²² The Fifth Circuit's opinion in *Fisher* gives credence to those concerns:²³ The Fifth Circuit stated that it would give a "degree of deference" to "the university's good faith determination that certain race-conscious measures are necessary."²⁴ Moreover, the court stated that it would "scrutinize the University's decisionmaking process" rather than the "merits of [its] decision," "to ensure that [the university's] decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires."²⁵ And the court accorded the university a rebuttable presumption that it had indeed operated in good faith.²⁶

As one might expect under a traditional narrow tailoring inquiry, the Fifth Circuit did in fact examine the operational details of the University's admissions process, and consider the

21. See Brief for Petitioner, *supra* note 6, at 5, 10 (noting that the percentage of enrolled underrepresented minorities rose from 16.2% in 1998 to 21.4% in 2004).

22. See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 757-58 (2007) (reasserting in response to the dissent and concurrences from Court of Appeals decisions that "strict scrutiny applies to every racial classification" (emphasis in original)); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970-71 (2004) (discussing the Court's distortion and weakening of the strict scrutiny standard); Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 511 (2004) (expressing confusion regarding the Court's dilution of the strict scrutiny standard).

23. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 249-51 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012) (Garza, J., specially concurring) (criticizing the *Grutter* majority for failing to apply true strict scrutiny).

24. *Id.* at 233 (majority opinion).

25. *Id.* at 231 (emphasis added).

26. *Id.* at 231-32.

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merits of the argument that Texas's Top Ten Percent law presented a workable race-neutral alternative.²⁷ However, the manner in which it described its task—a deferential, process-oriented review that inverts strict scrutiny's traditional burden of proof—is highly unlikely to find defenders at the Court. The Court has consistently invoked strict scrutiny in evaluating racial classifications,²⁸ and has made clear that, under strict scrutiny, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”²⁹ While *Grutter* did presume the good faith of a university in defining its institutional mission for purposes of finding a compelling state interest,³⁰ the Court has never indicated that the narrow tailoring inquiry should utilize deference or focus on anything other than the operational details of the race-based classification at issue. Indeed, the university does not really defend the Fifth Circuit's articulation in its briefing.³¹ And, while the Fifth Circuit's formulation did not receive specific attention at the oral argument, several justices made it clear that they anticipated active judicial supervision of both the ends and means of affirmative action programs.³² Thus, even if the Court maintains that universities are entitled to deference with respect to their diversity objectives,³³ I anticipate that the Court will take this opportunity to clarify that the university bears the entire burden of justifying a race-based classification, and that the Court will actively and skeptically review not just the university's good faith, but also the operational details of the affirmative action program as well as the efficacy of alternative race-neutral

27. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 226-30 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (examining the holistic operation of admissions); *id.* at 234-35 (rejecting the claim that the university is utilizing a racial quota). See also *id.* at 238-42 (analyzing the effect of the Top Ten Percent law).

28. See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (stating that “all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny”).

29. *Id.* at 505.

30. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

31. Brief for Respondents, *supra* note 20, at 47-50.

32. See, e.g., Oral Argument, *supra* note 7, at 44:10 (questioning by Chief Justice Roberts regarding how to quantify the “critical mass”).

33. See, e.g., Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461 (2005) (arguing that universities are First Amendment institutions that deserve deference with respect to their institutional goals).

approaches.

NARROW TAILORING AND THE LIMITED EFFECT OF TEXAS'S RACIAL PREFERENCE

The next question is how the Court will perform the narrow tailoring inquiry with respect to the merits of this case. Texas appears to have fashioned a system that tracks, and even improves upon, the Michigan plan approved in *Grutter*,³⁴ the Harvard plan cited favorably by Justice Powell in *Bakke*,³⁵ and even the hypothetical system described by Justice Kennedy in his *Grutter* dissent.³⁶ Texas's plan does not work toward a numeric target.³⁷ It gives individualized consideration to each applicant. Race is not a predominant factor, but rather—as the university puts it—is a “factor of a factor of a factor of a factor” in the admissions process.³⁸ And the racial composition of the class is not monitored during the admissions process.³⁹ Thus, insofar as the narrow tailoring inquiry focuses on the operational details of the university's plan, the plan is narrowly tailored in a manner that the Court has previously described. Thus, the Court should not take issue with these aspects of the university's admissions scheme.

Given that the operation of the system tracks what the Court has approved in the past, the narrow tailoring inquiry focuses on two other issues: First, is the program *too* narrowly tailored? In other words, is its use of race so limited in scope and efficacy that it is constitutionally superfluous? Second, is the program necessary to achieve diversity, or is Texas's Top Ten Percent law a race-neutral alternative that adequately advances the university's interest in diversity?

34. *Grutter v. Bollinger*, 539 U.S. 306, 334-38 (2003) (approving plan that does not operate as a quota, but instead uses race as a “plus’ factor in the context of individualized consideration of each and every applicant”).

35. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 316-18 (1978) (opinion of Powell, J.) (endorsing plan in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant's file, [and yet] does not insulate the individual from comparison with all other candidates for the available seats”).

36. *Grutter*, 539 U.S. at 390-93 (critiquing program where the statistics “raise[d] an inference that the Law School subverted individual determination” and instead pursued a quota, and where “admissions officers consulted the daily reports which indicated the composition of the incoming class along racial lines”).

37. Brief for Respondents, *supra* note 20, at 1-2.

38. *Id.* at 13.

39. *Id.* at 2.

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For the six-year period in which the Top Ten Percent law was in operation with no additional race-conscious measures (1998-2004), the percentage of underrepresented minorities⁴⁰ enrolled in the incoming freshman class rose from 16.2% to 21.4%.⁴¹ For the three years during which racial preferences were added into the system (2005-2008⁴²), the percentage of these enrolled minorities rose to 25.5%—a 4.1% increase.⁴³ In 2008, when Abigail Fisher applied, “full file review,”—*i.e.*, the race-conscious portion of the admissions program—resulted in a sizable number of minority admits (35% of total underrepresented minorities admitted).⁴⁴ However, the yield for the enrolled class was far smaller, with 3.4% of the entire in-state enrolled class (216 of 6322) constituting underrepresented minorities admitted through full-file review.⁴⁵ Moreover, it is likely that many of those 216 would have been admitted even without consideration of race. While the parties dispute the numbers of enrolled students for whom race would have been dispositive,⁴⁶ Fisher calculates that race was dispositive for only 33 enrolled students, or .5% of the class.⁴⁷

Fisher argues that a racial classification that produces such a small yield of enrolled students cannot be viewed as making a “constitutionally meaningful impact on student body diversity.”⁴⁸ She cites *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴⁹ which stated that “the minimal impact” the racial classification used in that case had on school enrollment “casts doubt on the necessity of using racial

40. As used in *Fisher*, this term includes African Americans and Hispanics. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 224 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

41. See Brief for Petitioner, *supra* note 6, at 10 (noting the percentage of underrepresented minorities in 1998); *id.* at 5 (noting the percentage of underrepresented minorities in 2004).

42. Abigail Fisher applied to the University of Texas in 2008. See *Fisher*, 631 F.3d at 217.

43. See Brief for Petitioner, *supra* note 6, at 10.

44. See Brief for Respondents, *supra* note 20, at 38.

45. See *id.* at 9.

46. Compare Brief for Petitioner, *supra* note 6, at 38-39, with Brief for Respondents, *supra* note 20, at 14.

47. See Brief for Petitioner, *supra* note 6, at 11.

48. *Id.* at 39.

49. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

classifications.”⁵⁰ It is not clear, though, that this concern applies equally here. In this case, it is difficult to assess the real impact of the racial classification because the statistics regarding the effect of the university’s program are malleable and in dispute. While Fisher asserts that race was dispositive for 33 enrolled students,⁵¹ the university claims that the focus should be on admitted students, and that full-file review accounted for 20% of all African-American admits and 15% of all Hispanic admits.⁵²

Moreover, the factual context in which the Court articulated its concern in *Parents Involved* was quite different than the facts in *Fisher*. In *Parents Involved*, the school districts used a binary definition of race (*i.e.*, white/non-white) as a determining factor for school assignments—an “extreme approach” that concerned the Court.⁵³ Here, the university uses race in a more nuanced way in its admissions formula and, indeed, in a manner that the Court itself has approved in the past. The Court has repeatedly stated that the hallmark of a constitutional university affirmative action admissions program is one in which race plays only a modest and nuanced role.⁵⁴ Thus, even if Fisher’s calculations are correct, to deem the university’s admissions program too narrowly tailored would essentially be to condemn it for following the Court’s prior guidance. At oral argument, Justice Kennedy was very skeptical, understandably so, about this line of argument.⁵⁵

IS TEXAS’S TOP TEN PERCENT LAW AN EFFECTIVE RACE-NEUTRAL ALTERNATIVE?

Thus, the narrow tailoring analysis in *Fisher* is likely to focus on Fisher’s argument that the university has alternative, effective race-neutral means available to it in its quest for racial diversity. Fisher points to two alternatives, both of which focus

50. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007).

51. See Brief for Petitioner, *supra* note 6, at 10.

52. See Brief for Respondents, *supra* note 20, at 38.

53. *Parents Involved*, 551 U.S. at 704, 735.

54. See *Gutter v. Bollinger*, 539 U.S. 306, 337, 339 (2003) (finding that Michigan Law School’s program was “individualized,” “holistic,” and “nuanced”). See also *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment) (advocating “nuanced, individual evaluation of . . . student characteristics”).

55. See Oral Argument, *supra* note 7.

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on Texas's Top Ten Percent law.⁵⁶ First, she points out that almost half the minorities currently admitted to the university through the Top Ten Percent program do not enroll at the university.⁵⁷ Thus, she suggests that better recruiting of those admitted minority students would yield a meaningful increase in minority enrollment even without resort to race-conscious measures.⁵⁸ While this is an appealing argument in the abstract, and one that points to the sort of race-conscious measures Justice Kennedy has cited approvingly in the past,⁵⁹ it is not clear that such an effort will be effective at the University of Texas. In its *Fisher* brief, the university noted that it has gone “deep into the playbook for race-neutral alternatives” relating to recruiting and scholarships, but “levels of underrepresented minorities at UT remained stagnant, at best,” in the absence of race-conscious admissions policies.⁶⁰

Second, Fisher's most serious and fundamental challenge on the narrow tailoring prong is that the Top Ten Percent law itself is a sufficient alternative to a race-conscious admissions program. She argues that the 4.1% increase in minority enrollment obtained through “full file review” is not a sufficiently meaningful benefit to justify the costs imposed by the consideration of race. In other words, Fisher is arguing—at least on the facts here—that the 21.4% minority enrollment achieved through the Top Ten Percent program is constitutionally sufficient to preclude future race-conscious action by the university.⁶¹

This argument could find some purchase at the Court. While the university points to *Grutter* and claims that it seeks an unspecified “critical mass” of underrepresented minorities in its enrolled class,⁶² some members of the Court were very concerned about the indeterminacy of the university's diversity target. Chief Justice Roberts, for example, stated that he could not assess whether the university's admissions program was narrowly tailored until the university quantified its diversity

56. See Brief for Petitioner, *supra* note 6, at 4 (describing Top Ten Percent Law).

57. See *id.* at 42 n.10.

58. See *id.*

59. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

60. Brief for Respondents, *supra* note 20, at 35.

61. See Brief for Petitioner, *supra* note 6, at 35.

62. See Brief for Respondents, *supra* note 20, at 40-41; see also *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

goal.⁶³ Fisher's claim that 21.4% minority enrollment is sufficient—at least at the University of Texas—might give interested members of the Court a vehicle to clarify and quantify acceptable racial diversity goals.

This argument is problematic on a number of fronts. First, any desire to concretize the concept of critical mass is in tension with the Court's previous insistence that universities may not pursue numerical quotas or targets.⁶⁴ Moreover, in *Grutter*, the majority specifically rejected the argument that percentage plans are a constitutionally required race-neutral alternative to affirmative action programs. Such programs, *Grutter* stated, "preclude the university from conducting the individualized assessments necessary to assemble a student body that is . . . diverse along all the qualities valued by the university."⁶⁵ Further, it is not clear that the Court could ever endorse a set numerical target that would be automatically transferrable to other public universities. A 21.4% constitutional maximum in Texas may well not be the right target for other state schools that are confronting different histories, admissions trends, and state demographics.

If the Court were to embrace Fisher's argument on this point, it would have somewhat counterintuitive consequences. Texas's Top Ten Percent law has been relatively successful in creating racial diversity because Texas's public high schools are severely segregated by race.⁶⁶ In a state where public high schools have higher levels of racial integration, one can imagine a Top Ten Percent law yielding fewer minority admits, particularly if there is a race-based achievement gap among high school students.⁶⁷ If the Court were to adopt Fisher's proposal, in states where Top Ten Percent plans would not yield adequate racial diversity, race-conscious diversity programs would remain constitutionally permissible. This would result in the peculiar situation where states with greater secondary school integration would have a broad array of constitutional tools available to

63. Oral Argument, *supra* note 7, at 37:54.

64. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

65. *Id.* at 340.

66. Brief for Respondents, *supra* note 20, at 8.

67. *See, e.g.*, Provisional Data File: SY2010-11 Four-Year Regulatory Adjusted Cohort Graduation Rates, U.S. DEPT OF EDUC., *available at* <http://www2.ed.gov/documents/press-releases/state-2010-11-graduation-rate-data.pdf> (providing state-by-state high school graduation rates, broken down by race).

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pursue university-level integration while states with greater segregation will have correspondingly fewer options and, indeed, will be constitutionally barred from pursuing integration through race-conscious action.

CONCLUSION

Ultimately, I anticipate that the Court will use *Fisher* to clarify the level of scrutiny it will apply to university admissions programs. I also expect that it will provide additional guidance on how the narrow tailoring inquiry should proceed in cases dealing with university admissions programs. Whereas the *Grutter* Court focused its narrow tailoring inquiry primarily on the operational details of the plan,⁶⁸ the *Fisher* Court may focus on the availability of a race-neutral approach—namely, Texas’s Top Ten Percent law. How the *Fisher* Court deals with that issue will surely have major implications for state universities and state legislatures in years to come.

68. *See Grutter v. Bollinger*, 539 U.S. 306, 333-39 (2003).