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Fisher v. University of Texas at Austin: Navigating the Narrows Between Grutter and Parents Involved

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*FISHER V. UNIVERSITY OF TEXAS AT AUSTIN:
NAVIGATING THE NARROWS BETWEEN GRUTTER
AND PARENTS INVOLVED*

Kimberly A. Pacelli

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FISHER V. UNIVERSITY OF TEXAS AT AUSTIN:
 NAVIGATING THE NARROWS BETWEEN
 GRUTTER AND PARENTS INVOLVED

Kimberly A. Pacelli*

I. INTRODUCTION

Universities' use of race as a factor in their admissions decisions has been a divisive issue both in the legal system and in political discourse. Opponents of affirmative action have challenged racial preferences in public university admissions under the Equal Protection Clause of the Fourteenth Amendment. Individuals who find themselves denied a coveted seat in a university class and suspect that racial preferences are to blame will often challenge their rejection as a denial of their state's "equal protection of the laws."¹ The United States Court of Appeals for the Fifth Circuit recently considered whether the University of Texas at Austin's use of race as a factor in its admissions system denied two white applicants, who were refused admission to the university, equal protection under the Fourteenth Amendment.² *Fisher* is only the latest chapter in a long and complex history of jurisprudence regarding the use of race in college admissions.

Although this full and rich history has received generous and thorough treatment from hundreds of scholars, this Note will consider only the two most recent cases regarding race-conscious admissions: *Grutter v. Bollinger*³ and *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*.⁴ Whereas *Grutter* permitted race-consciousness within certain generous parameters, many scholars have expressed concern that *Parents Involved*, which restricted racial preferences by public secondary charter schools, may signal that the current Supreme Court has grown increasingly reluctant to continue its typical deference to affirmative action efforts in higher education. Social scientist Patricia Gurin, who provided expert testimony in the *Grutter* case, highlights the tension between educators and the legal system:

Educators in American higher education have long argued that affirmative action policies are essential to ensure a diverse student body, that such diversity is crucial to creating the best possible educational environment, and that the educational benefits of racial and ethnic diversity on campus are not limited to any one group of students.⁵

William G. Bowen and Derek Bok, in their extensive longitudinal study of

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1. U.S. CONST. amend. XIV, § 1, cl. 4.

2. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011); *see also Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

3. 539 U.S. 306 (2003).

4. 551 U.S. 701 (2007).

5. PATRICIA GURIN, ET AL., *DEFENDING DIVERSITY* 100 (2004).

race in college admissions, describe specifically how this educational goal plays out in the admissions process. They identify four main goals that admissions officers have in deciding among applicants, including a desire to “assemble a class of students with a wide diversity of backgrounds” in order to provide students with a richer classroom experience than that provided by the curriculum alone.⁶ Educators argue, therefore, that using affirmative action in college admissions allows them to admit as diverse a class as possible in order to improve educational outcomes for all students.

Fisher v. University of Texas at Austin provides the first opportunity since *Parents Involved* to explore what that case might mean for university admissions. *Fisher* presents a novel question regarding affirmative action-based Equal Protection challenges because the University’s acknowledged use of race for *some* applicants in its admissions system operates alongside the legislatively-mandated race-neutral Top Ten Percentage Plan, which guarantees admission to all graduates of Texas public high schools finishing near the top of their class, effectively boosting enrollment of students of color without explicit use of racial preferences. *Fisher* presents for the first time the question of whether the success of a race-neutral alternative for admitting some students of color demands that a university abandon the use of race as a factor in the admission of other students. It also provides a first opportunity to test the hypothesis that *Parents Involved* signaled the Court’s unwillingness to continue its deference to higher education administrators in their pursuit to achieve campus diversity through racial preferences.

This Note will focus on the second prong of typical strict judicial scrutiny of racial classifications.⁷ The Supreme Court has held that, “racial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”⁸ This Note will focus on the second prong of this test: whether the University of Texas at Austin’s use of race is narrowly tailored enough to pass constitutional muster.⁹ In Part II, this Note will discuss the evolving jurisprudence before *Fisher*, focusing primarily on *Grutter* and *Parents Involved*. In Part III, this Note will contemplate the implications of *Parents Involved* for the future of race-conscious college admissions. In Part IV, this Note will examine specifically the *Fisher* decision and appeal. Finally, in Part V, this Note will analyze the underlying opinions issued by the District Court and the Fifth Circuit.¹⁰

6. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 23-24 (1998).

7. In *City of Richmond v. J.A. Croson Co.*, the Supreme Court held that the standard of review when racial classifications are challenged under the equal protection clause is the highest level of review, commonly coined “strict scrutiny.” 488 U.S. 469, 493-94 (1989) (O’Connor, J.).

8. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring)). The Court subsequently rearticulated the rule in the admissions context: the university must prove that its “use of race in its current admissions program employs ‘narrowly tailored measures that further compelling governmental interests.’” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand*, 515 U.S. at 227).

9. The first prong of the strict scrutiny analysis, whether the goal of racial diversity within the University is a “compelling government interest” is treated extensively in both *Fisher* as well as in other cases, but lies outside the scope of this Note. See *Fisher*, 645 F. Supp. 2d at 601-09.

10. The Fifth Circuit’s decision was rendered immediately before this Note was published. Therefore, although this Note endeavors to integrate some analysis of the Fifth Circuit’s opinion, more extensive analysis is needed to fully gauge its impact on *Grutter*.

Finally, this Note concludes that both courts have protected racial preferences in college admissions by predominantly resting their analyses on *Grutter* rather than *Parents Involved*.

II. THE ROAD TO *FISHER*

Fisher v. University of Texas at Austin is only the most recent legal challenge of the use of race in the context of admissions to educational institutions.¹¹ In fact, the Supreme Court's first consideration of racial preferences to aid persons of color, rather than disadvantage them, occurred in the context of preferential admissions treatment.¹² Placing *Fisher* in historical context requires a review of four significant cases: *Regents of the University of California v. Bakke*,¹³ *Hopwood v. Texas*,¹⁴ *Grutter v. Bollinger*, and *Parents Involved in Community Schools v. Seattle School District No. 1*. All four cases contemplate the use of racial classifications in school admissions decisions and create the legal ambiguity surrounding narrow tailoring that the plaintiffs seek to leverage in *Fisher*.

A. *Bakke and Hopwood: Texas Becomes Ground Zero*

The United States Supreme Court first evaluated whether the use of race by colleges violated the Equal Protection Clause of the Fourteenth Amendment when it decided *Regents of the University of California v. Bakke* in 1978. In *Bakke*, the Court considered whether a public medical school violated the Equal Protection Clause when it set aside a certain number of seats for students from specified minority groups.¹⁵ The Court first determined that because racial and ethnic distinctions are inherently suspect, the Court must apply "the most exacting judicial examination."¹⁶ Applying strict scrutiny,¹⁷ the Court held that a university's stated goal of achieving a diverse student body could be a compelling government interest,¹⁸ but that the use of racial quotas was not narrowly tailored to satisfy strict

11. The jurisprudence regarding race in higher education is extensive and complicated and has received extensive descriptive and analytical treatment by hundreds of authors. See, e.g., Charles J. Russo & William E. Thro, *Higher Education Implications of Parents Involved in Community Schools*, 35 J.C. & U.L. 239 (2009).

12. Hannah L. Weiner, *The Subordinated Meaning of "Color-Blind": How John Marshall Harlan's Words Have Been Erroneously Commandeered*, 11 J.L. & SOC. CHALLENGES 45, 67 (2009).

13. 438 U.S. 265 (1978).

14. 78 F.3d 932 (5th Cir. 1996). *Hopwood* is a Court of Appeals opinion, but its significance both to the national landscape of college admissions as well as to the University of Austin merits its inclusion alongside Supreme Court cases.

15. *Bakke*, 438 U.S. at 269-70 (Powell, J.).

16. *Id.* at 291.

17. *Id.*

18. *Id.* at 311-12. The *Bakke* opinion was authored by Justice Powell; however, there was extensive disagreement on the Court at the time about the interaction between the Equal Protection Clause and the Civil Rights Act. Therefore, the structure of the *Bakke* opinion raises a question of whether it is binding precedent on the issue of whether student diversity could be a compelling government interest. In fact, the Fifth Circuit took this view in *Hopwood*. See generally Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001).

scrutiny.¹⁹ Furthermore, *Bakke* provided guidance as to how universities may properly consider race in admissions decisions, noting that the use of race as a “plus” factor in evaluating a student’s application could be appropriate.²⁰ The Court envisioned admissions programs that treated “each applicant as an individual in the admissions process” and that looks to all of the qualities of all individuals and weighs them, rather than looking at race in any mechanized way.²¹

Nearly two decades later, the University of Texas at Austin’s admissions system became the subject of the next major case regarding use of race in college admissions. In 1996, the Fifth Circuit held in *Hopwood v. Texas* that the University of Texas at Austin’s use of race as a “plus” factor gave minority applicants a “significant” racial preference and thus violated the Equal Protection Clause.²² The Fifth Circuit found that *Bakke* was not binding precedent,²³ reasoning that the diversity goals of the university were not a compelling enough government interest to survive strict scrutiny.²⁴ In response, only one year after *Hopwood*, the Texas legislature reasserted its commitment to improving racial diversity at its flagship university by enacting the “Top Ten Percent Plan,” which guarantees automatic admission for graduating high school seniors in the top ten percent of every public high school in Texas.²⁵ The Top Ten Percent Plan is still in place in Texas and is a crucial element in the *Fisher* case.²⁶

B. The Supreme Court Reaffirms Affirmative Action in Grutter

Although *Hopwood* was a Fifth Circuit decision, its holding surely confused the national landscape for the use of race as a factor in college admissions until the Supreme Court again considered the use of race in college admissions in 2003.²⁷ In response, the Court’s landmark decision in *Grutter v. Bollinger* reestablished that public universities may consider race as a factor in admissions decisions.²⁸

19. *Bakke*, 438 U.S. at 319-20 (Powell, J.).

20. *Id.* at 317.

21. *Id.* at 318.

22. 78 F.3d at 934-35.

23. *Id.* at 941-46.

24. *Id.* at 948 (O’Connor, J., concurring).

25. TEX. EDUC. CODE ANN. § 51.803 (West 2009). For a general discussion of the legislative history and motivation for passing the Top Ten Percent Plan, see Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 293-96 (2001).

26. Also, it is important to note that some scholars have questioned whether percentage plans, such as the one adopted in Texas, would even pass constitutional muster as being race-neutral because they are often adopted with racial goals in mind. See, e.g., R. Richard Banks, *Race-Conscious Affirmative Action and Race-Neutral Policies in the Aftermath of the Michigan Cases*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION: LEGAL VICTORIES, CONTINUING ATTACKS, AND NEW RESEARCH 35-56 (Gary Orfield, et al. eds., 2007), available at <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/charting-the-future-of-college-affirmative-action-legal-victories-continuing-attacks-and-new-research/orfield-charting-the-future-affirmative-action.pdf> (last visited Feb. 14, 2011); Fitzpatrick, *supra* note 25.

27. For a full treatment of the case law path from *Bakke* to *Grutter*, see John C. Jeffries, Jr., *Bakke Revisited*, 55 SUP. CT. REV. 1 (2003).

28. 539 U.S. 306 (2003). *Grutter* is discussed frequently alongside its companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), which was announced on the same day. In *Gratz*, the Court held that

Overturning *Hopwood*, the Supreme Court held that the University of Michigan Law School's use of race did not violate the Equal Protection Clause and survived strict scrutiny.²⁹ First, the Court held that the law school had a compelling government interest in ensuring racial diversity within its student body.³⁰ Second, the Court held that the law school's use of race was narrowly tailored to satisfy strict scrutiny.³¹

The law school's admissions system included many factors that helped to satisfy the narrow tailoring prong. First, the Court was satisfied that the law school was not using race as a quota,³² but rather as a tool for achieving a "critical mass" of students of color, a permissible goal.³³ Next, the Court put great value on the law school's articulated process for making admissions decisions, which included a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."³⁴ In other words, race was only one factor, and it was not dispositive.

The Court also found that the law school had satisfactorily considered race-neutral alternatives.³⁵ The Court disagreed with the petitioner's argument that the law school could only use race as a last resort, holding that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."³⁶ Instead, the Court articulated an expectation of "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity that the university seeks."³⁷ This standard, which arguably granted much deference to the law school in how to achieve its diversity goals, would become an important point of contention in future cases, including *Fisher*. Notably, the *Grutter* opinion ended with the hope that within twenty-five years, the use of a race-based factor in admissions systems would no longer be necessary to further a university's interest in campus diversity.³⁸

In order to properly understand the context of *Fisher*, a brief discussion of Justice Kennedy's dissent in *Grutter* is helpful because it foreshadowed issues that

the University of Michigan's use of race as a factor in its undergraduate admissions system did not satisfy strict scrutiny because the use of race was too mechanical and inflexible to satisfy the narrow tailoring prong of strict scrutiny. 539 U.S. at 251. Under the system, all students who were identified as a part of a minority group were given a twenty-point bonus out of the 100 points needed to guarantee admission. *Id.* at 255, 270.

29. See generally Ann Mallatt Killenbeck, Bakke, *With Teeth?: The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1 (2009) (arguing that *Grutter* went farther than *Bakke* by placing stricter obligations on universities).

30. *Grutter*, 539 U.S. at 329. The Court was highly deferential to the University's determination of what constitutes an educational benefit afforded by a racially diverse campus, and based its reasoning primarily on First Amendment academic freedom rights.

31. *Id.* at 334-40.

32. *Id.* at 335.

33. *Id.* at 335-36.

34. *Id.* at 337.

35. *Id.* at 339.

36. *Id.*

37. *Id.*

38. *Id.* at 343.

later arose in both *Parents Involved* and *Fisher*.³⁹ Although Justice Kennedy endorsed diversity as a compelling government interest in *Grutter*,⁴⁰ he insisted that the Court's extreme deference to the law school as to the proper means to achieve diversity abandoned strict scrutiny and did not satisfy the narrow tailoring prong.⁴¹ Justice Kennedy argued that "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."⁴² Justice Kennedy also questioned the meaningfulness of the difference between the quotas struck down in *Bakke* and the law school's methods of achieving a "critical mass," expressing suspicion about the genuineness of the law school's assurances that it was not really just implementing quotas under another name.⁴³

C. *Parents Involved* Changes the Landscape Again

Although *Grutter* is the most recent Supreme Court case to consider racial preferences in higher education, the Court recently revisited similar questions in the context of public secondary schools. In *Parents Involved*, the Court considered whether it violated the Equal Protection Clause to use race as a factor in determining student placements in public high schools.⁴⁴ *Parents Involved* represents, in many ways, a contradictory view of the use of race in schooling decisions than the Court's stance in *Grutter* and may signal a change in the Court's view on these types of equal protection challenges.

In *Parents Involved*, the Supreme Court was asked to review the system used by the Seattle School District (the District) to assign students to the city's ten public high schools.⁴⁵ Under the plan, incoming ninth graders could choose which school to attend; however, some schools were more popular than others.⁴⁶ The District used a variety of factors to place students in schools, including race.⁴⁷ The District's plan specified that the racial composition of each school must fall within ten percentage points of the District's overall racial balance.⁴⁸ Because the use of racial preferences was not narrowly tailored to achieve the District's stated goals, the Court held that the plan was unconstitutional under the Equal Protection Clause.⁴⁹ The Court reasoned that racial classifications must only be used as a "last

39. *Id.* at 387 (Kennedy, J., dissenting).

40. *Id.* at 387-88.

41. *Id.* at 388.

42. *Id.*

43. *Id.* 391-93.

44. 551 U.S. 701 (2007).

45. *Parents Involved* was a consolidated opinion that also reviewed the use of race by public schools in Louisville, Kentucky. For purposes of simplicity and brevity, only the Seattle facts are discussed in this Note.

46. *Parents Involved*, 551 U.S. at 711.

47. *Id.* at 711-12.

48. *Id.* at 712.

49. *Id.* at 711. The school district argued that its use of race was necessary to ensure, among other things, the "educational and broader socialization benefits [that] flow from a racially diverse learning environment." *Id.* at 725.

resort” to achieve a compelling government interest,⁵⁰ and that the District did not satisfactorily consider race-neutral alternatives in “good faith.”⁵¹

Writing for four members of the Court, Chief Justice Roberts went beyond the narrow tailoring prong to question whether the diversity interest articulated by the District satisfied the “compelling government interest” prong of strict scrutiny.⁵² Justice Kennedy refused to adopt this view, however, and urged in his concurrence that the plurality opinion represented an “all-too-unyielding insistence” that race could never be a factor.⁵³ Justice Kennedy’s agreement with the plurality’s view on narrow tailoring, however, doomed the District’s system and became the important portion of the case for purposes of the challenge brought forward in *Fisher*.

Parents Involved discusses and distinguishes *Grutter* in a number of ways.⁵⁴ On the one hand, the Court determined that *Grutter* was not controlling because higher education is a different context than public secondary school.⁵⁵ The Court further distinguished the District’s plans from the admissions system in *Grutter*, where “the consideration of race was viewed as indispensable in more than tripling minority representation at the law school.”⁵⁶ In *Parents Involved*, on the other hand, the Court found that the minimal impact of the policy on student assignments “casts doubt on the necessity of using racial classifications.”⁵⁷ The Court’s heavy reliance on *Grutter*, largely for purposes of drawing distinctions that helped to invalidate the District’s plan in *Parents Involved*, raises many questions about whether the Court was signaling a retreat from the principles of *Grutter* or whether the Court truly sees affirmative action as a viable program in higher education even though it may be inappropriate in a public secondary school context. Unsurprisingly, *Parents Involved* created many questions about the ongoing viability of *Grutter*.

III. THE ACADEMY RESPONDS: DID *PARENTS INVOLVED* SIGNAL THE END FOR AFFIRMATIVE ACTION IN HIGHER EDUCATION?

In the wake of *Parents Involved*, questions immediately emerged as to whether or not the Supreme Court was poised to begin whittling down the *Grutter* holding to reduce the constitutionally permissible uses of racial preferences in college admissions.⁵⁸ The highly complex and volatile nature of the jurisprudence in this

50. *Id.* at 735 (quoting *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment)).

51. *Parents Involved*, 551 U.S. at 735 (quoting *Grutter*, 539 U.S. at 339).

52. *Id.* at 727.

53. *Id.* at 787-88 (Kennedy, J., concurring).

54. For a full treatment of the factual and analytical distinctions, including several considerations beyond the scope of this Note, see Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 512-20 (2009).

55. *Parents Involved*, 551 U.S. at 722, 724-25. “In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education,” such as expansive academic freedom. *Id.* at 724-25.

56. *Id.* at 734-35.

57. *Id.* at 734.

58. For a general discussion of suggestions that *Parents Involved* signals a first attempt to weaken *Grutter*, see generally Michael P. Pohorylo, Note, *The Role of Parents Involved in the College*

area certainly raises questions about whether the Court is likely to re-examine and reverse its holding in *Grutter*.⁵⁹ A large part of the scholarship in this area focuses on Justice Kennedy's opinions in *Grutter* and *Parents Involved* by suggesting in anticipation that his vote will continue to be crucial in future cases. In order to frame some of the issues raised in *Fisher*, this Part will briefly highlight this scholarship regarding the future of race in higher education admissions after *Parents Involved*, paying particular attention to the narrow tailoring portion of the strict scrutiny analysis.⁶⁰

A. *The Initial Vulnerability of Grutter*

For many of the reasons Justice Kennedy articulates in his dissent in *Grutter*, some commentators have argued that the narrow tailoring prong of *Grutter* was vulnerable even before *Parents Involved*. One common *Grutter* critique argues that the Court was completely—and inappropriately—deferential to the law school's assurances that it had “adequately” considered race-neutral alternatives in devising its admissions system.⁶¹ Justice Kennedy himself described the Court's scrutiny of the law school's assurances that its admissions system did not function as a quota system as “nothing short of perfunctory.”⁶² In Justice Kennedy's view, the law school did not meet its burden to show how its internal monitoring of its “critical mass” of minority students as it proceeded through its admissions process was any different than the quotas prohibited by *Bakke*.⁶³ Scholars often critique this deference to the law school's methodology as conflating the compelling government interest and narrow tailoring analyses, which prior precedent intended to be separate inquiries under strict scrutiny.⁶⁴ More specifically, the dissenters in

Admissions Process, 42 CONN. L. REV. 693 (2009) (referencing several possible ways *Parents Involved* revises the narrow tailoring analysis, some of which are argued by the *Fisher* plaintiffs).

59. It is interesting that there has been significant disagreement within the Court about the analytic framework regarding race-consciousness in admissions. From *Bakke* through *Parents Involved*, there were marked and stark differences among members of the Court on how to deal with race-conscious remedies. Across the nineteen cases that have dealt with race-conscious government remedies (both education cases and otherwise) there have been ninety-two separate opinions. Russo & Thro, *supra* note 11, at 266.

60. The scope of this Note focuses on the narrow tailoring prong of these cases. There is a rich depth of scholarship on the merits of diversity as a compelling government interest in education, which lies outside of the scope of this Note. See, e.g., Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795 (2004). Recall also that Justice Kennedy essentially refused to join the Roberts plurality in *Parents Involved* due to his adherence to the idea that diversity can be a compelling government interest. 551 U.S. at 787-88 (Kennedy, J., concurring in part and concurring in judgment).

61. Douglas M. Raines, *Grutter v. Bollinger's Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, but the University of Michigan Law School's Admissions Plan is Not Narrowly Tailored*, 89 MARQ. L. REV. 845, 868 (2006).

62. *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting).

63. *Id.* at 391-92.

64. Raines, *supra* note 61, at 870. But see Stoner & Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown By Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583 (2004) (arguing that the *Grutter* deference to university administration judgment on admissions methodology conforms closely with high levels of judicial deference generally to university decisions in other areas, such as academic freedom, and student judicial sanctions, for example).

Grutter argue that the Court's deference to the law school's definition of its diversity goals should not necessarily result in deference to "the implementation of this goal."⁶⁵ Some scholars agreed with Justice Kennedy, arguing for more rigorous scrutiny on the narrow tailoring prong.⁶⁶

Although accepting that the use of race meets constitutional scrutiny, a second common *Grutter* critique argues that the Court did not provide sufficiently clear guidance to universities on the appropriate use of race as a factor in their admissions systems.⁶⁷ Whereas *Grutter* clearly and unequivocally held that diversity could be a compelling governmental interest, its holding with respect to the narrow tailoring analysis "left substantial uncertainty" regarding how to evaluate whether a particular admissions method that utilized race would satisfy constitutional scrutiny.⁶⁸ Although many schools simply adopted the law school's method of individualized, holistic review, the Court provided little other guidance to schools whose resources and staffing levels necessitated a different admissions methodology than one that conforms neatly to the *Grutter* model.⁶⁹ Faced with this lack of clarity, some universities are reluctant to continue using race despite the Court's strong holding in *Grutter*, rather preferring to err on the side of caution.⁷⁰ Questions linger whether admissions systems that do not mirror closely the law school's will satisfy the narrow tailoring prong. As we will see in Part IV, this critique is particularly prescient with respect to the employment of racial preferences alongside Texas's Top Ten Percentage Plan at issue in *Fisher*.

B. Parents Involved Raises New Questions

The foregoing analysis bases its scholarship on *Grutter* itself, even before the holding in *Parents Involved* raised further questions about the ongoing viability of racial preferences in higher education admissions. Indeed, some scholars note that both before and after *Parents Involved*, universities remained cautious about racial classifications in admissions and may have independently limited the use of race in admissions policies.⁷¹ Following *Parents Involved*, it appears that these universities took the wise approach. Given Chief Justice Roberts's strong language in *Parents Involved*—"the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"⁷²—prudent universities will contemplate whether the case signals a desire to curtail deference to higher education and require the exhaustion of race-neutral alternatives.⁷³ One general concern about

65. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

66. Raines, *supra* note 61, at 871.

67. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1463, 1478 (2005). See also George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 CATH. U.L. REV. 991 (2008).

68. Ellison S. Ward, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U.L. REV. 609, 628 (2009).

69. *Id.*

70. *Id.* at 631.

71. *Id.* at 631-32.

72. *Parents Involved*, 551 U.S. at 748.

73. But see Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211 (2010) (reviewing dozens of subsequent cases where federal courts considered *Parents Involved* and refused to adopt its "colorblind" approach, relying instead on

Parents Involved is that it could signal an abandonment of customary deference to higher education. A second concern asks whether the Court's judicial scrutiny in *Parents Involved* could signal that stricter scrutiny will be applied to universities in the future. The way the Court distinguishes *Grutter* in *Parents Involved*, however, could indicate that the Court finds that the meaningful distinctions between universities and secondary schools constitute a sufficient constitutional basis to retain the current validity of race-conscious admissions in higher education.

1. *Is the Era of Deference Over?*

Several scholars have questioned whether the era of full deference to higher education is due to come to an end.⁷⁴ Russo and Thro posit that the Court's scrutiny of the narrow tailoring prong will change after *Parents Involved*, arguing the decision "creates a greater hurdle for officials in institutions of higher learning if they try to justify the use of race in the contexts of scholarship and outreach without first having seriously considered other approaches, perhaps such as socioeconomic status, that do not directly implicate race."⁷⁵ Perhaps the Court's holding in *Parents Involved* signaled only the first wave of judicial effort to apply a more exacting judicial scrutiny to racial preferences and that in future cases regarding higher education, the Court will back away from its historic deference to colleges and universities.

2. *Must Universities Now "Exhaust" All Race-Neutral Alternatives?*

Other scholars question whether the holding in *Parents Involved* requires full exhaustion of race-neutral alternatives before racial preferences may be used. Such a requirement would signal a departure from the more flexible standard in *Grutter*, which explicitly held that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."⁷⁶ Because the District did not demonstrate that they satisfactorily considered race-neutral alternatives, the Court in *Parents Involved* struck down the racial preferences used by the District under the narrow tailoring analysis.⁷⁷ Some scholars have suggested, therefore, that the Court's language in *Parents Involved* signals a desire to scrutinize racial preferences more closely than the *Grutter* Court. Michelle Adams notes, for example, that the Roberts opinion in *Parents Involved*, which includes the Court's holding that the District's plan did not satisfy narrow tailoring, cites prior language from Justice Kennedy that race should only be used as a "last resort" in the context of racial preferences in government contracting.⁷⁸ Adams argues that the inclusion of this

decades of other Equal Protection jurisprudence and suggesting that *Parents Involved* might not be as influential as feared).

74. Russo & Thro, *supra* note 11, at 268.

75. *Id.*

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

77. Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U.L. REV. 937, 982 (2008).

78. *Id.* at 981 (citing *City of Richmond*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment)).

language signals a rejection of the deferential approach taken in *Grutter*.⁷⁹ *Parents Involved* begs the question of whether the Court will reverse course from *Grutter* and hold that universities will only satisfy the narrow tailoring prong of strict scrutiny after they exhaust all race-neutral alternatives before turning to racial preferences.⁸⁰

Practically speaking, if the Court does require exhaustion of race-neutral alternatives, some scholars express concerns that universities will continue to use race as a factor, albeit covertly.⁸¹ By using racial proxies rather than race itself, universities may continue to use race implicitly to achieve classroom and campus diversity.⁸² For example, class-based affirmative action plans or percentage plans like Texas's Top Ten Percentage Plan (or other supposedly race-neutral programs), might allow universities to seek racial diversity by cloaking their goals in other terms.⁸³ As a matter of public policy, do we want to encourage universities to be transparent about the means employed to reach their diversity interests, or would we prefer that universities be covert about their diversification efforts?

3. Are Racial Preferences Still Permissible if Their Impacts are Only "Minimal?"

Another area of concern contemplates what the *Fisher* court describes as the *Parents Involved* "minimal effect" argument.⁸⁴ In Part III-C of the *Parents Involved* decision, joined by Justice Kennedy, the Court ruled that the District's plan was not narrowly tailored because it only had a "minimal effect on the assignment of students, . . . suggest[ing] that other means would be effective."⁸⁵ The insufficient impact of the use of race suggested to the *Parents Involved* majority that the District could have employed other race-neutral means to achieve the same diversification goals.⁸⁶ Acknowledging the danger of its own reasoning, the Court clarified that although it was "not suggest[ing] that greater use of race would be preferable, . . . the minimal impact . . . casts doubt on the necessity of using racial classifications."⁸⁷ Distinguishing the facts of *Parents Involved* from those in *Grutter*, the Court noted that "[i]n *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation."⁸⁸ After *Parents Involved*, one may reasonably ask whether the traditional deference to higher education will be eviscerated if universities decide to use race as a factor in very few admissions decisions relative to their entire admissions system. This "theory of insufficient impact" raises a question of whether the Court intends to shift to a results-oriented approach in evaluating evidence of whether a university's admissions program satisfies the narrow tailoring inquiry.

79. Adams, *supra* note 77, at 982.

80. *Id.*

81. Andrew LeGrand, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT'L BLACK L.J. 53, 78 (2009).

82. *Id.* at 78.

83. *Id.*

84. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 609-10 (2009).

85. *Parents Involved*, 551 U.S. at 732.

86. *Id.* at 733.

87. *Id.* at 734.

88. *Id.* at 734-35.

4. *Is Parents Involved Even Relevant to Higher Education?*

Despite the concern that *Parents Involved* could signal the Court's intent to overturn or curtail *Grutter*, some proponents of ongoing affirmative action in higher education distinguish *Parents Involved* by limiting its applicability to higher education. For example, several scholars argue that the language of *Parents Involved* may be interpreted as the Court's recognition that there are sufficient distinctions between the secondary and post-secondary educational contexts to keep the *Grutter* holding intact. The Roberts opinion in *Parents Involved* takes care to distinguish the District's admissions decisions from the facts of the higher education cases.⁸⁹ Scholars are left asking whether this characterization represents an honest distinction between the two educational contexts or if it is simply a tool to avoid applying the *Grutter* holding to the facts of *Parents Involved*.

It is also possible to distinguish *Parents Involved* based on facts pertinent to the narrow tailoring analysis. For example, one may reasonably argue that the *Parents Involved* holding simply requires a good-faith consideration of race-neutral alternatives.⁹⁰ The fact that the District officials did not demonstrate that they had actually made a good faith effort to consider race-neutral alternatives to achieve diversity in student school assignments was an important determinant in *Parents Involved*.⁹¹ Furthermore, the record before the *Parents Involved* majority focused on the design and operation of the District's admissions systems, and included a complete failure by school board officials to *seriously* consider any race-neutral alternatives.⁹² One can make the argument that a university that does seriously consider alternatives to racial preferences may be able to survive a narrow tailoring analysis, even under *Parents Involved*'s reasoning.

Another possible view of *Parents Involved* interprets its holding as striking down a system that operated like a quota system, more akin to the types of admissions systems the Court has continually struck down in cases such as *Bakke* and *Gratz*. This interpretation seeks to protect a more individualized review such as the type of admissions methodology upheld in *Grutter*. In *Parents Involved*, the Court compared the District's plan to a constitutionally impermissible quota system, noting that "the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."⁹³ Under this interpretation of *Parents Involved*, therefore, universities are able to satisfy the narrow tailoring prong by showing that their admissions methods provide for an individualized review of applicants. Arguably, if a university establishes that its use of race is more akin to the "individualized" and "holistic" review upheld in *Grutter*, than the *Parents Involved* decision does not apply.

Fisher provided the first opportunity to test whether *Parents Involved* dictated a shift in judicial scrutiny over continued use of race in university admissions. On

89. See generally *Parents Involved*, 551 U.S. at 722-28 (emphasizing that *Grutter* involved the unique context of higher education).

90. La Noue & Marcus, *supra* note 67, at 1003-04.

91. *Id.*

92. *Id.* (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 970-75 (9th Cir. 2004)). For example, the Roberts opinion cites testimony from one school board member that he "chose not to read" reports detailing less racially-based options put before the Board. *Id.*

93. *Parents Involved*, 551 U.S. at 726.

the one hand, *Parents Involved* seems to indicate a stricter and less deferential analysis of whether the use of race is narrowly tailored, which may make it more difficult for universities to demonstrate the ongoing viability of the use of racial classifications as a tool to achieve campus diversity. Conversely, other interpretations of *Parents Involved* that focus on the distinction between the higher education and secondary education contexts signal the possibility of a constitutionally permissible use of racial preferences in higher education going forward. Overall, it may be difficult to predict how *Parents Involved* changes the narrow tailoring inquiry because of its structure as a plurality opinion. Of course, Justice Kennedy played a pivotal role in both the *Grutter* and *Parents Involved* cases. With this backdrop in mind, we can now examine the specifics of *Fisher*, the first opportunity for federal courts to grapple with the Fourteenth Amendment in higher education after *Parents Involved*.

IV. FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

Fisher appears to be the first reported case considering a challenge to college admissions under the Equal Protection Clause since *Parents Involved*. The *Fisher* plaintiffs, two white students who were denied admission to the University of Texas at Austin (UT), argue that the success of Texas's Top Ten Percent Plan (TTPP) renders UT's ongoing use of race as an admissions factor a violation of their equal protection rights.

A. Procedural History

The *Fisher* challenge germinated from a complaint filed by the United States Department of Education, which determined that *Parents Involved* barred UT from the explicit use of race due to the TTPP.⁹⁴ Shortly thereafter, claiming an equal protection violation in UT's admissions methodology, the plaintiffs filed their lawsuit and moved for a preliminary injunction to order UT to admit them both.⁹⁵ The United States District Court for the Western District of Texas rejected their motion due to their lack of substantial likelihood of success on the merits.⁹⁶ After the plaintiffs and UT agreed to bifurcate the trial into separate liability and remedy phases, the parties filed cross motions for summary judgment on the question of "whether UT's admissions policies and practices violate the Equal Protection Clause."⁹⁷ On August 21, 2009, the District Court ruled for UT; the Fifth Circuit affirmed the District Court on January 18, 2011.⁹⁸

94. LeGrand, *supra* note 81, at 67 (citing Complaint Filed Against University of Texas with the U.S. Department of Education Over Admissions Policy (July 23, 2008)), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-23-2007/0004630597&EDDATE> (last visited Feb. 07, 2008) (on file with author).

95. *Fisher v. Univ. of Tex. at Austin*, 556 F. Supp. 2d 603 (W.D. Tex. 2008).

96. *Id.* at 609.

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

98. On appeal, the passage of time altered the procedural posture of the case. Because neither student sought to reapply to UT, the appellants only had standing to seek money damages for injuries alleged. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (2011).

B. Factual History

For many years, UT has used its Personal Achievement Index (PAI) as its rubric to evaluate prospective students. In an effort to provide a holistic review of candidates, the PAI supplements traditional markers of academic achievement and seeks to identify meritorious applicants who may not have the strongest high school class rank or test scores.⁹⁹ Following *Hopwood*'s invalidation of race as a factor in admissions, UT ceased using race immediately as a factor within the PAI.¹⁰⁰ Following *Hopwood* and its immediate cessation of racial preferences, UT discovered that minority enrollment decreased immediately.¹⁰¹ To increase minority enrollment at UT, the Texas legislature enacted the TTPP,¹⁰² a program still used by UT.¹⁰³ The TTPP did result in enrollment increases for students of color. In 1997, when *Hopwood* first went into effect, 2.7 percent of the entering class was black and 12.6 percent of the entering class was Hispanic.¹⁰⁴ Seven years later, after the TTPP had taken root, the incoming class included 4.5 percent black students and 16.9 percent Hispanic students, in contrast.¹⁰⁵

Despite the improvements as a result of the TTPP, UT still remained concerned about recruitment of students of color. After *Grutter*, UT undertook an extensive review of diversity on campus and determined there was not a "critical mass" of students of color, both on campus overall as well as "at a classroom level."¹⁰⁶ Additionally, students of color reported "feeling isolated."¹⁰⁷ As a result, UT revised its admissions policy to reintroduce an applicant's race as one of the "special circumstances" to measure PAI, in accordance with the new permissive use of race after *Grutter*.¹⁰⁸ This dual methodology of admitting students of color through both the TTPP and in the PAI is still in place.¹⁰⁹

When measuring a student's qualifications in the PAI, UT endeavors to undertake an "individualized and holistic" review as directed in *Grutter*.¹¹⁰ There are many factors that can affect an applicant's PAI, such as demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, and community service.¹¹¹ Race is never explicitly assigned an independent numerical value itself.¹¹² However, UT identifies race on the front of each

99. *Fisher*, 645 F. Supp. 2d at 591.

100. *Id.*

101. *Id.* at 592.

102. *Id.* at 593 n.3 (noting that the term "[r]ace-neutral" may be a misnomer. As the parties appear to agree . . . HB 588 [is] intended to increase minority enrollment and thus, in reality [is] 'race-conscious.' But *facially* th[is] polic[y] [is] race-neutral. . . .").

103. *Id.* at 593.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 593-94.

109. *Id.* at 594-95. The University does not have a stated end date for the use of race as a part of the PAI. The University informally reviews its admissions policies each year and undertakes a formal review every five years. *Id.* at 594.

110. *Id.* at 593.

111. *Id.* at 597.

112. *Id.*

applicant's admissions file, and the file reviewer is aware of an applicant's race as he or she reads the file, even though race is not considered a "plus factor" in PAI.¹¹³ Instead, evaluators may factor in special circumstances, such as family socio-economic status, school socio-economic status, family responsibilities, single-parent household, English as a second language, or relative SAT scores compared to the average at the student's high school.¹¹⁴ In other words, an applicant's achievements are placed in a context that may include racial awareness.¹¹⁵ The admissions staff does not track aggregate data on the racial composition of the admitted class as they go through the admissions cycle each year.¹¹⁶

Though UT undertakes both informal and formal reviews of its admissions system, it does not have a specified end date designated to stop using race as a factor in its system.¹¹⁷ UT has achieved considerable national attention for its success in graduating students of color.¹¹⁸ Because the admissions system has changed multiple times over the past ten years, it is difficult to attribute the increases clearly or exclusively to either the TTPP or the use of race in PAI.¹¹⁹ It is clear, however, that comparing one program against the other, the majority of students of color at UT are admitted under the TTPP. In 2008, for example, 85 percent of admitted Hispanic students and 80 percent of admitted black students were admitted under the TTPP.¹²⁰ The District Court noted that whereas UT's use of race in the PAI is akin to the "holistic . . . individualized assessment" mandated by *Grutter*, the fact that the admissions system is dominated by the TTPP raises questions about the constitutionality of this two-tiered admissions system.¹²¹

C. The Parties' Arguments

The plaintiffs argued that UT's use of race violated the Equal Protection Clause of the Fourteenth Amendment because it failed both prongs of strict scrutiny, serving neither a compelling government interest¹²² nor satisfying the narrowly tailored standard. Specifically, the plaintiffs argued that even if UT satisfied the compelling government interest prong, its use of race was not narrowly tailored because: (1) it produced only minimal gains in minority enrollment; (2) it failed to consider race-neutral alternatives; (3) it was over-inclusive because it benefited Hispanic applicants, who were not underrepresented

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 598.

117. *Id.* at 594.

118. *Id.* UT ranks sixth nationally "in producing undergraduate degrees for minority groups."

119. *Id.*

120. *Id.*

121. *Id.* at 595.

122. The *Fisher* plaintiffs asserted that UT's use of race did not serve a compelling government interest because: (1) it was not tethered to the educational benefits in student body diversity identified in *Grutter*; and (2) UT did not define with enough specificity what amount of student of color enrollment would achieve a "critical mass" to realize the educational benefits of a diverse student body. Pls.' Mem. in Support of Mot. for Partial Summ. J. at 8, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS), 2009 WL 5055458.

in Texas nor at the University; and (4) it had no defined end point.¹²³ The plaintiffs first asserted an argument akin to the “theory of insufficient impact” argument from *Parents Involved*, arguing that the use of race in PAI was not necessary and failed narrow tailoring because it resulted in only minimal increases in student of color enrollment.¹²⁴ Furthermore, the plaintiffs also drew upon *Parents Involved* in making their argument that UT failed to adequately consider race-neutral alternatives, noting that the use of race must only be a “last resort.”¹²⁵ The plaintiffs argued that the overall success of the TPPP indicated that race-neutral alternatives were not only available, but also sufficient to meet UT’s diversity interest.¹²⁶

UT responded that its use of race was entitled to the kind of deference the Court established in *Grutter*.¹²⁷ Because the entire judicial framework allowed for “flexible, nonmechanical” use of race by universities, UT plainly asserted that “[t]his case is governed by *Grutter*, not *Gratz* or *Parents Involved*.”¹²⁸ UT further argued that its use of race in PAI satisfied both the compelling governmental interest and the narrow tailoring prongs.¹²⁹ UT emphasized that it satisfied all of *Grutter*’s criteria to gauge narrow tailoring, in that: (1) the PAI did not operate as a quota system; (2) it provided flexible, individual review; (3) it included good faith consideration of race-neutral alternatives; and (4) no undue harm befell any racial groups.¹³⁰ UT urged that its use of race was *less* burdensome than the policy upheld in *Grutter* because the PAI’s use of race could benefit a student of *any* racial group, including whites or Asian-Americans, who were not traditionally underrepresented.¹³¹ UT concluded that its use of race was more modest than the policy upheld in *Grutter*.¹³²

On the question of narrow tailoring, UT responded to the plaintiffs’ arguments in three broad ways: (1) it challenged the utility of the “theory of insufficient impact”; (2) it argued it adequately considered race-neutral alternatives; and (3) it sought to limit the applicability of the “last resort” mandate in *Parents Involved*.¹³³

123. *Id.* at 8-9.

124. *Id.* at 9.

125. *Id.*

126. *Id.*

127. Defs.’ Mem. in Support of Cross-Mot. for Summ. J. and in Opp. to Pls.’s Mot. for Partial Summ. J. at 5, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS) [hereinafter Defs.’ Mem.].

128. *Id.*

129. *Id.* at 8, 10. In arguing it had a compelling government interest, UT reasserted “the educational benefits of a diverse student body,” as upheld in *Grutter*. UT cited its broad educational vision as including multi-faceted student diversity that encompasses numerous dimensions, including but not limited to, race. Having found that it did not have a critical mass, UT sought to employ racial consideration to achieve greater diversity. UT further asserted it had a compelling interest in improving diversity “at the classroom level” in order to ensure that students’ educational experiences, such as classroom discussions, truly derived the benefits of a diverse student body. *Id.* at 8-10.

130. *Id.* at 10-12.

131. *Id.* at 12. To make its point, UT hypothesized about a white applicant, selected student body president at a predominantly black high school and offering a “unique perspective on race relations,” would be accordingly valued in the PAI. *Id.*

132. *Id.*

133. *Id.* at 20-24.

First, UT attempted to narrow the applicability of “theory of insufficient impact” from *Parents Involved* as applying only to rigid, mechanical racial classifications, rather than the flexible, individualized systems used in the PAI.¹³⁴ UT also argued that Justice Kennedy’s concurrence supported an interpretation that the applicability of the “theory of insufficient impact” turned on whether race was a rigid classification.¹³⁵ Second, UT argued that its reliance on the TTPP as its dominant method of admitting students of color demonstrated its good faith consideration of race-neutral alternatives.¹³⁶ Recalling that *Grutter* held that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative,” UT argued that the plaintiffs’ reliance on *Parents Involved* “last resort” language was misplaced.¹³⁷

Generally speaking, the arguments made by the parties to the District Court, repeated before the Fifth Circuit, seemed to parallel the general scholarship that contemplates how much of an impact *Parents Involved* will have on the *Grutter* holding. Whereas the plaintiffs argued that *Parents Involved* directs stricter scrutiny and less judicial deference to universities on the narrow tailoring analysis, UT sought to negate the applicability of *Parents Involved* to an admissions system that achieves the type of individualized treatment of each applicant required under *Grutter*.

D. The District Court’s Decision

As if signaling its eventual holding, the District Court framed its analysis by beginning with a review of the facts and analysis of *Grutter*.¹³⁸ Finding that UT satisfied both the compelling governmental interest and narrow tailoring prongs of strict scrutiny, the District Court upheld UT’s consideration of race in the PAI.¹³⁹ Notably, the court relied almost exclusively on the *Grutter* framework for both parts of the inquiry.¹⁴⁰ Furthermore, in its discussion of the narrow tailoring prong, the court distinguished *Parents Involved* in several ways that limited its applicability to the facts of *Fisher*. For example, the court found that the undisputed evidence demonstrated that UT did seriously consider race-neutral alternatives in good faith, notably through the TTPP as well as other recruitment

134. *Id.* at 20.

135. *Id.* UT cited the following language: “[T]he number of students whose assignments depends on express racial classifications is limited. I join . . . the Court’s opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means.” *Id.* (quoting *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in judgment)) (emphasis in brief).

136. *Fisher*, 645 F. Supp. 2d at 610.

137. Defs.’ Mem., *supra* note 127, at 21-22.

138. *Fisher*, 645 F. Supp. 2d at 600-01.

139. *Id.* at 604, 612.

140. In its analysis of the compelling government interest prong, the District Court adhered to the benefits “stemming from a diverse student body” upheld in *Grutter*. *Id.* at 601. The record persuaded the court that the TTPP and other race-neutral policies were not sufficient to achieve a critical mass of students of color to satisfy UT’s educational mission. *Id.* at 603.

and outreach efforts.¹⁴¹ The court distinguished the *Fisher* facts from those in *Parents Involved*, where the District's rejection of race-neutral alternatives came after little or no consideration.¹⁴² Simply put, the District Court was more than satisfied that UT had carefully considered a multi-faceted admissions system that included several race-neutral alternatives.¹⁴³ Therefore, the ongoing use of race was narrowly tailored.¹⁴⁴

The District Court also distinguished *Parents Involved* under the "theory of insufficient impact" argument put forth by the plaintiffs. The District Court found that the plaintiffs mischaracterized the Supreme Court's analysis in *Parents Involved*.¹⁴⁵ The District Court interpreted the Supreme Court's discussion of the "minimal effect" of the racial classifications not as adding a new element to the narrow tailoring analysis but rather simply evidence that the District had failed to consider race-neutral alternatives in good faith.¹⁴⁶ The District Court stated "the question is not whether the means adopted by UT exceeds some undefined 'minimal effect' on diversity, but rather whether UT has demonstrated 'serious, good faith consideration of workable race-neutral alternatives.'"¹⁴⁷ In other words, the District Court construed *Parents Involved* as immaterial on this point as long as UT satisfied its burden of good faith consideration.

In conclusion, the District Court upheld UT's use of race as a part of its evaluation of applicants as satisfying both prongs of strict scrutiny. In doing so, the court found *Grutter* to control almost exclusively and severely curtailed the applicability of *Parents Involved* as applied to these facts.

E. The Fifth Circuit

On January 18, 2011, the Fifth Circuit issued its long-awaited opinion in *Fisher*.¹⁴⁸ Although the opinion affirms the District Court, it reveals that the three-judge panel grappled with the narrow tailoring prong just as scholars had after *Grutter* and again after *Parents Involved*. Whereas all three judges on the panel saw the case as squarely governed by *Grutter*, only two seemed to find that UT's use of race satisfactorily passed constitutional muster.¹⁴⁹

141. *Id.* at 610. The court also relied on specific evidence of scholarship programs intended to increase the yield of admitted students of color, expanded outreach efforts, and increased recruitment in low-performing high schools.

142. *Id.*

143. *Id.*

144. *Id.* at 612.

145. *Id.* at 610.

146. *Id.*

147. *Id.*

148. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (2011). The Fifth Circuit issued its opinion shortly before this Note went to the production process. Although some very brief treatment of the decision is offered for purposes of further illuminating the significance of the case, the Fifth Circuit opinion is a rich ground for further analysis. Much of the opinion discusses the proper standard of strict scrutiny that the court should apply. *Id.* at 231-34. During the production process of this Note, the appellants petitioned the Fifth Circuit for a rehearing en banc. Petition for Rehearing En Banc at 5, *Fisher v. Univ. of Tex. At Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).

149. *Id.* at 217-18 ("We begin with *Grutter v. Bollinger* because UT's race-conscious admissions procedures were modeled after the program it approved."). See also *id.* at 247 (Garza, J., specially

Writing for the majority, Judge Higginbotham was as satisfied as the District Court that UT's use of race satisfied the narrow tailoring prong of strict scrutiny; however, the opinion did not distinguish *Parents Involved* in the same way the District Court did.¹⁵⁰ Instead, the opinion expended substantial effort analyzing the TTPP and cataloging the myriad ways it frustrates the University's efforts to build a critical mass of students of color to support its goal of classroom diversity.¹⁵¹ The majority noted that, "while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve."¹⁵² The Fifth Circuit agreed with UT that the TTPP was not "the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies."¹⁵³ The Fifth Circuit even suggested that the inflexibility engendered by TTPP, a direct product of the court's own decision in *Hopwood*, actually inhibits UT's ability to achieve the student body diversity so central to its public mission.¹⁵⁴ Although the opinion did not say so precisely, it arguably falls in line with the "need not exhaust" interpretation of the narrow tailoring prong.

The majority opinion also discussed the plaintiffs' "theory of minimal impact" argument, though it only devoted two brief paragraphs to the issue before reaching its conclusion that UT's use of race is constitutional.¹⁵⁵ Here the Fifth Circuit explicitly limited the applicability of *Parents Involved*, noting that "*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke . . . the 'minimal effect' [was offered] as evidence that other, more narrowly tailored means would be effective to serve the school districts' interests."¹⁵⁶ The Fifth Circuit expressly rejected the argument that the some quantitative "impact" should become a new factor of the narrow tailoring prong.¹⁵⁷

Judge Garza's lengthy concurrence foreshadows UT's next battle should the Supreme Court take up *Fisher*. Incorporating many of the critiques of *Grutter* both before and after *Parents Involved*, he suggested that *Grutter* itself should be overturned.¹⁵⁸ Judge Garza mounted a full-scale attack on *Grutter*, challenging its deferential approach to strict scrutiny, the concept of student body diversity as a compelling government interest, as well as how narrowly tailored the UT's use of

concurring) ("I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep.")

150. *Id.* at 232.

151. *Id.* at 238-42. Much like the District Court, the Fifth Circuit's majority opinion suggested that the constitutionality of the TTPP itself was unclear. *Id.* at 242. On this point, Judge King wrote a special concurrence, noting that although he concurred in the judgment and analysis of the majority opinion, he could not adopt the critique of TTPP, which was not briefed by the parties nor considered by the District Court. *Id.* at 247 (King, J., concurring).

152. *Id.* at 242.

153. *Id.*

154. *Id.*

155. *Id.* at 246.

156. *Id.*

157. *Id.* ("The [Supreme] Court did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small.")

158. *Id.* at 247 (Garza, J., concurring).

race is.¹⁵⁹ Most notably, however, he suggested that *Grutter* is too deferential to universities that “are no longer required to use the *most effective* race-neutral means.”¹⁶⁰ By suggesting that any gains in racial composition must be statistically meaningful in order to be constitutional, Judge Garza implicitly adopted *Parents Involved*’s “minimal effect” rationale. Applying this reasoning to *Fisher*, he wrote, “[t]he constitutional inquiry for me concerns whether the University’s program meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass. I find it does not.”¹⁶¹ Should *Fisher* reach the Supreme Court, Judge Garza’s opinion will provide ample opportunity for foes of affirmative action to continue to leverage *Parents Involved* to weaken *Grutter*.

V. ANALYZING THE *FISHER* DECISIONS AND LOOKING AHEAD

Regardless of the various possible interpretations of *Parents Involved*, the Supreme Court certainly raised new questions about the ongoing vitality of racial preferences in higher education admissions. Will the Supreme Court continue its deference to higher education on the question of narrow tailoring by allowing universities to continue experimenting with race-neutral alternatives, as both courts did in *Fisher*? Or will the Supreme Court retrench from the deferential approach and only allow race as a “last resort?” The facts of the *Fisher* case expose the contradictory holdings of *Grutter* and *Parents Involved*: whereas *Grutter* holds that universities “need not exhaust” race-neutral alternatives before turning to racial classification, *Parents Involved* expects that racial classifications only be used as a “last resort.” The holding in *Fisher*, which aligns more with the more flexible standard in *Grutter*, conforms closely to the legal precedents of racial classifications in higher education admissions and steers a sound course for public policy reasons.

Fisher provided a first opportunity to explore the legal question of what satisfies the narrow tailoring prong, and the opinions carefully negotiated the space between *Grutter* and *Parents Involved* by protecting the deferential framework higher education has historically enjoyed. The courts in *Fisher* recognized that higher education is a unique enterprise, and both acknowledged the need to allow universities to experiment flexibly with various means to increase diversity, and reinforced the strength of the *Grutter* legacy.

The *Fisher* opinions refocus the attention on *Grutter* in two ways. First, because of the obvious similarity between two cases that deal with admissions decisions in higher education rather than public secondary education, both the District Court and Fifth Circuit looked primarily to *Grutter* as the governing precedent to be applied to the facts in *Fisher*. In the absence of further precedent from the Supreme Court either abrogating or overturning *Grutter*, this analysis in *Fisher* soundly adheres to principles of stare decisis. The District Court in *Fisher* extensively reviewed the facts and legal analysis of *Grutter* and consistently placed the facts and arguments by the parties in the context of *Grutter* to determine whether UT’s policies conform to *Grutter*’s constitutional mandate.

159. *Id.* at 247, 254, 263.

160. *Id.* at 250.

161. *Id.* at 260.

The second method of adhering to *Grutter* was more nuanced, however, and effectively addressed concerns that *Parents Involved* may have signaled a changing legal landscape. By focusing on the distinctions that *Parents Involved* made in how it dealt with *Grutter*, the District Court in *Fisher* reinforced the ongoing viability of *Grutter*. In other words, the District Court was able to leverage the Supreme Court's distinction of *Grutter* in *Parents Involved* in order to strengthen the applicability of the *Grutter* precedent to the facts in *Fisher* (although the Fifth Circuit was less explicit in its treatment of *Parents Involved*, the effect is the same). Recall that in *Parents Involved*, the Supreme Court was careful to articulate that *Grutter* did not govern those facts because of the unique and special nature of higher education. This distinction served UT's interests in *Fisher*. Furthermore, the District Court noted that the facts of *Parents Involved* represented more of a mechanized, non-individualized effort to achieve racial balance, which would be unconstitutional under *Grutter*.¹⁶² Instead, both *Fisher* opinions ruled that UT's use of race was much more individualized and holistic, even alongside the TTPP, than that at issue in *Parents Involved*.

Despite *Fisher*'s focus and adherence to *Grutter*, an important question lingers: Does the *Grutter* holding that universities "need not exhaust" race-neutral alternatives to survive strict scrutiny still govern? Or did the District Court and Fifth Circuit err by not adhering to the new *Parents Involved* mandate that racial classifications may only be used as a "last resort" when race-neutral alternatives still exist? Given these apparently contradictory holdings, federal courts must make a choice. In the context of its adherence to *Grutter*, with respect to other dimensions of its strict scrutiny analysis, it follows logically that UT's policy should be evaluated in the context of "need not exhaust." In doing so, UT would be constitutionally permitted to utilize racial classifications alongside viable race-neutral alternatives. When the courts upheld UT's system, they not only satisfied the legal test outlined in *Grutter*, but also soundly reflected prudent public policy.

The *Fisher* endorsement of UT's dual admissions system recognizes that *Parents Involved*'s requirement that racial classifications be used only as a "last resort" in the higher education context is entirely unworkable in practice. The District Court addressed this squarely in its opinion by recognizing that to adopt the position taken by the plaintiffs—that the existence of the TTPP rendered continued use of race unconstitutional—would be to put UT in an "impossible Catch-22."¹⁶³ Adopting the plaintiffs' position would have created an unworkable and unwise scenario: once a university experiments with race-neutral alternatives, it forfeits all opportunity to continue to use race as a factor at all. Not only would this trample upon a university's First Amendment right to achieve the educational benefits in accordance with its mission, but it also would seriously jeopardize the *Grutter* sunset provision's broader goal and charge for higher education: to achieve a level of racial diversity so that race no longer needs to be a factor.

Instead, the *Fisher* decisions noted that the wiser course is to allow universities to experiment with admissions strategies, some of which may be race-neutral and

162. *Fisher*, 645 F. Supp. 2d at 610-11.

163. *Id.* at 609.

others of which may consider race as a factor.¹⁶⁴ Allowing various types of institutions to employ a wide range of constitutional means to attract and retain students from all walks of life will maximize the educational benefits that flow from diversity on campus. The task of “building a class” is complex work, reflecting not just the admissions decisions of each student, but also recruitment policies, retention programs, and financial aid packaging philosophies. Different universities will need to tailor their approaches to conform to their own unique diversity goals, their financial resources, and their progress toward achieving “critical mass.” Courts will be ill-equipped to fashion these policies and will likely not be nimble enough to evaluate them on an ongoing basis as universities themselves can do.

Suppose a university, in accordance with *Grutter*, continues to use race as a factor in admissions decisions, but also experiments with race-neutral alternatives in order to increase retention rates, such as a percentage plan for in-state students, new merit scholarships designed to attract students of color, or expanded on-campus support programs. The university succeeds in yielding more students of color and student satisfaction survey data and retention statistics show that students of color are having more success at the university than their counterparts several years ago. This success builds upon itself in future admissions cycles; marketing helps to demonstrate that the university is a welcoming place for students of color. As these successes build upon themselves, although the university continues to use race as a factor, it comes to depend upon it less.

The *Fisher* opinions rightly recognize that initial successes in increasing diversity on campus should not necessarily have to mean an immediate curtailment of the ongoing use of race as a factor. To hold that it does (perhaps by applying the *Parents Involved* “last resort” language and its “minimal effect” analysis) might put universities in an impossible bind that may never allow them to achieve full racial neutrality within the *Grutter* twenty-five year framework. Following the *Fisher* treatment of *Parents Involved* allows *Grutter* and *Parents Involved* to stand side-by-side. Once a university strays into a mechanical use of race, it violates narrow tailoring; but, so long as colleges continue to apply an individualized, holistic review where race is only one factor, their programs survive strict scrutiny. This deference and flexibility acknowledges the need for universities to experiment with various race-neutral alternatives as long as they continue to satisfy a baseline constitutionality.

VI. CONCLUSION

The Supreme Court may be called upon to decide whether or not *Fisher* sufficiently resolved the apparent ambiguity on the question of whether or not a university “need not exhaust” all race-neutral alternatives or only use race as a “last resort.” If the Court resolves this ambiguity, it will provide substantial definition to the current question of whether or not there is current deference on the value of

164. *Fisher*, 631 F.3d at 231 (“Rather than second-guess the merits of the University’s decision, a task we are ill-equipped to perform, we instead scrutinize the University’s decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy *followed* from the good faith consideration *Grutter* requires.”).

diversity to educational outcomes and the means they employ to achieve it given to higher education by *Bakke* and *Grutter*, or whether *Parents Involved* signaled a new era of judicial scrutiny. If *Fisher v. University of Texas at Austin* were to come before the Supreme Court, Justice Kennedy will no doubt be the key to the resolution of this question, due to his previous opinions that the Court has been too deferential to colleges and universities on the question of narrow tailoring.

Educators who endorse the use of racial preferences as the most effective means to achieve campus diversity are likely to applaud the *Fisher* opinions for steering a course that both neutralizes *Parents Involved* and protects the ongoing viability of the *Grutter* holding. By finding that UT had satisfied its burden regarding narrow tailoring to consider in good faith race-neutral alternatives, the lower *Fisher* court distinguished *Parents Involved* as requiring only good faith. Will the Supreme Court be persuaded that *Parents Involved* can be limited to only requiring “good faith?” Or does *Parents Involved* signal the Court’s interest to more strictly scrutinize this dimension of its narrow tailoring analysis? *Fisher*’s focus on good faith was consistent with a deferential approach to higher education and acknowledged that universities are better equipped—and are a more appropriate forum than courts—to devise a fabric of admissions policies that includes experimentation with race-neutral alternatives. Focusing the judiciary on good faith also allows courts to stay true to fact-based inquiries when constitutional challenges arise, rather than encouraging courts to second-guess the educational missions and admissions methodologies employed by particular campuses.