Mutiny over strict scrutiny? Interpreting the judicial approach to race-conscious higher education admission policies in Fisher and Students for Fair Admissions (SFFA)

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Introduction

During the upcoming 2015-16 term on December 9, 2015, the United States Supreme Court (hereinafter referred to as the Supreme Court) is scheduled to hear for a second time, Fisher v. University of Texas at Austin (hereinafter referred to as Fisher I and Fisher II). The main issue in this case centers on the question of whether the University’s implementation of its admissions plan, in conjunction with the state’s Top Ten Percent law, meets the two-prong strict scrutiny standard of first, being a compelling state interest and second, a narrowly tailored means to meet the stated objective. In its 2013 ruling in Fisher I, the Supreme Court surmised that the Fifth Circuit Court of Appeals failed to properly apply the strict scrutiny analysis to the contested plan. The Fifth Circuit Court of Appeals ruled in the first appearance of Fisher I in 2011 and the second in 2014 that the University’s admissions format is constitutionally sound based on a strict scrutiny analysis. Since the application of the doctrinal framework for strict scrutiny is at odds between the high court and the Fifth Circuit, the Supreme Court’s analysis in Fisher II will be of great interest.

In this article using colorblind discourse, we posit why the Supreme Court has accepted Fisher I for a second time especially in light of justiciability questions regarding the “troublesome threshold issues relating to standing and mootness,”¹ speculate on what the Supreme Court’s ruling will be in Fisher II, and share best practices on what higher education

institutions can do to continue admitting and retaining people of color. Some legal scholars have argued that the Supreme Court has adopted a colorblind constitutionalism, which is “a collection of legal themes functioning as a racial ideology” that functions as “treating race as if it were, like eye color, a wholly irrelevant characteristic.” Colorblindness is maintained and perpetuated by the denial of race as a social and cultural definer. If race is reduced to one’s imagination or a far-fetched rationale for claims of inequity, candid discussions about race are ignored or relegated to “nonsense.” Intentionally and inadvertently, the colorblind legal rhetoric has and continues to be used to enfranchise while simultaneously, disenfranchising people of color.

This article sets the stage with the seminal Supreme Court race-conscious higher education admissions cases dealing with the elimination of affirmative action practices in state and local government hiring and contracts and education, such as Bakke, Grutter, Gratz, and Fisher I. Additionally, legal claims subsequent to Fisher I, such as Fisher II, Students for Fair Admissions v. Harvard University and Students for Fair Admissions v. University of North Carolina-Chapel Hill, will be explored. In order to provide a foundation for our analysis, this article will also provide a primer on colorblind discourse and apply it to interpret the Supreme Court’s race-conscious higher education admissions cases. The article then will briefly expand on the implications of Fisher II and best practices for institutions to continue recruiting, admitting, and enrolling students of color.

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Legal Background on Race-Conscious Admissions

Opponents of race-conscious admissions programs have argued that they violate the Equal Protection Clause of the Fourteenth Amendment since they consider race in admitting students. Under the Equal Protection Clause of the U.S Constitution, “no State shall … deny to any person within its jurisdiction the equal protection of the laws,” or “similar individuals … be dealt with in a similar manner by the government.” In order to determine the constitutionality of a government act, courts must apply one of three standards of judicial review – strict scrutiny, mid-level scrutiny, or rational basis.8

Because race is at question in these race-conscious admissions cases, courts must employ the strict scrutiny standard when they decide whether the admissions policy was constitutional. Strict scrutiny is the utmost stringent standard of review used by the courts and the most demanding of the reviews to satisfy. Strict scrutiny is also required in government acts concerning discrimination based on national origin, religion, and alienage. In order to pass strict scrutiny, the government must first illustrate that its act to treat people differently is justified by a compelling state interest.9 As the law currently stands, the Supreme Court has found that the promotion of diversity in higher education is a “compelling governmental interest.” Secondly, under the strict scrutiny standard, the Supreme Court must also find that race-conscious admissions policies are “narrowly tailored.” In order to be constitutional, a government act

6 U.S. CONST. amend. XIV, § 1.
8 See generally, K. SULLIVAN & G. GUNTER, CONSTITUTIONAL LAW (17th ed. 2010).
9 See id.
employing racial classifications must satisfy both prongs.\textsuperscript{10} There have been four cases that have set the stage for this interpretation over the past several decades. These cases are briefly discussed below.

\textit{Regents of the University of California v. Bakke}

\textit{Regents of the University of California v. Bakke} was the first Supreme Court case that set the foundation for race-conscious admissions. The University of California Davis Medical School considered race in its admissions practices by strictly setting aside sixteen out of 100 seats for disadvantaged racial minority students.\textsuperscript{11} A white male applicant who was rejected twice by the medical school claimed that he was denied admission because of his race in violation of the Equal Protection Clause.\textsuperscript{12} Bakke argued that the medical school accepted less qualified racial minority applicants since the minority students who filled these sixteen spots had lower GPAs and test scores than otherwise rejected white students.\textsuperscript{13} While the Supreme Court found the medical school’s race-conscious policy unconstitutional because reserving a specific number of seats to be filled only by minorities was not narrowly tailored,\textsuperscript{14} the Court reversed the lower court’s ruling that race could never be considered a factor in admissions programs as Justice Powell noted that diversity is critical to train future leaders. It is a compelling state interest to have a broader definition of diversity where race and ethnicity are important factors.


\textsuperscript{11} 438 U.S. 265, 57 L.Ed.2d 750 (1978) (“Bakke”).

\textsuperscript{12} Id. at 266.

\textsuperscript{13} See id.

\textsuperscript{14} Suzanne E. Eckes, Race-Conscious Admissions Programs: Where Do Universities Go from Gratz and Grutter? 33 J.L. & Educ. 21, 23 (2004), see also Bakke, 438 U.S. at 277
along with other qualifications and characteristics.\textsuperscript{15} Additionally, an admissions program may consider diversity holistically while examining an admissions application.\textsuperscript{16} After \textit{Bakke}, some universities were still uncertain how race could be used in admissions.\textsuperscript{17}

\textit{Grutter v. Bollinger \& Gratz v. Bollinger}

Over a couple of decades and lower court cases, the Supreme Court provided clarity in \textit{Grutter v. Bollinger} and \textit{Gratz v. Bollinger}, both in 2003. The 6-3 \textit{Gratz} decision struck down the undergraduate admissions program at the University of Michigan because it held that the automatic designation of twenty points to every applicant from an underrepresented minority group was not narrowly tailored nor a holistic approach.\textsuperscript{18} Quota systems insulate certain applicants from competition with others based on race or ethnicity.\textsuperscript{19} However, in \textit{Grutter}, the

\begin{itemize}
\item \textsuperscript{15} Id. at 313 - 320.
\item \textsuperscript{16} Id. at 318.
\item \textsuperscript{17} See, \textit{e.g.}, \textit{Podberesky v. Kirwan} 38 F.3d 147, 95 Ed. Law Rep. 52 (4th Cir. 1994) (finding that University of Maryland’s scholarship program for African-American students was not narrowly tailored); \textit{Hopwood v. Texas} 78 F.3d 932, 107 Ed.Law Rep. 552 (5th Cir. 1996) (finding university’s race-conscious admissions policy unconstitutional); \textit{Smith v. Univ. of Wash. Law Sch.}, 233 F.3d 1188, 149 Ed. Law Rep. (9th Cir. 2000) (upholding university’s race-conscious admissions policy); \textit{Johnson v. Bd. of Regents of the Univ. of Ga.}, 263 F.3d 1234, 156 Ed. Law Rep. 829 (11th Cir. 2001) (finding university’s race-conscious admissions policy unconstitutional).
\item \textsuperscript{18} Id. at 250-60.
\item \textsuperscript{19} See \textit{Grutter}, 539 U.S. at 327.
\end{itemize}
law school’s admissions program satisfied Bakke because it considered each applicant as an individual, looking at how each may contribute to the diversity of the school and using race and ethnicity only as a “plus” in addition to other characteristics.20 In a 5-4 decision, the Grutter Court adopted Justice Powell’s ruling in Bakke finding race could be considered in admissions practices so long as it was one of the many factors considered.21 The Supreme Court upheld the reasoning that student body diversity is a compelling state interest.22

The Grutter Court also required admissions programs to consider other criteria beyond grades and test scores, such as the applicant’s personal statement, the quality of the undergraduate institution, letters of recommendation, and whether the applicant chose challenging undergraduate courses, among other criteria set by the institution.23 This holistic review could also examine one’s study abroad experiences, language proficiencies, and record of community service.24 The Court found narrow tailoring does not require “exhaustion of every conceivable race-neutral alternative” be attempted before a race-conscious policy is implemented, but it does require that universities consider race-neutral plans in good faith.25 Up until now, this approach to admissions has survived the strict scrutiny test while under review of the U.S. Supreme Court.26 However, recent cases, such as the grant of certiorari of Fisher II27

20 Id. at 328.
21 Id. at 312.
22 Id. at 320-25.
23 See id. at 339.
24 See id. at 340.
25 Id.
26 See Eckes, supra note 15.
and the filing of cases against Harvard University and the University of North Carolina at Chapel Hill by the Students for Fair Admissions, Inc., suggest that universities may no longer be able to admit students with this approach. This potential change will be discussed later in the article.

While the Grutter Court mentioned “the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . . ,” Justice O’Connor suggested “the use of racial preferences will no longer be necessary” in twenty-five years from its ruling in 2003. Given that only over a decade later since the Supreme Court ruled on the constitutionality of race-conscious higher education admission programs and evidence of institutional racism is still embedded in American society, it is premature for today’s U.S. Supreme Court Justices to reverse its previously held precedence.

_Fisher v. University of Texas at Austin (Fisher I)_

_Fisher_ has yet to be concluded since the Supreme Court remanded the case back to the lower court. The Fifth Circuit Court of Appeals entered its ruling on July 15, 2014, in favor of the University, and Fisher filed a petition for certiorari, which the U.S. Supreme Court granted. On December 9, 2015, the Supreme Court will hear another challenge against the University.

In 2008, Abigail Fisher claimed racial discrimination in violation of the Equal Protection Clause because she was denied admission to the University of Texas at Austin. Based on current legal precedent, the University of Texas at Austin considered race as a factor among many

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29 See Grutter, 539 U.S. at 344-347.
30 Id.
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others, and it currently admits students through a two-step process based on state and federal law.\textsuperscript{32} First, under the state’s Top Ten Percent Law, high school students who graduate in the top ten percent of their class are eligible for automatic admission to any public college or university in Texas.\textsuperscript{33} Although students are automatically eligible, it does not necessarily mean that they are automatically admitted to their institution of choice. Secondly, based upon the \textit{Grutter v. Bollinger} decision, applicants that are not eligible under the state’s Top Ten Percent Law could be considered using the \textit{Grutter} standard, which considered race as one of many “plus factors” that each candidate contributes to the learning environment.\textsuperscript{34} The University asked students to identify their race among five predefined racial categories, and race was not assigned a numerical value but considered a meaningful factor.\textsuperscript{35} The various plus factors were then plotted on a grid and students above a specific baseline were offered admission while others were not.\textsuperscript{36}

The Top Ten Percent Law was passed in response to the decline in minority student enrollment after the decision in \textit{Hopwood v. Texas}.\textsuperscript{37} The law also suggested that public universities consider a variety of other factors in admissions decisions for students not eligible

\begin{footnotes}


\textsuperscript{34} \textit{See Fisher}, 133 S. Ct. at 2413.

\textsuperscript{35} \textit{See id.}

\textsuperscript{36} \textit{See id.}

\textsuperscript{37} \textit{Hopwood v. Tex.}, 78 F.3d 932, 107 Ed.Law Rep. 552 (5th Cir. 1996).
\end{footnotes}
under the law, which included socioeconomic status, bilingual proficiency, and first-generation college student. Not surprisingly, race was not one of these factors.

Fisher claimed that she was discriminated against because the University used the Grutter-based race-conscious admissions process after admitting students through the Texas-legislated Top Ten Percent Law. The District Court found the University’s policy constitutional. On appeal, the Fifth Circuit Court of Appeals ruled the policy was not akin to an illegal quota or racial balancing and affirmed the District Court’s finding. The Fifth Circuit interpreted Grutter to give substantial deference to the University to define the benefits of diversity that provide the compelling state interest and to determine whether its admission plan is narrowly tailored to achieve this goal.

The U.S. Supreme Court granted certiorari and held 7-1 that the Fifth Circuit Court failed to properly apply strict scrutiny. The Court vacated and remanded the case back to the Circuit Court. While the Fisher I Court reaffirmed the constitutionality of Grutter-based admissions programs that considered “racial minority status as a positive or favorable factor in a university’s admissions process, with the goal of achieving the educational benefits of a more diverse student body,” it stressed, as outlined in Gratz and Grutter, that these admissions processes must

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39 See id.

40 Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 264 Ed. Law Rep. 564 (5th Cir. 2011).

41 Fisher, 133 S. Ct. 2411.

42 Id. at 2417.
undergo the strictest standard of judicial review.\textsuperscript{43} Justice Kennedy in \textit{Fisher I} agreed with the Circuit Court that the University has the expertise and experience to determine the scope of diversity and how it would benefit its campus, students, faculty, and staff. However, Kennedy did not agree to the level of deference that the lower court gave to the University on how it implemented this admissions plan.\textsuperscript{44} Justice Kennedy wrote, “… there must be a further judicial determination that the admission process meets strict scrutiny in its implementation. The University must prove that its chosen means to attain diversity are narrowly tailored.”\textsuperscript{45} Kennedy stressed on this prong of strict scrutiny the University is to receive no deference.\textsuperscript{46} This rationale would have required the lower court to test whether there was no other alternative to achieve the benefits of diversity than this admissions plan.

However, the Circuit Court noted that it was “ill-equipped” to make this determination and that it only needed to ensure the University made a good faith effort to consider alternatives.\textsuperscript{47} Kennedy disagreed stating the Circuit Court deferred the narrow tailoring analysis to the University’s good faith without considering evidence sufficiently.\textsuperscript{48} While the Court in \textit{Fisher I} did not overrule the use of race-conscious admissions policies upheld in the previous \textit{Grutter} decision, Justices Scalia and Thomas supported the notion for doing so.\textsuperscript{49} In sharp

\begin{itemize}
\item \textsuperscript{43} Id.
\item \textsuperscript{44} \textit{Fisher}, 133 S. Ct. 2411.
\item \textsuperscript{45} See id.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} \textit{Fisher v. Univ. of Tex. at Austin}, 631 F.3d 213, 231, 264 Ed. Law Rep. 564 (5th Cir. 2011).
\item \textsuperscript{48} Id.
\item \textsuperscript{49}
\end{itemize}
contrast, Justice Ginsburg, argued that under strict scrutiny the University’s policy does not require further judicial review, and its use of race as a factor continues to serve an important purpose in helping the university to increase the educational benefits of diversity.\(^{50}\) In addition, she argued that colorblind, race-neutral policies, such as Texas’ Top Ten Percent Law, which are supposed to be less discriminatory alternatives to race-conscious plans are actually by no means race-neutral.\(^{51}\)

On remand, the Circuit Court of Appeals heard the case again. The appeals court gave the attorneys a list of questions to consider at this next level. The list of questions addressed everything from whether the case is now moot because Fisher graduated from another institution, Louisiana State University, to whether the appeals court or district court should hear the next round. The Circuit Court had the option of ruling on the constitutionality of the plan or sending the case down to the district court to determine additional facts involving the plan. Attorneys for Fisher urged the appeals court to rule on the case while the University requested the case be sent back to the district court in order to gather additional facts about the admissions policy.\(^{52}\) The Circuit Court found merit with Fisher’s position by stating “there are no new issues of fact that need to be resolved, nor is there any identified need for additional discovery; that the record is sufficiently developed” …and a remand “would likely result in duplication of effort”\(^{53}\)

\(^{50}\) *Id.* at 2433-2435.

\(^{51}\)


\(^{53}\) Fisher
Some suggest the Supreme Court wanted the lower court to make it more challenging for colleges and universities to implement race-conscious admissions plans. The Circuit Court in a 2-1 decision found merit again with the University’s plan being constitutionally sound in both prongs of the strict scrutiny analysis by being narrowly tailored to achieve diversity. The Court began its discussion by restating the Supreme Court’s precedent in Grutter that “strict scrutiny must be applied to any admissions program using racial categories or classifications.” The court acknowledged that Justice Kennedy’s Grutter dissent “faulted the district court’s and this Court’s review of UT Austin’s means to achieve the permissible goal of diversity—whether UT Austin’s efforts were narrowly tailored to achieve the end of a diverse student body”. Before proceeding with its analysis, the court declared “our charge is to give exacting scrutiny to these efforts”. After a detailed discussion of the Top Ten Percent Plan and the University’s additional admissions office diversity efforts, the court reiterated the Grutter precedent, “narrow tailoring does not require exhaustion of every race neutral alternative” but rather” serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks”. The court asserted “put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program-in addition to an automatic admissions plan not required under Grutter that admits 80% of the student body with no facial use of race at all”. It then brought attention to the circumstances under which the plan exists, “the sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education

54 Nguyen, Ulm, Chesnut, & Eckes (2014)
55 See Grutter, 539 U.S. at 326.
56 See Fisher
57 Id. at
58 See Grutter, 539 U.S. at 339.
59 See Fisher
system. The court shared data in a footnote to support its assertion, “the de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race” 61. The court viewed the Top Ten Percent Plan “nearly indistinguishable from the University of Michigan’s Law School’s program in Grutter and “was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores or other unique skills” 62. Persuaded by the University’s admission plan and and its implementation, the court stated “to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of Bakke and Grutter. In its final sentence the court invoked two of the four seminal race-conscious cases, “to reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from Bakke and Grutter, leaving them in uniform but without command due only a courtesy salute in passing” 63.

In his 26-page dissent, Judge Emilio M. Garza argued the University did not define “critical mass” and therefore “whether the University’s use of racial classifications in its admissions process is narrowly tailored to its stated goal… remains unknown” 64. He accused the majority of “defer[ing] impermissibly to the University’s claim and asserted “this deference is squarely at odds with the central lesson of Fisher” 65 (p. 44). Ultimately, Judge Garza concluded that the University had not satisfied the narrowly tailored prong and therefore he would have reversed the court’s previous decision and ruled in favor of Fisher. The en banc request made by
Fisher’s legal team was denied and now the Supreme Court will decide if the strict scrutiny two-prong test was properly applied on remand by the Fifth Circuit in *Fisher I*.

**Current Status of Race-Conscious Admissions**

The current status of race-conscious admissions is uncertain. With the rehearing of *Fisher II* in the Supreme Court and new legal challenges against Harvard and UNC-Chapel Hill, there is a full-fledged effort to eliminate race as one of the many factors in admissions decisions and the ability of institutions of higher education to shape the diverse make-up of their student body. The Supreme Court may either eliminate the use of race-conscious admissions, make it more challenging for institutions to utilize, or heighten the strict scrutiny standard impacting affirmative action programs broadly. The following section provides information on the current challenges against Harvard and UNC-Chapel Hill.

*Students for Fair Admissions, Inc. v. Harvard and Students for Fair Admissions v. University of North Carolina-Chapel Hill*

On Monday, November 17, 2014 two separate lawsuits were filed against Harvard University and the University of North Carolina-Chapel Hill by a “newly-formed, nonprofit, membership organization whose members include highly qualified students recently denied admissions to both schools, highly qualified students who plan to apply to both schools, and their parents”\(^6\). The 120-page complaint against Harvard alleged "employing racially and ethnically discriminatory policies and procedures administering the undergraduate admissions program at

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Harvard College in violation of Title VI of the Civil Rights Act of 1964”\textsuperscript{67}. The plaintiffs also claim that Harvard’s current program has resulted in a limited number of qualified Asian-Americans admitted yearly to the university\textsuperscript{68}. Project on Fair Representation (POFR)’s executive director, Edward Blum helped to fund this lawsuit as well as Fisher v. University of Texas. Ironically, the suit comes six months after POFR launched a website soliciting "students who claim they were not admitted to Harvard because of their race to participate in a potential lawsuit."\textsuperscript{69} Harvard's general counsel released a statement that referenced Justice Powell's opinion in Bakke touting the university's admissions plan being 'legally sound' and alleged the University has continued the same practice all these years\textsuperscript{70}.

Within the group of plaintiffs, there is at least one Asian American who is a first generation college student, graduated top of their high school class, scored a 36 on the ACT, and active in multiple extracurricular activities, was denied admission to Harvard. This student will seek a transfer to Harvard if it no longer uses race or ethnicity on its admissions 'preference'.\textsuperscript{71} In the UNC-Chapel Hill complaint the plaintiffs alleged the same violation of Title VI and that in an amicus brief submitted in Fisher I the University stated it could “…maintain, and actually increase, racial diversity through race-neutral means if it ends its race-based affirmative action policies”\textsuperscript{72}. To date, no activity has been reported on either case moving forward in the federal district courts. Institutions of higher education and other stakeholders should continue to monitor these cases.

\textsuperscript{67} Students for Fair Admissions, Inc. v. President and Fellows of Harvard college and the Honorable and Reverend the Board of Overseers, complaint, pg. 1.
\textsuperscript{68} Id. At 4.
\textsuperscript{69} Delwiche, supra note 65.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Students for Fair Admissions, at 26.
Colorblind Discourse Applied

Colorblind discourse centers “on managing the appearance of formal equality without worrying over much about the consequences of real-world inequality. Proponents of a colorblind ethos define freedom and equality exclusively in terms of the autonomous-some would say atomized-individual” 73. This “atomized-individual” is without a history and void of political affiliations or social interactions. This person exists in an abstract world with equal opportunity and preferences rather than a racist, sexist, homophobic and socially stratified structure. Ultimately, the atomized person is a fictitious creation of non-whites that masks white supremacy and frustrates the realities of people of color as they seek higher education admission.

This colorblind universe that has embedded itself into our society is substantiated by social and legal systems. First, race and skin tone are viewed as synonymous. The reduction of race to pigmentation allows people to argue that categorizing by perceived phenotype is discriminatory. However, the historical but silenced racial stratification saturated with privileges for whites, is absent. Second, acknowledging race as a scientifically flawed project by depraved hearted white men versus a powerful and dominating societal construction, frames race as a taboo to recognize and those who do are “implicitly manifesting racial enmity or racial preference” 74. And third, presenting racism as a “personal problem” and offending behavior only being exhibited by Ku Klux members, erroneously leaves out liberal card carrying whites, disconnects race from subtle everyday acts and masks power and subordination.

74 Id. at 102.
Gotanda (1991) asserts the idea of a “formal race” analysis used by the Supreme Court in which it views individuals “as neutral, apolitical descriptions, reflecting merely “skin color” or country of ancestral origin. Formal-race is unrelated to ability, disadvantage, or moral culpability.”\textsuperscript{75} Therefore, in “reverse discrimination” lawsuits involving white plaintiffs, courts dismiss the “connections between the race of the individual and the real social conditions underlying litigation or other constitutional dispute”\textsuperscript{76} Without the acknowledgement of historical or social factors, the interests of whites are made supreme in intentionally not recognizing race. Ultimately, colorblind legal rhetoric “allows the Supreme Court to be blind to the law’s role in sustaining white supremacy and to preserve the myth of the law’s innocence.”\textsuperscript{77}

As a legal strategy, colorblindness is appealing to the judiciary but for litigants suing for justice, it “has now become an impediment in the struggle to end racial inequality.”\textsuperscript{78} Using a formal race approach to decisions gives justices a non-complicated task. If the veiled realities of racism are not acknowledged, the judiciary’s decision making process can be performed in a manner in which abstraction prevails and intellectually sound rulings are issued based on the Supreme Court’s creation of doctrinal tests that cannot be invalidated unless the Court acquiesces.

Colorblindness in legal jurisprudence was first introduced by Justice Harlan in his \textit{Plessy} dissent; “Our Constitution is colorblind, and neither knows nor tolerates classes among

\textsuperscript{75} Gotanda, \textit{supra} note 3 at 4.
\textsuperscript{76} \textit{Id.} at 7.
considering the preceding text to this infamous statement that has been adopted by so many provides a complete and accurate understanding of Justice Harlan’s viewpoint:

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

Highly critical of the Court’s decisions in both Plessy and Brown, an associate professor of English and Humanities, David Holmes, asserts there was “rhetorical maneuvering around color consciousness and back toward a racist consciousness in vogue during those historical moments. This is why the defenders of both decisions could claim to be following the letter of the Fourteenth Amendment” 81 . The use of legal rhetoric around equality masked the systemic issues of “how we engage or ignore race as an ideology so as to reproduce said material inequalities” which resulted in the maintenance of the status quo and in reality continued inequality (p. 36). Later in the article, colorblind discourse is applied to the race-conscious admissions cases, but before that, this article will provide a brief history and foundation of cases leading up to Fisher and SFFA.

In Bakke, Justice Powell gives a different interpretation of the colorblind argument that “prohibits the use of race as the sole factor in government decisions absent a compelling justification” 82 . Ironically, each justice asserted that his colorblind position was based on an interpretation of the Fourteenth Amendment’s Equal Protection Clause. A critical distinction in both justices’ interpretations is that “Harlan believed that the Fourteenth Amendment has special

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79 Plessy v. Ferguson 163 U.S. 537, 559 (1896)  
80 Id.  
81 Holmes, supra note 5, at 36.  
82 Crenshaw, supra note 76, at 247.
relevance for Blacks, while Powell believed that Blacks and whites must receive the same
treatment.” Both interpretations lead to different outcomes and not necessarily either will
result in justice for people of color in admission to race-conscious higher education institutions.
Justice Powell’s version of colorblindness disconnects history and reality from the Court’s
analysis. It allows white privilege to be masked and avoids the questioning of white supremacy
and social dominance. Colorblind rhetoric distracts our society from dealing with the complex
nature of “race” and “racism”. It has stalled the discussions and actions of colleges and
universities as they have adopted this detrimental Utopian viewpoint.

Whiteness being normal aligns with the rhetoric of innocence which is a concept
discussed by legal scholar Ross (1990) as a legal tool used by white rhetoricians, lawyers and
judges. He asserts the avoidance of whites benefitting people of color’s oppression is a key
component in the rhetoric of innocence because it “obe subtles this question: “What white person is
“innocent”, if innocence is defined as the absence of advantage at the expense of oth-

Bakke is an example in which “Justice Lewis Powell introduced the rhetoric of innocence to the
Court’s affirmative action discourse” which occurred throughout the opinion and the oral
argument, to be discussed in chapter four. In the Bakke opinion he stated, “the patent unfairness
of “innocent persons…asked to endure….[deprivation as] the price of membership in the
dominant majority. He wrote of “forcing innocent persons …to bear the burdens of redressing
grievances not of their making”.

Racial arrogance fuels conservatives to seek out ideal litigants for reverse discrimination
lawsuits. In Bakke, the university, justices, nor Bakke “contested the legitimacy of medical

85 Id. at 302.
school admissions standards that reserved five seats in each class for children of wealthy donors to the university or that penalized Bakke for being older than most of the other applicants”\textsuperscript{86}.

The Center for Individual Rights (CRI), a conservative public interest group founded by Ward Connerly, a mixed race man of color born and raised during segregation and advocates for the eradication of affirmative action measures, including race-conscious admissions in higher education, intentionally and strategically seeks out locations and people to challenge equity focused practices. Connerly being a person of color gives credence to racial arrogance and serves as a poster child for “post-racial society” rhetoric. Barbara Grutter, Jennifer Gratz, and Abigail Fisher, all white women with “innocent and hardworking” narratives for both conservative and liberal whites set the perfect stage for arguing violation of their equal protection rights under the 14\textsuperscript{th} Amendment. In the context of higher education, Whites view themselves as having a right to obtain a degree and therefore entitled to a “seat” in undergraduate, graduate and professional schools. This sense of entitlement has been reinforced in higher education since its inception in America has resulted in lawsuits filed against polices supporting the inclusion of people of color instead of those for legacies, athletes, or other Whites with lower scores. People of color are easy targets because of their marginalized “place” in society that has been politically, socially and legally framed as unworthy of being admitted to a university over a White person.

Two ideologies of the construct, “diversity,” have become institutionalized in the public’s rhetoric about equality efforts. One is that “diversity ideology represents white elites’ taming of what began as a radical fight for African-American equality” and the other is “the ideology of ‘diversity’ was a neoliberal response to the reactionary blowback against affirmative action”\textsuperscript{87}.


\textsuperscript{87} Cedric Herring and Loren Henderson, \textit{From affirmative action to diversity: Toward a critical}
Both ideologies of diversity are flawed because neither moves society in a direction of inclusion and equality. Derrick Bell (2003) voiced four key concerns with diversity and described it as a “distraction” to the achievement of racial justice. To support the four reasons, Bell gives specific examples for each one based on the *Gratz* and *Grutter* cases. First, “diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants”\(^{88}\). Bell argues that his interest convergence thesis in which people of color only receive benefits when white are not disenfranchised by the benefits, is manifested through the justices’ and lawmakers’ lack of recognition for a history of discrimination that continues to impact people of color’s advancement, specifically in higher education. Bell states the “Michigan lawyers and civil rights allies shifted the focus from remediation for past discrimination to the value of diversity to the schools and to society”\(^{89}\). Second, “diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected”\(^{90}\). Litigation possibilities are increased by the Court’s fragmented opinions in both *Gratz* and *Grutter*. Bell argues “the narrowness of this diversity “victory” in the law school case and its vulnerability in future litigation can be gauged by the *Grutter* dissents”\(^{91}\).

Heavy criticism from the disagreeing justices of diversity meeting the strict scrutiny and the lack of definition for “critical mass” are evidence that the use of race in higher education admissions is not settled. Further proof of this is the Court’s acceptance of hearing *Fisher* a second time. This decision signals to civil rights allies that the Court is not in agreement with the Fifth Circuit diversity perspective. 38 Critical Sociology, 629, 632 (2011).

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89 Id. at 1624-25.
90 Id. at 1622.
91 Id. at 1627.
Court of Appeals application of the strict scrutiny standard to Texas’s Top 10 Percent Plan.

There should be great concern that the decision will be made through a colorblind constitutional analysis which would eradicate the use of race in any form as an admissions consideration factor.

Third, “diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants”\(^92\). Bell discusses meritocracy by using Justice Thomas’s opinion that concurs in part and dissents in part. Thomas explains that he is anti-affirmative action because of “his conviction that all such remedies are unconstitutional and his personal belief that “blacks can achieve in every avenue of American life without the meddling of university administrators”\(^93\). Justice Thomas specifically focuses on a preference category that does not garner needed attention and has not been litigated-legacy. Bell provides data collected to show how financial disparities disproportionately impact the ability of students of color to afford resources that can enhance their standardized test scores. For example, “a seatbelt maker in Indianapolis is closing a plant and laying off 350 workers, more than 75% of them black”\(^94\). “The standardized tests are retained for the convenience of the schools even though they privilege applicants from well-to-do families, alumni children, and those born into celebrity”\(^95\). And fourth Bell points out,” the tremendous attention directed at diversity programs divert concern and resources from the serious barriers of poverty that exclude far more students entering college than are likely to gain admission under an affirmative action program”\(^96\). To support this view, Bell gives data about the economic hardships of people of color that have an impact on all areas of their lives including quality education in the K-12

\(^92\) Id. at 1622.
\(^93\) Id. at 1629.
\(^94\) Id. at 1632.
\(^95\) Id. at 1631.
\(^96\) Id. at 1622.
setting. Bell concludes with a harsh criticism of diversity as not being an effective practice for the admission of students of color but rather “it is a shield behind which college administrators can retain policies of admission that are woefully poor measures of quality, but convenient vehicles for admitting the children of wealth and privilege” 97.

With the Court’s majority members’ change in viewpoint of race-conscious admissions programs between Bakke and Fisher,…. The Court has also established a challenging set of “doctrinal barriers that must be overcome before a majoritarian affirmative action plan can be upheld” 98. Having determined that strict scrutiny is the analysis tool to determine if a governmental program is meets a compelling state interest and is narrowly tailored to achieve the stated interest, in race-conscious higher education cases, the benefits of diversity, the Courts analysis has evolved into a position that “equate [s] benign discrimination with invidious discrimination, as if the harms that affirmative action imposes on whites are equivalent to the harms that white have imposed on racial minorities” 99. Additionally, the Court at one-time racial affirmative action solutions if there was inadequacy with proposed race-neutral measures. Based on seven of the nine members of the Court’s analysis lacking real differences in Gratz and Grutter the concern for a definitive standard is warranted. Ironically, Justice Kennedy stated strict scrutiny “must not be strict in theory but feeble in fact” 100 which seems to be the sentiment of two members of the conservative majority bloc, Justices Scalia and Thomas stated in Grutter that they did not find merit with “the educational benefits flowing from student body diversity” meeting the compelling state interest analysis 101. At no time in history has the number of people

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97 Id. at 1632.
98 Spann, supra note 1, at 50.
99 Id.
100 See Fisher, 133 S. Ct. at 2421.
101 See id. at 2413.
of color being substantial enough to disrupt the homogenous environments of Predominantly White Institutions. These are still very “white spaces” and many are not welcoming to people of color be it students, staff, faculty, or administrator.

Implications of Fisher II and the Potential Elimination of Race-Conscious Admissions

Institutions of higher education should not wait for the Supreme Court’s Fisher II ruling but instead review their admissions policies and criteria. If there is a holistic review utilized the factors considered should be transparent to potential students via websites, printed materials, and during Open House and other campus recruiting events. Specifically individual applicant review should consist of evaluating contributions in the form of various backgrounds and characteristics that align with an institution’s goals for inclusion. Additionally, in 2011 the U.S. Department of Justice in conjunction with the Department of Education released a report “Guidance on the voluntary use of race to achieve diversity in postsecondary education” summarizing the Supreme Court’s Grutter/Gratz decisions and providing examples for admissions practices that would be legal. One of the recommendations, included a top percentile program similar to the one challenged in Fisher I as well as using non-race factors such as socioeconomic and /or first generation to potentially draw students from different racial and ethnic backgrounds. Programs like the Top Ten Percent Plan are in the balance until the Supreme Court decides Fisher II. If the Court chooses to find the Top Ten Percent plan unconstitutional there could be negative implications for “economic or geographic diversity to the extent that those factors correlate to race”. Institutions of higher education that target students using race-neutral

102 College Board and Education Counsel Report 2014 (n.d.)
104 Spann, supra note 1, at 53.
factors may have to cease or restructure their criteria if a connection can be made to race otherwise the potential for lawsuits alleging reverse discrimination is imminent.

With the prevalence of a “post-racial society” ideology being dominant in our culture and the Court’s jurisprudence, scholars and other stakeholders inside and outside the academy should work towards debunking this viewpoint and “demonstrate the harmful effects of racially isolated learning environments for minorities and society at-large”\textsuperscript{105}. Starting grassroots organizations that can politically influence local, state, and national lawmakers to defeat and repeal legislation designed to re-segregate education at all levels is key in light of the recent movement of using the ballot initiatives to further a conservative agenda.

Conclusion

With the prevalence of a “post-racial society” ideology being dominant in our culture and the Court’s jurisprudence, scholars and other stakeholders inside and outside the academy should work towards debunking this viewpoint and “demonstrate the harmful effects of racially isolated learning environments for minorities and society at-large”\textsuperscript{106}. Starting grassroots organizations that can politically influence local, state, and national lawmakers to defeat and repeal legislation designed to re-segregate education at all levels is key in light of the recent movement of using the ballot initiatives to further a conservative agenda.


\textsuperscript{106} Id.