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Leslie Yalof Garfield

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The Paradox of Race-Conscious Labels

Leslie Yalof Garfield[†]

“I would rather be a man of paradoxes than a man of prejudices.”¹

INTRODUCTION

What a difference a label makes! In the recently decided *Fisher v. Texas*² case, a majority of the Supreme Court defined Texas’s Top Ten Percent Law as a race-neutral means of achieving viewpoint diversity.³ This law, enacted in its original form by the Texas legislature in 1997, guarantees admission to the state’s leading public universities for every Texas student who graduates in the top 10% of his or her high school graduating class.⁴ The goal of this law is to achieve viewpoint diversity in the state’s higher education systems, which it does by relying on Texas’s diverse school system, composed of individually homogenous schools drawn on geographic boundaries, to collectively produce a diverse entering class. By categorizing the Top Ten Percent Law as race-neutral rather than race-conscious, the Court excused Texas from defending its diversity initiative against a rigorous equal protection challenge, leaving the Law intact.

In her singular dissent, Justice Ginsburg took issue with the Court’s characterization of the Top Ten Percent Law as race-neutral.⁵ The Top Ten Percent Law successfully achieves its goal of diversity because it draws from students who live in racially segregated housing and school districts.

[†] Professor of Law, Pace University School of Law. B.A. 1982 Univ. of Fla.; J.D. 1985 Univ. of Fla. I am most grateful to Noa Ben Asher, Bridget Crawford, Darren Rosenblum, Jonina Sauer and Emily Waldman for their helpful comments and conversations, and to Kristen Carroll, Marley Strauss and Marissa Kingman for their outstanding research support.

¹ JEAN-JACQUES ROUSSEAU, *ÉMILE: OR ON EDUCATION* 2 (Allan Bloom, trans., 1979).

² *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher III*].

³ *See id.* at 2415-16.

⁴ *See* HOUSE RESEARCH ORG., SESSION FOCUS REPORT, H.R. DOC NO. 75-17, 75th Sess., at 72 (Tex. 1997).

⁵ *Fisher III*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting).

Stated plainly, the Top Ten Percent Law works because the Court's earlier housing and school desegregation cases have failed. According to Justice Ginsburg, therefore, the "supposedly neutral alternatives," such as the Top Ten Percent Law, are driven by "race consciousness, not blindness to race."⁶ Consequently, Justice Ginsburg would identify the Top Ten Percent Law for what it is: a race-conscious admissions policy.⁷ Labeling the Law as race-conscious, however, would subject it to strict scrutiny review—a standard the Court has made almost impossible to meet.

This article argues that the justices' labels of Texas's legislative diversity initiative create an unfortunate paradox for either side of the affirmative action debate. Labeling the Top Ten Percent Law race-conscious is antithetical to Justice Ginsburg's good intentions. Legally, race-conscious legislation faces the almost insurmountable hurdle of strict scrutiny review. Politically, it serves to undermine the type of consensus that a race-neutral label could more easily garner. Her race-conscious designation, therefore, threatens to dismantle a diversity initiative that a majority of the Court is poised to uphold. On the other hand, a race-neutral label, while guaranteeing the Law's likely constitutional approval, signals racial complacency and a sense that society need no longer pursue its quest to undo the lingering effects of discrimination.

Labeling affirmative action laws with integrity is a hopelessly paradoxical pursuit. This article illustrates the consequences of such a pursuit. Section I traces the origins of the Top Ten Percent Law, which arose as a legislative protest to the Fifth Circuit's rejection of the use of race in admissions decisions. This section provides an in-depth understanding of the Top Ten Percent Law and concludes with a detailed analysis of the *Fisher* decision. Section II supplies an explanation of the majority's conclusion to treat the Top Ten Percent Law as race-neutral and provides detailed support for Justice Ginsburg's affirmation that the Law is really race-conscious. This section explores the foundation upon which the Top Ten Percent Law rests, illustrating that the Top Ten Percent Law only works because the Court's school and housing desegregation cases have failed.

Section III articulates the legal and political consequences of labeling the Top Ten Percent Law as race-conscious or race-neutral. This section discusses the stringency

⁶ *Id.* at 2433-34.

⁷ *Id.*

of the strict scrutiny test and the flexibility of the rational basis test and demonstrates that a Supreme Court label often dictates a law's constitutionality. This section then exposes the political fallout that will result from labeling the Top Ten Percent Law race-neutral and pays particular attention first to the argument that a race-neutral designation signals an unearned complacency for racial equality, and second to the concern that a race-neutral label turns a blind eye to the lingering effects of past discrimination. Section IV concludes that an unfortunate paradox arises when courts assign a race-neutral label to a race-conscious law. Regardless of whether the Court designates a law as race-conscious or race-neutral, its unbiased labels create very biased results.

I. HISTORICAL ORIGINS OF A RACE-NEUTRAL LAW

The Top Ten Percent Law had its genesis in the earliest challenges to race-conscious admissions policies.⁸ Frustrated with a 1996 Fifth Circuit decision prohibiting the use of race in admissions, the Texas Legislature adopted what it perceived as a workable, constitutional solution to ensuring diversity in its state's public universities. But a decade after its adoption, Texas nonetheless had to defend the Law against an equal protection claim. This section will detail the case law leading up to the Top Ten Percent Law, explain the Law in detail, and then discuss *Fisher v. Texas*, the 2013 case that considered the constitutionality of both the Law and the admissions policies adopted in response to its application.

A. *Judicial Backdrop*

To understand how the Top Ten Percent Law came about, one must dig deep to the first equal protection challenge to a race-preference admissions policy: *Regents of the University of California v. Bakke*.⁹ *Bakke* concerned the constitutionality of the UC Davis Medical School's 1973 admissions policy, which set aside a specific number of seats for students in identified minority groups.¹⁰ Allan Bakke, a white male, challenged the policy after the school rejected him in favor of applicants from underrepresented minority groups who

⁸ See *infra*, notes 30-38.

⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see generally Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action*, 39 J.C & U.L. 1 (2013).

¹⁰ *Bakke*, 438 U.S. at 269-70.

had applied to the school with test scores and grades inferior to Bakke's.¹¹ Bakke filed suit in the Superior Court of California arguing that UC Davis's admissions policy violated the equal protection clause,¹² the California Constitution,¹³ and Title VI of the Civil Rights Act of 1964.¹⁴ After winding its way through the California court system, the case eventually made its way to the Supreme Court of the United States.

In 1978, the Court issued its opinion on Bakke's challenge. The Court considered both the equal protection and the Title VI claims.¹⁵ With regard to the equal protection claim, the majority of the Court concluded that because the UC Davis program involved the use of an explicit racial classification, the program's preferential treatment of certain minority groups disregarded individual rights as guaranteed by the Fourteenth Amendment.¹⁶ Because the UC Davis program favored one group over another based on race, it was subject to the strictest scrutiny and would only pass constitutional muster if it were "precisely tailored to serve a compelling governmental interest."¹⁷

Justice Powell announced the judgment of the Court in an opinion that no other Justice joined.¹⁸ Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist concurred in finding that the program was unlawful, but based their conclusion on the Title VI claim, thereby finding it unnecessary to consider the equal protection claim.¹⁹ These four justices, together with Justice Powell, made up the majority necessary to invalidate the UC Davis program.

¹¹ *Id.* at 276.

¹² U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

¹³ CAL. CONST. art. I, § 7(b) (amended 1979) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.")

¹⁴ *Bakke*, 438 U.S. at 277-78.

¹⁵ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

¹⁶ *Bakke*, 438 U.S. at 320 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

¹⁷ *Bakke*, 438 U.S. at 291, 299. Justice Powell also wrote that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721-22 (1973)); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

¹⁸ *Bakke*, 438 U.S. at 267. For an in depth discussion of *Bakke*, see Garfield, *supra* note 9.

¹⁹ *Bakke*, 438 U.S. at 267.

Justice Powell held that the UC Davis program violated the equal protection clause.²⁰ He thought that the UC Davis policy of setting aside a certain number of seats was tantamount to a quota and therefore in violation of the Constitution.²¹ In his opinion, however, the Constitution would permit some use of race in admissions decisions at institutions of higher education.²² Specifically, Justice Powell found “a legitimate and substantial interest in ameliorating or eliminating, where feasible, the disabling effects of identified discrimination.”²³

Justice Powell paid particular attention to the benefits that both minorities and non-minorities would experience from learning in classrooms filled with diverse voices.²⁴ According to Powell, encouraging diversity in the student population is a compelling interest that is sometimes permissible, even if such action results in unequal treatment.²⁵ The majority student would greatly benefit and his or her educational training would be enhanced by having the opportunity to learn, study, and discuss academic information with students from diverse backgrounds.²⁶ A diverse student body contributing to a “robust exchange of ideas” is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.²⁷ The Constitution does not bar admission policies from introducing race as a factor in the selection process.

Justices Brennan, White, Blackmun, and Marshall dissented from the majority’s conclusion but agreed with Justice Powell that race-conscious programs are sometimes permissible. The four justices endorsed most of Justice Powell’s opinion, which highlighted the benefits that both minorities and non-minorities would experience from learning in a classroom filled with diverse voices²⁸ and that diversity in the

²⁰ *Id.* at 320.

²¹ *Id.* at 307.

²² *Id.* at 314. While race may be a factor, it cannot be the sole factor in the admission process: “Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” *Id.*

²³ *Id.* at 307.

²⁴ *Id.* at 312-13.

²⁵ *Id.* at 325.

²⁶ *Id.* at 312-13; *id.* at 312 n.48.

²⁷ *Id.* at 312-13 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *See id.*

²⁸ *Id.* at 325-26 (Opinion of JJ. Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

student population is a compelling interest that is sometimes permissible, even if such action results in unequal treatment.²⁹

The fractured decision yielded two dominant principles that have withstood future challenges and become binding precedent where challenges to race-conscious admissions policies are concerned. First, race could be considered a “plus” in the admissions process to achieve a compelling governmental interest in ensuring the benefits of viewpoint diversity. Second, any affirmative action admissions policy would be upheld only if it were “precisely tailored to serve a compelling governmental interest.”³⁰

Following *Bakke*, institutions of higher education could consider race as a plus during the admissions process, but quotas were constitutionally unacceptable. In response, the University of Texas School of Law (the University) adopted an admissions policy designed to increase acceptance of underrepresented minority applicants. Concerned with what it perceived as an unhealthy favoritism of individuals based on race, the Center for Individual Rights (CIR),³¹ a conservative public interest law firm, identified four law school applicants amenable to bringing an equal protection claim against the University of Texas School of Law, including Cheryl Hopwood, a single mother with a handicapped child.³² Hopwood was denied admission while the school admitted several black and Hispanic students with lower Law School Admissions Test (LSAT) scores and GPAs than Hopwood presented.

In 1993, funded by the CIR, Hopwood brought an action in the United States District Court for the Western District of Texas challenging the Texas law under the equal protection clause.³³ Judge Sam Sparks heard the case at the District level.³⁴ He concluded that based on the *Bakke* precedent, the UT law school could continue to consider race a “plus” in the admissions process.³⁵ Hopwood appealed to the Fifth Circuit Court of Appeals.³⁶

At the Circuit Court level, the CIR got what it wanted. Two of the three members of the Fifth Circuit panel found

²⁹ *Id.*

³⁰ *Id.* at 299.

³¹ *The Center for Individual Rights*, INST. FOR THE STUDY OF ACADEMIC RACISM, <http://www.ferris.edu/isar/Institut/CIR/cir.htm> (last visited Aug. 9, 2013).

³² *Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

³³ *Id.* at 551.

³⁴ *See id.*

³⁵ *Id.* at 577-78.

³⁶ *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) [hereinafter *Hopwood II*], *abrogated by Grutter v. Bolinger*, 539 U.S. 306 (2003).

Justice Powell's reasoning in *Bakke*, with which none of the other members of the majority of the Supreme Court in *Bakke* agreed, was not binding on the Court of Appeals and that race could never lawfully be considered as a factor in the admissions process.³⁷ The Supreme Court denied the University's appeal,³⁸ and, following *Hopwood II*, the then-Attorney General for Texas, Dan González, banned schools from considering race and ethnicity when evaluating eligibility for scholarships, financial aid policies, and admissions decisions for both public and private institutions.³⁹ In response to concern that the *Hopwood* decision would thwart diversity in higher education, the Texas legislature adopted section 51.803 of the Texas Education Code,⁴⁰ the Top Ten Percent Law.

B. Texas Legislature's Response—The Top Ten Percent Law

The Top Ten Percent Law prohibited public colleges and universities from considering race in the admissions process of any public institute of higher education. In exchange for the loss of diversity that prohibiting race considerations would yield,⁴¹ it guaranteed each Texas student who scores in the top 10% of his or her high school graduating class automatic admission to all state-funded schools.⁴² In most instances, students chose the University, the State's premier post-secondary institution.⁴³

³⁷ *Id.* at 944.

³⁸ *Texas v. Hopwood*, 518 U.S. 1033 (1996) (denying cert.).

³⁹ RICHARD KAHLBERG, A BETTER AFFIRMATIVE ACTION 31 (2012), available at <http://tcf.org/publications/pdfs/ABAA.pdf>; Peter Appelbome, *Affirmative Action Ban Changes a Law School*, N.Y. TIMES (July 2, 1997), <http://www.nytimes.com/1997/07/02/us/affirmative-action-ban-changes-a-law-school.html?pagewanted=all&src=pm>.

⁴⁰ TEX. EDUC. CODE ANN. § 51.803 (West 2013).

⁴¹ Absent mandated considerations of race, and without any other programs in place, some of the more elite Texas Universities were less likely to accept students of color. As a general, and sad, matter, in the mid-1990s students of color performed less well on their standardized tests and, when measured against non-minority students in the same high schools, earned lower GPAs. Since the bulk of the admissions were based on these scores, absent consideration of race as a plus—which *Hopwood* had eliminated—students of color were less likely to gain admission, and the states strongest universities would not have any meaningful diversity in its classrooms. For similar examples in other states, see John Eligon, *In Missouri, Race Complicates a Transfer to Better Schools*, N.Y. TIMES (July 31, 2013), http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?_r=0.

⁴² TEX. EDUC. CODE ANN. § 51.803. See Brian Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 290 (2001).

⁴³ See *University of Texas—Austin*, U.S. NEWS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/university-of-texas-austin-3658> (last visited Aug. 21, 2013); *University of Texas—Austin*, COLLEGE PROWLER, <http://collegeprowler.com/university-of-texas---austin/admissions/> (last visited Aug. 21, 2013).

The Law was designed to ensure admission to students who might otherwise be unable to compete when the University considered their objective test scores against the entire applicant pool.⁴⁴ Therefore, it achieved viewpoint diversity by garnering students from different demographically homogenous school districts who together would create a heterogeneous entering class. When adopting the Top Ten Percent Law, the legislature acknowledged the segregated house of cards on which it was built.⁴⁵ In many regions of the state, school districts and high schools are still predominantly composed of people from a single racial or ethnic group.⁴⁶ Because of “the persistence of this [*de facto*] segregation, admitting the top 10%” of students from every Texas high school “would provide a diverse student body and ensure that a large, well qualified pool of minority students was admitted to Texas universities.”⁴⁷

The bill was not without its detractors. According to legislative materials accompanying the bill, opponents of the Law argued that it “would not solve the problems created by [*Hopwood II*. Specifically, t]he employment of race-neutral criteria would not address the reason that affirmative action was originally initiated: to overcome prejudice and discrimination and their effects on the educational, professional, and socioeconomic achievements of minorities.”⁴⁸ Nonetheless in May 1997, the

⁴⁴ See JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT (Joel Spring ed., 2003). Numerous studies show that black and Hispanic students tend to perform less well academically when measured against their white peers. In a premier study on this issue, Professor John U. Ogbu, of University of California Berkeley, measured academic performance of black and white students in Shaker Heights, Ohio, whose school district is equally divided between blacks and whites. *Id.*; but see HOUSE RESEARCH ORG., SESSION FOCUS REPORT, H.R. Doc. No. 75-17, 75th Sess., at 72 (Tex. 1997) (“The underrepresentation . . . of certain groups in Texas colleges and Universities does not indicate these student are unable to succeed in a university setting.”). Prof. Ogbu found that as in many racially integrated school districts, the black students have lagged behind white students in grade point averages, test scores and placement in high level classes. OGBU, *supra* note 44.

⁴⁵ HOUSE RESEARCH ORG., BILL ANALYSIS H.B. 588, at 4 (Tex. 1997).

⁴⁶ *Fisher III*, 133 S. Ct. 2411, 2433 (2013) (“Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.”); HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS HB 588, pp. 4–5 (Tex. 1997) (“Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities.”).

⁴⁷ HOUSE RESEARCH ORG., *supra* note 44, at 4-5.

⁴⁸ *Id.* at 6.

legislature adopted the Top Ten Percent Law,⁴⁹ and the Texas universities' admissions policies changed.

C. *The Space Between*

From 1997 until 2004, the University of Texas employed an admissions policy plan that combined the Top Ten Percent Law with traditional admissions standards.⁵⁰ The University first extended offers to those guaranteed admission under the plan. If there was an insufficient number of admits based on the plan, the University then considered students based on both objective criteria such as GPA and SAT and on unique attributes, including geographic location, extra-curricular activities, and personal statements.⁵¹ Pursuant to *Hopwood*, the admissions committee did not consider race as a factor in the admissions process.⁵²

But the admissions policy changed following the Supreme Court's 2003 decisions in *Grutter v. Bollinger*⁵³ and *Gratz v. Bollinger*.⁵⁴ *Grutter* and *Gratz* presented to the Court the first challenges to race-conscious admissions policies since it decided *Bakke* 25 years earlier.⁵⁵ The cases challenged the admissions policies of the University of Michigan School of Law and the University of Michigan College of Literature, Science, and the Arts (LSA).⁵⁶ The two schools adopted race-conscious admissions policies that, following the *Bakke* doctrine, considered race as one of several factors in the admissions process. LSA's admissions decisions were based on a point system that the Court determined was unconstitutional because it specifically awarded 20 of 150 points to applicants identifying themselves as members of an underrepresented minority group.⁵⁷ The School of Law's admissions policy provided for an individual review of each applicant, but permitted admissions officials to consider race as a factor (among many other non-racial factors) in admissions until the

⁴⁹ David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 187 (1998).

⁵⁰ *Fisher III*, 133 S. Ct. at 2415-16.

⁵¹ *Id.* at 2416.

⁵² *Hopwood II*, 78 F.3d 932, 940 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵³ *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

⁵⁴ *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003).

⁵⁵ *Grutter*, 539 U.S. at 333.

⁵⁶ *Id.* at 311; *Gratz*, 539 U.S. at 249-50.

⁵⁷ *Gratz*, 539 U.S. at 273-75.

Law School achieved a “critical mass” of underrepresented voices in its incoming class.⁵⁸

By the time the Court considered *Grutter* and *Gratz*, the requirement that a court subject programs that favor race to the strictest scrutiny was entrenched doctrine.⁵⁹ Thus, the Court could uphold the policies only if the proponents demonstrated that each policy was narrowly tailored to meet a compelling governmental interest.

The cases were decided separately but the opinions were issued together. In both cases, a majority of the Court found a compelling government interest in achieving viewpoint diversity in the classroom.⁶⁰ The Court differed, however, as to whether the two programs were narrowly tailored to meet that compelling interest. In *Gratz*, the Court struck down LSA’s affirmative action admission program as not narrowly tailored because it gave points on a wholesale basis to a class of individuals based solely on race. The LSA program did not allow for individual review in a meaningful way that would assess whether a particular applicant might contribute to a diverse setting.⁶¹

In *Grutter*, however, the Court upheld the Law School’s program, ruling that its policy of requiring admissions committee members to assess each application individually was narrowly tailored.⁶² In fact, the Court stated that the “the Law School’s admission program bears the hallmarks of a narrowly tailored plan.”⁶³ According to the Court, the individual review process ensured that an applicant was not admitted solely based on membership in a particular class, but instead, was admitted because his or her race or ethnicity was one of several factors that might contribute to creating a well-rounded

⁵⁸ *Grutter*, 539 U.S. at 315-16.

⁵⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218-31 (1995); *United States v. Paradise*, 480 U.S. 149, 167 (1987); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978); see also *infra* pp. 25-27.

⁶⁰ *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 270-76.

⁶¹ *Gratz*, 539 U.S. at 270-76. The Supreme Court upheld Justice Powell’s determination that Universities could use race as a “plus” factor. *Id.* at 270-71 (quoting *Bakke*, 438 U.S. at 307 (1978)). However, the Court also re-emphasized the “importance of considering each particular applicant as an individual, assessing all of the qualities that individuals possess, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.” *Id.* at 271. Then, the Court found that the University’s policy of distributing 20 of 150 points to an applicant based upon qualifying as an “underrepresented minority” did not provide for the individualized review required by *Bakke*. *Id.* at 271-72. The Court found the awarding of points made race the “decisive” factor for “virtually every minimally qualified underrepresented minority applicant.” *Id.* at 274.

⁶² *Grutter*, 539 U.S. at 334.

⁶³ *Id.*

entering class whose members would in turn contribute to a discussion that included a diversity of views.⁶⁴

The *Grutter* Court paid attention to percentage plans:

[A]lthough percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because “they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” In addition, the Court emphasized [that] existing percentage plans—including UT’s—are simply not “capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission.”⁶⁵

Following the Court’s pronouncements in *Grutter* and *Gratz*, the University reshaped its admissions policy to reflect what it believed was now constitutionally permissible.⁶⁶ Thus in 2004, students applying to the University were reviewed under a judicially engineered two-pronged policy. The first prong was shaped by the legislative response to *Hopwood*. The University fashioned its second prong closely to the permissible boundaries of the narrowly tailored program considered in *Grutter*. Thus, under the University’s program, which still exists today,⁶⁷ students who are in the top 10% of their high school class are guaranteed admission to the University.⁶⁸ If, following application of the Top Ten Percent Law, the University still has

⁶⁴ *Id.* The Court found that the Law School plan bears the “hallmarks of a narrowly tailored plan[,]” because it used race as a “plus’ factor in the context of individualized review of each and every applicant.” *Id.* The Court described the Law School’s plan as 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.” *Id.* at 337.

⁶⁵ *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011) [hereinafter *Fisher II*], *rev’d*, 133 S. Ct. 2411 (2013) (third and fourth alterations in original) (quoting *Grutter*, 539 U.S. at 340).

⁶⁶ The Top Ten Percent Law did not yield the type of diversity the school had hoped. In 1996, the last year pre-*Hopwood* that UT used an admissions process that considered race as a factor, UT’s enrolled freshman class included 4.1% African-American and 14.4% Hispanic student enrollment. Second Amended Complaint for Declaratory, Injunctive and Other Relief at ¶ 32, *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 8 Civ. 263), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded* by 133 S. Ct. 2411 (2013) [hereinafter *Fisher I*] (citing IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN at Table 1 (Dec. 2006)). From 1998 to 2007, a period during which the Top Ten Percent law, the AI/PAI system, and race-neutral initiatives governed the University’s admissions policies, and to which consideration of race was added in 2005, the enrollment of African-American students increased from 3% to 6% of the entering freshman class while the enrollment of Hispanic students increased from roughly 13% to 20%. *Id.* at ¶¶ 63-95.

⁶⁷ *Fisher III*, 133 S. Ct. 2411, t 2422 (2013).

⁶⁸ HOUSE RESEARCH ORG., *supra* note 44, at 3-4.

“seats”⁶⁹ available, it considers applicants who did not fall in the top 10% of their class. Those students are subject to a *Grutter*-type review, which includes consideration of several “special circumstances” about the applicant including socioeconomic status, his or her high school, and the applicant’s race.⁷⁰

In 2008, while this admissions process was in place, Abigail Fisher and Rachel Michalewicz applied to UT and were denied admission to its fall entering class.⁷¹ In April of that same year, Fisher and Michalewicz, at the behest of The Project For Fair Representation, a conservative organization,⁷² brought suit requesting a preliminary injunction that would require UT to reevaluate their applications without considering race.⁷³ The plaintiffs alleged that the UT admissions policies violated their right to equal protection under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 2000(d).⁷⁴

D. Fisher v. Texas

1. Lower Courts

Judge Sam Sparks, the judge who decided *Hopwood I*, heard the case in the District Court for the Western District of Texas.⁷⁵ The court was bound not only by *Bakke*, *Grutter*, and *Gratz* but also by the Fifth Circuit’s *Hopwood* decision. Judge Sparks was charged with hearing and ultimately passing judgment on the constitutionality of the UT race-preference program, at least at the trial court level.⁷⁶ As in *Hopwood*,

⁶⁹ The common name given to admissions slots offered to applicants.

⁷⁰ *Fisher III*, 133 S. Ct. at 2415.

⁷¹ *Fisher I*, 645 F. Supp. 2d at 590.

⁷² The case was funded by Edward Blum, the sole proprietor of the Washington, D.C. legal defense fund, Project for Fair Representation. A conservative think tank interested in seeing the demise of race-preference admissions policies, the Project for Fair Representation is considered to be one of the impetuses to the eventual lawsuit. See Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES (Feb. 23, 2012), <http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all> (“Mr. Blum is the driving force behind *Fisher v. University of Texas*”); Interview with Nikole Hannah Jones, staff writer for ProPublica, NPR (June 17, 2013), <http://www.npr.org/templates/story/story.php?storyId=192703172> (“Abigail Fisher was recruited by a man named Edward Blum. And he runs a nonprofit called the Project on Fair Representation. And so he was looking for a plaintiff to challenge the use of race in affirmative action for admissions at the University of Texas at Austin.”).

⁷³ Memorandum In Support of Motion for Preliminary Injunction at 2, *Fisher I*, 645 F. Supp. 2d 587 (W.D. Tex Apr. 7, 2009) (No. 8 Civ. 263).

⁷⁴ *Fisher I*, 645 F. Supp. 2d at 591.

⁷⁵ *Id.* at 589.

⁷⁶ *Id.*

Judge Sparks favored the school's two-tiered policy.⁷⁷ The court did not pay particular attention to the Top Ten Percent Law, labeling it race-neutral.⁷⁸ In fact, the Top Ten Percent Law only figured into the court's decision making when considering whether it satisfied the University's compelling governmental interest in viewpoint diversity.⁷⁹ Judge Sparks denied the plaintiffs any damages in the case.⁸⁰ The plaintiffs appealed to the Fifth Circuit and Judge Higginbotham delivered the opinion of that court.⁸¹

The Fifth Circuit's opinion rejected *Hopwood* to the extent that Judge Higginbotham considered Justice Powell's plurality opinion in *Bakke* binding. Citing *Bakke*, he found that diversity in education is a compelling interest because a university's ability to pursue an atmosphere of speculation, excitement, and creation is promoted by a diverse student body and is essential to the quality of higher education.⁸² And student body diversity better prepares students as professionals.⁸³ The opinion, however, seemed to go beyond the court's adoption of the Supreme Court's finding that there is a compelling governmental interest in viewpoint diversity and found it is the University's mission to define whether its interest in diversity is compelling or not. According to the judge, "a university's educational judgment in developing diversity policies is due deference."⁸⁴ Thus, the Court seemed to shift the burden of identifying a compelling governmental interest from the courts to the schools.⁸⁵

⁷⁷ See *id.* Plaintiffs initially filed a preliminary injunction. Judge Sparks denied the plaintiffs' motion for a preliminary injunction and concluded that given the quality of the applicants' applications, they could not demonstrate a likelihood of success on the merits. See *id.* at 587. Judge Sparks further found that plaintiffs failed to establish a substantial likelihood that UT's use of race in undergraduate admissions unlawfully discriminated in violation of the Fourteenth Amendment of the United States Constitution. *Id.* Following the court's denial of the motion for preliminary injunction, the parties agreed to a bifurcated trial, allowing the court to separately consider the issues of liability and remedy. *Id.* at 590.

⁷⁸ *Id.* at 592-93. Plaintiffs agreed that the Top Ten Percent Law was race-neutral. *Id.* at 610.

⁷⁹ *Id.* at 603-04.

⁸⁰ *Id.* at 601-03.

⁸¹ *Fisher II*, 631 F.3d 213, 213 (5th Cir. 2011).

⁸² *Id.* at 231.

⁸³ See *id.* at 232-35.

⁸⁴ *Id.* at 231.

⁸⁵ It is on this point that the Supreme Court took issue. See *Fisher III*, 133 S. Ct. 2411, 2421 (2013) ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications . . .").

Judge Higginbotham broadened the scope of the court's review, finding that the University's two-pronged admissions program should be viewed in its totality. Rather than casually affirming the legality of the Top Ten Percent Law with the brush of a race-neutral label, he wrote in the first paragraph of his opinion that the Top Ten Percent Law "casts a shadow on the horizon to the otherwise-plain legality of the *Grutter*-like admissions program."⁸⁶ In his view, the University's policy should be looked at as a whole and not parsed into two separate prongs. The *Grutter* prong is only necessary because the Top Ten Percent Law failed in achieving the type of diversity the University believed was necessary to forward its educational mission. Thus according to Judge Higginbotham, the Top Ten Percent Law is "not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies."⁸⁷ The Judge deemed the Top Ten Percent Law as entirely relevant and wrote that "'facially neutral' has a talismanic ring in the law, but it can be misleading, [and i]t is here."⁸⁸ The court concluded that with the Top Ten Percent Law and the *Grutter*-type plan, the University effectively ensured the type of educational diversity that was constitutionally permissible and compelling. For this reason, the Court upheld the University's policy and affirmed the lower court's decision.

In a separate concurrence, Judge Garza called the decision "a faithful, if unfortunate, application of [*Grutter*]," which he opined was a "digression in the course of constitutional law."⁸⁹ Judge Garza took issue with the *Grutter* Court's abandonment of strict scrutiny. Consequently, he wrote that he "await[s] the Court's return to constitutional . . . principles."⁹⁰ Fisher appealed the decision and in February 2012, the Supreme

⁸⁶ *Id.* at 217. He paid particular attention to the relationship between the Top Ten Percent Law and the benefits of achieving diversity noting that in 2004, the last year in which the school admitted students solely based on the Top Ten Percent Rule, enrollment of minorities included 275 African-Americans and 1,024 Hispanics. In contrast, enrollment doubled once a *Grutter*-like plan was instituted.

⁸⁷ *Fisher II*, 631 F.3d at 242.

⁸⁸ *Id.*

⁸⁹ *Id.* at 247 (Garza, J., concurring).

⁹⁰ *Id.* at 266. The decision was contentious for the Fifth Circuit, in part because of Judge Higginbotham's conclusion that *Bakke* was binding on it. Following the decision, one member of the court requested that the court poll a majority of the bench. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) ("A majority of the judges who are in regular active service and not disqualified not having voted in favor, the Petition for Rehearing En Banc is DENIED.")

Court granted certiorari.⁹¹ Many believed the Court did so to address Judge Garza's concerns.

2. The Supreme Court

The *Fisher* decision was among the most widely anticipated and frequently debated of the Supreme Court's 2012-2013 term.⁹² The Court rendered its decision along with other much-watched opinions on issues including marriage equality⁹³ and voting rights,⁹⁴ during the last week of the term—more than seven months after hearing oral arguments. On June 24, 2013, with many watching, the Court rendered a decision that some Court watchers had anticipated would portend the end of affirmative action.⁹⁵ In fact, the decision passed up the chance to issue a sweeping ruling.

The Court chose not to rule on the merits of affirmative action or the constitutionality of race-conscious admissions policies. Instead, it remanded *Fisher* to the Fifth Circuit for further consideration.⁹⁶ To some this left unresolved the issue of whether a university could consider race in the admissions process. Many viewed the decision as the equivalent of a football kicker's punt.⁹⁷

⁹¹ *Fisher II*, 631 F.3d at 213.

⁹² See, e.g., Jess Bravin, *Justices Take Pass On Texas Affirmative-Action Case*, WALL ST. J. (June 25, 2013, 3:22 AM), <http://online.wsj.com/article/SB10001424127887324412604578517602559504498.html>; David Leonhardt, *Four Takeaways From Affirmative-Action Decision*, N.Y. TIMES (June 24, 2013, 3:45 PM) <http://projects.nytimes.com/live-dashboard/2013-06-supreme-court-decisions>; Adam Liptak, *Justices Step Up Scrutiny of Race in College Entry*, N.Y. TIMES (June 24, 2013), <http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?pagewanted=all&r=0>.

⁹³ E.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹⁴ E.g., *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

⁹⁵ See, e.g., Daniel Fisher, *Will Fisher v. Texas End Affirmative Action or Make it More Effective?*, FORBES (Oct. 9, 2012) <http://www.forbes.com/sites/danielfisher/2012/10/09/will-fisher-vs-texas-end-affirmative-action-or-make-it-more-effective/>.

⁹⁶ *Fisher III*, 133 S. Ct. 2411, 2434 (2013).

⁹⁷ Emily Bazelon, *Why Did the Supreme Court Punt the Affirmative-Action Case?*, SLATE (June 24, 2013, 1:09 P.M.), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/fisher_v_university_of_texas_why_did_the_supreme_court_punt_the_affirmative.html; Chris Miles, *Fisher v. University of Texas Decision: Affirmative Action Ruling Punted on by Supreme Court*, POLICYMIC (June 24, 2013), <http://www.policymic.com/articles/50659/fisher-v-university-of-texas-decision-affirmative-action-ruling-punted-on-by-supreme-court>; Richard Whittaker, *SCOTUS Punts on Fisher vs. UT, Lifts Part of Voting Rights Act*, AUSTIN CHRON. (June 28, 2013), <http://www.austinchronicle.com/news/2013-06-28/scotus-punts-on-fisher-vs-ut-lifts-part-of-voting-rights-act/>.

Chief Justice Roberts was credited with garnering support for the seven-member decision,⁹⁸ which Justice Kennedy authored.⁹⁹ On its face, this meant that a great majority of the Court was in agreement on an issue that had previously polarized its members.¹⁰⁰ Although Justice Ginsburg wrote a dissent, telling us no other justices joined.

The Court's decision did shape affirmative action jurisprudence, if only in a limited way. Writing for the majority, Justice Kennedy reaffirmed the need for lower courts to employ the strictest standard of scrutiny when reviewing race-conscious admissions programs.¹⁰¹ Where race-preference admissions policies are concerned, strict scrutiny requires the courts to find a compelling governmental interest in viewpoint diversity and a finding that the challenged program is narrowly tailored to meet that interest.¹⁰² Having reaffirmed the standard of review, the justices set out the procedure by which the University's admissions process should be scrutinized.

The seven-member majority took issue with the level of deference Judge Higginbotham accorded the University when evaluating whether its admissions policy was narrowly tailored.¹⁰³ In its relatively brief opinion,¹⁰⁴ the majority offered

⁹⁸ Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html?pagewanted=all&r=0>.

⁹⁹ *Fisher III*, 133 S. Ct. at 2422. Justice Kagan had recused herself.

¹⁰⁰ *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 291 (2003).

¹⁰¹ *Fisher III*, 133 S. Ct. at 2419 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). In reaching its conclusion, the Court drew on cases beyond *Grutter*, *Gratz* and *Bakke*, including: *Rice v. Cayetano*, 528 U.S. 495 (2000); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁰² *Grutter*, 539 U.S. at 321; see also Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 392 (2008).

¹⁰³ See *Fisher III*, 133 S. Ct. at 2420 (“[T]he Court of Appeals held petitioner could challenge only ‘whether [the University’s] decision to reintroduce race as a factor in admissions was made in good faith.’ And in considering such a challenge, the court would ‘presume the University acted in good faith’ and place on petitioner the burden of rebutting that presumption. The Court of Appeals held that to ‘second-guess the merits’ of this aspect of the University’s decision was a task it was ‘ill-equipped to perform’ and that it would attempt only to ‘ensure that [the University’s] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration.’ The Court of Appeals thus concluded that ‘the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y].’ Because ‘the efforts of the University have been studied, serious, and of high purpose,’ the Court of Appeals held that the use of race in the admissions program fell within ‘a constitutionally protected zone of discretion.’” (internal citations omitted) (alterations in original)).

¹⁰⁴ The majority opinion is roughly only 10 pages long. See *Fisher III*, 133 S. Ct. at 2411.

a new two-tiered analysis for evaluating the constitutionality of a race-conscious admissions policy. To pass constitutional muster, a reviewing court must first allow a college or university to demonstrate a “reasoned, principled explanation for the academic decision.”¹⁰⁵ Once a university has met its burden, the equal protection clause demands that a reviewing court “examine with care” the challenged policy.¹⁰⁶

Evaluating the Fifth Circuit’s decision under the Court’s announced two-tiered inquiry of the “narrowly tailored” prong, the majority found that the lower court impermissibly limited its own inquiry to whether the University acted in good faith when it chose to consider race as a factor in its admissions decision.¹⁰⁷ The deference paid by the Fifth Circuit was “at odds with *Grutter*’s command that ‘all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.’”¹⁰⁸ At least six of the eight sitting justices took no issue with whether there was a compelling governmental interest in the University’s mission to create viewpoint diversity in its classroom.¹⁰⁹ At issue in this particular case, therefore, was whether the *Grutter*-type second prong of the University’s admissions policy was narrowly tailored to meet that goal.

That the majority considered the Top Ten Percent Law race-neutral is evident in the way Justice Kennedy shaped the opinion. Justice Kennedy observed that the University “resume[d] its race-conscious admissions,” the subject of the *Fisher* challenge, following the 2004 *Grutter* case.¹¹⁰ The Court ascribed the label of race-neutral to the admissions policy that was in place prior to 2004, in this case the Top Ten Percent Law. The Top Ten Percent Law, for the majority’s purposes, was a race-neutral alternative to assuring viewpoint diversity.

Justices Scalia and Thomas wrote separate concurring opinions. Although both justices agreed with the result in the case, they each took issue with the Court’s failure to address whether there is ever a compelling governmental interest in viewpoint diversity. Justice Scalia offered a single paragraph, writing that he chose to join the opinion in full because the issue of

¹⁰⁵ *Id.* at 2419.

¹⁰⁶ *Id.* at 2420. A policy, the Justice wrote, may not be upheld unless the reviewing court is “ultimately satisfied that no workable race-neutral alternatives” would achieve the goals of viewpoint diversity. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2414 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)) (internal quotation marks omitted).

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 2416.

whether there is a compelling governmental interest in viewpoint diversity was not before the Court.¹¹¹ Justice Thomas offered a more substantive and definitive expression of his views, writing that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”¹¹²

Justice Ginsburg wrote the lone dissent. She sharply disagreed with the majority’s characterization of the Top Ten Percent Law as a sufficiently “race-neutral” alternative to assure educational diversity.¹¹³ Writing that “only an ostrich could regard the supposedly neutral alternatives as race unconscious,” Justice Ginsburg observed that the Top Ten Percent Law only works because the Court’s previous school and housing desegregation cases have failed.¹¹⁴ She would have affirmed the Fifth Circuit decision finding the University’s plan permissible, rather than remanding the case for further review. According to Justice Ginsburg, the University’s program was constitutionally permissible since it tracked “the model approved by the court in *Grutter*”¹¹⁵

The majority’s characterization of the Top Ten Percent law as race-neutral and Justice Ginsburg’s characterization of the same law as race-conscious illustrates the propensity of the judiciary to look at the same law in different ways. In this instance, the majority of the Court labeled the Top Ten Percent Law race-neutral while Justice Ginsburg and Judge Higginbotham labeled the Top Ten Percent Law as race-conscious. Either way, there are consequences to assigning a label. Laws labeled race-neutral enjoy the benefits of light judicial scrutiny while laws labeled race-conscious are subject to a strict and almost insurmountable judicial review.

The next section highlights the unequal treatment the same program receives based on the label assigned by a court. It first fleshes out the reasons the justices assigned different labels to the Top Ten Percent Law, and provides an in-depth examination of the reasons for Justice Ginsburg’s conclusion. Then, using the Top Ten Percent Law as a typology, the section explores how differing judges can characterize the same program in disparate ways. It concludes that the Top Ten Percent Law is actuality a race-conscious admissions program.

¹¹¹ *Id.* at 2422 (Scalia, J., concurring).

¹¹² *Id.* (Thomas, J., concurring).

¹¹³ *Id.* at 2434 (Ginsburg, J., dissenting).

¹¹⁴ *Id.* at 2433.

¹¹⁵ *Id.*

II. LABELING THE TOP TEN PERCENT LAW

Historically, the Court has been fairly consistent with labeling laws as race-conscious or race-neutral.¹¹⁶ In determining the appropriate label to apply, a reviewing court considers the impact that the law has on race and/or the State's motivation for adopting the law.¹¹⁷ With respect to labeling a law, benches rarely disagree as to whether a law is racially motivated or benign.¹¹⁸ Their disagreements are generally reserved for ferreting out the law under the appropriate level of scrutiny.¹¹⁹

In *Fisher*, however, the majority disagreed with Justice Ginsburg about the racial label of the program.¹²⁰ Both sides relied equally on the legislative history of the Top Ten Percent Law. Each, however, reached distinct conclusions as to its impact on race.¹²¹

A. *The Majority's Race-Neutral Label*

Members of the *Fisher* majority seemed simpatico in their conclusion as to the race-neutrality of the Top Ten Percent Law. Calling it a legislative reaction to *Hopwood*, Justice Kennedy characterized the Law as granting, "automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards,"¹²² and mentioned nothing with regard to its impact on race. Nor did Justices Scalia's or Thomas's concurrences challenge the race-neutrality of the Law.¹²³

Similarly, the majority opinion failed to challenge the constitutionality of the Law itself. In fact, the majority excused

¹¹⁶ See, e.g., *Parents Involved in Community Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 740 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

¹¹⁷ See, e.g., *Adarand*, 515 U.S. at 200; *United States v. Paradise*, 480 U.S. 149 (1987); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹¹⁸ *Gratz v. Bolinger*, 539 U.S. 244 (2003) (Univ. of Michigan admissions policy was subject to strict scrutiny); *Adarand*, 515 U.S. 200 (federal law granting preference to contractors who hire minority subcontractors controlled by socially and economically disadvantaged individuals is race-coconscious and subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (law requiring contractors to set aside 30% of their budget for minority business enterprises race-conscious and subject to strict scrutiny).

¹¹⁹ See e.g., *Gratz*, 539 U.S. 244; *Grutter v. Bolinger*, 539 U.S. 982 (2003); *Adarand*, 515 U.S. 200; *Bakke*, 438 U.S. 265.

¹²⁰ See *supra* notes 88-110 and accompanying text.

¹²¹ See *supra* notes 88-110 and accompanying text.

¹²² *Fisher III*, 133 S. Ct. 2411, 2416 (2013).

¹²³ *Id.* at 2427 (Thomas, J., concurring).

the Law from any judicial review.¹²⁴ In his opinion, Justice Kennedy acknowledged the role that the Top Ten Percent Law plays in admissions decisions, but began the constitutional inquiry with whether the University's subsequent adoption of the *Grutter*-type second prong in its admissions policy was constitutionally permissible.¹²⁵ The Court's recalibration of the strict scrutiny rule, coupled with its decision to remand the decision for review of the *Grutter*-type prong of the University decision, supports the inference that the Top Ten Percent Law itself is race-neutral, and therefore exempt from the two-pronged strict scrutiny test.¹²⁶

The majority referenced the legislative intent of the Top Ten Percent Law, but quickly dismissed the notion that the Law had the kind of constitutional infirmities that would concern this particular Court.¹²⁷ In so doing, the Court was extending to the Top Ten Percent Law the level of deference traditionally reserved for rational basis review, further confirming the majority's race-neutral label. Upon remand, the Top Ten Percent Law will survive as an admissions policy, pursuant to the Court's stated scope of review.¹²⁸

In support of the argument that the majority characterized the Law as race-neutral, one need only read Justice Ginsburg's dissent, which called out her fellow justices for sticking their heads in the sand like ostriches.¹²⁹ At issue for her was the fact that the majority failed to even acknowledge the "overtly discriminatory past" upon which the Law is based.¹³⁰ By calling the legislation race-neutral, the majority exempted from judicial review an inquiry into the appropriateness of legislation whose intended purpose is to ensure students of color are admitted to the state's top universities.¹³¹

B. Justice Ginsburg's Race-Conscious Label

In contrast to the majority's characterization of the Law, Justice Ginsburg labeled the Top Ten Percent Law race-conscious. In support of her argument, Justice Ginsburg

¹²⁴ *Id.* at 2416 (majority opinion).

¹²⁵ *Id.* at 2419.

¹²⁶ *Id.* at 2422.

¹²⁷ *Id.* at 2416.

¹²⁸ See *supra* notes 91-92.

¹²⁹ *Fisher III*, 133 S. Ct. at 2433. ("I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.")

¹³⁰ *Id.* (citations omitted).

¹³¹ See HOUSE RESEARCH ORG., *supra* note 45, at 3-4.

highlighted the Law's legislative history, which cited the legislature's well-intentioned motivation of increasing admission for students of color. As she pointed out, "Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage."¹³² Homogenous housing and school patterns were central to achieving the Top Ten Percent law's goals.

In her dissent, Justice Ginsburg characterized the Top Ten Percent Law as race-conscious because it rests on the shoulders of persistent segregation in Texas. The Law works because it garners students from different geographic school districts who collectively create a critical mass of diverse viewpoints.¹³³ Housing patterns tend to reflect de facto segregation. According to a study performed by sociologist John Logan at Brown University and based on data culled from the 2010 U.S. Census report, the average non-Hispanic white person continues to live in a neighborhood that looks very different from neighborhoods where the average black, Hispanic, or Asians live. Average whites in metropolitan America live in neighborhoods that are 74% white. This is actually better than in 1980 when the average was 88% white.¹³⁴ Application of the Top Ten Percent Law means that Texas's many arguably homogenous school systems collectively produce a diverse entering class at the state's public universities. Were the Texas school systems already fully integrated, there could be no guarantee that the Top Ten Percent Law would increase diversity at Texas's universities.

As Justice Ginsburg pointed out, upholding the Top Ten Percent Law means turning a blind eye to the constitutional principles and goals of the Court's housing and school desegregation mandates. In *Fisher*, as in past cases, she looked unfavorably at the Court's renunciation of the compelling

¹³² *Fisher III*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). Judge Higginbotham, in his *Fisher* opinion, found the Top Ten Percent Law race-conscious in part because "underrepresented minorities were its announced target." *Fisher II*, 631 F.3d 213, 224 (5th Cir. 2011). Consequently, he subjected the Law to strict scrutiny. First concluding that there was a compelling governmental interest in viewpoint diversity, Justice Higginbotham held that the Law was narrowly tailored as well, because, in the University's good judgment, the program was the only reasonable means of assuring diversity in the classroom. *Id.* at 247. The deference Judge Higginbotham granted to the University, however, was the fatal flaw in his analysis and the reason for which the Supreme Court overturned his decision. See *Fisher III*, 133 S. Ct. at 2421.

¹³³ See Roque Planas, *Top 10 Percent Admissions Reduced at UT-Austin, Likely To Affect Latinos*, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/top-10-percent-ut-austin_n_2064055.html.

¹³⁴ JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2-3 (Mar. 24, 2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

governmental interest test in remedying the present effects of past discrimination where education is concerned.¹³⁵ Indeed, Ginsburg's commitment to retaining the post-civil rights desegregation goals fueled much of her vision. She was equally leery of the path future affirmative action cases may travel.

C. *The Road Previously Taken: A Brief Walk through the Court's Desegregation Cases*

The Court first committed itself to the desegregation of public education in the mid-1950s when it consolidated five school desegregation cases¹³⁶ that came to be known as *Brown*.¹³⁷ In these cases, the NAACP, representing school-aged plaintiffs, challenged the inherently unequal education of students who were taught in segregated schools.¹³⁸ The Court concluded that the Fourteenth Amendment was intended to prohibit state-sponsored racial segregation.¹³⁹ This first decision, which came to be known as *Brown I*, prohibited segregation as a violation of the Constitution.

One year later in *Brown II*,¹⁴⁰ the Court implemented a remedy of sorts to eradicate school segregation. In that case, Chief Justice Earl Warren ordered school boards to proceed with "all deliberate speed" to develop desegregation plans under the supervision of local federal courts.¹⁴¹ Many courts interpreted the language of *Brown II* as "an order to integrate."¹⁴²

Desegregation remained a highly charged issue after *Brown*. Several senators and a significant number of

¹³⁵ *Fisher III*, 133 S. Ct. at 2434 (Ginsburg, J. dissenting); see also *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) ("This insistence on 'consistency' would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools." (citations omitted)).

¹³⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Briggs v. Elliott*, 342 U.S. 350 (1952); *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); *Belton v. Gebhart*, 91 A.2d 137 (Del. 1952).

¹³⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³⁸ *Id.* at 485.

¹³⁹ *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

¹⁴⁰ *Brown v. Board of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

¹⁴¹ *Id.* at 301.

¹⁴² *Teague v. Ark. Bd. of Educ.*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012). See, e.g., *McNeese v. Bd. of Ed.*, 373 US 668 (1963); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Bulluck v. Washington*, 468 F.2d 1096 (D.C. Cir. 1972); *Jenkins v. Missouri*, 965 F. Supp. 1295 (W.D. Mo. 1997); but see *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968) (arguably interpreting *Brown* as a charge not to segregate, though not as an order to integrate).

congressmen filed *The Southern Manifesto*,¹⁴³ which condemned the Court's *Brown* decisions. Governors defied federal court orders¹⁴⁴ and cases continued to wind their way up to the Supreme Court.¹⁴⁵ Through all this, the Court remained committed to assuring that school-aged students received an equal, integrated education regardless of race, and in many cases, provided the rhetoric to support its claim.

For the most part, school districts were drawn along city lines, so the pattern of individuals living in racially segregated neighborhoods within a particular school district and the subsequent phenomenon of "white flight" had a new effect on integration, one that seemed to elude the mandates of *Brown* and its progeny.¹⁴⁶ But a series of housing and school desegregation cases that the Supreme Court decided in the 1970s once again provided the Court with the opportunity to demonstrate its commitment to integration.

In 1970, the Court in *Swann v. Charlotte-Mecklenburg Board of Education* considered a challenge to a school board-imposed integration plan.¹⁴⁷ The plan included rezoning attendance lines in a school district that had previously assigned students based on de facto housing patterns. In upholding the busing plan, Chief Justice Warren Burger wrote that "[t]he objective remains to eliminate from the public schools all vestiges of state-imposed segregation,"¹⁴⁸ and that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."¹⁴⁹

Two subsequent cases concerned themselves with assuring integration in the wake of de facto segregated housing patterns. In *Milliken v. Bradley*, the Court considered a forced busing program created to integrate predominantly black inner-city Detroit with its more affluent white suburban school districts.¹⁵⁰ Although considered a school desegregation case,

¹⁴³ 102 Cong. Rec. 4459-61 (1956); see also Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 67 n.12 (2008).

¹⁴⁴ Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 655 (2007).

¹⁴⁵ See, e.g., *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 1218 (1969); *Griffin v. Cnty. Bd.*, 377 U.S. 218 (1964); *Lucy v. Adams*, 350 U.S. 1 (1955).

¹⁴⁶ For an excellent discussion of demographics and desegregation see Leland Ware, *Brown at 50: School Desegregation from Reconstruction to Resegregation*, 16. U. FLA. J.L. & PUB. POL'Y 267, 287-91 (2005).

¹⁴⁷ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

¹⁴⁸ *Id.* at 14-15.

¹⁴⁹ *Id.* at 15 (citations omitted).

¹⁵⁰ *Milliken v. Bradley*, 418 U.S. 717 (1974).

the issue had its roots in the city's government-influenced housing discrimination patterns. The NAACP brought the case against Michigan Governor William Milliken, arguing that he and the officials of Detroit had worked together to enact policies that promoted housing segregation programs such as redlining.¹⁵¹ These programs in turn led to de facto school segregation because school assignments were drawn along geographic lines. The District Court ruled in favor of the plaintiffs and found that it was the state's responsibility to integrate, even if integration required drawing a school district that extended beyond city lines.¹⁵² Defendants appealed, and the Court heard the case in 1974.¹⁵³

The *Milliken* Court noted that the schools' segregated housing practices resulted in a violation of the constitutional rights of blacks.¹⁵⁴ But the Court found that there was no constitutional mandate to force suburban school districts to join with the urban schools in a move to create racial balancing absent "any inter-district violation or effect."¹⁵⁵ Chief Justice Burger did state, however, that an inter-district remedy may be appropriate where racial discrimination in one or more school districts caused racial segregation in an adjacent district, or where school district lines were intentionally drawn based on race. "In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation."¹⁵⁶

After *Milliken*, the Court considered a challenge to Chicago's housing market in *Hills v. Gautreaux*.¹⁵⁷ In *Gautreaux*, black Chicago public housing tenants and applicants brought an action against the Chicago Housing Authority (CHA) and the U.S. Department of Housing and Urban Development (HUD) claiming that both agencies were guilty of racial discrimination in public housing. Specifically, plaintiffs charged that CHA and HUD had deliberately limited public housing to inner city Chicago locals "to avoid the

¹⁵¹ See *id.*; see also Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1214 (2012) (defining redlining as "the practice of not offering financial services in minority or low-income neighborhoods, sometimes indicated with a red line on a map").

¹⁵² *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *rev'd*, 418 U.S. 717.

¹⁵³ *Milliken*, 418 U.S. 717.

¹⁵⁴ *Id.* at 738 & n.18.

¹⁵⁵ *Id.* at 719.

¹⁵⁶ *Id.* at 745.

¹⁵⁷ *Hills v. Gautreaux*, 425 U.S. 284 (1976) (originally filed as *Gatreau v. Chicago Hous. Auth.*, 296 F. Supp. 907 (1969)).

placement of Negro families in white neighborhoods.”¹⁵⁸ At issue was the relevant geographic area for purposes of plaintiff’s housing options. HUD and CHA argued that, based on *Milliken*, the appropriate geographic area at issue was the city of Chicago and that the city had no duty or authority to find housing beyond the city borders. The Court, per Justice Stewart, rejected the defendant’s argument. It found that unlike the suburban school districts in *Milliken*, which did not commit any affirmative violations of segregation, the relevant housing market for purposes of the respondent’s housing options included Chicago and the surrounding suburban areas.¹⁵⁹

Justice Stewart referred to the “affirmatively further” obligation of the statute and noted that one of the steps HUD had taken to “discharge its statutory duty to promote fair housing was the adoption of project-selection criteria” designed “to assure that building in minority areas goes forward only after there truly exist housing opportunities for minorities elsewhere in the housing market.”¹⁶⁰ The reasoning of *Gautreaux* supports the notion that the Court, whenever possible, will seek to assure that housing, like schools, are integrated. Not much has changed over the past 50 years with regard to that message.

For the most part, the current, more conservative Court has remained true to the interpretation of constitutional principles espoused in *Brown*, *Swann*, *Milliken*, and *Gautreaux*. When the Court recently revisited the housing/school desegregation issue in the consolidated cases of *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁶¹ and *Meredith v. Jefferson County Board of Education*,¹⁶² its decision remained true to its earlier ideals. *Parents Involved* and *Meredith* concerned voluntary school desegregation plans implemented by the school boards in Seattle, Washington and Louisville, Kentucky to avoid racial isolation that would have occurred because of housing patterns.¹⁶³ Although the Court found that the plans, which were enacted to counter de facto segregation, were overly broad and therefore invalid, a majority of the Court used the

¹⁵⁸ *Id.* at 286 (citation omitted).

¹⁵⁹ *Id.* at 305-06. For an excellent review of desegregation and housing patterns, see Florence Wagman Roisman, *Affirmatively Furthering Fair Housing In Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (2007).

¹⁶⁰ *Hills*, 425 U.S. at 301 (citations omitted).

¹⁶¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹⁶² Consolidated with *Parents Involved*, 551 U.S. 701.

¹⁶³ See generally *Parents Involved*. 551 U.S. 701.

opportunity to confirm its dedication to avoiding a return to racial isolation in any school district.¹⁶⁴

The Court's decades-long sensitivity to racial inequality in education may be reaching its endpoint. Only five justices on the *Parents Involved* court found a compelling governmental interest in viewpoint diversity.¹⁶⁵ The lopsided *Fisher* decision indicates further movement away from civil rights era judicial mandates. Because none of the other justices chose to join her dissent, Justice Ginsburg's opinion is more of a cautionary tale than the potential for precedent. As Adam Liptak observed, Justice Ginsburg's lone dissent "may suggest that she is alert to the Chief Justice's apparent strategy" to slowly build consensus and then shift policy to the right.¹⁶⁶

By characterizing the Top Ten Percent Law as race-neutral, the Court is disregarding its own dearly held constitutional principles¹⁶⁷ with the potential to undo the judicial activism of the civil rights and post-civil rights era. Ironically, Justice Ginsburg's race-conscious label also potentially works against her interest. Race-conscious legislation is subject to the strictest scrutiny and is therefore likely to fail when measured against the constitutional principles of the equal protection clause.

Justice Ginsburg's dissent and the majority opinion set the Top Ten Percent Law up for varying levels of scrutiny. The label assigned to the Law, therefore, has significant consequences on its future constitutional viability. These consequences range from the legal mandates dictated by equal protection jurisprudence to the political fallout that results from calling a law race-conscious or race-neutral.

III. CONSEQUENCES OF A LABEL

There are significant consequences to labeling a program as race-conscious or race-neutral. Legally, a label will dictate the level of scrutiny to which the Court will subject the program. And as previously stated, the level of scrutiny can portend a law's constitutionality. Politically, the label a

¹⁶⁴ *Id.* at 865 (Breyer, J., dissenting).

¹⁶⁵ *See id.* at 708, 725-33.

¹⁶⁶ Adam Liptak, *Court Is "One of Most Activist" Ginsburg Says, Vowing to Stay*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html?pagewanted=1&r=0>.

¹⁶⁷ *Fisher III*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) ("It is race consciousness, not blindness to race, that drives [the Top Ten Percent Law].").

program receives dictates its support and ultimately its momentum. Using the Top Ten Percent Law as a typology, this section will explore the legal and political consequences of assigning a race-conscious or race-neutral label to a particular law and will illustrate that the Court's honest and unbiased assignment of labels can have very biased results.

A. *Legal Consequences*

The equal protection clause guarantees individuals "equal protection of the laws."¹⁶⁸ Equal protection, however, does not necessarily mean identical treatment. In certain limited instances, therefore, the Court will permit states to deny a right or benefit to one group that it affords to another group when it is able to demonstrate a legitimate or, in some instances, compelling governmental reason for so doing.¹⁶⁹

The Court looks with skepticism upon laws that classify or favor one group over another, particularly when the laws classify groups by immutable characteristics, which are those qualities with which one is born, such as race.¹⁷⁰ In the Court's view, an individual's race, ethnicity, or national origin are so "seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."¹⁷¹

Laws affecting race are particularly suspect. As the Court announced in *Washington v. Davis*: "The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race."¹⁷² Consequently,

¹⁶⁸ U.S. CONST. amend. XIV.

¹⁶⁹ See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993) (upholding Kentucky's involuntary commitment law despite differing commitment procedures for particular groups); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976) (per curiam) (upholding law that treats police officers differently for retirement purposes); *Railway Express Co. v. New York*, 336 U.S. 106, 110 (1949) (upholding a prohibition of advertisements on a limited class of trucks).

¹⁷⁰ See, e.g., *Holland v. Illinois*, 493 U.S. 474, 496 (1990) (citing *Lockhart v. McCree*, 476 U.S. 162, 175 (1986)). Gender classifications, however, are generally subject to an intermediate level of scrutiny. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976). And whether a "heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation" is a question "still being debated and considered in the courts." *U.S. v. Windsor*, 133 S. Ct. 2675, 2683-84 (2013).

¹⁷¹ *Windsor*, 133 S. Ct. at 2675 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)); cf. *Cleburne*, 473 U.S. at 452-53 (Stevens, J., concurring) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right.").

¹⁷² *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) ("the

race-conscious programs are subject to the strictest scrutiny.¹⁷³ In contrast, the Court has held that laws that do not classify based on race, or other immutable characteristics—laws that are, say, race-neutral—are constitutionally permissible so long as the party defending the law can demonstrate that it has a rational basis for so doing.¹⁷⁴ Because race-conscious laws are subject to the strictest scrutiny, and race-neutral laws are only subject to the rational basis test, the label to which a court ascribes a particular program has a substantial impact on the level of review to which it will be subjected.

1. Strict Scrutiny Test

Laws and state-sponsored programs that favor racial one group over another are subject to strict scrutiny. Thus, labeling the Texas law as race-conscious would require the application of this heightened test. Under strict scrutiny, a court must invalidate the race-conscious policy absent a demonstration that the policy is supported by a compelling governmental interest and that the policy is narrowly tailored to meet that interest.¹⁷⁵ Strict scrutiny is tough to pass. Roy

primary purpose of the Equal Protection Clause was to end discrimination against the former slaves”); *Assoc. Gen. Contractors of Cal., Inc. v. City and Cnty. of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny).

¹⁷³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978). *Cf. Windsor*, 133 S. Ct. at 2684 (noting that whether heightened scrutiny should apply to sexual orientation classifications is still being debated by the courts). For further examples of strict scrutiny, see, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) In *Skinner*, Oklahoma attempted to use its Habitual Criminal Sterilization Act to authorize the vasectomy of a convicted felon. Court used strict scrutiny review and found procreation was a fundamental right. While this was a due process violation, it was the first time the Supreme Court used strict scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944) was the second case where the Court recognized strict scrutiny. Here, a Japanese-American appealed his conviction for failing to comply with a federal military order excluding Japanese-Americans from a certain part of the west coast, but also not letting him leave. This racial classification survived strict scrutiny, but today is considered a repugnant decision. Laws that classify based on gender receive intermediate scrutiny, wherein the classification must be substantially related to an important governmental purpose. See, e.g., *Craig*, 429 U.S. 190; *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁷⁴ *F.C.C. v. Beach Commc'ns Inc.*, 508 U.S. 307, 313 (1993).

¹⁷⁵ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Adarand*, 515 U.S. at 237; *United States v. Paradise*, 480 U.S. 149, 167 (1987).

Brooks and Mary Newborn observed: “[S]urviving strict scrutiny is like climbing Mount Kilimanjaro two times.”¹⁷⁶

The strict scrutiny test has its modern origins in First Amendment and freedom of association challenges. In the late 1950s and early 1960s, the Court used the test to protect individuals from excessive state infringement on their individual rights.¹⁷⁷ In 1971, the Court in *Graham v. Richardson* concluded that classifications “based on nationality or race are inherently suspect and subject to close judicial scrutiny.”¹⁷⁸ Seven years after *Graham*, Justice Powell pronounced that the strict scrutiny test was the appropriate standard for reviewing equal protection challenges to race-conscious admissions policies.¹⁷⁹

Since *Bakke*, the Court has been clear that race-conscious admissions policies, because they favor one race over another, must be subject to strict scrutiny.¹⁸⁰ Justice Powell’s opinion informed the present strict scrutiny test; a program or policy will only withstand strict scrutiny if it is justified by a compelling governmental interest and if the policy is narrowly tailored to meet that interest. The strict scrutiny test was applicable to all laws that favored one race over another, regardless of whether the laws were aimed at academia or the workplace.

For the 25 years that followed, the Court limited its strict scrutiny inquiries to workplace challenges.¹⁸¹ These cases collectively concluded that a compelling governmental interest exists in the workplace if the challenged law is designed to ameliorate the present effects of past discrimination.¹⁸² In

¹⁷⁶ Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without A Difference?*, 82 CAL. L. REV. 787, 813 (1994).

¹⁷⁷ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

¹⁷⁸ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹⁷⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978).

¹⁸⁰ See *supra* note 59 and accompanying text. For an in-depth discussion of the strict scrutiny test, see Garfield, *supra* note 102, at 392.

¹⁸⁰ See *Fisher III*, 133 S. Ct. 2411, 2419 (2013).

¹⁸¹ See Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 640 (2005). During that time, the Court declined to hear *Hopwood* and *Smith*, the only cases involving race discrimination in school admissions appealed to the Supreme Court during the 25 years between *Bakke* and *Grutter*. See *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001); *Smith v. Univ. of Wash. Law Sch.*, 392 F.3d 367 (9th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005).

¹⁸² In the 25 years between *Bakke* and *Grutter* the court limited relief to instances where there was a present effect of past discrimination.

Grutter, the Court's first post-*Bakke* opportunity to consider an equal protection challenge to a school admissions policy, Justice O'Connor wrote that context matters when considering what constitutes a compelling governmental interest in equal protection clause challenges to race-conscious admissions policies.¹⁸³ In this particular instance, the context to which Justice O'Connor referred was an academic setting as opposed to the workplace environment. The compelling governmental interest is met when the governmental entity defending the program or policy can demonstrate the need for viewpoint diversity in its classrooms.¹⁸⁴

Equal protection challenges do not frequently come before the Court. In fact, during the 2012-2013 term, the Court only mentioned the strict scrutiny test twice.¹⁸⁵ In *Fisher*, the first of the two Court opinions to consider the matter, a majority of the Court affirmed its long-held policy of subjecting race-conscious programs to strict scrutiny and reiterated that there is a compelling governmental interest in viewpoint diversity.¹⁸⁶ When a race-conscious action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

It would be quite difficult for the Top Ten Percent Law to pass the strict scrutiny test. Post-*Fisher*, the Texas Legislature would have to demonstrate the compelling governmental interest in the Law and that the Top Ten Percent Law is narrowly tailored to meet that interest.¹⁸⁷ Texas would have little trouble defending the compelling governmental interest in viewpoint diversity. Five sitting justices are likely to agree with the state: Justices Breyer, Ginsburg and Kennedy have already endorsed the interest.¹⁸⁸ Justice Sotomayor, who has publically called herself an "affirmative action baby," publically justifies the use of programs to benefit underrepresented minorities gaining entrance to elite

¹⁸³ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

¹⁸⁴ *Id.* at 328.

¹⁸⁵ See *Fisher III*, 133 S. Ct. at 2415; *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J. dissenting) (noting the majority's decision to not apply strict scrutiny to Defense of Marriage Act).

¹⁸⁶ *Fisher III*, 133 S. Ct. at 2419.

¹⁸⁷ *Id.* (citing *Grutter*, 539 U.S. at 326).

¹⁸⁸ *Grutter*, 539 U.S. at 310, 343; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 247 (2003).

schools.¹⁸⁹ Justice Kagan is seen as part of the Court's "liberal wing"¹⁹⁰ and would also likely agree.

While the Top Ten Percent Law might pass the compelling governmental interest prong, it would likely meet its fate for the failure to be narrowly tailored. The narrowly tailored test is almost impossible to pass.¹⁹¹ With regard to race-conscious admissions considerations, the Court has only upheld one of the four cases it has considered.¹⁹² According to the Court, a race-conscious admissions process is narrowly tailored if it provides a holistic individualized view of each applicant as a means of assembling a critical mass of diverse students, and if the school further reflects with regularity throughout the admissions process on whether it has met that goal.¹⁹³ But meeting the holistic review requirement is nearly impossible for undergraduate schools, given the voluminous applicant pools.¹⁹⁴

Treating the Top Ten Percent Law as race-conscious would change the Court's view of the University's admissions process. The Court would be forced to look at both prongs and

¹⁸⁹ Bill Mears, *Sotomayor Says She Was 'Perfect Affirmative Action Baby'*, CNN POLITICS (June 11, 2009, 6:37 PM), <http://www.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/index.html?ref=24hours>.

¹⁹⁰ Jess Bravin, *Kagan Gives New Life to Court's Liberal Wing*, WALL ST. J. (June 28, 2011), <http://online.wsj.com/article/SB10001424052702303627104576414211191945474.html>; Amanda Cox & Matthew Ericson, *Siding with the Liberal Wing*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html>.

¹⁹¹ *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477, 508 (1989) (city's plan, which required prime contractors awarded city construction contracts "to subcontract at least 30% of the dollar amount of the contract to one or more 'Minority Business Enterprises,'" denied certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race and so was struck down by the Court, in part because it was not narrowly tailored).

¹⁹² *Compare Grutter*, 539 U.S. at 306 (holding university's admissions program was narrowly tailored under equal protection clause and stating that "a race-conscious admissions program cannot use a quota system—[nor can it] insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants . . . instead, a university may consider race or ethnicity only as a 'plus' in a particular applicant's file, without insulat[ing] the individual from comparison with all other candidates for the available seats" (second and third alterations in original) (citations omitted)), *with Gratz*, 539 U.S. at 268, 275 (holding State university's interest in achieving educational diversity could constitute compelling state interest, but means chosen by University were not narrowly tailored), *and Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (holding admissions program was not narrowly tailored), *and Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (holding that school districts failed to show that use of racial classifications in their student assignment plans was narrowly tailored and necessary to achieve their stated goal of racial diversity).

¹⁹³ *Grutter*, 539 U.S. at 334-35.

¹⁹⁴ *See Gratz*, 539 U.S. at 275 (Chief Justice Rehnquist acknowledged that given the enormous number of students who applied to the University of Michigan undergraduate program, individual review was not feasible).

decide whether those prongs collectively are narrowly tailored to meet the compelling governmental interest in viewpoint diversity. In fairness, the Court need not find that the plan is the most narrowly tailored, only that it is sufficiently narrowly tailored to meet the rigid demands of impinging on the equal protection clause of the Fourteenth Amendment. Post-*Fisher*, the test becomes more rigorous than the *Grutter* Court had applied.¹⁹⁵ Thus to be narrowly tailored, the University must first demonstrate the “reasoned, principled explanation for its academic decision”¹⁹⁶ and then the Court must “examine with care” the challenged policy.¹⁹⁷

Even if the University can meet its burden, a majority of the Court is unlikely to find that the program is narrowly tailored. As a matter of votes, five justices upheld the program. Justices Scalia and Thomas, as recently as the *Fisher* decision, announced their desire to abolish race-preference admissions policies in any form. Justices Roberts and Alito in *Parents Involved* signaled the same desire. And even Justice Kennedy, who in *Parents Involved* announced his interest in achieving viewpoint diversity, struck down the challenged school assignment plans because neither was sufficiently narrowly tailored.¹⁹⁸ With respect to the challenged plan, Justice Kennedy wrote that the district’s broadly worded goals of “promot[ing] the educational benefits of diverse enrollments . . . [and assuring] that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools” were too broad to withstand the strict scrutiny test.¹⁹⁹

Under the narrowly tailored prong, the Top Ten Percent Law suffers two fatal flaws, particularly in light of the justices’ past opinions. First, it does not allowed a college or university to periodically take stock and reflect on whether it has met its challenge to assemble a critical mass of diverse students in the classroom, an aspect required by *Grutter*. Second, the legislative intent of the Law suggests its design is to ensure

¹⁹⁵ See *Grutter*, 539 U.S. at 334.

¹⁹⁶ *Fisher III*, 133 S. Ct. 2411, 2414 (2013).

¹⁹⁷ *Id.* at 2420. A reviewing court may not uphold an admissions policy that considers race unless it is “ultimately . . . satisfied that no workable race-neutral alternative” would achieve the policy’s goals of viewpoint diversity. *Id.*

¹⁹⁸ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007).

¹⁹⁹ *Id.* at 786-98 (Kennedy, J., concurring).

diversity in spite of housing patterns, a reason Justice Kennedy found repugnant in *Parents Involved*.²⁰⁰

The Court has often acknowledged the demanding rigor of the strict scrutiny test.²⁰¹ More laws fail than pass examination. When considered as a race-conscious alternative, the Top Ten Percent Law is likely to meet the same fatal fate. Because of its failure to take periodic account of its diversity achievements and its overly broad goals, the Court, if considering the Top Ten Percent Law under strict scrutiny, would most likely strike it down. Under the rational basis test, the Law is likely to meet with greater success.

2. Rational Basis Test

In contrast to laws that discriminate based on immutable characteristics such as race, courts will subject race-neutral laws, laws that impact “large and diverse groups,”²⁰² to a minimal level of review.²⁰³ This minimal standard would apply if the Court deemed the Texas admissions policy race-neutral. Under this light review, known as the rational basis test, the burden is on the challenger to show that the subject law or policy is not rationally related to a legitimate state interest.²⁰⁴ The Court uses this standard to review a government classification under the equal protection guarantee when that classification is related to welfare benefits, property use, or business or personal activity that does not involve a fundamental constitutional right, suspect classification, or the characteristics of alienage, sex, or legitimacy.²⁰⁵

²⁰⁰ *Id.* at 786-87.

²⁰¹ *Fisher III*, 133 S. Ct. at 2415; *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000).

²⁰² *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

²⁰³ *See, e.g., New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). In *Beazer*, a group of former and current employees of the New York City Transit Authority challenged the Transit Authority’s rule disallowing any employees from partaking in methadone treatment. *Id.* at 576. The regulation did not fail equal protection scrutiny even though it was over-inclusive. *Id.* at 592. That the reach of the rule included persons who did not exhibit the trait the Authority was seeking to exclude—unemployability due to narcotic use—did not make the regulation unconstitutional. *Id.* at 593.

²⁰⁴ *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (announcing the modern day rational basis test when considering the legality of a law that discriminated against certain dairy farmers).

²⁰⁵ *See, e.g., Lyng v. Castillo*, 477 U.S. 635, 639 (1986) (considering eligibility restrictions of Food Stamp Benefits); *Hodel v. Indiana*, 452 U.S. 314, 326 (1981) (considering the restriction of private property use under the Federal Surface Mining and Reclamation Act); *Cleland v. Nat’l College of Bus.*, 435 U.S. 213, 220 (1978) (considering restrictions on educational benefits of veterans); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (considering state control of retail gasoline pricing).

Under the rational basis standard, the Court must determine that state action has a rational relationship to a legitimate interest of government.²⁰⁶ The Court has indicated just how lenient this standard is:

[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.²⁰⁷

The rational basis test is considered quite easy to hurdle. Justice Roberts, in the 2013 voting rights decision, *Shelby County Virginia v. Holder*,²⁰⁸ acknowledged the test's minimal requirements.²⁰⁹ Justice Stevens, when referencing the Court's articulated standard of rational basis review, recalled the words of his "esteemed former colleague, Thurgood

Some call intermediate scrutiny rational basis with bite. See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987). There is general consensus among commentators that where the Court is considering a law that targets or works principally to the disadvantage of a politically unpopular group, it evaluates the law under a standard somewhat more rigorous than ordinary rational basis review, discarding any purported justifications for the law that are based on animus and scrutinizing the remaining justifications to ensure that there is a meaningful connection between the law's goals and its operation. This standard is called Rational Basis with Bite and has been employed to overturn legislation in cases like *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning law that impacted on mentally disabled) and *Lawrence v. Texas*, 539 U.S. 558 (2003) (anti-sodomy law disproportionately impacting gay men). For purposes of this article, the Top Ten Percent Law favors minority applicants over non-minority applicants, and thus its arguable discrimination is against a group—non-minority applicants—that is generally neither unpopular or disadvantaged. See Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1352 (2013).

²⁰⁶ See Kathryn A. Lee, *Intermediate Review 'With Teeth' in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 230 (1997). The Court has also articulated a third-intermediate standard of review reserved for those instances that do not impact directly on immutable characteristics but are not benign enough for the rational basis test. In this instance, a reviewing court will uphold a challenge under the intermediate standard of review if it finds that the classification bears a substantial relationship to an important interest of government. The court will use the intermediate standard when reviewing gender and illegitimacy cases. See, e.g., *Reed v. Reed*, 404 U.S. 71, 73 (1971) (considering gender preference in Idaho probate statute); *Clark v. Jeter*, 486 U.S. 456, 459, 461 (1988) (considering paternity action on behalf of an illegitimate child). Prior to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), courts used this standard in reviewing federal racial affirmative action cases. See *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 552, 564-65 (1990) (considering a minority preference policy in awarding new licenses).

²⁰⁷ *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992)).

²⁰⁸ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

²⁰⁹ *Id.* at 2638.

Marshall, remarking on numerous occasions: “The Constitution does not prohibit legislatures from enacting stupid laws.”²¹⁰

Thus, the rational basis test grants great deference to legislatures. For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court upheld a challenge brought by milk producers to a 1977 law that banned the retail sale of nonrefundable nonreturnable milk cartons.²¹¹ The Court found that the legislature’s noted interest in environmental recycling was sufficient to uphold the law against the milk producers’ argument that the law unfairly discriminated between interstate and intrastate milk producers.²¹² In some instances, the Court does not even demand that the legislature produce a previously articulated intent for its lawmaking. In *Nordlinger v. Hahn*, which considered a California law that assessed property taxes differently based on a homeowner’s decision to make capital improvements, the Court found that “the Equal Protection Clause does not demand for purposes of rational basis review that the legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification.”²¹³ In such instances, the Court presumes that the legislature had a reasonable interest in mind.²¹⁴

The Court extends this great deference to race-neutral policies even if the policies tend to have an impact on race or other immutable groups. In some instances, race-neutral laws have the effect of disproportionately disadvantaging a particular racial group. In *Washington v. Davis*,²¹⁵ the Court considered a challenge by a black candidate for the police force who was required to take a written test. Although the test had a disproportionate negative impact on black candidates, the Court subjected the law to a rational basis test because the test was race-neutral on its face.²¹⁶ In *Parham v. Hughes*,²¹⁷ the Court applied the rational basis test to a Georgia law that provided that fathers (as opposed to mothers) of out-of-wedlock children were prohibited from inheriting assets from their

²¹⁰ *New York Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (Stevens, J., concurring) (upholding a 1922 New York State election law that prohibited Judges to run for office absent support from a major political party).

²¹¹ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

²¹² *Id.* at 466.

²¹³ *Nordlinger v. Hahn*, 505 U.S. 1, 25 (1992).

²¹⁴ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2638 (“[L]egislation re-authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test.”).

²¹⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

²¹⁶ *Id.* at 242.

²¹⁷ *Parham v. Hughes*, 441 U.S. 347 (1979).

children absent legitimating them.²¹⁸ A plurality of the Court found that the law did not “discriminate against fathers as a class but instead distinguish[ed] between fathers who have legitimated their children and those who have not.”²¹⁹ As *Parham* and *Davis* illustrate, a legislature’s stated goal seems sufficient to satisfy the rational basis test.

To the extent that the Top Ten Percent Law discriminates, it is because it favors those in the highest percent of their graduating class. As a general matter, courts subject laws that discriminate based on location or geography to rational basis analysis.²²⁰ These laws, it is said, discriminate against people based on their choice of where to live. Thus, to the extent the Law distinguishes among groups, it is among geographic groups. Moreover, according to the legislative history of the Top Ten Percent Law, its intent was to assure more diversity in higher education following the limiting *Hopwood* decision.

The legislative record of HB 588 would be sufficient to pass the rational basis test that would follow when the Top Ten Percent law is characterized as racially neutral. The legislature stated its intent in passing the bill was to ensure that “all institutions of higher education pursue academic excellence.”²²¹ The legislative record further acknowledges the concern that enacting the Law will give underrepresented minorities “the opportunity to show what they can do” and further states that enacting the Law would ensure diversity in its schools.²²²

Where a legislature takes measures to ensure diversity without discriminating based on race, the Court is likely to find a rational basis for the law. The legislative record accompanying the bill serves the Court by announcing the lawmakers’ own reasons for the bill. Given that the Court has repeatedly announced a *compelling* governmental interest in

²¹⁸ *Id.* at 351-52.

²¹⁹ *Id.* at 356.

²²⁰ *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (subjecting zoning ordinance to rational basis review); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (subjecting law that applied different treatment to New York City residents and non-residents to rational basis review); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 364 (D.C. Cir. 2007) (noting that “geographic classifications need be supported only by a rational basis, as such classifications are not inherently suspect and don’t implicate a fundamental right.”); *but see Shaw v. Hunt*, 517 U.S. 899 (1996) (subjecting law designed to place minority voters in and out of certain North Carolina congressional election districts to strict scrutiny since law was racially motivated).

²²¹ HOUSE RESEARCH ORG., *supra* note 44, at 2.

²²² *Id.* at 4.

achieving viewpoint diversity,²²³ it is likely to find that the legislature has met the much lower threshold of establishing a legitimate interest in the need for the Top Ten Percent Law.

3. Unfair Advantage of a Race-Neutral Label

Labeling a program as race-neutral guarantees a level deference that a race-conscious program will never enjoy.²²⁴ The Court's acknowledged deference to legislative intent where a race-neutral program is concerned ensures more often than not that the program will survive the Court's scrutiny.²²⁵ Race-conscious programs, in contrast, are subject to the "strictest scrutiny of the law." As a result, these programs face the strongest headwinds in their constitutional challenges, and consequently, often fail to garner a court's approval.²²⁶

As previously described, the Top Ten Percent Law would withstand judicial scrutiny if courts view it as a race-neutral program.²²⁷ If viewed as race-conscious, however, a court would most likely strike it down.²²⁸ The label to which a court ascribes a program that impacts race significantly affects its likelihood of surviving an equal protection challenge. While race-neutral programs seem to pass through judicial scrutiny with relative ease,²²⁹ few legislative acts survive strict scrutiny—a reality acknowledged by both Supreme Court justices and scholars. In *Fullilove v. Klutznick*, Justice Powell, concurring in the decision, wrote that "the failure of legislative action to survive strict scrutiny has led some to wonder whether [the Court's] review of racial classifications has been strict in theory, but fatal in fact."²³⁰ And while 15 years later, in *Adarand Construction, Inc. v. Peña*, the Court tried to dispel

²²³ *Id.*

²²⁴ See *supra* notes 189-208 and accompanying text.

²²⁵ See *supra* notes 189-208 and accompanying text.

²²⁶ AMERICANS FOR A FAIR CHANCE, EQUAL OPPORTUNITY FACT SHEETS 9-10 (2013), available at http://www.civilrights.org/equal-opportunity/fact-sheets/fact_sheet_packet.pdf; See Borgna Brunner & Beth Rowen, *Timeline of Affirmative Action Milestones*, INFOPLEASE, <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited Feb. 13, 2014).

²²⁷ See *supra* note 208 and accompanying text.

²²⁸ See *supra* notes 184-87 and accompanying text.

²²⁹ See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 339-40 (2003); see also *supra* notes 202-05 and accompanying text.

²³⁰ *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980); see also *Bernal v. Fainter*, 467 U.S. 216, n.6 (1984) ("[S]trict scrutiny review is 'strict' in theory but usually 'fatal' in fact.") (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)); Leslie Y. Garfield, *Hopwood v. Texas: Strict in Theory or Fatal in Fact*, 34 SAN DIEGO L. REV. 497 (1997); Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, n.12 (2013).

the notion that strict scrutiny is almost impossible to pass,²³¹ a review of recent decisions suggest that the great weight of equal protection challenges fail under strict scrutiny review.²³²

Justice Ginsburg's characterization of the Top Ten Percent Law as race-conscious defeats her interest in assuring viewpoint diversity. The heightened scrutiny to which a race-conscious program is attached makes constitutional success unlikely for the Law. Thus her interpretation of the Top Ten Percent Law as race-conscious creates an unfortunate irony. It retains the integrity of the Court's civil rights era constitutional principles at the expense of sacrificing a workable program to enhance viewpoint diversity.

B. *Political Costs*

Great political implications rise from the race-neutral label Justice Kennedy and the petitioners in *Fisher* placed on the Top Ten Percent Law. A race-neutral cast makes the Law more digestible to the increasing majority of post-racialists who deny any need for racial-preferences. This racial satiation, however, is acquired through a sense of blindness to the underlying racial foundation upon which, as Justice Ginsburg points out in her dissent, the aspiration to viewpoint diversity can only be achieved. Calling the Top Ten Percent Law race-neutral, therefore, is a double-edged sword. It not only increases the Law's political capital, ensuring more supporters, but also grants those in power permission to ignore the racist foundations of the Law.

1. Complacency of Post-Racialism

Professor Sumi Cho defines post-racialism as a “twenty-first century ideology . . . reflect[ing] a belief that due to . . . racial progress, the state need not engage in race-based decision-making or adopt race-based remedies.”²³³ The theory,

²³¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“wish[ing] to dispel the notion that strict scrutiny is strict in theory but fatal in fact” (citation omitted)).

²³² See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school board student assignment plan failed to pass strict scrutiny review); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding university affirmative action admission plan did not pass strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (set-aside program that required contractors to sub contract out 30% of their business to minority owned businesses did not pass strict scrutiny). *But see* *United States v. Paradise*, 480 U.S. 149 (1987) (race based state trooper promotion plan passed strict scrutiny).

²³³ Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 & n.9 (2013).

according to Cho, supports the notion that “civil society should eschew race as a central organizing principle of social action.”²³⁴ Proponents of post-racialism argue race-conscious laws are unnecessary in the new millennium, and bring together a broad political cohort of conservatives and those slightly right of moderate, whose agenda includes the expulsion of race-conscious laws.²³⁵ Detractors argue that post-racialism excuses society from continuing its pursuit of post-civil rights goals and warn of an uneasy acceptance that accompanies post-racialism and threatens a retreat to segregation.²³⁶ Viewing *Fisher* in context with post-racialism, the observer can see both arguments at work.

Although the roots of post-racialism date back to the 1960s,²³⁷ the movement experienced its most significant growth following Barack Obama’s first presidential election.²³⁸ President Obama’s election, some (mostly conservative authors) argued, signaled that “America is past racism.”²³⁹ Following Obama’s election, post-racial theorists contended that laws favoring race, including race-based admissions laws, are no longer necessary.

Thus, post-racialism proclaims that race is irrelevant to societal interactions,²⁴⁰ thereby extinguishing the need for race-equalizing laws and measures. Michelle Alexander argues it gives society a sense that it has “finally moved beyond race.”²⁴¹ In so doing, however, it vitiates the need for race-conscious policies. It supports society’s acceptance of race-neutral alternatives and rejects the need for race-conscious reform.

²³⁴ *Id.*

²³⁵ See *infra* notes 221-35 and accompanying text.

²³⁶ See *infra* notes 239-48 and accompanying text.

²³⁷ See, e.g., ANTONIA DARDER & RODOLFO D. TORRES, AFTER RACE: RACISM AFTER MULTICULTURALISM 15 (2004) (questioning why so many scholars and politicians speak of race while class analysis and challenges to capitalism do not receive the same level of treatment and regard as race).

²³⁸ Cho, *supra* note 233, at 1591. See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967 (2010); William M. Carter, Jr., *The Paradox of Political Power: Post-Racialism, Equal Protection, and Democracy*, 61 EMORY L.J. 1123, 1128 (2012); Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415 (2012).. For a scholarly view on post-racialism and equal protection, see TIM WISE, COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY (2010).

²³⁹ See, e.g., John McWhorter, *Racism in America Is Over*, FORBES (Dec. 30, 2008, 2:00 PM), http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html.

²⁴⁰ Frank Rudy Cooper, *Post-racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 119 (2012) (“Whereas colorblind ideology argued that assuming that race does not matter is the best way to reach a racially egalitarian society, post-racialism declares that race already no longer matters in societal interactions.”).

²⁴¹ Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7 (2011). For an in-depth discussion of post-racialism following the Obama election, see generally WISE, *supra* note 238.

The *Fisher* decision illustrates the centralizing abilities of post-racialism. Kimberlé Williams Crenshaw asserts that the theory “permits a deeper alignment with forces that deny that significant racial barriers remain.”²⁴² But it also brings together moderates, who as a group may be viewed as interested in assembling a color-blind world while simultaneously acknowledging that society has not quite met the ideal.²⁴³

Arguably, the politically broad appeal of post-racialism served Chief Justice Roberts when he assembled the *Fisher* majority, achieving a seven-member Court consensus that included previously vociferous supporters and opponents of race-conscious admissions policies.²⁴⁴ In an analysis of the highly politicized 2012-2013 term, David Savage of the *Los Angeles Times* wrote that Justice Roberts “has preferred to steer a moderate course, avoiding factious, divided rulings whenever possible.”²⁴⁵ With *Fisher*, Justice Roberts did just that. To see Justice Breyer on the same side of an affirmative action decision as Justices Scalia and Thomas is quite astounding. Such has never been the case before where affirmative action is concerned.²⁴⁶

The majority’s characterization of the Top Ten Percent Law as race-neutral fits squarely within the post-racialism ethos. A critical reading of Justice Kennedy’s *Fisher* opinion reflects the unstated acceptance of the Law, which grants admissions preferences based on geographic location rather than race. The decision does not charge the Fifth Circuit to reevaluate the Top Ten Percent Law; rather, it mandates that the lower court review the *Grutter*-type component of the University’s admissions policy, given that the University is legally obliged to comply with the Top Ten Percent Law.²⁴⁷ Ascribing a race-neutral label to the Top Ten

²⁴² Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011).

²⁴³ Cho, *supra* note 233.

²⁴⁴ See *supra* notes 92-98 and accompanying text.

²⁴⁵ J.F., *Do it Again, Longhorns*, ECONOMIST (June 24, 2013, 4:12 PM) (citing David G. Savage, *Supreme Court Decisions Test Chief Justice’s Moderate Approach*, L.A. TIMES (June 22, 2013), <http://articles.latimes.com/2013/jun/22/nation/la-na-court-analysis-20130623>), <http://www.economist.com/blogs/democracyinamerica/2013/06/affirmative-action>; see also Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html?pagewanted=all&_r=0.

²⁴⁶ *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting), *with* Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Scalia, Thomas, J. dissenting), *and* Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Breyer J, dissenting in part).

²⁴⁷ The Court has charged the Fifth Circuit with considering whether “its admissions program is narrowly tailored to obtain the educational benefits of

Percent Law, therefore, left intact a program that achieves viewpoint diversity and enhances the acceptance rate of underrepresented minority applicants.

Much political capital was gained by Justice Kennedy's race-neutral characterization of the Top Ten Percent Law. The label assures fairly light judicial review should the issue return to the Court, which may be a given as two other states, Florida and California, have implemented very similar plans.²⁴⁸ With such guaranteed flexibility comes an assuredness that there are some safeguards to creating viewpoint diversity in the classroom. But opponents of post-racialism argue that ascribing a race-neutral label to the Top Ten Percent Law comes at great risk.

Professor Cho and others caution that societal acceptance of post-racialism threatens a retreat to pre-civil rights days.²⁴⁹ It authorizes a "material retreat [from] state intervention to address racial injustice through race-based remedies."²⁵⁰ By ignoring the segregated housing and school patterns that are at the heart of the Top Ten Percent Law, Justice Kennedy's majority opinion reflects Professor Cho's concerns.

A race-neutral label also prevents racial discourse. The majority's characterization of the Top Ten Percent Law excuses the Court from investigating the Law's legislative legitimacy beyond proof from the legislature that it is rationally related to its stated goals. Race-neutral laws receive great deference; race-conscious laws do not.

Labeling the Law as race-neutral also obscures the ideology of post-civil rights cases. According to Justice Ginsburg, the Top Ten Percent Law was adopted with racially segregated housing and school patterns in mind. "It is race

diversity." *Fisher III*, 133 S. Ct. 2411, 2419 (2013). In so doing, the Court limited the Fifth Circuit's inquiry to whether the University, in enacting its post-*Grutter* complement to the Law, adopted a program that is not narrowly tailored to meet the articulated compelling governmental interest in viewpoint diversity. *See id.*

²⁴⁸ *See* Marvin Lim, *Percent Plans: A "Workable, Race-Neutral Alternative" to Affirmative Action?*, 39 J.C. & U.L. 127 n.17 (2013) ("California's percent plan is called 'Eligibility in the Local Context.' Florida's percent plan is called 'Talented Twenty.' California and Florida banned affirmative action in 1996 and 1999, respectively." (internal citations omitted)).

²⁴⁹ *See, e.g.*, Jeremiah Chin, *What a Load of Hope: the Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 386-87 (2012) (observing that post racialism tends to "bury the role of racism in society"); Cho, *supra* note 233; Charles Ogletree, Jr., *From Dred Scott to Barak Obama, The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L. J. 1, 37 (2009) (highlighting the need to "remain vigilant about [racial] setbacks").

²⁵⁰ Cho, *supra*, note 233, at 1644.

consciousness, not blindness to race, that drives such plans.”²⁵¹ Accepting the race-neutral label of the Top Ten Percent Law excuses society from seeking further civil rights reform and grants a reviewing court, and its attending constituency, permission to accept the limited achievements of *Brown*, *Bakke*, and *Gatreaux*²⁵² and relieve itself of a moral or even legal obligation to champion civil rights laws.

2. Ignoring “Lingering Effects” of Discrimination

While a race-neutral label placates much of society, a race-conscious label has quite the opposite effect. Labeling legislation as race-conscious signals that government is providing an advantage to a particular group of people.²⁵³ To liberals, this advantage is often seen as a necessary byproduct of years of discrimination and unequal treatment. To a larger population and to the Constitution itself, such unequal treatment is impermissible unless it survives the strict scrutiny test.²⁵⁴

The strict scrutiny test has political advantages itself; it gives society a sense that its demanding standard protects against the threat of unequal treatment. The Court has treated the law as such, characterizing the test as a vehicle to “smoke out” illegitimate uses of race.²⁵⁵ Conservative justices like Justices Thomas and Scalia rely on the rigidity of strict scrutiny to invalidate race-conscious laws.²⁵⁶

The Court enforces equality by subjecting race-conscious laws to the very difficult strict scrutiny test. But in so doing, it extracts a large political cost. Sonu Bedi argues that the rigor of the strict scrutiny test is “too strict because it invalidates a wide range of laws that seek to better the status of racial minorities.”²⁵⁷ Professor Bedi points out that “strict scrutiny has doomed the vast majority of laws that aim to ameliorate the status of racial minorities,”²⁵⁸ citing *Gratz*, among other cases, in support of her argument.²⁵⁹

²⁵¹ *Fisher III*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

²⁵² See *supra* notes 137-57 and accompanying text.

²⁵³ See *supra* notes 159-68 and accompanying text.

²⁵⁴ See *supra* notes 159-68 and accompanying text.

²⁵⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

²⁵⁶ See *Fisher III*, 133 S. Ct. at 2422 (Scalia, Thomas, JJ., concurring); *Grutter*, 539 U.S. 306, 346 (2003) (Scalia, Thomas, JJ. concurring in part and dissenting in part).

²⁵⁷ Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 306 (2013).

²⁵⁸ *Id.* at 362.

²⁵⁹ *Id.*

According to Professor Bedi's theory, the race-conscious taint that Justice Ginsburg ascribed to the Top Ten Percent Law would only serve to doom its success. Such is the irony of Justice Ginsburg's dissent. In her effort to ferret out the injustice of Texas's seemingly racist housing patterns by labeling the Law race-conscious, she potentially extinguishes the potential survival of the least objectionable race-conscious alternative to assure viewpoint diversity.

Thus by labeling the Law race-conscious, Justice Ginsburg potentially threatens Texas with what Professor Bedi articulates is one of the primary goals of the equal protection clause: remedying democratic defects of representation. The notion of past discrimination as a justification for survival of the strict scrutiny test is supported in Court precedent. In *Wygant v. Jackson Board of Education*, the Court announced that racial preferences could only withstand strict scrutiny if they were narrowly tailored to the permissible goal of remedying the present effects of past discrimination.²⁶⁰ It is a concept well-documented both in scholarship and the law.

Justice Ginsburg, in her *Fisher* dissent, remains the vigilant defender of the concept of using the equal protection clause to combat historic racial abuse. She cites "an overly discriminatory past" and "centuries of law-sanctioned inequality" as support for concluding that the Top Ten Percent Law and the University's *Grutter*-type companion are "constitutionally permissible options."²⁶¹ Her theme, which serves as a narrative through most affirmative action jurisprudence,²⁶² suggests that labeling a law race-conscious is not a hindrance to success, but is rather a justification meriting constitutional approval.

Unfortunately, however, Justice Ginsburg's analysis would fail to assure strict scrutiny success for the Top Ten Percent Law. Under the strict scrutiny test, evidence of the present effects of past discrimination will not support a compelling governmental interest where admissions policies are concerned. In *Grutter*, the Court carved out a separate test for assembling diverse student bodies.²⁶³ Citing the benefits that flow

²⁶⁰ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 265, 273 (1986); see also *United States v. Paradise*, 480 U.S. 149 (1987).

²⁶¹ *Fisher III*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

²⁶² See *id.*; *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272-74 (1995) (Ginsburg, J., dissenting).

²⁶³ See *Grutter v. Bollinger*, 539 U.S. 306 (2003). When race-conscious action is necessary to further a compelling governmental interest, such action does not violate

both ways from having varied views in the classroom, Justice O'Connor wrote that "context matters" in terms of the strict scrutiny test, and in the context of education, it is viewpoint diversity and not the present effects of past discrimination that support a compelling governmental interest.²⁶⁴

Interestingly, the notion of viewpoint diversity as a compelling governmental interest better democratizes the race-conscious Top Ten Percent Law than does viewing the Law in support of remedying the present effects of past discrimination. This is because it couches its benefits to several identified groups rather than favoring those who have suffered past discrimination. Political ideology aside, Justice Ginsburg might have had better strategic success had she focused on the precedential compelling governmental interest of viewpoint diversity.

However, by defining the Law as race-conscious, and holding it to a standard supported by the present effects of past discrimination, Justice Ginsburg reminds us of the inherent injustice of which the Top Ten Percent Law is conscious. At first blush, her strategy seems imprudent. Race-conscious laws rarely meet with constitutional success. But the race-conscious label of the Top Ten Percent Law guards against the complacency of which anti-post-racialists warn, and at this point in time, might be the most effective means of ensuring the fight to remove racism remains alive.

A politically polarizing tension exists between a race-neutral and a race-based label, particularly where race-preference admissions policies are concerned. A race-neutral label imagines a society that has achieved educational equality, thereby granting conservative post-racialists the right to leave the civil rights movement behind.²⁶⁵ A race-based label heeds the politically liberal plaint that certain underserved minorities, who as a group still suffer from unequal primary and secondary educational experiences, arrive at the ratings-driven college and university admissions process at a distinct disadvantage.²⁶⁶ Ironically, the conservative group that brought *Fisher* likely anticipated the Court would strike down the University's admissions policy because of its race-based

the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

²⁶⁴ *Id.* at 327.

²⁶⁵ *See supra* note 233.

²⁶⁶ *See supra* note 233.

approach to admissions.²⁶⁷ But, as the *Fisher* majority and Justice Ginsburg's dissent demonstrate, the group's conservative goals may be realized, not because the Court labels these laws as preferential to a particular group, but rather because the Court deems them equal in their treatment. The race-neutral definition of a seemingly race-based law, however, will do little to assuage the dismay of those, like Justice Ginsburg, who look fondly on past judicial contributions to equal access to education at all academic levels. As the *Fisher* opinions demonstrate, a race-neutral label does not necessarily mean neutrality at all.

CONCLUSION

An unfortunate paradox arises when courts assign a race-neutral label to a race-conscious law. Neutrality makes the Law more politically palpable. A race-neutral label ushers the Law into the seemingly innocuous rational basis review. But a race-neutral label also washes away the gains made through civil rights initiatives and Supreme Court doctrine. By categorizing the Texas Law as race-neutral, the Court turns a blind eye to the segregation that serves as the foundation for assembling diverse student bodies in the State's post-secondary schools. In so doing, the Court seems to "throw up its hands" and refuse to further police homogenous de facto school and housing patterns. Consequently, assigning a race-neutral label to the Top Ten Percent Law frustrates housing and desegregation cases. Sadly, the Top Ten Percent Law's goals are achieved at these failed civil-rights era laws' expense.

On the other hand, Justice Ginsburg's commitment to ferreting out inherent racism sets the Law up for judicial failure. Labeling the Top Ten Percent Law as race-conscious demands that courts subject it to rigorous strict scrutiny review; making it a likely candidate for constitutional demise. As her body of decisional law makes clear, Justice Ginsburg's commitment to reversing the present effects of past discrimination remains steadfast, regardless of the consequences. Justice Ginsburg's dissent echoes the words of Jean-Jacques Rousseau; she would "rather be a [wo]man of paradoxes than a [wo]man of prejudices."²⁶⁸

²⁶⁷ See *supra* note 72 and accompanying text.

²⁶⁸ ROUSSEAU, *supra* note 1.