Fisher v. University of Texas at Austin: Could the Supreme Court Revisit Its Decision in *Grutter*?

*By Joshua Thompson**

In *Grutter v. Bollinger*, the Supreme Court held that achieving the educational benefits that flow from diversity could be a compelling interest in higher education.[1] Yet Justice O'Connor, writing for a bare majority of the Supreme Court, also wrote that the Court did not expect the use of racial preferences in higher education to be necessary to promote diversity within twenty-five years.[2] A recent case out of the Fifth Circuit, *Fisher v. University of Texas at Austin*, has brought the *Grutter* decision back into the national consciousness.[3] If concurring Judge Garza's opinion from the Fifth Circuit is heard, the constitutional sanction of racial preferences in higher education will have a shorter lifespan than the twenty-five years announced by Justice O'Connor. Though the plaintiffs in *Fisher* were recently denied en banc review by the Fifth Circuit,[4] a petition for certiorari to the Supreme Court is likely forthcoming. If the writ is granted, Judge Garza has all but assured that the Court's holding in *Grutter* will be revisited.

Proponents and opponents of racial preferences in higher education have marked *Fisher* as the next battleground for this politically-charged fight. Amicus briefs flooded the Fifth Circuit from national organizations all around the country, from the NAACP (in favor of preferences) to the Center for Equal Opportunity (against preferences). Even the Obama Administration found it necessary to weigh in at the circuit stage.[5] Because *Fisher* has generated such interest within the legal community, this article brings the reader up to speed on the constitutional issues at stake as well as the factual background that has made *Fisher* so "compelling."

I. Applying Strict Scrutiny to Racial Classifications

Amidst anti-Japanese sentiment, the Supreme Court during World War II was confronted with an extreme case of governmental discrimination in *Korematsu v. United States*.[6] In *Korematsu*, the Supreme Court held that national security was a compelling government interest that allowed the United States government to exclude all persons of Japanese ancestry from military zones on the West Coast.[7] While *Korematsu* today is rightly ridiculed for justifying internment of Japanese-Americans based on hysteria and xenophobia, the case remains noteworthy as the first Supreme Court decision to apply strict scrutiny under the Equal Protection Clause to racial classifications.

Although *Korematsu* laid the foundation for strict scrutiny analysis of racial classifications, the Supreme Court did not apply it to all race-implicated equal protection cases immediately.[8] By the 1960s, however, the Supreme Court began routinely striking down racially-discriminatory statutes under strict scrutiny analysis.[9] Around this time the Supreme Court also upheld racial classifications designed for remedial purposes. These remedial cases are the first to find a governmental interest sufficiently compelling to permit race-based classifications. In a number of school desegregation cases following *Brown v. Board of Education*, the Supreme Court consistently found racial classifications to be constitutional when employed to remedy past intentional discrimination.[10]

By the 1970s, overt discriminatory race-based policies became less common, and soon the Supreme Court's attention turned to affirmative action, or race-preference policies. In *DeFunis v. Odegaard*, the Supreme Court was presented with a challenge to the University of Washington School of Law's race-based affirmative action policy.[11] Although ultimately decided on mootness grounds, *DeFunis* is interesting in that the University of Washington never argued that its program could withstand strict scrutiny under the rationale of "diversity." Indeed, "the term 'diversity' does not appear at all in the record of the case."[12]

Not until *Regents of the University of California v. Bakke* did the Supreme Court determine whether the government had a compelling interest in racial classifications outside of remedying past discrimination.[13] Before *Bakke*, only state policies designed to remedy the effects of past discrimination were held to be sufficiently compelling to deny an individual's right to equal protection. Indeed, many governmental entities that began race preference programs could not justify those programs under a theory that they were remedying the effects of past intentional discrimination, and, therefore, many of these programs were struck down.

II. On *Bakke* and Diversity

At issue in *Bakke* was a race-preference program at the University of California at Davis School of Medicine that guaranteed admission to students from certain minority groups.[14] Allan Bakke was a white male (a disfavored race under the policy) who was twice denied admission to the medical school.[15] Because the medical school was only opened in 1968, the preferential program could not be justified on the grounds that it was needed to remedy past discrimination.[16]

Interestingly, the university did not rely on diversity to uphold its race-conscious program. The university's petition for certiorari "frame[d] the university's racial preferences as primarily an effort to realize 'the goal of educational opportunity unimpaired by the effects of racial discrimination.'"[17] Nevertheless, it was the University's passing references to diversity that convinced Justice Powell, and only Justice Powell, that racial classification may be permitted when narrowly tailored to further the compelling interest of diversity. "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body," wrote Justice Powell.[18]

In the years following *Bakke* but before *Grutter*, the Supreme Court heard a number of equal protection cases where those suing were not members of a preferred class. In

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** Joshua Thompson is a staff attorney at the Pacific Legal Foundation. Portions of this article appear in a recently-published article in the Texas Review of Law & Politics.*

that twenty-five-year span, the Supreme Court had many opportunities to introduce diversity as a compelling state interest but never did. Thus, pre-*Grutter*, remedying past discrimination was the lone constitutionally-recognizable rationale for the government's use of a racial classification.[19] Not surprisingly, race-preference programs almost universally failed strict scrutiny analysis. "Only once between its 1945 inception in *Korematsu* and its application in *Grutter* has an affirmative-action program survived both prongs of the strict scrutiny analysis."[20]

III. Diversity Can Be a Compelling Interest—*Grutter v. Bollinger*

Grutter concerned a challenge to the race-conscious admissions program of the University of Michigan Law School, a top-rated institution.[21] In 1996, Barbara Grutter, a nonminority Michigan resident with fairly good GPA and LSAT scores, unsuccessfully applied for admission to the law school and thereafter brought suit to challenge the constitutionality of the law school's race-conscious admissions plan. The *Grutter* majority opinion, authored by Justice O'Connor, begins with an analysis of *Bakke*. Justice O'Connor adopted Justice Powell's opinion for guidance in resolving *Grutter*.[22]

Having set forth the newly-adopted Powell framework, Justice O'Connor then articulated the majority's guiding principle: "not every decision influenced by race is equally objectionable."[23] She then acknowledged the law school's purported compelling interest: the educational benefits that flow from a diverse student body.[24] To achieve that end, outright racial balancing such as the kind entailed with quotas would not be allowed, but a university could use race to achieve "critical masses" of underrepresented minorities.[25] Justice O'Connor then embarked on an extended discussion of various educational benefits that she asserted flowed from a diverse student body, relying on a number of amicus briefs to show that such benefits extend beyond the classroom to the workplace, politics, and the military.[26]

Justice O'Connor next reemphasized from her *Bakke* discussion that race cannot be used as a blunt instrument, such that *Bakke*-style quotas, as well as *Gratz*-style point systems, are impermissible.[27] She also underscored that applicants must be understood as individuals and that race may only be used as one among many factors in a "holistic" review.[28] Race may be used as part of a "good faith" effort to achieve a permissible goal, and "some attention to numbers" is not the equivalent of a quota system.[29] Hence, the law school's keeping track of the race of admittees was permissible because the value given to race remained constant throughout the admissions process.[30] Justice O'Connor warned that race cannot become the defining feature of an application, and that no "bonus points" can be awarded because of race.[31] Justice O'Connor also observed that the law school's program gave serious consideration to other non-race factors when determining educational diversity.[32]

Justice O'Connor concluded her opinion with a discussion of when the law school's race-conscious admissions policy would end. She noted that all such race-based programs must have an endpoint, but that it would be unfair to require the law school to articulate a hard-and-fast deadline given the vagaries of critical mass and diversity.[33] Justice O'Connor observed that it had been about twenty-five years since Justice Powell's authorization of the use of diversity and race in university admissions, that minority test scores and admission rates had improved, and, thus, that it would be reasonable to expect that the law school's race-conscious program would become unnecessary in the next twenty-five years.[34]

IV. *Fisher v. University of Texas at Austin*

Prior to 1996, the University of Texas at Austin employed two criteria for student admission. The first, used to this day, is called the Academic Index. The Index rates a student's academic achievement according to her grade point average, SAT scores, and similar data.[35] The university's use of the second criterion—race—ended in 1996 when the Fifth Circuit ruled in *Hopwood v. Texas* that race-conscious admission policies are unconstitutional.[36] In response to *Hopwood*, the university developed a new race-neutral admission criterion termed the Personal Achievement Index, to be used in conjunction with the Academic Index.[37]

In 1997, the Texas Legislature responded to *Hopwood* by enacting the Top Ten Percent Law, which mandates that the top ten percent of students graduating from each public high school be guaranteed admission to the university.[38] (In 2010, the Texas Legislature amended the law to cap the number of guaranteed admissions to the University of Texas at Austin to seventy-five percent of the spots reserved to Texas residents).[39] Although the law is facially race-neutral, "underrepresented minorities were its announced target and their admission a large, if not primary, purpose."[40]

The admissions process changed again following the Supreme Court's decision in *Grutter*. *Grutter* effectively overruled *Hopwood* and spurred the university to reexamine its admission process. In response, the university commissioned two studies to determine whether, consistent with *Grutter*, the university had obtained a "critical mass" of minority students through the Top Ten Percent Law.[41] The university concluded that "it had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity."[42] The university accordingly adopted a new admissions policy under which race would be one factor to be considered in admissions.[43]

Texas residents Abigail Fisher and Rachel Michalewicz brought suit to challenge the university's denial of their admission to the Fall 2008 class at the University of Texas at Austin.[44] They alleged that the university's denial violated their rights against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment.[45] The district court ruled in the university's favor, and the plaintiffs appealed. The Fifth Circuit panel affirmed the district court in three opinions. Judge Higginbotham wrote for all three members of the panel. Judge King concurred to note that he did not join in the lead opinion to the extent that it called into question the constitutionality of the Top Ten Percent Law.[46] Judge Garza wrote an extensive concurrence expressing the view that *Grutter* was wrongly decided.[47]

A. *The* Fisher *Lead Opinion*

All parties agreed that the university's admissions policy was to be reviewed under strict scrutiny and would require a showing of narrow tailoring.[48] But the parties disagreed over whether and to what extent the university's determinations regarding the lack of a critical mass and how to achieve that critical mass were entitled to judicial deference. Judge Higginbotham looked to *Grutter* for the answer. He noted that deference to the university was justified on two grounds: its admissions policy was the result of expert educational decisionmaking, and the policy emerged from an academic environment entitled to First Amendment solicitude.[49] Judge Higginbotham specifically rejected the plaintiffs' argument that deference was only merited for the university's determination that educational diversity is a compelling interest. He also concluded that *Grutter* requires that a court's "narrow-tailoring inquiry . . . [be] undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."[50]

Judge Higginbotham began his analysis of the racial balancing issue by noting that the university, in designing its new policy, clearly wanted to avoid a quota system.[51] He emphasized that, whereas a quota presupposes some fixed goal, a *Grutter*-style diversity goal demands just a good-faith effort to reach a range established by the goal.[52] Moreover, the university's admission policies do not produce a result that is demographically consistent with Texas's general racial make-up, which, per Judge Higginbotham, supported the conclusion that the university's admission policy is not a quota system.[53]

The plaintiffs contended that the Top Ten Percent Law was an adequate and racially neutral way for the university to achieve its diversity goals. Consequently, the plaintiffs argued that the university's race-based admissions policy was necessarily *not* narrowly tailored. Judge Higginbotham rejected the argument, reasoning that the law and other "percentage plans" are not a constitutionally-required alternative to race-based plans.[54] He relied on *Grutter*'s conclusion that such percentage plans do not afford the individualized flexibility that universities need to achieve a diversity that begins, but does not end, with race.[55] And he reemphasized that "the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it."[56]

Judge Higginbotham noted two additional policy-based criticisms of the law. First, following Justice Ginsburg's dissent in *Gratz*, he observed that percentage plans give parents an incentive to keep their children in underperforming schools, and students a reason to take easy classes to protect their GPAs.[57] Second, Judge Higginbotham noted that the law creates very intense competition for the ten percent of slots left after the law's operation, such that on average those students admitted by virtue of their Academic and Personal Achievement Indices have higher average SAT scores than those admitted under the law. That result purportedly hurts "minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools."[58] Thus, Judge Higginbotham concluded that the Top Ten Percent Law was "a blunt tool for securing the educational benefits that diversity is intended to achieve," and hence the university was not constitutionally mandated to use it instead of a race-conscious program to achieve such *Grutter*-style diversity.[59]

Lastly, the plaintiffs argued that because the Top Ten Percent Law already substantially increased the number of minorities at the university, it placed the university's race-conscious program beyond *Grutter*'s protective ambit. Judge Higginbotham agreed to a point, conceding that the law's "substantial effect on aggregate minority enrollment at the University . . . places at risk [the University's] race-conscious admissions policies."[60] Nevertheless, Judge Higginbotham rejected the plaintiffs' proposed percentage-based levels of minority participation that would establish a critical mass, reasoning that they were grounded in the incorrect notion of critical mass as being just that number of students necessary to achieve representation in class discussions and to avoid feelings of isolation.[61] He also rejected the plaintiffs' contention that the law achieves critical mass because minority enrollment now exceeds minority enrollment before *Hopwood*, when the university last used race-conscious admission policies.[62] Judge Higginbotham found that argument unconvincing, both because it assumed without proof that pre-*Hopwood* minority numbers were at critical mass levels, and because pre-*Hopwood* numbers would not reflect demographic changes in Texas since that time.[63] Judge Higginbotham again underscored that, because *Grutter*-style diversity is not simply a function of racial diversity, *Grutter*-style diversity cannot be achieved by "any fixed numerical guideposts."[64]

B. Judge Garza's Special Concurrence

Judge Garza also authored a special concurrence, agreeing fully with the lead opinion to the extent that it faithfully applied *Grutter* to the university's admission policy, but also arguing that *Grutter* was wrongly decided and that the Supreme Court should revisit the use of race in university admissions.[65] Judge Garza advanced several criticisms of *Grutter*. First, he chastised the Court for replacing the traditional "least restrictive means" interpretation of narrow tailoring with "a regime that encourages opacity and is incapable of meaningful judicial review [because] [c]ourts now simply assume . . . that university administrators have acted in good faith in pursuing racial diversity."[66] Relatedly, Judge Garza criticized *Grutter* for relieving universities of the "require[ment] to use the *most effective* race-neutral means," such that, assuming good faith, universities "are free to pursue less effective alternatives that serve the [diversity] interest about as well."[67]

Judge Garza also took aim at *Grutter*'s conclusion that incorporating race into a holistic analysis cured any concerns about the use of quotas.

> If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.[68]

In Judge Garza's view, the use of catch phrases like "individualized consideration" and "holistic review" simply obscure the unchanging fact that race is used in essentially the same way as it is in blunter quota systems.[69] Even worse, *Grutter*'s prohibition against the quantification of race or ethnicity prevents courts from providing any meaningful review, because courts cannot determine whether race or ethnicity functions as just a plus factor or instead as a but-for cause of admission.[70]

Judge Garza also took issue with *Grutter*'s malleable concept of diversity, which would allow universities to continue to claim a need for race in admissions even if aggregate minority enrollment could be increased substantially through race-neutral means, so long as "these minority students were still disproportionately bunched in a small number of classes or majors."[71] Indeed, such a standardless understanding of critical mass would allow educators to use race until "the elusive critical mass had finally been attained . . . major-by-major and classroom-by-classroom."[72]

Judge Garza also criticized *Grutter*'s conclusion that educational diversity, in which race plays some ill-defined role, constitutes a compelling state interest. He noted that there is no sound way to measure any of the purported benefits flowing from educational diversity. "*Grutter* permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against."[73] Moreover, *Grutter* erroneously assumes that increasing racial diversity will increase viewpoint diversity.[74] But that assumption runs right up against the ultimate remedial purpose of the Equal Protection Clause: to prevent government from treating people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe.

Grutter sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.[75]

Judge Garza lambasted *Grutter* for its shift from "emphasis on diversity in educational *inputs* with a new emphasis on educational *outputs*"; in other words, from focusing just on the supposed value of diversity in the classroom to the supposed value of diversity in the workplace and in civic life, as well.[76]

Judge Garza concluded his critique of *Grutter* with a review of the decision's effectiveness criterion. Just how successful must a race-based program be at increasing diversity to be constitutionally justified? In Judge Garza's view, the standard should be whether the race-based program "meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass."[77] After an exhaustive review of the data in the record, Judge Garza concluded that "the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole" and thus "the University's use of race can be neither compelling nor narrowly tailored."[78] That conclusion follows because, if the impact on racial balance is minimal, then necessarily the University's race-based admissions program will have "no discernable educational impact."[79] Judge Garza ended his concurrence with reaffirmation of the principle that "the Constitution prohibits all forms of government-sponsored racial discrimination," such that the university's race-based program could never be justified if "the Court[s were to] return to constitutional first principles."[80]

C. The En Banc Denial

Shortly after the Fifth Circuit issued its decision in *Fisher*, the plaintiffs petitioned for rehearing en banc. On June 15, 2011, by a vote of nine to seven, the Fifth Circuit denied rehearing en banc.[81] Consistent with his view that the panel decision strictly followed *Grutter*, and despite his misgivings about the reasoning of that precedent, Judge Garza joined the majority denying rehearing en banc. However, Chief Judge of the Fifth Circuit, Edith H. Jones, authored a dissent to the rehearing denial, in which she, joined by four judges, argued that the panel decision misapplied *Grutter*.[82]

Chief Judge Jones offered three reasons the panel decision was not a strict application of *Grutter*. First, she argued that the panel decision watered down *Grutter*'s strict narrow tailoring requirement by adopting a new "'serious good faith consideration' standard of review."[83] This new standard of review "distorts narrow tailoring into a rote exercise in judicial deference."[84] The dissent goes so far as to describe the panel's application of strict scrutiny as "wholesale deference" and "judicial abdication."[85]

The Chief Judge also favored en banc rehearing because, as Judge Garza had noted in his special concurrence, the race-conscious admissions policy has had a minimal impact on the increase in diversity at the university.[86] On this point, the university's admissions plan differed significantly from *Grutter*. In *Grutter*, the race-conscious admissions policy tripled the number of minorities that would otherwise have been accepted.[87] Conversely, in Texas, under the Top Ten Percent Law, minorities were already being enrolled, in large numbers, in a race-neutral manner. Thus, the university's race-conscious preference program did not have the necessary impact to be constitutional.[88]

Lastly, Chief Judge Jones objected to the panel's countenance of the university seeking diversity on a classroom-by-classroom level. She rhetorically asks, "[w]ill classroom diversity 'suffer' in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled?"[89] The Chief Judge argued that classroom-by-classroom diversity goals would mark a leap from *Grutter*'s narrow holding, and would open the door to racial quotas in each classroom without containing any logical end point on the use of race in admissions.[90]

V. Conclusion

Even before Judge Garza took aim at the *Grutter* decision, or Chief Judge Jones dissented from the panel's application of *Grutter*, the legal community had marked *Fisher* as the next big case dealing with race in higher education admissions. With Judge Garza's opinion, it is all but assured that when the *Fisher* plaintiffs petition for a writ of certiorari, the Supreme Court will be presented with an opportunity to end the diversity rationale altogether. Or, if the high court takes up the case, it may adopt Chief Judge Jones's view that *Grutter* cannot be extended in the manner urged by the University of Texas. At a

minimum, *Fisher* presents the Supreme Court the opportunity to explain *Grutter* (and *Gratz*), and provide clarity to this highly contentious area of law.

Endnotes

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

2 *Id.* at 343.

3 Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011).

4 Fisher v. Univ. of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).

5 Brief for the United States as Amicus Curiae Supporting Appellees, Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).

6 323 U.S. 214 (1944).

7 *Id.* at 223.

8 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that segregated schools violate the Equal Protection Clause because of the social and psychological harms caused by segregation in education); Rachel C. Grunberger, Note, Johnson v. California*: Setting a Constitutional Trap for Prison Officials*, 65 Md. L. Rev. 271, 276 (2006) (discussing *Korematsu* and the application of strict scrutiny to racial classifications).

9 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (striking down law banning interracial marriage); Grunberger, *supra* note 7, at 276-77 (discussing the 1960s Court's strict scrutiny standard for racial classifications).

10 *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*); Green v. County Sch. Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

11 416 U.S. 312 (1974).

12 Peter Wood, Diversity 111 (2003).

13 438 U.S. 265 (1978).

14 *Bakke*, 438 U.S. at 369 (plurality opinion).

15 *Id.* at 276.

16 *Id.* at 372 (Brennan, J., opinion). The Brennan opinion argued that race could be taken into account to remedy the effects of past discrimination generally. Indeed, Justice Brennan noted that the "underrepresentation of minorities [in medical schools nationwide] was substantial and chronic." However, on this point, Justice Brennan could not command a majority of the Court.

17 Wood, *supra* note 11, at 104.

18 *Bakke*, 438 U.S. at 314 (Powell, J., opinion).

19 In *Korematsu*, the Supreme Court found national security to be a compelling government interest. However, the *Adarand* Court's statements on *Korematsu* bring into strong question whether that reasoning could command a majority of the Court today.

20 Libby Huskey, Case Notes, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact? Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), 4 Wyo. L. Rev. 439 (2004); *see also* United States v. Paradise, 480 U.S. 149, 165-66 (1987) (upholding race-conscious remedy designed to "remedy the present effect of past discrimination); Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 Ind. L. Rev. 523, 540-41 (1997) (discussing cases upholding race conscious policies under the compelling interest of remedying the effects of past discrimination).

21 *Id*. at 311-13. The Supreme Court considered this case in conjunction with a parallel challenge to the university's race-conscious admissions program for its undergraduate schools in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

22 *Grutter*, 539 U.S. at 325. Justice O'Connor observed that the lower courts have long been confused as to which *Bakke* opinion controls. She avoided that issue by simply declaring that the holding of *Bakke* is that race and ethnicity can play some role in the admissions process. The split-decision debate in *Bakke* has revolved around how to apply the test articulated in *Marks v. United States*. *Cf.* Damien M. Schiff, *When* Marks *Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum*, Engage, Vol. 9, Issue 1, at 119-24 (Feb. 2008) (discussing application of the *Marks* test to *Rapanos v. United States*, a split decision concerning the scope of the Clean Water Act, 33 U.S.C. § 1251, *et seq*.).

23 *Grutter*, 539 U.S. at 327. Justice O'Connor's statement is remarkable given that many commentators believed that, after *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (in which the Court's majority opinion was authored by Justice O'Connor), *all* racial classifications—even so-called "benign" classifications—would be subject to the most exacting of judicial scrutiny. *See, e.g.*, Russell N. Watterson, Jr., Note, Adarand Constructors v. Pena*: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 BYU L. Rev. 301, 301 n.3 (1996) (observing that *Adarand* requires strict scrutiny even for benign racial classifications); Stephen C. Minnich, Comment, 46 Case W. Res. 279, 286 (1995) (same); L. Darnell Weeden, *Yo, Hopwood, Saying No to Race-Based Affirmative Action Is the Right Thing to Do from an Afrocentric Perspective*, 27 Cumb. L. Rev. 533, 553 (1996/1997) (same); *cf. Adarand*, 515 U.S. at 227 ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Evidently, with *Grutter* the Court rejected that absolutist position for one in which the "strictness" of the scrutiny is based on contextual factors. *See* Paul Brest, *Some Comments on* Grutter v. Bollinger, 51 Drake L. Rev. 683, 690-91 (2003).

24 *Grutter*, 539 U.S. at 328. Justice Thomas in dissent observed that the real compelling interest was not those educational benefits attributable to having a diverse student body but rather obtaining those benefits in an *elite* institution, or simply achieving a diverse student body—an "aesthetic"—regardless of its benefits. *See id*. at 354-56 (Thomas, J., concurring in part and dissenting in part).

25 *Grutter*, 539 U.S. at 329-30. It is unclear how the use of race to achieve "critical mass" is different from the use of race in quota systems, at least in those quota systems where slots are provisionally set aside for minorities. *See* Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 Mich. J. Race & L. 625, 650 (2006) ("Unfortunately, 'critical mass' seems impossible to define concretely without resort to any poisonous 'quota.'").

26 *Grutter*, 539 U.S. at 330-33.

27 *Id.* at 334.

28 *Id.*

29 *Id.* at 335.

30 *Id.* at 336.

31 *Id.* at 337.

32 *Id.* at 338.

33 *Id.* at 342.

34 *Id.* at 343.

35 *Fisher*, 631 F.3d at 222.

36 Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir. 1996).

37 *Fisher*, 631 F.3d at 223.

38 *See* Tex. Educ. Code § 51.803 (1997).

39 *See id*. § 51.803(a-1) (2010).

40 *Fisher*, 631 F.3d at 224.

41 *See id.* at 224-25.

42 *Id*. at 226.

43 *Id*.

44 *Id.* at 217.

45 *Id.*

46 *See id*. at 247 (King, J., concurring specially).

47 *See id*. at 247-66 (Garza, J., concurring specially).

48 *Id*. at 231 (lead opinion).

49 *Id.*

50 *Id.* at 232.

51 *Id.* at 234-35.

52 *Id.* at 235.

53 *Id.* at 235-36.

54 *Id.* at 239.

55 *Id.*

56 *Id.* at 240.

57 *Id.* at 241.

58 *Id.*

59 *Id.* at 242.

60 *Id.* at 243.

61 *See id*. at 243.

62 *See id*. at 244.

63 *Id*. at 244. He also observed that the university enrolled fewer minorities in 2004 than in pre-*Hopwood* 1989. *See id*. at 244.

64 *Id*. at 244-45.

65 *See id*. at 247-48 (Garza, J., concurring specially).

66 *Id*. at 249.

67 *Id.* at 240-51.

68 *Id.* at 252.

69 *Id.*

70 *Id.* at 252-53.

71 *Id.* at 253.

72 *Id.* at 254.

73 *Id*. at 255-56.

74 *See id*. at 256.

75 *Id*. at 256.

76 *See id*. at 258.

77 *Id*. at 260.

78 *Id*. at 263.

79 *Id.*

80 *Id*. at 266.

81 Fisher v. Univ. of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).

82 *Id.* (Jones, C.J., dissenting).

83 *Id.*, slip op. at *6.

84 *Id.* at *13.

85 *Id.* at *14.

86 *Id.* at *14-15.

87 *Id*. at *15 (citing *Parents Involved*, 551 U.S. at 734-35).

88 *Fisher*, 644 F.3d 301, slip op. at *15-16 (Jones, C.J., dissenting).

89 *Id.* at *18.

90 *Id.*