

# Embracing Race-Conscious College Admissions Programs: How Fisher v. University of Texas at Austin Redefines "Affirmative Action" as a Holistic Approach to Admissions that Ensures Equal, Not Preferential, Treatment

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# **EMBRACING RACE-CONSCIOUS COLLEGE ADMISSIONS PROGRAMS: HOW FISHER V. UNIVERSITY OF TEXAS AT AUSTIN REDEFINES “AFFIRMATIVE ACTION” AS A HOLISTIC APPROACH TO ADMISSIONS THAT ENSURES EQUAL, NOT PREFERENTIAL, TREATMENT**

BY NANCY L. ZISK\*

*In Fisher v. University of Texas at Austin, the United States Supreme Court affirmed well-established Supreme Court doctrine that race may be considered when a college or university decides whom to admit and whom to reject, as long as the consideration of race is part of a narrowly tailored holistic consideration of an applicant's many distinguishing features. The Court's latest decision heralds a new way of thinking about holistic race-conscious admissions programs. Rather than considering them as “affirmative action” plans that prefer any one applicant to the disadvantage of another, they should be viewed as the Court has described them, as holistic plans that are “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration,” consistent with the Equal Protection Clause of the Fourteenth Amendment. Applying the “searching examination” that the Court defined and required in its first consideration of the case, the Court in its second review again confirmed that universities may include race in a holistic consideration of each applicant's potential to contribute to their university communities. Despite appearing to limit the reach of the decision by describing the case as “sui generis” litigated in such a way as to “limit its value for prospective guidance,” the Fisher decision affirms what the Supreme Court acknowledged in 1978 and established in 2003 that race may be considered as part of a narrowly tailored holistic consideration of the characteristics and traits of each applicant. Properly understood as treating the traits of all applicants “on the same footing,” race-conscious plans should be embraced, not limited, because they are consistent with the Court's now settled law and may be broadly used to achieve the well-established interest of student body diversity in this country's colleges and universities.*

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## I. INTRODUCTION

On June 23, 2016, the United States Supreme Court decided, once again, that race may be considered when a college or university decides whom to admit and whom to reject, as long as the consideration of race is part of a narrowly tailored holistic consideration of an applicant's

many distinguishing features.<sup>1</sup> This decision, building on well-established Supreme Court doctrine,<sup>2</sup> heralds a new way of thinking about holistic race-conscious admissions programs. Rather than considering them as “affirmative action” plans that prefer any one applicant to the disadvantage of another, they should be viewed as the Court has described them, as holistic plans that are “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration,” consistent with the Equal Protection Clause of the Fourteenth Amendment.<sup>3</sup>

In *Fisher v. University of Texas at Austin*, Abigail Fisher, a white female applicant who was rejected by the University of Texas at Austin, challenged the University’s race-conscious admissions program. In its first consideration of the case, the Supreme Court vacated the Fifth Circuit’s decision to uphold the University’s program and remanded the case, instructing the Court of Appeals to review the program with the demanding “strict scrutiny” standard the constitution requires.<sup>4</sup> On remand, the Court of Appeals reviewed with “exacting scrutiny” the University’s goal of student body diversity and its means for achieving it,<sup>5</sup> and again upheld the University’s race-conscious plan, concluding that to do otherwise “is to confound developing principles of neutral affirmative action.”<sup>6</sup> The Supreme Court labelled the University’s consideration of race as “affirmative-action” and affirmed the decision of the

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1. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

2. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (upholding the race-conscious admissions program used by the University of Michigan Law School); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (invalidating the admissions program used by the Medical School University of California at Davis that reserved seats for minority applicants but embracing holistic consideration of an applicant’s characteristics, including race) (plurality opinion).

3. *Bakke*, 438 U.S. at 317; accord *Grutter*, 539 U.S. at 334.

4. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013).

5. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014), *aff’d*, 136 S. Ct. 2198 (2016).

6. *Id.* at 660.

Court of Appeals.<sup>7</sup>

The Court's labelling of the University's plan as an "affirmative-action" plan is misleading because since 1978, in *Regents of University of California v. Bakke*, the Court has made clear that race cannot be used to "aid" anyone at the expense of another.<sup>8</sup> In contrast to the Supreme Court's label, the Court of Appeals for the Fifth Circuit referred to the University of Texas' race-conscious plan as "neutral affirmative action," properly recognizing that the University's race-conscious plan did not give preferential treatment to any applicant, but instead ensured individualized and equal consideration of each and every applicant.<sup>9</sup> In *Bakke*, the Supreme Court endorsed the idea that "the interest of diversity is compelling in the context of a university's admissions program,"<sup>10</sup> and in 2003, the Court in *Grutter v. Bollinger*, reiterated "that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>11</sup> Embracing race-conscious admissions programs that promote student body diversity as "central" to a university's "identity and educational mission," the Court in *Fisher II* has again confirmed that universities may include race in a holistic consideration of each applicant's potential to contribute to their university communities, so it may appear that this issue is now settled.<sup>12</sup>

However, the *Fisher II* Court appears to limit the reach of the decision by describing the case as "*sui generis*"<sup>13</sup> litigated in such a way as to "limit its value for prospective guidance."<sup>14</sup> Despite the Court's apparent limitation of its reach, however, the *Fisher II* decision affirms what the Supreme Court acknowledged in 1978 and established in 2003 that race may be considered as part of a narrowly tailored holistic consideration of the characteristics and traits of each applicant. Properly understood as treating the traits of all applicants "on the same footing,"<sup>15</sup> race-

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7. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016). For clarity throughout this article, the Supreme Court's 2016 decision will be referred to as *Fisher II* and its 2013 decision will be referred to as *Fisher I*. The district and appellate court decisions will be referred to as *Fisher* and identified by the appropriate court.

8. *Bakke*, 438 U.S. at 307.

9. *Fisher*, 758 F.3d at 646, 660.

10. *Bakke*, 438 U.S. at 314.

11. *Grutter*, 539 U.S. at 325.

12. *Fisher II*, 136 S. Ct. at 2214.

13. *Id.* at 2208.

14. *Id.* at 2209.

15. *Bakke*, 438 U.S. at 317.

conscious plans should be embraced, not limited. As this article concludes, they are consistent with the Court's now settled law and may be broadly used to achieve the well-established interest of student body diversity in this country's colleges and universities.

Section II examines the Supreme Court's decisions establishing that the goal of achieving diversity in higher education is a compelling interest and that considering race as part of an admissions program is constitutional if the program is narrowly tailored to achieving that goal. Section III reviews how the University of Texas satisfied the Court's strict scrutiny of its admissions program, and Section IV argues that the use of race-conscious admissions programs should be embraced because they ensure review of all of the traits and characteristics of each applicant for admission and do not aid unqualified or less qualified applicants at the expense of others. Section V concludes that universities in the future may incorporate race into their admissions programs to ensure consideration of all characteristics of all applicants which will, in turn, ensure student body diversity, as the Court has now repeatedly confirmed they can do.

## II. THE GOAL OF ACHIEVING DIVERSITY IN HIGHER EDUCATION IS A COMPELLING INTEREST AND CONSIDERATION OF RACE AS PART OF A UNIVERSITY'S ADMISSIONS PROGRAM IS CONSTITUTIONAL IF THE PROGRAM IS NARROWLY TAILORED TO ACHIEVING THAT GOAL.

The Supreme Court, in *Fisher II*, addressed the question of "whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause."<sup>16</sup> It was the second time that the Supreme Court considered Abigail Fisher's challenge to the University of Texas' admissions program. In its first consideration of the case, the Court reviewed the Fifth Circuit Court of Appeals' decision that the University's program was constitutional because it was based on a "holistic, multi-factor approach, in which race is but one of many considerations."<sup>17</sup> The Court vacated the appellate court's decision, not because the University considered the race of each applicant in its admissions process, but because the lower court "had applied an overly deferential

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16. *Fisher II*, 136 S. Ct. at 2205.

17. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

'good-faith' standard in assessing the constitutionality of the University's program."<sup>18</sup> The *Fisher I* Court remanded the case, warning that "[r]ace may not be considered unless the admissions process can withstand strict scrutiny."<sup>19</sup> Explaining the demands of strict scrutiny, the *Fisher I* Court called on the lower court to engage in a "meaningful" review of the University's race-conscious plan.<sup>20</sup>

"In order for judicial review to be meaningful," Justice Kennedy wrote for the Court, "a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that encompasses a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>21</sup> Thus, the Court instructed the Fifth Circuit Court of Appeals to examine the University of Texas' admissions program "to ensure that the means chosen to accomplish the [University's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."<sup>22</sup> Section (A) below reviews the case law in which the Court defined a university's goal of achieving diversity in higher education as a compelling state interest, and Section (B) examines the Court's definition of strict scrutiny and the requirement that a race-conscious plan be "specifically and narrowly framed" to accomplish that goal.<sup>23</sup>

#### A. *Student Body Diversity is a Compelling Interest that Justifies the Use of Race in University Admissions Programs*

The Supreme Court identified the one compelling interest that could justify the consideration of race almost four decades ago in *Regents of University of California v. Bakke*.<sup>24</sup> In that case, Allan Bakke, a white male,

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18. *Fisher II*, 136 S. Ct. at 2207.

19. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2418 (2013).

20. *Id.* at 2421. See Zisk, *supra* note \* at 1 (examining the Supreme Court's decision in *Fisher I* and the precedent on which the Court relied).

21. *Fisher I*, 133 S. Ct. at 2421 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (internal quotation marks and alterations omitted)).

22. *Id.* at 2420 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (internal quotation marks and alteration omitted)).

23. *Id.*

24. *Bakke*, 438 U.S. 265. Justice Powell wrote the opinion and Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concurred in the portion of the judgment that invalidated the Medical School's admissions program that reserved seats for minority applicants, and Justices Brennan, White, Marshall, and Blackmun concurred in the part of the judgment that reversed the lower court's invalidation of the Medical School's consideration of race. *Id.*

challenged the University of California Medical School's admissions program under the Equal Protection Clause of the Fourteenth Amendment because the program operated two separate admissions systems, one for white candidates and one for minority candidates, under which minority candidates were accepted with lower grade point averages and other scores, and 16 seats out of an entering class size of 100 were reserved for minorities.<sup>25</sup> Mr. Bakke was rejected twice in two consecutive years in which "applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."<sup>26</sup>

Writing for a plurality of the Court, Justice Powell outlined "certain basic premises" relevant to the use of race in university admissions.<sup>27</sup> As noted by the Court in *Fisher I*, Justice Powell's opinion rested on the basic tenets that "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment"<sup>28</sup> and that the "principle of equal protection admits no artificial line of a two-class theory that permits the recognition of special wards entitled to a degree of protection greater than that accorded others."<sup>29</sup> It followed, therefore, that "[a]ny racial classification must meet strict scrutiny, for when government decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."<sup>30</sup>

Justice Powell then evaluated the four possible justifications for consideration of race given by the University of California's Medical School, which included: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."<sup>31</sup> After a thorough analysis of the constitutional guarantee of equal protection, Justice Powell rejected the first

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at 271-72.

25. *Id.* at 273-75.

26. *Id.* at 277.

27. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2417 (2013).

28. *Id.* (quoting *Bakke*, 438 U.S. at 287).

29. *Id.* (quoting *Bakke*, 438 U.S. at 295 (internal quotation marks omitted)).

30. *Id.* (quoting *Bakke*, 438 U.S. at 299 (internal quotation marks omitted)).

31. *Bakke*, 438 U.S. at 306 (internal quotation marks and citation omitted).

three and concluded that only the goal of attaining “a diverse student body” can justify the use of race in an admissions program.<sup>32</sup> That goal, according to Justice Powell, “is a constitutionally permissible goal for an institution of higher education” and one that promotes the “atmosphere of speculation, experiment and creation—so essential to the quality of higher education.”<sup>33</sup>

Since *Bakke*, the Court has not wavered from the notion that “the interest of diversity is compelling in the context of a university’s admissions program.”<sup>34</sup> In 2003, in *Grutter v. Bollinger*, which upheld the constitutionality of a race-based admissions program at the University of Michigan Law School, the Supreme Court endorsed this view “that student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>35</sup> In 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court again acknowledged that diversity in higher education has been recognized by the Court as a compelling state interest and that race may be a component in an admissions program when it is “part of a broader assessment of diversity.”<sup>36</sup>

The Court in both *Fisher I* and *Fisher II* again endorsed this principle, affirming that “a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity.”<sup>37</sup> The Court in *Fisher II* reiterated what the *Grutter* Court held, that “enrolling a diverse student body promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races” and, “[e]qually important” that “student body diversity promotes learning

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32. *Id.* at 311. As noted by the Court in *Fisher I*, Justice Powell concluded that “[r]edressing past discrimination could not serve as a compelling interest, because a university’s broad mission of education is incompatible with making the “judicial, legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification. *Fisher I*, 133 S. Ct. at 2417 (2013) (quoting *Bakke*, 438 U.S. at 307–09 (1978)).

33. *Bakke*, 438 U.S. at 311–12 (internal quotation marks and citation omitted).

34. *Id.* at 314.

35. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

36. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (citing *Grutter*, 539 U.S. at 328 (2003)) (striking down admissions programs at a primary and secondary school because “race is not considered as part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints; race, for some students, is determinative standing alone”) (internal quotation marks and citation omitted).

37. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (quoting *Fisher I*, 133 S. Ct. at 2419) (internal quotation marks and citation omitted).

outcomes, and better prepares students for an increasingly diverse workforce and society.”<sup>38</sup> To use race as a factor to achieve this diversity, a university must satisfy the “most rigid scrutiny” of a reviewing court, which is discussed in the following section.<sup>39</sup>

*B. A Race-Conscious Admissions Program that is Narrowly Tailored to Achieve Student Body Diversity Withstands Strict Scrutiny*

In *Fisher I*, Justice Kennedy stated that “[r]ace may not be considered by a university unless the admissions process can withstand strict scrutiny.”<sup>40</sup> Describing strict scrutiny as “a searching examination,”<sup>41</sup> Justice Kennedy explained that to withstand such scrutiny, a university “bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate”<sup>42</sup> and that its plan is “narrowly tailored” to achieve student body diversity.<sup>43</sup> As Justice Kennedy explained in *Fisher I* and repeated in *Fisher II*, “[s]trict scrutiny requires the university to demonstrate with clarity 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.”<sup>44</sup>

Since *Bakke*, it has been clear that a university may not “impose a fixed quota or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>45</sup> As Justice Powell observed: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”<sup>46</sup> Twenty-five years after *Bakke*, the Court, in *Grutter v. Bollinger*, defined what a university may do by defining “the contours of the narrow-tailoring inquiry with respect to race-

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38. *Fisher II*, 136 S. Ct. at 2210 (quoting *Grutter*, 539 U.S. at 330) (internal quotation marks and alteration omitted).

39. *Fisher I*, 133 S. Ct. at 2419 (2013) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

40. *Id.* at 2418.

41. *Id.* at 2419.

42. *Id.* (internal quotation marks and citations omitted).

43. *Id.* at 2421.

44. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher I*, 133 S. Ct. at 2418 (internal quotation marks and alteration omitted)).

45. *Id.* (quoting *Fisher I*, 133 S. Ct. at 2419) (internal quotation marks omitted).

46. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

conscious university admissions programs.”<sup>47</sup> As the *Grutter* Court explained: “To be narrowly tailored, a race-conscious admissions program cannot use a quota system — it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.”<sup>48</sup> Rather, narrow tailoring requires a race-conscious admissions program to be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant . . . .”<sup>49</sup> The hallmark of narrow tailoring, according to the Court in *Grutter*, as defined first by Justice Powell in *Bakke*, is “individualized consideration of each and every applicant.”<sup>50</sup> The importance of “this individualized consideration in the context of a race-conscious admissions program is paramount.”<sup>51</sup>

Accordingly, the Court ruling in both *Fisher I* and again in *Fisher II* rested on the premise that a university cannot impose a fixed quota or otherwise “define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>52</sup> To ensure that the University of Texas’ admissions program was not a quota system, the *Fisher I* Court instructed the Fifth Circuit Court of Appeals to examine the University’s admissions program “to determine that the admissions processes ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>53</sup> The reviewing court must also “verify that it is necessary for a university to use race to achieve the educational benefits of diversity”<sup>54</sup> and to do this, the court must decide “whether a university could achieve sufficient diversity without using racial classifications.”<sup>55</sup> If “a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense, then the

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

48. *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315).

49. *Id.* at 334 (quoting *Bakke*, 438 U.S. at 317).

50. *Id.* Relying on Justice Powell’s opinion in *Bakke*, the court in *Grutter* noted that “Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.” *Id.* at 323.

51. *Id.* at 337.

52. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013)) (internal quotation marks omitted).

53. *Fisher I*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337) (internal quotation marks omitted).

54. *Id.* at 2420 (quoting *Bakke*, 438 U.S. at 305) (internal quotation marks omitted).

55. *Id.*

university may not consider race.”<sup>56</sup> The Court made clear that “strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”<sup>57</sup>

To carry this burden, the Court explained, a university may prove that “a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense.”<sup>58</sup> Relying on the Court’s direction in *Grutter*, the *Fisher I* Court made clear that to carry its burden of narrow tailoring, a university does not have to exhaust “every conceivable race-neutral alternative” or “choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>59</sup>

Applying these principles to the *Fisher* case, the Fifth Circuit Court of Appeals on remand from *Fisher I* reviewed the University’s admissions program and found “force in the argument that race here is a necessary part, albeit one of many parts, of the decisional matrix.”<sup>60</sup> After a thorough review of all of the steps the University took to increase diversity without considering race, discussed in the following section, the Court of Appeals was persuaded by the evidence that the University’s admissions review was a “holistic process” in which race was a single but “necessary” part because there were no race-neutral “workable alternatives.”<sup>61</sup> Accordingly, the court upheld the University’s race-conscious admissions program, which the Supreme Court affirmed.<sup>62</sup>

### III. SATISFYING THE COURT’S STRICT SCRUTINY

Over the course of several years, the University of Texas tried a variety of approaches to achieve diversity on its campuses.<sup>63</sup> The history of the University’s admissions practices provided the lower courts and

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56. *Id.* (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)) (internal citations and alterations omitted).

57. *Id.*

58. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher I*, 133 S. Ct. at 2420) (internal quotation marks omitted).

59. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

60. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014), *aff’d*, 136 S. Ct. 2198 (2016).

61. *Id.*

62. *Fisher II*, 136 S. Ct. at 2215.

63. *Id.* at 2205.

subsequently the Supreme Court with data that allowed each court to understand the University's "purpose or interest" in relying on race as a factor in its admissions program and then to determine whether that use of race "is necessary to the accomplishment of its purpose."<sup>64</sup> Reviewing the University's admissions program as it existed when Abigail Fisher filed suit, the Court noted that it was "a complex system" that had undergone "significant evolution over the past two decades."<sup>65</sup> The University's goal of achieving student body diversity defined the University's admissions program as it existed when Ms. Fisher filed suit and also in its various forms prior to that.<sup>66</sup>

For the University to satisfy the constitutionally required "searching examination,"<sup>67</sup> the *Fisher II* Court made clear that "asserting an interest in the educational benefits of diversity writ large is insufficient."<sup>68</sup> Rather, a university's goals "must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them" and the Court concluded that the University of Texas set forth "concrete and precise goals" when it adopted its challenged race-conscious plan.<sup>69</sup> Specifically, the Court noted each of the "educational values" the University sought to achieve through its admissions program, including the "promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry."<sup>70</sup> In addition, the Court noted the University's goal to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."<sup>71</sup> Based on its review of the record, the Court concluded that "[a]ll of these objectives, as a general matter, mirror the 'compelling interest' this Court has approved in its prior cases."<sup>72</sup>

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64. *Id.* at 2208 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2418 (2013)) (internal quotation marks and alterations omitted).

65. *Id.* at 2205.

66. *Id.* at 2210-11.

67. *Fisher I*, 133 S. Ct. at 2419.

68. *Fisher II*, 136 S. Ct. at 2211.

69. *Id.*

70. *Id.* (internal quotation marks and citations to the trial court record omitted).

71. *Id.* (internal citations to the trial court record omitted).

72. *Id.*

Convinced that the University provided a “reasoned, principled explanation for its decision to pursue these goals,”<sup>73</sup> the Court then considered whether the University’s plan was narrowly tailored to achieve student body diversity, consistent with the directive of *Fisher I*.<sup>74</sup> As Justice Kennedy noted in *Fisher II*, narrow tailoring imposes on a university a “heavy burden” to show “that it had not obtained the education benefits of diversity before it turned to a race-conscious plan.”<sup>75</sup> To carry its burden, the University relied on decades of data and “months of study and deliberation, including retreats, interviews, and review of data,” to conclude that “the use of race-neutral policies and programs had not been successful in achieving sufficient racial diversity at the University.”<sup>76</sup>

To decide that the University’s conclusion “could not be faulted on this score,”<sup>77</sup> the Court reviewed the various admissions programs the University utilized over many years and the enrollment data that these programs generated. To begin with, the Court noted that prior to 1996, the University considered an applicant’s SAT scores, high school academic performance, and race and gave preference to minorities.<sup>78</sup> Then, in 1996, the University was forced to remove the consideration of race from its admissions review because the Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas* that “any consideration of race in college admissions” violates the Equal Protection Clause.<sup>79</sup> Following the *Hopwood* decision, the University began making admissions decisions based on an “applicant’s essays, leadership and work experience, extracurricular activities, community service, and other ‘special characteristics’ that might give the admissions committee insight into a student’s background.”<sup>80</sup> The “special circumstances” to which the Court referred included “growing up in a single-parent home, speaking a lan-

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73. *Id.* (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013) (internal quotation marks omitted).

74. *Id.*; *Fisher I*, 133 S. Ct. at 2420 (noting that narrow tailoring “requires that the reviewing court to verify that it is ‘necessary’ for the university to use race to achieve the educational benefits of diversity”) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)).

75. *Fisher II*, 136 S. Ct. at 2211.

76. *Id.* (internal quotation marks and citations to the trial record omitted).

77. *Id.*

78. *Id.* at 2205.

79. *Id.* (citing *Hopwood v. Texas*, 78 F. 3d 932, 934–35, 948 (5th Cir. 1996)).

80. *Id.*

guage other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family."<sup>81</sup> Consistent with *Hopwood*, the University did not consider an applicant's race at any point during the admissions decision.<sup>82</sup>

To compensate for its inability to consider race in the admissions process, the University tried a variety of ways to increase minority enrollment and "created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools."<sup>83</sup> It also examined factors including "the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household."<sup>84</sup> Even using these tools, however, minority enrollment "decreased immediately."<sup>85</sup>

Responding to this decrease, the Texas Legislature enacted the Top Ten Percent Law that guaranteed high school seniors in the top ten percent of their class admission into any public state university in Texas.<sup>86</sup> According to its legislative history, the law was intended to "ensure a highly qualified pool of students each year in the state's higher educational system" while promoting diversity among the applicant pool so "that a large well qualified pool of minority students [is] admitted to Texas universities."<sup>87</sup> Pursuant to this law, beginning in 1998, the University was obligated to fill up to seventy-five percent of its freshman

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81. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2416 (2013).

82. *Fisher II*, 136 S. Ct. at 2205.

83. *Fisher v. Univ. of Tex. at Austin*, 631 F. 3d 213, 223 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

84. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591-92 (W.D. Tex. 2009), *aff'd*, 631 F. 3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

85. *Fisher*, 631 F. 3d at 223 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013) (noting that "the publicity from the [*Hopwood*] case impacted the number of admitted minorities who chose to enroll").

86. *Fisher*, 645 F. Supp. 2d at 592 (W.D. Tex. 2009), *aff'd*, 631 F. 3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013) (citing TEX. EDUC. CODE ANN. § 51.803(a) (West 2012) and noting that admission is guaranteed for "all public high school seniors in the top ten percent of their class at the time of their application, as well as the top ten percent of high school seniors attending private schools that make their student rankings available to university admissions officers").

87. *Id.* (quoting House Higher Educ. Comm., House Research Organization Digest, Tex. C.S.H.B. 588, 75th Leg. R.S. 4-5 (Apr. 15, 1997)).

class with students who graduated in the top ten percent of their high school class,<sup>88</sup> and relied on a race-neutral holistic review of other applicants to fill the remaining twenty-five percent of the class.<sup>89</sup>

Despite the fact that she did not qualify for admission under the Top Ten Percent plan, Fisher argued that the plan offered a race-neutral alternative to the University's race-conscious plan, making the race-conscious plan unnecessary and constitutionally unacceptable.<sup>90</sup> The University produced extensive evidence and proved that the percentage plan did not, however, achieve the University's goal of student body diversity.<sup>91</sup> To the contrary, the evidence, which the court labeled "significant evidence, both statistical and anecdotal,"<sup>92</sup> showed "consistent stagnation in terms of the percentage of minority students enrolling" during the time the University could not consider race as part of its holistic review of applicants.<sup>93</sup> The Court also noted that the University's evidence showed that minority students admitted during this time period experienced "feelings of loneliness and isolation" because of low enrollment across a wide variety of classes.<sup>94</sup> As observed by the Court of Appeals, although the Top Ten Percent plan "may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity."<sup>95</sup>

Additionally, as the Supreme Court noted, the plan is actually not race-neutral and it sacrifices the holistic approach to admissions decisions that captures a wide variety of students with different backgrounds, cultures, and experience.<sup>96</sup> Quoting from Justice Ginsburg's

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88. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206 (2016) (explaining that the "Texas law caps the number of places in the freshman class that may be filled through this program to seventy-five percent of the total class, which has the effect of guaranteeing admission only to students who graduate in the top seven or eight percent of their high school classes")

89. *Id.*

90. *Id.* at 2211.

91. *Id.* at 2212 (noting that at the time of Fisher's application, "none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought").

92. *Id.*

93. *Id.*

94. *Id.*

95. *Fisher v. Univ. of Tex. at Austin*, 631 F. 3d 213, 240 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013) (internal citation omitted).

96. *Fisher II*, 136 S. Ct. at 2213-14.

dissent in *Fisher I*, Justice Kennedy noted in *Fisher II* that the law, though facially neutral, was, in fact, “adopted with racially segregated neighborhoods and schools front and center stage.”<sup>97</sup> Again quoting Justice Ginsburg, Justice Kennedy explicitly stated: “It is race consciousness, not blindness to race, that drives such plans.”<sup>98</sup> Accordingly, the Court rejected Fisher’s assertion that the Top Ten Percent plan offered a race-neutral alternative to the University’s race-conscious admissions program.<sup>99</sup>

Moreover, as Justice Kennedy noted, using class rank alone to determine who attends the University presented a bigger problem than whether or not the Top Ten Percent plan was race-neutral because using only class rank “would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students.”<sup>100</sup> Antithetical to the purposes of a holistic approach that considers many facets of an applicant, the Top Ten Percent plan

would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.<sup>101</sup>

Apparently responding to the dissenting Justices’ opinion in *Fisher II* that “the Top Ten Percent Plan admits *the wrong kind* of African-American and Hispanic students,”<sup>102</sup> Justice Kennedy noted that admitting students using “any single metric” like class rank, “will capture certain types of people and miss others” and “[t]his does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent

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97. *Id.* at 2213 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting)).

98. *Id.* (quoting *Fisher I*, 133 S. Ct., at 2433 (Ginsburg, J., dissenting); see also *Fisher*, 631 F.3d at 224 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013) (noting that the law was touted as a “race-neutral” initiative because it “did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose”).

99. *Fisher II*, 136 S. Ct. at 2213.

100. *Id.*

101. *Id.*

102. *Id.* at 2216 (Alito, Thomas, JJs., and Roberts, C.J., dissenting).

Plan.”<sup>103</sup> Rather, it “merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body.”<sup>104</sup> The *Grutter* Court had previously recognized this weakness in the percentage plans in place in Florida, California, and Texas, observing that 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.”<sup>105</sup> Consistent with the *Grutter* Court’s concern, the *Fisher II* Court concluded not only that Texas’ Top Ten Percent plan does not offer a viable alternative to a race-conscious admissions program but also that it “is a blunt instrument that may well compromise the University’s own definition of the diversity it seeks.”<sup>106</sup>

Another argument Fisher made against using a race-conscious plan was that “the University could intensify its outreach efforts to African-American and Hispanic applicants.”<sup>107</sup> Rejecting this argument, the Court noted that “the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students.”<sup>108</sup> For example, the University “created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events.”<sup>109</sup> “Perhaps more significantly,” according to the Court, the University spent seven years under *Hopwood*’s directive “attempting to achieve its compelling interest using race-neutral holistic review” and “none of these efforts succeeded.”<sup>110</sup>

The Court also dismissed Fisher’s suggestion that the University could have altered “the weight given to academic and socioeconomic factors in the University’s admissions calculus” because that proposal ignored “the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors.”<sup>111</sup> Moreover, according to the Court, the proposal ignored “this Court’s precedent making clear that the Equal Protection Clause does

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103. *Id.* at 2213.

104. *Id.*

105. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

106. *Fisher II*, 136 S. Ct. at 2214.

107. *Id.* at 2212–13.

108. *Id.* at 2213.

109. *Id.* (citing the court record).

110. *Id.*

111. *Id.*

not force universities to choose between a diverse student body and a reputation for academic excellence.”<sup>112</sup> As the Court stated in *Grutter* and repeated in *Fisher II*, “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>113</sup> Instead, “it does impose on the university the ultimate burden of demonstrating” that “race-neutral alternatives that are both available and workable do not suffice.”<sup>114</sup> Based on its review of the data generated by the University’s varied attempts to achieve student body diversity, the Court concluded that at the time *Fisher* applied, “none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought.”<sup>115</sup>

Having come to the conclusion, after “months of study and deliberation,”<sup>116</sup> that its race-neutral efforts were not working to achieve student body diversity, and after the Supreme Court upheld the constitutionality of a holistic race-conscious plan in *Grutter v. Bollinger*,<sup>117</sup> the University proposed to the Board of Regents that it be allowed to begin taking race into consideration as one of “the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University.”<sup>118</sup> With approval from the Board, the University adopted the admissions policy that included the consideration of race.<sup>119</sup>

Under this plan, and consistent with *Grutter*, race was “given weight as a subfactor” within a much broader list of factors.<sup>120</sup> For the seats that were not filled with students admitted under the Top Ten Percent Plan, the University assigned one score based “an applicant’s SAT score and academic performance in high school”<sup>121</sup> and another score based on

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112. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

113. *Id.* at 2208 (quoting *Grutter*, 539 U.S. at 339) (alteration in original).

114. *Id.* (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 4211, 2420 (2013)) (internal quotation marks omitted).

115. *Id.* at 2212.

116. *Id.* at 2211.

117. *Grutter*, 539 U.S. 306.

118. *Fisher II*, 136 S. Ct. at 2206 (internal quotation marks and citations to the trial record omitted).

119. *Id.*

120. *Id.*

121. *Id.* at 2205.

“an applicant’s essays, letters of recommendation, resumes, writing samples, artwork,” and other things an applicant may submit and “evaluates the applicant’s potential contributions to the University’s student body based on the applicant’s leadership experience, extracurricular activities, awards/honors, community service, and other ‘special circumstances.’”<sup>122</sup> These “special circumstances” include such things as “the socioeconomic status of the applicant’s family, the socioeconomic status of the applicant’s school, the applicant’s family responsibilities, whether the applicant lives in a single-parent home, the applicant’s SAT score in relation to the average SAT score at the applicant’s school, the language spoken at the applicant’s home, and, finally, the applicant’s race.”<sup>123</sup>

Based on its review of this evidence and acknowledging that race “can make a difference to whether an application is accepted or rejected,” the Court took note that the University’s plan did not impose a quota or otherwise “define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>124</sup> Rather, according to the Court, “there is no dispute that race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”<sup>125</sup> Finding no obstacle to the plan on this point, the Court went on to consider whether other admissions policies would have accomplished the University’s goal of student body diversity without considering race.<sup>126</sup>

Reviewing the demographic statistics, anecdotes, and the “more nuanced quantitative data,” the Court concluded that the University’s assessment of its need for “race-conscious review” had been done “with care” and “a reasonable determination was made that the University had not yet attained its goals.”<sup>127</sup> In response to Fisher’s argument that the University’s did not have to consider race because “such consideration has had only a minimal impact in advancing the University’s compelling interest,” the Court made clear that “it is not a failure of narrow tailoring for the impact of racial consideration to be minor.”<sup>128</sup> To the contrary, the fact that “race consciousness played a role in only a small

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122. *Id.* at 2205–06.

123. *Id.* (internal citations to the trial record omitted).

124. *Id.* at 2207–08 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013)) (internal quotation marks omitted).

125. *Id.* at 2207 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *aff’d*, 631 F. 3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013)).

126. *Id.* at 2211–12.

127. *Id.* at 2212.

128. *Id.* (internal quotation marks and alteration omitted).

portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."<sup>129</sup>

Having carefully reviewed all of Fisher's suggested alternatives, the Court concluded that "none . . . have been shown to be available and workable means through which the University could have met its educational goals."<sup>130</sup> Accordingly, the Court decided that the University "met its burden of showing that the admissions policy it used at the time it rejected [Fisher's] application was narrowly tailored."<sup>131</sup>

#### IV. RACE CONSCIOUS ADMISSIONS PROGRAMS SHOULD BE EMBRACED, NOT LIMITED, TO ENSURE REVIEW OF ALL OF THE TRAITS AND CHARACTERISTICS OF EVERY APPLICANT FOR ADMISSION

The Court has now endorsed two race-conscious admissions plans, in *Grutter v. Bollinger* and *Fisher I* and *II*, and in *Fisher II* made clear what a university must show to defend the use of such a plan. Repeatedly, the Court has endorsed as constitutionally permissible race-conscious plans that consider all of an applicant's attributes, where race is "but a factor of a factor of a factor in the holistic-review calculus."<sup>132</sup> Instead of embracing this time-tested holistic approach to university admissions, however, Justice Kennedy refers in *Fisher II* to the University's race-conscious plan as an "affirmative-action program" and proceeds to limit the reach of the Court's holding.<sup>133</sup> The limitations he attached are reviewed in section (A). Section (B) raises the question whether any limitation is necessary, given that holistic race-conscious admissions programs are not "affirmative action" plans that allow for preferential treatment but are plans that ensure equal consideration of all of the characteristics and traits of every applicant for admission to a college or university class.

##### A. Justice Kennedy's Limitations of Fisher II's Reach

At the outset of his analysis of the facts of the case, Justice Kennedy described the University of Texas' admissions program as "*sui generis*" and drew a distinction between the University's admission program

129. *Id.*

130. *Id.* at 2214 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133, S. Ct. 2411, 2420 (2013)) (internal quotation marks omitted).

131. *Id.* at 2214.

132. *Id.* at 2207 (internal quotation marks and citation to lower court decision omitted).

133. *Id.* at 2208.

and “other approaches to college admissions considered by this Court,” because Texas’ program “combines holistic review with a percentage plan.”<sup>134</sup> He explicitly stated that the “case has been litigated on a somewhat artificial basis” because Fisher had not challenged the percentage plan, which “may limit its value for prospective guidance.”<sup>135</sup> Fisher’s failure to challenge the percentage plan, however, left the Court with only the issue of whether the University’s race-conscious program violated the Equal Protection Clause.<sup>136</sup> Justice Kennedy lamented that Fisher’s failure to challenge the percentage plan “led to a record that is almost devoid of information about the students who secured admission to the University through the Plan.”<sup>137</sup> This void in the record meant that the Court, according to Justice Kennedy, could not “know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.”<sup>138</sup> Justice Kennedy’s concern for this lack of evidence appears to be inconsistent with the Court’s close scrutiny of the evidence the University produced, which Justice Kennedy noted was “significant evidence, both statistical and anecdotal” and its conclusion that the University’s review of enrollment “appears to have been done with care,” and that “a reasonable determination was made that the University had not yet attained its goals.”<sup>139</sup>

Justice Kennedy also noted that the University had no choice but to work within the confines of the Top Ten Percent law and that the University’s compliance with the law must “refute any criticism that the University did not make good-faith efforts to comply with the law.”<sup>140</sup> This conclusion appears to support the University’s decision in this case and, again leaves the Court with only the issue of whether the University’s race-conscious admissions program could withstand strict scrutiny, which the Court concluded it did.<sup>141</sup>

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134. *Id.*

135. *Id.* at 2209.

136. *Id.* at 2208.

137. *Id.* at 2209.

138. *Id.*

139. *Id.* at 2212. See *supra* notes 91–95 and 108–15 and accompany text for the discussion of the evidence the University produced.

140. *Id.* at 2209.

141. *Id.* at 2209–10.

*B. Redefining the Use of Race in University Admissions as Part of a Holistic Approach to Understanding Every Applicant and Not as “Affirmative Action” to Help The Undeserving at the Expense of the Deserving Applicant*

The Court’s reaffirmation that holistic admissions programs are constitutionally sound should herald a new way of thinking about race-conscious plans. Instead of labelling a race-conscious plan an “affirmative action” plan, as Justice Kennedy did in *Fisher II*,<sup>142</sup> such a plan should be defined, as the Court defined the University of Texas and the University of Michigan’s Law School plans – as an “individualized consideration of each and every applicant.”<sup>143</sup> The phrase “affirmative action” carries with it the negative connotation suggesting that consideration of race allows for the admission of less qualified minority applicants, which Justice Thomas stated explicitly in his dissent in *Fisher I*.<sup>144</sup> Justice Thomas has also stated in his dissents in *Fisher I* and *Fisher II* that considering race in a university admissions program “demeans us all.”<sup>145</sup> Properly understood, however, when consistent with the Court’s definition of a constitutionally acceptable holistic approach, race-conscious plans do not allow for favorable treatment of any one applicant but instead ensure equal treatment of all applicants based on all of their personal characteristics and traits.<sup>146</sup>

Indeed, labelling race-conscious plans as “affirmative-action” plans is misleading because race cannot be used to “aid” anyone at the expense of another.<sup>147</sup> Instead, as recognized by the Court of Appeals in its second consideration of Fisher’s challenge, diversity “is a composite

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142. *Id.* at 2208 (reviewing the principles set forth by the Court in *Fisher I*).

143. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); accord *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2420 (2013).

144. *Fisher I*, 133 S. Ct. at 2431 (Thomas, J., concurring) (stating that “Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates”).

145. *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) (quoting *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring)).

146. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (“Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”). See also *Fisher II*, 136 S. Ct. at 2208 (noting that a university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin’”) (quoting *Fisher I*, 133 S. Ct. at 2419); *Grutter*, 539 U.S. at 334 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot ‘insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.’”) (quoting *Bakke*, 438 U.S. at 315).

147. *Bakke*, 438 U.S. at 307.

of the backgrounds, experiences, achievements, and hardships of students to which race only contributes."<sup>148</sup> This type of review does not give preferential treatment to any applicant, but instead ensures "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."<sup>149</sup> Based on this now well-established principle, the Court of Appeals for the Fifth Circuit upheld the University's race-conscious plan and recognized that to do otherwise would "confound developing principles of *neutral* affirmative action."<sup>150</sup> Thus, as the Fifth Circuit modified the phrase, "affirmative action" plans may be properly understood as plans to ensure "individualized" treatment of each and every applicant but not special treatment of any.<sup>151</sup>

Starting with Justice Powell's decision in *Bakke*, the Supreme Court has made clear that a university may not consider race alone to give preferential treatment to anyone but may be able to include race in its consideration of applicants, together with "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."<sup>152</sup> Reinforcing Justice Powell's approach in *Bakke*, the *Fisher II* Court noted the importance of using every characteristic of an applicant and not just one, warning that relying on any "single metric . . . will capture certain types of people and miss others."<sup>153</sup> As Justice Kennedy observed, the Top Ten Percent plan might exclude "the star athlete or musician," or the "talented young biologist who struggled to maintain above-average grades in humanities classes."<sup>154</sup>

Thus, a university must consider all characteristics of an applicant and, as Justice Powell recognized in *Bakke*, any of them, including race,

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148. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 643 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).

149. *Grutter*, 539 U.S. at 340; *see also Fisher*, 758 F.3d at 646 (noting that "*Grutter* blessed an admissions program, applied to the entire pool of students competing for admission, which considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race") (internal quotations marks omitted).

150. *Fisher*, 758 F.3d at 660 (emphasis added).

151. *Id.* at 646.

152. *Bakke*, 438 U.S. at 317.

153. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2213 (2016).

154. *Id.* *See supra* notes 100-01 and accompanying text for a discussion of the weaknesses of percentage plans.

“may tip the balance in his favor,” but that impact would be no different than how the “geographic origin or a life spent on a farm may tip the balance in other candidates’ cases.”<sup>155</sup> Justice Powell illustrated this by describing how the “file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.”<sup>156</sup> The *Grutter* Court agreed, warning that using only one characteristic like class rank as part of a percentage plan “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.”<sup>157</sup>

Considering race completes a university’s understanding of each applicant and should not be confused with “a classification that *aids* persons perceived as members of relatively victimized groups at the expense of other innocent individuals,” which the Court has “never approved . . . in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>158</sup> Accordingly, as the Court has repeated over the span of several years, instead of affirmatively helping any applicant, a “holistic, multi-factor approach, in which race is but one of many considerations,”<sup>159</sup> will be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them *on the same footing for consideration*, although not necessarily according them the same weight.”<sup>160</sup>

## V. CONCLUSION

Including race in a consideration of characteristics for each applicant allows universities to assess each candidate as an individual and to build a class that is diverse in many ways. Embracing the University of Texas’ race-conscious admissions program as “central” to its “identity

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155. *Bakke*, 438 U.S. at 316.

156. *Id.* at 317.

157. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

158. *Bakke*, 438 U.S. at 307 (emphasis added).

159. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

160. *Bakke*, 438 U.S. at 317 (emphasis added); *accord Grutter*, 539 U.S. at 334.

and educational mission,” the Court in *Fisher II* has confirmed that universities may include race in a holistic consideration of the potential of all applicants to contribute to their schools.<sup>161</sup> Calling on universities to “scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary,” the Court properly invites all universities to ensure the continuing integrity of their admissions programs.<sup>162</sup> Labelling race-conscious plans as “affirmative-action” plans, however, is misleading because race cannot be used to aid anyone at the expense of another.<sup>163</sup> Moving forward, therefore, universities may embrace race-conscious plans, not because they help some students who are unqualified or less qualified than their peers, but because they consider all of the characteristics of all of their applicants and ensure student body diversity, as the Court has now repeatedly confirmed they can do.

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161. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2214 (2016).

162. *Id.* at 2214–15 (noting that it “is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies”).

163. *Bakke*, 438 U.S. at 307.

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