CONDORCET DEFEATED: A MALTHUSIAN HISTORY OF AFFIRMATIVE ACTION IN EDUCATION FROM BAKKE TO FISHER

William J. Bogard

TABLE OF CONTENTS

I. Preface ........................................................................................................... 238

II. Introduction .................................................................................................... 239

III. The Evolution of Affirmative Action .............................................................. 242

   A. Origins: The Roosevelt Era ........................................................................ 242
   B. Expansion: The Johnson Era ....................................................................... 243
   C. Interpretation: The Landmark Education Cases ......................................... 244
      1. Regents of the University of California v. Bakke .................................... 245
      2. The University of Michigan Cases .......................................................... 248
         a. Gratz v. Bollinger ................................................................................ 249
         b. Grutter v. Bollinger ............................................................................ 251
      3. Parents Involved in Community Schools v. Seattle School District No. 1 ......................................................... 254

IV. Constitutional Standards for Affirmative Action in Education Programs ............................................................................ 260

V. The Continuum: Fisher v. University of Texas at Austin ............................. 261

   A. Texas’ Admissions Program ...................................................................... 262

---

1 The title is a reference to two famous Age of Enlightenment intellectuals: Marquis de Condorcet (1743–94) and Thomas Malthus (1766–1834). Condorcet’s seminal work, Idea of Progress, formed a fundamental piece of Enlightenment thought, and in it he viewed society as perfectible, at least in principle. See Jean-Antoine-Nicolas de Caritat Condorcet, OUTLINES OF AN HISTORICAL VIEW OF THE PROGRESS OF THE HUMAN MIND (1796). Contrarily, Malthus viewed society as
B. The District Court’s Decision .........................................................264
C. Constitutional: The Fifth Circuit’s Affirmation ..............................265
D. Unconstitutional: The En Banc Dissent .......................................268

VI. PREDICTING THE OUTCOME ..........................................................269
   A. The “‘Unconstitutional’ Bloc” .........................................................269
   B. The “Affirmation Alliance” ...........................................................271
   C. The New Justices’ Association .........................................................272
   D. The Kennedy Swing ........................................................................273

VII. CONCLUSION .....................................................................................275
America's fundamental law seeks to make real the brotherhood of man.\textsuperscript{2}

\section*{I. Preface}

In education, race-based admissions criterion is part of a larger governmental initiative colloquially known as “affirmative action.”\textsuperscript{3} The term “affirmative action” derives from an Executive Order of President John F. Kennedy instructing the “Committee on Equal Employment Opportunity . . . immediately to scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken . . . to realize more fully the national policy of nondiscrimination.”\textsuperscript{4} Discrimination generally refers to “[t]he effect of a law . . . that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability.”\textsuperscript{5} A plain reading of this definition indicates that nondiscrimination is race-neutral and universally applicable.

Less than twenty years after President Kennedy’s noble nondiscrimination proclamation, the Supreme Court of the United States preserved a University of California admissions program aimed at increasing the enrollment of certain students on the basis of their race.\textsuperscript{6} The assumed corollary of certain students being admitted because of their race is that other students would be denied admission.

\begin{itemize}
\item \textsuperscript{2} Justice Louis Brandeis, Speech to the Conference of Eastern Council of Reform Rabbis (Apr. 25, 1915).
\item \textsuperscript{3} At this point it should be noted that this Article’s focus is racial affirmative action. Affirmative action includes not only programs designed to address racial discrimination, but also gender discrimination. For further discussion of gender-based affirmative action programs, see Jason M. Skaggs, \textit{Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification Standard}, 86 \textit{Calif. L. Rev.} 1169 (1998) (addressing the differences between race and gender-based affirmative action programs); Rosalie Berger Levinson, \textit{Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci}, 34 \textit{Harv. J. L. \\& Gender} 1 (2011) (same).
\item \textsuperscript{4} Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 6, 1961) (emphasis added).
\item \textsuperscript{5} \textit{Black’s Law Dictionary} 534 (9th ed. 2009).
\item \textsuperscript{6} See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Although the Court affirmed the school’s use of a race-conscious program, it also held that such program must provide an individualized review of each applicant’s file. \textit{See id.} at 317.
\end{itemize}
admission on the basis of their race, i.e., suffer from “reverse discrimination.” And so continues the national debate regarding the constitutional permissibility of programs designed to achieve racial diversity in education, and programs whose fate will likely be determined by one of two unlikely candidates: another Kennedy—Justice Anthony Kennedy—or the Court’s newest member, Justice Elena Kagan.

II. INTRODUCTION

Affirmative action refers to “[a] set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.” There have traditionally been three primary focuses of affirmative action programs: employment, public contracting, and education, the latter of which is the focus of this Article.

With the Court’s landmark decision in Regents of the University of California v. Bakke, affirmative action in the context of higher education burst onto the legal scene amidst a time when both the federal and states’ governments

---

7 The earliest reference to the term “reverse discrimination” appears in Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). In Quarles, the court discussed the Civil Rights Act of 1964 and stated that “[t]he history [of the Act] leads the court to conclude that Congress did not intend to require reverse discrimination.” Id. at 516 (internal quotation marks omitted). The term had gained sufficient legal significance by 1974, when John Hart Ely, one of the most widely-cited legal scholars in United States history, wrote that “We would not allow a state university to favor applicants because they are White . . . whether it [sic] called the adjustment quota, affirmative action, or anything else. To allow [AAE programs] to favor applicants because they are Black seems to be countenancing the most flagrant of double standards.” John Hart Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723, 723 (1974).

8 See infra Part VI (C–D).

9 BLACK’S LAW DICTIONARY 68 (9th ed. 2009).


were initiating broad affirmative action programs. Although various bases for such programs have been asserted in the thirty-four years since Bakke, the traditional and most common justification is that diversity in higher education is a compelling state interest.\textsuperscript{12}

Part III will examine the historical and legal underpinnings of affirmative action in education ("AAE") programs, as well as the specific legislative and executive history, which has ultimately led to the Court’s upcoming consideration of AAE in Fisher v. University of Texas at Austin ("Fisher V").\textsuperscript{13} Part III will also explore Supreme Court jurisprudence regarding AAE programs. This survey will begin with Regents of the University of California v. Bakke,\textsuperscript{14} generally accepted as the first major AAE decision, then unpack two landmark AAE cases against the University of Michigan decided on the same day — Gratz v. Bollinger\textsuperscript{15} and Grutter v. Bollinger.\textsuperscript{16} Finally, Part III will examine and analyze the Court’s voluminous and controversial decision in Parents Involved in Community Schools v. Seattle School District No. 1.\textsuperscript{17}

Ultimately, the Court concluded from this line of cases that AAE programs are not per se constitutionally defective.\textsuperscript{18} Rather, the Court reasoned

\begin{enumerate}
\item 631 F.3d 213 (5th Cir. 2011), cert. granted, 2012 WL 538328 (U.S. Feb. 21, 2012) (No. 11-345).
\item 438 U.S. 265 (1979).
\item 539 U.S. 244 (2003).
\item 539 U.S. 306 (2003).
\item 551 U.S. 701 (2007). It should be noted that Parents Involved does not address AAE in the context of secondary education, but rather the focus of the case is a primary education AAE program.
\item See, e.g., id. at 720 (holding that for an AAE program to be valid, “the use of individual racial classifications . . . [must be] ‘narrowly tailored’ to achieve a ‘compelling’ government interest”; Grutter, 539 U.S. at 307 (same); Gratz, 539 U.S. at 246 (holding that if an AAE program is not narrowly tailored, it violates the Equal Protection Clause); Bakke; 438 U.S. at 319–320 (1979) (holding that race can be taken into account, but its consideration must be part of a full individualized review)).
\end{enumerate}
that the appropriate standard of review is “strict scrutiny”\(^\text{19}\) for AAE programs based on a “suspect” classification such as race.\(^\text{20}\) To pass constitutional muster under strict scrutiny, AAE programs must be narrowly tailored to serve a compelling governmental interest.\(^\text{21}\)

Part IV will synthesize relevant Supreme Court precedent into a workable set of rules with which to analyze the constitutional issues presented by AAE programs. Part V will provide an overview of the factual and procedural background of *Fisher V*,\(^\text{22}\) specifically the Fifth Circuit’s determination that the University of Texas’ admissions policies, to the extent that an applicant’s race is considered, are violative of the Fourteenth Amendment.\(^\text{23}\) The United States Supreme Court granted the University of Texas’ petition for a writ of certiorari on February 21, 2012,\(^\text{24}\) and heard oral arguments on October 10, 2012.

Part VI will evaluate available jurisprudence to estimate the Supreme Court’s likely ruling in *Fisher V*, including an assessment of which Justices will vote to reverse *Fisher III*\(^\text{25}\) and which will vote to go further and overrule *Grutter*. Next, Part VI will shed special light on the likely votes of the Court’s two newest

\(^{19}\) See, e.g., *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (holding that, if the government distributes burdens or benefits on the basis of individual racial classifications, the action is reviewed under strict scrutiny); *Grutter*, 539 U.S. at 326 (holding that all racial classifications made by the government are reviewed under strict scrutiny); *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 224 (1995) (holding that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized”).

\(^{20}\) See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

\(^{21}\) See *Adarand*, 515 U.S. at 227 (holding that “all racial classifications, . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests).


\(^{23}\) *Fisher v. Univ. of Tex. at Austin (“Fisher IV”),* 644 F.3d 301 (5th Cir. 2011) (en banc) (per curiam), *aff’g* 631 F.3d 213 (5th Cir. 2011).

\(^{24}\) 132 S.Ct 1536 (mem.) (2012).

\(^{25}\) For clarity and ease of reference, the individual cases involved in *Fisher* will be referenced as follows: the District Court’s denial of plaintiff’s preliminary injunction (*Fisher I*); the District Court’s ruling (*Fisher II*); the Fifth Circuit’s ruling (*Fisher III*); the Fifth Circuit’s denial of rehearing en banc (*Fisher IV*), and; the Supreme Court’s pending adjudication (*Fisher V*).
members, neither of which have yet heard an AAE case as members of the Court, and analyze the various ways Justice Kennedy might affect the case’s adjudication.

III. The Evolution of Affirmative Action

The idea of equality in education is not a 20th century invention, but is merely one point in the continuum of our nation’s advancement toward a just and fair society. Any thoughtful analysis of the constitutional issues surrounding AAE programs must be based upon a thorough understanding of the subject’s history. That history shows that the constitutionality of programs which seek to promote racial diversity, whether it be diversity in government contracting, public sector employment, or education, has been questioned since their inception, regardless of how noble their proponents may believe them to be.

A. Origins: The Roosevelt Era

In the mid-20th century, the legislative and executive branches of the United States government recognized that the federal government’s budgetary power could be used as a tool to aid in eliminating racial discrimination. Although reasonable minds may disagree on when the genesis of AAE programs occurred, it is fair to say that the roots of the federal government’s modern anti-discrimination policies date at least as far back as President Franklin D. Roosevelt’s administration, during which the first executive orders prohibiting discrimination in federal contract procurement were issued.26 In 1941, President Roosevelt issued Executive Order 8802 whose stated purpose was to “encourage full participation in the national defense program by all citizens . . . regardless of race, creed, color, or national origin” because the only way the country could be defended was with “the help and support of all groups within its borders.”27

Accordingly, Roosevelt ordered that “[a]ll contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate

27 Id.
against any worker because of race, creed, color, or national origin.”

Notably, however, Roosevelt issued the Order because of the compelling governmental interest in preparing the nation for war with Germany and Japan, not for the altruistic reasons of later affirmative action legislation. The Order merely prohibited contemporaneous and future discrimination; it did not have an eye towards any past societal, individual, or industry-specific discrimination, all three of which became future justifications for race-based legislation.

**B. Expansion: The Johnson Era**

Affirmative action aims to produce a society free of discrimination. Perhaps the greatest advancements toward that aim were made during Lyndon Johnson’s administration. During his presidency, Johnson constantly pushed for enhanced civil rights protections. The Johnson administration’s most significant accomplishment in the anti-discrimination arena was the promulgation of the Civil Rights Act of 1964. Included in the Act’s massive and groundbreaking legislation, and of significant importance to AAE programs, was Title VI.

Title VI, enacted to prevent discrimination by agencies that receive federal funding, states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Among the programs receiving funding from the federal Department of Education are “[all] state education agencies . . . [and] 3,200 colleges and universities.”

Johnson made another pioneering move when he issued the “Equal Employment Opportunity” Order on September 24, 1965. Similar to Executive Order 8802 that Roosevelt had issued in 1941, the Equal Employment

---

28 Id.
31 Id.
Opportunity Order reinforced several of the federal government’s already-established anti-discrimination policies, including a prohibition on discrimination in governmental employment, a prohibition on discrimination in employment by government contractors and subcontractors, and nondiscrimination provisions in federally assisted construction contracts.\(^{34}\)

In the wake of the 1960s civil rights legislation, the late 1970s and early 1980s became a period during which the nation’s judiciary grappled with the constitutional implications of affirmative action programs.\(^{35}\) One of the many issues courts struggled with, aside from general treatment of affirmative action programs, was how to deal specifically with AAE programs, which had been implemented ostensibly to ensure institutional compliance with federal nondiscrimination laws.

C. Interpretation: The Landmark Education Cases

One might consider the decisions in a plethora of cases regarding AAE programs to be “landmark.”\(^{36}\) By the late 1970s, flaws in affirmative action policies began to appear in greater numbers and the term “reverse discrimination” had begun to come into common parlance.\(^{37}\) In 1978, the Supreme Court addressed the issue head on in *Bakke*, ruling that race may be considered in a “holistic review” of an applicant’s file.\(^{38}\) After *Bakke*, there was relative calm regarding AAE programs for twenty-five years. Then, in 2003, the Supreme Court

\(^{34}\) Id.

\(^{35}\) See, e.g., *Bakke*, 438 U.S. 265 (1978) (holding the University of California’s race-conscious admissions policy unconstitutional); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (holding that Congress could use its power under the Spending Clause to remedy past discrimination).

\(^{36}\) To provide a concise history on the subject, this Part has narrowed the field to only Supreme Court decisions, which have played an extraordinary role in the evolution of AAE policy. There are a huge number of lower federal court cases involving AAE programs, and the positions adopted are varied. *Compare* *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that admissions programs which discriminate in favor of minority applicants by giving substantial racial preferences violate equal protection), *with* *Brewer v. West Irondequiot Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (holding that reducing racial isolation and de facto segregation justify AAE programs).

\(^{37}\) See supra note 7.

decided two cases, *Gratz v. Bollinger*\(^{39}\) and *Grutter v. Bollinger*,\(^{40}\) which reinforced *Bakke*. Most recently, however, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court prohibited assigning students to public schools solely for the purpose of achieving racial integration and declined to recognize racial balancing as a compelling state interest.\(^{41}\) This Part will address each of the aforementioned cases in turn, with the hope of building a logical framework with which to predict the Court’s forthcoming decision in *Fisher V*.\(^{42}\)

1. *Regents of the University of California v. Bakke*

In *Bakke*, the Court addressed the specific issue of whether the University of California at Davis’ admissions policy that set forth an implicit racial quota was constitutional. Beginning in the early 1970s, “[t]he Medical School of the University of California at Davis [“(Davis”) had two admissions programs for the entering class of 100 students—the [‘]regular[’] admissions program and the [‘]special[’] admissions program.”\(^{43}\) Out of the one hundred available slots, sixteen were reserved for applicants selected via the “special” admissions program.\(^{44}\) The 1973 and 1974 application forms allowed applicants to request consideration as “economically and/or educationally disadvantaged” and as members of a “minority group.”\(^{45}\) None, of the many non-minority students who requested consideration because of an economic or educational disadvantage were accepted under the “special” program, however.\(^{46}\)

\(^{39}\) 539 U.S. 244 (2003).

\(^{40}\) 539 U.S. 306 (2003).

\(^{41}\) See *Parents Involved*, 551 U.S. at 702–04 (2007).

\(^{42}\) 631 F.3d 213 (5th Cir. 2011), cert. granted, 2012 WL 538328 (U.S. Feb. 21, 2012) (No. 11-345).

\(^{43}\) *Bakke*, 438 U.S. at 265.

\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id. at 266.
Allan Bakke, a Caucasian male applicant, applied to Davis in both 1973 and 1974 under the “general” admissions program and was rejected both times. In both years, “special” applicants “with significantly lower scores than [Bakke’s]” were accepted. After his second rejection, Bakke sought a court order compelling his admission to Davis. Bakke claimed that:

[T]he special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment . . . and § 601 of Title VI of the Civil Rights Act of 1964, which provides, inter alia, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance.

“The trial court found that the [‘special’] program operated as a racial quota” and violated both the United States Constitution and Title VI; as such it declared Davis “could not take race into account when making admissions decisions.” The court did not, however, compel Bakke’s admission due to insufficient evidence “that he would have been admitted but for the [‘special’]

47 See id.
48 Id. Although the author finds no correlation, some opponents of Davis’ AAE program have pointed to the tale of Patrick Chavis as the epilogue to Bakke. Chavis, who was one of the “special” applicants admitted over Bakke, became an obstetrician-gynecologist. In a 1995 article promoting AAE programs, the New York Times portrayed Chavis as “an example of the [kind of] good [an AAE program] does.” Nicholas Lemann, Taking Affirmative Action Apart, N.Y. TIMES, June 11, 1995, at 36. In the same article, Bakke was described as a doctor who “has no private practice and works on an interim basis” and has not “set the world on fire as a doctor.” Id. Moreover, in 1997, Chavis himself said, “We need to go back and do a comparison of what [students admitted under the “special” program] are doing now compared to [Bakke].” Kenneth Lloyd Billingsley, Affirmative Action in Action, FRONTPAGE MAGAZINE, Sept. 1, 1997, http://archive.frontpagemag.com/readArticle.aspx?ARTID=22235. However, Chavis’ medical license was revoked less than a year later due to his “inability to perform even the most basic duties required of a physician.” Id. This inability resulted in a patient’s death, one of more than ninety counts against him. Douglas Martin, Patrick Chavis, 50, Affirmative Action Figure, N.Y. TIMES, Aug. 15, 2002, available at http://www.nytimes.com/2002/08/15/us/patrick-chavis-50-affirmative-action-figure.html.
49 Bakke, 438 U.S. at 266.
50 Id.
51 Id. The trial court also found the program violative of the California Constitution.
program." On appeal, the California Supreme Court, applied strict scrutiny, and affirmed the trial court’s decision that Davis’ “special” program violated the federal Constitution.

In its decision, the United States Supreme Court produced a fractured 5-4 opinion—including two pluralities—delivered by Justice Powell. The Court reversed the California Supreme Court’s decision “insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.” The Court concluded that excluding a candidate from consideration solely on the basis of race was unconstitutional, no matter what the purpose. Moreover, because Davis could not prove that even without the “special” admissions program Bakke would not have been admitted, Bakke’s admission was compelled. However, the Court stated that “[e]thnic diversity, . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”

_________________________
52 Id.
53 Bakke v. Regents of the Univ. of Cal., 18 Cal.3d 34, 49 (Cal. 1976) aff’d in part, rev’d in part, 438 U.S. 265 (1978). Clearly explaining the standard to be applied, the Supreme Court of California stated, Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a “compelling state interest,” but it must be demonstrated by rigid scrutiny that there are no reasonably ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification.

Id.
54 Id. at 38.
55 One plurality was comprised of Justices Brennan, White, Marshall, and Blackmun, and the other plurality was comprised of Chief Justice Burger and Justices Stevens, Stewart and Rehnquist. Additionally, Justices White, Marshall, and Blackmun all filed separate opinions.

56 Bakke, 438 U.S. at 267-72.
57 Id. at 267.
58 Id. at 320.
59 Id.
60 Id. at 314.
universities could use race as a “plus factor,” citing the Harvard College Admissions Program as a constitutionally valid program which took into account all of an applicant’s qualities during a “holistic review.”

In a plurality opinion, Justice Brennan concluded that Davis’ “special” program was in fact constitutional and that the California Supreme Court’s decision warranted reversal in full. Brennan also reasoned that race could be used as a factor when it was for the purpose of remedying extensive, prolonged underrepresentation of certain minorities in society generally. Finally, Justice Stevens’ opinion concluded that Davis’ “special” admissions program violated Title VI because it excluded from consideration an applicant on the basis of race. After Bakke, and in accordance with the Court’s position therein, many colleges and universities adopted “holistic review” admissions policies that included racial minority status as a “plus factor.”

2. The University of Michigan Cases

In 2003, the Supreme Court heard two cases concerning AAE programs, both originating with the University of Michigan (“Michigan”). In Gratz v. Bollinger, the Court, in a 6-3 decision, held that Michigan’s undergraduate AAE program was unconstitutional because it did not adequately provide “individual[] consideration” of each applicant. However, in Grutter v. Bollinger, with a narrower 5-4 majority, the Court held that admissions policy of the University of Michigan’s Law School (“Michigan Law”) was indeed constitutional because it sufficiently allowed for an individual assessment of each applicant’s contributions to class diversity. Gratz and Grutter are crucial to the analysis of Fisher in Part

---

61 Id. at 317.
62 See Bakke, 438 U.S. at 316. The term “holistic review” would first be used in Grutter. See Grutter, 539 U.S. at 309.
64 Id. at 370–71.
65 Id. at 421.
VI of this Article because five of the Court’s nine current members contributed to those decisions.  

**a. Gratz v. Bollinger**

*Gratz* involved two petitioners, Jennifer Gratz and Patrick Hamacher, both Caucasian residents of Michigan, who applied for admission to the University of Michigan for the fall semesters of 1995 and 1997, respectively; Michigan denied both petitioners admission.  

In October 1997, the petitioners filed a class action suit which consisted of applicants who had “applied for and were not granted admission to . . . the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat[ed] less favorably on the basis of race in considering their application for admission.” The petitioners alleged “violations and threatened violations . . . [of] equal protection of the laws under the Fourteenth Amendment . . . and for racial discrimination in violation of 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*”

Although Michigan’s undergraduate admissions policies changed several times during the time period relevant to the *Gratz* litigation, as of 2003 Michigan used a 150-point scale to rank applicants, with 100 points needed to guarantee admission. Under that policy, underrepresented racial minorities automatically received twenty points because of their racial status. For a comparison, if an applicant’s artistic talent “rivaled that of Monet or Picasso, the applicant would receive, at most, five points.”

---

68 The five current members of the Court who took part in *Gratz* and *Grutter* are Justices Breyer, Ginsburg, Kennedy, Thomas, and Scalia.

69 *Id.*

70 *Id.* at 252–53 (internal quotation marks omitted).

71 *Id.* at 252 (internal quotation marks omitted).

72 *Id.* at 255.

73 *Id.* at 256.

74 *Gratz*, 539 U.S. at 273.
The Court\textsuperscript{75} held that because one-fifth of the points necessary to guarantee admission under Michigan’s admissions policy were automatically awarded solely on the basis of the applicant’s status as an “underrepresented minority,” the policy was “not narrowly tailored to achieve the interest in \textit{educational} diversity.”\textsuperscript{76} The Court seemed to articulate the stance that the term “diversity” was being too narrowly defined, i.e., that Michigan implicitly construed the term to mean only “racial” diversity instead of a broader interpretation that encompassed a plethora of “soft variables.”\textsuperscript{77}

\textit{Gratz} produced three separate dissenting opinions.\textsuperscript{78} Justice Ginsburg, joined by Justice Souter, believed that it was constitutionally permissible for Michigan to have an admissions policy in which race was considered “to prevent discrimination being perpetuated and to undo the effects of past discrimination.”\textsuperscript{79} An insightful dissent filed by Justice Souter and joined in part by Justice Ginsburg observed that the argument that Michigan’s admissions policy operated as a \textit{de facto} set-aside for racial minorities “boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not. But suspicion does not carry petitioners’ burden of persuading in this constitutional challenge . . .”\textsuperscript{80} Importantly, Souter foreshadowed the issues surrounding “percentage plans”\textsuperscript{81} that would arise nine years later in \textit{Fisher V} by stating:

In contrast to [Michigan’s] forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it

\textsuperscript{75} The majority in \textit{Gratz} was comprised of Chief Justice Rehnquist and Justices O’Connor, Scalia, Thomas, and Kennedy. Justice Breyer concurred in the judgment and also joined Justice O’Connor’s separate concurrence.

\textsuperscript{76} \textit{See id.} at 270 (emphasis added).

\textsuperscript{77} \textit{See infra} p. 253 and note 87.

\textsuperscript{78} The three dissenting opinions were filed by Justices Stevens, Souter, and Ginsburg. Stevens believed the petitioners lacked standing and that the case should have been dismissed. \textit{See Gratz}, 539 U.S. at 291 (Stevens, J., dissenting).

\textsuperscript{79} \textit{Gratz}, 539 U.S. at 302 (quoting United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)).

\textsuperscript{80} \textit{Id.} at 296.

\textsuperscript{81} \textit{See} discussion \textit{infra} Part V(A).
is worth considering the character of [“percentage plans”] thrown up as preferable, because supposedly not based on race. . . . While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The “percentage plans” are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball. 82

b. Grutter v. Bollinger

In the companion case to Gratz, the Court in Grutter v. Bollinger analyzed the University of Michigan Law School’s admissions policies. 83 The petitioner, Barbara Grutter, was a Caucasian female Michigan who applied to Michigan Law in 1996 as a Michigan resident. Despite Grutter’s excellent credentials, Michigan Law denied her admission. 84 Like the petitioners in Gratz, Grutter filed suit alleging Michigan Law “discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981.” 85

At the time of the litigation, the goal of Michigan Law’s admissions policy was to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” 86 Michigan Law’s admissions policy ranked applicants by two different measures — “hard variables,” i.e., objective criterion such as GPA and LSAT scores, and “soft variables,” i.e., subjective criterion such as “the enthusiasm of

82 Gratz, 539 U.S. at 297-98.
84 Id. at 316. Grutter had a 3.8 GPA and a 161 LSAT score. Id.
85 Id. at 317.
86 Id. at 315.
recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection”—as well as the applicant’s status as a racial minority.\textsuperscript{87} Michigan Law asserted that its admissions policies required officials “to evaluate each applicant based on all the information available in the file, including [soft variables] and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”\textsuperscript{88}

The Court\textsuperscript{89} found that Michigan Law “engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”\textsuperscript{90} With a narrow majority, the Court held that “[t]he Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981.”\textsuperscript{91}

The majority’s decision, however, was strongly criticized by Chief Justice Rehnquist, Justices Scalia and Thomas, and, perhaps most surprisingly, Justice Kennedy, who not only concurred in Rehnquist’s dissent but also penned a separate dissent. The Rehnquist dissent argued that Michigan Law failed to meet its burden under the principle of strict scrutiny of establishing the necessity of its AAE program.\textsuperscript{92} Accordingly, Rehnquist concluded that “[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”\textsuperscript{93} Furthermore, Rehnquist found Michigan Law’s

\begin{itemize}
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id. (emphasis added).
\item \textsuperscript{89} The \textit{Grutter} majority was comprised of Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer.
\item \textsuperscript{90} \textit{Grutter}, 539 U.S. at 309.
\item \textsuperscript{91} Id. at 307.
\item \textsuperscript{92} See \textit{id.} at 385–86 (Rehnquist, J., dissenting).
\item \textsuperscript{93} Id. at 380.
\end{itemize}
program fatally flawed “because it is devoid of any reasonably precise time limit on the . . . use of race in admissions.”

Justice Thomas, concurring in part and dissenting in part, regarded the majority’s decision, “which approves of only one racial classification,” as “confirm[ing] that further use of race in admissions remains unlawful,” a position with which he concurred. Interestingly, his dissent responded directly to the portion of the majority’s opinion which stated “[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” In contrast, Thomas believed that Michigan Law’s “current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in [25 years].” As further evidence of his frustration, Thomas stated “[t]he Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution.”

During the intervening period between 2003 and the Court’s next major foray into the AAE arena, two new Justices joined the Court’s ranks. On July 1, 2005, Justice O’Connor announced that she would retire “upon the nomination and confirmation of [her] successor.” Subsequently, on July 19, 2005, President Bush nominated John Roberts to fill the vacancy that would be created by O’Connor’s retirement. However, six weeks later on September 3, 2005, Chief Justice Rehnquist died. Shortly thereafter, on September 5, 2005, President Bush

---

94 Id. at 386. The Court had previously emphasized the durational aspect in considering the constitutionality of race-conscious programs. See Fullilove v. Klutznick, 448 U.S. 448, 510 (1980).

95 In reality, Thomas merely concurred with his interpretation of the majority.

96 Grutter, 539 U.S. at 350–51 (Thomas, J., concurring).

97 Id. at 310 (majority opinion).

98 Id. at 351 (Thomas, J., concurring).

99 Id. at 370.


101 President George W. Bush, National Address (July 19, 2005).
withdrew Roberts’ nomination as O’Connor’s successor and instead nominated Roberts to fill the vacancy created by Rehnquist’s death. The Senate confirmed Roberts’ nomination as Chief Justice on September 29, 2005. With Rehnquist’s seat now filled, President Bush shifted his attention to filling O’Connor’s seat. On October 31, 2005, President Bush nominated Samuel Alito and Alito received Senate confirmation on January 31, 2006.

3. Parents Involved in Community Schools v. Seattle School District No. 1

The uncertainty of these new additions to the Court eventually gave way to Parents Involved, a crucial case in developing a framework to analyze the Court’s forthcoming decision in Fisher V. Parents Involved is distinguishable from Gratz and Grutter in several ways. The most obvious distinction is that Parents Involved concerned an AAE program in primary education, not at institutions of higher education like Gratz and Grutter.

In Parents Involved, the Seattle, Washington and Jefferson County, Kentucky school districts “voluntarily adopted student assignment plans that relied upon students’ races to determine which public schools certain children may attend.” Both school districts considered the student’s racial

---

102 President George W. Bush, National Address (Sept. 5, 2005).

103 S. 10771, 109th Cong. § 69 (2005). It is interesting to note that Roberts served as Rehnquist’s clerk from 1980–81.

104 Alito was not President Bush’s first choice. President Bush initially nominated Harriet Miers, but Miers withdrew her nomination after facing significant opposition and out of concern regarding potentially testifying about her service in the White House. Letter from Harriet Miers, to George W. Bush, President of the United States (Oct. 27, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700680_pf.html.


106 The decision in Parents Involved is 168 pages long. Although the author could easily write a great deal on this case, only the most relevant themes will be addressed.


classification when a student was assigned to a particular school in the interests of ensuring that “the racial balance at the school falls within a predetermined range based on the racial composition of the district as a whole.” However, the specifics of each district’s AAE programs were distinguishable in certain important respects.

Seattle School District Number 1 (“Seattle”) adopted a plan in 1998 that allowed incoming high school freshmen to choose from and rank by preference any of the district’s high schools with each school ranked in order of that student’s preference. As some schools were more popular than others, the district employed a series of “tiebreakers” to determine which students would be admitted into a school that had more requests than available seats. The first tiebreaker gave preference to students that had a sibling enrolled at the oversubscribed school.

However, the next tiebreaker—the one around which the controversy centers—depended solely on the student’s race in relation to the racial composition of the school. The racial composition of public high school students in Seattle was approximately forty percent “white” and sixty percent “nonwhite.” If the oversubscribed school’s racial composition was not within ten percentage points of the district’s overall white/nonwhite composition, the district would identify the school as “integration positive;” once a school received

---

109 Id. at 710. The Seattle school district classified children as white or nonwhite and the Jefferson County district classified children as black or “other.” Id.

110 Id.

111 The Court took note of the fact that Seattle had never operated segregated public schools, nor had it ever been subject to court-ordered desegregation. See id. at 712.

112 Id. at 711.

113 Id.

114 Parents Involved, 551 U.S. at 711.

115 Id. at 712.

116 Id. Surprisingly, Seattle, with significant populations of Asian (15%), Black (9.9%), Hispanic/Latino (5.3%), and Native American (1%), chose only to distinguish between “white” and “nonwhite.” See U.S. Census Bureau, Census 2000, available at http://www.ofm.wa.gov/pop/census2000/profiles/place/1605363000.pdf.
this designation, only students whose race would “serve to bring the school into balance”\textsuperscript{117} gained admission until the racial composition was within the guideline range.

The issues emanating from the Jefferson County, Kentucky (“Louisville”)\textsuperscript{118} district were in many ways similar to those from Seattle. The Louisville district’s twenty-five year court-ordered desegregation plan\textsuperscript{119} ended in 2000 after the District Court found that the vestiges of the Louisville district’s prior policy of segregation had been eliminated “[t]o the greatest extent practicable.”\textsuperscript{120} Then, in 2001, Louisville adopted a “voluntary” assignment plan, whereby most of the district’s public schools were required to maintain a minimum of fifteen percent and a maximum of fifty percent black\textsuperscript{121} student enrollment.\textsuperscript{122}

The Louisville plan assigned a student first entering the district’s schools to a school based either on the proximity of that student’s address to the school or based on that student’s parental request for a particular school.\textsuperscript{123} However, if a student’s race would contribute to “racial imbalance” as defined under the plan, it denied that student’s assignment and/or preference.\textsuperscript{124} Initial assignment could result in an inconvenience — i.e., if the assigned school was farther away than the preferred and/or nearest school. Although subsequent transfer between schools was possible, the district would, as with the initial school assignment deny transfer requests solely on the basis of the racial guidelines.\textsuperscript{125}

\begin{footnotesize}
\begin{enumerate}
\item Parents Involved, 551 U.S. at 712 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1169 (9th Cir. 2005)).
\item The city of Louisville composed the majority of the Jefferson County, Kentucky district.
\item See supra note 109. The Louisville district classified students only as black or “other.”
\item Parents Involved, 551 U.S. at 716.
\item Id.
\item Id.
\item Id. at 717.
\end{enumerate}
\end{footnotesize}
Upon analyzing the facts, the Court recognized two qualifying compelling interests of racial classifications in the school context: remedying the effects of past intentional discrimination and diversity in higher education. The Court found that neither district could rely on the interest of remedying the effects of past discrimination. Seattle had never operated a segregated public education system, and Louisville had previously been found to achieve unitary status.

The Court further held that both plans failed to demonstrate the diversity interest in higher education established in Grutter, which the Court interpreted as “not focused on race alone but encompassing all factors that may contribute to student body diversity.” The Court also noted that, “it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use

---

126 The majority in Parents Involved was comprised of Chief Justice Roberts, Justices Scalia, Thomas, Alito, and Kennedy. However, to the extent the majority held in Section III-B that “[h]owever closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled ‘racial diversity’ or anything else,” the Court produced only a plurality because Justice Kennedy did not join that Section of the opinion. See Parents Involved, 551 U.S. at 733. Additionally, although Justice Thomas wholly concurred in the majority opinion, he also wrote a concurring opinion in which he lambasted Justice Breyer’s dissent. Id. at 748 (Thomas, J., concurring). In his concurring opinion, Justice Thomas wrote:

Disfavoring a colorblind interpretation of the Constitution, [Justice Breyer] would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in Brown v. Board of Education. This approach is just as wrong today as it was a half century ago.

Id. (internal citations omitted).

127 See id. at 720–22 (majority opinion). See also Freeman v. Pitts, 503 U.S. 467, 494 (1992) (recognizing the interest in remedying the effects of past discrimination); Grutter, 539 U.S. at 328 (2003) (recognizing the interest in diversity in higher education).

128 See Parents Involved, 551 U.S. at 720–21.

129 Id.

130 See id. at 722-25. Although the Court framed its analysis in terms of diversity in higher education, the actual analysis focused merely on the interest in a diverse student body; “higher education” was mentioned only in passing and did not play a significant role in the Court’s analysis. See Grutter, 539 U.S. 306.

131 Parents Involved, 551 U.S. at 722 (quoting Grutter, 539 U.S. at 337 (2003)).
of race.” 132 With this framework in mind, the Court examined the Seattle and Louisville plans and held that they failed the Grutter analysis because, under those plans, “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.” 133

Justice Kennedy’s concurrence, likely to play an important role in the Court’s upcoming decision in Fisher V, warrants analysis. First, Justice Kennedy agreed with the majority that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.” 134 Kennedy concluded that both Seattle and Louisville’s AAE programs failed strict scrutiny analysis. Kennedy found that Louisville’s AAE program failed because the district failed to “establish, in detail, how decisions based on an individual student’s race are made,” 135 a threshold requirement for proponents of such challenged legislation. Although Kennedy never stated that he believed Louisville’s plan, as operated, to be unconstitutional, he nevertheless found that the proponents failed to sufficiently establish the plan’s details and “[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.” 136 Kennedy also found that Seattle’s AAE program failed strict scrutiny, even though the district described in detail the “methods and criteria used to determine assignment decisions on the basis of individual racial classifications,” because the district failed to show “its plan to be narrowly tailored to achieve its own ends.” 137

132 Id. (quoting Grutter, 539 U.S. at 324–25).
133 Id. at 723 (quoting Grutter, 539, U.S. at 330).
134 Id. at 783 (Kennedy, J., concurring).
135 Id. at 784–85 (“[Louisville] fails to make clear . . . who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made . . . or how it is determined which of two similarly situated children will be subjected to a given race-based decision.”).
136 Id. at 786.
137 See Parents Involved, 551 U.S. at 786–87(Kennedy, J., concurring). Kennedy took issue with the fact that under Seattle’s plan, a school with “fifty percent [Asian] students and fifty percent white students but no [Black], Native American, or Latino students would qualify as balanced, while a school with thirty percent [Asian], twenty-five percent [Black], twenty-five percent Latino, and twenty percent white students would not.” Id. at 787.
Responding to the Section III-B portion of the Court’s opinion, which he found “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race,” Justice Kennedy stated that he believed the Constitution does not “require[] schools districts to ignore the problem of de facto resegregation in schooling.” Kennedy found that race-conscious measures are permissible, but those measures cannot “treat[] each student in a different fashion solely on the basis of . . . race.”

Kennedy stated that of Justice Breyer’s reliance “on this Court’s precedents to justify the explicit, sweeping, classwide [sic] racial classifications at issue here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom.” In fact, Kennedy went so far as to say that the dissent’s analysis was so permissive of the challenged legislation that it “bears more than a passing resemblance to rational-basis review.” Kennedy noted that the dissent’s assertion that it was merely following *stare decisis* by relying on the majority opinions of *Gratz* and *Grutter* was “simply baffling.” Kennedy found *Gratz* inapplicable because it involved a system in which race was not the entire classification, and he found *Grutter* unsupportive of the dissent’s position because the system sustained in *Grutter*, unlike the Seattle and Louisville systems, was “flexible enough to take into account ‘all pertinent elements of diversity.’”

In conclusion, and revealing what will perhaps be the logic behind his decision in *Fisher V*, Kennedy stated that, because of the inherent problems in

---

138 Without Justice Kennedy’s acquiescence, Section III-B is merely a plurality.

139 *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring).

140 *Id.* at 789. Kennedy suggested some permissible race-conscious measures, such as “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”

141 *Id.* at 790–91.

142 *Id.* at 791.

143 *Id.* at 792.

144 *Id.* at 793 (quoting *Grutter*, 539 U.S. at 341).
defining “race” and who should be a part of a particular classification, the Constitution allows “the individual, child or adult, [to] find his own identity, [to] define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.” When analyzed in conjunction with language found earlier in his concurrence, this statement seems to indicate Justice Kennedy’s belief that in order for an AAE program to be constitutional, it must not allow for decisions to be made on an individual basis. Rather, broad, race-conscious decisions that are race-neutral on an individual level are a constitutionally permissible means to achieving the governmental interest in diversity.

IV. CONSTITUTIONAL STANDARDS FOR AFFIRMATIVE ACTION IN EDUCATION PROGRAMS

_Bakke, Gratz, Grutter, and Parents Involved_ represent the keystones of the Court’s jurisprudential evolution in AAE cases. Before turning attention to _Fisher V_, it is important to recognize the constitutional standards to which an AAE program will currently be held. First, the appropriate standard of review for such programs is strict scrutiny. This “‘standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.”

For an AAE program to survive strict scrutiny, the proponent “must demonstrate that the use of individual racial classifications . . . is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.” In other words, it must provide individual consideration of applicants of all races. Although a determination that a challenged program is narrowly tailored necessitates a fact-intensive, subjective inquiry, “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.” However, an AAE program is per

145 _Parents Involved_, 551 U.S. at 797 (Kennedy, J., concurring).
146 See cases cited _supra_ notes 19–21.
148 _Parents Involved_, 551 U.S. at 720 (citing _Adarand_, 515 U.S. at 227 (1995)).
149 See _Grutter_, 539 U.S. at 337.
150 _Id._ at 339; _see also_, e.g., _Wygant v. Jackson Bd. of Educ._, 476 U.S. 267, 280, n.6 (1986).
se invalid if it “insulat[es] each category of applicants with certain desired qualifications from competition with all other applicants.”\textsuperscript{151}

The presence of a compelling governmental interest is an objective measure, of which the Court has recognized two. The first interest is in “remedying the effects of past intentional discrimination;”\textsuperscript{152} however, it seems that this interest has limited applicability.\textsuperscript{153} The second recognized compelling interest is in diversity; whether or not that interest is limited to higher education seems unclear after the Court’s decision in \textit{Parents Involved}.\textsuperscript{154} This framework will be essential to accurately predicting the Court’s upcoming decision in \textit{Fisher V.}\textsuperscript{155}

**V. The Continuum: Fisher v. University of Texas at Austin**

The Supreme Court remained silent on AAE cases for the five years following \textit{Parents Involved} until February 21, 2012, when the Court granted certiorari in \textit{Fisher V}.\textsuperscript{156} At the time of this writing, the Supreme Court has not yet heard oral arguments in \textit{Fisher V}. Therefore, to provide the ideological support for how each side of a likely divided Court will decide the case, both the Fifth Circuit’s panel decision\textsuperscript{157} – which upheld Texas’ admissions policy – and the dissenting opinion from Fisher’s petition for rehearing\textsuperscript{158} – which concluded that the program is unconstitutional – will be analyzed.

\textsuperscript{151} Bakke, 438 U.S. at 315 (1978).

\textsuperscript{152} Parents Involved, 55 U.S. at 702 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

\textsuperscript{153} The Court in \textit{Parents Involved} invalidated Seattle’s AAE program in part because that district had never operated a segregated public education system. \textit{See id.} at 702–03.

\textsuperscript{154} \textit{Compare Grutter}, 539 U.S. at 328 (recognizing the diversity interest in higher education), with \textit{Parents Involved}, 551 U.S. 722–25 (recognizing the diversity interest in higher education, but conducing the analysis with only a general interest in diversity).

\textsuperscript{155} See infra Part VI.

\textsuperscript{156} 631 F.3d 213 (5th Cir. 2011), \textit{cert. granted}, 132 S. Ct. 1536 (mem.) (2012).

\textsuperscript{157} \textit{Fisher III}, 631 F.3d 213 (5th Cir. 2011).

\textsuperscript{158} \textit{Fisher IV}, 644 F.3d 301 (5th Cir.) (en banc) (Jones, J., dissenting) (per curiam), \textit{aff’g} 631 F.3d 213 (5th Cir. 2011).
In Fisher V, as in Gratz, the two petitioners, Abigail Fisher and Rachel Michalewicz, are both Caucasian.\(^{159}\) The University of Texas at Austin (“Texas”) denied both petitioners’ summer and fall admission into the 2008 freshman class at.\(^{160}\) The petitioners originally sought a preliminary injunction requiring Texas to re-evaluate their applications for admission without considering their race and grant them admission if the re-evaluation produced a different result, but their request was ultimately denied.\(^{161}\)

A. Texas’s Admissions Program

Texas’s admissions process has two major components. The primary component is the “Top Ten Percent Law,”\(^{162}\) which guarantees Texas high school students graduating in the top ten percent of their class admission into any state university.\(^{163}\) The second facet of Texas’s program—which applies to all applicants not admitted under the Top Ten Percent Law—is known as the “AI/PAI Plan,” which is itself composed of two scores: an Academic Index (“AI”) and a Personal Achievement Index (“PAI”).\(^{164}\)

The AI is an objective score based on an applicant’s class rank, standardized test scores, and high school curriculum.\(^{165}\) The PAI is a subjective score that is itself comprised of three separate scores: two applicant essays submitted by the applicant,\(^{166}\) and a completely subjective assessment of the applicant’s “demonstrated leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special ...
“Special circumstances” refer to “the socioeconomic status of the family and the [applicant’s] school, a single-parent home, whether languages other than English are spoken at home, family responsibilities, and race.”

Texas’s program organizes the applicants’ calculated AI/PAI scores into a selection matrix. The program then allocates the applicants according to their major preferences, “although in reality there is little availability in most majors other than Liberal Arts after application of the Top [Ten] Percent Law.” The program considers applicants for their first choice of major and then, if not admitted, considers them for their second choice of major. If still not admitted, an applicant is then designated an undeclared liberal arts major.

The issue in Fisher V arises from the application of the AI/PAI component to an applicant pool that has already shaped by the Top Ten Percent Law. The Texas legislature enacted the Top Ten Percent Law to promote diversity, and has proven its success, boasting one of the country’s most racially diverse public university systems. The question that emerges then, is whether Texas’s consideration of the race of applicants who do not benefit from the Top Ten Percent Law is a permissible attempt to balance the racial composition of the student body with that of the state.

---

167 Fisher I, 556 F. Supp. 2d at 606 (emphasis added).
168 Id. (emphasis added).
169 Id.
170 Id.
171 Id.
172 See infra note 189.
B. The District Court’s Decision

At trial in the Western District Court of Texas, the petitioners’ primary charge against Texas’s program was its failure to advance a compelling state interest:

[Texas’s] diversity goals are ‘open-ended’ or, in other words, because [Texas] has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass that therefore [Texas’s] use of race is not tied to the educational benefits of a diverse student body. Rather, it reflects a pursuit of racial balancing that reflects the state of Texas’ racial demographics.”

The court rejected the petitioners’ argument, reasoning that Grutter specifically prohibited Texas from implementing an invalid use of racial balancing or quotas by mandating a specific percentage of its student body be comprised of racial minorities. In summation of the compelling interest arguments, the court held that critical mass is not a “magic number”: it has never been defined as a specific percentage, and is instead defined by the educational benefits that diversity provides.

---

175 Among the petitioners’ other arguments were that Texas lacks a compelling interest “because it has already achieved or exceeded ‘critical mass’ through its race-neutral policies, most notably the Top Ten Percent [L]aw.” Id. at 603. In support of their proposition, the petitioners presented several weak arguments in an attempt to establish “critical mass” at twenty percent. See id. at 604–05. After a thinly veiled implication that the petitioners intentionally presented misleading support, the court held that the mere fact that minority enrollment at Texas exceeds twenty percent “does not mean [that Texas] lacks a compelling … interest.” Id. at 605.
176 Id. at 590 (internal quotation marks omitted).
177 Id. at 604.
178 American Heritage Dictionary 432 (4th ed. 2000) “Critical mass” is defined as “an amount of level needed for a specific result or action to occur.” In the context used above, the desired result was achieving educational benefits as the result of increased diversity.
179 See id. at 607.
The petitioners also argued that Texas’s program was not narrowly tailored\(^{180}\) for several reasons, most convincingly of which, was the lack of a “logical end point.”\(^{181}\) However, while the \textit{Grutter} Court required that “race-conscious admissions policies must be limited in time,” it also recognized that “[i]n the context of higher education, the durational requirement can be met by . . . periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”\(^{182}\) The district court accepted that Texas’s inclusion of an evaluation of the program every five years was sufficient to satisfy the \textit{Grutter} standard.\(^{183}\) The district court held, in conclusion, that “as long as \textit{Grutter} remains good law, [Texas’s] current admissions program remains constitutional.”\(^{184}\)

\textbf{C. Constitutional: The Fifth Circuit’s Affirmation}

The petitioners appealed to the Fifth Circuit in \textit{Fisher III}.\(^{185}\) The court’s panel opinion\(^{186}\) stated very early that “[t]he ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain legality of the \textit{Grutter}-like admissions program.”\(^{187}\) Nonetheless, the court affirmed the constitutionality of Texas’s program.\(^{188}\)

\footnotesize{\begin{itemize}
\item \(^{180}\) See \textit{id.} \textit{at} 609–12. Three of the petitioners’ four arguments were weak and quickly rejected by the court.
\item \(^{181}\) \textit{Id.} \textit{at} 612 (internal citation omitted).
\item \(^{182}\) \textit{Grutter}, 539 \textit{U.S.} \textit{at} 342.
\item \(^{183}\) \textit{Fisher II}, 645 \textit{F. Supp. 2d} \textit{at} 612.
\item \(^{184}\) \textit{Id.} \textit{at} 613.
\item \(^{185}\) \textit{Fisher III}, 631 \textit{F.3d} \textit{213, 216–17} (5th Cir. 2011).
\item \(^{186}\) It seems the respondents were very lucky regarding the Fifth Circuit’s decision. Judge King, one of the three judges on the panel, intimated in a special concurrence that he might have reached different conclusions had the court been fully briefed on the Top Ten Percent Law and its effect on racial diversity. \textit{Id.} \textit{at} 247 (King, J., concurring). Judge Emilio Garza, one of the panel’s other members also wrote a special concurrence, which stated “I concur in the majority opinion because, despite my belief that \textit{Grutter} represents a digression in the course of constitutional law, today’s opinion is a faithful, if unfortunate, application of that misstep.” \textit{Id.} (Garza, J., concurring).
\item \(^{187}\) \textit{Fisher III}, 631 \textit{F.3d} \textit{at} 216–17.
\item \(^{188}\) \textit{Id.} \textit{at} 217.
\end{itemize}}
The petitioners’ largely repeated their lower court arguments before the Fifth Circuit. First, petitioners argued that Texas’s plan goes beyond diversity for education’s sake and instead pursues a racial composition that mirrors that of the state as a whole, which is unconstitutional “racial balancing.”\(^{189}\) The petitioners point to Texas’s reference to “state population data to justify the adoption of race-conscious admissions measures” as evidence of its true motive of “outright racial balancing.”\(^{190}\) The Fifth Circuit rejected this argument, finding that Texas “gave appropriate attention to those educational benefits [of diversity] identified in *Grutter* without overstepping any constitutional bounds.”\(^{191}\)

The petitioners next contended that Texas’s incorporation of race-conscious programs did not give adequate consideration to “race-neutral” alternatives it had already implemented through the Top Ten Percent Law.\(^{192}\) The court evaluated that system in context of the *Grutter*-affirmed goal of diversity, noting that “[w]hile the [Top Ten Percent Law] 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”; the holistic review endorsed in *Grutter* better addressed those imbalances.\(^{193}\)

The petitioners’ last argument was that Texas’s minority enrollment under the combined Top Ten Percent Law and race-conscious programs surpassed a “critical mass,” and that the additional, minimal “increase in diversity achieved through [administration of a] *Grutter*-like policy does not justify its use of race-

\(^{189}\) *Id.* at 234.

\(^{190}\) *Id.* at 236. In 1996, the Fifth Circuit struck down the use of a race-conscious admissions policy at the University of Texas’ law school. *Hopwood v. Texas*, 78 F.3d 932 (1996). In 1997, the Texas legislature responded to *Hopwood* by enacting the Top Ten Percent Law, under which the number of minorities enrolled at Texas steadily increased. For example, in 1997, the Black and Hispanic enrollment at Texas was 2.7% and 12.6%, respectively. By 2004, Black enrollment rose to 4.5% and Hispanic enrollment rose to 16.9%. *Fisher III*, 631 F.3d at 224. Despite these positive gains and by relying on *Grutter*, Texas adopted a policy to include race as one of the factors it considers in admissions beginning in 2005. *Id.* at 226.

\(^{191}\) *Fisher III*, 631 F.3d at 236.

\(^{192}\) *Id.* at 234; see also supra note 173.

\(^{193}\) *See Fisher III*, 631 F.3d at 240.
conscious measures.” The court maintained, however, that “critical mass” is a determination properly left to Texas’s administrators, and that “Grutter pointedly refused to tie the concept of ‘critical mass’ to any fixed number.”

However, the court seemingly left the door open for the argument to be raised again in the future:

None of this is to say that Grutter left “critical mass” without objective meaning. Rather, the legally cognizable interest—attaining a critical mass of underrepresented minority students—“is defined by reference to the educational benefits that diversity is designed to produce.” If a plaintiff produces evidence that calls into question a university's good faith pursuit of those educational benefits, its race-conscious admissions policies may be found unconstitutional.

Moreover, the court added that “[Texas’s] claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law, which had already driven aggregate minority enrollment up to more than one-fifth of the University's incoming freshman class.”

The court also rejected the petitioners’ alternate argument that even if Texas had not yet achieved critical mass, “it had come close enough that the reintroduction of race-conscious measures was unwarranted.” Relying on Parents Involved, the petitioners argued that the “minimal effect,” of Texas’s race-conscious measures rendered them invalid. The Fifth Circuit believed,

---

194 Id. at 234.
195 See id at 243–44.
196 Id. at 245 (internal citations omitted).
197 Id.
198 Id. at 246.
199 Fisher III, 631 F.3d at 246. The district court thought this argument was an attempt “to force [Texas] into an impossible catch–22: on the one hand, it is well-established that to be narrowly tailored the means ‘must be specifically and narrowly framed to accomplish’ the compelling interest, but on the other hand, according to [petitioners], the ‘narrowly tailored’ plan must have more than a minimal effect.” Fisher II, 645 F. Supp. 2d 587, 609 (W.D. Tex. 2009) (internal citation omitted).
however, that the Parents Involved Court referred to the challenged policies’ “minimal effect” merely “as evidence that other, more narrowly tailored means would be effective to serve the school districts’ interests.”

Perhaps most relevant to this Article’s purpose, the court stated that “Justice Kennedy—who provided the fifth vote in Parents Involved—wrote separately to clarify that ‘a more nuanced, individual evaluation . . . informed by Grutter’ would be permissible, even for the small gains sought by the school districts.”

D. Unconstitutional: The En Banc Dissent

After the Fifth Circuit’s panel affirmed the District Court’s judgment, Fisher and Michalewicz petitioned for rehearing en banc; with a narrow 9–7 majority, the Fifth Circuit denied the petition in Fisher IV. In an uncommon move, five of the seven judges who voted to rehear the case wrote a lengthy dissent, which clearly expressed several reasons why they felt the challenged program was unconstitutional.

The dissent believed that the panel in Fisher III misapplied the strict scrutiny standard of review and “supplant[ed] strict scrutiny with total deference to [Texas’s] administrators.” More importantly — and indicative of what will likely be the crux of Fisher V — the dissent questioned “whether a race-conscious admissions policy adopted [in conjunction with the Top Ten Percent Law] is narrowly tailored to achieve [Texas’s] goal of increasing ‘diversity.’” The dissent concluded that the plan upheld in Grutter was distinguishable from Texas’s plan; in Grutter, “the consideration of race was viewed as indispensable in more than tripling minority representation at [Michigan Law].” Under Texas’s plan, however:

---

200 Fisher III, 631 F.3d at 246.
201 Id. (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring)).
202 644 F.3d 301 (5th Cir. 2011) (en banc) (per curiam), aff’g 631 F.3d 213 (5th Cir. 2011).
203 See id. at 303–08 (Jones, C.J., dissenting).
204 Id. at 305.
205 Id. at 306–07.
206 Id. at 307 (quoting Parent Involved, 551 U.S. at 704).
The additional diversity contribution of the [Texas’s] race-conscious admissions program is tiny, and far from “indispensable.” It is one thing for the panel to accept “diversity” and achieving a “critical mass” of preferred minority students as acceptable University goals. It is quite another to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African–American or Hispanic.  

VI. PREDICTING THE OUTCOME

There are a number of dynamics that will influence the Supreme Court’s ultimate decision on the fate of Texas’s AAE program. Will one of the Court’s conservative Justices go rogue, citing stare decisis? Will one of the Court’s liberal Justices break rank and find that the Equal Protection Clause “creep” has gone too far? How will the Court’s newest Justices rule? If the Court reverses Fisher III, will it merely find that Texas’s AAE program is unconstitutional, or will it go further and reverse Grutter? In what direction will Justice Kennedy’s swing vote turn? This Part will evaluate past opinions and political concerns that have the potential to influence the future of AAE programs.

A. The “‘Unconstitutional’ Bloc”

Based on their holdings in previous AAE cases, four Justices will, in all likelihood, vote to reverse Fisher III and find Texas’s AAE program unconstitutional: Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Of these four, three will also likely opine that Grutter should be reversed altogether. The probable conclusions of each will henceforth be addressed in turn, according to the likelihood that they will reverse the Fifth Circuit’s decision.

The Justices most likely to vote to reverse both Fisher III and Grutter are Justices Clarence Thomas and Antonin Scalia. Justice Thomas has a long

---

207 Id. at 307.

208 Thomas and Scalia vote together in 92% of cases, the highest ratio among the Court. SCOTUSblog Final Stats 0t09-7.7.10, SCOTUSBLOG (July 7, 2010), http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Charts-070710-JA.pdf.
history of ardently opposing AAE programs.\textsuperscript{209} For example, in \textit{Grutter}, Justice Thomas wrote a separate opinion in which he stated his belief that AAE programs violate the Equal Protection Clause.\textsuperscript{210} Justice Scalia will also likely vote to reverse both \textit{Fisher III} and \textit{Grutter}. In \textit{Grutter}, Justice Scalia wrote a separate opinion in which he stated, “[Michigan Law’s] mystical “critical mass” justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.”\textsuperscript{211} Moreover, Justice Scalia believed that the “educational benefit” of “cross-racial understanding” is not an “educational benefit” at all.\textsuperscript{212} He reasoned:

\begin{quote}
[I]t is a lesson of life rather than law-essentially the same lesson taught to (or rather learned by, for it cannot be “taught” in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an “educational benefit” at all, it is surely not one that is either uniquely relevant to law school or uniquely “teachable” in a formal educational setting.\textsuperscript{213}
\end{quote}

Chief Justice Roberts and Justice Alito, although recent additions to the Court, are anticipated to vote to reverse \textit{Fisher III}, and the Chief Justice will also likely find that \textit{Grutter} should be reversed. Roberts and Alito were both in the \textit{Parents Involved} majority. Roberts’ general disdain for race-based classifications manifests itself in his majority opinion for the \textit{Parents Involved} case which boldly states: “The way to stop discrimination on the basis of race is to stop

\begin{itemize}
\item \textsuperscript{209} See, e.g., \textit{Parents Involved}, 551 U.S. at 748 (Thomas, J., concurring) (holding that “state entities may not experiment with race-based means to achieve ends they deem socially desirable”); \textit{Gratz}, 539 U.S. at 281 (2003) (Thomas, J., concurring) (holding that “a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause”).
\item \textsuperscript{210} \textit{Grutter}, 539 U.S. at 351 (2003) (Thomas, J., dissenting).
\item \textsuperscript{211} \textit{Id.} at 346–47 (Scalia, J., dissenting).
\item \textsuperscript{212} \textit{Id.} at 347-48.
\item \textsuperscript{213} \textit{Id.} at 347.
\end{itemize}
discriminating on the basis of race.”\footnote{Parents Involved, 551 U.S. at 748.} However, it is worth noting that in the past, Roberts has at times been willing to vote in a manner inconsistent with what might be expected of him in a politically-charged matter.\footnote{See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012). Roberts shocked pundits by upholding the Patient Protection and Affordable Care Act.} Justice Alito, although likely to reverse Fisher III, will probably not go as far as to reverse Grutter; Alito has previously espoused his respect for the doctrine of \textit{stare decisis}.\footnote{See \textit{Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be An Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary}, 109th Cong. (2006) (statement of Judge Samuel Alito). During his confirmation hearings, Alito stated in response to a question regarding \textit{stare decisis} from Chairman Arlen Specter that, “in every case in which there is a prior precedent, the first issue is the issue of \textit{stare decisis}, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.” \textit{Id.} at 319.}

\section*{B. The “Affirmation Alliance”}

There are two Justices that will almost undoubtedly vote to affirm Fisher III. Justices Breyer and Ginsburg each have a long history of supporting AAE programs.\footnote{Compare Parents Involved, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting), and Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting), with Grutter v. Bollinger, 539 U.S. 306, 344-46 (2003) (Ginsburg, J., concurring).} Furthermore, each has also supported an AAE program that no reasonable mind could find is as narrowly tailored as the one at issue in Fisher V.\footnote{See \textit{generally Grutter}, 539 U.S. 306 (2003). In \textit{Grutter}, both Breyer and Ginsburg upheld Michigan’s admissions policy, which used race as a predominant factor.}

Justice Ginsburg will almost certainly vote to affirm Fisher III. In Gratz, Justice Ginsburg wrote a dissenting opinion in which she gave AAE programs wide latitude by stating that “government decision makers may properly distinguish between policies of exclusion and inclusion.”\footnote{\textit{Gratz}, 539 U.S. at 301 (Ginsburg, J., dissenting).} Justice Ginsburg went on to say “the Constitution is color conscious to prevent discrimination being
perpetuated and to undo the effects of past discrimination.” Moreover, Justice Ginsburg joined Justice Breyer’s dissent in *Parents Involved.*

Justice Breyer, also, will likely affirm *Fisher III.* Justice Breyer wrote a voluminous dissent in *Parents Involved,* which asserted that the law has “consistently and unequivocally approved of . . . race-conscious measures to combat segregated schools. The Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.” Justice Breyer also joined the majority and Justice Ginsburg’s concurrence in *Grutter.*

C. The New Justices’ Association

Since its decision in *Parents Involved,* the Supreme Court has welcomed two new members. On August 6, 2009, Sonia Sotomayor was confirmed to the Court to replace Justice Souter, and on August 5, 2010, Elena Kagan was confirmed to replace Justice Stevens. Although neither has participated in a Supreme Court case on point, one can draw insight into their potential conclusions from a variety of sources.

It is exceedingly likely that Justice Sotomayor will affirm *Fisher III,* the clearest evidence comes from the fact that Justice Sotomayor has voted with both

---

220 *Id.* at 302 (citing United States v. Jefferson Cnty. Bd. of Ed., 372 F.2d 836, 876 (5th Cir. 1966)).

221 *Parents Involved,* 551 U.S.at 803 (Breyer, J., dissenting).

222 *Id.* at 864.

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

224 S. 9063, 111th Cong. § 82 (2009); S. 6991, 111th Cong. § 140 (2010).

225 Although the author finds little relevance in the following, Justice Sotomayor was heavily criticized during her confirmation hearings because of some past comments she made regarding race. The most publicized of these comments occurred during a 2001 lecture at Boalt Hall, during which Sotomayor said “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Symposium, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation,* 13 La Raza L.J. 1 (2002).
Justices Ginsburg and Breyer in ninety percent of the Court’s decisions. The most notable affirmative-action-related case in which Justice Sotomayor participated prior to joining the Court was *Ricci v. DeStefano*. In this Second Circuit panel decision eventually reversed by the Supreme Court, Justice Sotomayor voted to allow the City of New Haven to discard the results of a test it had given to firefighters because the City believed the test had a disparate impact on minority firefighters. Justice Sotomayor’s ruling indicates that she finds affirmative action programs generally constitutional.

Justice Kagan recused herself from *Fisher V*. Although she did not announce her motive for doing so, many speculate that it was her tenure as Solicitor General during the time the Justice Department filed an amicus brief in the Fifth Circuit in support of Texas’s program—the same program that will be before the Court in *Fisher V*. Kagan’s recusal is important for two reasons. First, because she is the former dean of Harvard Law School, she is likely the only member of the Court with practical experience regarding the use of affirmative action admissions policies. Second, because one could reasonably assume that she would be inclined to uphold Texas’s policy, the prospect of that program being upheld is even more tenuous.

### D. The Kennedy Swing

A scholarly survey of the past twenty years of Supreme Court jurisprudence would point to Justice Kennedy as the traditional “swing vote.” However, given his nuanced views in the Court’s previous AAE cases, predicting Kennedy’s vote is not as difficult as scholars might believe. Justice Kennedy’s dissent in *Grutter* provides a clear roadmap for his likely vote in *Fisher V*.

---


227 264 F. App’x 106 (2d Cir. 2008), rev’d, 557 U.S. 557 (2009).

228 Id.

229 See 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), 2010 WL 2624787. As Solicitor General, Kagan’s approval was necessary for the brief to be filed.
In his *Grutter* dissent, Justice Kennedy agreed with the majority that the proper rule by which to analyze AAE programs comes from *Bakke* in which one of the Court’s holdings was that promoting racial diversity was a compelling governmental interest that can justify an AAE program, so long as it is narrowly tailored.\(^\text{230}\) His deviation from the *Grutter* majority centered on Michigan Law’s failure to narrowly tailor the AAE program, given the attention paid to the “daily reports,” which provided constant updates on the number of accepted minority applicants.\(^\text{231}\)

Given the fact-intensive nature of *Fisher V*, Kennedy will likely find that Texas’s holistic review, which includes an applicant’s race,\(^\text{232}\) is valid. Justice Kennedy’s primary concern for constitutionality seems to be giving each applicant an individual review, within the institution’s discretion, that takes into account all of the many ways the applicant can contribute to the school’s diversity.\(^\text{233}\)

However, Justice Kennedy may find that when used in conjunction with the Top Ten Percent Law, the subsequent consideration of race is invalid. There is solid factual support that Top Ten Percent Law was increasing the diversity of Texas.\(^\text{234}\) The Top Ten Percent Law increased Texas’s diversity by relying on the state’s *de facto* racial segregation. In other words, if the state’s racial demographics were homogenous throughout its territory, the law probably would not have made the same advances in Texas’s racial diversity. Based on those facts, Justice Kennedy could find that, because of the *de facto* racial segregation


[A] university admissions program may take account of race . . . [if] the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated . . ., the Court lacks authority to approve the use of race . . . [and] undermines both the test and its own controlling precedents.

*Id.*. *See Bakke*, 438 U.S. 265 (1978).

\(^{231}\) *Id.* at 392 (“The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning.”).


\(^{233}\) *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

\(^{234}\) *See supra* note 173.
in the state and its corresponding effect on high school demographics, the Top Ten Percent Law functions perfectly as a race-neutral means by which Texas increased enrollment of underrepresented minorities.

VII. CONCLUSION

A tabulation of the most plausible outcome of the Justices’ votes in Fisher V would produce a 5–3 opinion, written by Justice Kennedy, invalidating Texas’s program because of the contemporaneous statutory requirements of the Top Ten Percent Law. Justice Kennedy’s opinion will, however, reaffirm that the AAE program advocated in Grutter—narrowly tailored to serve a compelling interest—remains valid. Chief Justice Roberts and Justices Thomas, Scalia, and Alito will join in the portion of Kennedy’s opinion regarding the invalidity of Texas’s AAE program and join in a separate opinion holding that race-conscious admissions programs are never valid.

Justices Ginsburg, Breyer, and Sotomayor will almost certainly dissent. Whether these three Justices rely on stare decisis or their genuine beliefs, they will find that Texas’s program is in conformity with the type of program recognized as permissible in Grutter. Therefore, these three Justices will vote to affirm Fisher III and will thereby recognize the continuing validity of Grutter.

The most likely result of Fisher V is that Texas’s program will be found invalid, but that the overall validity of AAE programs will be upheld. Ultimately, it is unlikely that the Court’s opinion in Fisher V will have a dramatic effect on AAE programs; if a particular program is modeled after the Michigan program, then its continued use will be valid. Finally, even if the Court holds that any consideration of race in admissions decisions is invalid, a university’s race-

---

235 Chief Justice Roberts will likely assign the opinion to Kennedy to avoid losing him during circulation of the draft opinions.

236 That opinion will not receive a majority of votes and will therefore have scant precedential value.

237 The author’s final prediction is as follows: five Justices (Kennedy, Alito, Thomas, Roberts, and Scalia) will find Texas’ program invalid; four Justices (Alito, Thomas, Roberts, and Scalia) will concur in part and dissent in part, finding AAE programs unconstitutional; three Justices (Breyer, Ginsburg, and Sotomayor) will dissent, finding both that Texas’ program is valid and that AAE programs are constitutional.
neutral consideration of socio-economic factors will perpetuate the current status quo due to the correlation between race and economics throughout large areas in the United States.