

AFFIRMATIVE ACTION, THE FISHER CASE, AND THE SUPREME COURT:
What the Justices and the Public Need to Know*

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ABSTRACT

Once again, the U.S. Supreme Court will decide on the contentious issue of Affirmative Action, and specifically the use of race in admissions decisions in public universities. Despite differences in the details, seasoned veterans of affirmative action debates are experiencing déjà vu. In this case, Abigail Noel Fisher claims overt racial discrimination when the highly selective University of Texas at Austin (UT) rejected her freshman application in 2008. The Court's ruling could range from upholding the legal precedent of allowing race to be one of many factors in admissions; to a more narrow decision that affirms this precedent, but rejects UT's particular use of race in decision making, while setting new limits on such decisions; to an outright rejection of using race in any form. In this paper, I discuss the case and present a number of themes that should be considered by the Court and by the public, including problems with the notion of a "critical mass" of minority students; that arguments regarding academic merit are complex and nuanced; and that among highly selective public universities, where demand from many qualified students far exceeds the supply of admissions spots, admissions policies have arbitrary outcomes despite the best efforts to create rational and explainable admissions policies. As much as anything, the Fisher case is about the appropriate locus of admissions policy and decisions. The historical precedent, as reiterated by Justice Sandra Day O'Connor in the 2003 *Grutter* case, is that judgments related to the question of admissions, including the idea of sufficient critical mass of underrepresented students and factors that indicate future academic success, are, in the end, judgments that should remain with the Academy and should not be infringed without a compelling need to do so. There is no compelling need in the Fisher case. Simply agreeing to hear the case seems to indicate a willingness by the Court to overrule past precedent. Yet there is also a possibility that the Court's decision will be influenced by the prospect that a decisive ruling against affirmative action will, for the first time, have meaning for selective private institutions, which have largely avoided scrutiny of their admissions practices and biases. As all of the justices are products of eastern elite private institutions, this could be an important consideration, although speculative.

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.

- Justice Sandra Day O'Connor, *Grutter v. Bollinger*, U.S. Supreme Court, June 2003

In early October 2012, the U.S. Supreme Court heard the opening arguments in a case that reconsiders affirmative action in America's public universities. One possible outcome: the Court could reverse nearly four decades of legal precedent that has allowed public universities to use race and ethnicity as one among many factors when considering student admissions. Despite differences in the particular details, seasoned veterans of past affirmative action debates are experiencing "déjà vu all over again."¹

* This paper is based in part on themes in "Perils and Opportunities: Autonomy, Merit, and Privatization," in John Aubrey Douglass, *The Conditions for Admissions: Access, Equity and the Social Contract of Public Universities* (Stanford University Press, 2007). See: <http://www.sup.org/book.cgi?id=10538>. While the content and opinions written here are the author's alone, I wish to thank Richard Edelman, David Hollinger, C. Judson King, Steven Brint, Shannon Lawrence, and Saul Gieser for their comments and corrections to earlier drafts. Slightly revised version posted on March 1, 2013.

As in previous affirmative actions cases, a Euro-American student filed a lawsuit against a highly selective public university, in this case, the University of Texas at Austin (UT). The plaintiff, Abigail Noel Fisher, claims overt racial discrimination when UT rejected her freshman application in 2008. Her lawyers filed the case that same year, and it wound its way to a district court where Texas prevailed. Fisher appealed and the Supreme Court decided to review the case and began deliberations last October. This Court is decidedly more conservative than in the past, and seemingly more sympathetic to simply ending affirmative action.² As discussed here, the details of the case are not very different from earlier affirmative action cases, but the Court's decision to revisit precedent is driven, in large part, by the conservative majority among the nine justices.

In opening presentations offered to the Court, lawyers for both the plaintiff and the defendant presented a series of arguments that essentially reprised the 2003 battle over affirmative action presented in the *Grutter v. Bollinger* case and the 1998 *Bakke* decision—the two major previous Supreme Court rulings. Abigail Fisher's lawyers claim that she achieved an academic record that should have allowed her acceptance and enrollment at the Austin campus, and that others with less achieved merit had been allowed to enter in her place based on racial preferences.

The defenders of UT's admission policies professed the need to make admissions decisions informed by race in order to help the campus enroll a student population that reflects the state's population, and that it needs a "critical mass" of underrepresented students both to help the socioeconomic mobility of individual students from minority backgrounds and to provide significant educational benefits to the study body as a whole.

There are a range of options for the Court to decide upon, including: whether to uphold the legal precedent that allows race to be one of many factors in admissions decisions; to a more narrow decision that affirms this precedent, but rejects UT's particular use of race in decision making while setting new limits on such decisions; to an outright rejection of race as a consideration in admissions in any form.

Some observations and themes that should be considered by the Court and by the public as it waits for a decision:

- There is a long history of U.S. courts deferring to the academic community when it comes to making decisions not only related to admissions, but also regarding hiring faculty and setting curricula.
- The notion of critical mass, which the University of Michigan in the previous *Grutter* case and now the University of Texas have emphasized so greatly, is difficult to document and prove.
- Arguments over academic merit are complex with no clear data or indicators that, for example, high test scores provide evidence of future academic performance or engagement at highly selective colleges and universities—the relatively few institutions that actually use race as a factor in admissions decisions.
- Ultimately, at higher education institutions with highly selective undergraduate admissions—which thereby have high demand from many qualified students—admissions decisions will always have some random or arbitrary outcomes despite their best efforts to create rationale and explainable admissions policies.
- It is important to note that, thus far, U.S. Supreme Court has only heard cases challenging affirmative action at public universities—institutions that are subject to greater public scrutiny as well as state and national laws regarding equal access than private institutions. Selective private universities, with corporate status and less-than-transparent admissions practices that are not accountable to the public have generally not been subject to court decisions or to anti-affirmative action propositions in states such as California and Washington. Will the Court's possible decision against affirmative action now extend to private institutions, all of which receive large public subsidies in the form of student financial aid and federal research dollars and are, in fact, quasi-public institutions?

The particulars of the case and these observations should lead the Court to maintain the precedent first set out in the *Bakke* case. As long as race and ethnicity is not used overtly as a factor much greater than, say, socioeconomic background, or special talents in music, or demonstrated leadership, or academic performance in the midst of hardship, the Court should defer to the academic community to make admissions decisions.

The following discussion provides an interpretation of what the *Grutter* decision really meant and, in doing so, provides a basis for a discussion of the themes noted above and important details of the Fisher case.

THE COURTS AND AUTONOMY AFFIRMED

There is an adage that politics is about who gets what, where, and when. This trinity requires an addition: who gets to decide. With such a wide variety of stakeholders and growing demand, it is not surprising that admissions policy and practices, and their defense, have become increasingly political. In the midst of California's passage of Proposition 209 in 1995—a constitutional amendment that banned racial preferences in admissions and hiring in public institutions—a spate of court cases appeared ready

to lead to an eventual decision by a relatively conservative Supreme Court that would ban the use of racial and ethnic criteria in university admissions. Among anti-affirmative-action forces, a nationwide ban by the courts was a seemingly achievable goal.

But this did not happen. In *Grutter v. Bollinger*, the Supreme Court issued a landmark affirmative-action decision in the summer of 2003. Pro-affirmative action interests claimed a major victory. The actual meaning of the court case, however, is complicated, and its clarity is exaggerated. The decision, arguably, is more important regarding the autonomy it granted institutions in setting their admission policies than in its rather vague defense of affirmative action.

Like the current Fisher case, when the University of Michigan's Law School denied admission to a Euro-American resident of Michigan with a 3.8 GPA and a high LSAT score, she filed suit. Barbara Grutter and her lawyers alleged that the law school had knowingly discriminated against her on the basis of race and in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

Like Alan Bakke more than twenty years earlier, Grutter based her case on the fact that she had achieved higher grades and test scores than other applicants who gained admission, particularly African American and Hispanic students (see Figure 1 for a listing of major court cases related to admissions and higher education). The law school, it was charged, used race as a "predominant" factor, "giving certain minority students a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race."³ The Court considered a similar case at the same time, which charged racial discrimination in the University of Michigan's undergraduate admissions process.

The two cases were argued before the Court beginning in April 2003 and a ruling was issued on June 23 of that year. While condemning the use of weighted formulas in the undergraduate admissions processes at the University of Michigan, the Court upheld the admissions practices at Michigan's law school. The law school used a holistic or weighted admissions process that included race and ethnicity as one among many criteria. What were the differences between the undergraduate and graduate admissions process? One was formulaic and gave clear advantages to underrepresented minorities on a mass scale, a clear violation of *Bakke* by the leadership at Michigan that is hard to fathom after years of precedent; the other was more subjective and focused on a more detailed and time-consuming review of an individual's merit.

In the end, a slim majority of the Court reaffirmed the *Bakke* decision: Race, ethnicity, and gender could be used as factors among additional criteria. The Court's majority stated, "The 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."⁴

But who should determine the educational benefits and of a diverse student body, however defined, in admissions decisions?

Figure 1 Major US Supreme Court Cases Related to Access and Equity in Higher Education Before *Fisher*

- *Brown v. Board of Education (1954)* - The US Supreme Court maintained that the precedent of 'separate but equal' set in *Plessy v. Ferguson (1896)* was no longer constitutional. As a result of the *Brown* verdict, it was assumed that educational institutions would no longer resist the enrollment of African-Americans.
- *Hawkins v. Board of Control (1956)* - The unconstitutionality of 'separate but equal' was extended beyond elementary and secondary schools to enforce higher-education desegregation.
- *DeFunis v. Odegaard (1973)* - The Washington State Supreme Court ruled affirmative action admissions in professional schools justified by the need to promote a racially balanced student body and specifically to address a perceived shortage of African-American and Hispanics entering the legal profession.
- *UC Regents v. Bakke (1978)* - The US Supreme Court ruled that admissions quotas were unconstitutional but that race and ethnicity, and gender, could be one factor among many in admissions decisions in public universities.
- *Podberesky v. Kirwan (1994)* - The use of race-specific scholarships at the University of Maryland at College Park was questioned. A federal court ruled it was not permissible to maintain separate financial merit awards according to race.
- *Adarand v. Peña (1995)* - The *Adarand* case applied the legal concept of judicial or "strict scrutiny" to argue that affirmative action should be applied only in documented cases of prior institutional discrimination, and then only when carefully tailored to groups directly affected.
- *Hopwood v. Texas (1996)* - Four Euro-American students filed suit in federal court against the University of Texas at Austin School of Law after being denied admission, charging the university used separate admissions criteria for African-American and Hispanic applicants. The Fifth Circuit Court ruled in favor of the students. In 1996, University of Texas officials appealed the decision of the Fifth Circuit Court. The US Supreme Court upheld the lower court's ruling, thereby continuing the ban within the district court's jurisdiction on race and student affirmative action at public campuses in Texas.
- *Grutter v. Bollinger (2003)* - The Supreme Court abrogated *Hopwood* in *Grutter v. Bollinger*, 539 U.S. 306 (2003) in which the high court found that the United States Constitution "does not prohibit the 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." The ruling means that universities in the Fifth Circuit's jurisdiction can again use race as a factor in admissions (as long as quotas are not used).

The precedent is to leave these judgments to the academic community – a professional guild with unique expertise. Writing the majority opinion, Justice Sandra Day O'Connor supported this notion and reiterated two justifications similar to those offered twenty-six years earlier by Justice Lewis F. Powell in the 1978 *Bakke* case. First, O'Connor recognized the "principle of student body diversity as a compelling state interest" and that universities "can justify using race in university admissions" largely for their role in creating a more equitable society. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation," wrote O'Connor, "is essential if the dream of one Nation, indivisible, is to be realized." Second, O'Connor focused on the "constitutional dimension" of institutional autonomy and, specifically, the proper authority of universities in the realm of admissions.

In her written opinion, she cited Powell: "The freedom of a university to make its own judgments as to education includes the selection of its student body."⁵ O'Connor also cited Justice Felix Frankfurter's 1957 opinion identifying the selection of students as one of four freedoms essential for the academic enterprise, the others being "who may teach, what may be taught, how it should be taught."⁶

Past judicial decisions identified the need to balance the protection of individual rights with the rightful authority of organizations and individuals with "special knowledge" and experiences, in this case, the academic community that set the standards for admissions. O'Connor wrote that the courts should avoid "complex educational judgments in an area that lies primarily within the expertise of the university." "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer," she continued. "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."⁷

**Question Before the Supreme Court 11-345
*Fisher v. Univ. of Texas at Austin***

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including Grutter v. Bollinger, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

The *Grutter*, and now the *Fisher*, case relates to a fundamental question that should not be lost on the justices or the public: What is the purpose of America's public universities, and how might we understand their unique position to influence and shape society? What locus of decision-making is most appropriate in setting the general mission of public institutions and in setting admissions policies and making decisions? Should it be the state, the courts, public opinion and referenda, interest groups like wealthy or politically connected alumni, or the institutions themselves?

It is important to note what the Court did and did not find compelling in the 2003 case. Data and arguments regarding the overall success of students (e.g., graduation rates, professional success after graduation) admitted under affirmative action programs were largely ignored. The Court's majority opinion also made only passing reference to the supposedly critical nature of diversity for the educational process. The Court essentially made no effort to determine the strength of that argument and instead "deferred" to the law school's judgment on educational benefits.⁸

Understanding that public universities and colleges will always be subject to considerable external and internal political pressures, the Court's landmark decision gives renewed salience to the importance of considerable institutional autonomy in setting admissions policies. Greater legal authority, however, must be accompanied by a larger public sense that the admissions processes are reasonably transparent and fair—that collectively, decisions on admissions relate to a larger, comprehensible institutional mission. Only then can public universities and, in particular, highly selective institutions gain sufficient levels of trust from the public, lawmakers, and members of their governing boards that they are rationally balancing the needs of the individual with their larger social purpose.

Yet also looming was the prospect of a return to the issue of affirmative action by the U.S. Supreme Court. The Michigan case was not considered a definitive judgment. With the continued Bush-era packing of the Court with ideological conservatives, another case was bound to revisit this contested area of American domestic policy.⁹

NOTIONS OF CRITICAL MASS

Thus far, much of the debate about admissions revolves around the rights of individual or group access to selective universities, whether they are students with high SAT scores or students of a particular racial background. But another important question relates to the engagement of students once they arrive at the university. How well do they meet the expectations of the institution as motivated, high-performing, and engaged students, as contributors to the academic community, as potential leaders and contributors to society? What are the predictors of such engagement? High test scores? Socioeconomic background and high school grades?

As noted, in its amicus brief to the Supreme Court in the *Grutter* case, the University of Michigan ventured into this territory. Lawyers and the university's administration essentially clung to the primacy of race and ethnicity and the need for a "critical mass" of underrepresented minorities. That critical mass, it was argued, was beneficial, even crucial, to the academic experience of all students at the Ann Arbor campus. Their personal experiences and views, it was believed, would enrich the experience of their fellow Euro-American students within the classroom. There just had to be enough of these students. Few studies, then and now, effectively show that exposure to a more or less diverse group of peers fosters the development of new viewpoints or in some significant dimension furthers the educational experience and achievement of individual students. The general notion has merit, yet it is hard to prove.

Within the classroom, there is arguably only marginal influence exerted by ethnic and racial diversity, with perhaps a greater influence in the social sciences and humanities than in the sciences and engineering. Indeed, the traditional ideal of scholarship and higher learning, if not always the practice, is to strive toward the removal of personal background bias in the cause of analytical study. This is the very core of the scholarly enterprise, although it should be noted that postmodernists view all academic inquiry as hopelessly built on individual biases.

There is evidence, however, that outside of the classroom, a diverse student body—racial, economic, and otherwise—has a beneficial impact on the social behavior of students, on the process of enculturation, and perhaps on tolerance. A number of studies based on surveys of students have shown a "positive" correlation regarding "developmental benefits" and learning gains. It is common sense to view the interaction of students and other members of an academic community from diverse backgrounds, however defined, as beneficial. This notion is not new. In his famous 1852 tome on the importance of community within the English college, Cardinal Newman insisted that students learning and living together from different backgrounds were important both in the classroom and in the boarding house. Students, he remarked, "are sure to learn from one another, even if there be no one to teach them; the conversation of all is a series of lectures to each, and they gain for themselves new ideas and views, fresh matter of thought, and distinct principles for judging and acting, day by day."¹⁰

Yet how can we gauge the benefits of learning and living among a diverse student body? What is the relative role of race and ethnic differences versus other factors, such as economic background or interaction with students from different geographic regions?

While recognizing that socializing among students from varied racial or ethnic backgrounds likely has a positive influence on a campus, Anthony Lising Antonio once noted, "relationships on diverse college campuses are not well understood." Indeed, the complexity of the issue has caused a generally liberal caste of scholars to recognize the criticism of conservatives. Although students at "diverse" campuses note inevitable and positive interaction with students of other races and ethnic backgrounds, they state that their campuses still have racial conflict and isolation. They report that racial balkanization is often encouraged and supported by organizational structures on campuses, and that they still experience prejudices, perhaps magnified by America's fixation on race over issues such as economic class.¹¹ In fact, almost all work in the field defines diversity in racial and ethnic terms. Yet race and ethnicity are, frankly, not diverse enough notions of diversity. What other elements of diversity contribute to a "critical mass" of underrepresented students required for creating learning and living environments that measurably influence student outcomes?¹²

Abigail Fisher Arrives for the Opening U.S. Supreme Court Hearing *Fisher v. the University of Texas* – October 2012



Credit: Susan Walsh/AP

Perhaps more important than the idea of some tipping point in critical mass is the ideal of having a campus climate of respect for students from different ethnic and socio-economic backgrounds. If this is ingrained in an academic community, and intolerance lowered in part by campus policies and actions, then the critical mass argument seems less important—although it can be argued that critical mass helps generate tolerance.¹³ One recent study published in *Science* indicates that a positive campus climate for minority students (however defined), with targeted interventions, might be sufficient unto itself.¹⁴

The complications of arguing for or against the notion of critical mass has yet another variable. In a society undergoing yet another demographic transformation with countless racial and ethnic groups, as well as many multiethnic families, simply categorizing groups is increasingly problematic. For example, in California—admittedly one of the most demographically diverse

states, although other large states are not far behind—Latinos have the highest birthrates, but the second highest birthrate is among multiethnic families.¹⁵ California's higher education system is already majority-minority; Texas, Florida, New Mexico, and a number of other states will soon follow.¹⁶

Antiquated racial categories, like Asian American and African American, are too simplistic. At selective colleges and universities, many "African Americans" are immigrants or children of immigrants, many with highly educated parents—one of the most significant factors for influencing whether a person goes on to college or not. At the University of California, Berkeley, for instance, some 25 percent of African American students have at least one parent who is an immigrant, and another 8 percent are international students; only slightly more than half, 54 percent, have grandparents born in the U.S. Among the eight Ivy League campuses, the percentage of Blacks who are recent immigrants or international students is even higher.¹⁷ Those that fit within the broad categories of Chicano/Latino and Asian American students are also complicated. Not to belabor the point, but there are at least six major Asian American groups that could be further disaggregated to over 40 groups.¹⁸

As noted, the legal briefs in support of the University of Michigan placed tremendous emphasis on the idea of educational benefits of diversity and critical mass without ever defining them. The University of Texas, in its defense of its admissions practices and the decision not to accept Abigail Fisher, has done the same. As in the 2003 *Grutter* case, UT's defense of affirmative action, specifically in justifying racial preferences in admissions, could prove to be a slippery slope. If one could imagine a definition of that critical mass, would it become a floor or a ceiling for justifying a percentage target for the admission of underrepresented students?

Because this notion of critical mass posed legal problems for pro-affirmative action forces, University of Michigan administrators and lawyers drifted into the mist in arguing for the educational benefits of diversity. They testified that "critical mass" meant "meaningful numbers" or "meaningful representation" and that "there is no number, percentage, or range of numbers or percentages that constitute critical mass."¹⁹

In the current *Fisher* case, Texas officials said that having race as a factor in admissions was needed to make sure that individual classrooms contained a "critical mass" of minority students, but they also avoided any clear statement of what that might mean. Forced by the justices to provide some sort of numeric assignment, Austin's lawyers finally stated that it was probably something above three percent. In a lower court ruling, and before the case moved on to the Supreme Court, Chief Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit was skeptical of state officials' rationale that will likely be reiterated by at least some of the members of the Supreme Court in its final decision: "Will classroom diversity 'suffer' in areas like applied math, kinesiology, chemistry, Farsi or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled?" she asked.²⁰

In my view, the significant effort put into the concept of critical mass by the defenders of affirmative action, and therefore debate among the justices regarding its merit, has been a distraction.

RETHINKING MERIT

A more fruitful path in shaping admissions policies—and more generally, in creating a student body suitable to the mission and ideals of the public university—may be found by investigating more fully how admissions standards and practices correlate with actual student academic performance. That is, what admissions criteria result in a student body that is diverse in talent and fully engaged in meeting the academic and civic expectations of the university?

Whereas the defenders of affirmative action invested much of their argument on the notion of critical mass and the educational benefits of a diverse student body, their opposition placed their bet on a rather simplistic notion of merit: if X students achieve certain test scores and grades, they must be superior in merit to Y students with lower test scores and grades—they have earned a spot at a selective institution. Admission is then a reward. But should it be even if test scores and grades are only marginal predictors of academic engagement and achievement at highly selective institutions?²¹

There are difficulties in disentangling the specific effects of a student's experience and achievements prior to entering college. The pre-college variables are many and familiar: a person's early experience, family relationships and friends, social origins and advantages help shape their intellectual capacity to be a good to excellent student. Brains are not enough. Then once they are in a postsecondary institution, the variables grow. Beyond improving on general skills and knowledge in the chosen major, there are factors of broader competencies and behaviors. "The effects of higher education," once wrote Martin Trow, "may be very subtle and difficult to measure: effects on mind, character, sensibility, competence, horizons, and ambitions—effects, that is to say, on the whole range of moral, emotional, and intellectual skills and qualities that a person takes with him into his adult life."²²

While acknowledging the truth of Trow's observation, it is possible to gauge how the prior achievements and social backgrounds of university students influence learning and their experiences – to look at correlations that are informative. Using data from the Student Experience in the Research University (SERU) Consortium and Survey, a study of undergraduates at the University of California, one of the most highly selective public university systems in the United States, attempted to explore this link and generated some intriguing findings.

First, the study found that students' socioeconomic and ethnic backgrounds were much more diverse than previously thought. Some 55 percent of students from a representative sample stated that they had at least one parent who was an immigrant; on the two most selective campuses within the system, Berkeley and Los Angeles, the figure was approximately 65 percent. About 25 percent of students learned another language before learning English, and another 25 percent grew up speaking English in addition to another language. Although students reported a median parental income of \$72,000, about 25 percent of the student body was drawn from families whose incomes were below \$35,000. About 25 percent of the students were the first generation of their families to enter college, and about 30 percent identified their families as "working class" or "low income."²³

Second, and most important for this discussion, students from relatively disadvantaged backgrounds reported, on average, higher levels of academic engagement (e.g., time studying, class attendance, interaction with faculty, completion of assignments) than students from more affluent backgrounds. They also had similar and sometimes better time-to-degree rates. All of this was true despite the fact that the less privileged cohort was more likely to be working more hours to finance their education. They also typically had more family-related responsibilities than their more affluent counterparts. The study also found that time invested in studying and preparing for class was inversely related to students' scores on the SAT I verbal test—a provocative finding.²⁴

Another SERU based study that focused on students who were "disengaged" from their academic studies similarly found that, "Students with high SAT scores were also more likely to be found among disengaged populations."²⁵ They are often less engaged than students with scores near the median and below; they often do not take advantage of their academic opportunities once past the gauntlet of a standardized test-focused admissions process, and often have narrow skills—valuable, but narrow.

Critiques of America's higher education institutions suggest that students at selective and other institutions are "academically adrift," marginally engaged in their studies and learning little in their academic careers. Are students with high-test scores predisposed to being "academically adrift?" One might surmise that a place like UC Berkeley should avoid admitting students with very high-test scores. But that is not the point here; rather, the lesson is that student talent and potential comes in many forms.

Then there is the relative value of test scores versus GPA in determining merit. Within the University of California's multi-campus system, studies going back to the 1950s repeatedly showed that GPA is the best and most consistent predictor of academic success in terms of grades and graduation rates—better than test scores. Further, UC has viewed their course requirements as a primary tool for influencing not only the curriculum of secondary schools, but also the behaviors and preparation of prospective students for a university education.²⁶

Another important finding is that both GPA and test scores, in the end, have historically only marginally explained the variance in, for example, GPA performance once at the university. In the aftermath of the affirmative action battles in California during the 1990s, one university study indicated that high school GPA explained only 14.5 percent of the variance in the GPA of freshmen at UC; the SAT I explained 12.8 percent, and subject-based tests were only a little bit better at predicting, but still not as good as grades in high school.²⁷

A study in the early 1960s conducted by UC's academic senate showed similar results and was, in fact, one reason that UC did not require the SAT until 1968 (largely as a diagnostic tool), and did not incorporate the SAT and ACT into actual admission decisions until 1979. UC was one of the last major universities to require standardized tests or use them in admissions precisely because of their lack of predictive power or "validity."²⁸

These findings emphasize the importance of a more nuanced understanding of merit. What are public universities attempting to achieve in their admission practices?

In part, the goal should be to distribute access (when choosing among students) to those who are not only talented but who will be the most engaged, and who will have the most to gain or contribute to the academic milieu. One might also assume that universities, public and private, must also take some chances and provide exceptions to the general rules of admissions—the University of California has provided such a path since the 1870s. The goal is to seek admissions policies that can take into

account the great variety of human talents and abilities, the desire for learning, and the potential contribution of a student to the larger academic community; it includes the ideals of representation broadly defined (but not as an edict), and ultimately balances individual merit with the larger needs of society.

Hence, the Court, and the public, should consider the complexity of merit and reconsider the value of test scores and even GPA in high school as insufficiently narrow measures for predicting collegiate success. Test scores alone, it can be argued, do not equate to merit worthy of trumping all or any other factor in an admissions decision. They also need to see that the best place for such judgment on the difficult question of access to a highly sought public good is at the institutional level, not within the courts.

ARBITRARY ADMISSIONS OUTCOMES

Within the political realm that is unique to selective public universities, one dictum stands out: No matter how well constructed undergraduate admissions policies and practices are, there will be arbitrary outcomes, particularly at universities with high demand for access and relatively few openings. It is not uncommon, for example, that a student gains admission at UC Berkeley, but not at UCLA, which employs very similar admissions criteria—and vice versa.

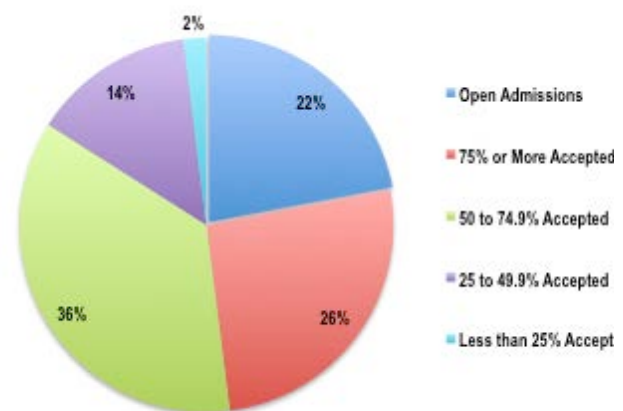
It is useful to understand that highly selective institutions are far and few between. Although they received tremendous media coverage, only two percent of all American colleges and universities are highly selective (as shown in Figure 2). This is where the battleground for affirmative action lies, with virtually no consequence for the vast majority of institutions that are moderately selective or have open admissions.

Included among the two percent of highly selective institutions are private colleges and universities. Because private institutions are legally corporate entities, they make no public or transparent outline of what it takes to be admitted. They have avoided the affirmative action debate—thus far—even though they rely on public funding via student financial aid and federal research funding. The political heat, and lawsuits, have all focused on the small sliver of public universities. This reality seems to elude the media and the public in understanding the debates over affirmative action in American universities.

At the same time, students who apply to highly selective institutions, public or private, are already a largely self-selected group, with the majority meeting or exceeding institutionally defined academic requirements. Certainly, that is the case for the Berkeley campus.

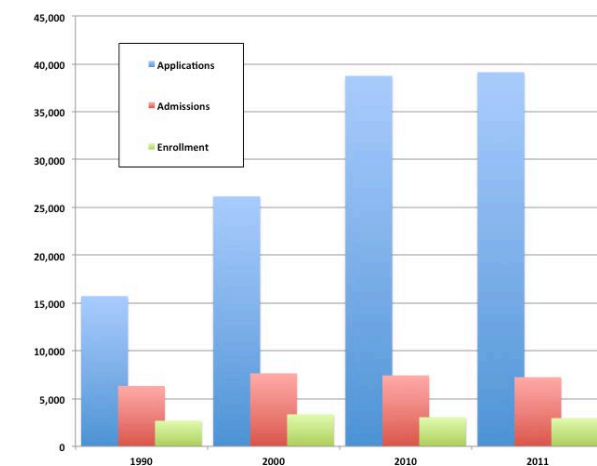
For example, in fall 2011, Berkeley had 39,804 students from California apply at the freshman level for only 2,950 enrollment spots; some 7,348 were accepted—an application to admission rate of 18.5 percent with nearly 60 percent of those accepted deciding to go elsewhere. In the end, 2,906 actually enrolled.

Figure 2
U.S. Four-Year Degree Granting Undergraduate Institutions by Acceptance Rate - Fall 2008



Source: The College Board, *Trends in College Pricing 2011*, Figure 21A

Figure 3
UC Berkeley: Applications, Admissions and Enrollment - California Residents Freshman Fall 2011



Source: UC Office of the President

Of the total applicant pool at Berkeley, more than 21,145 of these students achieved high school GPAs of 4.0 or higher in required courses (bolstered by additional credit for advanced placement courses). Approximately 94 percent of those who applied were UC-eligible, meaning that they met the academic criteria of grades in required California high school courses and test scores.²⁹

Technically, all of these UC-eligible students were qualified to enter UC Berkeley. Statistically, students of this caliber, irrespective of standardized test scores, generally do well within a demanding university curriculum. As shown in Figure 3, the number of California applicants continues to increase, while the number of students admitted and enrolled is relatively stable. This trend will continue into the future as California's population grows from about 37 million to a projected 50 million by 2050.

UC Berkeley also receives an ever-growing number of applications from out-of-state, including international students. The vast majority of these students are also highly qualified. In the face of significant cuts in public funding and the need to increase revenue, UC Berkeley, like other major public universities, is increasing the number of international and out-of-state students, thereby increasing the competition for admission. It's a zero-sum game, since UC Berkeley, for a variety of reasons, will not expand its undergraduate population—indeed, it may shrink its enrollment in the face of cuts in public funding.

For the 2011-12 academic year, California residents, plus international and out-of-state students, expanded the total freshman applicant pool to 52,066 (counting both fall and spring semesters) who are competing for about 5,200 enrollment spots. (The total freshman applicant pool at UC Berkeley just reached 67,600 in spring 2012.)

Figure 4 provides GPA data for all freshman applicants in 2011-12 (by percentage of the entire pool of applications), those admitted, and the admit rate (i.e., percentage of students in that GPA group who were admitted). Most applicants had GPAs above 3.67; most admitted students had GPAs above 4.0. Yet even among this cohort of exceptional students, the admit rate was not 100 or even 80 percent.

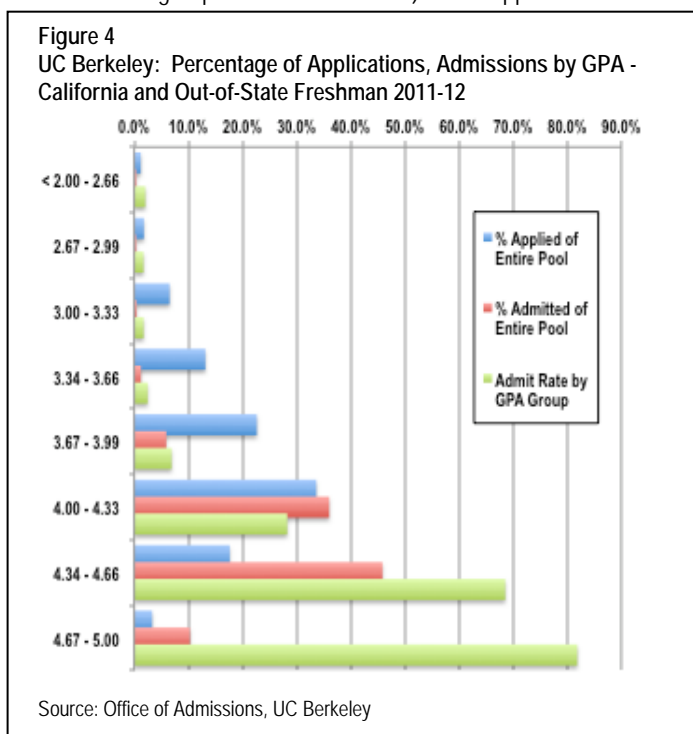
How do we interpret these findings?

Simply put, high school GPA, along with test scores, are historically handy ways for setting admissions criteria, but are not sufficient in isolation for the rational distribution of a highly sought public good. (Indeed, as I have argued in a history of admissions in public universities, standardized test were adopted by selective colleges and universities primarily as a tool to justify rejecting students.³⁰)

Intelligence comes in many forms and matures at different ages for different students. But how can a campus like Berkeley, or Austin, make complex decisions on admissions when confronted by so many talented students with the potential to do well academically and to take full advantage of the opportunity to be at a top research university?

Admissions policies at these institutions are not only about selecting students based on their academic performance in high school or their projected academic ability; they are also about rejecting students and, for public universities, providing some explanation. Rejecting so many able students has real political consequences, even if the denied students have other equally viable routes to a quality public or private institution.

Public universities must defend their admissions policies and actions but, under the dynamic described, they will always be vulnerable to criticism—and subject to lawsuits. The key is not simply to detail the mechanisms of admissions policies, but to cogently argue both the larger social purpose of these institutions *and* the need for significant levels of autonomy in making their choices. Just as importantly, admissions decisions are not simply an award for prior accomplishments, but also a means for shaping a progressive and productive society.



THE FISHER CASE

How does the *Fisher* case fit into the landscape of admissions decisions at selective public universities? Again, plaintiff Abigail Noel Fisher's lawyers claim that she should have been admitted to the University of Texas' flagship campus in Austin, but was displaced because of racial bias in the university's admissions practices. Under *Bakke*, and reinforced by *Grutter*, race-conscious admissions policies at public universities must be "narrowly tailored" to pass "strict scrutiny"—essentially, the legal concept that laws and policies related to fundamental rights, like racial equality, must meet a "compelling government interest" to be justified.

The Austin campus is not as selective in its admissions as Berkeley, but the scenario is similar: an ever-increasing and large number of qualified students compete for a limited number of freshman spots. Since 2005, UT has admitted most of its freshman students based on what is known as the "Top 10 Percent Law."³¹ Students ranking in the top ten percent of their high school class in Texas, based on GPA in required courses, can gain admissions to Austin or any other University of Texas campus. (Applicants must also provide ACT or SAT I scores, but this does not determine class rank, thus far).³²

UT adopted this eligibility scheme following a court decision in which Euro-American students sued UT's law school for not admitting them, charging racial discrimination – the *Hopwood v. Texas* case noted previously. The Ninth Circuit U.S. Court of Appeals that includes, Louisiana, Mississippi, and Texas found in favor of the plaintiffs. That decision was appealed to the Supreme Court in 1999, but the Court refused to hear the case, upholding the lower court's ruling within its jurisdiction. The *Grutter* decision in 2003 later overturned *Hopwood*—again allowing the use of race as one of many factors in admissions at UT.

The Austin campus constructed the top 10 percent plan under a mandate by the Texas legislature and as a race natural response to the 1999 *Hopwood* decision. After *Grutter*, it kept the Top 10 Percent policy, but added race as part of its alternative "holistic" path called the Personal Achievement Index (PAI). Figure 5 outlines the Top 10 Percent criteria and the PAI.

Figure 5
University of Texas – Austin Admissions Criteria

The Academic Index (AI) - High School Record

Class rank
Completion of UT required high school curriculum
ACT/SAT score

The Personal Achievement Index (PAI)

Scores on two essays
Leadership
Extracurricular Activities
Awards/honors
Work experience
Service to school or community
Special circumstances:

- o Socio-economic status of family
- o Single parent home
- o Language spoken at home
- o Family responsibilities
- o Socio-economic status of school attended
- o Average ACT/SAT of school attended in relation to student's own ACT/SAT
- o Race (authorized by the UT Board of Regents in 2003 and implemented in 2005)

In the fall of 2008, the year Abigail Fisher applied, the UT campus received 25,514 applications for undergraduate admissions for fall 2008, and 12,842 were admitted, a 50.3 percent acceptance rate. Of the 6,177 students admitted and then enrolled, 4,680 were admitted under the Top 10 Percent program, or approximately 75 percent of the total admitted—the limit for AI admits set by the Texas legislature.³³ (UC has a similar policy to the Top 10 Percent plan called "Eligibility in the Local Context," in UC's case at first limited to the top 4 percent of students within accredited high schools and mimicking UT; UC expanded that to the top 9 percent beginning with this year's freshman class.)³⁴

The other "holistic" review process at Texas, the PAI, has a number of variables used in the review process, including standardized test scores, community service, socioeconomic background, and, after *Grutter*, race.³⁵

Fisher did not meet the AI class rank criteria. With a 3.59 high school GPA, she ranked 82nd in a class of 674; she also scored 1180 on the SAT 1, which is below UT's average for freshman applications.³⁶ She was thus competing for an enrollment spot within the PAI pool in which there were approximately 16,600 applicants and only 3,590 admitted—an acceptance rate of just 21 percent.³⁷

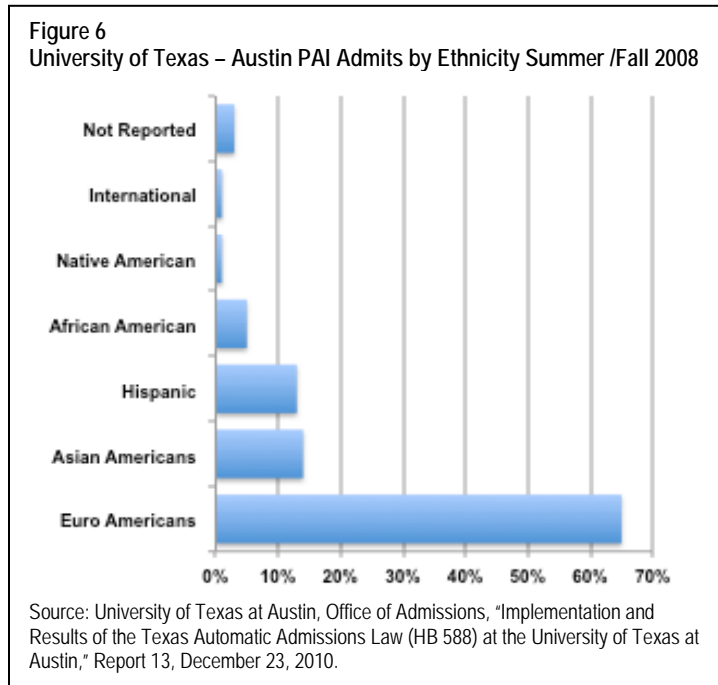
This is a highly competitive pool. Of those who were admitted and then enrolled, some 65 percent were Euro Americans, 14 percent were Asian American, 13 percent were Hispanic, and just 4 percent were African American³⁸ (see Figure 6). So while race was a criterion among many in the PAI decision-making process, it appears that it was not unduly weighted³⁹—a key observation in light of the precedent set by the *Bakke* case.

To reiterate, deciding among many highly qualified students, whether at UC Berkeley, UT-Austin, Harvard, or Stanford, can have a logic and process, but some outcomes are bound to be arbitrary. There is no clear evidence that race, as one variable among many, displaced Abigail Fisher. With so many qualified students encompassing a diverse set of backgrounds being rejected at

UC Berkeley, and at UT-Austin, it is a stretch of the imagination to posit the concept that one particular student displaces another—the crux of the Fisher's claim.

At the same time, there is one aspect of UT's admissions policies and outcomes that is more difficult to rationalize, and proved to be a point of contention at the initial Supreme Court hearing. While UT, along with UC and most other selective public universities, have focused much of their admissions decisions and financial aid on providing paths for lower-income student to gain access to higher education, UT did on occasion use the PAI to admit upper-income African Americans.

Before the court, UT's lawyers argued that while the Top 10 Percent policy had resulted in larger numbers of underrepresented students, including African American and Latino, as well as lower-income students, there was still a compelling need to expand diversity, specifically among African Americans. UT's lawyers claimed that a race-neutral admission process would be "faulty because it doesn't admit enough African-Americans and Hispanics who come from privileged backgrounds." As stated in the UT brief, those admitted through the Top 10 Percent plan were more likely "to be the first in their families to attend college." Yet, in its effort to build a class that reflected the state of Texas, UT also admitted under PAI, "the African-American or Hispanic child of successful professionals in Dallas."⁴⁰



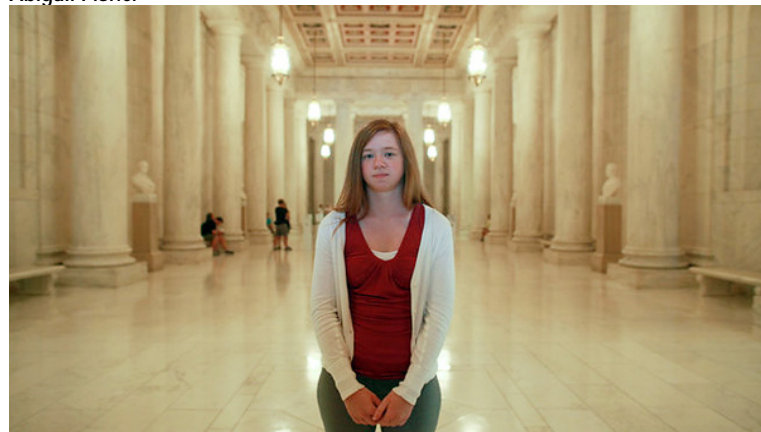
One could disagree with the logic of UT's argument. Students in upper-income brackets almost always enjoy the benefits of parents with high educational backgrounds (the number one determinant of whether or not a student goes to college), they come from high schools with higher-than-average budgets per student, they are much more likely to have access to college counseling and test preparatory regimes (now the norm among upper-income professional families), and they typically have the financial resources to gain access to another high-quality college or university, even if not admitted to UT. They have other options. Indeed, Fisher enrolled in Louisiana State University in Baton Rouge and graduated with a degree in business in 2012.

The stated effort by UT to enroll upper-income minority students was a source of irritation for both justices Alito and Kennedy (the latter being a key swing voter). Alito asked if a minority applicant whose parents are successful lawyers and are in the "top 1 percent of earners in the country" deserve an admissions preference over white and Asian applicants from families of more modest means? UT lawyer Gregory G.

Gare's statement that, "we want minorities from different backgrounds" spurred Justice Kennedy to comment, "So what you're saying is that what counts is race above all?" Kennedy then asked, "The reason you're reaching for the privileged is so that members of that race who are privileged can be representative, and that's race."⁴¹

But there is no evidence of an unduly weighted effort by UT to use race in the PAI track—it was one among many variables considered and if a student of any particular race did not demonstrate talent or desired socioeconomic traits and experiences, they would not be considered for admission to UT. Fisher's rejection appears statistically insignificant, the net result of a rational

Abigail Fisher



Credit: Fred R. Conrad/The New York Times

policy process with some arbitrary outcomes. But even if there was marginal bias based on race in the “holistic” admissions process, it is very difficult to impossible to convincingly prove.⁴²

Race as a variable, and as noted previously, is becoming increasingly complex. This means that notions of “underrepresented” students must evolve and adjust to the new reality. Fixed on old notions of race, the courts are ill equipped to create new precedents in admissions policies. While it may be true that selective public universities have been slow to expand their understanding of race and ethnicity and to adjust accordingly the process of selecting a limited number of talented students among many who apply—and there may be problems at the margin—the Supreme Court, in particular, need not make such judgments.

THE PROPER LOCUS OF DECISION MAKING

There is some evidence that admissions policies focused on socioeconomic status, or race-neutral criteria, can be an effective path for achieving racial diversity. In a report published by the Century Foundation that profiled 10 major public universities, in which state referendums or laws demanded that race could no longer be used in admissions, seven universities reformulated their admissions policies and equaled or surpassed previous enrollment numbers of African American and Latino students.⁴³ One reason is that changes in admissions policies, including high-school-based admissions criteria, has seemingly resulted in increasing minority enrollments in some states; another is simply the rapidly changing racial and ethnic demography of the nation. There are, simply put, many more Chicano-Latino students graduating from high school and now attempting to gain access to public universities.

Many pro-affirmative action voices contend that race-neutral admissions policies will never be as effective as those with some form of affirmative action. The amicus brief offered by the University of California in support of Texas said as much, and provided data on the universities’ struggle to enroll certain underrepresented groups.⁴⁴

What is or is not effective is up for debate. What is argued here is that it should not be up to courts, or legislators, to determine the path that universities formulate to meet a wide array of objectives in their admissions policies—as long as institutional policies meet the criteria outlined originally in *Bakke* and *Grutter*, along with the long-held social contract of public higher education to generally reflect the population of a state and meet a variety of social and economic goals.

The historical precedent, as reiterated by Justice Sandra Day O’Conner, is that judgments related to the complex question of admissions among a large pool of highly qualified students, are best left to the Academy. The issues of critical mass, which factors indicate future academic success and graduation, and which policies will best shape a student body, are, in the end, judgments that the courts should not infringe on without a compelling need to do so.

There is no compelling need in the *Fisher* case. As O’Conner’s wrote for the majority in 2003: “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”

Indeed, the appropriate locus of decision-making appears to be at the heart of the pending decision. Fisher’s lawyers argue that *Grutter* and *Bakke* have “interpretive difficulties” that have led lower courts to be too deferential to universities in admissions policies and also that *Grutter* is unworkable and leads to racial hostilities; they, in fact, do not challenge the basic concept that there is a “compelling interest” in promoting diversity—however it is defined.⁴⁵ *Grutter*, Fisher’s lawyers insisted, led to “an abominable kind of sorting out” by race, which “needs to be corralled.”⁴⁶

In light of the conservative majority now on the Supreme Court, there has been much attention on one or two perceived swing voters. Because Justice Kagan recused herself due to her former position as US Solicitor General, which generated an earlier brief in support for UT in the case, eight of the nine justices will decide the case. A 4-to-4 vote, a real possibility, leaves the lower court’s decision in the case intact and binding – in this case, the ruling in favor of the University of Texas.⁴⁷ With Kagen out of the mix, Alito, Thomas, Scalia, and Roberts, it seems, would vote in favor of Fisher’s argument.

Most pundits assume that Justice Kennedy will decide the case. In earlier decisions, Kennedy has seemingly supported narrowly tailored race-conscious admissions policies. But he voted on the minority side in the *Grutter* case, arguing that the University of Michigan’s law school had used “numerical goals indistinguishable from quotas.”⁴⁸ At the opening hearing in October, some think that Kennedy indicated his predilections in his give-and-take with UT’s lawyers when he questioned the inclusion of upper-income African Americans and Hispanics under the PAI’s racial criteria. Others suggest that Kennedy might reject UT’s use of race, specifically the seeming favoritism toward upper-income minorities, but uphold the basic tenets of *Bakke* and *Grutter*.⁴⁹

We will see whether Kennedy's views will ultimately decide the case, or if we are surprised once again (as we were in the health care law ruling) by Chief Justice John G. Roberts. There may also be another factor to influence the decision.

All of the Court's justices are products of Eastern elite private educations—all have law degrees either from Harvard or Yale. How the case might ultimately influence or, to be more exact, interfere in the admissions decisions of the Ivy League and similar institutions, may emerge as a concern for one or more of the conservative block of justices.

Thus far, selective private colleges and universities have avoided scrutiny in their admissions practices. They rarely have been open about how they make decisions. Most private institutions, for example, have policies that favor children of alumni or benefactors (a major factor for selective private institutions such as Harvard, where over 20 percent of the students are "legacy" admits). But this is not clearly articulated to the general public or, specifically, to prospective students.

At the same time, selective private, non-profit universities and colleges are clearly quasi-public institutions: They rely on student financial aid supplied by federal and, in some cases, state governments, and they claim a large percentage of federal research dollars and must meet federal rules and guidelines such as Title IX. These institutions also claim, and serve, a larger public purpose beyond their origins as largely sectarian entities serving a defined and limited population. At the same time, selective public universities are becoming increasingly quasi-private as public funding plummets. The dividing line between these selective private and public institutions in terms of public purpose is increasingly gray, to say the least.

Why should private institutions play by one set of alternative universe rules in admissions? Could a decisive ruling in favor of Fisher lead to a Court-induced foray into limiting admissions practices at private institutions as well? Previous Supreme Court decisions, including *Bakke*, have stated that Title VI of the 1964 Civil Rights Act making illegal racial discrimination does extend to private universities that received federal financial support.⁵⁰

U.S. Supreme Court 2013



Back row: Sonia Sotomayor, Stephen Breyer, Samuel Alito, Elena Kagan. Front row: Clarence Thomas, Antonin Scalia, John Roberts, Anthony Kennedy, Ruth Bader Ginsburg
- Courtesy: U.S. Supreme Court

Worries over the possible Supreme Court ban on using race is one reason that Columbia University and Fordham University, in associated with a group of Catholic institutions, filed separate friend-of-the-court briefs in support of UT.⁵¹ An overturning of *Bakke* and *Grutter* would, it appears, spawn new lawsuits against selective private institutions, and possibly open the door for an Executive Order via the White House to regulate their admissions practices—an event more likely under a conservative Republican president, with none on the immediate horizon.

Of course, this is pure conjecture, but perhaps the issue looms in the back of the minds of a group of justices who are the product of elite private colleges and universities, even if this notion has not been fully articulated. A fear of venturing into the admissions practices of private entities might, in the end, actually preserve what is now nearly four decades of precedent in U.S. law.

To a degree unmatched by any other single institution in the U.S., or by any other nation in the world until recently, America's public universities were conceived, funded, and developed as tools of socioeconomic engineering—an observation perhaps uncomfortable for those who view markets and the rugged individual as the hallmark of the nation's development. The goal was not simply to benefit the individual, but to support socioeconomic mobility and integration within a nation of immigrants, to shape a more progressive and productive society.⁵² Any decision on affirmative action needs to keep this American vision viable.

ENDNOTES

¹ Yogi Berra.

² Fisher filed suit in the United States District Court for the Western District of Texas, challenging UT's use of race in admissions under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964. The district court granted summary

judgment for UT, and the Fifth Circuit affirmed, finding that UT's use of race in admissions passed the strict-scrutiny standard established by the Supreme Court in *Grutter*. After the Fifth Circuit denied rehearing en banc, Fisher appealed to the Supreme Court. The Supreme Court granted certiorari on February 21, 2012 to consider whether UT's consideration of race in undergraduate admissions decisions violates the Fourteenth Amendment.

³ U.S. Supreme Court, *Grutter v. Bollinger*, June 2003.

⁴ *Ibid.* p. 17.

⁵ *Ibid.* Court cases cited by O'Connor include *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S., at 603.

⁶ *Sweezy v. New Hampshire*.

⁷ *Grutter v. Bollinger*, p. 16.

⁸ "The Law School's educational judgment," stated Justice O'Connor in the majority opinion, "that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici." *Grutter v. Bollinger*, p. 17

⁹ "Another Swing at Affirmative Action," *Inside Higher Ed*, June 6, 2006.

¹⁰ John Henry Newman, *The Idea of a University* (Notre Dame, IN: University of Notre Dame Press, 1852).

¹¹ Anthony Lising Antonio, "When Does Race Matter in College Friendships? Exploring Men's Diverse and Homogeneous Friendship Groups," *Review of Higher Education*, 27, no. 4 (2003): 553-75; University Committee on Minority Issues, "Building a Multiracial, Multicultural University Community: Final Report of the University Committee on Minority Issues," Stanford University, 1989.

¹² See Mitchell J. Chang, D. Witt, J. Jones, and K. Hakuta (ed.), *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (Stanford, CA: Stanford University Press, 2003); "Supplemental Expert Report of Patricia Y. Gurin." *Grutter, et al. v. Bollinger, et al.* (11 January 2001); Sylvia Hurtado, J. F. Milem, A. Clayton-Pederson, and W. A. Allen, "Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice," *The Review of Higher Education*, 21, no. 3 (1998): 279-302.

¹³ In a review of the literature and SERU data related to critical mass and campus climate, William C. Kidder notes the correlation but the difficulty of stating what comes first or is most important: "These data from leading research universities strongly support the modest conclusion that higher levels of racial diversity are generally better for the campus climate faced by African American and Latino students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate. Although these data are not proof of a causal role, the patterns are consistent with the conclusion that affirmative action bans and lower diversity (at least in combination) lead to African American and Latino students feeling that they are less respected by their peers." See William C. Kidder, "Misshaping the River: Proposition 209 and Lessons from the Fisher Case," pending publication, *Journal of College and University Law*, vol. 39, No 1, pp. 53-130. See also Steve Chatman, "Does Diversity Matter in the Education Process?: An Exploration of Student Interactions by Wealth, Religion, Politics, Race, Ethnicity and Immigrant Status at the University of California," Research and Occasional Paper Series, Center for Studies in Higher Education, March 2008: <http://cshe.berkeley.edu/publications/publications.php?s=1>; Sylvia Hurtado et al., "Assessing the Value of Climate Assessments: Progress and Future Directions," *Journal of Diversity in Higher Education*, 204, 213 (2008); Patricia Gurin et al., "The Benefits of Diversity in Education for Democratic Citizenship," *Journal of Social Issues*, 17, 32 (2004).

¹⁴ See Gregory M. Walton & Geoffrey L. Cohen, "A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students," *331 Science* 1447, 1447 (2011).

¹⁵ Hans P. Johnson, Laura Hill, and Mary Helm, *New Trends in Newborns: Fertility Rates and Patterns in California*, Public Policy Institute of California, August 2001.

¹⁶ See U.S. Department of Education, National Center for Education Statistics, Higher Education General Information Survey (HEGIS), "Fall Enrollment in Colleges and Universities," Surveys, 2000.

¹⁷ This data is from 2006 and the number of "African American" immigrant and international students at Berkeley and in the Ivy League campuses is probably now higher. See John Aubrey Douglass and Gregg Thomson, "The Immigrant's University: A Study of Academic Performance and the Experiences of Recent Immigrant Groups at the University of California," *Higher Education Policy*, vol. 23, 2010, pp. 451-474; see also Massey, D.S., Mooney, M. and Torres, K. (2007) 'Black immigrants and black natives attending selective colleges and universities in the United States', *American Journal of Education* 113(2), pp. 243-271.

¹⁸ See Robert T. Teranishi, T. K. Nguyen, "Asian Americans and Pacific Islanders and the Changing Demography of the United States: Implications for Education Policy," *Harvard Kennedy School Asian American Policy Review*, vol. 22, 2012.

¹⁹ *Grutter v. Bollinger*; this part of the narrative is from *The Conditions for Admissions*, pp. 237-245.

²⁰ Adam Liptak, "Justices Take Up Race as a Factor in College Entry," *New York Times*, February 21, 2012: http://www.nytimes.com/2012/02/22/us/justices-to-hear-case-on-affirmative-action-in-higher-education.html?pagewanted=all&_r=0

²¹ For a discussion on appropriate uses of standardized test scores in admissions, see Joseph Soares (ed), *SAT Wars: The Case the Case for Test Optional College Admissions* (New York: Teacher College Press 2011): <http://store.tcpress.com/0807752622.shtml>

²² Martin Trow, "The Public and Private Lives of Higher Education," *Daedalus*, 104, no. 1 (Winter 1975): 113-27.

²³ Richard Flacks, Gregg Thomson, John Douglass, and Kyra Caspary, *Learning and Academic Engagement in the Multiversity: Results of the First University of California Undergraduate Experience Survey* (Berkeley, CA: Center for Studies in Higher Education, 2004).

²⁴ *Ibid.* Students from more disadvantaged backgrounds emphasized career-oriented goals and learning for its own sake, whereas those from more affluent backgrounds tended to emphasize "fun" and "social" goals. Another SERU-related study focused on immigrant students showed that students at UC Berkeley who come from lower income families with relatively low socioeconomic capital (in particular Chicano/Latinos) do well academically in terms of university grades and graduation rates, if only marginally less so than those with higher rates of educational capital (parents with some higher education experience or degrees). At the same time, they also spend more time in paid employment, spend approximately the same amount of time as Euro-Americans studying and going to class, and have relatively high rates of overall satisfaction with their social and academic experience. See John Aubrey Douglass and Gregg Thomson, "The Immigrant's University: A Study of Academic Performance and the Experiences of Recent Immigrant Groups at the University of California," *Higher Education Policy* (December 2010) 23, 451-474: <http://www.palgrave-journals.com/hep/journal/v23/n4/pdf/hep201018a.pdf>

²⁵ Steven Brint and Allison M. Cantwell, "Portrait of the Disengaged," Research and Occasional Paper Series, Center for Studies in Higher Education, CSHE.9.12 (June 2012): <http://cshe.berkeley.edu/publications/publications.php?id=413>

²⁶ Certainly this was the case at the University of California See John Aubrey Douglass, *The Conditions for Admissions: Access, Equity, and the Social Contract of Public Universities* (Stanford University Press, 2007) pp. 93-119.

²⁷ A combination of GPA and Test Score explained up to 21.1 percent of the variance in freshman grades at UC in the same 2001 study, still relatively low predictability. See California Postsecondary Education Commission, *Examining Standardized Testing in the Context of University Admissions*, Sacramento, California, August 2001; also Saul Geiser and Maria Veronica Santelices, "Validity Of High-School Grades In Predicting Student Success Beyond The Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes." Research and Occasional Paper Series, Center for Studies in Higher Education – UC Berkeley (June 2007)

²⁸ For a description of the earlier UC studies on validity and why UC finally required standardized test scores, see *The Conditions for Admissions*, pp. 89-92, 97-101, and for more recent UC studies on validity pp. 224-226.

²⁹ University of California Application, Admission and Enrollment of California Resident Freshman for Fall 1989 through 2011, UC Office of the President: http://www.ucop.edu/news/factsheets/2011/Flow_FROSH_CA_11.pdf. The University of California outlines specific, transparent requirements to make a student "eligible" for UC—grades in required courses, a sliding scale on test scores, and GPA. This public outline of requirements is very different from highly selective private colleges and universities, with generally no publicly outlined criteria for admissions, and no significant pressure from the public to do so.

³⁰ See Douglass, *The Conditions for Admissions*, pp. 82-92.

³¹ Under legislation approved in May 2009 by the Texas House as part of the 81st Regular Session (Senate Bill 175), UT-Austin (but no other state universities) was allowed to trim the number of students it accepts under the 10% rule; UT-Austin could limit those students to 75 percent of entering in-state freshmen from Texas. The University would admit the top 1 percent, the top 2 percent and so forth until the cap is reached, beginning with the 2011 entering class. UT System Chancellor Francisco Cigarroa and UT-Austin President William Powers Jr. had sought a cap of about 50 percent, but lawmakers (led by Representatives Dan Branch (R-Dallas) and Rep. Mike Villarreal (D-San Antonio)) brokered the compromise. A study by Julie Berry Cullen *et al.* (2011) found that the law created a perverse incentive for students to transfer to a high school with lower-achieving peers, in order to graduate in that school's top percent.

³² A description of the Ten Percent Law and the University of Texas – Austin admissions policies can be found in the "Brief for Respondents," in *Fisher v. the University of Texas at Austin*, No. 11-345, see: <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>

³³ University of Texas at Austin, Office of Admissions, "Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin," Report 13, December 23, 2010: see also <http://www.utexas.edu/student/admissions/research/index.html>

³⁴ See John Aubrey Douglass, "SAT Wars: and The University of California," in Joseph Soares (ed.), *SAT Wars: The Case the Case for Test Optional College Admissions* (New York: Teacher College Press 2011): <http://store.tcpress.com/0807752622.shtml>

³⁵ The university had previously made explicit race-based admissions decisions, until the Fifth Circuit's 1996 decision in *Hopwood v. Texas* made this practice illegal. UT did not factor race into the PAI until 2005, after the Supreme Court's 2003 decision in *Grutter v. Bollinger* that allowed a university to consider race in a limited context.

³⁶ See *Fisher v. the University of Texas at Austin*, No. 11-345: <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>

³⁷ This is based on my own estimate of the pool of PAI students and their composition by analyzing data from various University of Texas-Austin admissions reports, including "Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin," Report 13, December 23, 2010: see also <http://www.utexas.edu/student/admissions/research/index.html>.

³⁸ University of Texas at Austin, Office of Admissions, "Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin," Report 13, December 23, 2010: see also <http://www.utexas.edu/student/admissions/research/index.html>

³⁹ It should be noted that comparing the racial and ethnic composition of the PAI application pool with the admissions results shown would strengthen this conclusion, but official at UT-Austin did not respond to requests for this data and I could not find it in various UT reports or compute it with data available.

⁴⁰ See pages 33 and 34 for a description of the Ten Percent Law and the University of Texas – Austin admissions policies can be found in the "Brief for Respondents," in *Fisher v. the University of Texas at Austin*, No. 11-345.

⁴¹ Cited in Richard Kahlenberg, "The Achilles Heel of Affirmative Action," *Chronicle of Higher Education*, October 11, 2012: <http://chronicle.com/blogs/conversation/2012/10/11/the-achilles-heel-of-affirmative-action/>

⁴² A recent debate about admissions practices at UCLA illustrates the point. In his study of a process of admissions review similar to that of PAI, Richard Sander, a critic of affirmative action and UCLA professor of law, contends that African American students in certain groupings by scores (that is some but not all) are more likely to be admitted than white applicants as well as Latinos based on his analysis of admissions data. But another study prepared by Robert Mare, a UCLA sociology professor, and requested by UCLA's academic senate to independently review admissions practices at the campus, found only marginal differences: "In both final and supplemental review, African-American applicants receive somewhat more favorable and North Asian (Chinese, Japanese, Korean and Indian/Pakistani American) applicants receive somewhat less favorable holistic read scores than applicants in other ethnic identity groups who are otherwise similar in academic qualifications, personal characteristics, and measured challenges and hardships." The reason for these biases may have absolutely nothing to do with race *per se*, but point to the complexity of student backgrounds. See Richard Sander, "The Consideration of Race and ULCA Undergraduate Admissions," Self-published, October 20, 2012: <http://www.seaphe.org/pdf/uclaadmissions.pdf>; Robert D. Mare, "Holistic Review in Freshman Admissions at UCLA," Undergraduate Admissions and Relations with Schools, UCLA Academic Senate, January 2012: <http://www.senate.ucla.edu/committees/cuars/documents/UCLAReportonHolisticReviewinFreshmanAdmissions.pdf>; see also, Scott Jaschik, "Holistic Controversy," *Inside Higher Education*, October 31, 2012: <http://www.insidehighered.com/news/2012/10/31/debate-over-admissions-and-race-ucla>

⁴³ Richard D. Kahlenberg, *A Better Affirmative: State Universities that Created Alternatives to Racial Preferences*, Century Foundation, 2012: <http://tcf.org/publications/pdfs/ABAA.pdf>

⁴⁴ University of California Office of the President, Abigail Noel Fisher v University of Texas at Austin, *Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents, Supreme Court of the United States*, No. 11-345; See also William C. Kidder, "Misshaping the River: Proposition 209 and Lessons for the Fisher Case," Working paper Social Science Research Network, August 3, 2012.

⁴⁵ For an excellent summary of the case and arguments presented by the plaintiff, see "Fisher v. University of Texas at Austin (11-345), Legal Information Institute: <http://www.law.cornell.edu/supct/cert/11-345>

⁴⁶ Cited in Peter Schmidt, "Supreme Court Hearing in Texas Admissions Case Exposes Gaps in Affirmative-Action Law," *Chronicle of Higher Education*, October 10, 2012: <http://chronicle.com/article/Supreme-Court-Hearing-in-Texas/134976/>

⁴⁷ For an explanation of court procedures in case of a tie vote, see Stuart Taylor, Jr, "Tie Vote: What Happens," *New York Times*, October 1987.

⁴⁸ Douglass and Thomson, "The Immigrant's University": <http://www.palgrave-journals.com/hep/journal/v23/n4/pdf/hep201018a.pdf>

⁴⁹ Peter Schmidt speculates in the *Chronicle of Higher Education*, however, that Kennedy, will more likely "reject Texas' policies as falling outside the guidelines set forth by the *Grutter* decision, leaving the policies at other colleges intact. There's also a chance he could uphold Texas' plan, but that possibility is seen as remote." Peter Schmidt, "Supreme Court Hearing in Texas Admissions Case Exposes Gaps in Affirmative-Action Law," *Chronicle of Higher Education*, October 10, 2012: <http://chronicle.com/article/Supreme-Court-Hearing-in-Texas/134976/>

⁵⁰ There are differing interpretations of past precedent and the vulnerability of private higher education institutions. The dean of the law school at UC Irvine, Erwin Chemerinsky, stated to the author that a decision for Fisher would change the landscape for private colleges and universities in their use of affirmative action because of language in the *Bakke* and the *Grutter* cases: David E. Bernstein of the Cato Institute made an argument in 2003 before the *Grutter* case was decided that private institutions might be protected because of the right of "free association" articulated in the Supreme Court's 2000 decision *Dale v. Boy Scouts of America* that allowed the Boy Scouts to exclude gays. "Conditioning federal funding of universities on the abolition or modification of affirmative-action preferences," he writes, "as will almost certainly occur after the Michigan cases, would place what constitutional scholars call an "unconstitutional condition" on that funding. Congress should amend Title VI to exempt private universities from interference with their admissions policies. If Congress fails to do so, universities should force the issue through lawsuits asserting their right to expressive association. David E. Bernstein, "Let Private Colleges Practice Affirmative Action," Cato Institute, Commentary, June 23, 2003: <http://www.cato.org/publications/commentary/let-private-colleges-practice-affirmative-action>

⁵¹ Brenda Lasevoli, "Goodbye, Affirmative Action? A Supreme Court Case has colleges considering how to stay diverse if race-based admissions is axed," *The Village Voice*, October 24, 2012: <http://www.villagevoice.com/2012-10-24/news/goodbye-affirmative-action/>; see also *Fisher v. University of Texas at Austin*, Brief Amici Curiae of Fordham University et al, No. 11-345. That brief, Fordham et al state the following: "What this debate has failed to recognize is that there is another constitutional provision at issue—the First Amendment—and that it should be understood to *limit* the power of the government to require all universities—public and private—to adopt completely race-neutral admission programs. We urge that First Amendment interests can be accommodated and Fourteenth Amendment and Title VI interests still vindicated by providing, as this Court often has, a degree of deference to a university's good-faith determination as to how to further its academic mission. We urge specifically that when a university (especially a private university) determines that a constitutionally permissible goal—such as diversity within its student body—is essential to providing the highest quality educational experience for its students, a university's judgment about whether a race-conscious admission program is necessary to achieve that goal should not be easily ignored." See pp. 8-9: <http://www.utexas.edu/vp/irla/Documents/ACR%20Fordham%20University%20et.%20al.pdf>

⁵² This paragraph paraphrases a section in John Aubrey Douglass, *The California Idea and American Higher Education* (Stanford University Press, second edition 2007)