GAME CHANGER OR DOOR CLOSER?

THE FUTURE OF RACE CONSCIOUS ACTION POST-FISHER

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CENTER FOR INTERSECTIONALITY AND SOCIAL POLICY STUDIES

COLUMBIA LAW SCHOOL

OCTOBER 16TH, 2012
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Speaker Biographies

**Ian Haney Lopez** is the John H. Boalt Professor of Law at the University of California, Berkeley, where he teaches in the areas of race and constitutional law. He is currently writing a book entitled *Dog Whistle Politics: How Fifty Years of Race-Baiting Wrecked the Middle Class* (Oxford University Press, forthcoming 2013). This book traces the role of racial demagoguery in American politics in creating hostility toward liberalism and in facilitating the return of Robber Baron-era policies.


Professor Haney Lopez also edited an anthology titled *Race, Law and Society* (Ashgate 2006), and co-edited *After the War on Crime: Race, Democracy, and a New Reconstruction* (NYU 2008). His numerous articles have appeared in, among others, the *Stanford Law Review, Yale Law Journal, California Law Review*, and *Pennsylvania Law Review*. His work has also been featured in more than two dozen anthologies and encyclopedias, and he has published opinion pieces in *The New York Times* and the *Los Angeles Times*.

Haney Lopez has been a visiting law professor at Harvard, Yale, and NYU, as well as a Rockefeller Fellow in Law and Humanities at Stanford University. In 2010, Haney Lopez received an Alphonse Fletcher Fellowship, which recognizes scholars whose works honors the spirit of *Brown v. Board of Education*.

M.P.A, Princeton University (1990)
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**Thomas Mariadason** is a staff attorney in the Educational Equity Program at the Asian American Legal Defense & Education Fund (AALDEF). His work focuses on addressing issues of bias harassment, racial diversity, language access, and English language learner (ELL) programs as they impact Asian students in public education systems across the country. Prior to becoming an attorney at AALDEF, Thomas worked for an innovative alternative-to-incarceration program for New York City youth. He is a graduate of the CUNY School of Law, and clerked for the Hon. Roanne L. Mann in the Eastern District of New York.
Theodore Shaw is Professor of Professional Practice at Columbia University School of Law. He is also “Of Counsel” to Fulbright & Jaworski LLP.

For twenty-three years Mr. Shaw was an attorney with the NAACP Legal Defense Fund. He served as Assistant Counsel and Director of the Education Docket (1982-1987), Western Regional Director (1987-1990), Associate Director-Counsel (1993-2004), and Director-Counsel and President (2004-2008). Mr. Shaw started his legal career as a Trial Attorney in the Civil Rights Division of the U.S. Department of Justice (1979-1982).

In addition to his current position on the faculty of Columbia Law School, Mr. Shaw has taught at the University of Michigan Law School (1990-1993), and has also held rotating chairs at CUNY and Temple Law Schools.

Mr. Shaw has testified before Congress and before state and local legislatures on numerous occasions, and he has been a frequent guest on national and local television and radio. He has authored numerous articles and opinion pieces.

Mr. Shaw has argued before the U.S. Supreme Court and before U.S. Courts of Appeals in numerous cases, and has tried education, voting rights, housing discrimination, capital punishment, and other civil rights cases in trial courts throughout the Nation. He played a key role in initiating and drafting the admissions policy that was upheld by the U.S. Supreme Court in Grutter v. Bollinger, and was lead counsel for black and Latino interveners in Gratz v. Bollinger. He has trained, worked and consulted with human rights lawyers in Africa, South America, Europe, and Asia.

Mr. Shaw is an honors graduate of Wesleyan University (1976) and a graduate of Columbia Law School (1979). He is the recipient of numerous awards, honors, and citations. He was an Aspen Institute Fellow on Law and Society (1987); a Twenty-first Century Trust Fellow on Global Interdependence (1989) (London, England); and a Salzburg Institute Fellow (1991).

Mr. Shaw currently serves on the Boards of the American Constitution Society, Common Sense, The Equal Rights Trust (London, England), The International Center for Transitional Justice, The New Press, the Poverty and Race Research Action Council, the Wesleyan University Center for Prison Education, and the Board of Deacons of the Abyssinian Baptist Church in the City of New York. He is a Trustee Emeritus of Wesleyan University.

Kimberlé Crenshaw

Race Theory: Key Documents That Shaped the Movement. Has lectured nationally and internationally on race matters, addressing audiences throughout Europe, Africa, and South America. She has facilitated workshops for civil rights activists in Brazil and in India, and for constitutional court judges in South Africa. Her work on race and gender was influential in the drafting of the equality clause in the South African Constitution. In 2001, she authored the background paper on Race and Gender Discrimination for the United Nations' World Conference on Racism and helped facilitate the inclusion of gender in the WCAR Conference Declaration. In the domestic arena, she has served as a member of the National Science Foundation's committee to research violence against women and has assisted the legal team representing Anita Hill.

In 1996, she co-founded the African-American Policy Forum to highlight the centrality of gender in racial justice discourse. Professor Crenshaw is also a founding member of the Women’s Media Initiative and writes for Ms. Magazine, the Nation and other print media and is a regular commentator on NPR’s "The Tavis Smiley Show" and MSNBC. With the support of the Rockefeller Foundation, Crenshaw facilitates the Bellagio Project, an international network of scholars working in the field of social inclusion from five continents. She was twice named Professor of the Year at UCLA Law School and received the Lucy Terry Prince Unsung Heroine Award, presented by the Lawyers Committee on Civil Rights Under Law, for her path breaking work on black women and the law. She also received the ACLU Ira Glasser Racial Justice Fellowship in 2005-2007. She has researched and lectured widely in Brazil as the Fulbright Distinguished Chair for Latin America, and was the recipient of the 2008-2009 Alphonse Fletcher Fellowship. She was awarded with an in-residence fellowship at the Center for Advanced Study in the Behavioral Science at Stanford University in 2008-2009.

Luke Harris

B.A., Saint Joseph’s University; J.D., LL.M., Yale University; Ph.D., Princeton University

Dr. Luke C. Harris, Director of Programs and Chairman of the Board of Directors of the African American policy Forum, is an Associate Professor of American Politics and Constitutional Law. He clerked for the late A. Leon Higginbotham, Jr., the distinguished scholar and former Chief Judge of the U.S. Court of Appeals for the Third Circuit; and he served as a Fulbright Scholar to England at the University of Warwick, School of Law.

Dr. Harris has served as Chair for Vassar's Department of Political Science. Dr. Harris is the author of a series of critically acclaimed articles on questions of equality in contemporary America, and he is completing a book entitled The Meaning of Equality in Post-apartheid America. Two of his essays "My Two Mothers and the Million Man March" and "The Challenge and Possibility for Black Men to Embrace Feminism" appeared in Devon Carbado’s edited anthology Black Men on Race Gender and Sexuality (New York University Press: NY, 1999).
Dr. Harris is cofounder, along with Professor Kimberle Crenshaw of the Columbia Law School, of both the African American Policy Forum, a thinktank that promotes public education and activism on feminist issues in the Black community, and the Women’s Media Initiative. He was also the co-writer and chief consultant for Kathe Sandler’s 1993 award-winning documentary film A Question of Color.

Olati Johnson

Education

- Yale University, B.A. Cum Laude and with Distinction in Literature, May 1989.

Detailed Biography

Timed Agenda

5pm—Registration and CLE Registration Opens

6–6.15pm—Program Begins
  • Welcome
  • Introductions
  • Background of the Discussion

6.15–7.30pm—Audience Q&A

7.55–8pm—Summation/Adjournment

8pm—CLE Sign-out & Reception
READINGS
**Grutter v. Bollinger**


**Background:**

*Grutter*, the opinion delivered by a 5 justice majority a mere nine years ago, is central to the arguments proffered by both sides in *Fisher* as well as spells out what is at stake. In *Grutter*, the Majority ruling authored by just about to retire Justice Sandra Day O'Connor, held that there was no Equal Protection violation by the University of Michigan Law School's tailored use of race as one of many factors in admissions decisions. Because, as the majority frames it, “diversity” is a compelling interest “in obtaining the educational benefits that flow from a diverse student body.”

Crucial to note, and likely to be discussed by the panelists, is Justice O'Connor's side note that it is likely that in 25 years (from the date of the *Grutter* decision) it is likely that a colorblind policy would be needed. Many pundits and scholars at the time noted that the clock O'Connor set in *Grutter* was aspirational at best, and foolish at worst as it is unclear how she could so accurately predict the cessation of the institutional barriers and an complex systems of structural racism still in the United States today that make affirmative action and other such race conscious programs necessary.
JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

312*312 I

A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class 313*313 of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial 314*314 promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." Ibid. In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See Regents of Univ. of Cal. v. Bakke, 438 U. S. 265 (1978). 315*315 Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. Id., at 83-84, 114-121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. Id., at 112. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." Id., at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Id., at 113. Nor does a low score automatically disqualify an applicant. Ibid. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. Id., at 114. So-called "soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution." Ibid.

The policy aspires 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." Id., at 118. 316*316 The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." Id., at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." Id., at 120. By enrolling a "'critical mass' of [underrepresented] minority students," the Law

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School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." *Id.*, at 120-121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

**B**


Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." *App.* 33-34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U. S. 656, 666 (1993).*

The District Court granted petitioner’s motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as "[a]ll persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School." *App.* to Pet. for Cert. 191a-192a.

The District Court heard oral argument on the parties’ cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School’s asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling. 318*318 The District Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School’s admissions decisions, and whether the Law School’s consideration of race in admissions decisions constituted a race-based double standard.

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School’s use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of
minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a-209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a "'determinative'" factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's "'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'" Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, 320 racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students. *Id.*, at 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995-2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made "'cell-by-cell'" comparisons between applicants of different races to determine whether a statistically significant relationship existed.
between race and admission rates. He concluded that membership in certain minority groups "is an extremely strong factor in the decision for acceptance," and that applicants from these minority groups "are given an extremely large allowance for admission" as compared to applicants who are members of nonfavored groups. *Id.*, at 218a-220a. Dr. Larnzt conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11-13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "very dramatic," negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

321*321 In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class ... was not recognized as such by *Bakke* and it is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity constituted the controlling rationale for the judgment of this Court under the analysis set forth in *Marks v. United States*, 430 U.S. 188 (1977). The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F. 3d 732, 746, 749 (CA6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body diversity on the merits and concluded it was not compelling. The fourth disseliner, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, 322*322 he believed that the Law School's use of race was not narrowly tailored to further that interest.

We granted certiorari, 537 U.S. 1043 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas*, 78 F. 3d 932 (CA5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith v. University of Wash. Law School*, 233 F. 3d 1188 (CA9 2000) (holding that it is).
We last addressed the use of race in public higher education over 25 years ago. In the landmark Bakke case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U. S. 265 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Id., at 325 (joint opinion of Brennan, White, Marshall, and Blackmun, concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Id., at 408 (opinion of STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in Bakke was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving 323*323 the competitive consideration of race and ethnic origin." Id., at 320. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." Ibid.

Since this Court's splintered decision in Bakke, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. See, e. g., Brief for Judith Areen et al. as Amici Curiae 12-13 (law school admissions programs employ "methods designed from and based on Justice Powell's opinion in Bakke"); Brief for Amherst College et al. as Amici Curiae 27 ("After Bakke, each of the amici (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion ... and set sail accordingly"). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke, 438 U. S., at 289-290. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." Id., at 299. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" as an unlawful interest in racial balancing. Id., at 306-307. Second, Justice Powell rejected an interest in remedying societal discrimination 324*324 because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." Id., at 310. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." Id., at 306, 310.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." Id., at 311. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." Id., at 312, 314. Justice Powell emphasized that nothing less than the "nation's future depends upon leaders trained through wide
exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.*, at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967)). In seeking the "right to select those students who will contribute the most to the `robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." *438 U.S.*, at 313. Both "tradition and experience lend support to the view that the contribution of diversity is substantial." *Id.*

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*, at 314. For Justice Powell, "[i]t 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 325*325 can justify the use of race. *Id.*, at 315. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*. In that case, we explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of those Members who concurred in the judgments on the narrowest grounds," *430 U.S.*, at 193 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, "[t]his test is more easily stated than applied to the various opinions supporting the result in *Bakke*." *Nichols v. United States*, 511 U.S. 738, 745-746 (1994). Compare, e. g., *Johnson v. Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood v. Texas*, 236 F. 3d 256, 274-275 (CA5 2000) (Hopwood II) (same); *Hopwood I*, 78 F. 3d 932 (CA5 1996) (same), with *Smith v. University of Wash. Law School*, 233 F. 3d, at 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, supra, at 745-746. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

**326*326 B**

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protect[s] persons, not groups," all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original; internal quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U. S. 1, 11 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña*, 515 U. S., at 227.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into
the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Richmond v. J. A. Croson Co., 488 U. S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." Ibid.

Strict scrutiny is not "strict in theory, but fatal in fact." Adarand Constructors, Inc. v. Peña, supra, at 237 (internal quotation marks and citation omitted). Although all governmental 327*327 uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U. S., at 229-230. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." Id., at 230. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. See Gomillion v. Lightfoot, 364 U. S. 339, 343-344 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In Adarand Constructors, Inc. v. Peña, we made clear that strict scrutiny must take "'relevant differences' into account." 515 U. S., at 228. Indeed, as we explained, that is its "fundamental purpose." Ibid. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

III

A

With these principles in mind, we turn to the question whether the Law School’s use of race is justified by a compelling state interest. Before this Court, as they have 328*328 throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondent Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School’s argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since Bakke. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, e. g., Richmond v. J. A. Croson Co., supra, at 493 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since Bakke, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.
The Law School’s educational judgment 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. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. 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. See Regents of Univ. of Mich. v. Ewing, 474 U. S. 214, 225 (1985); Board of Curators of Univ. of Mo. 329*329 v. Horowitz, 435 U. S. 78, 96, n. 6 (1978); Bakke, 438 U. S., at 319, n. 53 (opinion of Powell, J).

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. See, e. g., 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 Univ. of State of N. Y., 385 U. S., at 603. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." Bakke, supra, at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the `robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U. S., at 313 (quoting Keyishian v. Board of Regents of Univ. of State of N. Y., supra, at 603). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U. S., at 318-319.

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a `critical mass' of minority students." Brief for Respondent Bollinger et al. 13. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." Bakke, 438 U. S., at 330*330 307 [opinion of Powell, J]. That would amount to outright racial balancing, which is patently unconstitutional. Ibid.; Freeman v. Pitts, 503 U. S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); Richmond v. J. A. Croson Co., 488 U. S., at 507. Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." Id., at 246a, 244a.

The Law School’s claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as Amici Curiae 3; see, e. g., W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining
the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as Amici Curiae 331*331 5; Brief for General Motors Corp. as Amicus Curiae 3-4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as Amici Curiae 5. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. Ibid. At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." Ibid, (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." Id., at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." Ibid.

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. Plyler v. Doe, 457 U. S. 202, 221 (1982). This Court has long recognized that "education ... is the very foundation of good citizenship." Brown v. Board of Education, 347 U. S. 483, 493 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as amicus curiae, affirms that "[e]nsuring that public institutions are open and available to all segments of American 332*332 society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as Amicus Curiae 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Ibid. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Sweatt v. Painter, 339 U. S. 629, 634 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as Amicus Curiae 5-6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. Id., at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See Sweatty, Painter, supra, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society 333*333 may participate in the educational institutions that provide the training and education necessary to succeed in America.
The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose." Shaw v. Hunt, 517 U. S. 899, 908 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Richmond v. J. A. Croson Co., 488 U. S., at 493 (plurality opinion).

Since Bakke, we have had no occasion to define the contours of the narrow-tailing inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to JUSTICE KENNEDY’S assertions, we do not "abando[n] strict scrutiny,” see post, at 394 (dissenting opinion). Rather, as we have already explained, supra, at 327, we adhere to Adarand’s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account." 515 U. S., at 228 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." Bakke, 438 U. S., at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "‘plus’ in a particular applicant’s file,” without "insulat[ing] the individual from comparison with all other candidates for the available seats." Id., at 317. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." Ibid.

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See id., at 315-316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Ibid. Universities can, however, consider race or ethnicity more flexibly as a "‘plus’ factor in the context of individualized consideration of each and every applicant. Ibid.

335*335 We are satisfied that the Law School’s admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Richmond v. J. A. Croson Co., supra, at 496 (plurality opinion). Quotas "impose a fixed number or
Here, the Law School 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. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in Gratz v. Bollinger, ante, p. 244, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See ante, at 271-272 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." Bakke, supra, at 317 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in Bakke, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect 338*338 to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittes who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. Id., at 118-119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e. g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." Id., at 83-84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondent Bollinger et al. 10; App. 121-122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this 339*339 flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. JUSTICE KENNEDY speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. Post, at 389 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in Bakke, and indeed of any plan that uses race as one of many factors. See 438 U. S., at 316 ("When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor").

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence
or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (alternatives must serve the interest "about as well"); *Richmond v. J. A. Croson Co.*, 488 U. S., at 509-510 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Ed.*, *supra*, at 280, n. 6 (narrow tailoring 340*340 "require[s] consideration of "lawful alternative and less restrictive means").

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." App. to Pet. for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as Amicus Curiae 14-18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

341*341 We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke*, 438 U. S., at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 630 (1990) (O'CONNOR, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke*, *supra*, at 317 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant

"will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname... His qualifications would have been weighed fairly and competitively,
and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 U.S., at 318.

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmental imposition of discrimination based on race." Palmore v. Sidoti, 466 U.S. 429, 432 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrinining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. United States v. Lopez, 514 U.S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." Richmond v. J. A. Croson Co., 488 U.S., at 510 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 343-345 58 Chicago Bar Rec. 282, 293 (May-June 1977) ("It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all").

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondent Bollinger et al. 34; Bakke, supra, at 317-318 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause 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. Consequently, petitioner's statutory claims based on Title VI and 42 U. S. C. § 1981 also fail. See Bakke, supra, at 287 (opinion of Powell, J.) ("Title VI . . . proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); General Building Contractors Assn., Inc. v. Pennsylvania, 458 U. S. 375, 389-391 (1982) (the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause). The judgment 344*344 of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," ante, at 342, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422-423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR, 20th Sess., Res. Supp. (No. 14), p. 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." Ibid.; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR, 34th Sess., Res. Supp. (No. 46), p. 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating de facto equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").

The Court further observes that "[i]t has been 25 years since Justice Powell [in Regents of Univ. of Cal. v. Bakke, 438 U. S. 265 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." Ante, at 343. For at least part of that 345*345 time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See Hopwood v. Texas, 78 F. 3d 932 (CA5 1996); cf. Wessmann v. Gittens, 160 F. 3d 790 (CA1 1998); Tuttle v. Arlington Cty. School Bd., 195 F. 3d 698 (CA4 1999); Johnson v. Board of Regents of Univ. of Ga., 263 F. 3d 1234 (CA11 2001). Moreover, it was only 25 years before Bakke that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See Brown v. Board of Education, 347 U. S. 483 (1954); cf. Cooper v. Aaron, 358 U. S. 1 (1958).

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. See, e. g., Gratz v. Bollinger, ante, at 298-301 (GINSBURG, J., dissenting); Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 272-274 (1995) (GINSBURG, J., dissenting); Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L. Rev. 1251, 1276-1291, 1303 (1998). As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? p. 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (as visited June 16, 2003, and available in Clerk of Court's case file). And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See id., at 11; Brief for National Urban League et al. as Amici Curiae 11-12.
(citing General Accounting Office, Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area 17 (2002)).

346*346 However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, A National Priority: Americans Speak on Teacher Quality 2, 11 (2002) (public opinion research conducted for Educational Testing Service); No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1806, 20 U. S. C. § 7231 (2000 ed., Supp. I), it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.[*]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

I join the opinion of THE CHIEF JUSTICE. As he demonstrates, the University of Michigan Law School's mystical 347*347 "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.

I also join Parts I through VII of JUSTICE THOMAS's opinion. I find particularly unanswerable his central point: that the allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

I add the following: The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "'cross-racial understanding,'" ante, at 330, and "'better preparation of students for an increasingly diverse workforce and society,'" ibid., all of which is necessary not only for work, but also for good "citizenship," ante, at 331. This is not, of course, an "educational benefit" on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it 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. And therefore: If it is appropriate for the University 348*348 of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, particularly appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.
Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s Grutter-Gratz split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," ante, at 337, and sufficiently avoids "separate admissions tracks," ante, at 334, to fall under Grutter rather than Gratz. Some will focus on whether a university has gone beyond the bounds of a "good-faith effort" and has so zealously pursued its "critical mass" as to make it an unconstitutional de facto quota system, rather than merely "a permissible goal." Ante, at 335 (quoting Sheet Metal Workers v. EEOC, 478 U. S. 421, 495 (1986) (O’CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in Grutter; and while the opinion accords "a degree of deference to a university's academic decisions," ante, at 328, "deference does not imply 349*349 abandonment or abdication of judicial review," Miller-El v. Cockrell, 537 U. S. 322, 340 (2003).) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in Grutter. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical Grutter-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I-VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today’s majority:

"[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of 350*350 their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury." What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 The Frederick Douglass Papers 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."
No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only 351*351 one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. See ante, at 343 (stating that racial discrimination will no longer be narrowly tailored, or "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. Ante, at 326. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in Korematsu v. United States, 323 U.S. 214 (1944). There the Court held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." Id., at 216. This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest," see, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.). A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of Korematsu is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy 352*352 past discrimination for which it is responsible. Richmond v. J. A. Croson Co., 488 U.S. 469, 504 (1989).

The contours of "pressing public necessity" can be further discerned from those interests the Court has rejected as bases for racial discrimination. For example, Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986), found unconstitutional a collective-bargaining agreement between a school board and a teachers' union that favored certain minority races. The school board defended the policy on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. See Brief for Respondents, O. T. 1984, No. 84-1340, pp. 27-28; 476 U.S., at 315 (STEVENS, J., dissenting) ([A]n integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty"). Nevertheless, the Court found that the use of race violated the Equal Protection Clause, deeming both asserted state interests insufficiently compelling. Id., at 275-276 (plurality opinion); id., at 295 (White, J., concurring in judgment) ("None of the interests asserted by the [school board] ... justify this racially discriminatory layoff policy").

[2]
An even greater governmental interest involves the sensitive role of courts in child custody determinations. In *Palmlove v. Sidoti*, 466 U.S. 429 (1984), the Court held that even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage. *Id.*, at 433 (finding the interest "substantial" but 353*353 holding the custody decision could not be based on the race of the mother's new husband).

Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. See *Wygant, supra, at 276* (plurality opinion); *Croson, 488 U.S., at 496-498 (plurality opinion); id., at 520-521 (SCALIA, J., concurring in judgment). "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant, supra, at 276* (plurality opinion). But see *Gratz v. Bollinger, ante*, p. 298 (GINSBURG, J., dissenting).

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." Cf. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (*per curiam*) (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); *Croson*, *supra*, at 521 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]").

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society." 354*354 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment).

II

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondent *Bollinger* et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means, is the 355*355 mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" not simply the forbidden interest in "racial balancing," *ante*, at 330, that the majority expressly rejects?
A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably. Compare ante, at 328 ("[T]he Law School has a compelling interest in attaining a diverse student body"), with ante, at 333 (referring to the "compelling interest in securing the educational benefits of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the educational benefits that are the end, or allegedly compelling state interest, not "diversity." But see ante, at 332 (citing the need for "openness and integrity of the educational institutions that provide [legal] training" without reference to any consequential educational benefits).

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondent Bollinger et al. 33-36. In other words, the Law School seeks to improve marginally the education it offers 356*356 without sacrificing too much of its exclusivity and elite status.[4]

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." Ante, at 333. No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling, see Part I, supra, or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination. In the absence of any explanation, one might expect the Court to fall back on the judicial policy of stare decisis. But the Court eschews even this weak defense of its holding, shunning an analysis of the extent to which Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), 357*357 is binding, ante, at 325, in favor of an unfounded wholesale adoption of it.

Justice Powell's opinion in Bakke and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another. This "we know it when we see it" approach to evaluating state interests is not capable of judicial application. Today, the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class. I can only presume that the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle. See Part VI, infra.

B
Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

1

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Additionally, circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity. Evidence that States, in general, engage in a certain activity by no means demonstrates that the activity constitutes a pressing public necessity, given the expansive role of government in today’s society. The fact that some fraction of the States reject a particular enterprise, however, creates a presumption that the enterprise itself is not a compelling state interest. In this sense, the absence of a public, American Bar Association (ABA) accredited, law school in Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island, see ABA-LSAC Official Guide to ABA-Approved Law Schools (W. Margolis, B. Gordon, J. Puskarz, & D. Rosenlieb eds. 2004) (hereinafter ABA-LSAC Guide), provides further evidence that Michigan’s maintenance of the Law School does not constitute a compelling state interest.

2

As the foregoing makes clear, Michigan has no compelling interest in having a law school at all, much less an elite one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

This Court has limited the scope of equal protection review to interests and activities that occur within that State’s jurisdiction. The Court held in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), that Missouri could not satisfy the demands of “separate but equal” by paying for legal training of blacks at neighboring state law schools, while maintaining a segregated law school within the State. The equal protection

"obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." Id., at 350 (emphasis added).

The Equal Protection Clause, as interpreted by the Court in Gaines, does not permit States to justify racial discrimination on the basis of what the rest of the Nation "may do or fail to do." The only interests that can satisfy the Equal 359*359 Protection Clause's demands are those found within a State's jurisdiction.

The only cognizable state interests vindicated by operating a public law school are, therefore, the education of that State’s citizens and the training of that State’s lawyers. James Campbell’s address at the opening of the Law Department at the University of Michigan on October 3, 1859, makes this clear:

"It not only concerns the State that every one should have all reasonable facilities for preparing himself for any honest position in life to which he may aspire, but it also concerns the community that the Law
should be taught and understood. ... There is not an office in the State in which serious legal inquiries may not frequently arise. ... In all these matters, public and private rights are constantly involved and discussed, and ignorance of the Law has frequently led to results deplorable and alarming. ... [I]n the history of this State, in more than one instance, that ignorance has led to unlawful violence, and the shedding of innocent blood." E. Brown, Legal Education at Michigan 1859-1959, pp. 404-406 (1959) (emphasis added).

The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the Law School made up less than 6% of applicants to the Michigan bar, Michigan Lawyers Weekly, available at http://www.michiganlawyersweekly.com/barpassers0202.cfm,barpassers0702.cfm (all Internet materials as visited June 13, 2003, and available in Clerk of Court's case file), even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. Ibid. Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. ABA-LSAC Guide 427. Thus, while a mere 27% of the Law School's 2002 entering class is from Michigan, see University of Michigan Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm, only half of these, it appears, will stay in Michigan.

In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. ABA-LSAC Guide 775. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.

Again, the fact that few States choose to maintain elite law schools raises a strong inference that there is nothing compelling about elite status. Arguably, only the public law schools of the University of Texas, the University of California, Berkeley (Boalt Hall), and the University of Virginia maintain the same reputation for excellence as the Law School. Ibid. Two of these States, Texas and California, are so large that they could reasonably be expected to provide elite legal training at a separate law school to students who will, in fact, stay in the State and provide legal services to its citizens. And these two schools far outshine the Law School in producing in-state lawyers. The University of Texas, for example, sends over three-fourths of its graduates on to work in the State of Texas, vindicating the State's interest (compelling or not) in training Texas' lawyers. Id., at 691.

**361*361 3**

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies.

IV

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of ... the academic quality of all admitted students," ante, at 340, need not be considered before racial discrimination can be employed. In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this
context, that any race-neutral alternative work “‘about as well.’” Ante, at 339 (quoting Wygant, 476 U. S., at 280, n. 6). The majority errs, however, because race-neutral alternatives must only be "workable," ante, at 339, and do "about as well" in vindicating the compelling state interest. The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. See Part III-B, supra. Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, 362*362 see Brief for United States as Amicus Curiae 13-14, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.

A

The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of "educational autonomy" grounded in the First Amendment. Ante, at 329. In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.

The constitutionalization of "academic freedom" began with the concurring opinion of Justice Frankfurter in Sweezy v. New Hampshire, 354 U. S. 234 (1957). Sweezy, a Marxist economist, was investigated by the Attorney General of New Hampshire on suspicion of being a subversive. The prosecution sought, inter alia, the contents of a lecture Sweezy had given at the University of New Hampshire. The Court held that the investigation violated due process. Id., at 254.

Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation. Id., at 256-267 (opinion concurring in result). Much of the rhetoric in Justice Frankfurter's opinion was devoted to the personal right of Sweezy to free speech. See, e. g., id., at 265 ("For a citizen to be 363*363 made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling"). Still, claiming that the United States Reports "need not be burdened with proof," Justice Frankfurter also asserted that a "free society" depends on "free universities" and "[t]his means the exclusion of governmental intervention in the intellectual life of a university." Id., at 262. According to Justice Frankfurter: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Id., at 263 (citation omitted).

In my view, "[i]t is the business" of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in Bakke. Justice Powell, for his part, relied only on Justice Frankfurter's opinion in Sweezy and the Court's decision
in *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions. *Bakke*, 438 U.S., at 312, *Keyishian* provides no answer to the question whether the Fourteenth Amendment's restrictions are relaxed when applied to public universities. In that case, the Court held that state statutes and regulations designed to prevent the "appointment or retention of `subversive' persons in state employment," 385 U.S., at 592, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to university 364*364 faculty members, although the Court appeared sympathetic to the notion of academic freedom, calling it a "special concern of the First Amendment." *Id.*, at 603. Again, however, the Court did not relax any independent constitutional restrictions on public universities.

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

**B**

**1**

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. See *ante*, at 330-332; but see also Rothman, Lipset, & Nevitte, Racial Diversity Reconsidered, 151 Public Interest 25 (2003) (finding that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality). The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, e.g., Flowers & Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen, The Color of Success: African-American College Student 365*365 Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white colleges).

At oral argument in *Gratz v. Bollinger*, *ante*, p. 244, counsel for respondents stated that "most every single one of [the HBCs] do have diverse student bodies." Tr. of Oral Arg. in No. 02-516, p. 52. What precisely counsel meant by "diverse" is indeterminate, but it is reported that in 2000 at Morehouse College, one of the most distinguished HBCs in the Nation, only 0.1% of the student body was white, and only 0.2% was Hispanic. College Admissions Data Handbook 2002-2003, p. 613 (43d ed. 2002) (hereinafter College Admissions Data Handbook). And at Mississippi Valley State University, a public HBC, only 1.1% of the freshman class in 2001 was white. *Id.*, at 603. If there is a "critical mass" of whites at these institutions, then "critical mass" is indeed a very small proportion.

The majority grants deference to the Law School's "assessment that diversity will, in fact, yield educational benefits," *ante*, at 328. It follows, therefore, that an HBC's assessment that racial homogeneity will yield educational benefits would similarly be given deference. An HBC's rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the
majority's view of the Equal Protection Clause. But see United States v. Fordice, 505 U. S. 717, 748 (1992) (THOMAS, J., concurring) ("Obviously, a State cannot maintain ... traditions by closing particular institutions, historically white or historically black, to particular racial groups"). Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation.

2

Moreover one would think, in light of the Court's decision in United States v. Virginia, 518 U. S. 515 (1996), that before being given license to use racial discrimination, the Law School would be required to radically reshape its admissions process, even to the point of sacrificing some elements of its character. In Virginia, a majority of the Court, without a word about academic freedom, accepted the all-male Virginia Military Institute's (VMI) representation that some changes in its "adversative" method of education would be required with the admission of women, id., at 540, but did not defer to VMI's judgment that these changes would be too great. Instead, the Court concluded that they were "manageable." Id., at 551, n. 19. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. Id., at 533; Craig v. Boren, 429 U. S. 190, 197 (1976). So in Virginia, where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference. Apparently where the status quo being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

C

Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U. S., at 544-545. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

367*367 The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment ... on the basis of race ... in the operation of ... public education,"[8] Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics.[9] University of California Law and Medical School Enrollments, available at http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," ante, at 339, rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a
true 368*368meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot. I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late-19th century. See H. Wechsler, The Qualified Student 16-39 (1977) (hereinafter Qualified Student). Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplanted, and later virtually replaced (at least in the Midwest), the prior regime of rigorous 369*369 subject-matter entrance examinations. Id., at 57-58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see ante, at 340, are in many ways the descendents of the certificate system.

Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. See Qualified Student 155-168 (Columbia); H. Broun & G. Britt, Christians Only: A Study in Prejudice 53-54 (1931) (Harvard).

Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that "[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews." Letter from Herbert E. Hawkes, dean of Columbia College, to E. B. Wilson, June 16, 1922 (reprinted in Qualified Student 160-161). In other words, the tests were adopted with full knowledge of their disparate impact. Cf. DeFunis v. Odegaard, 416 U.S. 312, 335 (1974) (per curiam) (Douglas, J., dissenting).

Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools 370*370 continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. See Part IV, supra. The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test. See App. 156-203 (showing that, between 1995 and 2000, the Law School admitted 37 students—27 of whom were black; 31 of whom were "underrepresented minorities"—with LSAT scores of 150 or lower). And the Law
School's amici cannot seem to agree on the fundamental question whether the test itself is useful. Compare Brief for Law School Admission Council as Amicus Curiae 12 ("LSAT scores . . . are an effective predictor of students' performance in law school") with Brief for Harvard Black Law Students Association et al. as Amici Curiae 27 ("Whether [the LSAT] measure[s] objective merit . . . is certainly questionable").

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.

The 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. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes 371*371 rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, see Adarand, 515 U. S., at 239 (SCALIA, J., concurring in part and concurring in judgment), and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are per se harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.

Putting aside what I take to be the Court's implicit rejection of Adarand's holding that beneficial and burdensome racial classifications are equally invalid, I must contest the notion that the Law School's discrimination benefits those admitted as a result of it. The Court spends considerable time discussing the impressive display of amicus support for the Law School in this case from all corners of society. Ante, at 330-331. But nowhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605-1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom).

The silence in this case is deafening to those of us who view higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, 372*372 credentialing process. The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite
institutions. See T. Sowell, Race and Culture 176-177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begins at the top can mean that such students are generally overmatched throughout all levels of higher education"). Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, see University of Michigan Law School Student Handbook 2002-2003, pp. 39-40 (noting the presence of a "diversity plan" for admission to the review), and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities,"[21] instead continuing their social experiments on other people's children.

373*373 Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." Adarand, 515 U. S., at 241 (THOMAS, J., concurring in part and concurring in judgment). "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." Ibid.

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. See Brief for RespondentBollinger et al. 6. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"? Ante, at 332.

Finally, the Court's disturbing reference to the importance of the country's law schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," ibid., through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly 374 rejected the remediating of societal discrimination as a justification for governmental use of race. Wygant, 476 U. S., at 276 (plurality opinion); Croson, 488 U. S., at 497 (plurality opinion); id., at 520-521 (SCALIA, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remediying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color—an endeavor I have previously rejected. See Holder v. Hall, 512 U. S. 874, 899 (1994) (THOMAS, J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." Defunis, 416 U. S., at 342 (Douglas, J., dissenting).

VII
As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree.

A

First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains that it does not. See Brief for Respondent Bollinger et al. 32, n. 50, and 6-7, n. 7. I join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. Ante, at 326-327. Under today's 375*375 decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. This is so because preferring black to Hispanic applicants, for instance, does nothing to further the interest recognized by the majority today. [14] Indeed, the majority describes such racial balancing as "patently unconstitutional." Ante, at 330. Like the Court, ante, at 336, I express no opinion as to whether the Law School's current admissions program runs afoul of this prohibition.

B

The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. Ante, at 343. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white 376*376 students is shrinking or will be gone in that timeframe. [15] In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. [16] In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission Council, National Statistical Report (1994) (hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time. [17]

377*377 Indeed, the very existence of racial discrimination of the type practiced by the Law School may impede the narrowing of the LSAT testing gap. An applicant's LSAT score can improve dramatically with preparation, but such preparation is a cost, and there must be sufficient benefits attached to an improved score to justify additional study. Whites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School, and thus whites aspiring to admission at the Law School have every incentive to improve their score to levels above that range. See App. 199 (showing that in 2000, 209 out of 422 white applicants were rejected in this scoring range). Blacks, on the other hand, are nearly guaranteed admission if they score above 155. Id., at 198 (showing that 63 out of 77 black applicants are accepted with LSAT scores above 155). As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score. It is far from certain that the LSAT test-taker's behavior is responsive to the Law School's admissions policies. [18] Nevertheless, the possibility remains that this racial discrimination will help fulfill the bigot's prophecy about black underperformance—just as it confirms the conspiracy theorist's belief that "institutional racism" is at fault for every racial disparity in our society.

38
I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School’s educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to “eliminate” the [perceived] need for any racial or ethnic” discrimination because the academic credentials gap will still be there. Ante, at 343 (quoting Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chicago Bar Rec. 282, 293 (May-June 1977)). The Court defines this time limit in terms of narrow tailoring, see ante, at 343, but I believe this arises from its refusal to define rigorously the broad state interest vindicated today. Cf. Part II, supra. With these observations, I join the last sentence of Part III of the opinion of the Court.

** **

For the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court’s opinion and the judgment.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. Ante, at 333; see also Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental 379*379 purpose"). I do not believe, however, that the University of Michigan Law School’s (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a “critical mass” of underrepresented minority students. Brief for Respondent Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.

As we have explained many times, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223 (1995) (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.)). Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race "fit" a compelling state interest "with greater precision than any alternative means." Id., at 280, n. 6; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.) ("When [political judgments] touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

Before the Court’s decision today, we consistently applied the same strict scrutiny analysis regardless of the government’s purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Adarand, supra, at 226; Fullilove, supra, at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the
most exact connection between justification and classification"). We likewise rejected 380*380 calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Bakke, supra, at 314.*

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.

Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.'" *Ante, at 328* (quoting Brief for Respondent *Bollinger* et al. i). They contend that a "critical mass" of underrepresented minorities is necessary to further that interest.*Ante, at 330.* Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. See App. to Pet. for Cert. 211 a; Brief for Respondent *Bollinger* et al. 26. These objectives indicate that "critical mass" relates to the size of the student body. *Id,* at 5 (claiming that the Law School has enrolled "critical mass," or "enough minority students to provide meaningful integration of its classrooms and residence halls"). Respondents further claim that the Law School is achieving "critical mass." *Id,* at 4 (noting that the Law School's goals have been "greatly furthered by the presence of... a 'critical mass' of" minority students in the student body).

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of each underrepresented minority 381*381 group. See, e.g., *id,* at 49, n. 79 ("The Law School's... current policy... provide[s] a special commitment to enrolling a 'critical mass' of 'Hispanics'"). But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass:*

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

382*382 These different numbers, moreover, come only as a result of substantially different treatment among the three under-represented minority groups, as is apparent in an example offered by the Law School and highlighted by the Court: The school asserts that it "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Ante, at 338* (citing Brief for Respondent *Bollinger* et al. 10).
Specifically, the Law School states that "[s]ixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 [Grade Point Average (GPA)] and a [score of] 159 or higher on the [Law School Admission Test (LSAT)]" while a number of Caucasian and Asian-American applicants with similar or lower scores were admitted. *Ibid.*

Review of the record reveals only 67 such individuals. Of these 67 individuals, 56 were Hispanic, while only 6 were African-American, and only 5 were Native American. This discrepancy reflects a consistent practice. For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. App. 200-201. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. *Id.,* at 198. Likewise, that same year, 16 Hispanics who scored between a 151-153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. *Id.,* at 200-201. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted. *Id.,* at 198.

These statistics have a significant bearing on petitioner's case. Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are in need of in order to achieve "critical mass" or further student body diversity. They certainly have not explained why Hispanics, who they 383*383 have said are among "the groups most isolated by racial barriers in our country," should have their admission capped out in this manner. Brief for Respondent Bollinger et al. 50. True, petitioner is neither Hispanic nor Native American. But the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of "critical mass" is simply a sham. Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation.

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Ante,* at 329 (quoting *Bakke,* 438 U.S., at 307 *(opinion of Powell, J.)*). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante,* at 330. The Court concludes, however, that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke,* only pays "'[s]ome attention to numbers." *Ante,* at 336 (quoting *Bakke, supra, at 323*).

But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

<table>
<thead>
<tr>
<th>Number of applicants</th>
<th>% of</th>
<th>Number of admitted</th>
<th>% of</th>
<th>Number of African-American applicants who were admitted</th>
<th>% of</th>
<th>Law school American</th>
<th>% of</th>
<th>School American</th>
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<tr>
<td>384*384</td>
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Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Applicants</th>
<th>African-American</th>
<th>Admitted</th>
<th>American</th>
<th>African-American</th>
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</thead>
<tbody>
<tr>
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<td>100</td>
<td>25</td>
<td>50</td>
<td>75%</td>
<td>18.75%</td>
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<tr>
<td>1996</td>
<td>120</td>
<td>30</td>
<td>60</td>
<td>50%</td>
<td>16.67%</td>
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<tr>
<td>1997</td>
<td>140</td>
<td>35</td>
<td>70</td>
<td>50%</td>
<td>17.86%</td>
</tr>
<tr>
<td>1998</td>
<td>160</td>
<td>40</td>
<td>80</td>
<td>50%</td>
<td>18.75%</td>
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<tr>
<td>1999</td>
<td>180</td>
<td>45</td>
<td>90</td>
<td>50%</td>
<td>19.44%</td>
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<tr>
<td>2000</td>
<td>200</td>
<td>50</td>
<td>100</td>
<td>50%</td>
<td>19.60%</td>
</tr>
</tbody>
</table>
themselves emphasize that the number of underrepresented minority students admitted to the Law

| 1995 | 4147 | 404 | 9.7% | 1130 | 106 | 9.4% |
| 1996 | 3677 |
| 1997 | 3429 | 320 | 9.3% | 1218 |
| 1998 | 3537 | 304 | 8.6% | 1310 | 103 | 7.9% |
| 1999 | 3400 |
| 2000 | 3432 | 259 | 7.5% | 1249 |

Table 2

| 1995 | 4147 | 213 | 5.1% | 1130 | 56 |
| 3677 |
| 1997 | 3429 | 163 |
| 1998 | 3537 | 150 | 4.2% | 1310 | 55 |
| 1999 | 3400 | 152 | 4.5% | 1280 | 48 | 3.8% |
| 2000 | 3432 | 168 |

Table 3

| 1995 | 4147 | 45 | 1.1% | 1130 | 14 | 1.2% |
| 3677 |
| 1997 | 3429 | 37 | 1.1% | 1218 | 19 |
| 1998 | 3537 | 40 | 1.1% | 1310 | 18 | 1.4% |
| 1999 | 3400 | 25 | 0.7% |
| 2000 | 3432 | 35 | 1.0% | 1249 | 14 | 1.1% |

385*385 For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law
School would be significantly smaller if the race of each applicant were not considered. See App. to Pet. for Cert. 223a; Brief for Respondent Bollinger et al. 6 (quoting App. to Pet. for Cert. 299a). But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. See Brief for Respondent Bollinger et al. 43, n. 70 (discussing admissions officers’ use of “periodic reports” to track “the racial composition of the developing class”).

Not only do respondents fail to explain this phenomenon, they attempt to obscure it. See id., at 32, n. 50 (“The Law School’s minority enrollment percentages … diverged from the percentages in the applicant pool by as much as 17.7% from 1995-2000”). But the divergence between the percentages of underrepresented minorities in the applicant pool and in the enrolled classes is not the only relevant comparison. In fact, it may not be the most relevant comparison. The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School’s admissions program 386*386 that the Court finds appealing, see ante, at 337-338, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a “critical mass,” but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls “patently unconstitutional.” Ante, at 330.

Finally, I believe that the Law School’s program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School’s use of race in admissions. We have emphasized that we will consider “the planned duration of the remedy” in determining whether a race-conscious program is constitutional. Fulfillove, 448 U.S., at 510 (Powell, J., concurring); see also United States v. Paradise, 480 U. S. 149, 171 (1987) (“In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . duration of the relief”). Our previous cases have required some limit on the duration of programs such as this because discrimination on the basis of race is invidious.

The Court suggests a possible 25-year limitation on the Law School’s current program. See ante, at 343. Respondents, on the other hand, remain more ambiguous, explaining that “[t]he Law School of course recognizes that race-conscious programs must have reasonable durational limits, and the Sixth Circuit properly found such a limit in the Law School’s resolve to cease considering race when genuine race-neutral alternatives become available.” Brief for Respondent Bollinger et al. 32. These discussions of a time 387*387 limit are the vaguest of assurances. In truth, they permit the Law School’s use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny—that a program be limited in time—is casually subverted.

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School’s program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of “fit” between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.
JUSTICE KENNEDY, dissenting.

The separate opinion by Justice Powell in Regents of Univ. of Cal. v. Bakke, 438 U. S. 265, 289-291, 315-318 (1978), is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. Id., at 312-314; ante, at 329. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among 388*388 students can further its educational task, when supported by empirical evidence. Ante, at 329-331.

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. Bakke, supra, at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). This Court has reaffirmed, subsequent to Bakke, the absolute necessity of strict scrutiny when the State uses race as an operative category. Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"); Richmond v. J. A. Croson Co., 488 U. S. 469, 493-494 (1989); see id., at 519 (KENNEDY, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts"). The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's (Law 389*389 School) assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." Ante, at 330; see also Bakke, supra, at 307 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition
becomes tight and where any given applicant’s chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.

390*390 The District Court relied on this uncontested fact to draw an inference that the Law School’s pursuit of critical mass mutated into the equivalent of a quota. 137 F. Supp. 2d 821, 851 (ED Mich. 2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987-1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school’s miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondent Bollinger et al. 49, n. 79.

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of enrolled minorities</th>
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<tbody>
<tr>
<td>1987</td>
<td>13.6%</td>
</tr>
<tr>
<td>1988</td>
<td>14.4%</td>
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<td>1990</td>
<td>13.4%</td>
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<td>1998</td>
<td>13.8%</td>
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The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict 391 scrutiny requires the Law School to overcome the inference. Whether the objective of critical mass “is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,” and so risks compromising individual assessment. Bakke, 438 U. S., at 289 (opinion of Powell, J). In this respect the Law School program compares unfavorably with the experience of Little Ivy League colleges. Amicus Amherst College, for example, informs us that the offers it extended to students of African-American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers extended, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. See Brief for Amherst College et al. as Amici Curiae 10-11. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.

The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way. Adarand Constructors,515 U. S., at 224. At the very least, the constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool, discussed by THE CHIEF JUSTICE, ante, at
380-386, require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither.

The obvious tension between the pursuit of critical mass and the requirement of individual review increased by the end of the admissions season. Most of the decisions where race may decide the outcome are made during this period. See supra, at 389. The admissions officers consulted the daily reports which indicated the composition of the incoming class along racial lines. As Dennis Shields, Director of Admissions from 1991 to 1996, stated, "the further [he] went into the [admissions] season the more frequently [he] would 392want to look at these [reports] and see the change from day-to-day." These reports would "track exactly where [the Law School] stood at any given time in assembling the class," and so would tell the admissions personnel whether they were short of assembling a critical mass of minority students. Shields generated these reports because the Law School's admissions policy told him the racial makeup of the entering class was "something [he] need[ed] to be concerned about," and so he had "to find a way of tracking what's going on." Deposition of Dennis Shields in Civ. Action No. 97-75928, pp. 129-130, 141 (ED Mich., Dec. 7, 1998).

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.

The Law School made no effort to guard against this danger. It provided no guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students. The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept. The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning. The Little Ivy League colleges, for instance, do not keep ongoing tallies of racial or ethnic composition of their entering students. See Brief for Amherst College et al. as Amici Curiae 10.

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Dean Allan Stillwagon, who directed the Law School's Office of Admissions from 1979 to 1990, explained the difficulties he encountered in defining racial groups entitled to benefit under the Law School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a
policy that they prefer to justify on other grounds." Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol’y Rev. 1, 34 (2002) (citing Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 577-578 (2000); Rubenfeld, Affirmative Action, 107 Yale L. J. 427, 471 (1997)). This is not to suggest the faculty at Michigan or other law schools do not pursue aspirations they consider laudable and consistent with our constitutional 394*394 traditions. It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking. Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. Ante, at 341-343. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

As to the interpretation that the opinion contains its own self-destruct mechanism, the majority's abandonment of strict scrutiny undermines this objective. Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith. The majority admits as much: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." Ante, at 343 (quoting Brief for Respondent Bollinger et al. 34).

If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes. Other programs do exist which will be more effective in 395*395 bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it.

It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.


Briefs of amici curiae urging affirmance were filed for the State of Maryland et al. by J. Joseph Curran, Jr., Attorney General of Maryland, Andrew H. Baida, Solicitor General, Mark J. Davis and William F. Brockman, Assistant Attorneys General, Eliot Spitzer, Attorney General of New York, Caitlin J. Halligan, Solicitor General, Michelle Aronowitz, Deputy Solicitor General, and Julie

As the Court explains, the admissions policy challenged here survives review under the standards stated in Adarand Constructors, Inc. v. Peña, 515 U. S. 200 (1995), Richmond v. J. A. Croson Co., 488 U. S. 469 (1988), and Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U. S. 265 (1978). This case therefore does not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review. Cf. Gratz, ante, at 301-302 (GINSBURG, J., dissenting); Adarand, 515 U. S., at 274, n. 9 (GINSBURG, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," ante, at 325, rank as sufficiently important to justify a race-conscious government program. Cf. Gratz, ante, at 301-302 (GINSBURG, J., dissenting), Adarand, 515 U. S., at 273-274 (GINSBURG, J., dissenting).

Part VII of JUSTICE THOMAS's opinion describes those portions of the Court's opinion in which I concur. See post, at 374-378 (opinion concurring in part and dissenting in part).

Throughout I will use the two phrases interchangeably.

The Court's refusal to address Wygant's rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing. If the Court defers to the Law School's judgment that a racially mixed student body confers educational benefits to all, then why would the Wygant Court not defer to the school board's judgment with respect to the benefits a racially mixed faculty confers?

"Diversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. Cf. Orr v. Orr, 440 U. S. 268, 283 (1979) (noting that suspect classifications are especially impermissible when "the choice made by the State appears to redound . . . to the benefit of those without need for special solicitude"). It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.

The Law School believes that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do so suggests that the educational benefits it alleges are not significant or do not exist at all.


The Court refers to this component of the Law School's compelling state interest variously as "academic quality," avoiding "sacrifice [of] a vital component of its educational mission," and "academic selectivity." Ante, at 340.

For example, North Carolina A&T State University, which is currently 5.4% white, College Admissions Data Handbook 643, could seek to reduce the representation of whites in order to gain additional educational benefits.

Cal. Const., Art. 1, § 31(a), states in full:

"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See Coalition for Economic Equity v. Wilson, 122 F.3d 692 (CA9 1997).

Given the incredible deference the Law School receives from the Court, I think it appropriate to indulge in the presumption that Boalt Hall operates without violating California law.
I use the LSAT as an example, but the same incentive structure is in place for any admissions criteria, including undergraduate grades, on which minorities are consistently admitted at thresholds significantly lower than whites.

Indeed, during this 5-year time period, enrollment of Native American students dropped to as low as three such students. Any assertion that such a small group constituted a “critical mass” of Native Americans is simply absurd.
**Fisher v. University of Texas**  
631 F.3d 213 (5th Cir. 2011)

**Background:**

Next to the Supreme Court’s decision in *Grutter*, the Fifth Circuit’s appellate decision in *Fisher* greatly informs the ongoing legal discourse surrounding the Supreme Court case. In an opinion authored by Judge Patrick Higgenbotham, a Republic appointee, the Fifth Circuit held that University of Texas’ general admissions program which, unlike the Top Ten Percent Program explicitly takes race into account, did not violate the constitution. The Fifth Circuit narrowly read *Grutter*. Yet, almost reminiscent to O’Connor’s observations in *Grutter* that the time for ending affirmative action is just around the corner, Higginbotham noted that “ever-increasing numbers of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain legality of the *Grutter-like* admissions program, the Law’s own legal footing aside.”

It should be noted that despite some effort, the Fifth Circuit failed to garner the necessary votes to review the Higgenbotham authored opinion *en banc*, with 9 judges voting against *en banc* review to 7 in favor.
Before KING, HIGGINBOTHAM and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We consider a challenge to the use of race in undergraduate admissions at the University of Texas at Austin. While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in Grutter v. Bollinger, UT’s program acts upon a university applicant pool shaped by a legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the otherwise-plain legality of the Grutter-like admissions program, the Law’s own legal footing aside. While the Law’s ultimate fate is not the fare of this suit, the challenge to the Grutter plan here rests upon the intimate ties and ultimate confluence of the two initiatives. Today we affirm the constitutionality of the University’s program as it existed when Appellants applied and were denied admission.

Abigail Fisher and Rachel Michalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in Fall 2008. They filed this suit alleging that UT’s admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment and federal civil rights statutes. They sought damages as well as injunctive and declaratory relief. Proceeding with separate phases of liability and remedy, the district court, in a thoughtful opinion, found no liability and granted summary judgment to the University.

The procedural posture of this case defines the scope of our review. There are no class claims and both students deny intention to reapply to UT. It follows that Fisher and Michalewicz lack standing to seek injunctive or forwardlooking declaratory relief. This principle is rote. To obtain forward-looking equitable remedies, a plaintiff must show she faces imminent threat of future injury. Without that threat, these two applicants only have standing to challenge their rejection and to seek money damages for their injury.

Our focus will be upon the process employed by UT to admit freshmen when Fisher and Michalewicz applied for the class entering Fall 2008, looking to earlier and later years only as they illuminate the rejection of these two applicants. Our task is burdened by the reality that we are examining a dynamic program administered by a large university subject to government oversight. Indeed, the first of UT’s periodic five-year reviews was to begin in the fall of 2009, a review that must engage an array of variables, including an ever-present question of whether to adjust the percentage of students admitted under the two diversity initiatives.

I. Grutter v. Bollinger

We begin with Grutter v. Bollinger because UT’s race-conscious admissions procedures were modeled after the program it approved. In rejecting constitutional challenges to the University of Michigan Law School’s admissions program, Grutter held that the Equal Protection Clause did not prohibit a university’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.” Mapping on Grutter, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations. In granting summary judgment to UT, the district court found that “it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in Grutter,” and “as long as Grutter remains good law, UT’s current admissions program
remains constitutional."[9] Laying aside the Top Ten Percent Law, that observation is indisputably sound.[10]

A

Grutter embraced the diversity interest articulated twenty-five years earlier by Justice Powell, who wrote separately in Regents of the University of California v. Bakke.[11] This vision of diversity encompassed a broad array of qualifications and characteristics where race was a single but important element.[12] The Michigan Law School designed its admissions program to achieve this broad diversity, selecting students with varied backgrounds and experiences—including varied racial backgrounds—who would respect and learn from one another.[13] The Court explained:

[The Law School's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.[14]

The Law School's policy also reaffirmed its "longstanding commitment" to "one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."[15]

In an effort to ensure representation of minorities, the Law School sought to enroll a "critical mass" of minority students, which would result in increased minority engagement in the classroom and enhanced minority contributions to the character of the School. The Grutter Court endorsed this goal, holding that diversity, including seeking a critical mass of minority students, is "a compelling state interest that can justify the use of race in university admissions."[16]

That the concept of critical mass bears a simple but deceptive label is evidenced by the division of the Justices over its meaning. In his dissent, Chief Justice Rehnquist saw critical mass as only the minimum level necessary "[t]o ensure that the minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes."[17] On this view, critical mass is defined only as a proportion of the student body, and the percentage that suffices for one minority group should also suffice for another group.

In contrast, Justice O'Connor, writing for the Court, explained that critical mass must be "defined by reference to the educational benefits that diversity is designed to produce."[18] Her opinion recognizes that universities do more than simply impart knowledge to their students. Synthesizing, we find at least three distinct educational objectives served by the diversity she envisioned:

1. Increased Perspectives. Justice O'Connor observed that including diverse perspectives improves the quality of the educational process because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[19] In this respect, Grutter echoes Justice Powell's recognition in Bakke that it is "essential to the quality of higher education" that a university be able to pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body."[20] Indeed, diversity often brings not just excitement, but valuable knowledge as well. "[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university]
experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[21]

2. Professionalism. The majority pointed to "numerous studies" showing that "student body diversity... better prepares [students] as professionals."[22] The Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship,"[23] and today's students must be prepared to work within "an increasingly 220*220 diverse workforce."[24] Indeed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[25] A diverse student body serves this end by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races."[26]

3. Civic Engagement. The Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[27] A diverse student body is crucial for fostering this ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[28] Maintaining a visibly open path to leadership demands that "[a]ccess to [higher] education... be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[29] Each member of society "must have confidence in the openness and integrity of the educational institutions that provide this training."[30] Further, efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national fabric.

B

Recognizing the pursuit of diversity, including racial diversity, to be a compelling interest in higher education, Grutter endorsed the right of public universities to increase enrollment of underrepresented minorities. Grutter also cautioned that, while it accepted diversity as a compelling interest, any sorting of persons on the basis of race must be by measures narrowly tailored to the interest at stake.

As we read the Court, a university admissions program is narrowly tailored only 221*221 if it allows for individualized consideration of applicants of all races.[31] Such consideration does not define an applicant by race but instead ensures that she is valued for all her unique attributes. Rather than applying fixed stereotypes of ways that race affects students' lives, an admissions policy must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[32] As the Supreme Court later summarized, "The entire gist of the analysis in Grutter was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group."[33] Thus, a university admissions policy is more likely to be narrowly tailored if it contemplates that a broad range of qualities and experiences beyond race will be important contributions to diversity and as such are appropriately considered in admissions decisions.[34]

Because a race-conscious admissions program is constitutional only if holistic, flexible, and individualized, a university may not establish a quota for minority applicants, nor may it evaluate minority applications "on separate admissions tracks."[35] The "racial-set-aside program" rejected by Justice Powell in Bakke ran afoul of these related prohibitions because it reserved 16 out of 100 seats for members of certain minority groups.[36] A university also may not award a fixed number of bonus points to minority applicants.[37] That was the lesson of Grutter's companion case, Gratz v. Bollinger, in which
the Court struck down the University of Michigan’s undergraduate admissions program because it automatically awarded a fixed number of admissions points to all underrepresented minority applicants, resulting in a group-based admissions boost.[38]

Both Bakke and Gratz firmly rejected group treatment, insisting that the focus be upon individuals and that an applicant’s achievements be judged in the context of one’s personal circumstances, of which race is only a part. So deployed, a white applicant raised by a single parent who did not attend high school and struggled paycheck to paycheck and a minority child of a successful cardiovascular surgeon may both claim adversity, but the personal hurdles each has cleared will not be seen to be of the same height.

C

Finally, Grutter requires that any race-conscious measures must have a "logical end point" and be "limited in time."[39] This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity "about as well."[40] In this respect, Grutter is best seen not as an unqualified endorsement of racial preferences, but as a transient response to anemic academic diversity. As Justice O’Connor observed, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[41]

II. HISTORY OF THE UNIVERSITY’S ADMISSIONS POLICIES

Justice O’Connor’s vision may prove to be more aspirational than predictive. Regardless, universities will construct admissions programs wedded to their missions, which include bringing both meritorious and diverse students to campus. Each year, UT receives applications from approximately four times more students than it can enroll.[42] Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.

A

Until 1996, UT selected students using two metrics. The first measure, still employed today, is the Academic Index ("AI"), a computation based on the student’s high school class rank, standardized test scores, and the extent to which the applicant exceeded UT’s required high school curriculum.[43] Perceiving that AI alone would produce a class with unacceptably low diversity levels, UT considered a second element for admissions—race. These measures combined resulted in UT admitting more than 90% of applicants who were ranked in the top ten percent of their high school class.[44]

There were then no clear legal limits on a university’s use of race in admissions. The Supreme Court decided Bakke in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty.[45] The record does not detail 223*223 precisely how race factored in admissions decisions during this time, but it is undisputed that race was considered directly and was often a controlling factor in admission.[46] Under this race-conscious admissions policy, the freshman class entering in Fall 1993 included 5,329 students, of whom 238 were African-American (4.5% of the overall class) and 832 were Hispanic (15.6%).[47]
Race-conscious admissions ended in 1996 with *Hopwood v. Texas*, when a panel of this court struck down the use of race-based criteria in admissions decisions at UT's law school. A majority of that panel held that diversity in education was not a compelling government interest, a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities.

Beginning with the 1997 admissions cycle, UT deployed a Personal Achievement Index ("PAI") to be used with the Academic Index. In contrast to the mechanical formulas used to calculate the AI, the PAI was meant "to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores." Although facially race-neutral, the PAI was in part designed to increase minority enrollment; many of the PAI factors disproportionately affected minority applicants.

UT also implemented other facially "race-neutral" policies that, together with the AI and PAI, remain in use today. It created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.

Despite these efforts, minority presence at UT decreased immediately. Although the 1996 admissions decisions were not affected by *Hopwood*, the publicity from the case impacted the number of admitted minorities who chose to enroll. In 1997, fewer minorities applied to UT than in 224 years past. The number of African-American and Hispanic applicants dropped by nearly a quarter, while the total number of University applicants decreased by only 13%. This decrease in minority applicants had a corresponding effect on enrollment. Compared to 1995, African-American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen). In contrast, Caucasian enrollment increased by 14%, and Asian-American enrollment increased by 20%.

In 1997, the Texas legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law, still in effect. The law altered UT’s preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.

In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African-American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African-Americans increased. The entering freshman class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African-American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian-American (1,218 students) in a class of 6,796 students.

The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose. In 2004, among freshmen who were Texas residents, 77% of the enrolled African-American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students. These numbers highlight the contribution of the Top Ten Percent Law to increasing minority enrollment, but they also reflect a trade-off implicit in the Law: the increase rested
heavily on the pass from standardized testing offered by the Top Ten Percent Law. After implementation of the Law, the likelihood of acceptance for African-American and Hispanic students in the second decile of their high school class, who were without the benefits of the pass from standardized testing, declined. Meanwhile, the acceptance probability of similarly situated Caucasian students increased.[59]

D

Hopwood's prohibitions ended after the 2004 admissions cycle with the Supreme Court's 2003 decision in Grutter.[60] In August 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system to examine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" Grutter.[61]

As part of its examination, UT commissioned two studies to explore whether the University was enrolling a critical mass of underrepresented minorities. The first study examined minority representation in undergraduate classes, focusing on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of the undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes in Fall 2002 had either one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.[62] A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students.[63] In its second study, UT surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students reported feeling isolated, and a majority of all students felt there was "insufficient minority representation" in classrooms for "the full benefits of diversity to occur."[64]

The University incorporated the findings of these two studies in its June 2004 Proposal to Consider Race and Ethnicity in Admissions.[65] The 2004 Proposal concluded that diverse student enrollment "break[s] down stereotypes," "promotes cross-racial understanding," and "prepares students for an increasingly diverse workplace and society."[66] With respect to the undergraduate program in particular, the 2004 Proposal explained that "[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."[67] With one eye on Grutter, it observed that these objectives are especially important at UT because its "mission and... flagship role" is to "prepare its students to be the leaders of the State of Texas"—a role which, given the state's increasingly diverse profile, will require them "to be able to lead a multicultural 226*226 workforce and to communicate policy to a diverse electorate."[68]

Citing the classroom diversity study, the 2004 Proposal explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity. Accordingly, the 2004 Proposal recommended adding the consideration of race as one additional factor within a larger admissions scoring index. This recommendation was presented as "an acknowledgment that the significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."[69]

After more than a year of study following the Grutter decision, UT adopted a policy to include race as one of many factors considered in admissions. UT has no set date by which it will end the use of race in undergraduate admissions. Rather, it formally reviews the need for race-conscious measures every five

57
years and considers whether adequate race-neutral alternatives exist. In addition, the district court found that the University informally reviews its admissions procedures each year.\[78] The current policy has produced noticeable results. One magazine dedicated to diversity in higher education ranked UT "sixth in the nation in producing under-graduate degrees for minority groups."\[78] In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African-American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian-American enrollment also increased nearly 10%, from 1,034 students to 1,126 students.\[72] By contrast, in 2004, the last year the Top Ten Percent Law operated without the Grutter plan, fall enrollment included only 275 African-Americans and 1,024 Hispanics.

Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide.

### III. THE CHALLENGED POLICY

UT's consideration of race is one part of the complex admissions process operating when Appellants were rejected. Given Appellants' challenge, we must examine the whole of the process.

#### A

UT is a public institution of higher education, authorized by the Texas Constitution and supported by state and federal funding. Accordingly, it begins its admissions process by dividing applicants into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students. Students compete for admission only against other students in their respective pool. Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices.\[74] Because Appellants are Texas residents, their challenge focuses on the admissions procedures applied to in-state applicants.

Texas applicants are divided into two subgroups: (1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not. Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without a confessed consideration of race. In 2008, for example, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents and leaving only 1,216 offers of admission university-wide for non-top ten percent residents.\[74] The impact of the Top Ten Percent Law on UT's admissions has increased dramatically since it was first introduced in 1998, when only 41% of the seats for Texas residents were claimed by students with guaranteed admission.\[75]

The remaining Texas applicants, who were not within the top ten percent of their high school graduating class, compete for admission based on their Academic and Personal Achievement Indices.\[76] The Academic Index is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank.\[77] Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough that their applications are considered presumptively denied. If an application is presumptively denied, senior admission staff review the file and may, on rare occasions, designate the file for full review notwithstanding the AI score.\[79]
The Personal Achievement Index is based on three scores: one score for each 228*228 of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file. The essays are each given a score between 1 and 6 through "a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development, and facility with language." The personal achievement score is also based on a scale of 1 to 6, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.

This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index. Admissions staff assign the score by assessing an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a "special circumstances" element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race. To assess these intangible factors, evaluators read the applicant's essays again, but this time with an eye to the information conveyed rather than the quality of the student's writing. Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that holistic file readers scored within one point of each other 88% of the time.

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context. As UT's director of admissions explained, "race provides—like [the] language [spoken in the applicant's home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain." Race is considered as part of the applicant's context whether or not the applicant belongs to a minority group, and so—at least in theory—it "can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever." Moreover, given the mechanics of UT's admissions process, race has the potential to influence only a small part of the applicant's overall admissions score. The sole instance when race is considered is as one element of the personal achievement score, which itself is only a 229*229 part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.

B

Although the process for calculating AI and PAI scores is common to all parts of the University, each offer of admission to UT is ultimately tied to an individual school or major. Texas residents in the top ten percent of their high school class are guaranteed admission to the University, but they are not assured admission to the individual school or program of their choice.

Most majors and colleges in the University provide automatic admission to Top Ten Percent Law applicants, but certain "impacted majors"—including the School of Business, the College of Communication, and the Schools of Engineering, Kinesiology, and Nursing—are obligated to accept only a certain number of Top Ten Percent Law applicants. These programs are "impacted" because they could fill 80% or more of their available spaces each year solely through operation of the Top Ten Percent Law. To avoid oversubscription and to allow these colleges and majors to admit some non-top
ten percent applicants, UT caps the percentage of students automatically admitted to these programs at 75% of the available spaces.[88]

Top Ten Percent Law applicants who do not receive automatic entry to their first choice program compete for admission to the remaining spaces, and if necessary to their second-choice program, on the basis of their AI and PAI scores. The admissions office places students into matrices for each preferred school or major, with students grouped by AI score along one axis and PAI score along the other axis. Liaisons for the majors then establish a cutoff line, which is drawn in a stair-step pattern. Applicants denied admission to their first-choice program are considered for their second choice, with cutoff lines readjusted to reflect the influx of those applicants. Any top ten percent applicants not admitted to either their first- or second-choice program are automatically admitted as Liberal Arts Undeclared majors. All other applicants not yet admitted to UT compete, again according to AI and PAI scores, for any remaining seats in the Liberal Arts Undeclared program.

Although this completes the admissions process for the fall portion of the freshman class, no Texas resident who submits a timely application is denied admission. Instead, those residents not admitted to the entering fall class are offered admission to either the summer program or the Coordinated Admissions Program (CAP). Marginal applicants who missed the cutoff for the fall class are offered admission to the summer program, which permits students to begin their studies at UT during the summer and then join the regularly admitted students in the fall. About 800 students enroll in the summer program each year. All remaining Texas applicants are automatically enrolled in CAP, which guarantees admission as a transfer student if the student enrolls in another UT system 230*230 campus for her freshman year and meets certain other conditions, including the completion of thirty credit hours with a cumulative grade point average of 3.2 or higher.

C

The Academic Index and Personal Achievement Index now employed by UT have been in continuous use since 1997. The lone substantive change came in 2005, following the Grutter decision, when the Board of Regents authorized the consideration of race as another "special circumstance" in assessing an applicant's personal achievement score.

Race—like all other elements of UT's holistic review—is not considered alone. Admissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decision for any particular applicant is not affected—positively or negatively—by the number of other students in her racial group who have been admitted during that year.[89] Thus, "it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission."[90] Nevertheless, the district court found that race "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application."[91]

D

UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions—expressed in the 2004 Proposal—mirror those approved by the Supreme Court in Grutter. The district court found that both the UT and Grutter policies "attempt to promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multicultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as
'spokespersons' for their race."[92] Like the law school in Grutter, UT "has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a 231*231 diverse student body."[93] UT has made an "educational judgment that such diversity is essential to its educational mission," just as Michigan’s Law School did in Grutter.[94]

Considering UT's admissions system in its historical context, it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion. That said, the use of race summons close judicial scrutiny, necessary for the nation's slow march toward the ideal of a color-blind society, at least as far as the government can see.

IV. STANDARD OF REVIEW

It is a given that as UT's Grutter-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring.[95] At the same time, the Supreme Court has held that "[c]ontext matters" when evaluating race-based governmental action, and a university's educational judgment in developing diversity policies is due deference.[96]

A

Judicial deference to a university's academic decisions rests on two independent foundations. First, these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university," far outside the experience of the courts.[97] Second, "universities occupy a special niche in our constitutional tradition," with educational autonomy grounded in the First Amendment.[98] As Justice Powell explained in Bakke, "[a]cademic freedom. . . . includes [a university's] selection of its student body."[99]

Yet the scrutiny triggered by racial classification "is no less strict for taking into account" the special circumstances of higher education.[100] "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [a] particular context."

Narrow tailoring, a component of strict scrutiny, requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype. Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration Grutter requires. We presume the University acted in good faith, a presumption Appellants 232*232 are free to rebut.[102] Relatedly, while we focus on the University's decision to adopt a Grutter-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check.

B

With a nod to Grutter's command that we generally give a degree of deference to a university's educational judgments, Appellants urge that Grutter did not extend such deference to a university's decision to implement a race-conscious admissions policy. Instead, they maintain Grutter deferred only to the university's judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end.
As an initial matter, this argument in its full flower is contradicted by Grutter. The majority held that, like the examination into whether the University has a compelling interest, "the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[103] That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment.

Appellants would have us borrow a more restrictive standard of review from a series of public employment and government contracting cases, in which the Supreme Court "held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[104] The Court most recently applied this strong-basis-in-evidence standard in Ricci v. DeStefano.

In Ricci, white firefighters from New Haven, Connecticut sued under Title VII, challenging the city's decision to disregard a promotions test after the results showed that white candidates significantly outperformed minority candidates.[105] New Haven defended this action, arguing that if it had ratified the test results it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.[106] The white firefighters, however, argued that ignoring the test results was a violation of Title VII's separate prohibition against intentional race discrimination, or disparate treatment.[107] Responding to this tension, the Supreme Court held that such intentional race-based action is not permitted by Title VII unless the employer can demonstrate with a strong basis in evidence that it would have been liable under the disparate impact provision had it not taken 233*233 the action.[108] The Court suggested that anything less would risk creating a de facto quota system, where an employer could disregard test results to achieve a preferred racial balance, impermissibly shifting the focus from individual discrimination to group bias.[109] Applying the strong-basis-in-evidence standard, the Supreme Court held that New Haven's fear of disparate impact liability was not adequately supported.[110]

The city had argued it only needed to show a fear of liability based on a goodfaith belief—a rough analogy to the university admissions standard. Yet the Court found that an intent-based standard could not be squared with the statutory text. The Ricci Court turned to the strong-basis-in-evidence standard "as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII."[111]

Although Ricci did not address the firefighters' equal protection claim, the Court derived its standard from Richmond v. J.A. Croson Co.,[112] a government contracting case, which in turn adopted from a plurality opinion in Wygant v. Jackson Board of Education, a public employment case.[113] In Wygant, the plurality concluded that defending race-based public employment decisions as responsive to present effects of past discrimination required a strong basis in evidence of the past discrimination.[114] Similarly, Croson adopted this standard after observing that "an amorphous claim [of] past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[115]

This recitation of history, quick as it is, makes plain that the cases Appellants cite have little purchase in this challenge to university admissions. The high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration. In doing so, it touches the third rail of racial quotas. Wygant and Croson both involved explicit quotas; in Ricci, the Court was concerned that the city's use of race threatened to devolve into a de facto quota.
By contrast, *Grutter* recognized that universities are engaged in a different enterprise. Their holistic approach is part of a forward-looking effort to obtain the educational benefits of diversity. The look to race as but one element of this further goal, coupled with individualized consideration, steers university admissions away from a quota system. *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.

*Parents Involved in Community Schools v. Seattle School District No. 1* 234*234 further supports this understanding.[116] When scrutinizing two school districts' race-conscious busing plans, the Court invoked *Grutter*’s "serious, good faith consideration" standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply.[117] The *Parents Involved* Court never suggested that the school districts would be required to prove their plans were meticulously supported by some particular quantum of specific evidence. Rather, the Court struck down the school districts' programs because they pursued racial balancing and defined students based on racial group classifications, not on individual circumstances.

In short, the Court has not retreated from *Grutter*’s mode of analysis, one tailored to holistic university admissions programs. Thus, we apply strict scrutiny to race-conscious admissions policies in higher education, mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.

**C**

Appellants do not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT *needs* a *Grutter*-like policy. As their argument goes, the University's race-conscious admissions program is unwarranted because (1) UT has gone beyond a mere interest in diversity for education's sake and instead pursues a racial composition that mirrors that of the state of Texas as a whole, amounting to an unconstitutional attempt to achieve "racial balancing"; (2) the University has not given adequate consideration to available "race-neutral" alternatives, particularly percentage plans like the Top Ten Percent Law; and (3) UT's minority enrollment under the Top Ten Percent Law already surpassed critical mass, such that the additional (and allegedly "minimal") increase in diversity achieved through UT's *Grutter*-like policy does not justify its use of race-conscious measures. We will consider each of these arguments in turn.

**V. RACIAL BALANCING**

Again, diversity is a permissible goal for educational institutions, but "outright racial balancing" is not. Attempting to ensure that the student body contains some specified percentage of a particular racial group is "patently unconstitutional."[118] This concept follows from the Supreme Court's repeated emphasis that, by itself, increasing racial representation is not a sufficiently compelling interest to justify the use of racial preferences. *Grutter* described many important educational interests that may be sought through diversity, but steadfastly maintained that "'[r]acial balance is not to be be achieved for its own sake.'"[119] Moreover, "'[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance' by creating 235*235 an unconstitutional quota.[120]"
A

Looking to the details of UT’s race-conscious admissions policy, it is clear that administrators knew a quota system would not survive judicial review, and they took care to avoid this fatal mistake. UT’s system was modeled after the *Grutter* program, which the Supreme Court held was not a quota. UT has never established a specific number, percentage, or range of minority enrollment that would constitute “critical mass,” nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake.[121]

Further, there is no indication that UT’s *Grutter*-like plan is a quota by another name. It is true that UT looks in part to the number of minority students when evaluating whether it has yet achieved a critical mass, but “[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”[122] Whereas a quota imposes a fixed percentage standard that cannot be deviated from, a permissible diversity goal “require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself.”[123] Indeed, UT’s policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process.[124]

UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas’s African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans.[125]

B

Appellants nevertheless argue that UT’s program amounts to racial balancing because it supposedly evinces a special concern 236*236 for demographically underrepresented groups, while neglecting the diverse contributions of others. These arguments do not account for the operation of UT’s admissions system or the scope of the diversity interest approved by the Court in *Grutter*.

1

The district court expressly found that race can enhance the personal achievement score of a student from any racial background, including whites and Asian-Americans.[126] For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter’s* holistic and individualized assessments, which must be ”flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”[127] Indeed, just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.[128]

The summary judgment record shows that demographics are not consulted as part of any individual admissions decision, and UT’s admissions procedures do not treat certain racial groups or minorities differently than others when reviewing individual applications. Rather, the act of considering minority group demographics (to which Appellants object) took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass. Appellants’ objection
therefore must be directed not to the design of the program, but rather to whether UT's decision to reintroduce race as a factor in admissions was made in good faith.

2

Appellants contend that UT revealed its true motive to be outright racial balancing when it referenced state population data to justify the adoption of race-conscious admissions measures. They insist that if UT were truly focused on educational benefits and critical mass, then there should be no reason to consult demographic data when determining whether UT had sufficient minority representation.

We disagree. The University's policies and measured attention to the community it serves are consonant with the educational goals outlined in Grutter and do not support a finding that the University was engaged in improper racial balancing during our time frame of review.

Both Grutter and Bakke recognized that "there is of course `some relationship between numbers and achieving the benefits to be derived from a diverse student body.'"[129] In its policymaking process, UT gave appropriate attention to those educational benefits identified in Grutter without overstepping any constitutional bounds.

Grutter recognized that racial and ethnic backgrounds play an influential role in producing the diversity of views and perspectives which are paramount to a university's educational mission. As Justice O'Connor explained, the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" can have a significant impact on a student's views.[130] The Court acknowledged that "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented minority students] are both likely to have experiences with particular importance to the [University's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore these experiences."[131] UT properly concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms. Identifying which backgrounds are underrepresented, in turn, presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.

Preparing students to function as professionals in an increasingly diverse workforce likewise calls for some consideration of a university's particular educational mission and the community it serves. For instance, a nationally renowned law school draws upon a nationwide applicant pool and sends its graduates into careers in all states; therefore it is appropriate for such a school to consider national diversity levels when setting goals for its admissions program. In contrast, UT's stated goal is to "produce graduates who are capable of fulfilling the future leadership needs of Texas."[132] This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workforce is especially important. The 2004 Proposal concluded that a raceconscious admissions program was necessary at UT specifically because "from a racial, ethnic, and cultural standpoint, students at the University [were] being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow."[133]

The need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership also requires a degree of attention to the surrounding community. A university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not. Indeed, the 2004 Proposal expressed concern that UT appeared "largely closed to nonwhite applicants" and did not "provide a welcoming supportive environment" for minority students. [134] UT was keenly aware that by sending a message that people of all stripes can succeed at UT, the University would attract promising applicants from once-insulated communities, over
time narrowing the credentials gap between minority and nonminority applicants. After *Hopwood*, such applicants were dissuaded from applying to UT. But through the Top Ten Percent Law and *Grutter*-like plan, UT has increased its minority applicant pool in its effort to ensure that it serves as a flagship university for the entire state, not just Texans of certain backgrounds. Cultivating paths to leadership for underrepresented groups serves both the individual and the public, sustaining an infrastructure of leaders in an increasingly pluralistic society. Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.

Finally, *Grutter*'s structure accepts that a university's twin objectives of rewarding academic merit and fostering diversity can be complementary rather than competing goals; that students rising to the top of underrepresented groups demonstrate promise as future leaders. These students' relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone. Insofar as Appellants complain that the University's limited attention to demographics was inconsistent with the legitimate educational concerns recognized in *Bakke* and *Grutter*, we conclude that their contention cannot be sustained.

3

Appellants argue that a broad approach to educational diversity is improper because "critical mass" must be an "inward-facing concept . . . that focuses on the functioning of the student body," encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated. While Appellants' view may comport with one literal interpretation of the "critical mass" label, it is not the view that prevailed in *Grutter*. The *Grutter* majority defined critical mass "by reference to the educational benefits that diversity is designed to produce," and the educational benefits recognized in *Grutter* go beyond the narrow "pedagogical concept" urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university. We are persuaded, as was the district court, that the University adhered to *Grutter* when it reintroduced race into its admissions process based in part on an analysis that devoted special attention to those minorities which were most significantly underrepresented on its campus.

VI. THE TOP TEN PERCENT LAW

*Grutter* is best read as a path toward the moment when all race-conscious measures become unnecessary. To that end, *Grutter* requires universities that employ race-conscious admissions to seriously consider race-neutral alternatives. But "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.

The parties devote significant attention to the Top Ten Percent Law. Since the Law was first enacted in 1997, UT has seen increases in both African-American and Hispanic enrollment, but again, changing demographics and other minority outreach programs render it difficult to quantify the increases attributable to the Top Ten Percent Law.

Appellants put forward the Top Ten Percent Law as a facially race-neutral alternative that would allow UT to obtain a critical mass of minority enrollment without resorting to race-conscious admissions. As the argument goes, if the Top Ten Percent Law were able to serve the University's interests "about as well" as race-conscious admissions, without differentiating between students on the basis of race, then it
would render UT’s current admissions program unconstitutional. UT responds that the Top Ten Percent Law does not constitute a workable alternative to a flexible admissions system, and so it is "entirely irrelevant" as a matter of law in determining whether or not a university may adopt the holistic consideration of race to achieve critical mass.

UT is correct that so-called "percentage plans" are not a constitutionally mandated replacement for race-conscious admissions programs under Grutter, although—as will become apparent—this realization alone does not end our constitutional inquiry. The idea of percentage plans as a viable alternative to race-conscious admissions policies was directly advocated to the Grutter Court by the United States, arguing as amicus curiae. In response, the Court held that although percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." In addition, the Court emphasized existing percentage plans—including UT’s—are simply not "capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission."

That the Top Ten Percent Law is not a constitutionally-mandated alternative does not make it irrelevant. By now it is clear that the Law is inescapably tied to UT’s Grutter plan, as Grutter does its work with the applicants who remain after the cut of the Top Ten Percent Law. In 2008, top ten percent applicants accounted for 8,984 of the 10,200 Texas admittees. Thus, with the Top Ten Percent Law in effect, UT’s Grutter plan can only possibly influence the review of approximately 1,200 admitted students’ applications. In evaluating the constitutionality of an admissions program, we cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshmen.

The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity Grutter endorsed and is in many ways at war with it. While the 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. For example, nearly a quarter of the undergraduate students in UT’s College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American. It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by Grutter gives UT that discretion, but the Top Ten Percent Law, which accounts for nearly 90% of all Texas resident admissions, does not.

Focusing narrowly on geographic diversity, in part as a proxy for race, the Top Ten Percent Law crowds out other types of diversity that would be considered under a Grutter-like plan. By ignoring these other diversity contributions, the Top Ten Percent Law restricts the University’s ability to achieve the maximum educational benefits of a truly diverse student body. As UT’s 2003 classroom study shows, percentage plans bear little promise of producing the meaningful diverse interactions envisioned by Grutter, at least not in the classroom. For instance, the study reported that although overall enrollment of minority students at UT rose significantly between 1996 and 2002, the Fall 2002 schedule contained more classes with zero or one African American or Hispanic students than had the Fall 1996 schedule.
Justice Ginsburg pointed out in *Grutter*’s companion case that percentage plans create damaging incentives to the education system. She observed that "[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level." These measures "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."[152] Similarly, these plans create a strong incentive to avoid competitive educational institutions like magnet schools.[153]

Texas applicants falling outside the top ten percent group face extreme competition to gain admittance to the University. There are approximately 16,000 students competing for only 1,216 fall admissions slots. The competition is so great that, on average, students admitted from outside the top ten percent of their high school class, regardless of race, have even higher SAT scores than those granted automatic admission under the Top Ten Percent Law.[154] Perversely, this system negatively impacts minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools. *Grutter*’s holistic look at race may soften this unreasonable exclusion of those second-decile minorities better qualified than many of the non-minorities bluntly swept in under the Top Ten Percent Law. But not much. It requires no empirical study to observe that those excluded under this Law have been a rich source of Texas leaders over its history and that for some applicants, admission to the flagship school of Texas is little more possible than admission to Harvard.[155] 242*242 That all of these weaknesses are apparent in the Top Ten Percent Law only make its focus upon race the plainer.[156]

The Top Ten Percent Law was adopted to increase minority enrollment. That it has done, but its sweep of admissions is a polar opposite of the holistic focus upon individuals. Its internal proxies for race end-run the Supreme Court’s studied structure for the use of race in university admissions decisions. It casts aside testing historically relied upon, admitting many top ten percent minorities with significantly lower scores than rejected minorities and non-minorities alike. That these admitted minorities are academically able to remain in the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities. Such costs may be intrinsic to affirmative action plans. If so, *Grutter* at least sought to minimize those costs through narrow tailoring. The Top Ten Percent Law is anything but narrow.

In short, while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT’s contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies. We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling. Yet we cannot agree that it is irrelevant. To the contrary, that the Top Ten Percent Law, accounting for the vast majority of in-state admissions, threatens to erode the foundations UT relies on to justify implementing *Grutter* policies is a contention not lacking in force. "Facially neutral" has a talismanic ring in the law, but it can be misleading. It is here.

**VII. CRITICAL MASS**

Appellants contend that UT’s decision to reintroduce race-conscious admissions was unconstitutional because minority enrollment already met or exceeded "critical mass" when this decision was made, and thus any further facial consideration of race was neither warranted nor constitutional. Appellants claim the best measure of whether UT had attained the benefits of diversity is the raw percentage 243*243 of minorities enrolled. As a result of the combined effects of changing demographics, targeted high school programs, and the Top Ten Percent Law, total minority enrollment had increased over the years. When
the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class (4.5% African-American and 16.9% Hispanic).[157]

Although Texas was not constitutionally required to enact the Top Ten Percent Law, Appellants are correct that the decision to do so—and the substantial effect on aggregate minority enrollment at the University—places at risk UT's race-conscious admissions policies. We are confident, and hold, that a Grutter-style admissions system standing alone is constitutional. That said, whether to overlay such a plan with the Top Ten Percent Law and how to calibrate its flow presents a Hobson's choice between the minority students it contributes and the test of constitutional bounds it courts. True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense, a "facially" race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.

A

Appellants propose various baseline levels of diversity which, they suggest, would fully satisfy the University's interest in attaining critical mass. They first argue that if "from 13.5 to 20.1 percent" minority enrollment was adjudged to be great enough diversity each year by Michigan's Law School in Grutter, then the 21.4% minority enrollment that UT had achieved prior to reintroducing race-conscious admissions must already have achieved critical mass. We find this comparison inapt for numerous reasons.

Appellants' comparison presumes that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition. It is based on Appellants' continued insistence that the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race. As we have discussed, Grutter firmly rejects that premise and defines critical mass by reference to a broader view of diversity.

At oral argument, Appellants qualified this insistence and wisely conceded that what constitutes critical mass in the eyes of one school might not suffice at another. Grutter concerned a law school, whereas Appellants challenge UT's undergraduate program. Michigan's Law School operates on a national level, while UT focuses on recruiting and producing future leaders for Texas. The law school enrolled approximately 350 students in its first-year class, few enough students that diversity in the student body readily approximates diversity in the classroom. In contrast, UT enrolls approximately 7,000 undergraduates in its first-year class and has data showing diversity rates vary widely across individual classrooms. African-Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law School's applicant pool during the examined time period,[158] while those same underrepresented minorities were 28% of 244*244 UT's freshman applicant pool for Fall 2008.[159]

Appellants point to the Supreme Court's observation in United States v. Virginia that the Virginia Military Institute "could achieve at least 10% female enrollment—a sufficient critical mass to provide the female cadets with a positive educational experience."[160] But this figure, even if accurate, covers only one component of the multi-faceted concept of diversity elaborated in Grutter. In any event, the claim that 10% minority enrollment is a ceiling to critical mass is confounded by Grutter.

Appellants lastly note that minority enrollment at UT now exceeds the level it had reached in the mid-1990s, pre-Hopwood, when the University was free to obtain any critical mass it wanted through overtly race-based decisions. UT responds that it has consistently maintained, both in the 2004 Proposal and
before this Court, that even before *Hopwood* it had never reached critical mass.\[161\] While UT was making a greater use of race in that era, its pursuit of diversity was constrained by other interests, such as admitting only well-qualified students. We cannot assume that diversity levels immediately before *Hopwood* were indicative of critical mass. Moreover, minority enrollment in 1996 is not indicative of UT's true pre-*Hopwood* diversity. While admissions decisions in 1996 were not controlled by *Hopwood*, the case impacted enrollment, resulting in fewer minority students. If one instead compares minority enrollment from 1989 to 2004, a different picture emerges. In 2004, UT enrolled significantly fewer African-Americans than it had in 1989 (309 compared to 380). In addition, the 2004 entering class consisted of only 100 more Hispanics than the 1989 class, a low number considering the vast increases in the Hispanic population of Texas. Further, the 2004 Proposal demonstrated that the percentage of diverse classrooms had declined since 1996.\[162\] The decrease in classroom diversity will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future years. Finally, whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years. Appellants' proposed baselines are insufficient reason to doubt UT's considered, good faith conclusion that "the University still has not reached a critical mass at the classroom level."\[163\]

*Grutter* pointedly refused to tie the concept of "critical mass" to any fixed number. The *Grutter* Court approved of the University of Michigan Law School's goal of attaining critical mass even though the school had specifically abjured any numerical target.\[164\] The Court recounted how school officials had described "critical mass" only through abstract concepts such as "meaningful numbers," "meaningful representation," and "a number that encourages underrepresented minority students to participate in the classroom and 245*245 not feel isolated."\[165\] The type of broad diversity *Grutter* approved does not lend itself to any fixed numerical guideposts.

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."\[166\] 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. We are not persuaded, however, that any of the benchmarks suggested by Appellants succeed at calling that judgment into question.

**B**

As we have observed, benchmarks aside, UT'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 before less subtle race-conscious admissions were reintroduced.

The chief difficulty with looking to aggregate minority enrollment is that it lumps together distinct minority groups from different backgrounds who may bring various unique contributions to the University environment. African-American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass, and a university must be sensitive to important distinctions within these broad groups. In *Parents Involved*, the Supreme Court specifically faulted two school districts for employing "only a limited notion of diversity" that lumped together very different racial groups.\[167\] One school district classified students exclusively as "white" or "nonwhite"; another labeled them as "black" or "other."\[168\] This "binary conception of race" runs headlong into the central teaching of *Grutter* and other precedents which instruct that a university must give serious and flexible consideration to all aspects of diversity.\[169\]
On this record, we must conclude that the University has acted with appropriate sensitivity to these distinctions. Although the aggregate number of underrepresented minorities may be large, the enrollment statistics for individual groups when UT decided to reintroduce race as a factor in admissions decisions does not indicate critical mass was achieved. Further, we recognize that some year-to-year fluctuation in enrollment numbers is inevitable, so statistics from any single year lack probative force; the University needs to maintain critical mass in years when yield is low just as it does when yield is high.

It is also apparent that UT has given appropriate consideration to whether aggregate minority enrollment is translating into adequate diversity in the classroom. Through two separate studies, the 2004 Proposal reached a serious and good faith determination that the aggregate number overstated the University’s true level of diverse interaction. UT sought to obtain the full educational benefits of diversity as 246*246 approved in Grutter and properly concluded that race-conscious admissions measures would help accomplish its goals.

C

Appellants argue that even if UT had not yet achieved critical mass under race-neutral policies, it had come close enough that the reintroduction of race-conscious measures was unwarranted. Pointing to the Supreme Court’s recent decision in Parents Involved, they argue that the University's use of race is unnecessary, and therefore not narrowly tailored, because it has only a "minimal effect." The district court thought this was an attempt "to force UT 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 [Appellants], the 'narrowly tailored' plan must have more than a minimal effect."[170]

Parents Involved does not support the cost-benefit analysis that Appellants seek to invoke. Rather, Parents Involved was primarily a critique of the school districts' "extreme approach" that used binary racial categories to classify schoolchildren.[171] The Court referred to the "minimal effect" sought by this policy as evidence that other, more narrowly tailored means would be effective to serve the school districts' interests.[172] The Court did not hold that a Grutter-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small. To the contrary, 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.[173]

VIII. CONCLUSION

Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a "serious, good faith consideration" before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university’s race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state’s redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University's formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen.[174] This trajectory evidences a risk of eroding the necessity of using race to achieve critical
mass with accents that may, if persisted in, increasingly present as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded 247*247 focus upon individuals when considering race.

A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity. The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in Grutter, are narrowly tailored—procedures in some respects superior to the Grutter plan because the University does not keep a running tally of underrepresented minority representation during the admissions process. We are satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported by the "serious, good faith consideration" required by Grutter. Finally, it is neither our role nor purpose to dance from Grutter's firm holding that diversity is an interest supporting compelling necessity. Nor are we inclined to do so. The role of black athletes in the southern universities forty years ago presents diversity's potential better than can we, although at that early juncture, it was ability overcoming a barrier of race.[L75]

The judgment of the district court is AFFIRMED.

KING, Circuit Judge, specially concurring:

I concur in the judgment and in the analysis and application of Grutter in Judge Higginbotham's opinion. No party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law. We have no briefing on those subjects, and the district court did not consider them. Accordingly, I decline to join Judge Higginbotham's opinion insofar as it addresses those subjects.

EMILIO M. GARZA, Circuit Judge, specially concurring:

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in Grutter, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not.

Today, we follow Grutter's lead in finding that the University of Texas's race-conscious admissions program satisfies the Court's unique application of strict scrutiny in the university admissions context. I concur in the majority opinion, because, despite my belief that Grutter represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. One of 248*248 the Amendment's "core principles" is to "do away with all governmentally imposed discriminations based on race," Palmore v. Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), and to create "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). This is why "[r]acial and ethnic distinctions of any sort are inherently suspect and...

In Grutter, the majority acknowledged these fundamental principles, see Grutter v. Bollinger, 539 U.S. 306, 326-27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), but then departed and held, for the first time, that racial preferences in university admissions could be used to serve a compelling state interest. Id. at 328, 123 S.Ct. 2325. Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, id. at 326, 123 S.Ct. 2325, what the Court applied in practice was something else entirely.

A

The Grutter majority asserts that "[s]trict scrutiny is not `strict in theory, but fatal in fact.'" 539 U.S. at 326, 123 S.Ct. 2325 (quoting Adarand Constructors, Inc. v. Pena,515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). But since the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand. The Court has rejected numerous intuitively appealing justifications offered for racial discrimination, such as remedying general societal discrimination, see Croson, 488 U.S. at 496-98, 109 S.Ct. 706 (plurality opinion); enhancing the number of minority professionals available to work in underserved minority communities, see Bakke, 438 U.S. at 310-11, 98 S.Ct. 2733 (opinion of Powell, J.); and providing role models for minority students, see Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). In all of these cases, the Court found that the policy goals offered were 249*249insufficiently compelling to justify discrimination based on race.

In those rare cases where the use of race properly furthered a compelling state interest, the Court has emphasized that the means chosen must "work the least harm possible," Bakke, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and be narrowly tailored to fit the interest "with greater precision than any alternative means." Grutter, 539 U.S. at 379, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting) (quotation omitted). Moreover, the failure to consider available race-neutral alternatives and employ them if efficacious would cause a program to fail strict scrutiny. See Wygant, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (plurality opinion) (the "term `narrowly tailored' ... requires consideration of whether lawful alternative and less restrictive means could have been used."); see also Adarand, 515 U.S. at 237-38, 115 S.Ct. 2097; Croson, 488 U.S. at 507, 109 S.Ct. 706; Fullilove v. Klutznick, 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) [Stevens, J., dissenting] ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Beyond the use of race-neutral alternatives, the Court, pre-Grutter, had considered several other factors in determining whether race-conscious programs were narrowly tailored. Programs employing a quota system would fail this inquiry, as would programs of unlimited duration. See Bakke, 438 U.S. at 315-18, 98 S.Ct. 2733; Croson, 488 U.S. at 498, 109 S.Ct. 706. The Court looked to a program's flexibility and its capacity for individualized consideration. See United States v. Paradise, 480 U.S. 149, 177, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion); Croson, 488 U.S. at 508, 109 S.Ct. 706. The Court also considered the relationship between the numerical goal and the percentage of minority group members in the relevant population, and whether the means chosen were likely to be
overinclusive. See Croson, 488 U.S. at 506-10, 109 S.Ct. 706. Finally, the Court considered the program’s burden on innocent third parties. See, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O’Connor, J., dissenting) (programs should not “unduly burden individuals who are not members of the favored racial and ethnic groups”); Bakke, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J).

Grutter changed this. After finding that racial diversity at the University of Michigan Law School (“Law School”) was a compelling governmental interest, the Court redefined the meaning of narrow tailoring. See Grutter, 539 U.S. at 387, 123 S.Ct. 2325 (Kennedy, J., dissenting) (“The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”); see generally Ian Ayres & Sydney Foster, Don’t Tell, Don’t Ask: Narrow Tailoring AfterGrutter and Gratz, 85 TEX. L. REV. 517 (2007). The Court replaced narrow tailoring’s conventional “least restrictive means” requirement with a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny. Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity, and courts are required to defer to their educational judgments on how best to achieve it. Grutter, 539 U.S. at 328-29, 123 S.Ct. 2325. What is more, the deference called for in Grutterseems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. See id. at 343, 123 S.Ct. 2325 (“We take the Law School at its word that it would ‘like nothing better than to find a race-neutral 250×250admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”). This new species of strict scrutiny ensures that only those admissions programs employing the most heavy-handed racial preferences, and those programs foolish enough to maintain and provide conclusive data, will be subject to “exacting judicial examination.” Miller, 515 U.S. at 904, 115 S.Ct. 2475. Others, like the University of Michigan in Grutter, and the University of Texas here, can get away with something less.

B

Setting aside for a moment Grutter’s finding that racial diversity within the Law School was a compelling state interest, see infra Sections I.D and III, I find troubling the Court’s treatment of whether the Law School’s chosen means—using race as a “plus” factor—was narrowly tailored to achieving that end. The Court discussed five hallmarks of a narrowly tailored race-conscious admissions program in answering this question: (1) the absence of quotas; (2) a program that does not unduly harm any racial group; (3) serious, good-faith consideration of race-neutral alternatives; (4) a program that contains a sunset provision or some logical end point; and (5) individualized consideration of all applicants. See 539 U.S. at 335-43, 123 S.Ct. 2325. The Court’s opinion effectively emptied at least three of these criteria of their probative content, leaving the first and fifth as determinative in any narrow tailoring inquiry. See Ayres & Foster, 85 TEX. L. REV. at 543.

First, Grutter defined a quota as reserving a fixed number or percentage of opportunities for certain minority groups, and insulating individuals from those groups from competition with all other candidates for available seats. Id. at 333-36, 123 S.Ct. 2325. These prohibitions were clear well before Grutter. See Bakke, 438 U.S. at 317, 98 S.Ct. 2733; Croson, 488 U.S. at 496, 109 S.Ct. 706. Only those programs with overt numerical set-asides or separate minority admissions tracks would fail this requirement.

Next, the Court found that race-conscious admissions programs do not unduly burden innocent third parties so long as they provide individualized consideration. Grutter, 539 U.S. at 341, 123 S.Ct. 2325 (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”). Here, the Court collapsed the second narrow tailoring criterion into the fifth.
Grutter also held that there were no workable race-neutral alternatives at the Law School, such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." Id. at 340, 123 S.Ct. 2325. The Court likewise rejected the United States' argument that the Law School's plan was not narrowly tailored because race-neutral alternatives that had proven effective elsewhere (i.e., the percentage plans utilized in California, Florida, and Texas) were available and would deliver the educational benefits the Law School was seeking. Id. The Court held that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative ... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Id. at 339, 123 S.Ct. 2325. After Grutter, universities are no longer required to use the most effective race-neutral means. So long as admissions officials have given "serious, good faith consideration" to such programs, they are free to pursue less effective alternatives 251*251 that serve the interest "about as well." Id. (citing Wygant, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (plurality opinion)). Thus, this third criterion is now essentially without meaning. Given the deference that universities' educational judgments are to be afforded post-Grutter, "serious, good faith consideration" is a peculiarly low bar that will be satisfied in most every case. Compare id. at 339, 123 S.Ct. 2325 (narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives"), with id. at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is `presumed' absent a showing to the contrary.") (citation and internal quotation marks omitted).

Finally, while the Court acknowledged that race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary, the Court suspended application of this criterion for twenty-five years. Id. at 343, 123 S.Ct. 2325 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). In doing so, the Grutter majority simply accepted the Law School's promise that it would terminate its race-conscious policies as soon as possible. See id. at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would `like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). The Court's approval here is remarkable given the constitutional gravity of this experiment (i.e., the Law School's allocation of preferences along racial lines). This fourth criterion will now be considered satisfied with little or no showing on the part of university administrators, at least until 2028.

And thus, all that truly remains of strict scrutiny's narrow tailoring inquiry post-Grutter is the requirement of "individualized consideration." But what does this term mean specifically? Grutter never tells us. Moreover, the weight given to race as part of this individualized consideration is purposefully left undefined, making meaningful judicial review all but impossible.

C

In Grutter, the University of Michigan Law School sought to achieve a student body that was both academically strong and diverse along several dimensions, including race. There, the Court endorsed the Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." Id. at 337, 123 S.Ct. 2325. The Court noted approvingly that the Law School had "no policy ... of automatic acceptance or rejection based on any single `soft' variable." Id. The Grutter majority permitted the use of race and ethnicity as "plus" factors within the Law School's holistic review, but this simply raises the question: how much of a plus?21 Grutter did not say.

Instead, the Court implicitly forbade universities from quantifying racial preferences in their admissions calculus. Contrasting the admissions system found unconstitutional in Gratz, the Grutter majority noted that "the Law School awards no mechanical, predetermined diversity `bonuses' based on race or
of race is no longer necessary, compelling interest, coupled with the deference allegedly owed to their determination of when the use of race is no longer necessary, see id. at 343, 123 S.Ct. 2325, would appear to permit race-based policies.
indefinitely. For example, notwithstanding that a university's race-conscious policies had achieved 25% African-American and 25% Hispanic enrollment in the student body generally, that university could still justify the use of race in admissions if these minority students were disproportionately bunched in a small number of classes or majors. In fact, the majority's application of Grutter today reaches just such a result.

Despite Top Ten Percent's demonstrable impact on minority enrollment at the University of Texas, the majority opinion holds that the University's use of race in admissions can be justified by reference to the paucity of minority students in certain majors:

While the [Top Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority 254*254 students remain clustered in certain programs, severely limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American. It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.

Ante at 240. If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.

Given the "large-scale absence of African-American and Hispanic students from thousands of classes" at the University of Texas, Fisher, 645 F.Supp.2d at 607, today's decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity. Such a use of race "has no logical stopping point" and is not narrowly tailored. See Croson, 488 U.S. at 498, 109 S.Ct. 706 (citing Wygant, 476 U.S. at 275, 106 S.Ct. 1842). Allowing race-based social engineering at the university level is one thing, but not nearly as invasive as condoning it at the classroom level. I cannot accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines.

D

The same imprecision that characterizes Grutter's narrow tailoring analysis casts doubt on its discussion of racial diversity as a compelling state interest. Grutter found that the Law School had a compelling interest in "securing the educational benefits of a diverse student body," and that achieving a "critical mass" of racially diverse students was necessary to accomplish that goal. Id. at 333, 123 S.Ct. 2325. The Law School defined "critical mass" as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race." Id. at 318-19, 123 S.Ct. 2325. The Court clarified: "critical mass is defined by reference to the educational benefits that diversity is designed to produce." Id. at 330, 123 S.Ct. 2325. Justice O'Connor's majority opinion identified three such constitutionally relevant benefits: (i) increased perspective in the classroom; (ii) improved professional training; and (iii) enhanced civic engagement. Id. at 330-33, 123 S.Ct. 2325. The first element is based on Justice Powell's focus in Bakke on the campus-level benefits of diversity. The second two are new.[vi]

255*255 My difficulty with Grutter's "educational benefits of diversity" discussion is that it remains suspended at the highest levels of hypothesis and speculation. And unlike ordinary hypotheses, which
must be testable to be valid, Grutter’s thesis is incapable of testing. Justice O’Connor’s majority opinion rests almost entirely on intuitive appeal rather than concrete evidence.

1

The first constitutionally relevant benefit that makes up Grutter’s compelling interest is racial diversity’s direct impact in the classroom. Here, the Court concluded that diverse perspectives improve the overall quality of education because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds."Id. at 330, 123 S.Ct. 2325 (internal quotation marks omitted). This rationale conforms to Justice Powell’s opinion in Bakke that universities should pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body."438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.). I question the validity of this surmise.

Nonetheless, assuming a critical mass of minority students could perceptibly improve the quality of classroom learning, how would we measure success? By polling students and professors, as the University of Texas has done? If all a university "need do is find .. report[s]," studies, or surveys to implement a raceconscious admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." Croson, 488 U.S. at 504, 109 S.Ct. 706; see also J.E.B. v. Alabama ex rel. T.B., 515 U.S. 127, 139 n. 11, 115 S.Ct. 2475 (1995) ("[C]lassifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalizations."). Grutter permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect 256*256 against. See 539 U.S. at 327, 123 S.Ct. 2325 ("Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.") (citation and internal quotation marks omitted).

Grutter and Bakke err by simply assuming that racial diversity begets greater viewpoint diversity. This inference is based on the assumption that members of minority groups, because of their racial status, are likely to have unique experiences and perspectives incapable of expression by individuals from outside that group. But as the Court has recognized elsewhere, the Constitution prohibits state decisionmakers from presuming that groups of individuals, whether classified by race, ethnicity, or gender, share such a quality collectively. See Miller, 515 U.S. at 914, 115 S.Ct. 2475 (the Equal Protection Clause forbids "the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.") (citation omitted). There is no one African-American or Hispanic viewpoint, and, in fact, Grutter approved the Law School’s diversity rationale precisely because of the role that racial diversity can play in dispelling such falsehoods. See id. at 320, 123 S.Ct. 2325 (citing expert testimony suggesting that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students."); and id. at 333, 123 S.Ct. 2325 ("[D]iminishing the force of such stereotypes is a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.").
Grutter sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.

2

Grutter's second asserted educational benefit of diversity relates to improved professional training. Here, Justice O'Connor writes that diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." Id. at 330, 123 S.Ct. 2325 (internal quotation marks and brackets omitted). Such training is essential, the argument goes, for future leaders who will eventually work within and supervise a racially diverse workforce. Id. at 330-31, 123 S.Ct. 2325.

State universities are free to define their educational goals as broadly as needed to serve the public interest. We defer to educators' professional judgments in setting those goals. Grutter, 539 U.S. at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally proscribed limits."). My concern, discussed throughout this opinion, is not that Grutter commands such deference, but that it conflated the deference owed to a university's asserted interest with deference to the means used to attain it. See id. at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of that goal.").

There is, however, one aspect of the Court's "improved professional training" rationale that I find especially troubling. While Grutter made much of the role that educational institutions play in providing professional training, see id. at 331, 123 S.Ct. 2325 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship"), the cases the Court relied on involved primary and secondary schools. See id. (citing Plyler v. Doe, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (describing education as pivotal to "sustaining our political and cultural heritage") and ibid. (citing Brown v. Bd. of Educ., 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("education ... is the very foundation of good citizenship."))). I question whether these cases apply with equal force in the context of higher education, where academic goals are vastly different from those pursued in elementary and secondary schools. Moreover, a university's self-styled educational goals, for example, promoting "cross-racial understanding" and enabling students "to better understand persons of different races," could just as easily be facilitated in many other public settings where diverse people assemble regularly: in the workplace, in primary and secondary schools, and in social and community groups. See Grutter, 539 U.S. at 347-48, 123 S.Ct. 2325 (Scalia, J., dissenting). I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals. Notwithstanding an institution's decision to expand its educational mission more broadly, the university's core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.

3

Finally, Grutter articulated a third benefit of racial diversity in higher education: enhancing civic engagement. Here, the Court wrote that:

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.
In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of educational institutions that provide this training. Access to higher education must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Id. at 332-33, 123 S.Ct. 2325.

Unlike the first two "educational benefits of diversity," which focused on improving classroom discussion and professional training, this third claimed benefit plainly has nothing to do with the university's core education and training functions. Instead, Grutter is concerned here with role that higher education plays in a democratic society, and the Court suggests that affirmative action at public universities can advance a societal goal of encouraging minority participation in civic life. This proposition lacks foundation.

If a significant portion of a minority community sees our nation's leaders as illegitimate or lacks confidence in the integrity of our educational institutions, as Grutter posits in the block quote above, see id., 539 U.S. at 332, 123 S.Ct. 2325, I doubt that suspending the prevalent constitutional rules to allow preferred treatment for as few as 15-40 students, see infra Section II, is likely to foster renewed civic participation from among that community as a whole.

Grutter replaced Bakke's emphasis on diversity in educational inputs with a new emphasis on diversity in educational outputs. By expanding Justice Powell's original viewpoint diversity rationale to include diversity's putative benefits in the workforce and beyond (i.e., inspiring a sense of civic belonging in discouraged minority communities), the Court has endorsed a compelling interest without bounds. Post-Grutter, it matters little whether racial preferences in university admissions are justified by reference to their potential for improved discussion in individual classrooms, or even at the university generally. Now such preferences can be justified based on their global impact. By removing the focus of attention from diversity's educational value at the campus level, the Court has ensured that the "educational benefits of diversity" will accommodate all university affirmative action plans as compelling.

E

Finally, by using metaphors, like "critical mass," and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, Grutter fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently. And notwithstanding the Court's nod to federalism, Grutter's ambiguity discourages States from experimenting or departing from the one accepted norm. See id. at 342, 123 S.Ct. 2325 (citing United States v. Lopez, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). In the absence of clear guidance, public universities nationwide will simply model their programs after the one approved in Grutter rather than struggle with the risks and uncertain benefits of experimentation. That is exactly what has occurred here. With one exception—the Top Ten Percent law—the race-conscious admissions policy that we review today is identical to the program used at the Law School.
II

As mentioned at the outset, I concur in the opinion because I believe today's decision is a faithful application of Grutter's teachings, however flawed I may find those teachings to be. I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry. See 28 U.S.C. § 453. My difficulty is not necessarily with today's decision, but with the one that drives it. Nonetheless, there is one aspect of Judge Higginbotham's thoughtful opinion that gives me pause about whether Grutter compels the result we reach today. Ultimately, and regretfully, I recognize that the deference called for by Grutter may make this concern superfluous.

As today's opinion notes, the University of Texas's race-conscious admissions policy is nearly indistinguishable from the program approved by the Supreme Court in Grutter. Ante at 216-17, 217-18, 230. As such, the majority opinion summarily finds that, like the Law School in Grutter, the University of Texas has a compelling interest in obtaining the educational benefits of diversity in its undergraduate program. Id. at 230-31. After affording all deference due, today's decision focuses on the efficacy of the University's race-conscious admissions policy. Id. at 232-33 ([W]hile we focus on the University's decision to adopt a Grutter-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check."). In my view, the efficacy of the University's race-based admissions policy is more than merely relevant, it is dispositive.

The plaintiffs here argue that the University of Texas's interest in obtaining a racially diverse student body is not compelling because the University has already achieved critical mass by way of Texas's Top Ten Percent law. See TEX. EDUC. CODE § 51.803 (1997). The University disagrees. This claim is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields. See Fisher, 645 F.Supp.2d at 608-09 ([A]t no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context."). Whether the University of Texas's use of race is narrowly tailored turns on whether its chosen means—using race as a plus factor in the University's holistic scoring system—are effective, not just in theory, but also in practice.

If, apart from the Top Ten Percent law, the University of Texas's race-conscious admissions program added just three-to-five African-American students, or five-to-ten Hispanic students, to an entering freshman class of 6,700, that policy would completely fail to achieve its aims and would not be narrowly tailored. See Ayres & Foster, 85 TEX. L. REV. at 523 n. 27 ([A]t least as a theoretical matter, narrow tailoring requires not only that the preferences not be too large, but also that they not be 260*260 too small so as to fail to achieve the goals of the relevant compelling government interest."). The marginal benefit of adding five or ten minority students to a class of this size would be negligible and have no perceptible impact on the "educational benefits that diversity is designed to produce." Grutter, 539 U.S. at 330, 123 S.Ct. 2325 ([C]ritical mass is defined by reference to the educational benefits that diversity is designed to produce."). This is especially so, if, as the district court suggests, "the large-scale absence of African-American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits." Fisher, 645 F.Supp.2d at 607 (citing statistics showing that in 2002, the University offered over 5,631 classes, 79% of which (4,448) had just one or zero African-American students; 30% of classes (1,689) had zero or one Hispanic students).

So, the controlling question is, "Is the University of Texas's race-conscious policy effective?" And by effective, I do not mean that every statistically insignificant gain (i.e., adding one, three, or five students at the margin) qualifies. The constitutional inquiry for me concerns whether the
University's program meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass. I find it does not.

In the 2008 admissions cycle, 29,501 students applied to the University of Texas. See Fisher, 645 F. Supp. 2d at 590. Less than half, 12,843, were admitted and 6,715 ultimately enrolled. Id. Of these enrolled students, 6,322 came from Texas high schools. See Implementation and 261*261 Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, October 28, 2008 at 7 (“2008 Top Ten Percent Report”), 5,114 (80.9% of enrolled Texas residents) of these students were a product of Top Ten Percent, meaning that, at most, 1,208 (19.1%) enrolled non-Top Ten Percent Texas residents had been evaluated on the basis of their AI/PAI scores. Id.

Of the 363 African-American freshmen from Texas high schools that were admitted and enrolled (6% of the 6,322-member enrolling class from Texas high schools), 305 (4.8%) were a product of Top Ten Percent, while 58 (0.92%) African-American enrollees had been evaluated on the basis of their AI/PAI scores. See 2008 Top Ten Percent Report at 7. For the 1,322 (21%) total enrolled in-state Hispanic students, 1,164 (18.4% of enrolled in-state students) were a product of Top Ten Percent, while 158 (2.5%) had been evaluated on the basis of their AI/PAI scores. Id. We know that in some cases an applicants' AI score is high enough that the applicant is granted admission based on that score alone. But we do not have data to show how many of these 58 African-American and 158 Hispanic students were admitted automatically based on their AI scores, which are race-neutral, and how many were admitted after factoring in the students' PAI scores, which use the University's Grutter-like holistic evaluation plan and include consideration of an applicant's race as one of seven "special circumstances." Nonetheless, assuming that all 58 and 158 African-American and Hispanic students, respectively, were admitted on the basis of their combined AI and PAI scores (i.e., that none of these minority students gained admission on the basis of their race-neutral Academic Index score alone), the question is whether the University's use of race, which is a "highly suspect tool," Croson, 488 U.S. at 493, 109 S.Ct. 706, as part of the PAI score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas.

We do not know, because the University does not maintain data, the degree to which race influenced the University's admissions decisions for any of these enrolled students or how many of these students would not have been admitted but-for the use of race as a plus factor. But assuming the University gave race decisive weight in each of these 58 African-American and 158 Hispanic students' admissions decisions, those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class. And this is assuming a 100%, unconstitutional use of race, not as a plus factor, but as a categorical condition for guaranteed admission. See Grutter, 539 U.S. at 329-30, 123 S.Ct. 2325 (making race an automatic factor in admissions would "amount to outright racial balancing, which is patently unconstitutional.").

262*262 Assume further, that such a prohibited use of race was employed in only half of the University's admissions decisions. This would still only yield 29 (0.46%) African-American and 79 (1.25%) Hispanic students.

Now assume that the University's use of race is truly holistic; that given the multitude of other race-neutral variables the University considers and values sincerely, race's significance is limited in any individual application packet. See Fisher, 645 F. Supp. 2d at 608 ("UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven 'special circumstances,' which is in turn one of six factors that make up an applicants personal achievement score."). Lastly, assume that in this system, the University's use of race results in a but-for offer of admission in one-quarter of the decisions. A twenty-five percent but-for admissions rate seems highly improbable if race is truly limited in its holistic weighting, but the unlikelihood of the assumption
proves my point. Even under such a system, the University’s proper use of race holistically would only yield 15 (0.24%) African-American and 40 (0.62%) Hispanic students. African-American students, for example, admitted and enrolled by way of this holistic system would still only constitute two-tenths of one percent of the University of Texas's 2008 entering freshman class. Such a use of race could have no discernable impact on the classroom-level "educational benefits diversity is designed to produce" or otherwise influence "critical mass" at the University of Texas generally. Such a plan exacts a cost disproportionate to its benefit and is not narrowly tailored. This is especially so on a university campus with, for example, 4,448 classes (out of 5,631) with zero or one African-American students, and 1,689 classes with zero or one Hispanic students. [Fisher, 645 F.Supp.2d at 607.]

More importantly, if the figures above are reasonably accurate, the University's use of race also fails Grutter's compelling interest test as a factual matter. See 539 U.S. at 333, 123 S.Ct. 2325 ("[D]iminishing the force of [racial] stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). From its inception immediately following Grutter, the University's race-conscious admissions policy was described as essential to the University of Texas's educational mission:

[T]o accomplish [UT's] mission and fulfill its flagship role ... the undergraduate experience for each student must include classroom contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admissions process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission.

[Fisher, 645 F.Supp.2d at 602] (citing Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 24). If the University's use of race is truly necessary to accomplish its educational function, then as a factual matter, the University of Texas's race-conscious measures have been completely ineffectual in accomplishing its claimed compelling interest.

In contrast, Top Ten Percent was responsible for contributing 305 and 1,164 African-American and Hispanic students, respectively, to the entering 2008 freshman class using entirely race-neutral means. These students represent 4.8% and 18.4% of the entering in-state freshman 263*263 class. In addition, of the 58 African-American and 158 Hispanic enrolled students evaluated on the basis of their AI and PAI scores, if the University's use of race was truly holistic, the percentage of these students for whom race was a decisive factor (i.e., but-for admits) should be minimal. In other words, the vast majority of these 58 and 158 students were admitted based on objective factors other than race. That is, the University was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means. And although the University argues that this number still does not qualify as critical mass, one thing is certain: the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole. As such, the University's use of race can be neither compelling nor narrowly tailored.

I do not envy the admissions officials at the University of Texas. In 1997, in response to our decision in Hopwood v. Texas, 78 F.3d 932 (5th Cir.1996), the people of the State of Texas determined, through their elected representatives, that something needed to be done to improve minority enrollment at Texas’s public institutions of higher education. Texas's Top Ten Percent law was intended to effectuate that desire. We take no position today on the constitutionality of that law. [21] Instead, we are asked to scrutinize the legality of the University's race-conscious policy designed to complement Top Ten Percent. Even with the limited data available, I cannot find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernable educational impact. In my view, the University's program fails strict scrutiny before or after Grutter. See, e.g., Parents
The Supreme Court's narrow tailoring jurisprudence has been reliably tethered, at least before 2003, to the principle that whenever the government divides citizens by race, which is itself an evil that can only be justified in the most compelling circumstances, that the means chosen will inflict the least harm possible, see _Bakke_, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and fit the compelling goal "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." _Croson_, 488 U.S. at 493, 109 S.Ct. 706; see also _Kimel v. Fla. Bd. of Regents_, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("[W]hen a State discriminates on the basis of race ..., we require a tighter fit between the discriminatory means and the legitimate ends they serve."). _Grutter_ abandoned this principle and substituted in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.

My disagreement with _Grutter_ is more fundamental, however. _Grutter_’s failing, in my view, is not only that it approved an affirmative action plan incapable of strict scrutiny, but more importantly, that it approved the use of race in university admissions as a compelling state interest at all.

The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races. A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decisionmakers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions. The University of Texas, for instance, segregates student admissions data along five racial classes. See, e.g., _2008 Top Ten Percent Report_ at 6 (reporting admissions data for White, Native-American, African-American, Asian-American, and Hispanic students). That is not how society looks any more, if it ever did.

When government divides citizens by race, matters are different. Government-sponsored discrimination is repugnant to the notion of human equality and is more than the Constitution can bear. See _Grutter_, 539 U.S. at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("Perferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."). There are no _de minimis_ violations of the Equal Protection Clause, and when government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think alike or have common life experiences. The Court has condemned such class-based presumptions repeatedly. See, e.g., _United States v. Virginia_, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications."); _Shaw_, 509 U.S. at 647, 113 S.Ct. 2816 (rejecting the notion “that members of the same
racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same interests, or have a common viewpoint about significant issues); Wygant, 476 U.S. at 316, 106 S.Ct. 1842 (Stevens, J., dissenting) (the "premise that differences in race, or the color of a person's skin, reflect real differences ... is utterly irrational and repugnant to the principles of a free and democratic society"). I do not see how racial discrimination in university admissions is any less repugnant to the Constitution. If anything, government-sponsored discrimination in this context presents an even greater threat of long-term harm.[24]

For the most part, college admissions is a zero-sum game. Whenever one student wins, another loses. The entire competition, encouraged from age five on, is premised on individual achievement and promise.[25] It is no exaggeration to say that the college application is 18 years in the making and is an unusually personal experience: the application presents a student's best self in the hopes that her sustained hard work and experience to date will be rewarded with admission. Race-based preferences break faith with this expectation by favoring a handful of students based on a trait beyond the control of all. See Bakke, 438 U.S. at 361, 98 S.Ct. 2733 (opinion of Brennan, White, Marshall & Blackmun, JJ.) ("[A]dvancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of the individual ..."]. Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary—entitlement. More fundamentally, it "assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from 266*266 governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." Croson, 488 U.S. at 495, 109 S.Ct. 706 (citation and internal quotation marks omitted).

Yesterday's racial discrimination was based on racial preference; today's racial preference results in racial discrimination. Changing the color of the group discriminated against simply inverts, but does address, the fundamental problem: the Constitution prohibits all forms of government-sponsored racial discrimination. Grutter puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.


[3] Like all Texas residents, Appellants could attend UT Austin as transfer students if they first enrolled in a participating UT system school and met the standards required by the Coordinated Admissions Program, discussed in greater detail below. Instead, Appellants permanently enrolled at other institutions.

[4] See DeFunis v. Odegaard, 416 U.S. 312, 319, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (dismissing for lack of standing a suit that challenged a law school admissions policy because the plaintiff would "never again be required to run the gauntlet of the Law School's admissions process").


In practice, the admissions systems of Michigan Law School and UT differ because UT’s automatic admission of the top ten percent of Texas high school seniors “largely dominates [its] admissions process.” Fisher, 645 F. Supp. 2d at 595. We discuss the impact of the Top Ten Percent Law in greater detail below.


See Grutter, 539 U.S. at 325, 123 S.Ct. 2325 (citing Bakke, 438 U.S. at 315, 98 S.Ct. 2733 (opinion of Powell, J.).

Id. at 316, 123 S.Ct. 2325 (internal quotation marks omitted).

Id. at 325, 123 S.Ct. 2325; see id. at 329-30, 123 S.Ct. 2325.

Id. at 380, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting).

Id. at 329-30, 123 S.Ct. 2325 (opinion of the Court).

Id. at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

Id. at 314, 123 S.Ct. 2325.

Grutter, 539 U.S. at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

Id. (internal quotation marks omitted).

Id. (internal quotation marks omitted).

Id.

Id. (internal quotation marks and brackets omitted).

Id. at 332, 123 S.Ct. 2325.

Id.

Id. at 332-33, 123 S.Ct. 2325. The Court further explained:

[Education] is pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society. . . . [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as amicus curiae, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” And, “[n]owhere is the importance of such openness more acute than in the context of higher education.”

ld. at 331-32, 123 S.Ct. 2325 (final two alterations in original; citations and some internal quotation marks omitted).

Id. at 332, 123 S.Ct. 2325.
[31] Id. at 337, 123 S.Ct. 2325.

[32] Id. (quoting Bakke, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J)).

[33] Parents Involved, 551 U.S. at 722, 127 S.Ct. 2738; see also Grutter, 539 U.S. at 337, 123 S.Ct. 2325 (“The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”).

[34] Grutter, 539 U.S. at 338, 123 S.Ct. 2325.

[35] Id. at 334, 123 S.Ct. 2325 (citing Bakke, 438 U.S. at 315-16, 98 S.Ct. 2733 (opinion of Powell, J)).

[36] Id. at 322, 123 S.Ct. 2325; see Bakke, 438 U.S. at 289, 98 S.Ct. 2733 (opinion of Powell, J).


[38] Id.


[40] Id. at 339, 123 S.Ct. 2325 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)).

[41] Id. at 343, 123 S.Ct. 2325.


[43] Id. at 596.

[44] Marta Tienda et al., Closing the Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action 52 tbl5 (Tex. Higher Educ. Opportunity Project Working Paper), available at http://theop.princeton.edu/workingpapers.html. Unlike the current Top Ten Percent Law, UT’s earlier policies did not mandate the admission of all top ten percent students. Thus, even though a top ranking at a predominantly minority high school would contribute to a higher AI score, the AI alone could not effectively serve as a proxy for race because, on average, minorities received lower standardized test scores.

[45] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Four Justices would have held that universities have broad authority to consider race in admissions in order to “remedy disadvantage cast on minorities by past racial prejudice.” Id. at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Four other Justices would have held that Title VI of the Civil Rights Act of 1964 bars federally funded universities from making any admissions decisions on the basis of race. Id. at 417-18, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, CJ., and Stewart and Rehnquist, JJ.). Justice Powell cast the decisive vote in a separate opinion—not joined in full by any other Justice—that invalidated the racial set-aside in the admissions program then before the Court, but reasoned that it would be constitutional for a university to consider race as one facet of diversity in a flexible review that treated each applicant as an individual. Id. at 316-19, 98 S.Ct. 2733 (opinion of Powell, J.). Because none of these positions carried the support of a majority of the Court, it was not completely clear which (if any) of these rationales was controlling. See Grutter, 539 U.S. at 322-25, 123 S.Ct. 2325 (2003) (recounting this history and the subsequent confusion among lower courts).

[46] Records do reflect that at UT’s law school during this time, minority and nonminority applicants were reviewed by separate admissions committees and were subject to different grade and test-score cutoffs. See Hopwood v. Texas, 78 F.3d 932, 935-38 (5th Cir. 1996).


[49] Id. at 944-48.


[52] Id. at 591-92.

[53] Id. at 592.


[56] TEX. EDUC.CODE § 51.803 (1997). The Top Ten Percent Law was amended, during the course of this litigation, to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents. Id. § 51.803(a-1) (2010). The cap is effective starting with admissions to the Fall 2011 entering class and is currently scheduled to end with admissions to the Fall 2015 entering class.

[57] 2008 Top Ten Percent Report at 6 tbl.1.

[58] Id. at 8; see also Fisher, 645 F.Supp.2d at 593 (reporting statistics for total admitted applicants, both Texas and non-Texas residents).

[59] Tienda et al., supra note 44, at 52 tbl.5.


[61] Minutes of the Board of Regents of the University of Texas at Austin, Meeting No. 969, Aug. 6-7, 2003 (Dist. Ct. Dkt. No. 94, Ex. 19, Tab A), at 4.

[62] Fisher, 645 F.Supp.2d at 593. Classes with only one student of a given minority were thought to be just as troubling as classes with zero students of that minority because a single minority student is apt to feel isolated or like a spokesperson for his or her race. Id. at 602-03; see also Grutter, 539 U.S. at 319, 123 S.Ct. 2325.

[63] Lavergne Aff. (Dist. Ct. Dkt. No. 102, Tab B) ¶¶ 4-5.


[66] Id. at 1 (internal quotation marks omitted); see also Fisher, 645 F.Supp.2d at 603.


[68] Id. at 24 (quoted in Fisher, 645 F.Supp.2d at 602).

[69] Id. (quoted in Fisher, 645 F.Supp.2d at 602).

[71] Id. This particular ranking is somewhat limited in its significance, however, as the results are based on raw tabulations of the number of degrees conferred upon minority students. Large schools, like UT, are more likely to be ranked higher simply because they graduate a greater number of students (both minorities and non-minorities). See Victor M.H. Borden, Top 100 Undergraduate Degree Producers: Interpreting the Data, DIVERSE ISSUES IN HIGHER EDUC., June 12, 2008.


[73] Admission decisions for domestic non-Texas residents and international applicants are made solely on the basis of their Academic and Personal Achievement Indices.

[74] 2008 Top Ten Percent Report at 8 tbl.2, 9 tbl.2 b. Table 2 shows 8,984 top ten percent students were admitted in 2008. The UT Associate Director of Admissions reported that 10,200 admissions slots are available for Texas residents, leaving 1,216 slots for non-top ten percent students. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

[75] Id. at 7 tbl.1 a. In 1998, out of a class that included 6,110 Texas residents, only 2,513 enrolled freshmen were admitted under the Top Ten Percent Law.

[76] The district court found that, on "relatively rare" occasions, a holistic review of the entire application may result in the University admitting an applicant to the fall class even though his or her AI or PAI scores fall just shy of the official cutoff. See Fisher, 645 F.Supp.2d at 599.

[77] Fisher, 645 F.Supp.2d at 596. The precise formulas used to calculate an applicant’s Academic Index are derived by regression analysis and vary by intended major. For instance, the formula for prospective engineering majors gives greater weight to math scores, whereas the formula for prospective liberal arts majors gives somewhat greater weight to verbal scores. See 2004 Proposal at 27 & n.5. The differences in these formulas are immaterial to the present case.

[79] In other words, no applicant is denied admission based purely on Al score without having her file reviewed by at least one admissions reader and her individual circumstances considered.


[80] PAI = [(personal achievement score * 4) + (average essay score * 3)] / 7. Id. at 597 n. 7.

[81] Id. at 591-92, 597.

[82] Id. at 597; see Univ. of Tex. at Austin Office of Admissions, Inter-Rater Reliability of Holistic Measures Used in the Freshman Admission Process of the University of Texas at Austin (Feb. 22, 2005) (Dist.Ct.Dkt. No. 94, Ex. 10).


[86] See id. at 608.

[87] In addition, because of special portfolio, audition, and other requirements, the Top Ten Percent Law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs.

[88] Thus, for example, the School of Business granted automatic admission only to those students who graduated in the top 4% of their high school class and selected a business major as their first choice. Ishop Dep. (Dist. Ct. Dkt. No. 96, Tab 2) at 32.


[90] Id. at 597.
Bd. of Educ., (quoting quotation marks omitted) (quoting quotation marks omitted) (The Law School's educational judgment . . . is one to which we defer . . . . 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.).

[97] Id. at 328, 123 S.Ct. 2325.

[98] Id. at 329, 123 S.Ct. 2325.

[99] Bakke, 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).

[100] Grutter, 539 U.S. at 328, 123 S.Ct. 2325.

[101] Id. at 327, 123 S.Ct. 2325.

[102] Id. at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is presumed absent a showing to the contrary." (internal quotation marks omitted) (quoting Bakke, 438 U.S. at 319-19, 98 S.Ct. 2733 (opinion of Powell, J.))).

[103] Id. at 333-34.


[105] Id. at 2664.


[109] Id. at 2676.

[110] Id.
unconstitutional under contrary, if conscious universit “that diversity as a basis for employing racial preferences is simply too open, opinions expressely approved of policies seeking only some undefined “meaningful number” of minorities, see Grutter, 539 U.S. at 335, 123 S.Ct. 2325; Bakke, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.), and the Court has firmly “rejected” the argument “that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite” a ground for race-conscious university admissions policies, Gratz, 539 U.S. at 268, 123 S.Ct. 2411 (internal quotation marks omitted). On the contrary, if UT were to identify some numerical target for minority enrollment, that would likely render the policy unconstitutional under Grutter.

Grutter, 539 U.S. at 336, 123 S.Ct. 2325 (citation, internal quotation marks, and brackets omitted).

Id. at 335, 123 S.Ct. 2325 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).


Fisher, 645 F.Supp.2d at 607 n. 11.

Id. at 606.

Grutter, 539 U.S. at 337, 123 S.Ct. 2325 (quoting Bakke, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

Id. at 338, 123 S.Ct. 2325; see Fisher, 645 F.Supp.2d at 597.

Grutter, 539 U.S. at 336, 123 S.Ct. 2325 (quoting Bakke, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.)).

Id. at 333, 123 S.Ct. 2325.

Id. at 338, 123 S.Ct. 2325.

2004 Proposal at 23 (quoted in Fisher, 645 F.Supp.2d at 602).

Id. at 24-25 (quoted in Fisher, 645 F.Supp.2d at 602).
opportunity to select for a wide range of diverse experiences (such as travel abroad, extra-curricular involvement, or work

risks driving away matriculating minority students from difficult majors like business or the sciences.

This effect, in turn, further widens the "credentials gap" between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences.

The Top Ten Percent Law may produce diversity beyond varying hometowns, including differences in socioeconomic status and rural/urban/suburban upbringing. However, under the Top Ten Percent Law, the University does not have the opportunity to select for a wide range of diverse experiences (such as travel abroad, extra-curricular involvement, or work
experience), so the Top Ten Percent Law bluntly operates as an attempt to create diversity through reliance on perceived group characteristics and segregated communities.


[153] In an effort to ameliorate this effect, a special provision of the Top Ten Percent Law provides that "a high school magnet program, academy, or other special program" may be considered "an independent high school with its own graduating class separate from the graduating class of other students attending the high school," effectively allowing the school to certify two separate groups of Top Ten Percent Law students. See TEX. EDUC. CODE § 51.8045.

[154] See *2008 Top Ten Percent Report* at 12 tbl.6 (showing the average SAT range for top ten percent and non-top ten percent students); id. at 13-15 tbl.6a-6d (displaying SAT ranges based on race and top ten percent status).

[155] To reach its target class size, UT offers fall admission to 10,200 Texas applicants. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7 ¶ 12. For the class entering Fall 2008, after UT offered admission to top ten percent students, there were 1,216 admissions spots remaining. (The district court noted there were 841 places, but that number included the admission of so-called "Group A" applicants who have extremely high AI scores but are not in the top ten percent of their class. See id.) There were a total of 27,712 applicants for the fall class of 2008. *Statistical Handbook 2009-2010*, at 25 tbl.S21. Neither the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%. By comparison, the overall acceptance rate at Ivy League schools for the class entering Fall 2008 ranged from 8% (Harvard) to 21% (Cornell). See *The Rankings: Best National Universities*, U.S. NEWS & WORLD REP., Sept. 2009, at 84-85.

[156] Appellants here do not challenge the constitutionality of the Top Ten Percent Law. In fact, they endorse it as a race-neutral alternative to the *Grutter* plan. A court considering the constitutionality of the Law would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); cf. Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). available at 2003 WL 402129, at *2, *9-*10 (noting that "it is not clear that [percentage] plans are actually race-neutral" and that some *amicus* counsel in *Grutter* "have signaled interest in moving on after this case to challenge these aspects of the Texas program").


[161] See, e.g., *2004 Proposal* at 24 ("[R]estoration to pre-Hopwood levels is not sufficient.").

[162] Id. at 25 & tbl.8.

[163] Id. at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).


[165] Id.

[166] Id. at 330, 123 S.Ct. 2325.

experience, service to the school or community, and special circumstances.

is based on an evaluation of the file in its entirety by senior members of the admissions staff. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.

F.Supp.2d 587, 597 (W.D.Tex.2009) ("The third [Personal Achievement Index] element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.")
as the majority opinion recognizes, comparing enrollment data for Texas residents, which include precise figures for Top 10% and Non-Top 10% enrollees. Second, as the majority opinion recognizes, ante at 241-42 n. 155, the record does not include data showing what portion of the total
applicants pool were Texas residents and what portion came from out-of-state. This is problematic. We know, for example, that the 2008 entering freshman class included 375 African-American and 1,338 Hispanic students, and that 363 and 1,322 of these students, respectively, were Texas residents. See 2008 Top Ten Percent Report at 6-7. So, although we know that the 2008 enrolling freshman class included 12 African-American and 16 Hispanic students from out-of-state, we cannot intelligently discuss the potential impact of UT’s race-conscious policy on this data set without also having total application and admissions information available for non-Texas residents. This does not affect my conclusions—the number of non-Texas African-American and Hispanic students enrolled in the freshman class is statistically insignificant.

[2.0] In this section, I often refer to a raw number followed by a percentage listed in parentheses. E.g., "305 (4.8%)." This percentage figure (\(\%\)) is calculated by dividing number of students cited by 6,322, the number of enrolled Texas residents in the 2008 freshman class.

[2.1] In assessing whether the University’s use of race is narrowly tailored, today’s majority opinion finds that Top Ten Percent is not a race-neutral alternative that serves the University’s asserted interest "about as well" as its Grutter-like plan. See ante at 238-42. My concurrence should not be read to approve or reject the constitutionality of percentage plans like Top Ten Percent. That issue remains open. I write separately to underscore the minimal effect that the University’s use of race has had on critical mass in light of Top Ten Percent, and why the University’s use of race would not, therefore, be narrowly tailored applying traditional strict scrutiny principles before Grutter. I recognize that Grutter appears to swallow this concern.


[2.3] See Alexander & Schwarzschild, 21 CONST. COMMENT. at 6-7 ("[W]hen the government classifies people racially and ethnically, and then makes valuable entitlements such as admission to a university turn on those classifications... that very fact encourages people to think that 'races' are real categories, not bogus ones, and that one's race is an exceedingly important rather than a superficial fact about oneself and others. In other words, it encourages people to pay close attention to race and to think in racial terms.”).

[2.4] Professor Cohen succinctly describes some of the effects of racial and ethnic preferences in higher education:

1. preference divides the society in which it is awarded;
2. it establishes a precedent in excusing admitted racial discrimination to achieve political objectives;
3. it corrupts the universities in which it is practiced, sacrificing intellectual values and creating pressures to discriminate by race in grading and graduation;
4. ...
5. it obscures the real social problem of why so many minority students are not competitive academically;
6. it obliges a choice of some few ethnic groups, which are to be favored above all others;
7. ...
8. it removes incentives for academic excellence and encourages separatism among racial and ethnic minorities;
9. it mismatches students and institutions, increasing the likelihood of failure for many minority students; and
10. it injures race relations over the long haul.


[2.5] For example, in the School of Architecture, the School of Fine Arts, and certain honors programs, where aptitude is essential, the University requires special portfolio, audition, and other requirements. See ante at 229 n. 87. In these and other impacted programs where student demand outstrips available space, the University recognizes and uses merit as the decisive
consideration in admission. I do not see why excellence and merit warrant less consideration in the University's other disciplines.
Petitioner’s Brief

2012 WL 1882759

Background:

Petitioner, Abigail Fisher, argues that use of race in admissions decisions at any level and at any possible weight inherently violates the protections of the Equal Protection Clause of the 14th Amendment. Framing the purported violation, Petitioner claims that Respondent fails to meet the strong basis in evidence standard required in strict-scrutiny review when race is used at all in the educational context. Further, Petitioner argues that the use of race is not sufficiently “narrowly tailored” as it only generates a “minimal additional minority enrollment” at the University in light of the number of minority students brought in under Texas’ Top Ten Percent Program. To this end, Petitioner argues that the Top Ten Percent Program itself was a sufficient means of ensuring a sufficient number of minority students at University of Texas without having to use other means. Petitioner frames that identification and successful utilization of “race neutral” means such as the Top Ten Percent Program as reason why Texas did not “need” to use race conscious means in the general admission process.
STATEMENT

Petitioner Abigail Fisher, a White female, applied for undergraduate admission to the University of Texas at Austin ("UT") in 2008. Petitioner was not entitled to automatic admission under Texas’s Top Ten Percent Law ("Top 10% Law"). She instead competed for admission against other non-Top 10% in-state applicants under a system in which UT expressly considered race in order to increase enrollment of Hispanic and African-American applicants. Although Petitioner’s academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having "suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection," Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (quotation omitted), Petitioner filed this lawsuit challenging the constitutionality of UT’s use of race in undergraduate admissions decisions. Affirming the district court, the Fifth Circuit rejected that legal challenge and denied en banc review by a vote of 9-7. This Court granted certiorari on February 21, 2012.

A. History Of UT’s Admissions Program

UT is a “highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class.” App. 119a. Because admission to UT does not guarantee admission to an applicant’s preferred program of study, applicants also must compete for admission to their preferred school or major. App. 130a; JA 164a. The role of an applicant’s race in this process has changed several times during the past two decades in response to judicial and legislative decisions. App. 14a.

*3 Until 1996, “race was considered directly and was often a controlling factor in admissions” to UT and its programs of study. App. 16a. Admission was based on an applicant’s Academic Index (“AI”), which was calculated from high school class rank and standardized test scores, and was then adjusted to assist “underrepresented” minorities. App. 15a. In 1996, the last year that UT employed this system, the enrolled freshman class was 18.6% African-American and Hispanic. App. 122a.

After UT was prohibited from using race in admissions following Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), UT added a new metric - a Personal Achievement Index (“PAI”) - to its admissions calculus. The PAI was designed, at least in part, to increase minority enrollment through race-neutral means. App. 17-18a. The PAI is a composite of scores received on two written essays that an applicant must submit and the applicant’s “personal achievement score.” App. 27a. The “personal achievement score” takes into account several “special circumstances,” some of which “disproportionately affect minority candidates,” such as “the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household.” App. 121a.

Once an applicant’s AI and PAI scores are calculated, UT plots them on a grid (AI on the horizontal axis, PAI on the vertical), which it uses to make its admissions decisions. App. 135a. This system, first used for the 1997 *4 entering class, then resulted in an enrolled class that was 15.3% African-American and Hispanic. App. 121a-122a.

That same year, also in response to Hopwood, the Texas legislature enacted the Top 10% Law, requiring UT to admit all Texas high school seniors ranking in the top 10% of their classes. H.B. 588, Tex. Educ. Code § 51.803 (1997). Starting with the incoming class in 1998, UT began implementing the Top 10% Law in conjunction with its extant admissions system. App. 19a. Thus, for in-state applicants who were not in the top 10% of their high school class nothing changed: AI and PAI scores determined admission to UT and to particular programs of study. App. 129a. For other in-state applicants, the Top 10% Law guaranteed admission to UT, but AI and PAI scores still determined whether the applicant would be admitted to a particular program of study. Id.

The Top 10% Law had an immediate and positive effect on minority enrollment. App. 19a. UT announced that its 1999 “enrollment levels for African American and Hispanic freshman ... returned to those of 1996, the year before the Hopwood decision.” JA 34a. On top of that, “minority students earned higher grade point averages [in 1999] than in 1996 and ha[d] higher retention rates.” Id. Thus, UT announced that the Top 10% Law had “enabled [UT] to diversify enrollment ... with talented students who succeed.” Id. Indeed, “[a]n impressive 94.9 *5 percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999.” Id.
Consequently, UT credited the Top 10% Law for producing “a more representative student body and ... students who perform well academically.” Id.

This upward trend in minority enrollment continued in the years that followed. In 2003, UT declared that it had “effectively compensated for the loss of affirmative action.” JA 346a. That year, UT “brought a higher number of freshman minority students - African Americans, Hispanics and Asian Americans - to the campus than were enrolled in 1996.” JA 348a. The percentages continued to increase the next year. In 2004, the freshman class was 21.4% African American and Hispanic, and 17.9% Asian American. App. 20a.

Despite the success of its race-neutral admissions system in increasing minority enrollment, UT promised to restore race as a factor in admissions decisions on the very day that this Court decided Grutter. Mere hours after this Court issued its decision, then-UT President Dr. Larry Faulkner announced that UT would “modify its admissions procedures to ... combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity.” JA 356a-357a.

B. UT’s Proposal To Consider Race In Admissions

Having already announced it would restore race in its admissions system, UT accepted the invitation of its Board of Regents to inquire “whether to consider an applicant’s race and ethnicity ... in accordance with the standards enunciated in” Grutter. App. 21a. UT produced two studies *6 primarily focused on diversity at the classroom level. The first study “surveyed undergraduates on their impressions of diversity on campus and in the classroom.” App. 22a. A majority responded that they “felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur.” Id. The second study “examined minority representation in undergraduate classes,” App. 21a, to determine whether UT had sufficient classroom diversity, which it defined as more than one African-American student, more than one Hispanic student, and more than one Asian-American student, Supplemental Joint Appendix (“SJA”) 25a-26a. This study focused on “classes of participatory size,’ which [UT] defined as between 5 and 24 students,” App. 21a, thus requiring, in many cases, a majority of minority students to meet UT’s classroom diversity definition. Unsurprisingly, UT found that the majority of small classes did not have “sufficient diversity.” SJA 25a.

UT acknowledged that its purported lack of classroom diversity resulted in part from an increase in the number of small classes offered. SJA 70a. UT explained that because, over time, it had added class sections “(from 4,742 in 1996 to 5,631 in 2002),” minority students were “spread out’ in more classes, leaving many sections with little or no representation.” Id. Indeed, while UT’s minority enrollment steadily increased, the number of classes it deemed to have “sufficient diversity” actually decreased. SJA 71a, 73a.

Invoking these studies and “significant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population,” UT proposed to its Regents that race be restored as a factor *7 in undergraduate admissions. S JA 24a. UT asserted that the campus survey, classroom study, and demographic imbalance between its freshman class and the Texas population proved that it had not “achiev[ed] a critical mass of racial diversity.” SJA 24a-25a. It further claimed that racial preferences in admissions were needed because its existing race-neutral policies, including the Top 10% Law, while “very useful in producing a student body of strong academic ability,” SJA 39a, “failed to improve diversity within the classroom,” SJA 25a.

UT’s proposal, which the Board of Regents accepted, maintained the same basic admissions criteria, but added race to the list of “special circumstances” that make up an applicant’s personal achievement score. JA432a-433a; SJA 29a. UT claimed that its use of race would be part of an individualized and holistic approach to admissions, which it considered “[t]he major requirement of [Grutter]” SJA 15a. UT decided that it would use race to benefit African-American and Hispanic applicants, groups that it considers “underrepresented.” SJA 25a. Though there are fewer Asian Americans than Hispanics at UT, UT deems Asian Americans “overrepresented” because UT uses state racial demographics as its baseline for determining which minority groups should benefit from its use of race. In other words, although UT includes Asian Americans as minorities in its diversity statistics, marketing materials, and classroom analysis, it employs race in admissions decisions to the detriment of Asian Americans, thus subjecting them to the same inequality as White applicants. JA 305a.
In restoring race to its admissions system, UT declined to establish a "specific goal ... in terms of the numbers *8 of [underrepresented minority] students" that it would seek to admit. SJA 29a. Nor did UT identify a projected date at which it would cease using race in admissions decisions. SJA 32a. Rather, it stated that it would review its admissions policy “every five years” beginning in Fall 2009 in order “to assess whether consideration of an applicant’s race is necessary in order to create a diverse student body, or whether race-neutral alternatives exist that are able to achieve the same results.” Id.

C. UT’s Current Admissions System

UT’s current system, which uses race as a factor both for admission and placement, was first employed during the 2005 admissions cycle. While the bulk of UT’s in-state admissions (approximately 70% to 80% during the relevant period) are pursuant to the race-neutral Top 10% Law, access to particular programs of study is still determined by AI and PAI scores - with race now part of the PAI scoring. App. 30a-31a. Non-Top 10% law applicants, like Petitioner, are both admitted to UT and to particular programs of study based on their AI and race-affected PAI scores. App. 31a. Hence, race is a factor in admission, placement, or both for every in-state undergraduate applicant. Id. 3

*9 Each applicant’s race appears on the front of the application file and “reviewers are aware of it throughout the evaluation.” App. 134a. UT does not record how race affects a specific PAI score or admissions decision, nor can it track or measure the impact that using race has had on enrollment. App. 32a-33a. But UT officials have confirmed that race “can make a difference” in individual admissions decisions. App. 33a.

Notwithstanding UT’s failure to measure the impact of using race on its enrollment numbers, App. 104a, it is clear that impact is negligible, SJA 157a. By design, race can be determinative only for in-state underrepresented minority students not admitted under the Top 10% Law, a segment of the class that is dwarfed by the Top 10% enrollees. For example, in 2008, when Petitioner applied, 6,322 in-state students enrolled: 5,114 under the Top 10% Law and 1,208 under the race-affected AI/PAI regime. Id. Of the non-Top 10% enrollees, 216 were African American or Hispanic, representing only 3.4% of the enrolled in-state freshman class. Id.

Moreover, it is undisputed that many of the 216 non-Top 10% minority enrollees would have been admitted without regard to their race. Some were admitted based solely on high AI scores. App. 103a; JA 410a. Many more would have been admitted under an AI-PAI system unaffected by race. App. 104a. To illustrate, when race was not a factor in the PAI calculus, 15.2% of the non-Top 10% Texas enrollees in 2004 were African American or Hispanic; in 2008, when race was considered, 17.9% were African American or Hispanic. SJA 157a. Thus, even if the entirety of the increase between 2004 and 2008 is attributed to race, it would have been decisive for only *10 2.7% of the 1,208 non-Top Ten enrollees in 2008 - or 33 African-American and Hispanic students combined. Id. If so, race would have accounted for 0.5% of the 6,322 in-state freshman class in 2008. In other words, UT’s “use of race has had an infinitesimal impact on critical mass in the student body as a whole.” App. 107a (Garza, J.).

At the same time, the Top 10% Law has continued to increase minority enrollment at UT. App. 127a. During the ten years from 1998 to 2008, the percentage of African-American and Hispanic students who enrolled in the incoming freshman class at UT increased from 16.2% to 25.5%, with most of the increase attributable to the Top 10% Law. SJA 156a. Indeed, over the same ten-year period, the percentage of African-American and Hispanic students enrolling through the Top 10% Law increased from about 44% to almost 86%. SJA 156a-157a. The trend has continued. As recently as 2010, UT officials credited “changes in the demographics of Texas” for its success in enrolling a majority-minority freshman class. 4 And, UT’s President recently announced that “[f]ifty-two percent of our [2010] freshmen are minority students, including 23 percent who are Hispanic, reflecting the changing demographics of the state.” 2010-2011 Impact Report at 6.5 Provost Steven Leslie also noted the success, applauding the fact that “[t]he university’s student population is beginning to truly reflect the demographics of the state of Texas.” Id. 4.
*11 Nevertheless, UT’s reliance on race in admissions shows no signs of stopping. In fact, UT promised that “[a]lthough the university enrolled the most ethnically diverse freshman class in its history during fall 2007 (19.7 percent Hispanic students, 19.7 percent Asian American students and 5.8 percent African-American students) it [would] striv[e] to continue building a diverse student body, faculty and staff that truly reflect Texas and the entire country.” SJA 176a. Indeed, in lobbying the legislature to repeal or cap the Top 10% Law, UT argued that it would offset any associated loss in minority enrollment by giving even greater consideration to race in its admissions decisions. JA 359a-360a. And, despite becoming a majority-minority university in 2010, UT continues to use race in admissions decisions to this day.

D. Proceedings Below

1. When Petitioner was denied admission to the entering class of 2008, she filed this action 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 and 1983, and Title VI of the Civil Rights Act of 1964. App. 3a. UT defended its use of race in undergraduate admissions as a narrowly tailored means of pursuing greater diversity, which it deemed essential to its mission as Texas’s flagship institute of higher education. App. 144a-147a.

UT argued it had not attained a “critical mass” of “underrepresented” minorities because its percentage of African-American and Hispanic freshmen was below the percentage of African-Americans and Hispanics in the Texas population and because a significant number of its *12 small classes did not have two or more African Americans, Hispanics, and Asian Americans. App. 155a-157a. UT further argued that its use of race was “narrowly tailored” because it had integrated racial classifications into an individualized, holistic admissions process and planned to reconsider its need for racial preferences every five years. App. 161a-167a.

On cross-motions for summary judgment on liability, filed after the case had been bifurcated into liability and remedy phases, JA 32a, the district court found that the admissions system conformed to Grutter and granted summary judgment to UT. The district court held that UT’s pursuit of demographically proportional African-American and Hispanic enrollment rates was within Grutter’s concept of “critical mass” and endorsed UT’s reliance on “classroom diversity” statistics. App. 155a-157a. The district court also found UT’s admissions system narrowly tailored as properly holistic and subject to periodic review. App. 158a-159a, 167a. The district court concluded that Petitioner could not prevail “as long as Grutter remains good law.” App. 169a.

2. The Fifth Circuit affirmed. In an opinion written by Judge Higginbotham, it acknowledged that UT’s admissions system discriminates between applicants on the basis of race and thus should be subject to strict-scrutiny review. App. 35a. However, the court employed a novel, relaxed standard of judicial review because UT’s “educational judgment in developing diversity policies is due deference”:

Rather than second-guess the merits of the University’s decision, a task we are ill-equipped to perform, we instead scrutinize *13 the University’s decision-making process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration Grutter requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 35a-36a.

The Fifth Circuit held that its deferential “good faith” standard applied comprehensively, including to the questions of “whether the university has attained critical mass of a racial group” and “whether race-conscious efforts are necessary” to do so. App. 37a. It also concluded that “the narrow tailoring inquiry - like the compelling-interest inquiry - is undertaken with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.” Id. Acknowledging that this Court’s application of strict scrutiny has been “more restrictive” in cases involving racial preferences in state employment and contracting, the Fifth Circuit determined that such cases have “little purchase” in the context of university admissions decisions. App. 38a-40a.
Applying its deferential “good faith” standard, the Fifth Circuit found that “the efforts of [UT] have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion.” App. 34a. It thus concluded that UT’s decision to “reintroduce race as a factor in admissions was made in good faith.” App. 47a. Consideration of state demographics to decide whether UT had reached “critical mass” was constitutional, the court reasoned, because “attention to the community it serves” - not just to the university experience - is “consonant with the educational goals outlined in Grutter.” *14 App. 48a. In the court’s view, “[a]lthough a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.” App. 51a. Thus, the court found it proper to measure critical mass by looking to the racial composition of “the surrounding community.” App. 50a.

The Fifth Circuit further deferred to “UT's considered, good faith conclusion that the University still has not reached a critical mass.” App. 66a. It rejected UT’s argument that the state-mandated Top 10% Law is “entirely irrelevant” to the analysis of critical mass, finding that UT could not simply “ignore a part of the [admissions] program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman.” App. 55a. Thus, the court focused on whether it was constitutional for UT to “overlay” its system of racial preferences on “the Top Ten Percent Law” given the law’s “substantial effect on aggregate minority enrollment at the University.” App. 62a. 6

Conceding that “UT's claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law,” the Fifth Circuit nonetheless held that Petitioner had not rebutted UT's “good faith conclusion” that it lacked a critical mass of African-American and Hispanic students. App. 67a. The court pointed to Hispanic enrollment numbers, which it found “low ... considering the vast increases in the Hispanic population of Texas,” and the classroom diversity *15 study, which showed that “minority students remain[ed] clustered in certain programs” - a problem that “will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future years.” App. 56a, 65a-66a. Thus, it held that UT “properly concluded that race-conscious admissions measures would help” it achieve its vision of “critical mass.” App. 68a.

Finally, the Fifth Circuit rejected the argument that, under Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), UT’s use of race was not justified because the existing race-neutral admissions system worked about as well in achieving student-body diversity as the post-Grutter race-based admissions program. App. 69a. The court found that “Parents Involved does not support the cost-benefit analysis that Appellants seek to invoke” because that decision turned on the “‘extreme approach’” used by the school districts in that case. Id. (quoting Parents Involved, 551 U.S. at 735). The court further reasoned that Parents Involved “did not hold that a Grutter-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small.” Id.

3. Judge Garza specially concurred, characterizing the panel's decision as “a faithful, if unfortunate, application of Grutter's erroneous ‘digression in the course of constitutional law.’” App. 72a. Judge Garza saw Grutter as “abandon[ing] [strict scrutiny] and substitut[ing] in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.” App. 109a. He warned that the court’s “decision ratifies the University's *16 reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity,” awaiting a time that “educators can certify] that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.” App. 87a. Judge Garza could not “accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines.” Id.

Judge Garza was particularly troubled by the fact that UT's decision to classify every applicant by race “has had an infinitesimal impact on critical mass in the student body as a whole.” App. 107a. From an applicant pool totaling 29,501 students in 2008, he estimated that the number of enrolled underrepresented minority students ultimately admitted because of race could amount to no more than 1% of the freshman class, or about 55 students. App. 101a, 105a. Judge Garza therefore concluded that UT's use of race has been “completely ineffectual in accomplishing its claimed compelling interest” in filling its classrooms with minority students. App. 106a. Judge Garza could not “find that [UT]’s use of race is narrowly tailored where
the University’s highly suspect use of race provides no discernible educational impact,” but concluded that, post-Grutter, “narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer,” but is solely about “good faith.” App. 108a. He added that, “[l]ike the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.” App. 114a.

*17 4. The Fifth Circuit, by a vote of 9 to 7, denied rehearing en banc. App. 173a. Writing for five of the dissenting judges, Chief Judge Jones lamented that the panel had “extend[ed] Grutter in three ways” and, in so doing, “abdicate[d] judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States.” App. 174a. In her view, the decision “in effect gives a green light to all public higher institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that Grutter requires.” App. 175a.

Chief Judge Jones criticized the panel for deferring to UT both on the necessity of using race as a factor in admissions and on whether UT’s use of race was narrowly tailored. As she explained, “Grutter does not countenance ‘deference’ to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications.” App. 178a. She found it objectionable that the “panel’s ‘serious, good-faith consideration’ standard distorts narrow tailoring into a rote exercise in judicial deference” and that “Grutter nowhere countenances this radical dilution of the narrow tailoring standard.” App. 180a.

Chief Judge Jones also found that only “wholesale deference” to UT could result in a conclusion that the admissions system is narrowly tailored as it led to the admission of “no more than a couple hundred out of more than six thousand new students.” App. 180a-181a. “Contrary to the panel’s exercise of deference, the *18 Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment.” App. 182a (citing Parents Involved, 551 U.S. at 734-35). Here, the “additional diversity contribution of the University's race-conscious admissions program is tiny, and far from ‘indispensable.’” Id. She thus disagreed with the panel's decision “to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic.” Id.

Last, Chief Judge Jones rejected classroom diversity as a constitutional justification for racial preferences. App. 182a-184a. “The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be ‘underrepresented.’ It offers no stopping point for racial preferences despite the logical absurdity of touting ‘diversity’ as relevant to every subject taught” at UT and it “offers no ground for serious judicial review of a terminus of the racial preference policy.” App. 183a. She found that UT’s classroom-diversity rationale is “without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs.” App. 184a.

**SUMMARY OF ARGUMENT**

If any state action should respect racial equality, it is university admission. Selecting those who will benefit from the limited places available at universities has enormous consequences for the future of American students and the perceived fairness of government action. Strict scrutiny thus remains the rule, not the exception, when universities use race as a factor in admissions decisions. Strict scrutiny requires that UT demonstrate both that its use of race in admissions decisions is “necessary to further a compelling government interest” and that “the means chosen to accomplish the government’s asserted purpose” are “specifically and narrowly framed to accomplish that purpose.” Grutter, 539 U.S. at 327, 333. Because UT cannot bear that heavy burden, its use of race in denying admission to Petitioner was unconstitutional.

Neither of UT’s justifications for restoring race to its admissions system is a constitutionally compelling state interest. UT’s acknowledged goal of using race in admissions to mirror the demographics of Texas is nothing more than “racial balancing, which is patently unconstitutional.” Id. at 330. UT’s goal is not racial diversity to enhance the educational dialogue and exchange of ideas by keeping minority students from feeling “isolated or like spokespersons for their race.” Id. at 319. Instead, it is purely representational. It is only by using
Texas’s racial demographics as the benchmark for diversity that UT could consider Hispanics underrepresented and Asian Americans overrepresented when “the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.” App. 154a. UT simply is not pursuing the educationally-based diversity interest that Grutter deemed to be compelling.

UT’s asserted interest in classroom diversity also is not a compelling interest. The proper base for measuring “critical mass” is the “student body,” not the classroom. Grutter, 539 U.S. at 325. As noted above, the point of Grutter was to permit universities to create a “critical mass” of minority students on the campus to foster exchange of ideas and experiences. But Grutter nowhere suggests that every classroom must have a “critical mass” of minority students. Endorsing the classroom as the *20 new benchmark for critical mass would promote the use of race in perpetuity. The Court should not acknowledge an interest that would justify racial engineering at every stage of the university experience “until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.” App. 87a (Garza, J).

Because UT is not using racial classifications to pursue a compelling state interest, that should be the end of the matter. In any event, UT has not provided a “strong basis in evidence,” Wygant v. Jackson Bd. of Educ, 476 U.S. 276, 277 (1986), that its use of race is “necessary” to enroll any “critical mass” of minority students, Grutter, 539 U.S. at 327. UT has not even attempted to articulate an educational concept of critical mass. Even if it had, UT could not have set forth a strong factual basis that the university was not already enrolling that critical mass of minority students. As UT’s own public statements show, largely because of the Top 10% Law, UT was one of the most diverse public universities in the nation prior to its 2004 restoration of race into its admissions system. UT should not be permitted to employ “gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic.” App. 182a (Jones, C.J.).

But even assuming UT was pursuing a compelling interest and had produced strong evidence that it was necessary to use race in admissions to meet that interest, neither of which is the case, its system of racial preferences still is not narrowly tailored. Foremost, the “minimal effect” of UT’s admission plan is antithetical to *21 narrow tailoring. Parents Involved, 551 U.S. at 733. UT “was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means.” App. 107a (Garza, J). The limited results of UT’s racial preferences shows that race-neutral “means would be effective” and thus “casts doubt on the necessity of using racial classifications.” Parents Involved, 551 U.S. at 733-34. UT has subjected tens of thousands of applicants to “disparate treatment based solely on the color of their skin,” id. at 734, even though it “has had an infinitesimal impact on critical mass in the student body as a whole,” App. 107a (Garza, J.), and even though existing race-neutral measures were working “about as well,” Wygant; 476 U.S. at 280 n.6. UT’s use of race in admissions also lacks narrow tailoring in several other respects. Among them, UT’s admissions system could never achieve “classroom diversity” through constitutional means. UT has set the bar for classroom diversity so high that it considers data showing that 63% of its classes with 10 to 24 students included 2 or more Hispanic students to be insufficient evidence of critical mass in the classroom. App. 22a. The only way UT could even approach the level of classroom diversity it desires would be to institute a fixed curriculum, make each student’s race a dominant criterion in the selection of a major, or make race so dominant an admissions factor that there would be no way for every small classroom not to include several minority students. UT has shown no interest in the first option and the second two are plainly unconstitutional. App. 87a (Garza, J); App. 183a (Jones, C.J.). Accordingly, no “means” available to UT could be narrowly tailored to the “end” of classroom *22 diversity. UT likewise could never pursue a demographic representational goal through constitutional means because such a goal would necessarily involve different targets for each minority group and thus degenerate into multiple minority-group quotas.

In addition, even assuming that UT were pursuing the type of educational interest endorsed in Grutter, UT’s classification of Hispanics as an “underrepresented minority” shows that UT’s use of race is more expansive than necessary to meet any legitimate “critical mass” goal. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989). Given the high rates of Hispanic enrollment at UT and its noted success in graduating Hispanic students, it cannot reasonably be concluded, and UT could not establish, that Hispanic students are isolated.
on its campus, unable to offer their perspectives, or mere “spokespersons for their race.” *Grutter*, 539 U.S. at 319.

The Fifth Circuit avoided these massive constitutional problems by substituting a good-faith, process-oriented review standard for the strict scrutiny constitutionally required when racial preferences foist unequal treatment on non-preferred applicants. Whether or not UT acted in “good faith,” it must bear the burden of demonstrating that its use of race is necessary to further a compelling interest and that its means of pursuing that interest were narrowly tailored. Neither *Grutter* nor any other decision condones unlimited deference to university administrators. *Grutter* affords universities a measure of deference in claiming an unsatisfied educational interest in student-body diversity. But *Grutter* explicitly excluded racial balancing from that interest and afforded no deference on whether racial preference is necessary to further a diversity goal or on *23* the means by which diversity is pursued. Under *Grutter*, UT may be entitled to deference on its “decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go.” App. 178a (Jones, C. J.).

Indeed, even if UT were entitled to more deference than *Grutter* suggests, the Fifth Circuit erred by “distort[ing] narrow tailoring into a rote exercise in judicial deference.” App. 180a (Jones, C.J.). If anything is clear, an individual suffering discrimination should not shoulder the heavy burden of proving that the government’s use of race is not narrowly tailored. “[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests.” *Johnson v. California*, 543 U.S. 499, 505 (2005). Once deference applies to narrow tailoring, strict scrutiny becomes “total deference to University administrators,” App. 178a (Jones, C.J.), so long as they have articulated a rational basis for the use of race. There is no authority supporting deference to UT’s subjective judgment that its use of race in admissions is narrowly tailored.

If the Fifth Circuit’s reading of *Grutter* is permissible, however, that decision should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment’s guarantee of equal protection. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231-35 (1995). The strict scrutiny label is meaningless if its “review ... is nothing short of perfunctory [and] accepts [a university’s] assurances that its admissions process meets with constitutional requirements.” *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting). In fact, “[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the *24* Court lacks authority to approve the use of race even in a modest, limited way.” Id. at 387 (Kennedy, J., dissenting). Accordingly, if the choice is between affirming the Fifth Circuit or correcting *Grutter* to the extent that decision effectively abandons strict scrutiny, the Constitution requires the latter.

ARGUMENT

I. UT’s Use Of Race In Admissions Decisions Violates The Equal Protection Clause.

In applying for undergraduate admission to UT, Petitioner was handicapped by her race in derogation of the “central mandate” of equal protection: “racial neutrality in governmental decisionmaking.” *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Regardless of the race of those “burdened or benefited by a particular classification,” any government classification based on race is subject to “the strictest judicial scrutiny.” *Adarand*, 515 U.S. at 224. To survive strict-scrutiny review, a racial classification must be “‘necessary to further a compelling governmental interest’ ” and must be “narrowly tailored to that end.” *Johnson*, 543 U.S. at 514 (quoting *Grutter*, 539 U.S. at 539). For the reasons set forth below, UT’s use of race in admissions fails strict scrutiny.

A. UT’s Use Of Race In Admissions Decisions Is Subject To Strict Scrutiny.

It is indisputable that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Adarand*, 515 U.S. at 227; *25 Parents Involved*, 551 U.S. at 741; *Johnson*, 543 U.S. at 505; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 326. Strict scrutiny requires a “detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed,” as race is “a group classification long recognized as in most circumstances irrelevant and therefore prohibited.” *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment) (“[A]ny racial preference must face the most
rigorous scrutiny by the courts"). Strict scrutiny imposes a heavy burden on any government using the “highly suspect tool” of race, Grutter, 539 U.S. at 326, and judicial “scrutiny” of racial classifications is “no less strict” in the educational setting, id. at 328; see also Parents Involved, 551 U.S. at 741-42; Gratz, 539 U.S. at 270; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-91 (1978) (Powell, J.).

Strict scrutiny requires a “detailed examination, both as to ends and as to means.” Adarand, 515 U.S. at 236. First, the end must be compelling - not merely legitimate or important - because racial classifications are “inherently suspect.” Bakke, 438 U.S. at 291 (Powell, J.). Second, the state must have a “strong basis in evidence” that a racial classification is “necessary” to further the compelling end because “the mere recitation of a benign or legitimate purpose” is not “an automatic shield which protects against any inquiry” into the necessity of race-based action. Croson, 488 U.S. at 495, 500 (citations and quotations omitted). Last, “the means chosen” must “fit” the unmet compelling interest “so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” Id. at 493 (citations and quotations omitted); see also *26 Grutter, 539 U.S. at 342 (“[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.”). Strict scrutiny “forbids the use even of narrowly drawn racial classifications except as a last resort.” Croson, 488 U.S. at 519 (Kennedy, J.), concurring in part and concurring in the judgment.

B. UT’s Use Of Race In Admissions Decisions Fails Strict Scrutiny.

1. UT’s asserted interest in using race in admissions decisions is not compelling.

Although “government may treat people differently because of their race only for the most compelling reasons,” Adarand, 515 U.S. at 227, this Court has held that universities have “a compelling interest in obtaining the educational benefits that flow from a diverse student body,” Grutter, 539 U.S. at 343. Grutter thus permits race to be used as a factor in admissions decisions to obtain a “critical mass” of otherwise underrepresented minority students for educational reasons. Id. at 333. As the Court explained, “critical mass is defined by reference to the educational benefits that diversity is designed to produce.” Id. at 330. Accordingly, a university’s “interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” Id. at 330. Grutter instead endorses an inward-facing concept of diversity focused on enhancing the university experience - not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population.

*27 Neither of UT’s asserted interests falls within the educational interest in student-body diversity endorsed in Grutter. UT first asserts a need to use race in admissions to bring UT’s student-body demographics in line with the racial demographics of the state. App. 47a-51a. In UT’s view, “significant differences between the racial and ethnic makeup of [its] undergraduate population and the state’s population prevent the University from fully achieving its mission.” App. 23a. But UT has produced “no evidence that the level of racial diversity necessary to achieve the asserted educational benefits [of diversity] happens to coincide with the racial demographics” of Texas. Parents Involved, 551 U.S. at 727. “This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under ... existing precedent.” Id. at 729.

UT thus has not shown that it is seeking increased racial diversity in order to enhance the educational value of campus exchanges by keeping minority students from feeling “isolated or like spokespersons for their race.” Grutter, 539 U.S. at 319. Instead, UT’s goal is “simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” Id. at 329. That UT’s targets are demographic rather than purely arbitrary does not save its decision to classify each applicant by race - it confirms the decision’s unconstitutionality. UT’s demographic proportionality objective is nothing more than “outright racial balancing,” which this Court has held “patently unconstitutional.” Id. at 330. “[P]roportional representation” can never be a constitutional “rationale for programs of preferential treatment.” Id. at 343.

*28 UT’s differing treatment of Asian Americans and other minorities based on each group’s proportion of Texas’s population illustrates why demographic balancing is constitutionally illegitimate. See Parents
Involved, 551 U.S. at 731 (“The validity of our concern that racial balancing has no logical stopping point is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics.”). As noted above, UT gives no admissions preference to Asian Americans even though “the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.” App. 154a. This differing treatment of racial minorities based solely on demographics provides clear evidence that UT’s conception of critical mass is not tethered to the “educational benefits of a diverse student body.”

Grutter, 539 U.S. at 333, UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity?

The Fifth Circuit attempted to salvage UT’s reliance on demographics by suggesting that it merely represented “measured attention to the community [UT] serves” in order to “send[] a message” to that community “that people of all stripes can succeed at UT and graduate as part of “an infrastructure of leaders in an increasingly *29 pluralistic society.” App. 48a, 50a, 51a. But this Court has always rejected the use of race to advance the general welfare of society. Croson, 488 U.S. at 499-50; Wygant, 476 U.S. at 276; Bakke, 438 U.S. at 288-89 (Powell, J.). A generalized societal interest has “no logical stopping point” and is far “too amorphous a basis for imposing a racially classified remedy.” Wygant, 476 U.S. at 276; see also Croson, 488 U.S. at 499-50.

Aside from demographic proportionality, the only other interest UT asserts is the need for greater classroom diversity. App. 23a. “Although the aggregate number of underrepresented minorities may be large,” UT argues that it must use race in admissions because its student-body diversity is not “translating into adequate diversity in the classroom.” App. 68a. But ensuring diversity in every small classroom goes far beyond the interest endorsed as compelling in Grutter.

This Court could not have been clearer that critical mass should be measured against the enrolled “student body” and not the number of minority students in each individual class. The Court framed the “question” in Grutter as whether it should “recognize, in the context of higher education, a compelling state interest in student body diversity.” Grutter, 539 U.S. at 328; see also id. at 380 (Rehnquist, C.J., dissenting) (explaining that “‘critical mass’ relates to the size of the student body”). Indeed, the majority repeatedly referenced “student body” diversity as the relevant interest throughout its opinion. See id. at 318, 325, 328, 329, 343.

Under Grutter, one educational benefit possibly attributable to student-body diversity may be additional *30 participation of underrepresented minority students “in the classroom.” Id. at 318. But each asserted consequence of overall student-body diversity is not itself a compelling interest or a legal benchmark for critical mass. Grutter instead recognized that the overall comfort of a racially diverse campus should encourage increased minority participation in all educational settings - whether large or small, curricular or extra-curricular - because minority students will “not feel isolated” on campus or like “spokespersons for their race.” Id. at 318-19. Grutter did not even suggest - let alone hold - that a university has a compelling interest in using race in admissions until every small class has some minimum number of minority students.

Indeed, the Grutter Court hesitated before even recognizing student-body diversity as a compelling government interest because of the “serious problems of justice connected with the idea of preference itself.” Id. at 341 (citation and quotations omitted); see also id. at 388 (Kennedy, J., dissenting) (“Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”). Given these concerns, it is untenable to read the decision to allow UT administrators to go several steps further and employ racial classifications not only at the admissions stage but also in major and course selection. The Court should resist UT’s effort to break constitutional ground and create an unprecedented classroom-diversity interest. Classroom diversity has no foundation in this Court’s decisions and could never be implemented in a narrowly tailored way. See infra at 43-44.

*31 2. UT cannot establish a strong basis in evidence that its use of race is necessary to further a compelling interest in student-body diversity.
a. Requiring UT to establish a strong basis in evidence is essential to strict-scrutiny review in the educational setting.

UT also must demonstrate that its use of race in admissions is “necessary to further” an unmet compelling government interest. Adarand, 515 U.S. at 237. This demonstration of necessity requires a “strong basis in evidence.” Wygant, 476 U.S. at 277; Croson, 488 U.S. at 500; Grutter, 539 U.S. at 387-88 (Kennedy, J., dissenting) (“Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence”) (emphasis added). UT thus needed a strong factual basis that the student body did not already include the “meaningful number” of minority students needed to meet an educational goal in student-body diversity before restoring race into its admissions system. Grutter, 539 U.S. at 318.

The Fifth Circuit refused to hold UT to a strong-basis-in-evidence obligation. App. 38a-42a. In the court’s *32 view, “[t]he high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration.” App. 40a. The court added that “Wygant and Croson both involved explicit quotas; in Ricci, the Court was concerned that the city's use of race threatened to devolve into a de facto quota.” Id.

The Fifth Circuit's cursory attempt to distinguish this Court’s precedent is fatally flawed. In the educational setting, the Court has expressly relied on decisions such as Wygant, Croson, and Adarand for its analytical framework. See, e.g., Grutter, 539 U.S. at 326-34; Parents Involved, 551 U.S. at 729-32; Gratz, 539 U.S. at 270. Although the particular attributes of any race-based program may bear on whether it is narrowly tailored, compare Grutter, 539 U.S. at 334-43, with Gratz, 539 U.S. at 270-75, they do not bear on the question whether it is “necessary” to invoke racial preferences in the first place. Ignoring these bedrock equal-protection decisions “fails to apply the avowed continuity in the principle of the Court's decisions.” App. 180a (Jones, C.J.). In the context of university admissions, as in other settings, the government must prove that race-based measures are necessary before they can be used.

This case illustrates why the “strong basis in evidence” standard is essential to strict-scrutiny review. The Fifth Circuit accepted on faith UT's assertion that pervasive racial admissions preferences were needed on a campus that has already reached award-winning levels of diversity. Yet to meet strict scrutiny, a university must *33 “define both the scope of the injury and the extent of the remedy necessary to cure its effects.” Croson, 488 U.S. at 510. Without precision in identifying the critical problem that the race-based measure will address, there will be “no logical stopping point” for the disfavored use of race. Id. at 498 (quoting Wygant, 476 U.S. at 275). In other words, if UT may sustain a race-based preference through its own opinion of necessity, “the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.” Id. at 504. “[C]lassifications based on race are potentially so harmful to the entire body politic” that “the reasons for any such classification [must] be clearly identified and unquestionably legitimate.” Id. at 505 (citations and quotations omitted). Subjective assessments of need, like those advanced by UT and accepted by the Fifth Circuit, are not enough.

Finally, the strong basis in evidence standard “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” Id. at 510. If government cannot marshal a strong evidentiary basis for disparate treatment of its citizens because of their race, there is a very real “danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.” Id. Strict scrutiny “smoke[s] out” just such “illegitimate uses of race.” Id. at 493. In other words, demanding a strong factual basis before allowing race-based governmental action ensures that “[s]trict scrutiny remains ... strict.” Bush v. Vera, 517 U.S. 952, 978 (1996).

*34 b. UT cannot meet the strong basis in evidence standard.

For several reasons, UT cannot come close to meeting its evidentiary burden of proving that racial classifications were needed to meet an educational interest in student body diversity. Foremost, UT announced its intention to reintroduce race into admissions before it gathered any factual evidence. In fact, UT announced its decision on the very same day that this Court issued Grutter. See supra at 5. For this reason alone, UT has failed to provide a strong evidentiary foundation for its conclusion that minority enrollment fell short of “critical mass.”

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Even if the Court were to allow UT to rely on its later-conducted study, however, the university still “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.” App. 148a; JA 265a. UT never even purported to study the level of minority enrollment needed to enhance campus dialogue, interracial understanding, graduation rate, or any other educational benchmark for critical mass. And, although it promised periodic review, any such review could only measure minority admission levels against demographics and classroom diversity levels. Without an educationally based target for “critical mass,” UT has left its use of race unbounded - it can neither tailor its means to fit a compelling end, nor accumulate evidence to support the necessity of using race in admission decisions to reach that end, nor meaningfully measure its progress in any periodic review it might conduct.

Moreover, even if UT had shown an interest in pursuing educationally-based “critical mass,” it still lacked a strong basis in evidence that using race in admissions *35 was necessary to meet that goal. In Grutter, the Court found that it was necessary for the University of Michigan Law School (“UMLS”) to use race in admissions to boost minority enrollment from 4% to 14%. 539 U.S. at 320. By contrast, the record here establishes that UT’s pre-Grutter admissions system was generating substantial and growing levels of Hispanic and African-American enrollment. In 2004, the last year in which UT used that system, African-American (4.5%) and Hispanic (16.9%) students were 21.4% of the incoming freshman class. App. 20a. By the time Petitioner applied, their enrollment levels were even higher, thus eliminating any possible need to continue using race during her admissions cycle. The year prior, the combined percentage of Hispanic and African-American enrollees had risen to 25.5%, with racial preferences having only a negligible effect on this figure. See infra at 38-42. Including Asian-American minority students, UT’s minority enrollment was well over 40% before Petitioner applied to UT. See supra at 11.

With the Top 10% Law in operation then, UT was one of the most diverse public universities in the nation both when it restored race to its admissions system in 2004 and later used race to deny Petitioner admission in 2008. Neither Grutter nor any of this Court's other decisions authorizes “gratuitous racial preferences when a race-neutral policy has resulted in one-fifth of University entrants being African-American or Hispanic.” App. 182a (Jones, C.J.).

*36 UT's own public statements suggest that UT knew that it had already achieved educational critical mass as early as 2000 and certainly no later than 2003. In 2000, while proclaiming the success of the Top 10% Law, UT reported that its race-neutral program had restored minority enrollment levels “to those of 1996, the year before the Hopwood decision prohibited the consideration of race in admissions policies.” JA343a. UT also announced that its program was enrolling minority students that performed better than ever before, and applauded the Top 10% Law for “helping to create a more representative student body and enroll students who perform well academically.” Id. In 2003, UT proudly announced that it had “effectively compensated for the loss of affirmative action.” JA 346a. UT thus had every reason to avoid identifying, or attempting to support with evidence, some educationally related point or even a general range within which it would conclude that it had enrolled a “critical mass” of minority students.

At bottom, UT’s use of race in admissions is flawed in all the ways that the strong-basis-in-evidence standard is designed to root out as hallmarks of an unconstitutional program. UT asks this Court to take it at its word that it will cease using race in admissions at some unspecified time in the future when it achieves some unspecified critical mass. JA 265a. That explanation falls far short of the precision needed to assure that the use of race has a logical stopping point. Accepting these assurances in the absence of an evidentiary foundation is all the more problematic given, as UT publicly acknowledged, that its preexisting race-neutral system was enrolling a large group of minority students. In the absence of any evidentiary basis for UT’s decision to restore race to its admissions system, let alone a strong one, there is no *37 way for the Court to dispel the concern that the decision to racially classify every applicant for admission is “the product of unthinking stereotypes or a form of racial politics.” Croson, 488 U.S. at 510.

3. UT’s use of race in admissions decisions is not narrowly tailored.

To survive strict scrutiny, UT’s use of race in admissions also must be narrowly tailored. See Grutter, 539 U.S. at 333 (“Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.”) (citation and quotations omitted). Strict scrutiny requires that “the means chosen to accomplish the [government’s]
asserted purpose ... be specifically and narrowly framed to accomplish that purpose.” Shaw v. Hunt, 517 U.S. 899,908 (1996) (internal quotation marks and citation omitted).

UT attempts to short-circuit the narrow tailoring requirement by arguing that race is only a “factor of a factor of a factor” in admissions decisions for a limited group of non-Top 10% Law in-state applicants. App. 159a-160a. In UT's view, so long as consideration of an applicant’s race is a small part of a larger so-called holistic review process, its use of race in admissions is narrowly tailored. See id. As noted above, UT's narrow tailoring justification is fatally flawed ab initio as it is not “tailored” to meet any legitimate compelling educational interest. See supra at 26-30.

As explained below, even leaving aside the absence of any constitutionally valid interest to which UT's use of race could be tailored, it is not narrowly tailored *38 for additional reasons. Given the success of UT’s prior race-neutral admissions system in increasing minority enrollment, primarily through the Top 10% Law, and the minimal contribution racial preferences make to student body diversity, there can be no question that “a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense.” Wygant, 476 U.S. at 280 n.6. Additionally, even if increased classroom diversity or demographic representation were a sufficient basis for using race, neither could possibly be implemented in a narrowly tailored way. Finally, UT’s treatment of Hispanics as “underrepresented” renders its use of race overinclusive because the high level of Hispanic enrollment at UT demonstrate that Hispanic students are not underrepresented on campus in any educational sense.

a. That UT’s use of race is generating only minimal additional minority enrollment demonstrates that race-neutral means would have worked about as well.

Among other things, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives.” Grutter, 539 U.S. at 339. And where racial classifications have only a “minimal impact” in pursuing a compelling interest, it “casts doubt on the necessity of using racial classifications” in the first instance and demonstrates that race-neutral alternatives would have worked about as well. Parents Involved, 551 U.S. at 734; see also id. at 790 (Kennedy, J., concurring).

That is precisely the case here. UT is unable to identify any students who were “ultimately offered admission due *39 to their race who would not have otherwise been offered admission.” App. 33a. Its admissions statistics confirm that its decision to classify each of the tens of thousands of applicants by race has “had an infinitesimal impact on critical mass in the student body as a whole.” App. 107a (Garza, J.). This “infinitesimal impact” demonstrates that the continued use of UT’s pre-2005 race-neutral admissions system would have worked “about as well.” Wygant, 476 U.S. at 280 n.6.

In 2008, for example, after classifying 29,501 applicants by race, UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis. App. 10 1a-10 3a. Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% Law, UT's use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322. On a campus as large as UT's, with significant student-body diversity already in place, it strains credulity to conclude that the addition of students representing “0.92% and 2.5%, respectively, of the entire 6,322-person enrolling instate freshman class” made a constitutionally meaningful impact on student body diversity. App. 104a (Garza, J).

However, the applicant’s race was not decisive for many of the 216 “underrepresented” minority students. Some of the students were admitted based solely on their high AI scores, and others would have been admitted irrespective of race. App. 103a-104a. As a comparison, in 2004, when race was not a factor in admissions, 15.2% of non-Top 10% Texas enrollees were African American or Hispanic; in 2008,17.9% of all enrollees were African American or Hispanic. SJA 157a. It stands to reason *40 that at least the same percentage of “underrepresented” minority students would have been admitted in 2008 as were admitted in 2004 on a race-neutral basis. If so, race could only have determined the admission of the 2.7% difference between the two years - or 33 additional students. Classifying every applicant by race in order to add only 33 students, representing 0.5% of an enrolled instate class of 6,322, where the class already has a nearly 40% minority enrollment rate, is the type of gratuitous racial preference that narrow tailoring forbids.
“[T]he necessity of using racial classifications” is doubtful when racial classifications have a “minimal impact ... on school enrollment.” Parents Involved, 551 U.S. at 734. Small gains suggest that UT “could have achieved [its] stated ends through [nonracial] means.” Id. at 790 (Kennedy, J., concurring). That is not speculation in this instance. As explained above, UT’s prior race-neutral plan, including the reliably high level of minority enrollment produced by the Top 10% Law, already has, in fact, resulted in an “ever-increasing number of minorities gaining admission” to UT. App. 2a (Jones, C. J.).

Narrow tailoring clearly prevents UT from using the “extreme measure” of racial classifications to obtain trivial gains in minority enrollment, especially in light of the meaningful impact of existing race-neutral measures on UT’s student-body diversity. Parents Involved, 551 U.S. at 728. Of course, it is not that “greater use of race would be preferable.” Id. at 734. Rather, narrow tailoring recognizes that racial preferences, which “are by their very nature odious to a free people,” id. at 746 (quoting Adarand, 505 U.S. at 214), cannot be deployed unless their benefits far outweigh their heavy cost, id. at 735. In *41 Parents Involved, therefore, the Court squarely rejected the use of race where, as here, it operated in “subtle and indirect ways” and benefited only a “small number” of students. Id. at 733-34. Racial preferences at UMLS, in contrast, were “indispensable in more than tripling minority representation at the law school - from 4 to 14.5 percent.” Id. at 734-35 (citing Grutter, 539 U.S. at 320).

Thus, contrary to the Fifth Circuit’s conclusion, the constitutionally significant difference between the use of race in Grutter and Parents Involved was not the ages of students affected or the types of “racial categories” employed. App. 69a-70a. The critical difference was the necessity and effectiveness of the program. Unlike in Grutter, where the Court concluded that the benefits of achieving “critical mass” warranted the heavy cost of using racial classifications, the Court concluded in Parents Involved that a minimal increase in diversity simply could not “justify the particular extreme means they have chosen - classifying individual students on the basis of their race and discriminating among them on that basis.” 551 U.S. at 745.

Thus, contrary to the Fifth Circuit’s assertion, App. 69a-70a, a reviewing court cannot myopically credit “small gains” in minority enrollment without comparing those alleged benefits to the “undeniable” costs that the use of race imposes at all levels of education. Parents Involved, 551 U.S. at 745. As this Court has repeatedly recognized, “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” Id. at 746 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)). Racial classifications “carry a danger of stigmatic harm” and may “promote notions *42 of racial inferiority.” Croson, 488 U.S. at 493. Because a racial preference “inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race,” they can inflict the most harm on their “supposed beneficiaries.” Adarand, 515 U.S. at 229 (citations omitted).

Here, UT’s use of race in admissions “exacts a cost disproportionate to its benefit.” App. 105a (Garza, J.). UT has not attempted to quantify any tangible benefit from its pervasive racial classifications and, even if it had, it would be minimal at best. UT thus has failed to establish any benefit from its use of racial classifications that could justify reliance on this “highly suspect tool.” Grutter, 539 U.S. at 326. In order to enroll a few additional “underrepresented” minority students each year, UT makes the educational future of all its students depend, in part, on “irrelevant factors [such] as a human being’s race,” Croson, 488 U.S. at 495, and places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT each year based on merit and achievement. In sum, UT cannot satisfy its “burden of proving [its] marginal changes ... outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.” Parents Involved, 551 U.S. at 734.10

*43 b. UT’s claimed interest in classroom diversity could never be implemented in a narrowly tailored way. Even if UT has a compelling interest in classroom diversity, which it does not, see supra at 29-30, UT has no plan to achieve it within the constraints imposed by the narrow tailoring requirement. UT’s definition of classroom diversity - a classroom with at least two African-American, two Hispanic and two Asian American students - is virtually guaranteed never to be satisfied. Attainment is literally impossible in classes of five and UT disclaims satisfaction in the 63% of classes with two or more Hispanic students. See App. 22a. Moreover,
the results of UT's study indicate that “classroom diversity” is more lacking for Asian Americans than for Hispanics. Id. But UT's use of race in admissions discriminates against Asian Americans and, if anything, exacerbates the classroom diversity problem. See supra at 28. Such a system is not narrowly tailored to resolve any alleged classroom diversity deficiency. Realistically, UT has created a classroom diversity metric that will function as an endless justification for using racial preference in admissions.

For the same reason, UT's pursuit of classroom diversity lacks a meaningful termination point. “[R]eliance on race at the departmental and classroom levels ... will, *44 in practice, allow for race-based preferences in seeming perpetuity.” App. 87a (Garza, J.). As Chief Judge Jones queried, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a. "If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.” App. 87a. (Garza, J.). Given these concerns, the Court should not break new ground and recognize a compelling government interest in classroom diversity. See supra at 29-30. Nor should it find that classroom diversity levels are an appropriate measuring stick for a university's attainment of “critical mass.”

As UT's experience demonstrates, a university can have a sizable minority enrollment but, due to factors outside the control of the admissions office, still have many individual classes with fewer minority students than it desires. But if UT seriously attempted to produce classroom diversity, it would need to either (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class, (2) require some students to enroll (or prevent others from enrolling) in specific schools or majors, or (3) make race so dominant in admissions decisions that it floods the system with enough minority students to solve the problem. UT has not expressed any interest in the first option and the other two are patently unconstitutional. Accordingly, there are no “means” available to UT that can be narrowly tailored to the “end” of classroom diversity.

*45 c. UT's claimed interest in demographic representation could never be implemented in a narrowly tailored way.

Even if UT has a compelling interest in proportional a representation based on Texas demographics, which it does not, see supra at 27-29, such a goal could not possibly be implemented in a narrowly tailored way. Pursuing a representational interest would necessarily involve setting different enrollment targets for each minority group (presumably commensurate with their respective pro rata shares of the state population) and thus inevitably lead to discrimination between and among the various minority groups, including those minority groups already receiving an admissions preference. Indeed, even the process of creating each minority “group” category and then determining which one a particular applicant belongs to for purposes of granting an admission preference to some minorities but not others is itself problematic. App. 175a (Jones, C.J.) (“Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program.”).

In any event, among the problems with pitting one minority group against another is that “preferring black to Hispanic applicants, for instance, does nothing to further the interest” in student-body diversity. Grutter, 539 U.S. at 375 (Thomas, J., concurring in part and dissenting in part). By focusing on “underrepresented minority students” as a group, 539 U.S. at 316, 318, 319, 320, 335, 336, 338, 341, and defining critical mass in terms of “underrepresented minorities,” id. at 333, *46 the Court was ensuring that a university would not be allowed to discriminate in admissions between “similarly situated” ethnic or racial groups, id. at 374-75 (Thomas, J., concurring in part and dissenting in part). (“[T]he Law School maintains that it does not ... discriminate[en] among the groups the Law School prefers.”) This is precisely the situation that exists here. There are slightly more Hispanic students than Asian-American students enrolled at UT, SJA 156a, yet UT discriminates between the two by using race in admissions decisions to benefit the former but not the latter, App. 154a. Because this discrimination between minority groups is the necessary result of pursuing a representational goal, such a goal never could be implemented in a narrowly tailored manner.

d. UT's use of race is not narrowly tailored because it is overinclusive.

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Even assuming that UT is pursuing the type of interest endorsed in *Grutter*, UT’s classification of Hispanics as an “underrepresented minority” and thus an intended beneficiary of racial preference renders its admissions system overinclusive. *See, e.g.,* *Croson,* 488 U.S. at 506 (citing *Wygant,* 476 U.S. at 284 n.13). It thus runs afoul of the narrow-tailoring requirement, the very purpose of which “is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Grutter,* 539 U.S. at 333.

*47 It is quite a stretch to argue that Hispanic students at UT are underrepresented or feel “isolated or like spokespersons for their race,” *id.* at 319, when UT has been recognized as one of the nation’s “top producers of undergraduates for Hispanics” by *Diverse Issues in Higher Education* magazine, JA 320a, and one of the nation’s “Best Schools for Hispanics” by *Hispanic Business Magazine,* JA 325a. Given the educational success of its Hispanic students, UT’s use of race clearly is purely representational and thus over-inclusive.

II. The Fifth Circuit’s Comprehensive Deference To UT Under A Novel “Good Faith” Standard Cannot Be Sustained.

Because searching judicial review of UT’s racial preferences under traditional strict scrutiny would have doomed them, the Fifth Circuit was only able to uphold UT’s admissions system by replacing such review with a novel good faith, process-oriented review standard, which it termed “Grutter’s ‘serious, good faith consideration’ standard.” *App.* 41a. This effective abandonment of strict scrutiny should be rejected. Once it is, every one of the reasons that the Fifth Circuit gave for sustaining UT’s admissions program dissipates.

*Grutter* reiterated - no fewer than eleven times - that strict scrutiny remains the governing standard in higher education. *See* 539 U.S. at 326-28, 334. The Court’s subsequent decisions likewise confirm that strict scrutiny remains the rule “in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies.” *Johnson,* 543 U.S. at 505 (citing *Grutter,* 539 U.S. at 326). In *Parents Involved,* this *48 Court* found it “well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” 551 U.S. at 720. No decision of this Court before or since suggests that any more deferential standard applies here.

To reach a contrary conclusion, the Fifth Circuit ripped the phrase “serious, good faith consideration” out of its *Grutter* context. Strict scrutiny includes an inquiry into UT’s “serious, good faith consideration of workable race-neutral alternatives.” *Id.* at 735 (quoting *Grutter,* 539 U.S. at 339). But it does so only in the context of the narrow-tailoring prong of the strict scrutiny analysis; that is, UT cannot establish that its use of race in admissions decisions is narrowly tailored simply by engaging in “a rote exercise in dismissing race-neutral alternatives.” *App.* 180a (Jones, CJ.). For all other aspects of the strict scrutiny test, UT’s “good faith” is plainly insufficient. “More than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system.” *Adarand,* 515 U.S. at 226. Were it otherwise, “[t]he mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially ... insulate any racial classification from judicial scrutiny.” *Croson,* 488 U.S. at 490; see, *e.g., Parents Involved,* 551 U.S. at 743.

The Fifth Circuit’s application of its newly minted deferential standard shows how far it departed from strict scrutiny. First, the court characterized its role as one of merely “scrutiniz[ing] the University’s decisionmaking process.” *App.* 36a. Simple process-oriented review is entirely incompatible with *Grutter*’s reaffirmation of *49 strict scrutiny and its reliance on *Croson* to emphasize the importance of a “‘searching judicial inquiry into the justification for such race-based measures.’” 539 U.S. at 326 (quoting *Croson,* 488 U.S. at 493). *Croson* makes clear that the entire point of strict scrutiny is to “‘smoke out’ illegitimate uses of race by assuring that the [governmental] body is pursuing a goal important enough to warrant use of a highly suspect tool.” 488 U.S. at 493. The only way to accomplish this task is through “an examination of the factual basis for [the racial classification at issue] and the nexus between its scope and that factual basis.” *Id.* at 494-95. Endorsing the Fifth Circuit’s process-oriented review would thus defeat the fundamental purpose of strict scrutiny and allow evidence of good intentions and rote recitals of diversity goals to trump the close scrutiny “as to ends and as to means” that the Constitution requires. *See* *Adarand,* 515 U.S. at 236.
Second, the court deferred to UT administrators at every step of its “strict scrutiny” analysis. It found that “due deference” validated UT’s conclusions that racial diversity is “essential to its educational mission,” App. 34a-35a (quoting Grutter, 539 U.S. at 328), that the levels of minority enrollment arising from UT’s pre-existing race-neutral admission program were insufficient to meet its legitimate diversity goals, App. 66a, and that UT’s use of racial preferences was narrowly-tailored to pursue that interest, App. 71a. But neither Grutter nor any other decision condones such unlimited deference.

In Grutter, this Court deferred to the “academic decision[]” that student body diversity “is essential to [a university’s] educational mission.” 539 U.S. at 328. It did not suggest - let alone endorse - that courts should also *50 defer to a university’s assertions that racial classifications are necessary to further that compelling government interest and narrowly tailored to that end. Instead, “scrutiny of the interest asserted by [UMLS] [was] no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university.” Id. Additionally, the Court scrutinized “the means chosen to accomplish the [government’s] asserted purpose” to ascertain whether they were “specifically and narrowly framed to accomplish that purpose.” Id. at 333. Under Grutter, UT is entitled to deference on an educational “decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go.” App. 178a.

Third, the Fifth Circuit’s deference to UT was so sweeping that it entirely inverted the strict scrutiny standard and placed the burden on Petitioner to prove that that UT’s actions were not taken in good faith. App. 36a (“We presume the University acted in good faith, a presumption Appellants are free to rebut.”). This is the antithesis of strict scrutiny. It is “the government” - not Ms. Fisher - that “has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests.” Johnson, 543 U.S. at 505 (quotation omitted).

Fourth, the Fifth Circuit refused to take “relevant [factual] differences’ into account.” Grutter, 539 U.S. at 327 (quoting Adarand, 515 U.S. at 228). Instead, the court concluded that because “[t]he admissions procedures that UT adopted [were] modeled after the plan approved by the Supreme Court in Grutter, [they] are narrowly tailored[,]” App. 71a. It thereby ignored the “important *51 factual distinction[s] between this case and Grutter” App. 180a-181a, contrary to the instruction of Grutter itself. The “fundamental purpose” of strict scrutiny is “to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” Grutter, 539 U.S. at 328 (emphasis added).

Fifth, and perhaps most troubling, the Fifth Circuit deferred to UT’s subjective assertion that its use of race was narrowly tailored. The court refused to “second-guess the merits of the University's decision” that race-neutral measures were an insufficient alternative to its restoration of racial classifications in admissions decisions. App. 36a. Rather than restrict UT’s ability to broadly use race as an admissions factor, the court conducted the “narrow-tailoring inquiry ... with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.” App. 37a. Under the court’s standard, provided a “university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system,” its system will always be narrowly tailored. App. 41a.

Even if UT were entitled to greater deference on the compelling government interest side of the strict-scrutiny analysis than any of this Court’s decisions have suggested, it certainly is not entitled to deference as to whether its interest is narrowly tailored. Narrow tailoring reviewed through a deferential lens is effectively meaningless. The entire point of narrow tailoring is to ensure that benign motives do not replace absolute necessity as the touchstone for the permissible use of race. Narrow tailoring ensures *52 that racial classifications are used only as “a last resort to achieve a compelling interest,” Parents Involved, 127 S. Ct. at 2792 (Kennedy, J., concurring); see also Croson, 488 U.S. at 519 (Kennedy, J., concurring). Thus, “[f]ar from diluting narrow tailoring in order to defer to university administrators,” Grutter’s discussion of narrow tailoring “was meant to challenge the university.” App. 177a (Jones, C.J.).

The Fifth Circuit’s deferential review effectively transformed strict scrutiny into rational basis review - “the lowest level of permissible equal protection scrutiny.” Logan v. Zimmerman Brush Co., 455 U.S. 422, 439 (1982); see Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (holding that rational basis review “is satisfied so long as
there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”). Indeed, rational basis review “is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith.” *Logan, 455 U.S. at 439.*

This Court has rejected deferential rational-basis review when it comes to racial classifications. *Adarand, 515 U.S. at 227.* It should not change course now. *Croson, 488 U.S. at 519* (Kennedy, J., concurring); *Parents Involved, 551 U.S. at 784* (Kennedy, J., concurring). Judging “the ultimate validity of any particular [racial classification] ... is the job of the court applying strict scrutiny.” *Grutter, 539 U.S. at 327* (quoting *Adarand, 515 U.S. at 230*). Thus, UT's use of race in admission decisions cannot be sustained by deference or presumed good faith.

*53 III. Grutter Should Be Clarified Or Overruled To The Extent It Can Be Read To Permit The Fifth Circuit’s Effective Abandonment Of Strict Scrutiny.*

The history of this case illustrates the difficulty inherent in *Grutter.* The District Court interpreted *Grutter* as a mechanicistic formula for racial preference - a claimed “holistic” review coupled with avoidance of express quota or point systems suffices to satisfy strict scrutiny. App. 158a-162a. The Fifth Circuit thought *Grutter* preserved the form of strict scrutiny but replaced its substance with deference to the academy at every stage of the judicial inquiry. App. 36a-37a. In contrast, the five Judges joining in Chief Judge Jones' dissent from rehearing en banc agreed with Petitioner that, apart from deference on an educational diversity goal, rigorous strict scrutiny was required and fatal to UT’s use of racial classifications in admissions. App. 176a-184a.

The potential for these interpretive difficulties was noticed by the dissenting Justices in *Grutter.* See, e.g., *539 U.S. at 380* (Rehnquist, C.J., dissenting) (“Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”); *id.* at 388 (Kennedy, J., dissenting) (“The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal.”). As Judge Garza noted, “[w]henever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed.” App. 72a. The Court should expressly clarify or overrule *Grutter* to the extent needed to bring clarity to the law and restore the integrity of strict scrutiny review in the higher educational setting. See, e.g., *54 Adarand, 515 U.S. at 231-35* (overruling *Metro Broadcasting, Inc. v. FCC, 497 U.S. 547* (1990)).

By corrupting the “unitary formulation” of strict-scrutiny review, the Court "undermines both the test and its own controlling precedents." *Grutter, 539 U.S. at 387* (Kennedy, J., dissenting). It undermines that judicial test to suggest that strict scrutiny allows lower courts to “abdicate judicial review of a race-conscious admissions program for undergraduate students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States.” App. 174a (Jones, C. J.). It would undermine precedent to abandon "this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years," *Adarand, 515 U.S. at 231-35,* which affirmed "the absolute necessity of strict scrutiny when the State uses race as an operative category," *Grutter, 549 U.S. at 388* (Kennedy, J., dissenting). Strict scrutiny cannot serve its important purpose if "review that is nothing short of perfunctory [and] accepts [a university's] ... assurances that its admissions process meets with constitutional requirements." *Id.* at 388-89.

“Constant and rigorous judicial review forces” university officials, furthermore, “to undertake their responsibilities as state employees in the most sensitive of areas with utmost fidelity to the Constitution.” *Grutter, 539 U.S. at 393* (Kennedy, J., dissenting). In other words, “[b]ecause even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their ‘benign’ use of race in admissions.” App. 176a (Jones, C. J.). For example, universities can be “breathtakingly cynical” in deciding *55 who [will] qualify as a member of underrepresented minorities.” *Grutter, 539 U.S. at 393* (Kennedy, J., dissenting) (citation omitted). UT's overt discrimination against Asian-American applicants here reinforces the point. *See supra* at 28. "It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision-making.
Prospective students, the courts, and the public can demand that [universities] prove their process is fair and constitutional in every phase of implementation."  *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

Moreover, failing to restore the integrity of strict-scrutiny review either by clarifying or overturning *Grutter* would leave in place a regime that has "proved to be unworkable in practice."  *Swift & Co. v. Wickham*, 382 U.S. III, 116 (1965). An opinion that produces the amount of discord and confusion merely as to the applicable standard of review shown here exposes "litigants and courts alike [to] the perpetuation of an unworkable rule."  *Id.*

Retention of an unworkable rule would not only harm courts and litigants. Another "unhappy consequence" would be "to perpetuate the hostilities that proper consideration of race is designed to avoid."  *Grutter*, 539, U.S. at 394 (Kennedy, J., dissenting). "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives."  *Id.* Indeed, despite the substantial number of minorities being admitted to UT under its prior race-neutral system, the university announced it would return to a race-based admissions system on the very day *Grutter* was decided.  *See supra* at 5. As this case illustrates, then, when "universities are given the latitude to administer programs that are tantamount to quotas," they will discard race-neutral "programs ... more effective in bringing about harmony and mutual respect among all citizens that our constitutional tradition has always sought."  *Grutter*, 539 U.S. at 394-95.

In the end, "[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in [a] modest, limited way."  *Id.* at 387 (Kennedy, J., dissenting) (emphasis added). "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review."  *Id.* at 395. And "as between the principle and its later misapplications, the principle must prevail."  *Adarand*, 515 U.S. at 235. Thus, the Court should, as Chief Judge Jones suggested, clarify that *Grutter* imposes rigorous strict-scrutiny review, or, as Judge Garza suggested, overrule *Grutter* to the extent it abandons this essential aspect of equal-protection doctrine. In either case, the watered-down *57 version of judicial scrutiny that allowed the Fifth Circuit to invoke *Grutter* to uphold UT's blatantly unconstitutional restoration of race as a factor in admissions decisions must be corrected.

**CONCLUSION**

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

**Footnotes**

1 UT also "instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment [and] expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state."  App. 122a.

2 Because of special portfolio, audition, and other requirements, the Top 10% Law does not apply to the School of Architecture, School of Fine Arts, or honors programs.  App. 30a. Other programs, such as the School of Business, School of Nursing, School of Engineering, and College of Communications, cap the number of students they admit under the Top 10% Law.  App. 130a.

3 During the pendency of this litigation, the Texas legislature amended the Top 10% Law to cap the number of mandatory admissions at 75% of UT's overall freshman class.  Tex. Educ. Code § 51.803(a-1). However, were a court ruling to prohibit UT from considering race in admissions decisions, the 75% cap on the Top 10% Law would be lifted.  *Id.* § 51.803(k)(1).


6 Although Judge Higginbotham was critical of the Top 10% Law, neither Judge King nor Judge Garza joined that aspect of his opinion. Judge King explained that "[n]o party challenged ... the validity or the wisdom of the Top Ten Percent Law." App. 72a.

7 Recognizing representational diversity as a compelling state interest might allow universities in racially homogenous states to employ race to the detriment of qualified minority applicants in order to maintain a student body that mirrors the state population. Indeed, that is precisely the problem facing Asian-American students in Texas, as they are “over-represented” demographically but highly qualified academically.


9 Importantly, unlike in Grutter, Petitioners are not attempting to force a percentage plan upon Respondents. See 539 U.S. at 340. Here, the Texas legislature had already made the policy choice to adopt the Top 10% Law. Thus, “[i]n evaluating the constitutionality of an admissions program, [a court] cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman.” App. 55a.

10 Even were UT able to demonstrate a compelling educational interest in increasing the number of African-American and Hispanic enrollments by a few dozen students in 2008, UT failed to consider readily available alternatives to reach that goal. See Grutter, 539 U.S. at 339. First, of the 2,800 African-American and Hispanic students admitted under the Top 10% Law, 1,331 of them chose not to enroll at UT. By intensifying its outreach to this already-admitted group, UT would have easily matched the effect of its use of race even if it increased its yield rate among this group by only 1 or 2%. Moreover, allowing the Top 10% Law to achieve its full potential, see supra at 8 n.3, would increase minority enrollment as much or more than the use of racial classifications in admissions decisions.

11 Grutter has not created reliance interests that would warrant its retention. See Adarand, 515 U.S. at 233-34. Racial preferences, by their nature, do not produce weighty reliance interests. No university was required to employ racial preferences following Grutter. “[A]ny State ... is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program.” Bakke, 438 U.S. at 379 (Brennan, J.). Indeed, the Texas legislature has already made a contingency plan in the event that Petitioner prevails in this challenge. See supra at 8 n.3. Moreover, the limited racial preferences authorized by Grutter are by definition temporary, given that the decision itself announces that their termination is certain. See Grutter, 539 U.S. at 342.
**RESPONDENT’S BRIEF**

**(UNIV. OF TEXAS AT AUSTIN)**

2012 WL 3245488 (U.S.) (Appellate Brief)

**Background:**

Respondent—the University of Texas at Austin—takes the position that the University’s admission policy is a “model of the type of individualized and holistic plan that” the Supreme Court has approved from *Bakke* to *Grutter*. As per Respondent, the University’s Top Ten 10% Program, which accounts for approximately 77% of all admissions, has played a crucial role in helping to ensure that Texas’ flagship campus—University of Texas at Austin—is able to open access to underrepresented minority candidates by offering admission to the top ten percent of all graduating students from Texas’ schools. Because Texas schools are, even to this day, highly segregated, taking the top ten percent of students ensures that many minority students will fall within the top ten percent.

However, respondent argues that even though the top ten percent program has been successful as a means to increase enrollment of minority students in a so-called “race neutral” way, the program is *not enough*. Thus, Respondent argues that in order to satisfy the mission of the flagship school to serve its community and to educate a diverse array of its citizens and open access to the education and networks that attendance ensures, University of Texas felt compelled to ensure that race were used as *one of many factors* in admissions outside of the top ten percent program. Respondent argues that because “regular admissions” (non-top ten percent) does not turn on race as a factor alone—instead race is one of many factors calculated in the Personal Index, which itself is only one of two “index scores” utilized, the review the University affords applicants is sufficiently “holistic” under *Grutter*. 
INTRODUCTION

After considering largely the same objections raised by petitioner and her amici here, this Court strongly embraced Justice Powell’s controlling opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and refused to prohibit the consideration of race as a factor in admissions at the Nation’s universities and graduate schools. Grutter v. Bollinger, 539 U.S. 306 (2003); see id. at 387 (Kennedy, J., dissenting). And although the Court has made clear that any consideration of race in this context must be limited, it has been understood for decades that “a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary.” Id. at 387 (Kennedy, J., dissenting) (citing Bakke, 438 U.S. at 289-91, 315-18 (Powell, J.)); see id. at 322-23. The University of Texas at Austin (UT)’s highly individualized consideration of race for applicants not admitted under the State’s top 10% law satisfies that demand, and meets strict scrutiny under any conception of that test not designed simply to bar the consideration of race altogether.

That conclusion follows a fortiori from existing precedent. UT’s admissions plan was modeled on the type of plan upheld in Grutter and commended by Justice Powell in Bakke. Moreover, UT’s plan lacks the features criticized in Grutter by Justice Kennedy - who agreed with the majority that Bakke is the “correct rule.” Id. at 387 (dissenting). Justice Kennedy concluded that Michigan Law School’s admissions plan used race “to achieve numerical goals indistinguishable from quotas.” Id. at 389. Here, it is *2 undisputed that UT has not set any “target” or “goal” for minority admissions. JA 131a. Justice Kennedy stressed that Michigan’s “admissions officers consulted ... daily reports which indicated the composition of the incoming class along racial lines.” Grutter, 539 U.S. at 391 (dissenting). Here, it is undeniable that no such monitoring occurs. JA 398a. And Justice Kennedy believed that race was “a predominant factor” under Michigan’s plan. Grutter, 539 U.S. at 393 (dissenting). Here, petitioner argues (at 20) that UT’s consideration of race is too “minimal” to be constitutional. That paradoxical contention not only overlooks the indubitably meaningful impact that UT’s plan has on diversity, infra at 36-38, it turns on its head Justice Powell’s conception of the appropriately nuanced and modest consideration of race in this special context.

Because petitioner cannot dispute that UT’s consideration of race is both highly individualized and modest, she is forced to take positions directly at odds with the record and existing precedent. Her headline claim that UT is engaged in “racial balancing” (Pet. Br. 6-7, 19, 27-28, 45-46) is refuted by her own concession that UT has not set any “target” for minority admissions. JA 131a. Her argument that the State’s top 10% law bars UT from considering race in its holistic review of applicants not eligible under that law is foreclosed by Grutter’s holding that percentage plans are not a complete, workable alternative to the individualized consideration of race in full-file review, 539 U.S. at 340. And her argument that, in 2004, UT had already achieved all the diversity that the Constitution allowed is based on “a limited notion of diversity” (Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007)) rejected by *3 this Court - one that crudely lumps together distinct racial groups and ignores the importance of diversity among individuals within racial groups.

In the end, petitioner really is just asking this Court to move the goal posts on higher education in America - and overrule its precedent going back 35 years to Bakke. Pet. Br. 53-57. Stare decisis alone counsels decisively against doing so. Petitioner has provided no persuasive justification for the Court to reexamine, much less overrule, its precedent, just nine years after this Court decided Grutter and eliminated any doubt about the controlling force of Justice Powell’s opinion in Bakke. And overruling Grutter and Bakke (or effectively gutting them by adopting petitioner’s conception of strict scrutiny) would jeopardize the Nation’s paramount interest in educating its future leaders in an environment that best prepares them for the society and workforce they will encounter. Moreover, the question that petitioner herself asked this Court to decide is the constitutionality of UT’s policy under existing precedent, including Grutter. See Pet. i.; Pet. Br. i. Because the court of appeals correctly answered that question, the judgment below should be affirmed.

STATEMENT OF THE CASE

A. UT And Its Mission
UT was founded in 1883 pursuant to a constitutional mandate to create "a University of the first class." Tex. Const. art. VII, § 10. For nearly 130 years, UT has served as the flagship public university for Texas. Not all of that history has been noble. During the first 70-plus years of its existence, UT was racially segregated by law. The first African- *4 American was not admitted until 1950, following the Court's landmark decision in Sweatt v. Painter, 339 U.S. 629 (1950), holding that Heman Sweatt could not be excluded from the UT law school on account of his race. The vestiges of de jure segregation lasted for decades thereafter. UT is painfully aware of that history, and the lingering perception that "[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students." SJA 14a.1

Over time, UT has grown into one of the largest - and finest - state universities in the United States. UT now occupies a 350-acre campus in downtown Austin - the State capital - with 17 different colleges and schools, more than 50,000 students, and 24,000 faculty and staff. In 2009, UT had the fifth largest enrollment of any university in the country. Campuses with the Largest Enrollments, Fall 2009, Chronicle of Higher Education, Aug, 26, 2011, at 33. UT is also proud to have a robust Reserve Officers Training Corps (ROTC) program, which has trained officers of the Nation's armed forces for more than 60 years.

*5 UT's mission - as embodied in the "Compact with Texans" required by state law - is to provide "superior and comprehensive educational opportunities" and to "contribute to the advancement of society." Its core values include: "Leadership"; "Individual Opportunity" - Many options, diverse people and ideas, one University"; and "Responsibility" - To serve as a catalyst for positive change in Texas and beyond."2 A critical component of that mission is the responsibility to train the future leaders of Texas and, indeed, the Nation. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT's graduates include four-star generals, top leaders in federal and state government, Fortune 500 CEOs, astronauts, Pulitzer Prize winning authors, renowned physicians, and Heisman Trophy winners. Just as important, UT's graduates go on to become doctors, engineers, teachers, business persons, lawyers, and community leaders across Texas and the country.

Consistent with its mission, UT is a highly selective institution. JA 364a. In 2008, for example, UT received some 30,000 applications - the vast majority from Texans - for 6,715 places in the entering class. Id. For UT, as for any comparable school, the process of selecting its student body represents a critical means of advancing its mission. Each year, UT strives to assemble a class that is exceptionally talented and well-prepared for UT's rigorous academic environment. It is also a " 'major priority' " that each class be well-rounded and diverse. JA 309a, 364a-65a, 428a, 431a. UT has a "broad vision of diversity," which looks to a wide variety of individual characteristics - including "an applicant's culture; language; family; *6 educational, geographic, and socioeconomic background; work, volunteer, or internship experiences; leadership experiences"; special artistic or other talents, as well as race and ethnicity. JA 364a-365a, 374a. UT has set - and seeks to meet - "a high standard for diversity." JA 365a.

A diverse student body is "indispensable" (JA 309a) to UT's mission to educate and train the future leaders of Texas and America. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT has learned through experience that diversity has invaluable educational benefits. These benefits include, but are not limited to, promoting cross-racial understanding; breaking down racial, ethnic, and geographic stereotypes; and creating an environment where students do not feel like spokespersons for their race. JA 365a-66a, 428a-29a. Diversity improves academic outcomes and better prepares students to become the next generation of leaders in an increasingly diverse society. JA 366a.

B. Efforts To Promote Diversity At UT

Appreciating the vital importance of a diverse student body to its educational mission, both UT and the State of Texas have taken important steps over the past decades to promote diversity at UT.

a. Before 1996, UT selected students using an Academic Index (AI) and race. The AI is based on an applicant's high school class rank, standardized test scores, and high school curriculum. App. 15a. Separate admissions committees reviewed minority and nonminority applicants, and "race was considered directly and was often a controlling factor in admission." App. 16a & n.46. The Fall 1996 freshman class - the last class selected with this methodology - included 266 African-American students (4.1% of the *7 overall class) and 932 Hispanic students (14.5%). JA 108a. That represented some progress in addressing racial isolation, but it by no means indicated that UT had achieved the full educational benefits of diversity.
b. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held unconstitutional the University of Texas School of Law’s consideration of race in admissions. In response, UT revised its admissions policy and excluded the consideration of race. The new policy adopted a Personal Achievement Index (PAI) to be used with the AI, which included a “holistic review of an applicant’s leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances.” JA 112a. “[S]pecial circumstances” included factors such as the “socio-economic status of a family,” “language spoken at home,” and “socio-economic status of school attended” (but not an applicant’s race). JA 112-13a.

UT also devoted substantial efforts to developing race-neutral initiatives that it hoped would increase enrollment of underrepresented minorities. For example, UT increased its annual recruitment budget and established three new regional admissions centers to increase UT’s visibility and contact with prospective students, parents, and high school administrators in geographic markets with historically few UT students. JA 400a-01a. UT also created several scholarship programs aimed at recruiting highly qualified students of all races from lower socioeconomic backgrounds, and students who would be the first in their family to attend college. JA 399a-400a; see JA 274a-76a. Despite these efforts, UT experienced an immediate and serious decline in enrollment among underrepresented minorities. Compared to 1995, for example, African-American enrollment in 1997 had dropped almost 40% (from 309 to 190 entering students) and Hispanic enrollment had dropped by 5% (from 935 to 892 entering students). App. 19a.

c. The Texas Legislature responded to *Hopwood* by enacting the top 10% law (House Bill 588), which guarantees admission to UT to any graduate of a Texas high school who is ranked in the top 10% of his or her high school class, beginning with the 1998 admissions cycle. Tex. Educ. Code § 51.803; JA 368a-69a. An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions. *See App. 20a; JA 120a; House Research Organization Daily Floor Report: HB 588 at 4-5 (Apr. 15, 1997).* The top 10% law helps minority admissions, but at significant cost to educational objectives.

The top 10% law “hurts academic selectivity” by basing the admissions decision solely on class rank, without regard to other standard markers of academic achievement and potential. App. 57a n.149. Basing the admissions decision on “just a single criteria” has also undermined UT’s efforts to achieve diversity in the broad sense. JA 359a. And the racial diversity that the law does add is mostly a product of the fact that Texas public high schools remain highly segregated in regions of the State - *e.g.*, with overwhelmingly Hispanic student bodies in the Rio Grande Valley, and overwhelmingly African-American student bodies in urban areas such as Dallas and Houston. That limits the diversity that can be achieved *within* racial groups and creates “damaging incentives.” App. 58a.

The portion of the class admitted pursuant to the top 10% law has ranged from roughly 60 to 80%. SJA 170a. To fill the remaining seats in its freshman class, *9* UT used the full-file review process developed after *Hopwood* - which considered numerous individual characteristics (but not race). The odds of admission for a qualified African-American or Hispanic applicant from the second decile of their high school class declined after the top 10% law took effect, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a; *see App. 59a.*

C. UT’s 2004 Proposal To Consider Race

In June 2003, this Court decided *Grutter v. Bollinger*, effectively overruling *Hopwood*. Like many schools, UT re-examined its admissions policies in light of *Grutter* and its educational mission. JA 395.³

a. In August 2003, the Board of Regents of The University of Texas System authorized UT to reconsider its admissions policies. SJA 1a. Over the next year, UT reviewed admissions data, surveyed students, and held discussions with administrators, faculty, constitutional law experts, and others on student body diversity at UT and the possibility of considering race in full-file review of applicants not eligible under the top 10% law. JA 431a. Officials focused on UT’s “overall goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways.” *Id.*
*10 The picture that emerged was alarming. Even with the top 10% law and UT’s race-neutral diversity initiatives, African-American and Hispanic enrollment at best remained stagnant compared to the pre-Hopwood period. JA 122a. In Fall 2002, only 3.4% of the freshman class was African-American and 14.3% was Hispanic, below 1996 levels. JA 127a; SJA 25a. The numbers were 4.5% and 16.9%, respectively, in 2004. JA 127a. And underrepresentation actually worsened during this period for Hispanics, given the explosive growth of Hispanics in the State. SJA 43a.

School officials also considered diversity in classrooms at UT as “one window” into the effectiveness of UT’s efforts to foster a diverse campus environment. JA 266a. It found that nearly 90% of undergraduate classes of the most common size at UT - sections with 10-24 students - enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one Hispanic student. Defs.’ Summ. J. Reply Br. 7 n.2, ECF No. 102; SJA 140a. The numbers were scarcely better for classes enrolling 25-49 students - over 70% had zero or one African-American enrolled. Id. Classes of this size are not only predominant at UT; they are most likely to involve the kind of discussion or exchanges where the educational benefits of diversity are realized. In addition, UT sought feedback from the students themselves. Interviews with students “on their impressions of diversity on campus,” including “in the classroom,” further confirmed that diversity was wanting at UT. App. 22a; JA 267-68a, 432a.

b. In June 2004, UT proposed to alter its admissions policy to allow for the consideration of race in the context of the holistic review already conducted *11 for students not admitted under the top 10% law. JA 397a; SJA 23a-32a (2004 Proposal). The 2004 Proposal embraced the diversity interest that this Court found compelling in Grutter in all its dimensions (SJA 1a-4a), and observed that “[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” SJA 23a. “This type of academic environment,” the Proposal explained, “is a goal of [UT] and admission decisions must take into account this goal.” Id.

The 2004 Proposal concluded that UT “did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996,” and that that had not changed after seven years of good-faith efforts to achieve racial diversity through facially race-neutral means such as holistic admissions (not considering race), the State’s top 10% law, scholarships, and aggressive recruiting efforts. SJA 23a-24a. The 2004 Proposal explained that “[c]ritical mass” simply means “an adequate representation of minority students to assure educational benefits deriving from diversity,” including an environment in which students “learn that there is not ‘one’ minority or majority view.” SJA 25a; see JA 264a-66a.

The 2004 Proposal stressed that the consideration of race in the process of full-file review would be individualized, SJA 26a-29a; that an applicant’s race would be only one of many factors considered during the process and would not be assigned any independent weight, SJA 29a; that “[n]o specific goal will be established in terms of the numbers of students with specific characteristics who are admitted,” id.; *12 and called for periodic review of the need for race-conscious admissions, SJA 32a. In August 2004, the University of Texas System (as authorized by the Board of Regents) approved UT’s proposal, and it took effect for the Fall 2005 entering class. JA 432a-33a.4

D. UT’s Holistic Review Process

UT’s applicant pool is divided into applicants who are eligible for automatic admission under the top 10% law, and applicants who are not. Although most admits fall into the former category, the admission of students not eligible for the top 10% law is a critical means of pursuing UT’s educational mission and an important counterpart to the top 10% law. A Texas applicant may be ineligible for the top 10% law because she was in the bottom 90% of her class (like petitioner), or because her school does not rank students (as is true of some of the best private high schools in Texas).

After the files of the non-top-10% applicants are scored, they are plotted on a matrix corresponding to the school or major for which admission is sought, with the AI score on one axis and PAI score on the other. Each cell on the matrix contains all applicants with a particular AI/PAI combination. JA 392a. After considering the number of students in each cell and the available spaces for a particular major or school, admissions officers
draw a stair-step line on the matrix, dividing the cells of applicants who will be admitted from those that will be denied. JA 386a-87a.

*13 For each cell, admission is an all-or-nothing proposition: all the applicants within a cell are either admitted or denied. PAI scores are fixed long before this step in the process occurs, and nameless applicants clustered within each cell are not identified by race. So, as petitioner has acknowledged, admissions officers cannot - and do not - consider the racial demographics of the cell (or the race of any applicant within it) when they draw the stair-step line dividing cells. JA 387a-89a, 411a-12a; Summ. J. Hr’g Tr. 20, ECF No. 118 (petitioner’s counsel: “[T]hey use a matrix where you don’t know who’s who. Because once they’ve made a score, you become a number. So they’re not doing what Michigan was doing in Grutter”).

An applicant’s PAI score is based on two essays and a Personal Achievement Score (PAS). JA 374a. Essays are reviewed by specially trained readers, and are scored on a race-blind basis from 1 to 6. JA 374a-76a. The PAS score ranges from 1 to 6 as well, and is based on holistic consideration of six equally-weighted factors: leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances. JA 379a. The “special circumstances” factor is broken down into seven attributes, including socioeconomic considerations, and - as of 2005 - an applicant's race. JA 380a. Race is one of seven components of a single factor in the PAS score, which comprises one third of the PAI, which is one of two numerical values (PAI and AI) that places a student on the admissions grid, from which students are admitted race-blind in groups. In other words, race is “a factor of a factor of a factor of a factor” in UT’s holistic review. App. 159a.

*14 No automatic advantage or value is assigned to race or any other PAS factor. JA 379a-81a. Each applicant is considered as a whole person, and race is considered “in conjunction with an applicant’s demonstrated sense of cultural awareness,” not in isolation. JA 397a, 130a. “Race is contextual, just like every other part of the applicant’s file,” JA 169a, and “[t]he consideration of race helps [UT] examine the student in ‘their totality,’ ” JA 129a. Adding race to the mix in whole-file review “increases the chance” that underrepresented minorities will be admitted. App. 434a. But because of the contextualized way in which race is considered, it is undisputed (JA 130a) that consideration of race may benefit any applicant (even non-minorities) - just as race ultimately “may have no impact whatsoever” for any given applicant (even an underrepresented minority). JA 381a, 397a-98a; see JA 207a-09a, 285a, 434a; App. 29a, 46a.5

Consistent with the holistic and modest way in which race is considered, it is impossible to tell whether an applicant’s race was a tipping factor for any given admit. JA 294a. But it is undisputed that “race is a meaningful factor and can make the difference in the evaluation of a student’s application.” App. 163a n.14; see JA 130a. Moreover, although petitioner claims that the consideration of race in holistic admissions has had an “ ‘infinitesimal’ ” (at 10) impact on diversity at UT, the record shows otherwise. Of the 728 African-Americans offered admission to the 2008 class, 146 - or 20% - were admitted through full- *15 file review. SJA 158a. That figure was 15% for Hispanic students admitted. Id.; see infra at 36-38.

Petitioner notes (at 9) that race is listed on the front page of the application. But to be clear, the only place where race is considered in the admissions process is in the calculation of the PAS score as described above. Race plays no role in the calculation of Al. And petitioner has conceded that race has “no influence” in scoring essays, or in deciding whether to admit or deny a cell. Summ. J. Hr’g Tr. 8, 20.

E. Petitioner’s Application For Admission

Petitioner, a Texas resident, applied for admission to UT’s Fall 2008 freshman class in Business Administration or Liberal Arts, with a combined SAT score of 1180 out of 1600 and a cumulative 3.59 GPA. JA 40a-41a. Because petitioner was not in the top 10% of her high school class, her application was considered pursuant to the holistic review process described above. JA 40a. Petitioner scored an Al of 3.1, JA 415a, and received a PAI score of less than 6 (the actual score is contained in a sealed brief, ECF No. 52). The summary judgment record is uncontradicted that - due to the stiff competition in 2008 and petitioner’s relatively low Al score - petitioner would not have been admitted to the Fall 2008 freshman class even if she had received “a ‘perfect’ PAI score of 6.” JA 416a.

Petitioner also was denied admission to the summer program, which offered provisional admission to some applicants who were denied admission to the fall class, subject to completing certain academic requirements.
over the summer. JA 413a-14a. (UT discontinued this program in 2009.) Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner's were offered admission to the *16 summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner's. In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or higher than petitioner's were denied admission to the summer program.6

*17 UT did offer petitioner admission to the Coordinated Admissions Program, which allows Texas residents to gain admission to UT for their sophomore year by completing 30 credits at a participating UT System campus and maintaining a 3.2 GPA. JA 414a. Petitioner declined that offer and enrolled at Louisiana State University, from which she graduated in May.

F. Procedural History

Petitioner and another applicant - “no longer involved in this case,” Pet. Br. ii - filed suit in the Western District of Texas against UT and various University officials under 42 U.S.C. § 1983, alleging, inter alia, that UT’s 2008 full-file admissions procedures violate the Equal Protection Clause. JA 38a. They sued only on their own behalf (not on behalf of any class of applicants) and sought a declaratory judgment and injunctive relief barring UT’s consideration of race and requiring UT to reconsider their own applications in a race-blind process. JA 39a. They also sought a “refund of [their] application fees and all associated expenses incurred ... in connection with applying to UT.” Id.; see App. 3a-4a.

*18 The district court denied petitioner's request for a preliminary injunction. The parties filed cross-motions for summary judgment and supporting statements of fact (JA 103a-51a, 363a-403a). Applying strict scrutiny (App. 139a), the court granted judgment to UT, holding that UT has a compelling interest in attaining a diverse student body and the educational benefits flowing from such diversity, and that UT’s individualized and holistic review process is narrowly tailored to further that interest. App. 168-69a.

The Fifth Circuit affirmed. Like the district court, the court of appeals found that “it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in Grutter.” App. 5a. And the court likewise took it as “a given” that UT’s policy “is subject to strict scrutiny with its requirement of narrow tailoring,” App. 35a. While acknowledging that Bakke and Grutter call for some deference to a university’s “educational judgment,” the court emphasized that “the scrutiny triggered by racial classification ‘is no less strict for taking into account’ the special circumstances of higher education.” App. 34a, 36a. Applying strict scrutiny, the court upheld UT’s admissions policy. App. 71a.

Judge Garza concurred. He recognized that the court’s opinion was “faithful” to Grutter, but argued that Grutter was wrongly decided. App. 72a-73a.

SUMMARY OF ARGUMENT

UT's individualized consideration of race in holistic admissions did not subject petitioner to unequal treatment in violation of the Fourteenth Amendment.

I. Racial classifications are subject to strict scrutiny, including in the higher education context. But ever since Justice Powell’s opinion in Bakke, this *19 Court has recognized that universities have a compelling interest in promoting student body diversity, and that a university may consider the race of applicants in an individualized and modest manner - such that race is just one of many characteristics that form the mosaic presented by an applicant’s file.

UT’s holistic admissions policy exemplifies the type of plan this Court has allowed: race is only one modest factor among many others weighed; it is considered only in an individualized and contextual way that “examine[s] the student in ‘their totality,’ ” JA 129a; and admissions officers do not know an applicant’s race when they decide which “cells” to admit in UT’s process. At the same time, UT's policy lacks the features that Justice Kennedy found disqualifying in Grutter. it is undisputed that UT has not established any race-based
target; race is not assigned any automatic value; and the racial or ethnic composition of admits is not monitored during the admissions cycle.

II. Petitioner’s arguments that she was nevertheless subjected to unequal treatment in violation of the Fourteenth Amendment are refuted by both the record and existing precedent.

A. Petitioner’s main argument is that UT’s objective is not diversity, but outright “racial balancing.” But the record establishes that UT has not set a “goal, target, or other quantitative objective” for minority admissions, as petitioner herself has admitted. JA 131a. UT considered demographics in determining whether minorities were underrepresented at UT in the first place. But underrepresentation at a flagship state university like UT is naturally assessed by some attention to statewide numbers, and there is no constitutional requirement that such a university must blind itself to obvious evidence that particular minority groups are systematically faring poorly in admissions. Moreover, the record establishes that UT does not use its admissions process to work backwards toward any demographic target - or, indeed, any target at all.

B. Petitioner also errs in arguing that the State’s top 10% law categorically forecloses UT from taking race into account for applicants not subject to that law. In Grutter, this Court flatly rejected the contention that percentage plans are a complete, workable alternative to race-conscious holistic review. That makes perfect sense. Percentage plans not only bar consideration of important academic benchmarks beyond class rank, but prevent consideration of the many different factors - including race - that create a richly diverse student body, including diversity within different racial groups of individuals. Accepting petitioner’s argument also would have the perverse effect of discouraging universities from experimenting with percentage plans - for fear that they would then forfeit the ability to consider race in holistic review.

C. Petitioner’s counter-intuitive claim that UT’s consideration of race is too modest to be constitutional cannot be sustained. The fact that race has only a modest and nuanced role in admissions decisions is not a constitutional problem - it is the hallmark of the type of plan this Court has held out as constitutional since Bakke. And in any event, the limited consideration of race in holistic review unquestionably has had a meaningful impact at UT. Petitioner completely overlooks the diversity within racial groups that UT’s holistic plan fosters. And in 2008 alone, a full 20% of all African-American admits and 15% of all Hispanic admits secured admission through holistic review.

D. Petitioner’s effort to recast UT’s broad interest in diversity also fails. The record overwhelmingly establishes that UT’s objective was the educational benefits of a richly diverse student body - the very interest held compelling in Bakke and Grutter. The notion that, by 2004, UT had already achieved all the diversity it was allowed to seek not only paints a dim view of the student body diversity that this Court has recognized as vital to training the Nation’s future leaders, but is refuted by the record in this case. Indeed, in 2003 - despite years of aggressive race-neutral efforts - diversity remained at best stagnant at 1996 levels, despite a large increase in the Hispanic applicant pool. There was also stark racial isolation in classrooms - a critical environment where the educational benefits of diversity are realized, or lost.

E. Finally, petitioner’s attack on the Fifth Circuit’s opinion is misguided. The Fifth Circuit made clear that strict scrutiny applied - and in a manner that was “no less strict for taking into account the special circumstances of higher education.” App. 36a. The Fifth Circuit also recognized that certain educational judgments fall within the zone of academic freedom long recognized “as a special concern of the First Amendment.” Bakke, 438 U.S. at 312. But respecting such judgments on subsidiary issues is not incompatible with strict scrutiny. And the Fifth Circuit’s careful and extended analysis of petitioner’s contentions as to both the compelling-interest and narrow-tailoring prongs belie her claim that the Fifth Circuit abdicated its responsibility to scrutinize UT’s plan. In any event, this Court reviews judgments, not statements in opinions. And UT’s plan passes strict scrutiny on the record before this Court.

III. The Court should decline petitioner’s far-reaching request to reopen and overrule Bakke and Grutter. That request is outside the scope of the question presented, which asks the Court to review UT’s policy under existing precedent, including Grutter. In any event, petitioner has failed to identify any special justification for taking the extraordinary step of overruling Grutter, just nine years after this Court decided Grutter and
ARGUMENT

It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny, and that "[s]trict scrutiny requires that UT demonstrate both that its use of race in admissions decisions is 'necessary to further a compelling government interest' and that 'the means chosen to accomplish the government's asserted purpose' are 'specifically and narrowly framed to accomplish that purpose.' " Pet. Br. 18-19 (quoting Grutter, 539 U.S. at 327, 333; see Bakke, 438 U.S. at 290-91) (Powell, J.). But while that inquiry is undeniably rigorous, the fact that strict scrutiny applies to UT's policy does not mean that UT's policy is in fact unconstitutional.

This Court applies strict scrutiny "to "smoke out" illegitimate uses of race by assuring that [the *23 government] is pursuing a goal important enough to warrant use of a highly suspect tool." Johnson v. California, 543 U.S. 499, 506 (2005). But here UT was pursuing the broad interest in diversity that petitioner herself recognizes is compelling (JA 74a; see Part II.D, infra) and it is common ground (JA 131a) that UT has not established "a quota system," Bakke, 438 U.S. at 318 (Powell, J.). It also cannot be disputed that UT's admissions policy "treats each applicant as an individual in the admissions process" and considers race only in a modest, individualized, and nuanced way. Id.; see Part I, infra. Especially given those incontestable features of UT's plan, it is not surprising that UT's admissions policy satisfies strict scrutiny.

I. UT'S ADMISSIONS POLICY IS A MODEL OF THE TYPE OF INDIVIDUALIZED AND HOLISTIC PLAN THAT THIS COURT HAS APPROVED SINCE BAKKE

1. For 35 years, this Court has upheld the "competitive consideration of race and ethnic origin" in higher education admissions as one factor in a "properly devised admissions program" designed to further the compelling state interest in assembling a diverse student body - the kind of diversity that encompasses a "broad[ ] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Bakke, 438 U.S. at 320, 315; Grutter, 539 U.S. at 325 (quoting Bakke). As Justice Powell emphasized in Bakke, and this Court reaffirmed in Grutter, "nothing less than the "nation's future depends upon leaders trained through wide exposure" to ideas and mores of students as diverse as this Nation of many peoples." Grutter, 539 U.S. at 324 (quoting Bakke, 438 U.S. at 313 (Powell, J)).

*24 In Bakke, this Court invalidated an admissions policy adopted by the Medical School of the University of California at Davis that set aside 16 out of 100 places in the class exclusively for racial minorities. But the Court also reversed the California Supreme Court's injunction against "any consideration to race," 438 U.S. at 379, holding that the "competitive consideration of race and ethnic origin" in a "properly devised admissions program" would pass strict scrutiny. Id. at 320. Justice Powell offered the narrowest rationale for that holding. His controlling opinion approved Harvard College’s race-conscious admissions policy, which Justice Powell appended to his opinion as an example of a "properly devised" and "constitutional" plan. Id.

Justice Powell explained that, under the Harvard plan, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.” Id. at 317. Because such a policy “treats each applicant as an individual” - "without the factor of race being decisive" - one “who loses out on the last available seat” would know it was because her “combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.” Id. at 318, 316. Even though race might tip the balance, this individualized consideration ensured that each applicant was considered “fairly and competitively” and “would have no basis to complain of unequal treatment." Id. at 318.

Nine years ago, in Grutter v. Bollinger, this Court reaffirmed Justice Powell's landmark opinion and upheld Michigan Law School's race-conscious admissions policy. After recognizing that universities for decades "have modeled their own admissions *25 programs on Justice Powell's views on permissible race-conscious policies," the Court reaffirmed "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” 539 U.S. at 323, 325. In addition, the Court held that
the law school’s policy was narrowly tailored because it subjected each applicant to an individualized review process, in which race was only a possible plus factor. *Id.* at 334.

Justice Kennedy, in dissent, agreed with the majority that Justice Powell’s opinion in *Bakke* provided “the correct rule for resolving th[e] case.” *Id.* at 387. But he concluded that race was used as “an automatic factor in most instances” under the law school’s policy and that the law school had in fact established “numerical goals indistinguishable from quotas.” *Id.* at 389. Justice Kennedy emphasized evidence that “admissions officers consulted ... daily reports which indicated the composition of the incoming class along racial lines,” and concluded that there was no “individual review save for race itself” at the end stage of the admissions process. *Id.* at 391-92.

2. UT’s consideration of race in its holistic admissions process bears all of the hallmarks of the individualized - and constitutional - consideration of race that Justice Powell commended in his opinion in *Bakke* without the particular features that Justice Kennedy found impermissible in *Grutter*.

As explained, under UT’s policy race is but one of many factors that may be considered, including geographic diversity, socioeconomic diversity, cultural diversity, and so on. JA 313a; see *Id.* 310a. No numerical value is assigned to an applicant’s race or any other factor considered in determining a PAS *26* score. And any applicant - of any race - can benefit from UT’s contextualized consideration of race. *Supra* at 14. Race is just one factor that UT considers to “examine the student in ‘their totalty,’ ‘everything that they represent, everything that they’ve done, everything that they can possibly bring to the table.’ ” *Id.* 129a. The consideration of race along with other factors “may benefit some students, may not benefit other students, but it’s not based on their race, it’s based on the entire context of their file.” JA 209a. Race, that is, is not a predominant factor - it “is a factor of a factor of a factor of a factor.” App. 159a.

UT’s admissions process also ensures that race is considered only in an individualized and holistic fashion. Race is considered only in the full-file process of assigning a PAI score; at that stage, “ ‘whole file’ readers are not making admissions decisions ... but are simply assigning a PAI score.” JA 407a-08a. PAI scores are fixed long before admissions officers draw a line on the AI/PAI matrix identifying which “cells” will be admitted. *Supra* at 13. At that point, as petitioner herself has conceded, applicants are not identified by race within the cells on matrices. So admissions officers cannot - and do not - consider the race of any applicant in making the all-important decision where to draw the “ ‘stair-step’ decision line” that determines which cells will be admitted. JA 387a-89a, 411a-12a.

*27 The constitutionality of UT’s individualized consideration of race follows a *fortiori* from this Court’s precedents, because it suffers from none of the flaws identified by Justice Powell in *Bakke* or that caused Justice Kennedy to conclude that the admissions plan in *Grutter* operated as a quota. It is undisputed that UT does not have a quota or target for any racial group. JA 131a. It is undisputed that race is neither an “automatic” nor predominant factor (to the contrary, petitioner argues (at 38-42) that it is too “minimal”). And the record establishes that “[n]o admissions officer ... monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to determine whether an applicant will be admitted.” JA 398a; see *Id.* 131a, 387a-89a, 415a; App. 32a-33a, 45a.

Like the Harvard plan approved by Justice Powell, UT’s admissions policy “treats each applicant as an individual in the admissions process,” and does not “foreclose[] [petitioner] from all consideration” for any seats “simply because [s]he was not the right color or had the wrong surname.” *Bakke*, 438 U.S. at 318. Standing on its own, UT’s modest consideration of race in the non-percentage applicant pool is constitutional

*28 under this Court’s existing precedent, as the court of appeals and district court held. Because petitioner’s qualifications and circumstances were “weighed fairly and competitively” on a holistic and individualized basis, she has “no basis to complain of unequal treatment under the Fourteenth Amendment.” *Id.*

II. PETITIONER’S ARGUMENTS THAT UT’S ADMISSIONS POLICY NEVERTHELESS IS UNCONSTITUTIONAL LACK MERIT

Unable to challenge the individualized nature of UT’s consideration of race, petitioner is forced to wage a challenge at odds with existing precedent and the record developed in this case. That effort fails.
A. Petitioner's Central "Racial Balancing" Charge Is Unfounded

The centerpiece of petitioner's brief is her claim that UT is engaged in "racial balancing." Petitioner repeatedly asserts - mostly without citation to the record - that UT's objective is to "mirror the demographics of Texas," and thus is "purely representational." Pet. Br. 19; see id. at 6-7, 22, 26-29, 45-46. Petitioner even argues that "mirroring the demographics of Texas" is "UT's acknowledged goal." Id. at 19 (emphasis added). That is not only incorrect, it is fatally contradicted by petitioner's own concession.

The cases in which the Court has found racial balancing or the like have involved a policy that set a racial quota or target tied to demographics. See, e.g., Parents Involved, 551 U.S. at 729; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986); Bakke, 34. U.S. at 307 (Powell, J.). In Parents Involved, the plurality explained that "working backward to achieve *29 a particular type of racial balance ... is a fatal flaw under our existing precedent." 551 U.S. at 729. It then contrasted the plan invalidated in Parents Involved, which established a "defined range set solely by reference to ... demographics," and the plan upheld in Grutter, which (the Grutter Court held) "did not count back from its applicant pool to arrive at the 'meaningful number' it regarded as necessary to diversify its student body." Id.

The record here forecloses any finding of racial balancing. Indeed, petitioner herself conceded in a proposed statement of fact that UT has not established a "goal, target, or other quantitative objective" for admitting minorities. JA 131a. That should end the matter. Although petitioner now argues (at 27) that UT has established racial "targets," petitioner - like all litigants - is bound by her own concessions. See Christian Legal Soc'y Chapter of the Univ. of Cat, Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2983 (2010); id. at 2999 (Kennedy, J., concurring).

Moreover, petitioner's concession is unassailable. The record establishes that admissions officers do not monitor the racial composition of the class or work backwards to get to any target at any point in the process. Supra at 26-27. The structure of UT's admissions process makes that impossible - since race is considered only in the PAI score, and PAI scores are all determined individually, months before the actual admissions line is drawn on the (wholly race-blind) grid. Supra at 26. The numbers of minorities admitted under holistic review do not remotely mirror racial demographics. App. 45a. And the testimony of admissions officers confirms that UT's objective in *30 considering race was to achieve the educational benefits of diversity. JA 264a-65a, 178a, 309a.

So how does petitioner try to justify her racial balancing charge? She points to the determination in the 2004 Proposal that there are "underrepresented" minorities at UT, based on a comparison between UT's undergraduate student body and the State's population - the primary applicant pool for UT. See Pet. Br. 6-7 (citing SJA 24a-25a). But that is not evidence of racial balancing. " 'Some attention to numbers' " is unavoidable in determining whether a racial group is underrepresented as a general matter, and that attention in deciding whether to consider race at all in admissions by no means "transform[s] a flexible admissions system into a rigid quota." Grutter, 559 U.S. at 336 (quoting Bakke, 438 U.S. at 323); cf. Parents Involved, 551 U.S. at 788 (Kennedy, J., concurring) (it is "permissible" for a school to consider its "racial makeup" and "adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."). (citing Grutter).

There are some 26 references to underrepresented minorities in Grutter, and the concept of underrepresentation as gauged by state population has been used by this Court in other areas, such as in determining racial disparities in grand jury selection. E.g., Castaneda v. Partida, 430 U.S. 482, 494-95 & n.13 (1977). State population likewise is a logical data point in determining underrepresentation at a flagship state university - like UT - that draws the vast majority of its admits each year (about 90%) from the State it was created to serve. A university's identification of underrepresented minorities thus does not disqualify a plan under Grutter and Bakke. See Douglas Laycock, *31 The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership, 78 Tul. L. Rev. 1767, 1813-14 (2004).

UT considered such statewide data only in determining whether any race-conscious admissions policy could be warranted at all under this Court's precedent. SJA 1a. The point of considering such data was not to ensure that the university reaches some representational target; it was to assess whether minority groups are underrepresented at the university because, among other things, they are systematically faring poorly in the
admissions process. Of course, a university cannot look to racial demographics - and then work backward in its admissions process to meet a target tied to such demographics. But as discussed, the record establishes that UT has not done so - and, indeed, has not established any "target" at all. JA 131a.

B. The Top 10% Law Does Not Foreclose The Individualized Consideration Of Race In UT's Holistic Review Process

Petitioner argues (at 37-38) that the top 10% law is a "'workable race-neutral alternative' " that alone forecloses UT's holistic consideration of race for non-percentage applicants. That argument is unavailing. Applicants subject to UT's holistic admissions process are by definition not eligible for admission under the top 10% law. Petitioner has not argued that the entire undergraduate class should be mechanically selected pursuant to the top 10% law, and such a rule would impose enormous educational costs because of the shortcomings inherent in percentage plans, discussed below. Like all selective schools, UT seeks "to make the best possible use of the limited number of *32 places in each entering class" to advance as effectively as it can its educational mission. William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, Sept. 26, 1977, at 7, 9. So UT seeks to maximize broad diversity within the pool of holistic admits; indeed, the individualized consideration of a wide range of factors is the central purpose of whole-file review. *Supra* at 13-14. The existence of the top 10% plan does not bar UT from doing so.

Indeed, in *Grutter* this Court specifically rejected the argument that percentage plans are a complete, workable, and constitutionally required alternative to the individualized consideration of race in holistic review. 539 U.S. at 339-40. As the Court observed, "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340. That conclusion is particularly salient because the Court's decision specifically identified Texas's percentage plan. *Id.*

Percentage plans have serious educational tradeoffs. UT, like many of the Nation's top universities, seeks to assemble a class that is diverse in the innumerable ways - including race - that advance its mission of educating students and preparing them to be the leaders of tomorrow. UT's holistic admissions process directly advances that compelling interest. By contrast, the percentage plan - with its single-minded focus on class rank - makes such nuanced judgments impossible. It also forecloses the consideration of other academic criteria, including the quality of the applicant's high school, the nature of her *33 course load, and her performance on standardized tests. See Laycock, *supra*, at 1817-19. This Court presumably would not select its own law clerk based solely on class rank - from any law school within a State or geographic area - without regard to other academic criteria or individualized factors.

In addition, although the top 10% law helps admit minorities, it does so largely as a result of well-known de facto segregation throughout much of Texas's secondary school system. See *supra* at 8; Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences* 14-15 (2003); Laycock, *supra*, at 1806-10. That segregation produces clusters of overwhelmingly majority-minority schools - largely confined to particular geographic areas of the State - that tend to produce large numbers of minority admits under the top 10% law. But that clustering also means that the top 10% law systematically hinders UT's efforts to assemble a class that is broadly diverse, and academically excellent, across the board - including within groups of underrepresented minorities.

Holistic review permits the consideration of diversity within racial groups. *Cf*. Bakke, 438 U.S. at 324 (quoting Harvard plan; contrasting an applicant who is the "'child of a successful black physician'" and one who "'grew up in an inner-city ghetto of-semiliterate parents' "). And, in fact, admissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average, *34 have higher SAT scores than their top-10% counterparts. See UT, Office of Admissions, *Student Profile: Admitted Freshman Class of 2008*, at http://www.utexas.edu/student/admissions/research/AdmittedFreshmenProfile-2008.pdf.
These students have great potential for serving as a "bridge" in promoting cross-racial understanding, as well as in breaking down racial stereotypes. See App. 57a n.149. The African-American or Hispanic child of successful professionals in Dallas who has strong SAT scores and has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class (or attends an elite private school that does not rank) cannot be admitted under the top 10% law. Petitioner’s position would forbid UT from considering such a student’s race in holistic review as well, even though the admission of such a student could help dispel stereotypical assumptions (which actually may be reinforced by the top 10% plan) by increasing diversity within diversity.

That is not to say that a minority applicant with a less disadvantaged socioeconomic background is preferred. To the contrary, as noted, UT has made specific efforts to recruit minorities of all socioeconomic backgrounds. Supra at 7. The point is that just as broad diversity is essential to UT’s educational mission, so is the presence of minority students with different backgrounds and perspectives. As this Court has observed, “failing to account for the differences between people of the same race” not only compromises diversity in the broad sense, it does a “disservice” to the goal of becoming “a society that is no longer fixated on race.” League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 434 (2006).

*35 The Constitution permits UT to conclude that holistic review - including its modest consideration of race - for the remaining admissions decisions is a critical counterpart to the top 10% law in order to compensate for the various ways in which the single-criterion percentage plan otherwise distorts and limits the overall diversity of the class. That conclusion fits comfortably within strict scrutiny review. Race-neutral methods are not “workable” if they would have a significant “detrimental effect” on a university’s mission. Croson, 488 U.S. at 509-10. And they are not genuine “alternative[s]” unless they would serve the university’s compelling interest “about as well” as the race-conscious plan. Wygant, 476 U.S. at 280 n.6. The top 10% law comes up short on both yardsticks.

Petitioner argues (at 51-52) that UT’s adoption of the policy at issue was not a “last resort.” But the record overwhelmingly establishes that UT acted in good faith and only after considering many race-neutral alternatives, including recruiting, scholarships, and other measures. Supra at 7. As the district court put it, “[t]o argue that UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case.” App. 164a; see SJA 24a. For years, UT went deep into the playbook for race-neutral alternatives in this context, and yet levels of underrepresented minorities at UT remained stagnant, at best. The Constitution did not place the self-defeating burden on UT to continue even further down that unpromising path before trying the modest race-conscious measure at issue here.

Petitioner’s argument also creates perverse incentives. It would discourage universities from experimenting with percentage plans or similar *36 alternatives - and thus would impede the ultimate goal of ending race-conscious admissions. Under petitioner’s approach, the adoption of a race-neutral measure like a percentage plan for a portion of the admissions class would effectively preclude a university from engaging in race-conscious holistic review for the remaining part of the class. Experimentation is critical in this area. See William G. Bowen & Derek Bok, The Shape of the River 286 (1989). Experimentation with percentage plans should not be reduced to an all-or-nothing proposition.

C. The Modest Manner In Which Race May Impact Holistic Admissions Is A Constitutional Virtue, Not A Vice

Petitioner argues (at 38-42) that UT’s consideration of race in holistic admissions is too modest to pass muster. That argument is flawed as both a doctrinal and factual matter. As a doctrinal matter, in the kind of individualized and holistic review of applicants commended in Bakke and Grutter race does not predominate but instead plays only a nuanced and limited role in the admissions process. See Part I, supra; Grutter, 539 U.S. at 337; Bakke, 438 U.S. at 318 (Powell, J.); see also Grutter, 539 U.S. at 387 (Kennedy, J., dissenting) (race may be “one, nonpredominant factor” in such a system). The nuanced and modest impact of race under UT’s holistic review plan is thus a constitutional virtue, not a vice.

Petitioner’s reliance (at 38) on Parents Involved is misplaced. The plan at issue there used a crude “white/non-white” classification in pursuit of a fixed target based on the racial composition (in white/nonwhite terms) of the district. 551 U.S. at 723. Race was not considered simply as “one factor weighed with *37 others in reaching a decision, as in Grutter” - it was “the factor.” Id. And the plan merely “shuffle[d] a few handfuls of different minority students’ ” around to get a specified range of minority enrollment based on
district-wide demographics. *Id.* at 734. In that context - the “extreme approach” of assigning students to different districts based on “a binary conception of race” - the Court observed that the “minimal impact” of the challenged classification was a reason to conclude that other, less cumbersome means would have been just as (or more) effective. *Id.* at 735. UT’s individualized consideration of race in holistic admissions is entirely different, its purposes could not be accomplished in any other way, and as discussed, in this context the goal is for race to play a modest role.

In any event, UT’s nuanced consideration of race has a significant impact on advancing UT’s diversity objective. It is undisputed that “the consideration of race in admissions does increase the level of minority enrollment,” and the evidence shows that “race is a meaningful factor and can make a difference in the evaluation of a student’s application.” App. 163a n.14; *JA* 113a. Moreover, petitioner’s efforts to trivialize the number of minority admits from the holistic pool is based on only a one-dimensional view of diversity that ignores UT’s objective to assemble a student body that is broadly diverse - including within different minority groups. As discussed, that diversity itself has invaluable educational benefits. *Supra* at 34.

The raw numbers of underrepresented minorities admitted under holistic review also completely belied petitioner’s claim (at 9, 39) that the consideration of race has had a “negligible” - nay, “infinitesimal” - impact on diversity at UT. Petitioner states (at 39) *38 that* UT “classified 29,501 applicants by race” (a claim that is inaccurate, see *supra* n.7) and “enrolled 216 African-American and Hispanic students” evaluated through holistic review. But looking at minority enrollment masks the impact of the admissions policy; UT competes with Ivy League and other top schools for many holistic admits - and does not always win that battle. The relevant benchmark therefore looks to the minorities admitted. And in 2008, a full 20% of all African-American admits were offered admission through full-file review, as were 15% of all Hispanic students offered admission. *SJA* 158a.

Petitioner also argues (at 39) that UT’s consideration of race was likely “not decisive for many of the 216” African-American and Hispanic admits who ultimately enrolled. That may well be right - but only because it is precisely what you would expect to get when admissions decisions are made on an individualized basis, taking race into account only in context, and as a non-preemptive factor. UT has carefully followed this Court’s teachings to ensure that race is only one factor among many in a process that respects the individual dignity of each applicant. In petitioner’s view, those instructions were not a road map to the safe harbor recognized by *Bakke* and *Grutter*, but a trap leading to unconstitutionality.

D. UT Had A Sufficient Basis To Conclude That Adding Race To Its Holistic Review Promoted Its Compelling Interest In Diversity

Although UT decided to add race to holistic review to advance the same broad diversity interest that this Court held compelling in *Grutter* and *Bakke*, petitioner *39 argues that UT lacked a compelling interest to consider race in holistic admissions. Not so.

1. Petitioner first tries to recharacterize the interest pursued by UT. Pet. Br. 26-30. Her main claim (at 27) is that UT’s objective was simple “racial demographics.” As discussed (Part II.A, *supra*), that argument is meritless. As a fall back, petitioner argues (at 29) that UT’s “only other interest” was “classroom diversity.” That argument also fails. UT did consider diversity in the classroom as “one window” into whether its students were realizing the educational benefits of diversity. *JA* 226a (emphasis added). But UT’s objective was far broader than the interest in “classroom diversity” attacked by petitioner.

UT has made clear that its objective is the educational benefits flowing from a richly diverse class - an interest that this Court found compelling in *Grutter* and *Bakke*. *SJA* 1a, 3a-4a. That includes an “academic environment” in which there is “a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” *SJA* 23a. An obvious way of promoting that objective is fostering diversity in the classroom - one of the most important places where ideas are exchanged. But UT’s diversity interest extends beyond the classroom to the existence of “a student body that permits all students to experience concrete benefits from diversity.” *JA* 428a-29a (emphasis added). The record is replete with evidence that UT pursued this broader objective - and seeks diversity “spread across the university in all the things that [it does].” *JA* 266a; see, e.g., *JA* 159a, 204a-05a, 210a-11a, 264a-65a, 309a, 364a-65a, 396a, 428a.
*40 However it is parsed, UT's broad diversity interest is unquestionably compelling under *Grutter, 539 U.S. at 322-36*, and *Bakke, 438 U.S. at 311-15* (Powell, J.). *See Parents Involved, 551 U.S. at 722-23*. Indeed, this interest in diversity is if anything even more compelling here than in *Grutter or Bakke*, because it has been argued that the educational benefits of diversity are all the more salient in the undergraduate setting than the graduate school setting. *Bakke, 438 U.S. at 313* (Powell, J.). Likewise, ensuring a diverse student body is especially important at a flagship state university like UT, which "bear[s] a special responsibility in ensuring that 'the path to leadership be visibly open to talented and qualified individuals.'" *SJA 3a* (quoting *Grutter, 539 U.S. at 332*).

2. Petitioner argues (at 34) that UT's interest in diversity is suspect because UT has not defined the "percentage" of minorities that will meet its objective. But reducing racial diversity to a fixed percentage itself "would amount to outright racial balancing." *Grutter, 539 U.S. at 329-30*. Moreover, this argument overlooks the whole point of diversity in this context. As Justice Powell explained, the interest that is compelling is "not an interest in simple ethnic diversity" tied to a "specified percentage of [minorities in] the student body"; rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke, 438 U.S. at 315*.

Instead of seeking any fixed percentage, UT seeks a "critical mass," which is simply a short-hand reference to the racial diversity necessary to realize the educational benefits that this Court has repeatedly acknowledged. *SJA 25a*. No particular percentage of the incoming class will ensure that those benefits are realized in all educational settings - just as (to follow the analogy back to its roots) no fixed amount of fissile material guarantees a nuclear chain reaction without regard to other circumstances. Differences in the size or type of schools, in their educational missions, in the communities that universities serve, in their history of racial isolation or discrimination, and so on, may all affect the level of diversity required to realize the full educational benefits of diversity. Reducing diversity to an inflexible, one-size-fits-all percentage finds no support in *Bakke or Grutter*, or the real world.

That does not mean that the critical-mass determination is just an abstraction. An important part of the determination is a university's own firsthand assessment of the educational benefits flowing from student body diversity at a given point in time. Although that might seem like an amorphous determination to some, trained educators make these sorts of judgments all the time in ascertaining - and calibrating - the environment in which their students are educated. Because a diverse student body is "so essential to the quality of higher education," that judgment is entitled to some deference. *Bakke, 438 U.S. at 312-13*; *see Grutter, 539 U.S. at 328*. But UT did not simply rely on an unadorned statement of educational judgment. It based its determination that UT had not yet reached a critical mass in 2004 on hard data on minority admissions, enrollment and racial isolation at UT, as well as discussions with students about their own experiences at UT. *JA 267a-68a*.

3. Petitioner argues that UT already had achieved all the diversity the Constitution allowed it to seek *42 when it adopted the admissions policy in 2005. That argument has two major structural flaws. First, in gauging diversity, petitioner repeatedly combines individuals of different races - African-Americans and Hispanics - suggesting that the relevant measure of diversity is the sum of the percentages of both groups. *See Pet. Br. 35; see id. at 3, 4, 5*. But this Court has already rejected reliance on such "a limited notion of diversity," *Parents Involved, 551 U.S. at 723*, which lumps together distinct racial groups of individuals, and ignores the diversity that exists among individuals within racial groups, *Perry, 548 U.S. at 434*.

Second, petitioner apparently assumes that UT had already achieved all the diversity it was allowed in 1996 - the year of *Hopwood* - because she adopts 1996 as the baseline for whether UT was permitted to do more. *Pet. Br. 36*. But UT by no means regarded the level of racial diversity in 1996 as a fully-realized end point. UT also appreciated that, as one Texan observed in a similar vein, the fact that "race-neutral admissions policies have resulted in levels of minority attendance for incoming students that are close to and in some instances slightly surpass those under the old race-based approach" (such as quotas) does not mean that we should be "satisfied with the current numbers of minorities on Americans' college campuses." *39 Weekly Comp. Pres.
Docs. 71, 72 (2003) (President Bush’s remarks on the Michigan cases). To the contrary - “[m]uch more [progress] is needed.” Id.8

*43 The record amply supports UT’s judgment - following its year-long evaluation - that it had not yet achieved all the constitutionally permissible educational benefits of diversity. Indeed, in 2003, after several years of factually race-neutral efforts to promote diversity, only 3% - a startling number - of the entering class was African-American and 14% Hispanic, at or below 1996 levels. JA 121a-22a. The figures were only slightly better in 2004. JA 127a. In other words, the levels of underrepresented minorities at UT were at best stagnant compared to 1996. And in an important sense, the situation was worse for underrepresented minorities in 2004: the odds of admission for an African-American or Hispanic in the second decile of their high school class dropped under the top 10% law, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a.

At the same time, there was jarring evidence of racial isolation at UT. Supra at 10. The classroom is an especially important environment at a massive university like UT, where students are more dispersed and the vast majority live off campus. Of course a critical mass of underrepresented minorities is not required in “every small class.” Pet. Br. 30. But the fact that African-American and Hispanic students were nearly non-existent in thousands of classes was a red flag that UT had not yet fully realized its constitutional interest in diversity. App. 157a. If “[a] compelling interest exists in avoiding racial isolation,” *44 Parents Involved, 551 U.S. at 797 (Kennedy, J., concurring), then surely a university may take account of blatant racial isolation in its classrooms.9

4. Petitioner argues (at 7, 28) that UT’s interest in diversity cannot be compelling because UT’s policy purportedly favors African-Americans and Hispanic students, while (petitioner says) penalizing other groups such as Asian-Americans. That gets both the law and the facts wrong. As a legal matter, this Court’s precedents call for an examination of whether a university has reached a critical mass of “underrepresented minority students.” Grutter, 539 U.S. at 338. As the Court has explained, “[b]y virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university’s] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.” Id.; id. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”). That explains why UT focused on underrepresented minorities in gauging critical mass in 2004.

*45 As petitioner has recognized, Asian-Americans are not an underrepresented minority at UT when considering UT’s primary applicant pool - Texas. Pls.’ Mot. for Partial Summ. J. Br. 16 n.3, ECF No. 94; see App. 45a. In 2004, Asian-Americans comprised about 3% of the population in Texas, yet accounted for 18% - six times that figure - of UT’s freshman class (and grew to 19% by 2008 under the plan at issue). App. 155a n.10; SJA 156a. Meanwhile, Asian-American applicants to UT have for years gained admission at higher rates than any other group (including Caucasians). SJA 43a, 156a. For example, 61.7% of all Asian-American applicants in 2004 gained admission. SJA 43a. In other words, unlike African-Americans and Hispanics, Asian-Americans have fared dramatically better in admissions at UT than would be expected just considering their presence in the applicant pool.

As a factual matter, petitioner’s argument is based on a misconception of how the policy operates. As she has conceded, UT’s holistic consideration of race can benefit any applicant, minority or not. JA 130a; see supra at 14. That includes Asian-Americans (JA 284a) - whose enrollment actually increased under the policy at issue. App. 24a. At the same time, no applicant, even an underrepresented minority, is guaranteed that race will be a tipping factor in full-file review. As this Court recognized in Grutter, 539 U.S. at 338, underrepresented minorities are more likely to have racial experiences that may impact an admissions decision under the contextualized way that race is considered by UT. But because the contextualized consideration of race is the same for all applicants, any *46 applicant - of any race - may benefit from the individualized consideration of race.10

For similar reasons, petitioner’s argument (at 4647) that UT’s policy is unconstitutional on the ground that Hispanic students are “not underrepresented” at UT is not only wrong, but academic. Petitioner has acknowledged that Hispanics are underrepresented at UT compared to the State (UT’s main applicant pool).
Pls.’ Mot. for Partial Summ. J. Br. 16 n.3. Although petitioner emphasizes that Hispanics were 16.9% of the student body in 2004, there were still thousands of classes at UT with zero or only one Hispanic student, and Hispanics were being admitted at a far lower rate than one would expect. Supra at 10. The flagship state university for Texas - with a special obligation to train the future leaders of Texas - was entitled to conclude that that was simply unacceptable.

In any event, although petitioner focuses on the level of Hispanics admissions, she does not contest that African-Americans were, and still are, severely underrepresented at UT. That undeniable fact provided a sufficient basis for UT to adopt its race-conscious admissions policy in 2004, under which the consideration of race could benefit any applicant.11

*47 E. Petitioner’s Efforts To Recast And Impugn The Fifth Circuit’s Articulation Of Strict Scrutiny Fail

Although the Fifth Circuit explicitly recognized that strict scrutiny applied (App. 35a), petitioner argues (at 47) that the court “abandon[ed]” strict scrutiny. That argument is based more on statements stripped of context than a fair reading of the opinion.

The Fifth Circuit not only took it as “a given” that “strict scrutiny with its requirement of narrow tailoring” applied, it stressed that “race summons close judicial scrutiny, necessary for the nation’s slow march toward the ideal of a color-blind society.” App. 34a-35a. The court also emphasized that “[n]arrow tailoring ... requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype.” App. 36a. And the court made clear that “the scrutiny triggered by racial classification is no less strict for taking into account the special circumstances of higher education.” Id. (quoting Grutter, 539 U.S. at 328). Ultimately, the court's detailed and rigorous examination of the record and the parties’ arguments on both the compelling-interest and narrow-tailoring prongs in its lengthy decision refutes petitioner’s claim that the court was derelict in its duty to apply strict scrutiny.

Petitioner’s main complaint (at 48-49) is the way in which the Fifth Circuit characterized the deference *48 due to a university's educational judgments, and its willingness to presume “good faith” on part of UT in pursuing educational objectives - “absent a showing to the contrary,” Grutter, 539 U.S. at 329 (quoting Bakke, 438 U.S. at 318-19 (Powell, J.)). But in stating that it owed “a degree of deference to [UT]’s constitutionally protected, presumably expert academic judgment” (App. 37a), the Fifth Circuit did not abandon strict scrutiny. It simply recognized - as Justice Powell did in Bakke, 438 U.S. at 312-13, and the Court did in Grutter, 539 U.S. at 329-30 - that subsidiary facts in the strict scrutiny analysis may involve judgments within the ambit of the academic freedom that has long been recognized “as a special concern of the First Amendment.” 438 U.S. at 312; see Parents Involved, 551 U.S. at 792 (“First Amendment interests give universities particular latitude in defining diversity.”) (Kennedy, J., concurring); Grutter, 539 U.S. at 387-88 (Kennedy, J., dissenting) (it is appropriate to give “deference to a university’s definition of its educational objective”). This Court itself has deferred to analogous factual determinations in conducting strict scrutiny in other contexts, where courts likewise lack institutional competence to make the determinations. See, e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010).

Of course, such deference still has its limits. A university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored. Grutter, 539 U.S. at 334-35; see id. at 388 (Kennedy, J., dissenting) (university is not entitled to “deference to the implementation of [its diversity] goal”). But the Fifth Circuit did not defer to UT’s belief that its policy *49 was narrowly tailored. Nor did it defer to UT on whether its policy served as a disguised quota, ensured individual consideration, or relied upon race as a predominant factor in admissions. To the contrary, the court rigorously tested the policy in light of petitioner’s narrow-tailoring objections. App. 43a-70a.

Petitioner also argues (at 31-34) that the Fifth Circuit erred in not extending the “strong basis in evidence” standard to this case. Here again, however, the Fifth Circuit simply followed existing precedent. Although the petitioner in Grutter similarly argued that a “strong basis in evidence” was required (Grutter Pet. Br. 24), not even the Grutter dissenters advanced that view. And neither Parents Involved, nor Grutter, nor Gratz holds that this standard applies when the interest asserted is a university's compelling interest in the educational benefits of diversity - which this Court has long recognized is a compelling interest that all public universities

135
possess, so long as it is genuinely tied to their educational mission and is not a disguised quota (which, as discussed, is undisputed here).
Moreover, as the Fifth Circuit explained, the employment and government contracting cases on which petitioner relies in advocating this standard are readily distinguishable. App. 38a-42a. The only compelling interest that the Court has held could justify the consideration of race in those contexts is the “backward-looking” (App. 40a) interest in remedying past wrongs. In such cases, the Court has explained, “the necessary factual predicate is prior discrimination,” so there must be “a factual determination” for the conclusion that “remedial action was necessary.” Wygant, 476 U.S. at 277-78 & n.5 (Powell, J.). By contrast, the compelling interest *50 recognized by Bakke and Grutter in the higher education admissions process is the “forward-looking” interest that universities have in “obtain[ing] the educational benefits of diversity.” App. 41a.

In any event, the evidence discussed establishes that UT had a “strong basis” for concluding that race-conscious admissions were necessary in 2005 to further UT’s compelling interest in a diverse student body. Indeed, whereas the “strong basis in evidence” standard has been used to smoke out whether an employer has adopted a “de facto quota system,” App. 39a, it is conceded that UT has not established any quota. A contrary conclusion would subject the Nation’s finest universities and graduate schools to endless litigation over the use of race-conscious admissions policies. As a practical matter, that would be tantamount to forbidding the consideration of race in holistic admissions. But this Court has twice refused to do that. And it should reject petitioner’s request to overhaul the strict scrutiny inquiry in order to achieve the same practical result here.

Strict scrutiny can be strict without being “fatal in fact.” Johnson, 543 U.S. at 514. There is no basis to hold the Nation’s universities to any higher standard in seeking to advance educational objectives that this Court itself has held are compelling.

III. THERE IS NO BASIS TO RECONSIDER OR OVERRULE EXISTING PRECEDENT

Given the obvious tension between her arguments and this Court’s existing precedent, it is not surprising that petitioner ultimately finds it expedient to ask (at 53) this Court to “overrule[]” that existing precedent. That request underscores that petitioner’s objective is not so much the *application of* existing precedent as *51 the dismantling of* it. She has provided no basis for the Court to take that extraordinary step.

For starters, petitioner has not even properly presented that question. Her own question presented explicitly assumes the validity of existing precedent, asking “[w]hether this Court’s decisions ..., including Grutter ..., permit the University of Texas at Austin’s use of race in undergraduate admissions decisions.” Pet. i. The question whether a decision of this Court should be overruled is quite different from (and therefore not fairly included within) the question whether a policy is lawful “under” (Pet. Br. i) - *i.e.*, according to - such precedent. See Sup. Ct. R. 14.1(a); Yee v. City of Escondido, 503 U.S. 519, 535 (1992). A single sentence tacked onto the end of the petition for certiorari (at 35) states that, if the decision below is correct, Grutter should be overruled “to restore the integrity of the Fourteenth Amendment’s guarantee of equal protection.” But neither that platitude nor the back-of-the-envelope discussion of *stare decisis* at the tail-end of petitioner’s merits brief properly presents the far-reaching question whether Grutter and Bakke should be overruled. Cf Randall v. Sorrell, 548 U.S. 230, 263 (2006) (Alito, J., concurring).

In any event, even when the Court would not “agree with [a decision]’s reasoning and its resulting rule” were it “addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling” the decision at a later point. Dickerson v. United States, 530 U.S. 428, 443 (2000). After all, “[t]he doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of an arbitrary discretion in the courts’ *52 is restrained.*” Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., joined by Kennedy, J., concurring) (quoting The Federalist No. 78, at 471 (Clinton Rossiter ed., 1961)).

Although petitioner and her amici obviously believe that Grutter and Bakke are wrong, they have not identified any “special justification” (id.) for overruling those decisions. In Grutter, this Court reaffirmed Justice Powell’s opinion in Bakke. And in the nine years since Grutter, this Court has never questioned
Grutter’s core holding. To the contrary - it has relied on Grutter without questioning it. Parents Involved, 551 U.S. at 722-23, Bakke - as solidified by Grutter - has become a “long-established precedent … integrated into the fabric of the law.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233 (1995); see also, e.g., Grutter Amherst Br. 28-29. Indeed, petitioner herself does “not challenge” a central component of Bakke and Grutter: the Court’s holding that universities have a compelling interest “in promoting ‘student body diversity.’” JA 74a.

Nor have the standards established in Bakke and Grutter proven to be unworkable. That is underscored by this Court’s own reliance on those cases (see Parents Involved, 551 U.S. at 722-23), three decades of implementation of this Court’s decisions by the Department of Education (see Grutter Resp. Br. 18-19), and the fact that Grutter has not produced any conflict of authority in the lower courts.

Moreover, overruling Grutter and Bakke would upset profoundly important societal interests. As the Court recognized in Grutter, both public and private universities across the country have been modeling their admissions policies “on Justice Powell’s [opinion *53 in Bakke]” for decades. 539 U.S. at 323. The student body diversity fostered by these programs has translated into invaluable educational benefits for millions of Americans and had a vital impact on training the Nation’s future leaders in all fields, including the military. The selection and education of America’s future leaders in our increasingly diverse society are too important for this Court to eliminate the constitutional framework that has been used by universities for decades in pursuing that compelling objective on the basis of the skimpy, four-page argument (at 53-56) that petitioner makes here.

And, of course, the Court’s “legitimacy requires, above all, that [it] adhere to stare decisis, especially in such sensitive political contexts as the present, where partisan controversy abounds.” Bush v. Vera, 517 U.S. 952, 985 (1996). It would be an abrupt - and destabilizing - step for the Court to overrule Grutter just nine years after this Court reconsidered and reaffirmed Justice Powell’s opinion in Bakke. It would be all the more disruptive given that Grutter captured the attention of the Nation when it was decided by this Court; nothing has changed since Grutter (other than the composition of this Court); this case will not be considered by the full Court (because of Justice Kagan’s recusal); and this case concededly does not even present the central concern (the risk of disguised quotas) that critics of the consideration of race in the higher education context have attacked.

 UT well appreciates that the appropriate consideration of race in higher education admissions defies an easy answer. Certainly all aspire for a colorblind society in which race does not matter - and *54 need not be considered to ensure a diverse proving ground for the Nation’s future leaders. But in Texas, as in America, “our highest aspirations are yet unfulfilled.” Parents Involved, 551 U.S. at 782 (Kennedy, J., concurring). And it remains “a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background.” Bowen, supra, at 9. The Constitution did not bar UT from taking account of that fact - and considering race along with the many other characteristics applicants possess in the individualized and modest manner in which its holistic admissions policy operated in 2008, in order to seek the full educational benefits of a diverse student body.

*55 CONCLUSION

The judgment of the court of appeals should affirmed.

Footnotes

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whether they would get their first choice, some top 10% admits in 2008 also received a full-file read (and a PAI score) to determine whether they would get their first- or second-choice program. That policy furthers UT’s interests in academic

Petitioner asserts (at 8) that “race is a factor in admission, placement, or both for every in-state undergraduate applicant.” That is incorrect. Race is not considered in admitting students to UT under the top 10% law (which fills most of the class). Within UT, some programs are in such high demand that most (or all) of their slots could be filled with top 10% admits alone. But even these “impacted” programs accept 75% of their students based on class rank or PAI alone (where race is irrelevant); their remaining slots are filled using the AI/PAI matrix process described above. JA 383a. Accordingly, depending on the program selected as the first choice, some top 10% admits in 2008 also received a full-file read (and a PAI score) to determine whether they would get their first- or second-choice program. That policy furthers UT’s interests in academic
selectivity and ensuring that its students enjoy the educational benefits of student body diversity. In any event, petitioner challenges only the denial of her admission to UT under holistic review. JJA 38a. She has no basis to complain about UT’s placement of students admitted under the top 10% law.

8
Similarly, the fact that UT touted existing diversity in the various materials cherry-picked by petitioner - some of which post-date 2008 - in no way suggests that UT had concluded that it had already fully achieved a critical mass. And petitioner overlooks the critical importance of such materials in recruiting minority students to join a campus community still perceived as “largely closed” and “[un]welcoming” to them. SJA 14a.

9
Given the backward-looking nature of petitioner’s sole-remaining damages claim, the only question here is whether UT had a sufficient basis to adopt the challenged policy in 2005 or apply it in 2008. Supra at 17. Petitioner’s numerous references to minority enrollment at UT after that time period are therefore irrelevant here. See FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) (“[W]e adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.”) (quoting Sweatt, 339 U.S. at 631).

10
The Harvard plan, as well as all other holistic admissions plans of which UT is aware, consider the race of all applicants in full-file review, and not just that of underrepresented minorities. See Grutter Amherst Br. 10-11.

11
Petitioner’s suggestion that race-conscious admissions will never end at UT just renews the same basic end-point arguments that this Court rejected in Grutter. And this case is a particularly ill-suited vehicle in which to revisit those arguments, because petitioner’s only remaining claim is her backward-looking damages claim, which turns on whether UT’s policy was justified in 2005 or 2008. In any event, the proper application of strict scrutiny will ensure that any use of race in admissions lasts no longer than warranted. And one of the lessons of the explosive growth in Asian-American admissions in higher education in recent years is that racial barriers can be overcome.
Background:

This Brief, submitted by the President and Chancellors of the University of California succinctly and clearly articulates the ramifications of ending Affirmative Action programs in a non-White majority state like Texas. California¹ has a highly diverse population, with demographics close to those of Texas.² Up until the passage of Proposition 209—a state-level initiative that effectively banned affirmative action programs in the public university system, the University of California system—California’s preeminent research universities, graduate, and professional schools—also boasted one of the nation’s most diverse student body’s. As argued by the Brief, the elimination of affirmative action programs within the UC system has had dire effects, noting, inter alia, the precipitous drop of underrepresented minority enrollment, particularly among Blacks and Latinos, at all levels.

¹ As of the 2010 Census White non-Hispanics make up 39.7% of the population compared to Hispanic/Latino (38.1%), Black (6.6%), Native (1.7%), Asian (13.6%), Hawaiian and Pacific Islander (.5%), and 2 or more races (3.6%).

² As of the 2010 Census White non-Hispanics make up 44.8% of the population compared to Hispanic/Latino (38.1%), Black (12.2%), Native (1%), Asian (4%), Hawaiian and Pacific Islander (.1%), and 2 or more races (1.7%).
ARGUMENT

THE UNIVERSITY OF TEXAS AT AUSTIN’S UNDERGRADUATE ADMISSIONS POLICY SHOULD BE UPHELD UNDER THIS COURT’S EQUAL PROTECTION DECISIONS.

This Court properly recognized in Grutter that public universities have a compelling interest in achieving a diverse student body, a goal that furthers a number of significant educational and societal benefits. The University of California’s longstanding policies are fully consistent with that recognition. However, UC has been significantly hampered from fully achieving that goal and realizing its benefits by Proposition 209, a state constitutional amendment that prohibits the use of race-conscious admission policies. UC’s extensive experience with a wide range of race-neutral admissions measures since the implementation of Proposition 209 sheds important light on the extent to which race-neutral measures realistically can be expected to achieve such results.

A. Public Universities Have A Compelling Interest In Achieving The Numerous Educational And Societal Benefits Of A Diverse Student Body.

In Grutter, the Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” 539 U.S. at 325. The Court also recognized that an educational institution’s judgment that such diversity is “essential to its educational mission” is one that warrants judicial deference. Id. at 328; see also *6 Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 797 (2007) (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”) (Kennedy, J., concurring in part).

Grutter recognized that the interest in achieving diversity furthers a number of important educational and societal interests. First, the Court explained that the educational benefits that a diverse student body is designed to produce are both “substantial” and “real,” and mandate that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity” so as to further “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.” 539 U.S. at 331-32; see also id. at 332 (“All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training”). Second, the Court observed that universities and law schools “represent the training ground for a large number of our Nation’s leaders,” and opined that for leaders to have “legitimacy in the eyes of the citizenry,” it is necessary that “the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” Id. at 332. Third, it found the University of Michigan Law School’s conclusions regarding the educational value of diversity supported by a substantial body of evidence establishing “that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” Id. at 330 (citations omitted). In short, the Court observed, “*7 its conclusion that the Law School has a compelling interest in a diverse student body “is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission.” Id. at 329.

In UC Amici’s view, precisely the same conclusions obtain in the context of undergraduate institutions, particularly large, selective public universities such as UT-Austin and the campuses of the University of California. Indeed, closely similar considerations have long been officially recognized in formal policies of the Board of Regents, UC’s governing body.5

The University of California consists of ten campuses located throughout California with numerous undergraduate, graduate and professional schools and programs.6 In Fall 2011, UC had a total undergraduate and graduate enrollment of over 235,000 students. UC is broadly comparable in size and importance to the University of Texas System, another of the nation’s *8 largest systems of public higher education, which likewise has multiple campuses (nine universities, plus six health institutions) and a total enrollment of over 211,000 students.7
As the premier public university in the State of California, UC has a longstanding commitment to the educational and societal benefits that flow from a diverse student body, which are at the heart of its institutional mission. That commitment is expressed in the University’s Policy on Undergraduate Admissions, which dates to 1988:

Mindful of its mission as a public institution, ... UC seeks to enroll, on each of its campuses, a student body that, beyond meeting the University’s eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of cultural, racial, geographic, and socioeconomic backgrounds characteristic of California.9

That commitment is integral to the University’s commitment to academic excellence: Diversity can enhance the ability of the University to accomplish its academic mission. Diversity aims to broaden and deepen both the educational experience and the scholarly environment, as students and faculty learn to *9 interact effectively with each other, preparing them to participate in an increasingly complex and pluralistic society Educational excellence that truly incorporates diversity thus can promote mutual respect and make possible the full, effective use of the talents and abilities of all to foster innovation and train future leadership.9

Even more broadly, UC’s commitment to diversity is closely related to its duties as a public institution: Because the core mission of the University of California is to serve the interests of the State of California, it must seek to achieve diversity among its student bodies and among its employees. The State of California has a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups. The knowledge that the University of California is open to qualified students from all groups, and thus serves all parties of the community equitably, helps sustain the social fabric of the State.10

UC's policies are consistent with this Court’s recognition in Grutter that institutions of higher education have genuine interests in student body diversity stemming from their educational mission and their role in society. These interests are far from mere abstractions. To the contrary, whether institutions succeed in attracting and enrolling diverse student bodies has concrete and measurable effects in the real world. In particular, whether a given institution is able to achieve a “critical mass” of underrepresented minority students has a direct relationship to whether the campus enjoys a healthy racial climate.11

UC campuses, like UT, administer a biennial survey to undergraduates in which they are asked, among other things, whether they feel that students of their race/ethnicity are respected on campus. The results are striking: among racial and ethnic groups, African Americans are least likely to feel that their race is respected on campus. In many cases, students’ responses to the question correlate directly with whether the representation of underrepresented minority students on campus approaches critical mass.

*10 UC’s policies are consistent with this Court’s recognition in Grutter that institutions of higher education have genuine interests in student body diversity stemming from their educational mission and their role in society. These interests are far from mere abstractions. To the contrary, whether institutions succeed in attracting and enrolling diverse student bodies has concrete and measurable effects in the real world. In particular, whether a given institution is able to achieve a “critical mass” of underrepresented minority students has a direct relationship to whether the campus enjoys a healthy racial climate.

*11 Thus, in 2010, across eight UC campuses that surveyed undergraduates, from 12.9% to as many as 68.5% of African American students reported feeling that students of their race are not respected on campus (the comparable range in 2008 was from 20% to 51.9%).12 UC Riverside, the UC campus at which the greatest percentage of African Americans felt students of their race are respected (87.1%),13 was also the UC campus with the greatest percentage of African American students (7.8% of the undergraduate student body).14 Similar results obtained with respect to Chicano-Latino students: UC Berkeley and UC San Diego, the two campuses with the smallest percentage of Latino students, were also the two campuses at which Latinos were least likely to feel respected (26.3% and 37.9%, respectively).15 Conversely, UC Riverside had the highest percentage of Latino students who felt that students of their ethnicity are respected (92.9%), and also had the highest proportion of Latinos in its student body *12 (30.6%).16 In short, where critical mass is not achieved, the campus racial climate is likely to be significantly less hospitable to minorities.

The concern about a welcoming climate for all racial and ethnic groups on campus is part of a broader commitment by UC and other public institutions to serve the full range of their citizenry, from all cultural, racial, ethnic, geographic, and socioeconomic backgrounds. UC Amici strongly disagree with Petitioner’s contention that any consideration of state demographics in admissions amounts to “nothing more than ‘racial balancing, which is patently unconstitutional.” Pet. Br. at 19. That argument misconceives Grutter. The Court there condemned racial balancing, which it described as the practice of setting aside “some specified
percentage of a particular group merely because of its race or ethnic origin.” 539 U.S. at 336 (quoting Bakke, 438 U.S. at 307). That hardly means that a public university must blind itself to the demographic realities of the state it serves. As discussed above, the Court has acknowledged the broader educational and societal interests served by a diverse student body, including the value of ensuring that public institutions of higher education are visibly open to all persons, regardless of background; the critical role of universities in preparing individuals for leadership in our political, business and legal communities; and the increased legitimacy that such leadership enjoys when it is truly representative of all of its constituencies.

All of these interests properly permit, and indeed compel, public universities to be conscious of the demographics of the states in which they are located and from which their applicants are largely drawn. Petitioner’s cramped reading of Grutter as limited solely to narrow pedagogical interests is inconsistent with Grutter itself and with the larger realities faced by public universities such as the University of California and the University of Texas, which like public elementary and secondary schools have many compelling reasons to undertake “the important work of bringing together students of different racial, ethnic, and economic backgrounds.” Parents Involved in Community Schools, 551 U.S. at 798 (Kennedy, J., concurring).

B. The University of California’s Experience Establishes That Race-Neutral Admissions Policies Cannot Guarantee Fully Diverse Student Bodies.

Grutter held that the University of Michigan Law School’s race-conscious admissions program was narrowly tailored to accomplish the compelling interest in a diverse student body. 539 U.S. at 333-43. That program did not use a quota system, but instead allowed flexible consideration of race or ethnicity only as a “plus” factor in the context of *14 individualized consideration of each applicant. Id. at 335-36. The Law School satisfied this standard by its “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” Id. at 337. The Court emphasized that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” Id. at 349. Rather, the Court observed, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” Id.

Since 1998, when the state constitution prohibited any consideration of race or ethnicity in admissions decisions, the University of California has been actively engaged in precisely the sort of serious, good faith consideration and implementation of a variety of race-neutral alternatives that the Court contemplated in Grutter. As such, UC has extensive experience implementing race-neutral admissions policies while attempting to achieve diverse student bodies. That body of practical experience is directly germane to the Court’s inquiry here, because it bears on whether it is realistic to expect that public universities can always rely exclusively on race-neutral admissions policies as a means of achieving sufficiently diverse student bodies. The University of California’s experience thus provides this Court with an invaluable empirical test of the viability of such alternatives.

Despite numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed only limited success. In particular, the admission and enrollment of underrepresented minority students at a number of UC campuses still have not regained the levels that prevailed before Proposition 209 was enacted. The race-neutral measures UC has implemented in an effort to increase diversity have not enabled it to achieve a “critical mass” of certain minority students, particularly African-American students, at its most selective campuses. Nor have they enabled it to assemble a student body that fully reflects the racial and ethnic diversity of the pool of state high school applicants from which those campuses draw.

1. The University of California’s Admissions Standards And Policies.

Admission to the University of California is a two-step process: qualification for admission to the University as a whole and, once that is accomplished, admission to individual campuses. The Master Plan for Higher Education of the State of California provides that the University of California should educate freshmen from
the “top one-eighth” (12.5 per cent) of all graduates of California public high schools. To identify these students, the University of California promulgates minimum eligibility requirements that both specify a floor of preparation needed to pursue study at UC and also function as an entitlement: any high school graduate who meets these requirements is guaranteed a place at UC - although not necessarily at the campus nor in the major of his or her choice. At the same time, because demand for admission exceeds enrollment capacity at most UC campuses, the campuses over the years have developed *16 selection criteria (such as consideration of high school grade point average, test scores, and other evidence of academic promise) to choose which UC-eligible applicants they will admit. These criteria function as a second, and generally more demanding, set of requirements that applicants to most of the campuses must meet.

Students become eligible for admission to the University of California system by meeting established minimum requirements for coursework and grade point average (GPA) and submitting standardized test scores. Effective for the fall 2012 entering class, for example, minimum eligibility requirements for California residents included a GPA of 3.0 or better (weighted by honors/Advanced Placement bonus points); completion of 15 yearlong college preparatory courses, including courses in history/social science, English, math, laboratory science, foreign language, visual and performing arts, and college preparatory electives; and submission of scores from the ACT with Writing or SAT Reasoning Test.

The University's minimum eligibility criteria, which determine who is admitted to the University as a whole, have always been entirely race-neutral. From the 1960s through 1997, as part of the process of determining admission to a specific campus, individual campuses employed race-conscious criteria, the nature and degree of which varied. That changed beginning in the 1998-99 academic year, following the implementation of Proposition 209.

*17 2. The Adoption of Proposition 209 and Its Immediate Effects on Minority Admission and Enrollment Rates at the University of California.

In the November 1996 election, California voters approved Proposition 209, which added article I, Section 31 to the California Constitution. Article I, section 31 declares that the state, including its political subdivisions, “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (Cal. Const. art. I, § 31, subd. (a).) The fall 1998 freshman class at the University of California was the first to reflect the ban on affirmative action established by Proposition 209. See *18 Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement).

In the immediate aftermath of Proposition 209 becoming effective, the rates at which underrepresented minority students applied to, were admitted to, and enrolled at the University of California fell, often by very significant percentages, at every UC campus. In 1998, the first year in which race-neutral admission policies were implemented at UC, admission rates (i.e., the percentage of applicants admitted) for underrepresented minority students and the proportion that these students represented of the total admitted class fell for UC as a system and on every campus.

At the most selective campuses, these declines were steep. “The year after section 31 passed, the number of African American, Latino, and Native American freshmen at UCLA and U.C. Berkeley dropped by over 50%,” Coalition to Defend Affirmative Action v. Brown, 674 F.3d 1128,1133 (9th Cir. 2012). At UC Berkeley, for example, the admit rate for underrepresented minority students fell from 54.6 percent in 1995 to only 20.2 percent in 1998; at UCLA, the corresponding figures were 52.4 percent in 1995 and 24.0 percent in 1998. The net result was a dramatic drop in the number and proportion of underrepresented minority freshmen. Thus, while in 1995 UC Berkeley had enrolled 807 underrepresented minority freshmen, or 24.3 percent of the entering class, by 1998 it could count only 412, representing 11.2 percent of the class; at UCLA, the number of entering underrepresented minority freshmen dropped from 1,108 to 597 over the same period, from 30.1 percent to only 14.3 percent of the entering class.

African American enrollments were especially hard hit. At UC Berkeley, African Americans fell from 6.7 percent of the entering class in 1995 to only 3.7 percent in 1998; at UCLA, similarly, African Americans were 7.4 percent of the entering class in 1995, and only 3.5 percent in 1998. The enrollment of Chicano and
Latino students at those campuses also dropped sharply: at Berkeley, from 16.9 percent in 1995 to 8 percent in 1998; at UCLA, from 22.4 percent to 11 percent over the same period.26

*20 3. The University Adopts Various Measures To Reverse The Decline In Minority Admission and Enrollment.

Beginning after the implementation of Proposition 209 and continuing to the present, the University of California has taken a variety of actions to strengthen K-12 education, enhance student preparation for higher education, and implement other race-neutral initiatives designed to enhance its ability to attract, admit, and enroll an undergraduate student body that is both academically well prepared and reflective of the broad diversity of California.

a. Outreach Task Force

When it first adopted SP-1 in 1996, the Board of Regents found that “it is in the best interest of the University to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are ‘underrepresented’ in the University’s pool of applicants as compared to their percentages in California’s graduating high school classes.” It directed the formation of a task force on academic outreach, the goal of which was to develop proposals for new directions and increased funding to increase the eligibility rate of economically disadvantaged and other applicants.27

In response to this mandate, the University formed an Outreach Task Force to develop a comprehensive *21 approach to both low eligibility rates for students from underrepresented groups and the challenges those applicants faced in being admitted to the University’s most selective campuses. The Outreach Task Force’s report, issued in 1997, recommended a four-point strategy: enhancement and expansion of academic development programs for K-12 students; development of partnerships between UC campuses and selected regional schools to help improve opportunities for college preparation and to foster a school culture that promotes academic success and high educational standards; expansion of informational outreach to students, families, teachers, and counselors to improve planning and preparation for college; and University research and evaluation to identify the root causes of educational disparity within California’s school system and to guide the University’s outreach work.28

In response to these recommendations, the University dramatically expanded its outreach efforts beginning in 1998. In the years since completion of the report of the Outreach Task Force, UC has spent tens of millions of dollars to expand programs that improve college preparation levels for educationally disadvantaged students. Those efforts included an expansion of existing campus programs that work with individual students to increase academic preparation and motivate students to seek higher education; the establishment of the School/University Partnership Program, through which UC campuses partnered with K-12 schools; and the development of the California Professional Development Institutes, an initiative to train 70,000 teachers annually *22 and to improve teacher quality in core areas of the State’s standards-based curriculum.29

Consistent with Proposition 209, UC’s outreach programs operate in a race-neutral fashion.30 To be eligible for these programs, applicants must be from low-income families or those with little or no previous experience with higher education, or attend a school that is educationally disadvantaged.31 These efforts are partially responsible for the University’s very high enrollment of low-income students and those who will be the first in their families to graduate from college.32

*23

b. Eligibility in the Local Context

Following the adoption of Proposition 209, elected officials as well as some University faculty called on the University to adopt a “percent plan” somewhat analogous to the Top Ten Percent Plan implemented in Texas following the Hopwood decision.33 Accordingly, effective for students entering the University in 2001, the Board of Regents modified its existing eligibility policy to add a “top 4 percent” program, under which the top 4 percent of the eligible students in each California public high school were designated as Eligible in the Local Context (“ELC”). Effective for students entering UC as freshmen for fall 2012, the Board of Regents expanded the ELC program to the top 9 percent of eligible California high school graduates. Unlike the Texas Ten
Percent Plan, ELC guarantees admission only to a campus with available space in the UC system, rather than to an applicant’s campus of choice.\textsuperscript{34} ELC students are identified based on a review of the transcripts of the top students in California’s high schools. (ELC is not available to out-of-state applicants.) To be eligible for consideration, such students are required to complete the entire course pattern mandated by UC, achieve a minimum GPA of 3.0, and take the full battery of UC-required admission tests.

\textsuperscript{24} The ELC program has been successful in increasing interest and applications from students at high schools that traditionally sent few students to the University. However, because the State of California has few if any high schools with student bodies composed entirely of minorities, it has not substantially increased the diversity of the pool of students considered eligible for UC.\textsuperscript{35} Moreover, because ELC addresses only overall Systemwide eligibility and ELC students still must compete against tens of thousands of other well qualified students for admission to individual campuses, it has had limited effect on admissions at the system’s most selective campuses, such as UC Berkeley and UCLA.\textsuperscript{36}

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c. Comprehensive and Holistic Review

In the years following the implementation of Proposition 209, the Board of Regents and faculty also have made significant changes in the processes and criteria governing admission at the campus level. On November 15, 2001, effective for students entering UC in Fall 2002, the Board of Regents directed the campuses to institute a “comprehensive review process” by which all undergraduate students applying to UC campuses are evaluated for admission using “multiple measures of achievement and promise while considering the context in which each student has demonstrated academic achievement.”\textsuperscript{37}

Comprehensive review was intended to broaden the criteria for evaluating eligible applicants and to eliminate the historic practice of setting aside a particular proportion of the admitted class for students meeting a narrow range of academic criteria, thereby allowing all eligible applicants to be evaluated on an individualized basis in light of a broader set of criteria, including contextual information about students’ educational and personal circumstances.\textsuperscript{38} It is consistent with this Court’s \textsuperscript{26}direction in \textit{Grutter}, which approved the University of Michigan Law School’s “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.” \textit{539 U.S. at 337.}

The University adopted Guidelines setting forth eight guiding principles for comprehensive review and listing fourteen broad selection criteria for application by the campuses.\textsuperscript{39} Among those principles were that “merit should be assessed in terms of the full range of an applicant’s academic and personal achievements and likely contribution to the campus community, viewed in the context of the opportunities and challenges that the applicant has faced”, and that “[c]ampus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds.” The selection criteria, in addition to academic grade point average and standardized test scores, included qualification for the ELC program; the quality of academic performance relative to the educational opportunities available in the applicant’s secondary school; academic accomplishments in light of the applicant’s life experiences and special circumstances such as disabilities, low family income, first generation *27 to attend college, disadvantaged social or educational environment, difficult personal and family situations or circumstances, and refugee or veteran status.

The University has devoted substantial resources to creating tools that allow consideration of these factors even in a very large applicant pool, including the development of systemwide “read sheets” that display quantitative data such as grades, test scores, and numbers of courses taken as percentiles where an individual is rated against all applicants to UC, all applicants to the individual campus, and all applicants to UC and the campus from the student’s individual high school. The read sheet also provides contextual information about each applicant’s high school - for example, the number of applicants to UC, average test scores, socioeconomic data about the student body (\textit{e.g.}, average family income, numbers of students who qualify for state and federal welfare programs), numbers of uncredentialed teachers, numbers of honors and Advanced Placement
courses offered, etc. Read sheets are prepared electronically for every applicant and distributed to each campus to which the applicant has applied.

On January 20, 2011, the Board of Regents enacted a Resolution extending the concept of comprehensive review to encourage use of a single holistic score in evaluating applicants. Holistic review, which had been pioneered at Berkeley beginning in 1999 and was later adopted by UCLA, eliminates the use of fixed weights for specific criteria and allows admissions readers greater use of judgment in evaluating the totality of an applicant's achievements and potential. Individual applications are read and scored by multiple independent readers and significant score disparities are referred to additional more senior readers for adjudication.

d. Use of Standardized Tests

Another initiative taken by the University of California in an attempt to increase the diversity of its entering classes on a race-neutral basis was to reduce its reliance on standardized tests. Since the late 1960s, the University's eligibility requirements included the submission of scores from four standardized admissions tests: the Scholastic Aptitude Test (SAT) I or ACT, and three SAT II achievement tests in specific subject areas. Over time, however, the University's use of standardized admissions tests and the tests themselves evolved away from a preference for "aptitude" testing, based in part on evidence that scores on aptitude-type tests were highly influenced by family education and income levels.

*29 In February 2001, then-UC President Richard Atkinson called for the elimination of the SAT Reasoning Test requirement to increase inclusiveness and fairness and to avoid controversial notions of aptitude. In response, the College Board revised the SAT-Reasoning Test (SAT-R) to eliminate objectionable question types and to incorporate the writing component previously administered in the SAT-II Subject tests, while ACT Inc. similarly developed the ACT-with-Writing. The University maintained the SAT/ACT requirement, but reduced the number of required subject tests from three to two. Out of concern that requiring any additional tests beyond the SAT or ACT might discourage students from educationally disadvantaged families, the University eventually dropped the subject test requirement entirely. Beginning with applicants for Fall 2012, the University no longer requires applicants to submit SAT Subject test scores for eligibility.

C. The Limited And Disappointing Results of The University's Race-Neutral Admissions Initiatives.

While these and other measures have enjoyed some limited success, particularly at UC's less selective campuses, the unfortunate reality is that the University's experience continues to support the conclusion it reached a number of years ago: "in a highly selective institution, implementing race-neutral policies leads to a substantial decline in the proportion of entering students who are African American, American Indian, and Latino." Similarly, a recent assessment by the Board of Admissions and Relations with Schools ("BOARS") of the Academic *30 Senate concluded that while comprehensive review in freshman admissions is "capturing talent and diversity and helping UC continue to serve as an engine of social mobility for students with promise from modest backgrounds," the University continues to fall short in its admission of underrepresented minority students, particularly African American and Chicano/Latino students. In particular, that report identified a "disturbing persistence of low African American admit rates across UC campuses, which now is affecting the educational climate."

The shortfall is most apparent when one considers the admission rates for African American students at UC Berkeley and UCLA, the University's most selective campuses. Between 1995 and 2009, African Americans consistently represented between 7 and 8 percent of new high school graduates in California. In 1995, African *31 American students represented 7.3 percent of admitted freshmen at UC Berkeley, but by 1998, following the implementation of Proposition 209, that figure had dropped to only 3.2 percent. In 2010 and 2011, it was only 3.9 percent - still barely half the pre-Proposition 209 figure - and preliminary data for Fall 2012 place the percentage at 3.5 percent. Similar results obtain at UCLA, where African American students represented 6.7 percent of admits in 1995, but only 3.0 percent in 1998, 3.8 percent in 2010, 3.6 percent in 2011, and 3.8 percent in 2012 (preliminary). Thus, admission rates for African American students at these campuses have not recovered from their post-Proposition 209 decline, but instead have stagnated at lower levels. Systemwide, the faculty BOARS committee recently found that admission rates for African Americans
remain "far below" those for the groups with the highest admit rates on each campus, and concluded that "[t]he Comprehensive Review process alone is not sufficient to overcome the disadvantages that African Americans face in their educational opportunity." 49

Although the results for Latino/Chicano students have been appreciably better, they have been driven largely by the growth of Latinos in the state's high school graduating classes, the racial and ethnic diversity of which continue to increase rapidly. Thus, in 1995, Chicano and Latino students represented 18.5 percent of admits at *32 UC Berkeley, a figure that dropped to only 8.5 percent in 1998. In 2010, Latino/Chicano students at UC Berkeley had increased to 14.8 percent of the admitted pool, a figure that grew to 17.2 percent in 2011 and 17.8 percent in 2012. 50 Between 1995 and 2009, however, Latino/Chicano students went from 30 percent to fully 41 percent of California's high school graduates. 51 That is, Latino/Chicano admissions at UC Berkeley have not yet fully recovered to their levels of more than 15 years ago, during a period when the population of Latino high school graduates has increased by more than 25 percent. Thus, the increase in both the percentages and absolute numbers of admitted Latino students at UC campuses masks a growing gap between those numbers and their numbers in the available statewide pool of eligible, qualified applicants.

These figures are troubling, because they call into serious question whether it is currently feasible without the careful and limited application of race-conscious measures to achieve the level of diversity of underrepresented minority students that this Court has recognized as a legitimate objective in the context of higher education. Certainly, most UC campuses have found themselves unable to cross that threshold with respect to African American students, despite the extensive history summarized above of race-neutral measures intended to achieve that objective. In 2011, there were only 130 African American students in an entering freshman class of 4,443 *33 at UC Berkeley, and 224 of 5,825 at UCLA. 52 Thus, there is a high likelihood that each of those students would find himself or herself the only African American student in nearly all of his or her classes, and subject to the isolation that diversity is intended in part to avoid. See Grutter, 539 U.S. at 318 (describing testimony that admitting a "critical mass" of minorities requires a "meaningful number" that "encourages underrepresented minority students to participate in the classroom and not feel isolated"). 53 With African American students numbering only about four out of every hundred entering freshmen, that scenario is inescapable except perhaps in the very largest introductory lecture courses. 54

These limited numbers of underrepresented minority students in UC's undergraduate population are evident at the professional school level as well. In particular, business schools, which play an influential role in shaping tomorrow's business leaders, have very low proportions of underrepresented minorities, and UC's business schools compare poorly in that respect to similar programs nationally. Systemwide, UC enrolled fewer minority students in business (4.5 percent) than did comparable *34 programs nationally (12.8 percent). 55 In California, where an estimated 46.4 percent of the 2011 population is Latino/Hispanic, African American and American Indian, 56 recent entering classes of MBA students at UC campuses have averaged only one to two percent African American and three to four percent Latino students. 57 Indeed, during ten of the last eleven academic years, two or more of UC's six business schools enrolled zero African Americans. 58 While law school enrollment figures are somewhat more encouraging, and vary from school to school and year to year, UC law schools face similar challenges. Entering law school classes in recent years have averaged only three to four percent African American, with one UC law school in 2009-10 reporting only ten African American students in a student body of over 600, considerably below the numbers in the years immediately before Proposition 209. 59

These results threaten seriously to undermine the University of California's ability to discharge its role as "the training ground for a large number of our Nation's leaders." Grutter, 539 U.S. at 332. 60 As a University *35 report recently concluded, "the enrollment percentage of underrepresented minorities ... has exhibited little or no progress at UC's business schools. This clearly limits the University's ability to contribute to a diverse leadership cadre for California." 61

*36

CONCLUSION
The University of California's experience over a decade and one-half suggests that the limited and judicious application of race-conscious admissions measures remains necessary, at least under current circumstances, if the compelling interest in a diverse student body is to be fully realized. Accordingly, the judgment of the court of appeals should be affirmed.

* Footnotes *

1 Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus curiae briefs, in support of either party or of neither party, have been filed with the Clerk of the Court.

2 The names of the Chancellors joining this brief are listed in the appendix.


4 Other states, including Washington and Michigan, later passed substantially similar laws that prohibit public universities from discriminating or granting preferences on the basis of race.

5 Under the California Constitution, UC is established as a public trust, to be administered by The Regents “with full powers of organization and government ...” Cal. Const. art. IX, § 9. As such, the University enjoys a “unique constitutional status”: “The authority granted the Regents includes ‘full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the University and the security of its funds.’” Miklosy v. Regents of Univ. of Calif., 188 P.3d 629, 636-37 (Cal. 2008) (citations omitted).

6 One UC campus, UCSF, is a graduate health sciences campus that enrolls no undergraduates. Although this brief focuses primarily on undergraduate admissions, the educational value of diversity is equally important at UCSF and for all of UC's graduate and professional schools.


8 Undergraduate Admissions Policy (emphasis added).


10 Id.

11 Historically the University of California has classified as “underrepresented” students from groups that collectively achieved eligibility for the University at a rate below 12.5 percent. Underrepresented minorities refer to American Indian, African American, Chicano or Latino students. University of California, Office of the President, Student Academic Services, Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies (Mar. 2003) (“Undergraduate Access to UC”) at 1 n.3,4, http://www.ucop.edu/sas/publish/aa_fina12.pdf.

The importance of universities' admitting diverse student bodies recently was highlighted by the Census Bureau's announcement that for the first time in the country's history, births of minorities - including Hispanics, blacks, Asians, and those of mixed race - surpassed births of whites. Sabrina Tavernise, *Whites Account for Under Half of Births in U.S.*, The New York Times (May 17, 2012). Like Texas, California is one of four “majority-minority” states (that is, states where whites no longer are the majority), a status it attained in 1999. Rebecca Trounson, *U.S. Reaches Historic Demographic Tipping Point*, Los Angeles Times (May 18, 2012).


Proposition 209 was enacted following The Regents' adoption, in July 1995, of Special Policy 1 (“SP-1”), a resolution disallowing the use of “race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.” The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions § 2 (SP-1)* (July 20, 1995), http://www.universityofcalifornia.edu/news/compreview/sp1.pdf. When that resolution was being considered, the academic leadership of the University unanimously urged the continuation of the University's 1988 admissions policy, observing that “significant numbers of potentially qualified California students are still underserved by the University.” Statement of the President, Chancellors, and Vice Presidents of the University of California (July 10, 1995). The Regents later rescinded SP-1. The Regents of the University of California, *Future Admissions, Employment, and Contracting Policies, Resolution Rescinding SP-1 and SP-2* (May 16, 2001), http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf.

Proposition 209 also prohibits preferential treatment based on race or ethnicity in graduate admissions and in employment.

The discussion in this brief focuses on these two campuses, which admit the lowest percentage of freshman applicants in the UC system. The interest recognized by this Court in ensuring that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity” (Grutter, 539 U.S. at 332) is particularly acute at these campuses, which are ranked among the top undergraduate institutions nationally. *See 2012 Best Colleges*, U.S. News and World Report (UC Berkeley and UCLA ranked #1 and #2 among public colleges and universities and #21 and #25 among national universities), http://colleges.usnews.rankingsandreviews.com/best-colleges.

*Undergraduate Access to UC* at 15, 18-19 & Table 5.

*Id.* at 18, 19, 22 & Tables 4 and 5.

26 Id. The number of Native American students enrolling as freshmen at those campuses also fell sharply over the same period, from 56 to 13 at Berkeley and 42 to 14 at UCLA. Id.


29 Undergraduate Access to UC at 9-10.

30 While Proposition 209 has been interpreted to prohibit certain mandatory outreach programs, not all forms of outreach are unlawful. The California Supreme Court has found that “the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification.” Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068,1085 (Cal. 2000).

31 Undergraduate Access to UC at 24.

32 In 2009-10,35% of UC undergraduates were recipients of federal Pell Grants, i.e., they qualified as “low-income” students by the widely accepted federal definition (the figure increased to 39% in 2010-11). That is nearly double the rate at UC’s peer institutions that are members of the Association of American Universities (20% at public universities and 16% at private), and far higher than the rate at Ivy League colleges such as Harvard (10%) and Yale (13%). 2012 Accountability Report at 28; id., App., tbl. 3.5.1. As the minority enrollment figures discussed below make clear, policies that increase the enrollment of low-income students do not serve as an effective “proxy” for race and ethnicity.

33 Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (invalidating University of Texas School of Law’s use of racial preferences in admissions).

34 Policy on Undergraduate Admissions Requirements.

35 Although the expansion of ELC to 9 percent in 2012 was designed to increase the diversity of the ELC pool, preliminary indications suggest this was not successful. For Fall 2012, the UC system received applications from more than 93,000 Californians, roughly one-third of whom qualified as ELC. Preliminary analyses indicate that approximately 35 percent of the ELC applicants were underrepresented minorities. This is slightly less diverse than the overall California resident applicant pool to UC, which included roughly 37 percent underrepresented minorities. University of California Office of Institutional Research, internal analysis, Fall 2012.

36 For the Fall 2012 admissions cycle (the first in which ELC was extended to 9 percent of high school graduates), preliminary data indicate that UC Berkeley received applications from nearly 19,000 applicants who qualified for ELC - more than twice the number of California residents admitted (roughly 9,400). More than 80 percent of the total California students admitted to Berkeley qualified as ELC. But this left more than 11,000 ELC applicants who were denied. Numbers at UCLA were similar: more than 22,000 of UCLA’s 52,000 California resident applicants qualified for ELC. Roughly 85 percent of UCLA’s California admits were ELC, but this still left more than 14,000 who were denied. Id. These figures demonstrate in part why a “10% plan” such as Texas’s, which guarantees admission to a specific campus, would not work in California. The numbers are simply too large to accommodate at a campus such as Berkeley or UCLA.


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Given these figures, UC Amici do not believe that critical mass has been achieved, whether that threshold is measured on a campus-wide, department or program-wide, or classroom-by-classroom basis.
In 2011-12, more than 90 percent of all undergraduate class sections at UC Berkeley numbered less than 100 students. UC Berkeley, Office of Planning & Analysis, Common Data Set 2011-12, http://opa.berkeley.edu/statistics/cds/2011-2012.pdf.

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2012 Accountability Report at 90; id., App., tbl. 8.7.1.

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2011 Accountability Report, tbl. 8.7.1, at 102.

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Id. at 104-05.

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Id. at 103, 107-08.

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Over the years, scores of the State’s and the Nation’s political, legal, and business leaders have graduated from UC Berkeley and UCLA, including Chief Justice Earl Warren, current and former governors, Congressmen, judges, and a host of others. Notable among them are many prominent minorities, including Los Angeles Mayor Antonio Villaraigosa, former Los Angeles mayor Tom Bradley, D.C. Circuit judge (and former California Supreme Court Justice) Janice Rogers Brown, and diplomat and Nobel laureate Ralph J. Bunche, among others.

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Study Group on University Diversity at 5.
Background:

This Brief, submitted by a group of progressive Asian American and Pacific Islander American organizations provides an incredible contrast to that submitted by the Asian American Legal Foundation and Judicial Education Project, infra. The Authors argue that (1) Asian Americans are not treated as overrepresented under the current system, (2) there is no evidence of negative action against Asian Americans, (3) University of Texas’ individualized review in the non-Top Ten Percent Plan context is actually beneficial to Asian Americans and Pacific Islanders, and (4) the educational benefits of student diversity accrue to all students—white, Black, Latino, Native, and Asian American and Pacific Islander.
ARGUMENT

I. UT'S ADMISSION PROCESS DOES NOT DISCRIMINATE AGAINST OR DISADVANTAGE ASIAN AMERICAN APPLICANTS.

The record below establishes that in its effort to obtain the educational benefits that result from student diversity, UT uses race within the context of "a highly individualized, holistic review" that gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." See Grutter, 539 U.S. at 337. As Petitioner has admitted, UT has not established a "goal, target, or other quantitative objective" for the admission of any particular group. See JA 131a. Instead, it allows applicants of all races, including Asian Americans and Pacific Islanders, to benefit from the consideration of their race in the distinctive context of their background and experience. As discussed below, the arguments by Petitioner and her amici that Asian Americans are somehow victimized by this policy of individualized review are entirely unfounded in law and fact.2

A. UT Does Not Treat Asian Americans as Overrepresented.

Petitioner and her supporting amici repeatedly claim that UT has deemed Asian Americans to be "overrepresented" in its student population. See Pet. Br. at 7, 19, 28 n. 7; see also Brief for the Asian American Legal Foundation and the Judicial Education Project as Amici Curiae in Support of Petitioners ("AALF Br.") at 2, 9, 12-13 n.7, 22. From this premise alone, Fisher concludes that UT "employs race in admissions decisions to the detriment of Asian Americans." Pet. Br. at 7. Amici AALF similarly asserts that "[t]he very fact that UT currently deems Asian Americans overrepresented ... shows that the use of race in admissions will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans." AALF Br. at 2.

Such a claim - involving the numerical balancing of racial groups by a university bureaucracy and the imposition of a glass ceiling on a group deemed to have performed too well - would be deeply troubling, if true. It is not.

There is no support for Petitioner's claims in the record. She cites UT's Proposal to Consider Race and Ethnicity in Admissions, dated June 25, 2004, see Pet. Br. at 7 (citing JA 25a), but nowhere in this document is the word "overrepresented" used. Instead, UT described African American and Hispanic students as underrepresented based on their overall enrollment and classroom presence at the university. UT did not find, and there is no basis for concluding, that Asian Americans or any other group has been deemed overrepresented.

Petitioner also refers to the District Court opinion in this case. See Pet. Br. at 19 (citing App. 154a). There, in finding that under Grutter, UT could consider Texas population data in determining "which minority groups qualify as underrepresented and which do not," Judge Sparks observed that "compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented" while Asian Americans "are largely over represented compared to their percentage of Texas' population." See App. 154a-155a (emphasis in original). The *10 court's empirical observation about the differences between the UT student population and Texas demographics does not support Petitioner's claim about UT's admission policies. To the contrary, as the District Court observed, the fact that the percentage of Asian American students at UT is five times larger than the percentage of Asian Americans in Texas is compelling evidence that no ceiling has been imposed. See App. 156a, n.11. In other words, as discussed in Section II.B, infra, the data only negate Petitioner's claim that UT has limited Asian American admissions to mirror Texas demography.

For this reason, admission policies at UT cannot reasonably be compared to the abhorrent quotas and restrictive policies imposed against Jews throughout the past century. See AALF Br. at 18-19; Brief Amicus Curiae of the Louis D. Brandeis Center for Human Rights Under Law, The 80-20 National Asian-American Educational Foundation, et al., in Support of Petitioner ("80-20 Br.") at 20-34. Without question, there is a disturbing history of discriminatory admission policies, particularly at elite private universities, affecting Jews, African Americans, Asian Americans, women, and others. See Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton (2005). Nor do amici deny the possibility that some institutions may apply exclusionary policies against minority applicants, including Asian
Americans, today. As discussed below, amici would vigorously oppose any cap, quota, or other kind of negative action, formal or informal, *11 against any racial group. Nevertheless, there is no evidence that UT has suppressed Asian American admissions in any manner. Indeed, all evidence is to the contrary.

B. UT Has Not Limited Asian American Admissions to Match the Racial Demographics of Texas.

Petitioner and her supporting amici claim that UT has limited admission of Asian American students to “mirror the demographics of Texas.” See Pet. Br. at 19; see also id. at 28 (referring to “UT’s differing treatment of Asian Americans and other minorities based on each group’s proportion of Texas’s population”); AALF Br. at 2 (asserting that “UT currently deems Asian Americans overrepresented and seeks to reduce demographic differences between its student population and the State as whole”). This claim is also baseless.

A simple comparison of the numbers of Asian Americans that UT admitted and enrolled and the percentage of Asian Americans in Texas shows that UT has not tried to match the two. The Asian American population in Texas has rapidly expanded over the last 30 years, reaching 3.8% of the state population in 2010. Nevertheless, Asian American *12 enrollment at UT has increased at an even faster rate. From 1986 to 2001, enrollment of Asian Americans at UT increased from 6% to 19%. See UT Austin, 1995-1996 Statistical Handbook - Students 21; UT Austin, 2001-2002 Statistical Handbook - Students at 25. From 1999 to 2010, enrollment of Asian Americans from Texas remained in the range of 17% to 20%. See SJ A157a; UT Austin, Implementation and Results of the Texas Automatic Admissions Law, Dec. 23, 2010 (“2010 Top 10% Report”) at 8. The latter period encompasses both six years of race-neutral admissions (following Hopwood u. Texas, 78 F.3d 932 (5th Cir. 1996)) and six years of race-conscious admissions (following *13 Grutter). If the “core purpose” of the current policy has in fact been “to decrease or limit” the percentage of Asian Americans students to match “the racial composition of the State,” see AALF Br. at 7-8, UT has done, as the District Court observed, “a particularly bad job of it,” App. 156a, n.11.

Acknowledging that “the total number and percentage of Asian Americans have in fact increased at UT in the last ten years,” amicus AALF weakly posits that UT’s “efforts at racial balancing” have been “less effective than it would like.” AALF Br. at 12-13 n.7. But there is no basis in the record to suggest that UT has sought this goal. To the contrary, the record shows that the consideration of race in UT’s admissions process can positively impact applicants of any race, and the university makes no effort to monitor the number of applicants admitted in any particular group to ensure that a particular threshold is met. See JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.).

AALF then speculates that “many Asian Americans in Texas go to public school and may benefit from the Top Ten program,” which would “mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program.” AALF Br. at 12-13 n.7. AALF cites no evidence in support of this argument. In reality, the data show that from 2004 to 2010 a higher percentage of Asian American students admitted by UT have been admitted through *14 individualized (non-Top 10%) admissions than the corresponding percentage of Hispanic admittees. See SJ A158a tbl.2a; 2010 Top 10% Report at 9 tbl.2a. These numbers confirm that rather than attempting to match the racial composition of its student body with Texas demographics, UT has admitted students outside the Top 10% plan based on an individualized review of each applicant’s performance and personal circumstances.

C. There Is No Evidence of Negative Action Against Asian Americans at UT.

1. Narrowly tailored affirmative action programs do not constitute negative action against Asian American applicants.

Following on their inaccurate claims that UT deems Asian Americans to be “overrepresented” in its student body and treats them differently “based solely on demographics,” Petitioner and her amici argue that UT engages in “overt” discrimination “against Asian-American applicants.” See Fisher Br. at 28, 55; see also AALF Br. at 2, 9, 12-13 n.7. Again, these arguments are entirely unsupported by evidence in the record or empirical data. *15 Furthermore, they conflate two distinct concepts - affirmative action and negative action - producing a muddled and highly misleading picture of admissions at UT and other selective universities.
Under this Court's holdings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter*, universities may pursue educational diversity (of which racial diversity is one element) by taking into account the race of applicants in a narrowly tailored manner to enroll students from diverse backgrounds. An individualized affirmative action program is completely distinct from negative action, which involves discrimination by a university to suppress enrollment of a particular racial group, such as Asian Americans. See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 Asian L.J. 29, 33, 60 (2000); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3–4 (1996). To allege racial discrimination by comparing admissions for Asian Americans exclusively with other minorities - as Petitioner and her amici do - is to fall victim to a causation fallacy assuming “a finite number of minorities that can be admitted [to a university and] that spots for certain minorities must come at the expense of other minorities.” See Adrian Liu, *Affirmative Action & Negative Action: How Jian Li’s Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 421 (2008). In other words, it assumes that college *16 admissions is a “zero sum” game where minorities compete exclusively with one another for seats, and not with Whites as well.6

In reality, all applicants to UT and other selective institutions with a race-conscious admissions policy complying with *Gratz* and *Grutter* compete in a single pool, regardless of race. Even though racial quotas have been illegal since this Court’s ruling in *Bakke*, Petitioner’s amici treat collegiate admissions as if a quota for Whites keeps their numbers constant and caps the total number of minorities. In fact, many of the spots theoretically made available by ending affirmative action would go to Whites, who comprise a much larger percentage of the population than Asians. See, e.g., Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 448-50 (2012). This fact breaks the causal link that Petitioner’s amici repeatedly claim between race-conscious admissions and alleged discrimination against Asians. Therefore, any *17 suppression in the admission of Asian Americans *18 must be caused by something other than race-conscious affirmative action. This is where negative action comes in.

Negative action creates a de facto cap on admissions for Asian American students. It can be implemented by inflexible, numerical quotas or by an unquantified admissions calculation. Kang, *supra*, at 3–4. The analysis of whether a university is engaging in negative action against Asian American students must be divorced from any inquiry about the legality of a race-conscious admissions policy. Negative action against Asian American (or other minority) applicants may be real, but it is a phenomenon unrelated to affirmative action. The existence of a narrowly tailored, race-conscious admissions plan has no bearing on whether a university engages in negative action.

2. SAT score data at UT do not show negative action against Asian Americans.

Claims about differential standardized test scores by race are often highly misleading, if not demonstrably false. Differences in average scores among racial or ethnic groups at institutions such as UT reflect the racial/ethnic test score disparities already present in the applicant pool, resulting from socioeconomic differences, educational practices, and other environmental factors. See Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* 46 (1996); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of *19 Considering Race in College and University Admissions* 16 (2d ed. 2000). They are to be expected regardless of whether race neutral or race conscious criteria are used. See, e.g., Maria Veronica Santelices & Mark Wilson, *Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010); William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less Than Meets the Eye*, 38 Indus. Rel. 331 (1999).8 Substantial racial/ethnic SAT score averages on par with UT’s individualized admissions pool are found nationwide, including at other leading universities like UC Berkeley and UCLA that use race-neutral admissions. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 29-36 (2012). The College Board, which created the SAT, has itself acknowledged this phenomenon. See Jennifer L. Kobrin et al., *A Historical View of Subgroup Performance Differences on the SAT Reasoning Test* 19 (The College Board 2007) (finding that score gaps between different racial groups have “remained generally consistent” for 20 years).
Petitioner’s amici have not meaningfully analyzed these data. Nor do they address the longstanding SAT score disparities among admittees under UT’s race-neutral Top 10% plan, which, as discussed above, indicate the

*20 This is as true at UT as elsewhere. Even though Petitioner’s amici repeatedly suggest that Asian American applicants must achieve higher SAT scores in order to gain admission to UT, see, e.g., AALF Br. at 9-12, 30, only two cite actual UT score data. Amicus 80-20 observes that for the class admitted to start in the fall and summer of 2009 (the year after Fisher applied for admission), enrolled Asian Americans students admitted through individualized admissions had a mean SAT score of 1991 (on a scale of 2400), compared to mean scores for White (1914), Hispanic (1794), and African American (1524) enrollees. 80-20 Br. at 6. Amici Richard Sander and Stuart Taylor cite the same data. See Brief Amicus Cuiriae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3-4 & n.4. Although these amici attribute these differences to UT’s race-conscious admissions policy, their claim is fatally undermined by the fact that similar variations in SAT scores existed throughout UT’s race-neutral admissions between 1997 and 2004. See SJA 55a-62a. For example, in 2004, the year before the current race-conscious policy took effect, the mean SAT score for enrolled Asian American students admitted through individualized review was (on a scale of 1600) 37 points higher than Whites, 115 points higher than Hispanics, and 188 points higher than African Americans in the same pool. See id. at 62a. Similar gaps have existed and continue to exist in SAT scores for students admitted under the race-neutral Top 10% plan. For example, in 2009 Top 10%-admitted Asian American enrollees *21 had a mean SAT score of 1874, compared to 1864 for Whites, 1628 for Hispanics, and 1584 for African Americans. See 2010 Top 10% Report at 14. It is spurious for amici to attack UT’s admissions policy based on a longstanding phenomenon that has existed under race-neutral and race-conscious policies alike.

In addition, Petitioner’s amici treat SAT scores as the ultimate and indeed only indicator of merit in educational admissions. In fact, standardized test scores are only one among many factors considered in UT’s individualized review process, see Section II.D, infra, and their predictive power has been called into question by numerous studies, see, e.g., Sunny X. Niu & Marta Tienda, Test Scores, Class Rank, and College Performance: Lessons for Broadening Access and Promoting Success, Rassegna Italiana di Sociologia (forthcoming) (manuscript at 2, 13). Significantly, students admitted under the Top 10% plan achieve on average better grade point averages in their first year at UT than non-Top 10% students, even though non-Top 10% students have on average higher SAT scores. See JA 343a-344a; SJA 49a-53a. SAT scores can also be boosted by test-preparation courses, to the advantage of those with financial means rather than merit. See Brief of *22 the Asian American Center for Advancing Justice et al. as Amici Cuiriae in Support of Respondents (“AAJC Br.”) at § III.C (citing Jay Rosner, Disparate Outcomes by Design: University Admissions Test, 12 Berkeley La Raza L.J. 377, 383-84 (2001); Sigal Alon & Marta Tienda, Diversity, Opportunity, and the Shifting Meritocracy in Higher Education, 72 Am. Soc. Rev. 487, 490-91 (2007)). For these reasons, while a statistically significant difference in SAT scores between Asian American and White admittees might be one indicator of negative action, it would be far from sufficient to establish a prima facie case of discrimination.

Petitioner’s amici make no effort to analyze differences between the SAT scores of Asian and White students at UT. An examination of those scores does not show that negative action is afoot. First, mean SAT scores of Whites and Asians at UT admitted through individualized admissions (both before and after implementation of the current policy) reflect only small differences. Second, an *23 analysis of (i) SAT scores by major and (ii) concentration of racial groups across majors reveals a likely nondiscriminatory reason for these differences. UT requires Texas residents to apply to undergraduate programs by selecting a first-choice and second-choice major. Based on these priorities, UT admits students generally into one of six colleges (Liberal Arts, Social Work, Nursing, Business, Communications and Geosciences) or into a specific major at three other colleges (Natural Sciences, Education, and Engineering). Asian Americans at UT are more concentrated in those schools with the highest mean SAT scores at UT (Business, Engineering, and Natural Sciences) and have the lowest concentration in schools with the lowest SAT scores (Liberal Arts, Fine Arts, and Education). See SJA 54a-63a; 166a; 2010 Top 10% Report at 14-15. By contrast, Whites have larger concentrations in schools with the lowest SAT scores. Thus, along with the complex nature of individualized review, the various environmental factors, and issues with the predictive power of SAT scores, students’ selection of majors explains in part the minor *24 difference in scores between Asian American and White enrollees at UT.

Petitioner’s amici have not meaningfully analyzed these data. Nor do they address the longstanding SAT score disparities among admittees under UT’s race-neutral Top 10% plan, which, as discussed above, indicate the
impact of factors independent of race-conscious admissions. Nor are they able to correlate higher standardized test scores with better academic performance at UT. Instead, they seek to manipulate the causation fallacy to “triangulate” Asians as unwitting victims of UT's individualized admissions process. The Court should reject this unfounded effort.

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II. UT’S POLICY OF INDIVIDUALIZED REVIEW IS BENEFICIAL TO ASIAN AMERICANS AND PACIFIC ISLANDERS.

An overriding theme of Petitioner’s and her amici’s briefs is that UT’s admissions process for non-Top 10% applicants is discriminatory because it uses race to benefit Latinos and African Americans, but not Asian Americans. See, e.g., Pet. Br. at 7, 46; 80-20 Br. at 3; Brief of the Texas Association of Scholars as Amicus Curiae in Support of the Petitioner at 7. In fact, UT’s policy of individualized review strongly benefits Asian Americans and Pacific Islanders by allowing for the consideration of economic and educational inequities faced by students from certain subgroups - differences that are often hidden by the aggregation of data into a single “Asian” category and the promulgation of the pervasive and harmful “model minority” myth.

A. The “Model Minority” Myth Masks Tremendous Diversity Within the Asian American and Pacific Islander Community.

The treatment of any racial population as monolithic is problematic, and falls prey to racial stereotyping. Asian Americans, as amicus AALF correctly observes, are “a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds.” AALF Br. at 28. Because Asian Americans as well as Pacific Islanders, with whom Asians have historically been aggregated into *26 a combined racial category, have such high levels of diversity, including a wide array of languages and religious and cultural traditions, it is impossible to generalize a “typical” Asian American experience. Robert T. Teranishi, Asians In the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education 26 (2010). As discussed below, narrowly tailored, individualized admissions programs like UT’s are well suited to take into account the heterogeneity of the Asian American and Pacific Islander community as they pursue the substantial educational benefits of student diversity. See, e.g., Smith v. University of Washington Law School, 392 F.3d 367, 378 (9th Cir. 2004) (upholding admissions program that recognized “different cultures, backgrounds, and languages” of “applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China”).

In particular, the “model minority” myth, which correlates Asian American and Pacific Islander identity with academic and professional achievement and mobility, fails to capture the complex reality of their experience. This “monolithic image of success” inappropriately “lumps all Asian Americans together, implying that the needs of recent Southeast Asian refugees can be ignored because third- or fourth-generation Japanese or Chinese Americans have been relatively successful.” Natsu Taylor Saito, *27 Model Minority, Yellow PerilFunctions of “Foreignness” in the Construction of Asian American Legal Identity, 4 Asian L.J. 71, 90 (1997). The stereotype also downplays what AALF rightly describes as “the long and ugly history of racial discrimination against Asian Americans,” see AALF Br. at 13-14, and contributes to the persistence of discrimination today, see Frank H. Wu, Yellow: Race in America Beyond Black and White 49-77 (2003); Note, Racial Violence Against Asian Americans, 106 Harv. L. Rev. 1926, 1930-39 (1993).

B. The Different Immigration Histories of Asian American and Pacific Islander Subgroups Have Shaped Their Socioeconomic Experiences in the United States.

The history of U.S. policy on Asian immigration has vacillated from openness in the late 1800’s - when the country needed the pioneering efforts of Asian immigrants - to exclusion during the internment camps of World War II and the anti-Asian immigration acts which largely closed U.S. borders to Asian immigration until the 1950’s. See Angelo N. Ancheta, Race, Rights, and the Asian American Experience 21-27 (1998); see also Charles J. McClain, Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship, 2 Asian L.J. 33 (1995) (discussing challenges by Asian immigrants in nineteenth and twentieth centuries to denial of American
citizenship). Since then, differences in the migration paths taken by Asian American and Pacific Islander subgroups have led to substantial economic and educational disparities in the Asian American community today.

*28 Some Asian immigrants voluntarily traveled to the United States for better opportunities, were prepared to leave their homelands, and had connections here to help get them on their feet. Many were admitted to the United States under immigration policies giving employment preference to professionals “holding advanced degrees” or who have “exceptional ability.” See, e.g., Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Large percentages of immigrants from countries like Singapore, Korea, India, China, Japan, and Taiwan arrived as the result of employment preferences, and “[t]he capital that these individuals possess is often correlated with educational and social mobility in the United States.” Teranishi, supra, at 31.15

By contrast, the cultural capital of refugees who entered in the “surge of immigration from Southeast Asian countries ... starting in 1975 under refugee and asylee status” has been profoundly different. Id. More than one million Vietnamese, Cambodian, Hmong, Mien, and Laotians arrived from 1975 to 1990 after the end of the Vietnam War, and nearly all were refugees. Most started their new lives in *29 America with few material goods, their remaining family members scattered or lost, and often traumatized by war, their escape, and often years in refugee camps. They were forced to navigate a country and social and educational systems unfamiliar to them and for which they were unprepared, hindered by a lack of English fluency and inherent economic and social disadvantages.

Native Hawaiians, a subgroup of Pacific Islanders, and Pacific Islanders in U.S. territories such as Guam and Samoa are not immigrants at all, and like Native Americans have been subjected to colonization and marginalization on their own native land. Their post-colonial histories and relative lack of agency have made these communities the most misrepresented of any group of Asian Americans and Pacific Islanders by the model minority myth. See Id. at 34.

Today, many Southeast Asian and Pacific Islander communities remain economically disadvantaged and struggle with long-term poverty, language and literacy issues as well as post-traumatic stress disorder. See, e.g., Min Zhou & Carl Bankston, Straddling Two Social Worlds: The Experience of Vietnamese Refugee Children in the United States, Urban Diversity Series No. 111, 20-22 (2000). In 2010, while other ethnic groups had poverty rates at or below the national average for Asian American of 12.5%, rates for Hmong (27.5%), Cambodians (21.9%), Laotians (16.0%) and Vietnamese (15.6%) were substantially higher. U.S. Census Bureau, 2010 American Community Survey *30 1-Year Estimates (“ACS 1-Year Estimates”); see also Teranishi, supra, at 35. Unemployment rates for Hmong (9.9%), Laotians (8.8%), and Cambodians (9.4%) also exceeded the average for all Asian Americans (5.6%). Poverty (18.8%) and unemployment (9.8%) rates for Native Hawaiians and Pacific Islanders are similarly high. ACS 1-Year Estimates.

These socioeconomic factors are accompanied by poorer educational outcomes. Southeast Asians lag behind other Asian American subgroups in educational attainment. In 2010, over 30% of Hmong, Cambodian, Vietnamese, and Laotian individuals over the age of 25 did not have a high school degree, compared with an average of 15% for all Asian Americans. See id. Predictably, the road to higher education only gets tougher for Southeast Asians, with attainment rates for bachelor’s degrees at about 11% for groups other than Vietnamese, who are just above 18%. Id.16 The high degree of variation in educational attainment and academic preparation within the Asian American and Pacific Islander community is demonstrated by the fact that their test scores “actually have the widest standard deviation for any racial group.” NYU CARE & The College Board, Asian Americans and Pacific *31 Islanders: Facts, Not Fiction: Setting the Record Straight 10-12 (2008) (discussing how variation in test scores reflects “differences in social and cultural capital among the population”); see also Valerie Ooka Pang et al., Asian American and Pacific Islander Students: Equity and the Achievement Gap, 40 Educ. Researcher 378, 382 tbl.2 (2011) (establishing that Filipino, Lao, Cambodian, Native Hawaiian, Guamanian, Samoan, and Other Pacific Islanders perform less well than Whites and other Asian American ethnic groups on California Achievement Test); Coalition for Asian American Children and Families, Hidden in Plain View: An Overview of the Needs of Asian American Students in the Public School System 14-16 (2004).
C. Substantial Economic and Educational Disparities Exist Among Asian American Subgroups in Texas.

Consistent with national data, significant economic and educational disparities can be found among Asian American subgroups in Texas. According to the 2010 Census, the three largest Asian American ethnic groups in Texas are, in descending order, Indian, Vietnamese, and Chinese. Students in Texas communities with a high concentration of Indian and Chinese students tend to be more affluent and achieve higher SAT scores. For example, Coppell, an upper-middle class suburb that has benefited economically from development near the Dallas/Fort Worth International Airport, has one of the most distinguished school districts in the state. Fifty-seven percent of the Asian American population in the Coppell school district is Indian. Median income in this city is $101,510, and less than 10% of its students are deemed to be economically disadvantaged. The average SAT score for Asian American students in Coppell is 1213, and 79% of Asian students test as college ready.

By contrast, students in communities with higher Vietnamese populations tend to be more economically disadvantaged, achieve lower SAT scores, and are less prepared for college. For example, 54% of the Asian American population in the Arlington school district, another suburb of Dallas-Fort Worth, is Vietnamese. Median income in this city is $51,260, and 60% of its students are economically disadvantaged. The average SAT score for Asian American students in Arlington is 1056, and only 57% of Asian students test as college ready.

As discussed, the economic and educational disparities experienced by Vietnamese and other Southeast Asian communities in Texas reflect in large part their migration experiences. After leaving their homeland due to unrest or persecution and arriving with few economic resources, members of refugee communities have sometimes been met with hostility based on race or ethnic origin. In Texas, some Vietnamese refugees found opportunities in commercial shrimping along the Gulf coast. Working long hours, these refugees began buying their own boats, only to face intimidation and harassment by armed White supremacists. See *Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1001-06 (S.D. Tex. 1981).

Students growing up in these communities have faced unique challenges and have immeasurable potential to contribute to the diversity of the learning environment at UT.

D. Members of Disadvantaged Asian American and Pacific Islander Subgroups Benefit from UT’s Individualized and Narrowly Tailored Admissions Process.

Petitioner argues that UT discriminates in favor of certain groups and against Asian Americans “by using race in admissions decisions to benefit the former but not the latter.” Pet. Br. at 46. This claim fundamentally misapprehends how the process works. Under UT’s system of individualized review, no student automatically benefits just because he or she belongs to an underrepresented or disadvantaged group. To the contrary, all students, including Asian Americans, can benefit from UT’s individualized consideration of their race in the distinctive context of their background and experience.

As an individual factor, race has no predetermined or numerical impact on an applicant’s Personal Achievement Score (“PAS”). See, e.g., JA 172a-173a (Ishop Dep.). Instead, as one admissions official observed, consideration of an applicant’s race or racial background can be “as beneficial for some as their level of involvement with student council may be beneficial for some, as the strength of their letter of recommendation may be beneficial for some.” JA 209a (Ishop Dep.). Importantly, the consideration of race in admissions can positively impact applicants regardless of whether they belong to an underrepresented minority or some other group. See JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.). In this respect, UT’s plan is even more narrowly tailored than the plan in *Grutter*, in which the University of Michigan Law School considered race as a “plus factor” only with respect to applicants belonging to underrepresented minority groups. See *Grutter*, 539 U.S. at 321. In addition, no one at UT monitors the number of admittees in any particular group to ensure the enrollment of a critical mass of underrepresented minority students. Compare JA 398a, with *Grutter*, 539 U.S. at 318.

Because the consideration of race in UT’s individualized admissions process can benefit any applicant, Asian Americans and Pacific Islanders (including but not limited to members of disadvantaged subgroups) can benefit from it as well. See *Smith*, 392 F.3d at 379 & n.11 (upholding admissions program that gave “plus factor” to Filipino applicants “in order to enroll a sufficiently large and diverse group of Asian Americans”);
Tomiko Brown-Nagin, The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change, 65 Vand. L. Rev. En Banc 113, 120-21 (2012) (stating that UT admissions process can benefit “Asian students who defy the stereotype of the ‘model minority’ and are burdened by poverty - the reality for discrete Asian sub-groups in America”); Kidder, Negative Action, supra, at 623 (observing that “some underrepresented ... groups (e.g., Filipinos, Southeast Asians, Pacific Islanders) can directly benefit from affirmative action in higher *37 education”). For UT applicants with lower SAT scores and GPAs, consideration of race in the distinctive context of their background and experience may give them a higher PAS. For example, a student of Southeast Asian origin whose parents are refugees and who attends a majority-minority public high school in Texas may receive a higher score than she would absent the consideration of race. A higher PAS will not guarantee her admission to UT, but might improve her chances. In short, UT’s process of individualized review advances its compelling interest in achieving the educational benefits of student diversity, increases the likelihood of admission for those who do not have the same social mobility and capital as others, and has the potential to benefit all Asian American and Pacific Islander applicants. Claims that UT’s policy pits “one minority group against another,” see Pet. Br. at 45, or use consideration of race to divide minority applicants into winners and losers, see 80-20 Br. at 3; AALF Br. at 6, have no basis in the record.

III. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY ACCRUE TO ALL STUDENTS.

Finally, it is critical to recognize the benefits from the diversity produced by an individualized race-conscious admissions process accrue to all students, including Asian Americans and Pacific Islanders. Studies have demonstrated that interactions with a *38 diverse student body, both in and out of the classroom, lead to positive learning and civic outcomes for Asian American students. See NYU CARE, Asian Americans and the Benefits of Campus Diversity: What the Research Says 1 (2012); Patricia Gurin et al., Diversity and Higher Education: Theory and Impact on Educational Outcomes, 72 Harv. Educ. Rev. 330, 351-353, 354 tbl.3 (2002); Mark E. Engberg & Sylvia Hurtado, Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences, 82 J. Higher Educ. 416, 434 (2011) (observing that while “the effects of intergroup learning on the pluralistic measure were significant for all other groups,” Asian American students “seem to demonstrate the strongest benefit”). These benefits continue as students graduate and enter the “increasingly diverse workforce and society.” See Grutter, 539 U.S. at 330 (citation omitted). Student diversity also has positive social effects on the campus as a whole. See Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring); Grutter, 539 U.S. at 328-29; Bakke, 438 U.S. at 312-13. Asian Americans and other groups come to see each other more favorably, which leads to improved intergroup relations and reduced racial stereotyping. See Grutter, 539 U.S. at 328-29. Because UT’s process of individualized review is narrowly tailored to achieve the educational benefits of student diversity, this Court should uphold it as constitutional. See generally AAJC Br. at §§ I-II.

*39 CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision below.

Footnotes

1
In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of amicus briefs, and copies of the letters of general consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for amici state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici or their counsel.

2
Petitioner and her amici do not allege particular harm to Pacific Islanders resulting from UT’s individualized admissions process.

3
In 1980, 120,000 Asian Americans lived in Texas, making up only 0.8% of the overall state population. See Campbell Gibson & Kay Jung, U.S. Census Bureau, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990 for the United States, Regions, Divisions and States*, tbl.58 (2002). By 1990, that number had grown to 319,000, or 1.9% of the state population, id., and by 2000 it reached 562,000 or 2.8% of the overall state population, see U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2000*. From 2000 to 2010, the Asian American population in Texas expanded to 965,000 or 3.8% of the state population. See U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010*. This 72% increase outpaced even the Hispanic or Latino population, which increased by 42% from 6.7 million to 9.5 million.

Admissions numbers reflect a similar trend. From 1990 to 2009, the number of Asian American applicants whom UT admitted rose from 10% to 18% of all admitted students. See UT Austin, *1990-1991 Statistical Handbook - Students* 23; UT Austin, *2009-2010 Statistical Handbook - Students* 24. UT's Statistical Handbooks consolidate data on Asian American admittees from within and outside Texas. UT's Top 10% Reports distinguish between these groups.

In 2008, the year for which Fisher applied for admission, 16% of the total number of Asian Americans admitted to UT from Texas high schools were admitted through individualized review, as opposed to 13% of Hispanic students. SJA 158a tbl.2a.

It also ignores the reality that some universities (but not UT) give preference in admission to children of alumni, a policy that disproportionately benefits White applicants. See *Affirmative Action for the Rich: Legacy Preferences in College Admission* 127 (Richard D. Kahlenberg ed. 2010).

Petitioner's amici rely heavily on researcher Thomas Espenshade's work to show how differences between SAT scores of Asian Americans and other groups demonstrate a “penalty” on Asians. See AALF Br. at 9-10; 80-20 Br. at 5-6. Espenshade's estimates, however, pertain to 1997 data for three elite private universities and are therefore inapplicable to this case. Furthermore, while it is true that Espenshade sought to “quantify the effects of race-conscious admissions policies,” see AALF Br. at 9, amici do not make clear that “race-conscious admissions” for Espenshade include not only affirmative action but also negative action against Asian Americans. In other words, when Espenshade suggests that Asian Americans would benefit from the elimination of race-conscious admissions, he includes in his analysis the removal of a 50-SAT-point advantage that White applicants received over Asian Americans (i.e., negative action). See Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Soc. Sci. Q. 293, 298 (2005) (assessing removal of “disadvantage in admission” experienced by Asian Americans as well as preferences for other groups); id. at 301 (referring to “what some might term ‘disaffirmative action’ for Asians”). The same data in Espenshade's more recent book confirm that in his model, in terms of the overall impact on Asian American admission offers, ending negative action was estimated to have an effect more than five times greater than the effect of ending affirmative action for African American and Latino students. See Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 334 tbl.9.1, App. tbl.C.9.1 (2009). Other academics have challenged Espenshade's work as misleading or “internally contradictory” because it “confounds the role of negative action ... with the role of affirmative action,” and have described his conclusions as “untenable” because they assume that “the role of negative action is truly de minimis.” See, e.g., William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 614-15 (2006).

These disparities would exist even in the extreme (but counterfactual) case of a university admitting students in rank order based solely on their SAT scores. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1064 (2002).

Similar score gaps can be found in reported ACT scores. 2010 Top 10% Report at 15. Beginning in 2009, UT stopped concording applicants' ACT scores into equivalent SAT scores due to changes in the structures of both tests. *Id.* at 3.
As discussed in Section II, infra, Asian Americans are a highly diverse community with a broad range of religious and cultural differences, immigration histories, and socioeconomic experiences. This diversity is reflected in substantial SAT and educational attainment disparities among different Asian American subgroups.

11 The score differential between 1996 and 2008 fluctuated within 6 and 46 points, which is minimal in light of the range of possible scores. See SJA 50a, 52a; UT Austin, Implementation and Results of the Texas Automatic Admissions Law, Oct. 29, 2009, at 12 tbl.6a, 13 tbl.6c.

12 Admissions for Texas residents are handled centrally by UT for eleven of its undergraduate schools. JA 408a. The School of Architecture and College of Fine Arts make their own admissions decisions. JA 409a.

13 Consistent with UT’s experience, national studies show that SAT scores for students who intend to study engineering and natural sciences tend to be at the high end of standardized test score distributions. See College Board, College-Bound Seniors Total Group Profile Report 13 (July 2010).

14 See Claire Jean Kim, The Racial Triangulation of Asian Americans, 27 Pol. & Soc’y 105, 122-23 (1999) (observing that opponents of affirmative action in 1980s attempted to shift debate “from the real issue at hand - whether or not several leading universities imposed racial quotas on Asian American students to preserve the Whiteness of their student bodies - to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans”).

15 In 2010, the United States admitted 81,331 immigrants from Asia under the employment-based preference. See Department of Homeland Security, Yearbook of Immigration Statistics: 2010 at 31. Thirty six percent of the admittees were from India, 20% were from China, and 14% were from South Korea. In contrast, only 253 individuals (0.3%) were admitted under the employment-based preference from Vietnam.

16 While only 12.6% of Native Hawaiians and Pacific Islanders did not have a high school degree, the percentage who earned a bachelor's degree fell to 11.4%, compared to 29.6% of all Asian Americans. ACS 1-Year Estimates.

17 Native Hawaiians and Pacific Islanders make up 0.1% of the population in Texas. See U.S. Census Bureau, Texas Profile of General Demographic Characteristics: 2010.

18 Even though the Texas Education Agency (“TEA”) does not report disaggregated data on Asian American subgroups, disparities can be assessed by comparing economic and educational data for census designated places with data on different Asian subgroup concentrations as surveyed by the U.S. Census Bureau. This analysis shows that as the proportion of Indian and Chinese students in the population increases, both average SAT scores for Asian students and the percentage of Asian students who test as “college ready” tend to increase and the percentage of Asian students deemed “economically disadvantaged” tends to decrease. (The TEA reports only students’ math and critical reading scores, even though UT also considers applicants’ writing scores in its admissions process.) These trends run inversely as the proportion of Vietnamese students increases: average SAT scores and the percentage of Asian students who test as “college ready” tend to decrease and the percentage of Asian students considered “economically disadvantaged” tends to increase. See U.S. Census Bureau, 2006-2010 American Community Survey 5-Year Estimates (“ACS 5-Year Estimates”); Texas Education Agency, 2009-2010 Academic Excellence Indicator System Reports; see also U.S. Census Bureau, 2008-2010 American Community Survey 3-Year Estimates.

19 Approximately 12% of the Asian American population in Coppell ISD is Chinese, and 4% is Vietnamese. See ACS 5-Year Estimates

20 Approximately 10% of the Asian American population in Arlington ISD is Chinese, and 14% is Indian. See ACS 5-Year Estimates
Petitioner and her amici also suggest that UT’s Top 10% plan is sufficient to enroll a critical mass of minorities on campus. See, e.g., Pet. Br. at 37-42. The effectiveness of such “percentage plans,” however, depends on a high level of de facto racial segregation in the underlying secondary school system. See Michelle Adams, *Isn’t it Ironic? The Central Paradox at the Heart of “Percentage Plans”,* 62 Ohio St. L.J. 1729, 1733-1734 (2001). Amici question the wisdom of relying solely and on a long-term basis on a system that presupposes the existence of residential segregation for ensuring educational diversity at UT. In addition, this approach tends to disadvantage Asian Americans and Pacific Islanders because they tend to live in more integrated communities than other racial groups. See John Iceland, *Beyond Black and White: Metropolitan Residential Segregation in Multi-Ethnic America* 33 Soc. Sci. Res. 248, 250 (2004).

22

In calculating the PAS, UT considers an applicant’s demonstrated leadership qualities; awards and honors; work experience; involvement in extracurricular activities and community service; and special circumstances such as the applicant’s socioeconomic status, family status and family responsibilities, and race. See SJA 152a.
**Background:**

Writing in support of Petitioner, Abigail Fisher, this Brief authored by the Asian American Legal Foundation and Judicial Education Project takes the position that racial diversity programs in the contemporary US “continue a long history of discrimination against Asian Americans.” Specifically, the Authors argue that discrimination occurs in the admissions context because Asian Americans are “disfavored” as they are framed as “overrepresented minorities” rather than “underrepresented minorities” (e.g. Blacks and Latinos). Because Asian Americans are “overrepresented minorities” programs like Texas’ do not offer a “boost” for race in the Personal Index, and thus, the Authors argue, this amounts to discrimination against Asian Americans. This “disfavor” of Asian Americans, the Authors argue, signifies a failure by the University of Texas to establish a legitimate desire for “genuine diversity.”
ARGUMENT

I. Racial Diversity Programs Continue a Long History of Invidious Discrimination Against Asian Americans.

Efforts to manipulate the racial composition of schools necessarily come with a steep cost - borne in the first instance by individuals on the wrong side of the racial balancing act because their racial groups lack political or social clout. Schools in general, and highly competitive universities in particular, have a limited number of slots. Every slot allocated to someone who would not have been admitted but for their race is a slot denied to someone else who would have been admitted but for their race. The costs of such racial gerrymandering fall not merely on members of a supposedly privileged racial majority, but on individuals belonging to any non-preferred or “overrepresented” race that must be displaced in order to increase the numbers of a preferred or “underrepresented” race or ethnicity. UT’s current racial diversity efforts exact just such a cost and discriminate against Asian Americans.

Asian Americans have long been the victims of racial discrimination in education and elsewhere. Early on they were excluded from schools based on derogatory racial stereotypes of inferiority. Lately it seems their numbers are being limited because they would make up too large a percentage of certain schools if Asian-American individuals were judged solely by their individual qualifications and qualities. Neither excuse can justify judging individuals by the color of their skin.

*7

A. Racial Diversity Programs Discriminate Against Asian-American Individuals by Treating Them as Members of an Overrepresented, and Hence Disfavored, Race.

The origin and structure of UT’s racial-preference program reveal that a core purpose and goal of that program is to increase admissions of underrepresented minorities and to make the racial composition of the student body more closely approximate the racial composition of the State. In its proposal to adopt the race-based admissions policy under review in this case, UT asserted that “significant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population prevent the University from fully achieving its mission.”\(^2\) UT claimed that the mismatch in demographics meant that its students were “being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow.” Pet. App. 49a-50a (citation omitted).

The racial composition of Texas as of the 2010 Census was:
45.3% Non-Hispanic Whites;
37.6% Hispanic;
11.8% African American; and
3.8% Asian American.

*8 http://en.wikipedia.org/wiki/Demographics_of_Texas.\(^3\)
The racial demographics of UT in 2010, however, was:
52.1% Non-Hispanic White;
17.6% Hispanic;
4.5% African American; and
15.9% Asian American.

University of Texas at Austin Accountability Report, January 2012, at 2 (available at http://www.txhighereddata.org/Interactive/Accountability/UNIV_Complete_PDF.cfm?FICE=003658).\(^4\)

Having defined mismatched racial composition as detrimental to UT’s mission, the inevitable and intended function of UT’s racial preference program is to correct that mismatch; admitting more students of “underrepresented” races and fewer students of “overrepresented” races. At UT, therefore, the goal of “realistic” racial demographics means racial preferences are necessarily used to try to increase the percentage of Hispanics and African Americans and to decrease or limit the percentage of Whites and Asian Americans.
UT's representational goal is corroborated by its treatment of Hispanics and African Americans, but not Asian Americans, as underrepresented minorities. *9 Pet. App. 126a n. 5 (D.Ct. Opinion) (“UT does not consider Asian-American students to constitute an underrepresented minority at the University.”). Indeed, under UT's theory of reproducing a demographically "realistic" environment, Asian Americans - a demographic minority long subject to racial discrimination - are necessarily viewed as overrepresented at the University. As such, the race of Asian-American applicants can serve only as a thumb on the scales against them - their potential presence in the class filling spots that could otherwise go to students from underrepresented races.

Data from affirmative action programs around the country and the empirical experience in Texas, Florida, and California confirm that the inevitable result of race-conscious admissions policies is to discriminate against Asian-American students.

A 2005 study by Thomas Espenshade and Chang Chung of Princeton University attempted to quantify the effects of race-conscious admissions policies in 1997 at several elite universities and reached a deeply troubling conclusion. Controlling for numerous factors, their study found that, all other things being equal, race-conscious admissions policies provided African-American applicants the "equivalent of 230 extra SAT points (on a 1600-point scale)" and 185 extra points to Hispanic applicants relative to White applicants. Thomas J. Espenshade & Chang Y. Chung, The Opportunity Cost of Admission Preferences at Elite Universities, 86 Social Sci. Quarterly 293 (June 2005). Asian-American applicants, by contrast, faced the equivalent of a 50-point penalty relative to White applicants. *10 Id. at 293-94. The net penalty for Asian Americans under those race-based diversity programs, therefore, was 280 SAT points relative to African-American applicants and 235 points relative to Hispanic applicants. In other words, under race-based admissions policies, Asian-American applicants face a 235- to 280-point higher admissions hurdle than Hispanic and African-American applicants and a 50-point higher admissions hurdle than White applicants solely because of their race.

The study further concluded that eliminating racial preferences (both positive and negative) would result in a 33% increase in Asian Americans admitted to those schools (an increase from 23.7% to 31.5%, or 7.8%, of admitted students). Id. at 297-99. In the group of 45,549 applicants and 9,988 admitted students who were studied, that translates to 772 Asian-American applicants who were denied admission because of their race. And that was for just three universities in one year.

A 2008 study out of the University of Florida sought to test the predictions of Espenshade and Chung by looking to the real-world results in California, Texas, and Florida during the time period surrounding *11 the elimination of race-based preferences in those States. David R. Colburn, Charles E. Young & Victor M. Yellen, Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era, 4 Interactions: UCLA J. of Educ. and Information Studies (2008) (available at http://escholarship.org/uc/item/35n755gf). Looking at freshman enrollment patterns from five universities in those States from 1990 to 2005, they concluded that "Asian-American students in California were the major beneficiaries of" eliminating race-based admissions policies in California, making substantial gains in admittance at the top three University of California schools. Id. at 10-12. Asian Americans likewise made significant, though somewhat smaller, gains in Texas and Florida, with their gains limited to some extent by the smaller Asian populations in those States and by the impact of alternative programs - the top 10% program in Texas and a similar top 20% program in Florida - adopted to mitigate the effect of eliminating race-based affirmative action. *6 The authors ultimately determined that “[o]ur conclusions underscore much of what Espenshade and Chung (2005) and others have argued." Id. (abstract).

Professor Espenshade and another colleague returned to the issue of racial preferences and "recently completed an extensive examination of how much *12 weight is placed on applicants' many characteristics in the elite private university admission process." Thomas J. Espenshade & Alexandra Walton Radford, Evaluative Judgments vs. Bias In College Admissions, Forbes.com, Aug. 11, 2010 (available at http://www.forbes.com/2010/08/01/college-admissions-race-politics-opinions-best-colleges-10-espenshade-radford.html). The more recent evidence is that race now seems to play an even larger role:
Measured on an all-other-things-equal basis, black applicants have an admission advantage compared with whites equivalent to 310 SAT points (on the old 1,600-point scale), while the advantage for Hispanic candidates is 130 points. Asian-American applicants face a disadvantage of 140 SAT points. This means that Asian students have to have an SAT score 450 points higher than otherwise similar black applicants to have the same chance of being admitted.

*13

B. Discrimination Against Asian-American Individuals in Order to Benefit Other Races Is Odious and Demeaning to Individual Students.

It is *amicus'*s firm conviction that the use of race to judge individuals is odious and particularly offensive when done by the government. See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("c]lassifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’") (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Defenders of race-based admissions policies perhaps take comfort in imagining that current racial preferences merely make up for past racial discrimination - a claim not seriously advanced by respondents in this case - and that the students injured thereby are merely Whites who have unfairly benefited from past discrimination. By themselves those excuses merely mirror the offensive treatment of current students as representatives of their race, rather than as individuals. With respect to racial preferences that work to the detriment of Asian-American students, however, those excuses are doubly offensive - treating them as racial avatars and ignoring the *14 long and ugly history of racial discrimination against Asian Americans.

Asian Americans have long been subject to overt racial discrimination in this country. In the 1800s and 1900s, individuals of Chinese descent were disparagingly viewed as faceless members of a "yellow horde" and subject to numerous racist restrictions purporting to serve the greater public good. Such restrictions extended to numerous areas of life and business. See, e.g., Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Restrictions on Chinese Americans were so common and oppressive that they gave rise to the expression "a Chinaman's Chance," a phrase meaning "having little or no chance of succeeding." *News Watch Diversity Style Guide*, at *http://www.cij.org/publications_media/20050321-133409.pdf*.


*15 In fact, although it is not widely recognized, Chinese-American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. See *Wong Him v. Callahan*, 119 F. 381, 382 (C.C.N.D. Cal. 1902) (denying a child of Chinese descent the right to attend his neighborhood school in San Francisco, holding that the more distant "Chinese" school was "separate but equal"); *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (applying separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to deny a nine-year-old Chinese-American girl in Mississippi entry to a "white" school because she was a member of the "yellow" race).

Only through vigorous and repeated resort to the Equal Protection Clause has such discrimination been kept even partially at bay, most famously in *Vick Wo v. Hopkins*, 118 U.S. 356 (1886), which held that Chinese
Americans were “persons” under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.8

*16 Likewise in education, Asian Americans have long been forced to rely on the Equal Protection Clause to combat repeated efforts at discrimination. For example, in Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885), the court had to order San Francisco public schools to admit a Chinese-American girl who was denied entry because public schools were not open to “Mongolian” children. See McClain, In Search of Equality, at 137. In response, the California legislature authorized separate “Chinese” schools to which Chinese-American schoolchildren were restricted by law until well into the twentieth century. See Ho, 147 F.3d at 864; see also Kuo, 5 Asian L.J. at 207-208 (discussing “Chinese” segregation).

This Court itself has not been unmindful of the discrimination in education faced by Asian Americans and the essential role of the Fourteenth Amendment in combating that discrimination. In Lee v. Johnson, 404 U.S. 1215, 1215-16 (1971), Justice Douglas wrote that California’s “establishment of separate schools for children of Chinese ancestry *** was the classic case of de jure segregation involved in Brown v. Board of Education, 347 U.S. 483 [1954] ***.” This Court recognized that “Brown v. Board of Education was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco.” Lee, 404 U.S. at 1216 (citing Yick Wo v. Hopkins, 118 U.S. 356).

*17 Notwithstanding repeated resort to the Fourteenth Amendment and the courts, discrimination against Asian Americans, particularly in education, has continued well into modern times, though often glossed over with more creative claims to be acting in the public interest. See David I. Levine, The Chinese American Challenge to Court-Mandated Quotas in San Francisco’s Public Schools: Notes from a (Partisan) Participant-Observer, 16 Harv. BlackLetter L.J. 39, 54 (Spring 2000). In the 1998 Ho case, for example, Chinese Americans were still battling express racial quotas limiting the percentage of Chinese students in any individual San Francisco public school, including magnet schools. Ho, 147 F.3d at 857. For the Chinese-American students who made up a substantial percentage of the student population throughout the city and of students eligible for certain selective magnet schools, such racial caps had a severe and negative impact. John C. Yoo & Eric M. George, When Desegregation Turns Into Discrimination, Wall Street J., May 26, 1998 (available at http://www.law.berkeley.edu/faculty/yooj/professional/writings/lowell.html).9 While the Ho case was settled after an appellate ruling made it obvious that the School District would be unable to satisfy strict scrutiny of their racial restrictions, there is little doubt *18 that many cities and States will resume such racially discriminatory policies if they believe this Court’s jurisprudence will allow it. This case thus can be either the starter’s gun or the death knell for more aggressive anti-Asian racial restrictions in education in the future.

The admissions data discussed in the previous section also shows that discrimination against Asian Americans continues. The higher bar for admissions imposed on Asian-American applicants at selective colleges and universities may not be based on racist notions of Asian inferiority as was past discrimination, but it is still based on offensive racial stereotypes regarding the academic prowess, but supposedly uninteresting and fungible sameness, of Asian Americans. See, e.g., Daniel Golden, The Price of Admission 201 (1997) (describing a Dean of Admissions as stereotyping a Korean-American applicant as looking “like a thousand other Korean kids with the exact same profile of grades and activities and temperament” and as “yet another textureless math grind”).

In fact, much of the current discrimination against Asian-American students - particularly when done in the name of increasing racial diversity - painfully echoes the treatment of Jewish students in the 1920s through the 1950s. In the 1920s, Harvard College and other prominent universities reacted to the perceived “over-representation” of Jews in their student *19 bodies by setting up informal quotas and other restrictive policies that persisted through the 1950s.10

Those institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. “Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a ‘benign’ cap, which would help the University get beyond race.” Jerry Kang, Negative Action Against Asian Americans: The Internal Instability Of Dworkin’s Defense Of Affirmative Action, 31
Today, "Asian Americans are the new Jews, inheriting the mantle of the most disenfranchised group in college admissions." Golden, The Price of Admission at 199-200.

This Court repeatedly has warned that “[c]lassifications based on race carry a danger of stigmatic harm,” may “promote notions of racial inferiority,” *20 and threaten “to incite racial hostility.” Croson, 488 U.S. at 493; Shaw, 509 U.S. at 643. Once again, the Asian-American experience bears out this concern.

In San Francisco, for example, discrimination against Asian-American schoolchildren led to precisely the type of stigmatization this Court warned against in Croson and Shaw. In connection with the Ho case challenging San Francisco’s racial quota system, newspapers widely reported the shame and anger felt by children targeted by the racial quotas. As stated by the parent of one “Chinese” youth turned away because of his ethnicity, “[h]e was depressed and angry that he was rejected because of his race.” Julian Guthrie, S.F. School Race-Bias Case Trial Starts Soon, San Francisco Examiner (Feb. 14, 1999) (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1999/02/14/METRO13421.dtl&ao=all). “Can you imagine, as a parent, seeing your son’s hopes denied in this way at the age of 14?” Id.

Asian Americans familiar with the situation in San Francisco, including amicus AALF’s own Lee Cheng, have testified regarding the emotional fall-out from discrimination against Asian Americans in education: Many Chinese-American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

*21 Lee Cheng, Group Preferences and the Law, United States H.R. Sub-Comm. on the Constitution, Hearings (June 1, 1995) (available at http://judiciary.house.gov/legacy/274.htm). Many Asian-American students are unwilling to state their race at all on college applications or, if of mixed heritage, will self-identify with their non-Asian parents.

These very real and personal examples of stigmatization and injury to Asian-American students excluded from schools because of their race confirm and illustrate this Court’s recognition that “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeanes the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities.” Rice v. Cayetano, 528 U.S. 495, 517 (2000). Glossing over racial discrimination as an attempt to create racial diversity, or to mirror the state population as an educational tool, alters the demeaning and stigmatizing qualities of such discrimination not one bit.

The Asian-American experience with racial discrimination - both past and present - should cast a far less benign light on current efforts to impose skin-deep diversity rather than to strive for genuine, non-race-based, individual diversity. Although UT’s current foray into racial gerrymandering is framed in high-minded educational terms and prefers other minorities rather than the majority White race, it nonetheless continues to group individuals, including Asian Americans, based on race, and to tilt the scales against members of that historically disadvantaged group when they are deemed overrepresented in schools. But there is no “correct” proportion of racial representation in schools; only such individual diversity as varied accomplishment and personal qualities produce. Racial discrimination remains odious no matter the excluded student’s race, and is an especially bitter pill when applied to Asian Americans, who constitute a minority without significant political influence and have been subject to a long and continuing history of such discrimination by those with greater political clout.
This Court has been mindful of the wrongs done to Asian Americans in the past, should continue to be mindful of the discriminatory costs of racial diversity efforts in the present case, and should reject UT’s *23 scheme to categorize and gerrymander students by race.

II. Diversity Is Too Malleable and Slippery an Interest to Be Accepted as “Compelling” or Left to the “Good Faith” of Those Who Would Judge People, Even in Part, Based on Their Race.

In *Grutter, 539 U.S. at 333, 337*, this Court accepted the proposition that racial diversity was a compelling state interest that justified racial preferences if such preferences were buried within a broader “holistic” set of admissions policies directed at achieving an undefined “critical mass” of certain minority students. That holding encouraged racial gerrymandering so long as it was sufficiently concealed rather than blatantly overt, erroneously attributed to racial diversity the beneficial qualities of individual diversity, and encouraged ongoing and disingenuous manipulation by universities and the courts. This Court should disavow *Gruttes* holding that racial diversity is a compelling interest and the lax standard of review that has evolved from that case. It should reinstate a faithful application of traditional strict scrutiny to racial classifications in education.

A. Attempts to Make Universities Look Like Society Are Just the Latest Excuses for Proportional Racial Representation and Quotas.

It is the current and correct wisdom that racial quotas are constitutionally unacceptable. *Grutter, 539 U.S. at 330, 334*. Overtly enforcing a particular racial composition of the student body presumably would be struck down by this Court without hesitation, regardless of any claimed benefits. However, *24 where the goal and means of racial balancing are hidden behind the facade of a “holistic” admissions program, justified by impossible-to-disprove educational claims, and are less immediate in reaching any final balance, they apparently receive a pass. *Id.* at 318-19, 337.

Such distinctions between overt and obscured racial balancing in the name of “diversity,” however, are illusory where a university is given a presumption of acting in good faith in its use of race, and its supposed educational judgments are never second-guessed. Pet. App. 34a-37a (court of appeals decision). And where universities are also allowed to define the “critical mass” for various races as equivalent to the percentage of those races in the population at large, Pet. App. 40a-42a, 49a-51a, the distinction disappears entirely. Far from promoting genuine diversity – which is a function of individual qualities, abilities, experience and interests - using racial demographics as the yardstick for diversity merely masks racial stereotyping and appropriates the language of diversity for the far less noble goal of proportional racial representation.

The perversion of the otherwise worthwhile goal of “diversity” and of this Court’s critical mass theory as justification for race-based admissions can be seen in the structure and implementation of UT’s racial diversity program.

In addressing the critical mass argument in their 2004 proposal, UT expanded their argument to include the claim that individual classes, rather than the University as a whole, had insufficient underrepresented minorities to cure racial isolation or *25 generate sufficient interaction among the races. Pet. App. 21a-23a. But UT’s disparate treatment of Asian Americans and Hispanics shows this argument to be a make-weight excuse for furthering its overarching goal of causing the racial composition of the school to reflect that of the State.

While UT’s analysis of 2002 classes containing between 5 and 24 students revealed that 43% had only one or no Hispanic students, it also showed that 46% had had only one or no Asian-American students. Pet. App. 21a. Limiting that analysis to classes containing between 10 and 24 students similarly showed that 37% had only one or no Hispanics, whereas 41% had only one or no Asian Americans. Pet. App. 22a. The evidence below likewise showed that in 2008, the gross numbers and percentage of Hispanic students at UT exceeded that of Asian Americans. Pet. App. 154a-155a & n. 10; see also 2012 Accountability Report at 2 (in Fall of 2010 Hispanic students were 17.6% and Asian Americans 15.9%; in Fall 2011 Hispanic students were 18.2% and Asian Americans 16.2%).
Notwithstanding the favorable comparison of Hispanic presence at UT and Asian-American presence, the University views Hispanics, but not Asian Americans, as having failed to reach a critical mass and thus as entitled to racial preferences. The reality is that, by any objective standard, both groups have achieved the “meaningful representation” necessary to produce substantial educational benefits. Grutter, 539 U.S. at 319. This inevitably leads one to question whether UT’s view of critical mass itself varies according to race, whether UT is simply indifferent to *26 the harms from a supposed lack of a critical mass when it comes to Asian Americans, or whether discussion of critical mass is merely subterfuge for the different goal of proportional racial representation. The latter answer is the most plausible given that UT applies its program only to “underrepresented minorities,” which the district court recognized “necessarily involves the comparison of a minority group’s representation at a university to its representation in society.” Pet. App. 155a.

Given that UT expressly describes the difference between the racial composition of the State and the racial composition of the school as interfering with its mission, see supra at 7, there can be little doubt of its intent to use racial preferences as long and as much as necessary to eliminate that compositional difference, regardless of any genuine notion of achieving some critical mass of minority students.

In the end, using variance from the racial composition of the State as the yardstick for inclusion in a race-based admissions policy, and having elimination of the variance as the program's goal, is not meaningfully different from setting any other quota or racial balance. That UT has chosen to achieve this balance through incremental and less efficient uses of race rather than a forced percentage system does not change the essential nature of the quota imposed - it just means it will take somewhat longer to implement.*27 But as long as the school's educational mission is viewed as requiring student exposure to a racial mix mirroring that of the State itself, race will always be decisive for each incremental step towards that goal.

B. Efforts to Generate Racial Diversity Lump Individuals into Misleading Racial Groups and Undermine Genuine Diversity.

Using race-based admission policies to attempt to replicate the racial composition of a State has the further and obvious problem of treating individuals as largely fungible representatives of broad racial and ethnic categories. Such categorizations - even if playing only a partial role in admission decisions - rely on racial stereotypes regarding the perspectives *28 and “diversity” value that different races bring to the table and are poor proxies for genuine diversity based on individual differences.

Once again, the Asian-American experience tellingly illustrates the fallacy of treating racial balancing as a proxy for diversity. While historically treated as either a faceless “yellow horde,” or lately as a uniformly successful, though bland, “model minority” Asian Americans are in fact a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds.

The catch-all category of Asian Americans includes individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population. Glenn Ryan DeGuzman, The Impact of the Model Minority Myth in Higher Education, 7 J. Student Aff. 85, 88 (1998). Many have been in the United States for generations. Others are recent immigrants or the first generation children of immigrants. Different people and families came to the United States to escape communism, authoritarianism, war, poverty, or simply to seek the greater opportunities available in this country. Some come from highly educated backgrounds, many others not so much. Golden, The Price of Admission at 204. Some come from cultures that aggressively promote education, others from cultures that take a less demanding approach (not every Asian child has a “Tiger Mom”). They are of a wide range of religions, including Christians, Muslims, Buddhists, Jews and many others. The only true commonality among Asian *29 Americans is that they are all now Americans, and are here because they, their parents, and their ancestors believed that the United States would afford them and their descendants a better life, greater opportunity, and the blessings of liberty.

Given the tremendous variation within the artificial category of Asian American, it is absurd even to discuss whether that catch-all group is “overrepresented” at UT or any other university. It is equally absurd to
imagine that any given percentage of Asian Americans exhausts that group’s contribution to the diversity of a university setting. As already noted, any true diversity depends on individuals, not the racial groups to which they belong. But even at the group level, surely the perspectives and experiences of Indian-American students may differ from those of Japanese-American students; Vietnamese-American students may have different perspectives from Chinese-American students; and even Chinese-American students from mainland China and from Taiwan, may have highly diverse viewpoints on geopolitical and socioeconomic issues. Using racial stereotypes to imagine that all Asian Americans are representative of the others, provide fungible contributions toward diversity, and hence may be treated as overrepresented and unnecessary additions to diversity is both inaccurate and offensive.14

*30 Such erroneous amalgamation of Asian Americans into a single stereotyped group also disserves the overwhelming portion of Asian Americans who, not surprisingly, do not in fact conform to the “model minority” stereotype. Most Asian Americans are not mechanistic overachievers. Many live in poverty. Golden, The Price of Admission at 204. Many do not have access to educational opportunities or have Tiger Moms to drive them. But the “model minority” stereotype of high-achieving Asians - particularly when used to raise the standards by which Asian-American applicants are judged - does an even greater disservice to such individuals by making it virtually impossible for an “average” or disadvantaged Asian American to compete with others who are held to a lower standard. Whatever discriminatory obstacle a several-hundred-SAT-point penalty creates for a gifted and academically successful Asian-American student, it poses a potentially insurmountable barrier for the many more Asian-American students who have the potential to do well, but may not reach the pinnacle of the academic curve.

Indeed, stereotype-driven barriers for Asian-American students hit particularly hard against the many Asian-American individuals and groups at the low end of the economic curve who will have their own set of perspectives that would differ considerably from others in their forced racial grouping. Grouping Asian Americans by race thus tends to disadvantage *31 the economically poorer individuals within that group and make economically homogenous those Asian Americans admitted.

Because racial diversity inevitably substitutes superficial qualities and stereotypes for genuine consideration of individual diversity, it is a poor candidate for a compelling interest and a poor justification for the use of race in admissions.

C. Current Jurisprudence on Diversity Merely Encourages Universities to Be Disingenuous in Their Use of Race.

Apart from the intrinsic flaws in the very notion of racial diversity as a substitute for individual diversity, Grutter’s racial diversity interest and seeming dilution of traditional strict scrutiny of racial classifications create substantial incentives for school administrators to be disingenuous regarding the true scope and significance of race and racial preferences in admissions decisions and the need and rational for using race at all.

Thus, in this case, UT has gone out of its way to obfuscate the quantity or degree of preference that results from using race. It hides it in the guise of a holistic evaluation, never saying - and keeping no records regarding - whether any given student would have been accepted but for the use of race. Pet. App. 32a-33a. UT likewise goes to some effort to pretend that admissions decisions are not made with an eye toward - or even an awareness of - the racial composition of a particular admissions class. Id. But surely that claim obfuscates the role race actually plays in admissions. The express goal of the program is to increase *32 the number and percentage of certain underrepresented races, and UT routinely measures its success or failure in advancing toward that goal.

The ill-defined nature of diversity and critical mass likewise encourages disingenuousness. As discussed above, where the total numbers of Hispanics seemed to be easily above a critical mass for UT as a whole, the University has adjusted its denominator to be that of individual classes and whether a critical mass has been achieved in those. We are not told what percentage of classes must be diverse in order to reach a critical mass, and that too may well be a moving target. In short, this Court’s unwillingness or inability to objectively define the key concepts of diversity as a compelling interest simply invites universities to read whatever they want onto those concepts, so long as they provide lip service to the relevant buzz-words found in the cases.
The lack of well-defined and testable legal standards in an area as fraught with danger as the use of race by the government simply encourages and permits subterfuge and circumvention of the constitutional requirement of equality under the law. It damages this Court’s jurisprudence and harms the credibility of our nation’s educational and legal systems.

D. This Court Should Return to Genuine Strict Scrutiny and Reject Racial Diversity as a Compelling Interest.

Because the racial diversity rationale for race-based decisions is unworkable and harmful, this Court should overrule that aspect of Grutter and return *33 to the strict scrutiny of cases such as Adarand and Croson. In Adarand, this Court correctly recognized that government use of race is always “suspect” and should be viewed with “hostility.” Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). And in Croson it correctly observed that the very purpose of applying strict scrutiny to government use of race “is to ‘smoke out’ illegitimate uses of race.” 488 U.S. at 493. For those reasons this Court has repeatedly held that the burden of proving that the challenged program is narrowly tailored to address a compelling government interest rests firmly on the proponent of the race-based program. See Johnson v. California, 543 U.S. 499, 505 (2005).

The opinion in Grutter, and the broad application of that opinion by the court below, ill serves these fundamental principles and protections. Rather than being skeptical and hostile, the court of appeals’ application of Grutter to UT’s race-based program and justifications was accepting, uncritical, and deferential. As Judge Garza pointed out in his concurrence, Pet. App. 72a-73a, the fault lies as much in this Court’s Grutter opinion as it does in the court of appeals’ expansive application of that case. But one thing is certain from the decision below - neither Grutter nor that decision does justice to the personal nature of the right to Equal Protection, a right that vests solely in the individual, not in a group. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Adarand, 515 U.S. at 227.

In addition, this Court should make clear that even assuming a well-meaning desire for diversity - which in its non-racial forms is both laudable and *34 permissible - there is no equal protection exception for the “good motives” of a state actor and there are no “benign” racial classifications. Adarand, 515 U.S. at 226. Throughout history proponents of racial classifications routinely justified their restrictions with appeals to the public good and claims of the great benefits from or necessity for racial classifications. However, over time each of those claims has been rejected as contrived, overstated, or simply inadequate to warrant the use of race by the government.

In Plessy v. Ferguson, 163 U.S. 537 (1896), the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of “distinctions based upon color.” The lone dissenter, Justice John Harlan, wrote: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. *** In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case ***.” Id. at 559. History proved Justice Harlan to be right.

In Brown v. Board of Education, 347 U.S. 483 (1964), this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding “psychological knowledge” made in Plessy v. Ferguson, the Court found that use of race produces a “sense of inferiority.” Brown, 347 U.S. at 494-95.

Similar claims of public interest and necessity were used by the military to justify Japanese internment *35 during World War II, and racial segregation of the armed forces. Korematsu v. United States, 323 U.S. 214 (1944); see Watkins v. United States Army, 875 F.2d 699, 729 (CA9 1989) (Norris, J., concurring in the judgment) (“As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale.”), cert. denied, 498 U.S. 957 (1990). Those claims, too, proved overblown, unsupported, and inadequate to justify the racial policies of their day. Hirabayashi v. United States, 328 F.2d 591 (CA9 1967); See Korematsu v. United States, 584 F. Supp. 1406, 1416, 1420 (N.D. Cal. 1984). This Court should bear firmly in mind that the vigorous, and perhaps even heartfelt, rationales for the use of race in every generation have been viewed far less favorably with the passage of time. Rather than repeat history, we should *36 learn from it and be skeptical from the
outset of claims - whether by government, academics, or putative experts - that the latest interest offered up is finally important and genuine enough to justify the use of race. In time, Grutter will be seen as the Plessy of its generation. Rather than wait 58 years this time, this Court should expeditiously reject racial diversity as a compelling interest and overrule its holding in Grutter to the contrary.

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In case after case, the single historical truth that emerges from the Asian-American experience is that the rights of American citizens of Asian descent - and of all Americans - have been vindicated only by strict application of the Fourteenth Amendment’s protection of individual rights, applying a "hostile" standard of "strict scrutiny" to the government’s use of race. The Fifth Circuit’s ready acceptance of UT’s racial diversity rationale and application of a deferential "good faith" standard ignores what history has taught us, flies in the face of both the Constitution and this Court’s seminal jurisprudence on race, and, if allowed to stand, will continue to result in unacceptable racial discrimination against Asian Americans and others.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Footnotes

1 No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.
3 Those racial categories account for 98.5 percent of the population of Texas, with small percentages of Native Americans, Pacific Islanders, and other groups filling out the mix.
4 This figure includes 0.2% of multi-racial students where one part of the racial mix is African American. Accountability Report at 2.
5 The impact on White applicants of eliminating all racial preferences was a 2.4% increase in Whites admitted (an increase from 51.4% to 52.8%, or 1.4%, of admitted students), translating to 122 students denied admission because of their race. Id. at 297-99. Whatever the total numbers for different racial groups, however, the impact on individual students denied admission because of their race is exactly the same - they suffer racial discrimination, are demeaned as individuals, and are denied the equality and dignity this country rightly claims are the entitlement of all persons, regardless of race.
6 Looking at additional schools in States that maintained their race-based admissions policies, the authors found that the results from that “control group reveal that their racial and ethnic diversity numbers remained relatively constant throughout [the same period] as compared to those for the California, Florida, and Texas universities.” Id. at 17.
7 That the total number and percentage of Asian Americans have in fact increased at UT in the last ten years says little about UT’s treatment of Asian Americans, other than that its efforts at racial balancing are less effective that it would like (or might have been throttled back in recent years due to the pendency of this litigation). It also might well reflect that many Asian Americans in Texas go to public school and may benefit from the Top Ten program. But that would mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program. The racial bar for Asian Americans who do not conform to the
academic stereotypes of model-minority overachievers thus would be even higher in order to limit what UT views as an already overrepresented race.

See also Ho Ah Kow v. Nunan, 5 Sawyer, 552 (C.C.D. Cal. 1879) (invalidating San Francisco’s infamous “Queue Ordinance” - which forced Chinese-American prisoners to cut off their long ponytails or “queues” on equal protection grounds); In re Ah Chong, 2 F. 733 (C.C.D. Cal. 1880) (striking down prohibition on Chinese Americans fishing in California waters); In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (declaring unconstitutional a California constitutional provision that forbade corporations and municipalities from hiring Chinese); In re Lee Sing, 43 F. 359 (C.C.D. Cal. 1890) (striking down “Bingham Ordinance,” which mandated residential segregation of Chinese Americans); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (holding that Chinese-American boy, born in San Francisco, could not be prevented from returning to the city after a trip abroad).

See also Lawrence Siskind, Racial Quotas Didn’t Work in SF Schools, San Francisco Examiner (July 6, 1994) (at http://heather.cs.ucdavis.edu/pub/AffirmativeAction/Siskind.html) (“In 1993, Chinese-American applicants [to San Francisco’s ‘academically preeminent Lowell High School’] were required to score 66 out of a perfect 69 to gain admittance. ‘Other Whites’ and several other groups could qualify with a 59; blacks and Spanish-surnamed, with a 56.”)


Indeed, amicus AALF had its inception largely as an outgrowth of the need to bring about the Ho case, and its founders played an instrumental role in bringing that challenge. They have personally lived through and been affected by the discriminatory laws and policies in San Francisco and California that limited Asian-American enrollment and made it more difficult for Asian Americans to gain entry into quality academic institutions such as Lowell High School in San Francisco, U.C. Berkeley, U.C. Hastings School of Law, and U.C. Berkeley-Boalt Hall School of Law. The matters raised in this brief are not merely debating points for this Court; they are a product and reflection of the personal experience of individuals who know precisely what it is like to be discriminated against because of their race or ethnicity.


The notion that race plays only a minor role in admissions as part of a “holistic” evaluation deserves little credence where UT’s express goal is a particular result and a particular racial balance mirroring that of the State. In early efforts, race may impact only a handful of admissions decisions for students who are all close to the admissions line, but when that fails to achieve the requisite “diversity” in racial composition, it will necessarily play an ever-increasing role until the desired balance is achieved. (Indeed, the recent restriction of admissions under the Top Ten Percent program to 75% of admissions, Pet. App. 19a n. 56, seems precisely such an effort, increasing the number of slots subject to racial preferences in order to compensate for slow progress toward UT’s racial composition goals.) That UT claims its admissions officers do not track the racial balance of any given class during the admissions process, Pet. App. 32a-33a. does not mean they do not track the results of the previous years and the overall composition of the school. Knowing that their efforts the previous year fell short of the stated diversity goal, they will necessarily increase the weight accorded to race the following year. See also, Pet. App. 4 a (discussing 5-year reviews addressing “an ever-present question of whether to adjust the percentage of students admitted under” UT’s racial preference program). That they cannot track their results in real time, but only after the fact, only makes the process less efficient - it does not change the goal of a particular racial composition or the increased role of race when that goal is not reached.
It is likewise inaccurate to imagine that any and all Asian Americans are fungible when it comes to the goal of having a critical mass of minority students. One might reasonably wonder whether students of Korean and Japanese heritage would take comfort in each other's presence given the historic difficulties between those countries and peoples. Likewise with Indian and Chinese students, or other disparate or even antagonistic pairings. In the end, students can and should find comfort in the common quality of individuality among their classmates, not in superficial or forced groupings based on race.

Just as with the military's overblown justification for racial discrimination during World War II, so too the military's claim that racial preferences are needed to help the military today should be viewed with skepticism. See Grutter, 539 U.S. at 331. The military also once used military necessity to justify its efforts to continue segregation. The military's various claims regarding the use of race to enhance its operations have never stood the test of time, and there is no reason to believe that its more recent arguments in support of racial classifications will do so either.

Indeed, some Asian Americans themselves believe that racial preferences - properly calibrated - can help Asian Americans. That view, however unlikely to bear fruit, is both shortsighted and unprincipled. Indeed, it is reminiscent of arguments by some African Americans that segregation benefited certain segments of African-American society and should be accommodated. That view was discredited then for African Americans and so too should it be now with Asian Americans. Regardless of the effect on admissions rates, racial classifications discriminate against Asian Americans and should not be tolerated. There is no benign racial discrimination.
NAACP, Texas State Conference of NAACP Branches and Barbara Bader Aldave in Support of Respondents

2012 WL 3527863

Background:

As an ever present force in the continued battles for protecting affirmative action programs at the state and national levels this brief from the NAACP and NAACP branches is an important brief to keep an on eye. The NAACP Brief, inter alia, argues that (1) University of Texas' program does not constitute a racial preference because there is no injury in fact as to Abigail Fisher, (2) that Texas' long history of discrimination justifies a race conscious program as a remedial measure, (3) that even if diversity is not a compelling interest—the justification solidified in Grutter v. Bollinger (2003)—that Texas' program is nevertheless constitutional because it is narrowly tailored to eradicate "the vestiges of Texas's prior official policy of discrimination, and (4) forcing University of Texas to utterly ignore race in the admission process would inherently force it to ignore the unique accomplishments of individual candidates, which runs afoul of the “dignity” of individual candidates, as spelled out in Grutter.
ARGUMENT

I. UT’S ADMISSION POLICY HAS NO RACIAL PREFERENCE, AND CAUSED NO INJURY IN FACT TO PETITIONER

Pursuant to the Texas Top Ten Percent Law, admission to UT is offered automatically to Texas residents graduating in the top 10% of their high school classes. Petitioner, a Texas resident, applied to the schools of Business Administration and Liberal Arts, but was unqualified for automatic admission. Fisher, 556 F. Supp. 2d at 605; JA405a. The admissions office also establishes “A” group and “C” group parameters for some UT schools based solely on an applicant’s academic index (AI). JA 410a. The AI is derived from an applicant’s predicated G.P.A. (which includes ACT/SAT scores and class rank) and any curriculum-based bonus points, i.e., race plays no part whatsoever in the calculation of the AI. JA 406a. “A” *5 group applicants have high AIs, and are offered admission based solely thereon. JA 410a. Remaining admissions decisions are based upon a combination of each applicant’s AI and personal achievement index (PAI).

The PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, one of which is race. SJ A 152a. “None of the elements of the personal achievement score - including race - are considered individually or given separate numerical values to be added together.” Fisher, 631 F.3d at 228. Moreover, race “can positively impact applicants of all races, including Caucasian[s].…” Id. For example, “both a white student who is president of his or her majority African American high school and an African American student who is president of his or her majority white high school bring an additional aspect of diversity when one considers the relative rarity of being a student leader who can reach across racial lines.” JA 435a. Put succinctly, UT’s policy has no racial preferences and considers race as one of many factors to assess every applicant.2

For Fall 2008, the relevant term, 92% of 10,200 admissions slots available to Texas residents were awarded to top 10% and “A” group applicants, i.e., with no consideration of PAlS. JA 414a. Due to the limited amount of remaining admission slots, a minimum AI of 3.5 was necessary for Petitioner to be offered admission, *6 regardless of her PAL. JA 416a. Petitioner’s AIs were only 3.1. In short, Petitioner would not have been offered admission for Fall 2008 had she been Caucasian, African American, Hispanic, or otherwise. See id. Accordingly, even if race had been a factor considered in calculating her PAI, Petitioner cannot show any injury in fact. Although this is not a putative class action, the same would hold true for all similarly-situated applicants whose AIs precluded their admission. A petitioner who cannot show injury from a policy - even theoretically - has no standing to challenge the policy. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261 (1977).

II. TEXAS’S LONG HISTORY OF STATE-SPONSORED DISCRIMINATION NECESSITATES ITS ACTIONS TO REMEDY THE LASTING EFFECTS

Texas has a long history of racial discrimination in its public higher education and public elementary and secondary school systems. This dual elementary and secondary public school system has lowered the number of Texas high school graduates eligible to attend the public higher education system, including the State’s flagship campus and programs. Amici offer this as context to the environment in which the public higher education system operates.

In 1970, the United States brought suit in the Eastern District of Texas against various Texas school districts, the governing county boards of education of each such district and their respective officials, and the Texas Education Agency (“TEA”) to achieve meaningful school desegregation. Each of the school districts named as a defendant in the original suit was either an all-white district or an all-black district that had taken no steps to comply with the Supreme Court’s desegregation precedent. The district court, Judge William Wayne Justice presiding, found that the named school districts were responsible for creating and maintaining dual school systems and that systemically, “the vestiges of racially segregated public education” had not been eliminated. Accordingly, Judge Justice entered Order 5281, a far-reaching desegregation decree applicable to the named school districts and the TEA, which directs funding to the State’s public schools. United States v. Texas, 321 F. Supp. 1043 (E.D. Tex.1970). The Order contains two parts, the first directed at desegregating the named school districts and the second directed at correcting systemic segregation. Specifically, with respect to transfers, the Order enjoined TEA and any person acting in concert with TEA from permitting, approving or
Because the duty to desegregate is affirmative in nature, this Court has held that the mere adoption of racially

supporting by any means the inter-district transfer of students within the state of Texas which will *8 reduce or impede desegregation or which will reinforce, renew or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin. Id. at 1060. The Order was later modified by the district court, United States v. Texas, 330 F. Supp. 235 (E.D. Tex. 1971), and subsequently by the Fifth Circuit, United States v. Texas, 447 F.2d 441 (5th Cir. 1971), but the text of the transfer provision remained largely the same.

Throughout the 1980s, many black and Hispanic students in Texas lived in school districts that courts and the U.S. Department of Justice (DOJ) had determined were unconstitutionally segregated.6 In fact, more than 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.7 Nevertheless, Texas adopted an official policy of resistance to integration of its public schools throughout the 1980s.8 In 1983, the Fifth Circuit found that schools in numerous counties throughout Texas still suffered from *9 unconstitutional segregation.9 In Tasby v. Wright, the Fifth Circuit found that Dallas public schools were still segregated and had "opposed any student desegregation, no matter how feasible or how minimal." Similarly, in Ross v. Houston Indep. Sch. Dist, the court found that, although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."10

Texas's policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the 1980s and 1990s.11 Moreover, the Office of Civil Rights (OCR) found that many of the school districts operating dual systems of education were practicing "official" discrimination against black and Mexican American students.12 Segregation continued between 1989 and 1994. In fact, in May 1994, desegregation lawsuits were pending against more than forty Texas school districts.13

*10 On December 19, 2010, the Texas State Conference of NAACP and Texas League of United Latin American Citizens (LULAC) requested that OCR conduct a compliance review of the State with respect to African American and Latino K-12th grade public school students in the state of Texas (State of Texas, the Texas Education Agency (TEA), and the State Board of Education (SBOE)) pursuant to Title VI and its implementing regulations, and the Thirteenth and Fourteenth Amendments to the United States Constitution. This request concerned:

- the miseducation of minority students
- recent SBOE curriculum changes which negatively impact all students, but disparately greater harm of minority students
- disparate discipline for minority students14
- the use of accountability standards to impose sanctions on schools with high populations of minority students
- the underrepresentation of Latinos and African Americans in Gifted and Talented Programs and the rules relating to the operation of such programs that lead to and/or contribute to the discriminatory result

*11 The Texas State Conference of NAACP Branches and LULAC contended that the Texas State Board of Education (SBOE) curriculum changes were made with the intention to discriminate, and that the SBOE curriculum and other areas raised in the request to OCR were either the result of unnecessary policies that have a disparate or stigmatizing impact on African Americans and Latinos, or reflect disparate treatment or neglect. NAACP and LULAC remain concerned that historically, the State has not only failed to provide the basic education that its laws require to all its citizens' children, but it has adopted standards to ensure that the status quo of disproportionately poor performing and negatively impacted minority students does not change. Racially segregated elementary and secondary public schools throughout the State have denied many black students and other students of color meaningful opportunities to attend institutions of higher education.

Under Title VI of the Civil Rights Act of 1964, the constitutionally-mandated affirmative duty to eliminate all vestiges of a previously dual higher education system is a condition of receipt of federal financial assistance.15 Because the duty to desegregate is affirmative in nature, this Court has held that the mere adoption of racially
neutral policies for prospective application is not adequate to remedy the consequences of past discriminatory conduct.16

*12 The dual system of public higher education in Texas, like that in several other Southern and border states, reflects a long history of state-sponsored discrimination. Indeed, prior to 1955, the Texas Constitution specifically required separate schools for white and colored children.17 Heman Marion Sweatt, an African American, applied to the University of Texas Law School for admission in its February 1946 class.18 On February 26, 1946, President T.S. Painter of the University of Texas requested an opinion from the Texas Attorney General on the question of “whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution.” The Texas Attorney General’s response lauded the segregation of races as a wise policy. The opinion concluded that Texas is not required to admit any African American applicant until the applicant in good faith makes a demand for legal training at the segregated institution, gives the authorities reasonable notice, and is unlawfully refused. The Attorney General, Grover Sellers, then advised President Painter to refuse Mr. Sweatt’s admission to the University of Texas.19 NAACP and the Texas State Conference of NAACP assisted Mr. Sweatt in his challenge to the State’s policies of segregated educational institutions. This work ultimately led to Sweatt v. Painter, in which this Court held “that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School.”20

*13 Despite the elusiveness of Fourteenth Amendment guarantees for African Americans and other persons of color, two effective litigation strategies finally bore fruit in the 1950s. First, Brown v. Board of Education held that the Constitution demands the dismantling of dual school systems intentionally segregated by race.21 Second, Cooper v. Aaron and related cases barred governmental support of unconstitutionally discriminatory institutions.22 Both concepts were incorporated in one of the first sweeping federal commitments to civil rights enforcement, the Civil Rights Act of 1964 (the Act). Title VI of the Act prohibits discrimination on the ground of race, color, or national origin under any program receiving federal financial assistance.23 Each federal department may ensure compliance by (1) refusing financial assistance to any recipient found violating the prohibition after a finding on the record, with an opportunity for a hearing; or (2) “by any other means authorized by law.”24 The Act specifically provides that enforcement efforts should not begin until the non-complying party has been notified and given an opportunity to comply voluntarily.25 Thus, the Act permits the Executive to deny financial support to non-complying public educational bodies, and to use the threat of fund-termination to persuade recipients of federal funds to dismantle vestiges of segregation. Enforcement of the Act, however, had to overcome a ninety-year pattern of conduct by Texas and its institutions that had blocked or frustrated black entry into Texas’s historically white institutions of public higher education and inadequately funded historically black institutions of public higher education.26

Through agreement with other executive departments, the Department of Health, Education and Welfare (HEW) assumed responsibility for Title VI enforcement with respect to most federal financial assistance to elementary, secondary and higher education and other specified health and social welfare activities.27 In 1969, black students were still facing a wall of state-sponsored discrimination despite the mandate of Title VI, and HEW, through its OCR, determined that ten Southern states were operating dual systems of higher education in violation of Title VI.28 Nevertheless, HEW took no administrative enforcement actions and referred no states to the DOJ for litigation, preferring to follow an approach of voluntary negotiation and consensus in achieving desegregation.29

*15 In 1970, parents of school-age children filed Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), modified and aff’d, 480 F.2d 1159 (D.C. Cir. 1973), against the Secretary of HEW. This action charged that HEW had failed to enforce Title VI in state colleges and universities. The District Court found that between January 1969 and February 1970, HEW concluded that ten states were operating segregated systems of higher education in violation of Title VI. Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia were the states in question and are known as the original Adams states.
The District Court ruled that HEW had abused its discretionary authority under Title VI, and ordered the ten states to file plans for desegregating their public colleges and universities. For several years, HEW and the states bickered about the adequacy and appropriateness of the various plans. In April 1977, the District of Columbia Circuit, in *Adams v. Califano*, 430 F. Supp. 118 (D.C. Cir. 1977), ordered HEW to publish criteria specifying the ingredients of acceptable plans to desegregate systems of public higher education. “These criteria require states to create a unitary system out of the present racially unbalanced, dual system, and to desegregate student enrollment, academic and non-academic personnel, and administrative and governing boards in each institution.”

*16 Although Texas was not an original *Adams* state, and thus was not subject to the *Adams* court’s original order, as a result of Texas’s status as a state that had historically maintained a segregated public education system, the Court entered an unpublished supplemental order that directed HEW to include Texas in its enforcement proceedings. During the spring of 1978 and the summer of 1979, OCR staff in HEW conducted a statewide review of higher education in Texas. OCR concluded in 1981 that Texas had failed to eliminate the vestiges of its former *de jure* segregation in public higher education. Because vestiges of that dual system still existed, OCR found that the State’s public higher education system was not in compliance with Title VI. OCR specifically noted that the racial composition of student enrollments, faculties, staffs, and governing boards continued to reflect the racial identity assigned by law to Texas public institutions prior to 1954. In response, Texas made commitments to OCR *17 which, in turn, granted provisional approval to a Texas state-wide desegregation plan.*

In the early 1980s, OCR and Texas officials negotiated for appropriate measures that would improve the status of minorities in state institutions of higher education and bring Texas into compliance with Title VI. In 1982, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education (“Texas Plan”) which included a state commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students. Assistant Secretary of Education Clarence Thomas reviewed the Texas Plan and informed the State that the Texas Plan was deficient. He found that the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas’s commitment to enroll those minority students in proportion to the number of minorities graduating from undergraduate institutions statewide. Texas then submitted a revised Texas Plan, which OCR found deficient because it did not set targets *18 for increasing minority enrollment for each institution, and did not project achievement dates for the targeted goals.*

In March 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI enforcement suit, finding that “Texas has still not committed itself to the elements of a desegregation plan which in defendants’ judgment complies with Title VI.” The court ordered DOE to begin enforcement proceedings against Texas unless Texas submitted a plan that fully complied with Title VI within forty-five days. OCR provided Texas with a list of thirty-seven steps that would improve the Texas Plan, including the consideration of an applicant’s complete record in admission decisions and the selection of “[minority] students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements.” Texas amended its plan to address the deficiencies identified by OCR. In June 1983, OCR accepted the Texas Plan as being in compliance with Title VI. The revised Texas Plan *19 included a commitment to “seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs.” The Texas Plan was subject to monitoring for compliance until 1988. In 1988, the Texas Higher Education Coordinating Board (the “Board”) officials evaluated the results of the Texas Plan and determined that Texas had not met the goals and objectives of the plan. As a result, the Board developed and adopted a successor plan (Plan II) to avoid a mandate from the federal government to negotiate a second plan. Plan II did not contain any specific numeric enrollment goals but stated a commitment to increase black and Hispanic student enrollment. Plan II was effective from September 1989 to August 1994. OCR continued to monitor the Texas system to determine whether the vestiges of *de jure* segregation had been eliminated, in light of *United States v. Fordice*, 505 U.S. 717 (1992), *Hopwood*, 861 F. Supp. at 557.
*20 In 1996, the Fifth Circuit halted the state’s ongoing efforts to address the continuing de facto segregation in its institutions of higher education. In Hopwood v. Texas, four white plaintiffs who had been rejected from The University of Texas School of Law challenged the institution’s admissions policy on equal protection grounds and prevailed.53 The Fifth Circuit panel in Hopwood rejected the history of segregation contained in the district court opinion and declared the use of race-based criteria in admissions decisions at the law school to be unconstitutional.54 Following the Hopwood decision, the Texas Attorney General issued an opinion prohibiting the use of race as a factor in admissions by any undergraduate or graduate program in Texas state higher education. Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 222 (5th Cir. 2011). Thereafter, Texas institutions of higher education ceased all race-conscious admissions policies. The Texas Legislature responded to the Hopwood decision by enacting the Top Ten Percent Law.55 The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.56 The Top Ten Percent Law was not only ineffective in addressing the vestiges of segregation; it allowed the gains made in previous years to evaporate. In 1997, the number of minority applicants to the UT dropped by nearly 25%, while the total number of applicants to the university*21 decreased by only 13% as compared to 1995.57 African American enrollment for 1997 dropped almost 40% from the 1995 level (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen).58 In 1999, the Houston Chronicle reported that black students made up only 3 percent of overall enrollment at Texas colleges, with 32 percent of those students attending historically black colleges.59 Moreover, black students made up less than 5 percent of enrollment at more than half of the majority-white colleges.60 OCR continued its efforts to address Texas’s long history of segregation in schools. In February 1997, DOE wrote to Governor George W. Bush to renew OCR’s dialogue with Texas, asking “to augment our information in the areas of the [desegregation] plan where OCR has concerns, and to address information indicating possible problems with higher education opportunities for blacks and Hispanics in Texas.”61 Also in 1999, just nine years before Petitioner applied to UT, OCR officials met with representatives from the Board, the Governor’s Office and the Attorney General’s Office and informed those representatives that OCR had found that disparities traceable to de jure segregation continued to exist in *22 22Texas higher education.62 The Board agreed to prepare a revised Texas Plan for consideration by OCR in July 2000.

In 2000, OCR again found that “the racial identifiability of the State’s higher education institutions continued to reflect their former de jure segregated status.”63 On May 11, 2000, Governor Bush and OCR officials signed the “Texas Commitment” that would form the basis for the state’s implementation plan “to address issues of concern identified to the State regarding its higher education system, consistent with Title VI of the Civil Rights Act of 1964 and United States v. Fordice, 505 U.S. 717 (1992).”64 The “Texas Commitment” consisted of five areas of focused action, and one of the five areas was to “improve the recruitment, retention, and participation rates of African American and Hispanic students at the State’s historically white institutions.”65 Following the “Texas Commitment,” the State developed the Closing the Gaps by 2015 Plan. Texas has submitted progress reports every year since reporting began in 2003 regarding its progress in meeting the goals outlined in the Closing the Gaps by 2015 Plan.

In 2003, the U.S. Supreme Court rejected the Hopwood holding in *23 Grutter v. Bollinger, 539 U.S. 306 (2003). This re-opened the door for the State to reconsider race-conscious measures as a part of its remedial strategies. In 2010, Texas initiated its Accelerated Plan for Closing the Gaps by 2015. Although Texas has made some gains in achieving its Closing the Gaps by 2015 goals, the State recognized that “historically low participation and success rates [for African American and Hispanic students] warrant sustained focus and efforts from the Coordinating Board and stakeholders to consolidate these gains and move further towards 2015 Closing the Gap goals.”66 The affirmative duty to desegregate, recognized in the elementary and secondary school desegregation cases is equally applicable to state systems of higher education.67

III. EVEN IF THIS COURT HELD THAT DIVERSITY IS NOT A COMPELLING STATE INTEREST, UT’S ADMISSION POLICY WOULD BE CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO ERADICATE THE VESTIGES OF TEXAS’S PRIOR OFFICIAL POLICY OF DISCRIMINATION

Respondent argues that the UT admissions program passes constitutional scrutiny because it is narrowly tailored, evaluates each applicant individually and holistically, and because race is only one of many factors that UT weighs in carrying out the compelling state interest of building a diverse student body. NAACP agrees
that even under a narrow reading of \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003), UT's program does not violate the Fourteenth Amendment's guarantee of equal protection.

Moreover, UT's admissions policy is also constitutional for a second reason, one that was not considered in the lower court opinions or in Respondent's brief. UT's policy, adopted by a state agency (the Board of Regents of the University of Texas System), is a remedial measure which is aimed at, and has the effect, of lessening or eliminating remaining vestiges of \textit{de jure} segregation in the Texas higher educational system. This Court has consistently held that government entities that consider the race of applicants for purposes of remedying past racial discrimination do not violate equal protection.

The Court has identified the following four factors that, when present, permit race to be considered as a factor in government-sponsored remedial programs: (1) a past history of \textit{de jure} segregation; (2) whether the race-conscious plan ameliorates the disabling effects of the discrimination; (3) whether the injury from discrimination remains when the policy is in effect; and (4) whether the program imposes quotas or a fixed percentage of admission of minority students. All four are fully satisfied on the record of this case, and support the constitutionality of the UT admissions program.

First, there must be a “judicial, administrative, or legislative finding,” \textit{Fullilove v. Klutznick}, 448 U.S. 448, 497 (1980) (Powell, J., concurring), that the state or *25 governmental unit at issue previously had a system of \textit{de jure} segregation or other type of racial discrimination, in violation of the Constitution or statute. Even in decisions that have restricted the use of racial considerations, this Court has always pains to distinguish the facts of the immediate appeal from those situations where race has been used to implement a remedy for proven state-sponsored discrimination. For example, \textit{Regents of the University of California v. Bakke}, 438 U.S. 265 (1978), involved admission to medical school in California, a state which had never adopted discriminatory measures against African Americans. \textit{Bakke} distinguished the facts of that case from school desegregation cases which “involved remedies for clearly determined constitutional violations,” and in which “[r]acial classifications ... were designed as remedies for the vindication of constitutional entitlement.” \textit{Bakke}, 438 U.S. at 265. The majority in \textit{Bakke} recognized that “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.” \textit{Id}. at 307.

In \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003), this Court affirmed the position that remedying past discrimination is a permissible justification for race-based governmental action. \textit{Id}. at 328. While \textit{Grutter} divided the Court over whether “attaining a diverse student body” alone was a compelling governmental interest that justified a race-conscious admissions policy, not one Justice found that a race-conscious admissions policy would be impermissible as a remedy for proven past discrimination in college admissions. \textit{See also Parents Involved in Community Schools v. Seattle School Dist. No. 1}, 551 U.S. 701, 720 (2007) (referring to the “compelling interest of remedying the effects of past intentional discrimination.”).

*26 The Court's rulings dealing with affirmative action in the fields of employment and government contracting also accept the use of race in government action to remedy past discrimination. Even where the Court has invalided affirmative action laws or ordinances, it has noted that racial discrimination in employment or contracting may continue after the end of a \textit{de jure} segregation regime, and that government retains the power to combat these effects through race-aware remedial measures. \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200,237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it”); \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 509 (1989) (“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.”).

This first factor - a past history of \textit{de jure} segregation - is satisfied on the undisputed historical record. Until 1969, Texas’s own constitution and statutes required segregated schools at every level of education. Moreover, as shown above, for years after the formal end of segregation, Texas failed to implement any significant measures to eradicate the devastating effects of a century of legal segregation. *27 Until 1947, the Prairie View State Normal & Industrial College for Colored Teachers (now Prairie View A&M University) was the only state-supported institution of higher education which black students in Texas could attend. In 1947,
to avoid the integration of the University of Texas, the State created a second all-black college, the Texas State University for Negroes (now Texas Southern University). *Hopwood v. Texas*, 861 F. Supp. 551,555 n. 4 (W.D. Tex. 1994). Even after the end of legal education, Texas continued a discriminatory policy through all levels of education, *i.e.*, from kindergarten until effectively allowing black high school students only to attend its historically black colleges, then allocating money and other resources in a manner that strongly disfavored those colleges.

Second, this Court has upheld as constitutional race-conscious plans adopted by government bodies or educational systems in order to remedy the effects of past intentional discrimination. There is a legitimate government interest in “ameliorating the disabling effects of identified discrimination.” *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980). The body or system may voluntarily adopt a remedial plan; there is no requirement that only court-imposed plans are constitutional. *Parents Involved*, 551 U.S. at 737. The current process used by UT to admit students is the direct product of a plan adopted to remedy past *de jure* segregation.

Following the end of the Texas Plan, UT saw an immediate and precipitate drop in minority enrollment. *Fisher v. Univ. of Texas at Austin*, 631 F. 3d 213,222 (5th Cir. 2011). Texas responded to this situation in two ways. First, in 1997, the Texas Legislature enacted the Top Ten *28 Percent Law*, which stabilized the entering percentages of African American undergraduates, but at a significantly lower level than when the Texas Plan was in effect. Second, following this Court’s decision in *Grutter*, UT undertook a study to determine whether it could remedy the disparity in enrollment (which, it will be recalled, came from abandoning the remedial plan adopted to address the effects of *de jure* segregation) through race-conscious policies. It ultimately adopted the policy at issue in this appeal, which permits UT to consider race as one of the many factors that may be evaluated in admissions. *Id.* at 226.

The Texas Plan, as it was in effect before 1997, attempted to remediate the effects of a long-segregated state educational system. It had a clear positive effect on enrollment of minorities who had been the traditional targets of discrimination: 4.5% of the 1993 entering class at UT were African American and 15.6% were Hispanic. However, once that remedial program was ended in 1997, the remaining effects of *de jure* segregation reasserted themselves at once. “Minority presence at UT decreased immediately.” *Id.* at 223. African American enrollment in 1997 was almost 40% lower than in 1995 falling from 309 to 190. *Id.*

The current UT plan has returned African American enrollment at UT to the situation prevailing before the abolition of the Texas Plan (or better). In 1995, there were 309 entering African American freshmen; in 1998, during the purportedly “race-neutral” era, only 165 entered; but in 2008, 335 African Americans enrolled at UT. Even if the publicity surrounding *Hopwood* in 1996-97 negatively affected the number of African American *29 applications to UT* in that period, the effect was minor and transitory. What cannot be disputed is that African American admissions to UT stayed depressed throughout the so-called “race-neutral” era, long after the publicity from *Hopwood* dissipated. The Fifth Circuit found that “significantly fewer” African Americans were enrolled at UT in 2004 (309) than in 1989 (380). *631 F. 3d at 244.*

This data suggests the major contributor to depressed African American enrollment throughout the “race-neutral” period was the disappearance of the remedial measures adopted in the Texas Plan. UT’s current “race-conscious” admissions policy is serving the same remedial end - undoing the pernicious effects of long years of state-sponsored segregation - that the Texas Plan served before 1997.

UT has justified its race-conscious policy on the basis of the compelling state interest in diversity recognized in *Grutter*. Even if this Court chooses to modify or limit *Grutter’s* holding in some respect, it should uphold the constitutionality of UT’s policy. Under this Court’s precedents, UT’s policy is fully justified as a reinstatement of Texas’s original, proper remedy for the effects of past intentional discrimination by the state and its higher education system.

The third factor for a constitutional race-conscious remedial policy is that the policy can last only as long as the injury from discrimination remains. Thus, the policy must end when there has been a judicial determination, supported by evidence, that the effects of past state discrimination on educational opportunity have been fully remedied. This Court has distinguished between systems *30 which have been judicially determined to have fully eliminated the effects of *de jure* segregation, and those which have not. In *Parents
*31 Here, unlike Parents Involved, there has never been a judicial finding, based on evidentiary proof, that the vestiges of the segregated system of Texas higher education have been eliminated. Moreover, Petitioners never even attempted to make such a showing. Thus, the third factor is satisfied on this record. The fourth and final factor for a constitutional “race-conscious” remedial program is that the program may not impose quotas or a fixed percentage of admission of minority students. While there is a compelling state interest in remedying past discrimination, the means chosen by government “must be specifically and narrively framed to accomplish that purpose.” Grutter, 539 U.S. at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)). The narrow-tailoring requirement means that “a race-conscious admissions program cannot use a quota system,” Grutter, 539 U.S. at 334, undertake racial balancing, or use a system that adds a fixed amount of bonus points to an applicant based on race. Id. at 337. A university may, however, consider race or ethnicity as a “plus factor,” if it provides “truly individualized consideration” to applicants and is flexible enough to consider the whole person. Id. at 336-37. “There is no constitutional objection to the goal of considering race as one modest factor among many others,” provided that race “does not become a predominant factor in the admissions decision making.” Id. at 392-93 (Kennedy, J., dissenting).

In summary, UT’s admissions program provides a modest remedy for the lingering injury which black Texans have suffered from slavery, a century or more of de jure educational segregation, and several decades more of malign state neglect in a de facto segregated university system. Accordingly, UT’s admissions program serves one of the most compelling of state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education. The program considers race as only one factor among many, in the context of “truly individualized” evaluation of each applicant for admission to UT. UT’s program withstands strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state’s interest in remedying the effects of intentional discrimination.

IV. FORCING UT TO IGNORE RACE IN ADMISSIONS WOULD FORCE IT TO IGNORE THE ACCOMPLISHMENTS OF INDIVIDUAL STUDENT APPLICANTS IN OVERCOMING RACIAL BARRIERS

UT, like many other universities, requires applicants to submit personal essays. For example, in 2008, UT asked applicants to respond to the following in essay form: “Choose an issue of importance to you - the issue could be personal, school related, local, political, or international in scope - and write an essay in which you explain the significance of that issue to yourself, your family, your community, or your generation.” JA 417a. If the Petitioner prevailed here, UT would be required to ignore the personal essays of African Americans that revealed how they overcame racial barriers and achieved success in grade and high school, or at work. Such accomplishments may be the best indicator of how a student will deal with the challenges of an elite educational institution, and what individual contributions that student can make to the UT experience. They are thus directly relevant to UT’s *33 core mission of recruiting a distinguished and motivated student body.
Petitioner’s argument runs contrary to what this Court has long recognized: African Americans enhance a group effort by contributing their personal experience with racial issues. For example, this Court ruled that African Americans may not be barred from jury service, because they possess “qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable” and that such jurors contribute to the deliberations of juries a “perspective on human events that may have unsuspected importance in any case that may be presented.” Peters v. Kiff, 407 U.S. 493, 503-04 (1972). In 2003, this Court approvingly cited Harvard’s admission policy which recognized that “critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.” Gratz v. Bollinger, 539 U.S. 244, 272-73 (2003).

What Petitioner seeks is to deny African Americans and other racial minorities an admissions system that is “designed to consider each applicant as an individual.” Grutter v. Bollinger, 539 U.S. 306, (Kennedy, J., dissenting). Under her position, every applicant would be “holistically” considered except African Americans and other racial minorities, whose personal essays would have to be censored (or self-censored) to remove any mention of experience with race. Important achievements by these students would thereby be deemed meaningless and worthless. UT would have to treat extraordinary applicants as though they were commonplace. For example, UT would have to pretend that the first African American member of a traditionally all-white organization, who tore down *34 barriers and rose to become president of the organization, had not done anything of historical significance. Even if an applicant had triumphed over direct, personalized, de facto racism, UT would be barred from considering that triumph. Thus, granting Petitioner’s request would deny individuals who had overcome racial adversity the opportunity to demonstrate important accomplishments. Other students, for whom race presented no obstacle, would effectively have an unfair advantage. Many racial minority applicants have pulled themselves up by their bootstraps, and the Court should reject Petitioner’s attempt to take away their boots.

*35 CONCLUSION

The University of Texas at Austin’s admission policy has no racial preference and caused no injury in fact to Petitioner. Indeed, the long history of state-sponsored discrimination necessitates Texas’s actions to remedy the lasting effects. UT’s admission program is constitutional because it is narrowly tailored to eradicate the vestiges of Texas’s prior official policy of discrimination. Forcing UT to ignore race would force UT to ignore the accomplishments of racial minorities. For these reasons, amici urge the Court to uphold the lower court rulings.

Footnotes

1
No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the amici curiae, or their counsel, made a monetary contribution intended to fund such preparation or submission. The parties have filed blanket consents with the Court consenting to the filing of all amicus briefs.

2

3
Relevant admissions statistics were not finalized until October 2008, after the District Court’s May 29, 2008 opinion regarding Petitioner’s motion for preliminary injunction, and thus may contradict any preliminary data reflected therein, JA 405a.

4

5
Kevin T. Leicht & Teresa A. Sullivan, Minority student pipelines before and after the challenges to affirmative action (Ford Foundation, May 25, 2000).

6


8 Id.

9 U.S. v. Crucial, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983) (finding that Echor County suffered from unconstitutional segregation); Tasby v. Wright, 713 F.2d 90, 93 (5th Cir. 1983); Flax v. Potts, 567 F. Supp. 859, 861 (N.D. Tex. 1983) (holding that Fort Worth still was not a unitary school system); Ross v. Houston Indep. Sch. Dist, 699 F.2d 218, 226-27 (5th Cir. 1983) (noting that racial segregation in schools continued until 1967).


12 Id. at 554.

13 Id.


24 Title VI, § 602, 42 U.S.C. § 2000d-1, HEW regulations specified referral to the Department of Justice as the primary other means authorized under law. 45 C.F.R. § 80.8(a) (1979).

25 Id.


27
President Lyndon Johnson directed the Attorney General to coordinate enforcement of Title VI and directed each department to cooperate in the enforcement.


The responsibility for conducting this Title VI review was transferred to the U.S. Department of Education by authority of the Department of Education Organization Act, 20 U.S.C. Section 3441 (1980).


OCR also noted that additional vestiges of the formerly dual system were evident in inequities in resource allocations to traditionally black and traditionally white schools (such as resources for physical facilities and for faculty salaries) and the duplication of programs between traditionally black institutions and traditionally white institutions sharing service areas. *Id.* at 2.


Id.
48
Id.
49
Id. at 557.
50
Id.
51
Id.
52
Id.
53
78 F.3d 932 (5th Cir. 1996).
54
Id.
55
Fisher v. U. Tex. at Austin, 631 F.3d 213, 224 (5th Cir. 2011).
56
Id.
57
Id.
58
Id.
59
Lydia Lum, Duplication at UH, TSU Seen Impeding Diversity, Houston Chron., Nov. 10, 1999.
60
Id.
61
62
63
Letter from OCR to Mr. Clay Johnson, Office of the Governor (October 11, 2000) (on file with the amici).
64
65
Texas Commitment, George W. Bush and Office of Civil Rights 3 (May 11, 2000).
66
67
68
This Court has not endorsed the dictum, stated in Hopwood v. State of Texas, 78 F.3d 932, 954 (5th Cir. 1996) that only the specific state unit that originally adopted discriminatory measures in education is permitted to adopt remedial measures that take race into account. Indeed, Grutter rejected the Fifth Circuit's conclusion in Hopwood outright. See 539 U.S. at 322, 325 (noting that Hopwood rejected diversity as a compelling state interest).
NAT’L LATINO ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

2012 WL 3418592 (U.S.) (Appellate Brief)

Background:

The Authors of this brief, a set of Latino organizations that work at the national and local levels, argue that the University of Texas has a compelling governmental interest in classroom diversity that is ultimately achieved by the use of race as a factor in the Personal Index score in the general admission (non-Top Ten Percent Program) context. The Authors focus on the key values and links to inclusion of diverse student bodies including but not limited to the connection between a college education and (1) civic participation, (2) leadership potential, (3) military leadership, and (4) the private sector. Emphasizing the historical and the contemporary institutional barriers to racial minorities, with special emphasis upon those faced by Latinos in the United States, the Authors ultimately argue that without a racial conscious program like the kind adopted by University of Texas, Latinos will continue to face substantial barriers to education and beyond.
ARGUMENT

I. UT HAS A COMPELLING GOVERNMENTAL INTEREST IN CLASSROOM DIVERSITY, AND ITS ADMISSIONS PLAN IS NARROWLY TAILORED TO FURTHER THAT LEGITIMATE END

A. UT Has A Compelling Interest In Achieving Diversity

In Grutter v. Bollinger, 539 U.S. 306 (2003), this Court held unequivocally that a university has “a compelling state interest in student body diversity.” Id. at 328; see also id. at 328-31. Indeed, “attaining a diverse student body is at the heart of [a university’s] proper institutional mission, and ... ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” Id. at 329 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J)). Following Grutter, UT carefully sought to determine whether its student enrollment lacked the diversity it sought to fulfill its mission as the premier flagship university in Texas, and if so, how it might constitutionally seek to obtain that diversity.

*4 After careful evaluation of its admissions program and the student body, UT determined, like the University of Michigan Law School (“UMLS”) in Grutter, that the benefits flowing from a diverse student body had not been achieved using an exclusively race-neutral admissions plan. UT’s pursuit of diversity is not equivalent to a racial quota or an attempt to have UT’s student body mirror the demographics of Texas. Rather, as in Grutter, UT’s admissions plan “is defined by reference to the educational benefits that diversity is designed to produce.” 539 U.S. at 330.

In particular, UT conducted a study in the wake of Grutter to assess whether its wholly race-neutral admissions programs - the Top-Ten Percent (“TTP”) plan - had achieved a “critical mass” of diverse students.2 As part of that study, UT conducted a survey of students and found that UT minority students reported feeling isolated and a majority of UT students in general stated that there was insufficient diversity *5 in the classroom.3 App. 125a. The survey accorded with UT’s statistical study of classroom demographics, which determined that a substantial proportion of undergraduate classes contained one or zero underrepresented minority students. Id. The study found that “in 2002, 90 percent of classes with 5 to 24 students had one or zero African American students and 43 percent had one or zero Hispanic students.” Id. Diversity in the classroom remained highly elusive notwithstanding the dramatic increases in Latino high school graduates and Latino applicants to UT. See Tex. Educ. Agency, Count of Graduates by Ethnicity, PEIMS Data, at 10, 19, Dkt. No. 94-1 (“PEIMS Data”); Univ. of Tex. Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall 2006 at 9, Dkt. No. 96-11 (Ex. A to Lavergne Aff.).4 In addition to the survey and classroom study, UT examined its race-neutral admissions plan and *6 outreach,5 analyzed the performance of underrepresented groups in entering the existing labor force, and reviewed its role as a flagship university in producing a diverse group of leaders that would benefit the state, the nation, and the world. SJA 1a-3a, 6a-7a, 24a.

Based on these findings, UT determined that a sufficiently diverse student body had not yet been achieved. That determination “tak[es] into account complex educational judgments in an area that lies primarily within the expertise of the university,” and, as such, is entitled to deference. Grutter, 539 U.S. at 328. Deference is particularly appropriate because UT’s conception of diversity is identical to the one ratified in Grutter.

UMLS defined “critical mass” as “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated,” or “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” Grutter, 539 U.S. at 318-19 (emphasis added). UT - far from establishing a pre-determined quota or percentage of minority applicants to be admitted - similarly focused its diversity study on the classroom and whether minority students felt isolated there. UT found in that study that a high number of UT classes included no more than one minority student, and thus reasonably determined that those students would feel “isolated” “in the classroom,” and *7 “feel ... like spokespersons for their race.” Id. This determination was supported by the numerous responses of Latino and other minority students who reported feeling isolated in the classroom. Importantly, petitioner has offered no evidence to contradict UT’s finding that a critical mass was lacking in its classrooms or that Latino and African-American students felt isolated in the classroom or like spokespersons for their race.
Moreover, *Grutter* embraced the view that universities may seek increased diversity to “promote Q ‘cross-racial understanding,’ help[] to break down racial stereotypes, and ‘enable[] [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Grutter*, 539 U.S. at 330 (quoting district court opinion in *Grutter*) (fourth alteration in original). Again, UT’s uncontradicted findings support its determination that it had yet to achieve a “critical mass” of minority students, and that it needed to supplement its race-neutral admissions program in order to reap the many benefits of diversity in its classrooms. *Amici* urge this Court not to upset this delicate balance, and instead to defer to UT’s “complex educational judgments.” Id. at 328.

B. UT’s Admissions Program Is Narrowly Tailored

Following its comprehensive study concluding that its race-neutral approaches failed to deliver fully to its student the benefits of diversity, UT closely *8 modeled the race-conscious portion of its admissions program on the one affirmed in *Grutter*. Accordingly, like UMLS, UT “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.” *Grutter*, 539 U.S. at 337. Indeed, UT’s consideration of race in admissions is significantly more narrowly tailored than the program upheld in *Grutter*.

To begin, UT’s race-conscious, holistic program only applies to the minority of applicants who were not automatically admitted under the race-neutral TTP law. *6 For the non-TTP applicants, UT determines admission based on the applicant’s Academic Index/Personal Achievement Index scores. The Academic Index score predicts the applicant’s freshman GPA at UT based on factors such as high school class rank and SAT or ACT score. The Personal Achievement Index score is derived from three discrete elements, which are the applicant’s scores on each of two essays and her “personal achievement score.” The latter is based on a “holistic review” of the “applicant’s demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.” App. 133a.

In evaluating the applicant’s “special circumstances,” in turn, UT considers seven factors: the applicant’s socio-economic status, her school’s socioeconomic status, her family responsibilities, whether she *9 lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school’s average score, and race. App. 159a n.13. In this way, UT’s consideration of race is highly limited - it is “a factor of a factor of a factor of a factor.” Id. at 159a. And contrary to being a quota system, UT’s plan conforms to *Grutter*’s mandate that each applicant be “evaluated as an individual and not in a way that makes [the] applicant’s race or ethnicity the defining feature of his or her application.” 539 U.S. at 337.

Petitioner and her supporting *amici* ignore UT’s comprehensive plan and holistic consideration of seventeen factors. *Cf. SJA* 28a-29a. Indeed, petitioner asks this Court to ignore the fact that she failed to rank in the top ten percent of her graduating class (thus reducing her chances of gaining admission by eighty percent), and then failed to gain admission under the individualized, holistic review process - unlike 6,582 other white students admitted in 2008. SJA 156a. Instead, petitioner asks this Court to focus its attention on one criterion - SAT scores - which is the one factor that has a disparate impact against Latino and African-American students. *7 In essence, petitioner and her *amici* ask the Court to set aside an admissions plan that entails a holistic review of applicants’ other talents, and replace it with a plan tailored only to her strengths. See *Parents Involved in Cnty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring *10 in part and concurring in the judgment) (“Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”).

Additionally, unlike the UMLS plan, UT’s plan did not include monitoring on a daily or weekly basis the number of minority students admitted. *See Grutter*, 539 U.S. at 391-93 (Kennedy, J., dissenting) (stating that consultation of daily reports suggested lack of individual review and compromised finding that the admissions plan could survive strict scrutiny).*8 And unlike the UMLS plan, where a specific range of minority students was accepted from one year to the next, UT does not seek out any specific range. JA 131a. In fact, UT’s Latino enrollment for students admitted outside the TTP plan fluctuated in numbers and percentages between the years 2005 and 2008, ranging from 158 to 343 Latino students. *See Univ. of Tex. at Austin,*
Research Section, Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin 7 (2008). These aspects of UT's admissions plan demonstrate UT's faithful commitment not to evaluate applications expressly for race or ethnicity.10

*11 Finally, UT's plan is consistent with Grutter's emphasis on "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342. UT informally reviews its admissions policies every year, and "every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results." App. 126a; cf: Resp. Br. 12 n.4.

For those reasons, there is no tenable argument under Grutter that UT's adoption of a program considering race as part of a holistic, individualized admissions assessment - and as a supplement to the race-neutral TTP program that continues to dominate its admissions plan - fails to qualify as narrowly tailored to serve the compelling interest of promoting a diverse student body.

II. A DIVERSE STUDENT BODY, WHICH INCLUDES LATINO STUDENTS, GREATLY BENEFITS SOCIETY

To achieve its “goal of producing future educational, cultural, business, and sociopolitical leaders,” UT understands that “the undergraduate experience for each student must include classroom contact with peers of differing racial, ethnic, and cultural backgrounds.” §A 24a. A diverse student body not only improves educational outcomes for all students, but its benefits also extend far beyond the students’ time on campus. See Grutter, 539 U.S. at 330-33; see also Robert C. Post, The Supreme Court, 2002 Term - *12 Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 60 (2003) (“[Grutter] conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”). In particular, increased diversity at UT positively influences Latinos' participation in civic affairs, in political and military leadership, and in meeting the needs of Texas businesses in today's global economy.

A. Civic Participation

In Grutter, the Court emphasized that educational diversity is critical to securing “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation,” which is “essential if the dream of one Nation, indivisible, is to be realized.” Grutter, 539 U.S. at 332. One key metric of effective civic participation is voting registration and turnout. Although the Latino population is growing rapidly, it still lags behind other groups in voter participation. See Mark Hugo Lopez, Pew Hispanic Center, The Latino Electorate in 2010: More Voters, More Non-Voters, at 5-6 (2011).11 The figures from the 2010 *13 elections show that Texas's situation is even more severe than the national disparity. Only 36.5% of Texas's adult citizen Latinos were registered to vote - compared with 65.9% of the state's non-Latino whites. See U.S. Census Bureau, Voting and Registration in the Election of November 2010, tbl. 4b (2011).12 Worse, only 15.8% of Latinos actually turned out to vote, compared with 43.1% of non-Latino whites. See id. Nationally, 31.2% of Latino adult citizens voted, compared with 48.6% of non-Latino white adult citizens. See Lopez, supra, at 5-6.

Comparative college attendance rates, which correlate strongly with voter participation, help to explain this disparity: “Education has long been recognized as (perhaps the) prime performer among the constellations of influences on turnout, and deservedly so.” Robert A. Jackson, Differential Influences on Latino Electoral Participation, 25 Pol. Behav. 339, 354 (2003); see also Thomas S. Dee, Are There Civic Returns to Education?, 88 J. Pub. Econ. 1697, 1704 (2004) (“[C]ollege attendance has a sizable influence on subsequent civic participation.”). In fact, among Latino eligible voters, 50.3% of college graduates headed to the polls in 2010, while only 25.8% of high school graduates did. See Lopez, supra, at 6.

*14 Without innovative programs like UT's, given its size of enrollment, it is unlikely that these numbers will change significantly. Although a larger percentage of young Latino adults than the general public say that a college education is important for success in life, a smaller percentage of young Latino adults than the general public say that they themselves plan to get a college degree. See Mark Hugo Lopez, Pew Hispanic Center, Latinos and Education: Explaining the Attainment Gap, at 3 (2009).13 And nearly twice as many Latinos as non-
C. Military Leadership

Latino whites - 29% versus 15% - have not completed high school. See Pew Hispanic Center, Fact Sheet: Latinos in the 2010 Elections: Texas, at 2 & tbl.2 (2010). Expanding access to the state’s premier public institution can help increase Latinos' college-attendance rate, and with it, their level of civic participation.

Cultivating college-graduate role models is a powerful, targeted way to increase the chances that talented Latino youth will follow in graduates’ footsteps. See Ricardo D. Stanton-Salazar & Stephanie Urso Spina, Informal Mentors and Role Models in the Lives of Urban Mexican-Origin Adolescents, 34 Anthropology & Educ. Q. 231, 244 (2003). For example, across a series of interviews with Latino adolescents, researchers found that “the theme of exemplary adult role models as sources of inspiration and pride was consistent,” and the students “could articulate *15 many of the functions served by role models [e.g., inspiration, guide to achieving goals and dreams].” Id. The limiting factor seemed to be adolescents’ “limited networks,” which “left them often perplexed as to who they could identify as models.” Id. In other words, role models exert a powerful influence on Latino youth, but there are simply too few of them. By seeking a critical mass of Latino students, UT’s admissions plan helps to increase the number of potential Latino role models in the community.

Moreover, as this Court has recognized, “education ... is the very foundation of good citizenship.” Brown v. Bd. of Educ, 347 U.S. 483, 493 (1954). Meaningful representation of qualified Latino students at Texas’s flagship university lays the groundwork for increased Latino participation in and engagement with civic affairs. In this way, UT’s plan serves not just the students who attend the University, but the broader community as well.

B. Leadership Potential

Universities serve as the “training ground [s]” for our nation’s leaders. Grutter, 539 U.S. at 332. As this Court noted in Grutter, this is especially true of “highly selective” schools. Id. As with the University of Michigan, UT is the gem of Texas’s higher education system. Its undergraduate programs consistently rank among the best in the nation. See Univ. of Tex. at Austin, Rankings & Kudos. Among the nation’s leaders who count themselves as UT alumni *16 are Texas Senator Kay Bailey Hutchison, former Secretary of State James Baker, former First Ladies Laura Bush and Claudia “Lady Bird” Johnson, and Supreme Court Justice Tom Clark.

“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” Grutter, 539 U.S. at 332. UT recognizes the need for a diverse classroom environment to prepare its students adequately to assume the roles of leaders in Texas. In fact, its pursuit of diversity in admissions was explicitly adopted, among other things, to “develop the next generation of leadership, with the understanding and expectation that many of the University's graduates will become future leaders of Texas.” JA 365a.

Latinos comprise 37.6% of the population of Texas. See U.S. Census Bureau, The Hispanic Population: 2010, at 6 tbl.2 (2011). The Latino contingent of Texas’s federal congressional delegation, however, is only 17.6%. Compare Nat’l Assoc, of Latino Elected Officials (NALEO), 2011 National Directory of Latino Elected Officials, at 134-35 (six Latino congressmen), with U.S. House of Representatives, Directory of Representatives (32 House seats). Representation *17 at the state level is also disproportionately small: Latinos comprise 20.7% of Texas’s Representatives (31 of 150) and 22.6% of its Senators (7 of 31). Compare NALEO, supra (Latino elected officials), with The Senate of Tex., Texas Senators of the 82nd Legislature (31 Senators) and Texas House of Representatives, About Us (150 Representatives). With state and local positions aggregated, Latino representation shrinks to only 7.3%. See Louis DeSipio, Latino Voters: Lessons Learned and Misunderstood, in The Unfinished Agenda of the Selma-Montgomery Voting Rights March 135, 139 (2005). A critical mass of talented Latino students at UT is necessary to ensure that Latinos are among our nation’s leaders and that all leaders are exposed to the wide range of viewpoints from the communities that they serve.

C. Military Leadership
In addition to the benefits that flow from diversity in higher education, the Court in *Grutter* recognized that a "'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its princip[al] mission to provide national security.' " 539 U.S. at 331 (quoting military brief). The Court explained that the nation's "most selective institutions must remain both diverse and selective" so that Reserve Officers Training Corps and the military *could* continue to "train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.*

Since 1985, the Latino population in the military has "more than doubled." U.S. Army, *The Changing Profile of the Army: FY08*, at 9 (2008); see also Karin De Angelis & David R. Segal, *Minorities in the Military*, in *The Oxford Handbook of Military Psychology* 325, 334 (Janice H. Laurence & Michael D. Matthews eds., 2012) (noting that "increased accession numbers of Hispanics are beginning to fill the manpower void left by the declining numbers of African Americans"). As this growth continues, Latino military leadership may well be necessary to help retain and lead the military's significant Latino enlisted contingent. Retaining a Latino presence in the military may thus depend on increasing the officer corps, which has always been the highest educated segment of the military. *Id.* As a recent report on diversity *in* the military explained, "[d]uring the Vietnam War, the lack of diversity in military leadership led to problems that threatened the integrity and performance of the Nation's military ... because servicemembers' vision of what is possible for their career is shaped by whether they see individuals *with similar backgrounds* excelling and being recognized in their Service." Military Leadership Diversity Comm'n, *From Representation to Inclusion: Diversity Leadership for the 21st-century Military*, at 11 (Exec. Summary 2011) (emphasis added).

Despite the importance of a diverse officers corps, Latinos comprise a substantially higher percentage of enlisted active duty personnel than they do of officers. In 2006, across the entire military, Latinos accounted for 11.2% of enlisted personnel, but only 4.9% of officers. See Mady Wechsler Segal & David R. Segal, *Population Reference Bureau, Latinos Claim Larger Share of U.S. Military Personnel* (2007). *Id.* Latinos are underrepresented among officers, but, "considering their lower educational attainment and their naturalization status," they are overrepresented among enlisted personnel. *Id.* Indeed, the Army reported that, in 2008, Latinos constituted 11.9% of enlisted active duty soldiers but only 5.5% of officers, see U.S. Army, *Army Demographics: FY08 Army Profile* (2008). *Id.* and explained *20* that a "barrier for Hispanics entry in the Army is often related to lack of educational credentials," U.S. Army, *The Changing Profile of the Army*, *supra*, at 9.

These figures are not improving. In the 2011 Army, the Latino contingent stood at 13% of active duty soldiers, but only 8% of warrant officers and 6% of commissioned officers. U.S. Army, *Army Demographics: FY11 Army Profile* (2011). *Id.* By contrast, 60% of the enlisted population, 62% of warrant officers, and 72% of commissioned officers were white. *Id.*

Attaining a critical mass of Latinos at UT and other selective schools is essential to ensuring that the military officer corps is diverse and meets the military’s needs. UT has already established itself as a robust training ground for our nation's military with longstanding ROTC programs - the Naval ROTC was established at UT in 1940, *Id.* and the Army ROTC has been active on campus since 1947. *Id.* Increased Latino access to these programs will benefit all levels of the military.

D. Private Sector

Latinos are underrepresented in other leadership-oriented and professional careers, and in the *21* college pipeline that leads to such opportunities. In *Grutter*, this Court emphasized that a diverse educational background prepares *all* students to enter the modern job market and to meet the needs of modern industry. "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330-31. The Court approvingly cited the viewpoints of *amicus* *Fortune* 500 companies, which included several of Texas’s largest and most prominent employers, such as Dow Chemical, Shell Oil, and American Airlines. *Id.* Those *amicus* explained that having employees educated in a diverse environment allows companies to serve an increasingly diverse customer base, and also facilitates cross-cultural interactions with business partners. See Brief for 3M et al. as
1. Professional Career Paths and Diversity in the College Classroom

An educated Latino community is particularly important for Texas and the nation. In today’s economy, a college degree continues to become increasingly important. See Barbara Schneider et al., Barriers to Educational Opportunities for Hispanics in the United States, in Hispanics and the Future of America, at 211 (Marta Tienda & Faith Mitchell, Nat’l Res. Council of the Nat’l Academies, ed. 2006). But again, fewer Latinos attend college than whites. Consequently, in the private sector, *22 just as in the military, Latinos occupy more low-level positions. While Latinos make up 14.3% of the total population of employed civilians over 16, they comprise only 7.3% of employees in management, professional, and related occupations. See U.S. Census Bureau, The 2012 Statistical Abstract, Labor Force, Employment, and Earnings, at 393 tbl. 616 (2012).

Indeed, nationally nearly twice as many whites as Latinos per capita held management, professional, and related occupations in 2011 - 38.3% versus 19.5%. Bureau of Labor Statistics, U.S. Dep’t of Labor, Labor Force Statistics from the Current Population Survey, Table 10: Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex. And while Latinos serve as 12.6% of sales and office occupation workers, they are overrepresented as 21.3% of service workers (including 32.5% of cooks and 38.5% of dishwashers) and over 40% of laborers in a number of construction-related occupations. U.S. Census Bureau, The 2012 Statistical Abstract, supra, at 394-96 tbl. 616. At the same time, only 3.4% of lawyers are Latino. Id. at 396 tbl. 616.

2. Science, Technology, Engineering, and Math (STEM) and the Careers of the Future

Latino underrepresentation is particularly worrisome in the fields of science, technology, engineering, and math (STEM). These fields are widely recognized to be crucial to future American economic prosperity.*23 See Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, STEM, at 12-17 (2011); see also Jennifer Godinez, How Educators Can Support the High Expectations for Education that Exist in the Latino Family and Student Community, in White Teachers, Diverse Classrooms: Creating Inclusive Schools, Building on Students’ Diversity, and Providing True Educational Equity 256 (Julie Landsman ed. 2011) (“[E]ducation leaders agree that rigorous and equitable educational systems need to be developed within the next 10 years in order to train the human capital required to ensure the United States remains competitive in the global economy.”).

Despite their widely recognized importance, filling these jobs is no easy task. See Shelley DuBois, America’s Science Job Conundrum, CNNMoney (July 15, 2011) (“But even as the number of jobs in the STEM sector increases, there’s a possibility that Americans could struggle to meet the demand.”). A recent report to the President explained that the U.S. will need to produce another million STEM professionals over what it “will produce at the current rate over the next decade if the country is to retain its historical preeminence in science and technology.” President’s Council of Advisors on Science and Technology, Report to the President: Engage to Ex *24 cel: Producing One Million Additional College Graduates with Degrees in Science, Technology, Engineering, and Mathematics, at i (2012). Achieving this goal will require boosting "the number of students who receive undergraduate STEM degrees by about 34% annually over current rates." Id. By 2018, Texas will have 22% more STEM jobs than it did in 2008 - a staggering 91% of them will require postsecondary education and training, and 51% of them will require at least a bachelor’s degree. See Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, STEM, supra, at 47.

Latinos must be part of this critical sector of the workforce. See President’s Council of Advisors on Science and Technology, supra, at 5 (considering minority groups and women “an ‘underrepresented majority’ that must be part of the route to excellence”). For their part, corporations are increasingly recognizing the importance of diverse workplaces. See, e.g., Hispanic Ass'n on Corporate Responsibility, 2011 HACR Corporate Inclusion Index, at 13 (2011) ("Of the total respondents, 72 percent reported having or supporting an internship program specifically geared toward recruiting Hispanics.").
The trend of fewer Latinos attending college than whites unmistakably correlates with the underrepresentation of Latinos in STEM career paths - the less access Latinos have to postsecondary education, the less access they will also have to burgeoning *25 STEM career opportunities. See, e.g., Stanley Litow, A Silent Crisis: The Underrepresentation of Latinos in STEM Careers.34

The data nationally bear out Latinos’ underrepresentation in STEM careers. “Of all workers, 6 percent of white workers and 15 percent of Asian workers are currently working in STEM-related jobs.... Comparatively, only 2 percent of Latinos and 3 percent of African Americans work in STEM fields.” Nat’l Action Council on Minorities in Engineering, Inc., Critical Issues in Engineering Education Policy, 2 Res. & Pol’y (April 2012);35 see also Nat’l Action Council on Minorities in Engineering, Inc., 2011 NACME Data Book: A Comprehensive Analysis of the “New” American Dilemma 4-5 (2011) (“Latinos continue to lag far behind the other major race/ethnic categories in college enrollment” and underrepresented minorities “earned just 13 percent of all engineering bachelor’s degrees in 2009”).36 Changing these figures depends on providing Latinos better access to the education required to perform management and STEM jobs. UT has already proven itself a leader in such initiatives. For instance, its Freshman Research Initiative (FRI), which enrolls one quarter of the class in the College of Natural Sciences, provides mentoring-rich research and publication opportunities for first-year *26 students. See President’s Council of Advisors on Science and Technology, supra, at 88 box G-1. “Early results suggest that student retention in STEM programs is 30 to 35 percent higher for students in the initiative.” Id. Fully 40% of the 500 students participating in FRI are from underrepresented groups, and participating students demonstrate a variety of more positive educational and vocational outcomes. See Univ. of Tex. at Austin, Freshman Research Initiative, College of Natural Sciences, Facts & Numbers.37

Indeed, data suggest that once Latinos actually make it to college, they are as likely as other groups (excepting Asian-Americans) to major in a STEM subject. See David Beede et al., U.S. Dep’t of Commerce, Education Supports Racial and Ethnic Equality in STEM, at 4 fig.3 (2011) (showing, inter alia, that of college graduates, 21% of Latinos, and 22% of non-Latino whites, majored in STEM fields).38 Further, they are nearly as likely to enter STEM careers: the gap between whites and Latinos for those with STEM majors who now have STEM jobs is lower than the gap between whites and Latinos for college degrees generally (34% versus 28% for the former; 35% versus 14% for the latter). Id.

Thus, by attracting and seeking diversity at the college level, and, further, by ensuring rigorous STEM-based educational opportunities, UT’s plan *27 looks forward to the day when “the use of racial preferences will no longer be necessary to further the .... compelling interest in obtaining the educational benefits that flow from a diverse student body.” Grutter, 539 U.S. at 343.

3. The Economic Importance of College Education for the Latino Community

An educated Latino community is important for Texas and its economy in other ways. Both nationally and locally, the domestic consumers for Texas businesses are increasingly Latino. The Texas State Demographer predicts that the Latino population will reach parity with the non-Latino white population in Texas by 2020, and will be more than 50% larger than the white population in 2040. See The Univ. of Tex. at San Antonio, Office of the State Demographer, 2008 Methodology for Texas Population Projections (Feb. 2009).39

As the Latino population continues to increase, so too does its buying power. Already, according to one study, “[i]f it were a standalone country, the U.S. Hispanic market buying power would make it one of the top twenty economies in the world.” Nielsen, State of the Hispanic Consumer: The Hispanic Market Imperative (2012).40 The private sector is in great need of college graduates educated in a diverse environment who understand the needs of the Latino *28 community and who are able to connect with this important community.

At the same time, the success of Texas industry is crucially important to the United States’ international trade. Texas is the state with by far the strongest trading relationship with Mexico: it exports more goods to and engages in more land trade with Mexico than any other state. In 2003, for example, Texas exported $41.5 billion in goods and services to Mexico; the next-largest exporter was California, with $14.9 billion in exports. See Robert W. Gilmer, Fed. Reserve Bank of Dallas, U.S.-Mexico Trade: Are We Still Connected?, El Paso Bus.

In short, the benefits of diversity to the Texas and national economy are “not theoretical but real.” *Grutter*, 539 U.S. at 330; see also Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208 (Apr. 2009) (“[R]acial diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits.”). If UT is to provide its graduates the education they need to thrive in the rapidly changing Texas and national economy, the University must educate its students in a diverse classroom environment that includes a critical mass of Latino students.

III. TEXAS'S CONTINUING INSTITUTIONAL BARRIERS TO LATINOS CANNOT BE IGNORED

With the Latino population ever increasing and now accounting for over fifty percent of the students enrolled in Texas public schools, Latinos' potential for contributing substantially to society cannot be overlooked. UT recognizes this growing pool of qualified Latino applicants and how they factor into not only the current school setting, but also into the future workforce and leadership in Texas and the Nation. Nevertheless, Texas Latinos still struggle to attain the American dream. This is not surprising given the persistent institutional barriers faced by *v.*30 Latinos. Although the TTP law has undoubtedly helped create access to higher education for some Latinos, the TTP plan cannot possibly account for all of the nuanced challenges that Latino youth must overcome just to apply to a university like UT. And while *amici* do not contend that UT should implement its race-conscious admissions plan as a remedy to the persistent unequal treatment of Latinos in Texas, the following history shows contextually how much further UT and Texas have to go to ensure that Texas's fastest growing group has equal opportunities to succeed and participate fully as citizens. As this Court held in *Grutter*, “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” 539 U.S. at 332.

Latinos continue to face numerous obstacles in Texas, many of which taint their educational experience. They must overcome risk factors such as poverty, quality of health, family structures, and high dropout rates - a crisis that bears heavily on the group’s ability to participate meaningfully in society and in the country’s political process. To understand how institutional barriers persist, one cannot overlook what this Court has described as Texas’s “long, well-documented history of discrimination *v.*31 that has touched upon the rights of African Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (quotation omitted).

A. Overcoming Past Discrimination In Texas Public Schools

As this Court recognized in *Perry*, Texas's history of discrimination has been long and pervasive. Historical discrimination has been particularly virulent - and has had particularly significant lasting effects - in the area of education. By the 1920s, school segregation in Texas had “received endorsement not only from the Superintendent of Public Instruction and the state, but from University of Texas scholars as well.” Tijerina Expert Report at 25-26, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. 2012), Dkt. 241-2. Many school districts established “Mexican schools,” and by the 1930’s, 90% of South Texas schools were segregated. See Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307 (1972). Through the early twentieth century, districts intentionally channeled Latino students into substandard “Mexican” and “migrant” schools. See Kristi L. Bowman, *The New Face of School Desegregation*, 50 Duke L.J. 1751, 1769 (2001).

Latinos were forced to challenge the segregation and educational inequities in courts across Texas. See, e.g., *Delgado v. Bastrop Indep. Sch. Dist.*, No. 388 (W.D. Tex. June 15, 1948); *Cortez v. Carrizo* *v.*32 *Springs Indep.*
Despite *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hernandez*, Latinos continued to be denied equal educational opportunities in Texas. School districts often clustered African-American students with “white” Latino students, in order to claim that neither group was segregated. Indeed, not until *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), did the courts hold that *Brown* clearly prohibits the segregation of Latino students into racially isolated schools with African-American students, while leaving white students unaffected.

Even after *Cisneros*, Latino students continued to experience significant discrimination in Texas schools throughout the twentieth century and up until the present. Indeed, several school districts *33* across Texas remain subject to desegregation orders today. *See United States v. Texas*, 601 F.3d 354 (5th Cir. 2010). And even though formal segregation is no longer legally sanctioned, many Latino students continue to attend largely *de facto* segregated districts, which have effectively replaced the old “Mexican schools.” *50* Nationally and across every region, a typical Latino student attends a school that is less than one-third white. *See* Eric Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 44 (2003). Seventy-six percent of Latinos *34* attend predominantly minority schools, more than any other group. *Id.* at 33. Latinos attending intensely segregated schools, defined as schools with 90 to 100 percent minority enrollment, grew from 462,000 in 1968 to 2.86 million in 2000, comprising 46.9 percent of all Latino students in Texas. *Id.* at 33, 52.

**B. Overcoming Current Institutional Barriers In Education**

The serious educational disadvantages borne by Latinos are exacerbated by low socio-economic status. In multiple studies, the U.S. Department of Education has found that student achievement is adversely affected by poverty, *52* a significant problem for Latinos because of their disproportionately high poverty rates. *See* U.S. Census Bureau, Poverty, *Highlights* (2011) (26.6 percent of Latino families below poverty level). *53* In each of the Texas counties with large Latino populations, Latinos have lower educational attainment levels, lower income levels, and a higher poverty rate than non-Latinos. This is *35* true even when controlling for various demographic differences. *See* Chapa Expert Report at 4, *Perez v. Perry*, No. 11-cv-360, Dkt. 128-5 (W.D. Tex. Aug. 8, 2011; *see also id.* at Dkt. 128-10, tbls. 4-6. Additionally, the educational system has been largely unresponsive to the needs of Latino students, leading to high Latino attrition and dropout rates. *See* Intercultural Dev. Research Ass'n, *Attrition and Dropout Rates in Texas*. *54*

And although *amici* do not posit that standardized college entrance exams should be excluded for admission purposes, a rigid use of these tests for admissions, as petitioner requests, will eliminate academically promising minority and low-income students who apply with strong academic records, as well as other talents that contribute to the academic environment, but relatively low SAT scores. *55* This is especially true for Latinos, who have lower performance rates on college-readiness tests than do white students. *56*

*36* Despite the past discrimination and institutional barriers confronting Latinos in education, they are persevering and becoming qualified candidates for college in large part because universities like UT have begun to open their doors. It is not only important for their future but also for that of greater Texas and the nation. As the former Texas State Demographer predicts, if existing gaps between whites and minorities in educational attainment levels and household income persist, Texas will:

have a population that would be poorer, less well educated, and more in need of numerous forms of State services than its present population but would be less able to support such services. It would have a population that is likely to be less competitive in the increasingly international labor and other markets of the world.... [But] if socioeconomic differentials between demographic groups were to be reduced through
increased education and other means, Texas population growth could be a source of increased private- and public-sector resource growth.


While much progress has been made by Latinos, there is still a long way to go. As Justice Kennedy noted in Parents Involved, the “enduring hope is that race should not matter; the reality is that too often it does.” 551 U.S. at 787 (Kennedy J., concurring). Texas is no different. UT’s narrow use of race in a holistic, individualized manner to fulfill its compelling interest in diversity is an appropriate response.

*38 CONCLUSION

The judgment below should be affirmed.

Footnotes

1 No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties’ letters consenting to the filing of amicus curiae briefs have been filed with the Clerk’s office.

2 Petitioner’s argument that the race-neutral TTP law had helped restore UT’s enrollment to levels for Latino and African-American students that had been achieved prior to Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), and therefore foreclosed UT’s consideration of race, fails for at least two reasons. First, petitioner is wrong to assume that pre-Hopwood admitted classes ever included a diverse pool of students sufficient to fulfill UT’s mission. Second, petitioners ignore the fact that the increase in minority student enrollment at UT likely reflected the huge increase in Latino and African-American students enrolling in Texas public schools since the Hopwood decision in 1996. The two student groups comprised 97% of the total student growth. See West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley, No. GV-100528, 2004 WL 5719215 (Tex. Dist. Nov. 30, 2004) (Finding of Fact 68).

3 In these circumstances, students report that they rely on campus organizations for support. For example, one Latina student, the leader of the Longhorn League of United Latin American Citizens, explained that her organization was inspired to create on-campus annual leadership summits to recruit high school students into higher education “because of the lack of Latino and other minority students at the University.” Miriam Arellano Decl. at 2, Dkt. No. 72-1 (Ex. 4 to Motion to Intervene).

4 UT administrators have echoed these findings. For example, Bruce Walker, Director of Admissions at UT-Austin, testified that underrepresented minority students reported feeling isolated and that there was insufficient diversity. JA 267a-68a.

5 At the time UT considered adding race for underrepresented groups as a nonpredominant factor among many others, Latino students comprised only fourteen percent of the enrollment. SJA 25a.

6 The TTP program is itself race-neutral, and no one disputes its constitutionality.

But see Grutter, 539 U.S. at 336 (finding that, “[t]o the contrary, the Law School’s admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these [daily] reports”).


In fact, UT’s consideration of race is not limited to Latino and African American students, but also may be considered for other races, including white students. App. 134a.

11 Available at http://www.pewhispanic.org/files/reports/141.pdf. Low Latino voter registration and turnout can be attributed in part to Texas’s continuing history of discrimination in voting. Nearly forty years ago in White v. Regester, 412 U.S. 755 (1973), this Court recognized that discrimination created barriers that made it extremely difficult for native-born Latinos in Texas to participate in the political process. Id. at 768. As recently as 2006, this Court concluded that Texas had discriminated against Latinos in congressional redistricting. See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440 (2006) (Kennedy, J.) (“In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it.”). And Texas has not ceased enacting laws that create barriers to voting for Latinos. See, e.g., Perez v. Perry, No. 11-ca-360, Dkt. 60, at 11-12 (W.D. Tex. July 19, 2011) and Perez v. Perry, No. 11-ca-360, Dkt. 691, at 36-39 (W.D. Tex. Mar. 19, 2012) (three-judge panel altering temporarily Texas redistricting plans in Voting Rights Act challenge by Latino voters).


15 Available at http://www.utexas.edu/about.ut/rankingskudos.


17 Available at http://www.house.gov/representatives/#state_tx.

18 Available at http://www.senate.state.tx.us/75r/Senate/Members.htm (UT graduates comprise eleven (35%) of the state senators).

19 Available at http://www.house.state.tx.us/about-us/ (UT graduates comprise forty-one (27.3%) of the state representatives).

20 Available at http://www.armygl.army.mil/hr/docs/demographics/changing%20profile%20report%20december%202008.pdf.

21 See, e.g., U.S. Army, Careers & Jobs: Become an Officer, available at http://www.goarmy.com/careers-and-jobs/become-an-officer.html (listing “the four paths to becoming a commissioned officer,” all of which require a college degree); see also Kizzy M. Parks et al., Latina Perceptions of Diversity Climate in the Military (2009), available at http://www.deoml.org/EOEEOResources/documents/Latina_Peceptions_of_Diversity_Climate_in_the_Military-Parks.pdf (“[D]iversity climate was linked to job satisfaction and organizational commitment .... As job satisfaction and organizational commitment are strongly linked to retention and turnover for minorities - and Hispanics in particular - the military should ... build upon Latinas' strong sense of community in recruiting and retention efforts by emphasizing that the military is a large, but close-knit family that takes care of the individual by providing fair treatment and personal development opportunities.”).


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Univ. of Tex. at Austin, Naval Reserve Officer Training Corps, available at http://www.utexas.edu/cola/depts/navymarine/.
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Univ. of Tex. at Austin, Texas Army ROTC Longhorn Battalion, available at http://www.utexas.edu/cola/depts/arotc/.
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Available at http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf.
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Available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-engage-to-excel-final_feb.pdf.
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Available at http://www.edweek.org/ew/articles/2008/07/18/44litow-com_web.h27.html.
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Available at http://fri.cns.utexas.edu/about-fri/facts-numbers.
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Although the old “Mexican Schools” no longer exist, similar patterns of segregating Latino students on the perceived basis of language proficiency have been found even today. In Dallas, four years after being removed from a school desegregation order, a federal district court found that an elementary school principal intentionally segregated Latino students by race, using language as a proxy. See Santamaria v. Dallas Indep. Sch. Dist, 2006 U.S. Dist. LEXIS 33195 (N.D. Tex. May 17, 2006).

Available at http://pages.pomona.edu/~vis04747/h21/readings/AreWeLosingtheDream.pdf.

For example, on the National Assessment of Educational Progress reading scale (ranging from 0 to 500), high poverty students (75-100% eligible for free or reduced-price meals) on average performed 40 points lower than low poverty student populations (0-25% eligible for the meal program). Similar patterns exist on the mathematics scale. See Nat'l Ctr. for Educ. Statistics, U.S. Dep’t of Educ, NAEP Data Explorer: National Assessment of Educational Progress, Selected Years, 1998-2009, Reading & Mathematics Assessments, available at http://nces.ed.gov/nationsreportcard/naepdata/.

Available at http://www.census.gov/hhes/www/poverty/about/overview/index.html.

Available at http://www.idra.org/Research/Attrition (in 2010-2011, 110,804 Texas high school students were lost to attrition. The racial gap between Latino and white students was 23%).


See Div. of Research & Analysis, Tex. Educ. Agency, College Admissions Testing of Graduating Seniors in Texas High Schools Class of 2010 (2011), available at http://www.tea.state.tx.us/acctres/sat_act_index.html. For example, the average SAT and ACT scores decreased as the percentage of Latino students making up the student body increased: when between 20 and 30 percent, average scores were 1034 (SAT) and 22.1 (ACT); but when over 50 percent, the averages were 920 (SAT) and 18.6 (ACT). Moreover, Latino students had a 38.4% participation rate for the SAT, while white students had a rate of 53.6%, and Latino students had a 26.6% participation rate for the ACT, while white students had a rate of 37.7%.


2012 WL 3527821 (U.S.) (Appellate Brief)

Background:

This Brief, submitted by the nation’s leading selective private universities and colleges, argues that diversity, after Grutter, remains a compelling educational interest for the University of Texas as well as the Authors. Further, the Brief argues that race-neutral policies are not, under Grutter, the only means that meet constitutional muster for achieving diversity. More importantly, the Authors take the position that, contrary to Petitioner Abigail Fisher, that the Court has never applied a “strong basis in evidence” standard to the “unique context of higher education,” and further, that it should not change precedent and apply one in this case or others like it.
*6 ARGUMENT

I. This Court Should Reaffirm Grutter's Core Holdings That Diversity Is A Compelling Interest And That Universities May Pursue Diversity Without Relying Upon Ostensibly Race-Neutral Alternatives That Would Undermine Other Important Aspects Of A University's Mission

A. Diversity Remains A Compelling Educational Interest For Amici Institutions

Justice Powell recognized in Regents of University of California v. Bakke, 438 U.S. 265 (1978), and this Court held unequivocally in Grutter v. Bollinger, 539 U.S. 306, 328 (2003), that universities "ha[ve] a compelling interest in attaining a diverse student body." The Court in Grutter further underscored that the educational benefits of diversity are "substantial" and "not theoretical but real." Id. at 330. These are points to which Amici can attest without qualification. Decades of experience with admissions policies based on the Harvard Plan, Bakke, and Grutter have convinced them that the quality of their students' education is greatly enriched if the student body is diverse in many ways - including racial and ethnic diversity. Diversity encourages students to question their assumptions, to understand that wisdom and contributions to society may be found where not expected, and to gain an appreciation of the complexity of the modern world. In these ways, diversity bolsters the unique role of higher education in "preparing students for work and citizenship" and training "our Nation's leaders" for success in a heterogeneous society. Id. at 331, 332; see Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 783 (2007) ("Diversity ... is a compelling educational goal that a school district may pursue.") (*7) (Kennedy, J., concurring in part and concurring in the judgment).

Petitioner does not ask this Court to abandon Grutter's holding on this score. See, e.g., Pet. Br. 26 ("Grutter ... permits race to be used as a factor in admissions decisions to obtain a 'critical mass' of otherwise underrepresented minority students for educational reasons."); JA74a. That acknowledgment is exceptionally important to Amici. The admissions policies of Amici vary somewhat, but each is firmly committed to individualized, holistic review of the type long approved of by this Court. In deciding which students to admit, Amici consider all aspects of their applicants both as individuals and also in relation to other potential members of the incoming class. That review is intended to produce a student body that is talented and diverse in many ways, including in intellectual interests, geography, socio-economic status, background and experience (including race and ethnicity), perspective, and areas of accomplishment.

1. In pursuing an academically excellent and broadly diverse student body, Amici do not place dispositive weight on objective numerical measures such as *8 GPA and SAT scores. Certainly, Amici seek students who have the potential to succeed at demanding coursework, but each institution's applicant pool includes many more academically strong candidates than the institution could hope to admit, and even the highest GPA or SAT scores by no means guarantee admission. Thus, in addition to seeking students who are qualified, each institution also looks to compose a student body that is exceptional, complementary, and diverse in many ways. In service of this goal, each institution seeks, and invites applicants to submit, any relevant information about their experiences, accomplishments, and background to understand how the applicant might contribute to the vibrancy of the student body. The individualized, holistic review processes employed by Amici are not ways of ranking candidates from "strong" to "weak" but instead means to assemble an exceptional undergraduate community that exposes *9 students to differences of many kinds: backgrounds, ideas, experiences, talents, and aspirations.

Amici's admissions policies are based on the principle that, in a free society, inquiry proceeds best when views and goals must withstand examination from the widest possible range of perspectives. And Amici's experiences bear this out: A student body that is diverse in many dimensions, including racial and ethnic background, produces enormous educational benefits. Such diversity significantly improves the rigor and quality of students' educational experiences by leading them to examine and confront themselves and their tenets from many different points of view. It also prepares them for life, work, and leadership in a nation and world that are constantly becoming more complex.
This diversity benefits society as well, for it fosters the development of citizens and leaders who are creative, collaborative, and able to navigate deftly in dynamic, diverse environments. Indeed, the university plays a unique and critical role in this respect, for in our society a university educational experience may offer one of the few opportunities for individuals to live and interact on a daily basis with peers from markedly different backgrounds, experiences, and perspectives. As one university president has explained: Princeton also offers you a once-in-a-lifetime opportunity to connect with men and women whose lives have differed dramatically from your own; who view the world from a different vantage point. Never again will you live with a group of peers that was expressly assembled to expand your horizons and open your eyes to the fascinating richness of the human condition. ... The reason [the Admission Office] took such *10 care in selecting all of you - weighing your many talents, your academic and extracurricular interests, your diverse histories - was to increase the likelihood that your entire educational experience, inside and outside the classroom, is as mind-expanding as possible. When you graduate you will enter a world that is now truly global in perspective, and in which success will require that you have a cosmopolitan attitude. You must be equipped to live and work in not one culture, but in many cultures.


Like this Court, Amici look forward to the day when race does not matter. See Grutter, 439 U.S. at 343 (anticipating that “25 years from now, the use of racial preferences will no longer be necessary to further the interest” in diversity); id. at 346 (Ginsburg, J., concurring) (“one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action”). But for now, “the reality is that” “race [does] matter[].” Parents Involved, 551 U.S. at 787 (Kennedy, J., concurring in part *11 and concurring in the judgment); accord Grutter, 539 U.S. at 332-333. To say that race continues to matter is to acknowledge forthrightly that, for many reasons - including the frustrating persistence of segregated schools and communities - race continues to shape the backgrounds, perspectives, and experiences of many in our society, including Amici’s students. See, e.g., Parents Involved, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) (“Due to a variety of factors ... neighborhoods in our communities do not reflect the diversity of our Nation as a whole.”).

For many students, a university may be the first place in which they are exposed to others whose backgrounds are markedly different from their own. Through that exposure, students are encouraged to question their own assumptions and biases and to appreciate the complexity of our society and the world. In Amici’s judgment, such exposure will hasten the arrival of the day when race no longer matters.

2. Abandoning Grutter’s compelling-interest holding would significantly impair the ability of Amici to fulfill their educational missions. It would also call into question Amici’s ability to use individualized, holistic admissions at all. The structure of that review requires that Amici obtain and review copious information regarding the characteristics, life experiences, accomplishments, and talents of each applicant, to assess both the applicant’s academic potential and the contribution that the applicant may make to the class as a whole. Such an application process should allow - indeed encourage - applicants to provide any information about themselves, including their background, that the applicant *12 thinks relevant. If an applicant thinks his or her race or ethnicity is relevant to a holistic evaluation - which would hardly be surprising given that race remains a salient social factor - it is difficult to see how a university could blind itself to that factor while also gaining insight into each applicant and building a class that is more than the sum of its parts.

Nor is it at all apparent why universities should, at this point in our nation’s evolving understanding of race, be forced to will ignorance with respect to race. As this Court has recognized, race continues to influence our experiences. See Parents Involved, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment); accord Grutter, 539 U.S. at 332-333. In view of that reality, as well as the history and purposes of the Equal Protection Clause, it would be extraordinary to conclude at this time that race is the single characteristic that universities may not consider in composing a student body that is diverse and excellent in many dimensions, not just academically. Cf. Shaw v. Reno, 509 U.S. 630, 679 (1993) (Stevens, J., dissenting) (“If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members,
for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do to
the same thing for members of the very minority *13 group whose history in the United States gave birth to
the Equal Protection Clause.

Finally, the societal reliance interests on Bakke and Grutter counsel against any precipitous abandonment of
In the 34 years since Bakke and the nine years since Grutter, Amici and other selective universities have
undertaken a wide range of measures to encourage minority applications and to expand minority admissions.
The principle that diversity is a compelling interest, announced in Bakke, widely followed in practice, and
affirmed in Grutter, has provided the framework and foundation for these efforts. The reliance interests of
universities, applicants, students, high schools, businesses, and other social actors and institutions on this
Court’s jurisprudence are substantial. Absent some “special justification” - which is not present here -
principles of stare decisis require continued adherence to Grutter. See Dickerson v. United States, 530 U.S. 428,
443 (2000) (“even in constitutional cases, [stare decisis] carries such persuasive force that we have always
required a departure from precedent to be supported by some special justification” (internal quotation marks
omitted)).

*14

B. Mechanistic, Ostensibly Race-Neutral Policies Are Not Constitutionally Required Alternatives For Achieving
Diversity

In addition to holding that diversity is a compelling interest, this Court in Grutter firmly rejected the view that
universities must choose between maintaining “excellence or fulfilling a commitment to provide educational
opportunities to members of all racial groups.” 539 U.S. at 339. The Court declined to hold, as the Solicitor
General pressed, that universities must first try mechanistic measures - such as the Texas 10% Plan, which
itself depends upon the existence of segregated schools - before it may adopt race-conscious admissions
policies. The Court was clear that strategies that “require a dramatic sacrifice of diversity, the academic
quality of all admitted students, or both” are not constitutionally required. Id. at 340.

Petitioner is not challenging that aspect of Grutter. See Pet. Br. 35 n.9 (“unlike in Grutter, Petitioners [sic] are
not attempting to force a percentage plan upon Respondents”). She therefore is not advocating a rule *15 that
universities must first attempt mechanistic, race-neutral alternatives in pursuing a diverse student body. This
concession is crucial to Amici: Mechanistic admissions plans, whether based on guaranteed admissions or
other “objective” numerical criteria, would be at war with the educational missions of Amici and unworkable.
As this Court explained in Grutter, guaranteed admissions plans are not desirable race-neutral alternatives
for many universities because they “preclude the university from conducting the individualized assessments
necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued
by the university.” 539 U.S. at 340. For Amici, the assumption embodied in mechanistic alternatives - i.e., that
objective numerical measures are the only or even the best measure of an applicant’s potential - is profoundly
misplaced. As we have explained, Amici rely on individualized, holistic review designed to assess the
qualifications of the whole applicant, as well as how the applicant would contribute to fulfilling the
educational missions of the institution.

Mechanistic proposals like the Texas 10% Plan are also completely impracticable. Amici receive applications
from far more applicants qualified by objective measures than they could hope to admit. See supra n.3.
Beyond that, Amici have nationally and internationally based student bodies at the undergraduate and
graduate level. In the United States alone, there are more than 24,000 public secondary schools and more
than 2,700 private secondary schools in addition to more than 14,000 combined elementary and secondary
schools. See Snyder & Dillow, Digest of Education Statistics 2011 tbl. 5 (June 2012), available at
http://nces.ed.gov/pubs2012/2012001.pdf. Were each Amicus to guarantee admission to just the top
student *16 at each of the nation’s secondary schools, that would require admitting many more than 20,000
students. Even if only 20 percent of those students matriculated, a class of 4,000-plus students would easily
exceed any one of Amici institution’s educational resources.7 Apart from that basic math problem, guaranteed
admissions policies would raise profound difficulties with respect to international students and at the
graduate level. See Grutter, 539 U.S. at 340 (noting the United States did not “explain how [percentage] plans
could work for graduate and professional schools”). Again, however, even if these plans were somehow
workable for Amici (they are not). Amici would never voluntarily choose to structure their admissions policies in such a mechanistic fashion and with such a focus on a few quantitative measures.

Amici do extensively consider a wide range of race-neutral factors in seeking to compose broadly diverse and excellent student bodies. For example, Amici consider whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home. Amici also engage in substantial outreach and recruiting efforts aimed at increasing the size and diversity of the applicant pool. Furthermore, Amici have adopted financial aid policies designed to enable a wide variety of admitted students from all backgrounds to attend. These efforts have played an important role in contributing to the diversity, including racial and ethnic, of the student bodies of Amici institutions. But racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity of the type approved of by Grutter. See, e.g., Minow, After Brown: What Would Martin Luther King Say?, 12 Lewis & Clark L. Rev. 599, 636 n.192 (2008) (collecting studies showing that reliance on socioeconomic status as an admissions factor alone cannot produce racial diversity)

For these reasons, the Court should reaffirm, and in no way retreat from, the principle of Grutter, that the Constitution does not require the use of mechanistic, race-neutral policies before race-conscious admissions approaches may be used.

II. Petitioner’s Arguments Regarding The Application Of Strict Scrutiny Are Deeply Flawed

Petitioner argues that UT’s consideration of race in admissions does not satisfy strict scrutiny. UT ably defends the specifics of its admissions system in its brief. Amici write to emphasize that petitioner’s arguments amount to a backdoor effort to drain Grutter of meaning and would significantly unsettle this Court’s equal protection jurisprudence, on which Amici and many other universities have relied. Specifically, petitioner’s apparent view that Parents Involved, rather than Grutter, governs this case is fundamentally misplaced; petitioner’s understanding of the scope and nature of the educational benefits of diversity is unfounded; and petitioner’s call for a strict-basis-in-evidence standard to review the use of holistic, individualized admissions processes in higher education finds no support in this Court’s precedent and would have highly detrimental implications.

Before proceeding, Amici wish to underscore a crucial threshold point. No Amicus employs race or ethnicity as a classification in its admissions policies; no seats in the class are reserved to applicants of any race or ethnic background, nor are applicants of any race or background limited to a certain number of places. Rather, Amici’s admissions policies, by considering myriad factors including race and ethnicity, are designed to foster excellence through the admission of a class diverse in multiple dimensions. In this way, Amici’s policies are influenced by the Harvard Plan approved by Justice Powell in Bakke and this Court in Grutter. Many universities have adopted or reaffirmed such policies in the wake of Grutter. In light of this commitment to individualized, holistic review, Amici consider race and ethnicity with extraordinary care and in the most limited fashion necessary to contribute meaningfully to the diversity of their student body. Imposing judicial constraints on such review beyond those set forth in Grutter therefore would risk depriving Amici of the ability to compose academically excellent and diverse student bodies that remain vital to achieving Amici’s educational missions. See Grutter, 539 U.S. at 326-327 (“Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (“dispell[ing] the notion that strict scrutiny is strict in theory, but fatal in fact” (internal quotation marks omitted)).

*19 A. Petitioner's Reliance On Parents Involved Is Unavailing

At nearly every step of petitioner’s argument, she places heavy, if not exclusive, reliance on Parents Involved. That reliance is wholly misplaced. This Court has been clear that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,” Grutter, 539 U.S. 327, and the differences between Parents Involved and this case are stark. In view of the important guidance provided in Grutter with respect to structuring narrowly tailored admissions policies - guidance on which Amici and others have
heavily relied - this Court should reject any suggestion that Parents Involved, rather than Grutter, governs review of individualized, holistic admissions processes in the context of higher education.

1. In applying narrow tailoring in Grutter, this Court identified the “hallmarks of a narrowly tailored [admissions] plan.” 539 U.S. at 334. Those hallmarks are that an “admissions program cannot use a quota system”; an admissions program “may consider race or ethnicity only as a plus in a particular applicant’s file, without insulating the individual from comparison with all other candidates for the available seats”; and an admissions program must be “flexible enough to consider all pertinent elements of diversity in the particular qualifications of each applicant.” Id. (internal quotation marks and brackets omitted). The Court found that the program at issue in Grutter satisfied those requirements because, among other things, the law school “engage[d] 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.” Id. at 337.

*20 There is a wide gulf between that form of review and the assignment policies at issue in Parents Involved. Under the latter, race was a binary factor: One plan “classify[d] children as white or nonwhite,” while the other classified children “as black or ‘other.’” 551 U.S. at 710; see id. at 723 (“Even when it comes to race, the plans here employ only a limited notion of diversity[.]”). For each plan, moreover, race was effectively the entire classification at issue, and it was applied in a “crude” fashion that failed to give consideration to any other characteristics of students. See id. at 789 (Kennedy, J., concurring in part and concurring in the judgment). What is more, the assignment plans were challenged by parents of children “denied assignment to particular schools ... solely because of their race.” Id. at 710-711 (emphasis added).

The plans at issue in Parents Involved bear no meaningful resemblance to the individualized, holistic review used by Amici and endorsed in Grutter. Justice Kennedy, for example, expressly distinguished Gratz and Grutter on the ground that, unlike the challenged policies before the Court in Parents Involved, those cases addressed a “system where race was not the entire classification.” 551 U.S. at 792-793. Justice Kennedy further contrasted the assignment plans at issue with Grutter-like plans that would give “nuanced, individual evaluation of school needs and student characteristics that might include race as a component.” Id. at 790. And the majority opinion drew precisely the same distinction in comparing Grutter with the policies at issue. See id. at 722 (“The entire gist of the analysis in Grutter was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.”); id. at 723 (“under each plan[,] when race comes into play, it *21 is decisive by itself and not simply one factor weighed with others in reaching a decision, as in Grutter”).

In short, both the majority opinion and Justice Kennedy’s concurring opinion in Parents Involved took pains to emphasize a distinction between policies in which race (applied as a black/white binary distinction) is effectively the entire classification and those in which race and ethnicity are but single factors as part of individualized, holistic review. The Court in Parents Involved was clear that the plans before it were “not governed by Grutter,” 551 U.S. at 725, and the inverse is true here: Grutter, and not Parents Involved, continues to supply the appropriate benchmarks for assessing the constitutionality of admissions policies of universities, such as Amici, that are structured on Grutter and the Harvard Plan.

2. This basic distinction disposes of petitioner’s argument (at 38-41) that the use of race is unconstitutional when it has an insubstantial effect on actual admissions decisions. To be sure, Justice Kennedy in Parents Involved observed that “it is noteworthy that the number of students whose assignment depends on express racial classifications is limited.” 551 U.S. at 790. Those “small number of assignments affected,” he reasoned, “suggest[ed] that the schools could have achieved their stated ends through different means,” including “facially race-neutral means ... or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.” Id. The upshot of Justice Kennedy’s analysis, as the Fifth Circuit noted below, was that a state actor, when faced with a racial classification that has little effect in practice, should instead use race-neutral measures or Grutter-like policies that evaluate, *22 in an individualized, holistic manner, a number of factors, including race and ethnicity. See Pet. App. 70a.

Contrary to petitioner’s insistence, nothing in this Court’s precedents suggests that where race and ethnicity play only a small role (or are single factors among many) in influencing decisions in a Grutter-like admissions system, the use of race and ethnicity becomes unconstitutional. Such a result would defy common sense: That
race and ethnicity, when considered among a multitude of other factors, might have diminishing significance in effecting outcomes should be taken as welcome evidence that a program is carefully crafted to avoid overreliance on race and ethnicity while also achieving a diverse and academically excellent student body.

B. Petitioner Misapprehends The Educational Mission Of Universities And The Role And Benefits Of Diversity

In challenging UT's decision to reinstate a limited use of race in admissions after Grutter, petitioner argues (at 26) that "Grutter ... endorses an inward-facing concept of diversity focused on enhancing the university experience - not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population." To be clear, Amici (apparently like UT) do not seek to *23 attain levels of enrollment that conform to state, national, or international demographics. But petitioner's proposed distinction between the "inward" and "outward" benefits of diversity is inconsistent with the educational missions of Amici and precedent.

Amici's educational missions are broader than petitioner and her amici would acknowledge. Amici insist that students at their institutions will excel at demanding coursework, but their missions extend beyond that singular goal to developing active and engaged citizens equipped to handle the problems of a complex world and in training city, state, national, and international leaders in every field of endeavor, including the arts, government, science, and business. In order to train *24 active citizens and leaders for participation in a diverse nation and world, Amici must be able to compose an appropriately diverse student body.

This Court has long embraced this facet of the educational mission of universities, and has recognized the role diversity plays in advancing it. In Bakke, for example, Justice Powell explained that "it is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 313 (internal quotation marks omitted). Similarly, in Grutter, this Court held that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." 539 U.S. at 332; cf. Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954) (education is "required in the performance of our most basic public responsibilities" and "very foundation of good citizenship").

This understanding of the broad educational mission of universities reveals the basic error in petitioner's insistence (at 27) that any attention to demographics as a factor in assessing diversity is "outright racial balancing." Grutter recognized that universities train leaders and citizens for a heterogeneous society, *25 and that diversity is vital to that function. It stands to reason that a university may pay some attention to the communities from which its students come and into which its students graduate in pursuing those goals.

In Parents Involved, by contrast, the challenged student assignment plans were "tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." 551 U.S. at 726 (plurality opinion) (emphasis added). The plans set a range of enrollment "solely by reference to the demographics of the respective school districts." Id. at 729 (plurality opinion). And as explained above, the programs did not employ individualized, holistic review in order to achieve diversity.

Those considerations are not at issue here, where a university has a pedagogic concept of diversity in mind, and as part of its educational mission also pursues Grutter's approved goal of creating a "path to leadership" and citizenship for a "heterogeneous society." 539 U.S. at 332. Indeed, as explained throughout this brief, producing the next generation of citizens and leaders is a core mission of Amici institutions. In aiming for a *26 rich and robust concept of diversity consonant with those objectives, it would be illogical to exclude altogether any consideration of demographics, whether municipal, state, national, or international, depending upon the nature and mission of the institution.

As Texas's flagship educational institution, UT's mission is focused in part on training the next generation of leaders for Texas. See Resp. Br. 5. That may well affect the manner in which UT assesses the diversity necessary to fulfill its mission. See Pet. App. 50a ("The need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership ... requires a degree of attention to the
surrounding community.”). But this aspect of a university’s mission is not “racial balanc[ing], pure and simple.” Parents Involved, 551 U.S. at 726 (plurality opinion). The essence of racial balancing is a goal that functions as a quota, seeking to secure a “specified percentage of a particular group merely because of its race or ethnic origin.” Grutter, 539 U.S. at 329 (internal quotation marks omitted). Petitioner concedes that is not the goal of UT. See supra n.8. Nor, emphatically, is it the goal of these Amici. Amici do not employ quotas, and have no rigid baselines in mind with respect to diversity. Amici’s educational objectives are to admit a student body that is diverse across myriad axes, that constitutes more than the sum of its parts, that excels academically, and that prepares a next generation of nationally and internationally engaged citizens and leaders who are equipped to succeed in a remarkably diverse world.

Petitioner largely ignores Grutter’s recognition of this paramount role of universities, which the Fifth Circuit found crucial to its analysis. See Pet. App. 50a-51a. Petitioner argues (at 29) only that “this Court has *27 always rejected the use of race to advance the general welfare of society.” The cases petitioner cites hold that remedying societal discrimination is not a compelling interest. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (“amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota”); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) (“Societal discrimination ... is too amorphous a basis for imposing a racially classified remedy.”). That is not even remotely the issue here. The compelling governmental interest in diversity in higher education is quite different from remedying generalized discrimination. The issue here is whether, in assessing diversity, a university may take into account the need (a) to foster conditions for providing the most stimulating learning environment possible and (b) to train effectively citizens and leaders for a heterogeneous society. Justice Powell’s opinion in Bakke and the decision of this Court in Grutter answer that question affirmatively. A retreat now would be a substantial blow to the educational missions of Amici and many universities.

C. This Court Has Not Applied And Should Not Apply A Strong-Basis-In-Evidence Standard To The Unique Context Of Higher Education

Petitioner argues at length (at 31-37) that, under this Court’s precedents, a strong-basis-in-evidence standard applies to university admissions programs, although she says little about the content of this standard. As a matter of precedent, petitioner’s claim is wrong, as UT cogently explains (at 49). Amici write to emphasize why this Court should not, for the first time, apply such a standard to higher education.

*28 First, the reasons the Court has applied a strong-basis-in-evidence standard in other circumstances carry no force here. “Context matters when reviewing race-based governmental action under the Equal Protection Clause.” Grutter, 539 U.S. at 327. The strong-basis-in-evidence standard has been used to identify when race may be used to remedy historical discrimination. See Wygant, 476 U.S. at 277-278; Croson, 488 U.S. at 498-499. Whether discrimination has occurred is an objective and measurable fact: For example, did the City of Richmond discriminate in the past in awarding government contracts? In that setting, it would make little sense simply to credit a good-faith judgment by the City that discrimination has occurred because the City would have no special claim to expertise regarding that fact.11

By contrast, the educational benefits of diversity and the degree of diversity necessary to obtain those benefits defy easy calculation. Judgments about educational benefits are necessarily at the core of the expertise of universities and inevitably implicate the First Amendment interests in a university’s definition of its own educational mission, discussed further below. See Grutter, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”). In this crucial respect, higher education is far afield from government contracting and public employment, in which the state actors employing the racial classifications would have no reasonable claim to any special expertise as to whether historical discrimination has occurred.

Second, application of a strong-basis-in-evidence standard to universities’ admissions decisions would threaten to undermine the First Amendment interests of universities, as well as the proper deference due university officials’ educational judgments. This Court has long acknowledged the special role universities play in the First Amendment tradition. As Justice Powell explained, the First Amendment interests of a university includes the freedom “to determine for itself on academic grounds who may teach, what may be
taught, how it shall be taught, and who may be admitted to study:” *Bakke, 438 U.S. at 312* (Powell, J.). (quoting *Sweezy v. New Hampshire, 354 U.S. 243, 263 (1957)* (Frankfurter, J., concurring in the result)). This Court reiterated in *Grutter* that, “given the important purposes 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.” *Grutter, 539 U.S. at 329.*

*30* Although this “special niche” of universities has never meant and should not mean that they are immune from judicial review, a strong-basis-in-evidence standard could seriously impair universities’ legitimate First Amendment interests. A constitutional rule that required decisions regarding diversity - for example, determinations about the value of diversity, the types of diversity necessary to advance a university’s mission, and the contributions of various degrees of diversity to that mission - to be proven by surveys or data sets, and then second-guessed in court, would imperil the First Amendment interests of universities by cabining a university’s ability to rely on the nuanced and expert judgments of its officials, faculty, and administrators in assessing such questions. *Cf. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)* (“When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty’s professional judgment.”). And a standard that would afford no or little deference to the educational judgments of universities would be contrary to this Court’s recognition of the need to limit intrusive judicial inquiry of university decisionmaking. *See University of Penn. v. EEOC, 493 U.S. 182, 199 (1990)* (noting the “importance of avoiding second-guessing of legitimate academic judgments”); *Ewing, 474 U.S. at 226 n.12, 227* (“Academic freedom ... thrives *31 on autonomous decisionmaking by the academy itself [*].”)

*Third,* application of a strong-basis-in-evidence standard to *Grutter*-like admissions policies could have a particularly substantial impact on Amici. Amici receive applications from far more academically excellent students than they could hope to admit, and they rely exclusively on individualized, holistic review. *See supra* pp. 7-8. In light of that, a standard that demanded rigorous empirical evidence regarding individual admissions decisions or decisions regarding the composition of a student body as a whole could subject Amici to frequent litigation over whether the standard is satisfied. The predictable result would be intrusive discovery and judicial micro-management of admissions decisions and policies. *See supra* n.6 (explaining why a reversal of *Grutter* would have a similar effect). None of this is to say that universities need not carefully evaluate issues of diversity, but often the most probative evidence bearing on the issues will be the expert educational judgments of university officials, admissions officers, and faculty - judgments based on decades of experience with holistic, individualized race-conscious admissions policies. The Constitution should not be read to foreclose reliance on those judgments.

*32* In short, the framework adopted by this Court in *Grutter* supplies a workable and appropriate standard for reviewing race-conscious university admissions policies. There is no cause for replacing that framework with an ill-defined strong-basis-in-evidence standard that could interfere with the First Amendment interests of and educational judgments by universities and that would be sure to invite unnecessary litigation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Footnotes

1 Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

2 *See Grutter, 539 U.S. at 337* (upholding admissions policy because the Law School “engages in a highly individualized, holistic review of each applicant’s file”); *Gratz v. Bollinger, 539 U.S. 244, 271 (2003)* (identifying constitutional vice in undergraduate admissions as the absence of “individualized consideration”); *id. at 276* (O’Connor, J., concurring) (flaw in undergraduate admissions was a lack of “meaningful individualized review of applicants”); *Bakke, 438 U.S. at 315* (Powell, J.) (“The diversity that
furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.).

Amici’s focus on factors beyond objective qualifications reflects both their educational philosophy and the strength of their applicant pools. For example, in the most recent admissions year, one Amicus could have filled more than two full matriculating classes from students ranked first in their high schools. In fact, however, only 12 percent of those applicants were admitted, comprising slightly more than 21 percent of the total number of admitted applicants. For that school, more than eight matriculating classes could have been filled by students in the top ten percent of their high schools. Another Amicus recently admitted only six percent of applicants in the top ten percent of their high school classes and declined to admit nearly two thirds of applicants with perfect SAT scores. And a third Amicus institution has admitted, over the last three admission cycles, fewer than half of applicants with perfect SAT scores. That same institution received applications from 2,272 valedictorians for the class of 2016, but admitted only 294 of those applicants.

For Amici, diversity is meant to benefit the student body both inside and outside the classroom. Because Amici are all residential institutions, each strives to create a learning environment in which education occurs both within the classroom and through myriad other student interactions - in residences and dining halls, in performance, artistic, athletic, and recreational spaces, in student organizations and activities, and throughout the campus. Indeed, Amici aim to create an environment in which students learn as much from each other outside as within the classroom.

See, e.g., The Common Application, 2012-2013 First-Year Application (calling for an essay on, among other things, an “experience that illustrates what you would bring to the diversity in a college community” and inviting applicants to “attach a separate sheet if [applicant] wish[es] to provide details of circumstances or qualifications not reflected in the application”), available at https://www.commonapp.org/commonapp/DownloadForms/2013/2013/PacketFY_download.pdf (last visited Aug. 12, 2012).

Forbidding race-consciousness in individualized, holistic admissions processes would have many wrenching effects on Amici, including a potential wave of litigation by disappointed applicants. Because admissions officials would doubtless be aware of the race of at least some successful applicants, some applicants not admitted might sue, claiming that race improperly influenced admissions decisions and was responsible for the fact that other students were admitted rather than them. Unlike in other contexts in which allegations of discrimination might be raised, universities would often not be able to point to specific, objective distinctions between one applicant and another because numerical scores are not determinative of Amici’s admissions decisions: All such decisions are to some extent subjective and involve nuanced judgments about the applicant and composition of an entire class. Litigation over the merits of specific admissions decisions would inevitably draw courts into the second-guessing of core educational judgments. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (courts are not well-equipped “to evaluate ... academic decisions that are made daily by faculty members of public educational institutions - decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial ... decisionmaking” (internal quotation marks and brackets omitted)).


See JA131a (“UT Austin has not established a goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008.”); Pet. App. 44a (“UT has never established a specific number, percentage, or range of minority enrollment that would constitute ‘critical mass’” and “there is no indication that UT’s Grutter-like plan is a quota by another name”).

See, e.g., Harvard University, Frequently Asked Questions (“The Mission of Harvard College”: “Education at Harvard should liberate students to explore, to create, to challenge, and to lead. The support the College
provides to students is a foundation upon which self-reliance and habits of lifelong learning are built: Harvard expects that the scholarship and collegiality it fosters in its students will lead them in their later lives to advance knowledge, to promote understanding, and to serve society.

available at http://www.harvard.edu/faqs/mission-statement (last visited Aug. 12, 2012); Yale University, University Mission Statement (“Yale seeks to attract a diverse group of exceptionally talented men and women from across the nation and around the world and to educate them for leadership in scholarship, the professions, and society.”), available at http://www.yale.edu/about/mission.html (last visited Aug. 12, 2012); Dartmouth College, Mission (“Dartmouth College educates the most promising students and prepares them for a lifetime of learning and of responsible leadership, through a faculty dedicated to teaching and the creation of knowledge.”), available at http://www.dartmouth.edu/home/about/mission.html (last visited Aug. 12, 2012); Stanford University, The Founding Grant with Amendments, Legislation, and Court Decrees, at 24 (Stanford University’s “chief object is the instruction of students with a view to producing leaders and educators in every field of science and industry”), available at https://ogc.stanford.edu/sites/ogc.stanford.edu/files/Founding%20Grant%20(equivalent%20to%C20Articles%C20of%20Incorporation).22124_1.pdf (last visited Aug. 12, 2012).


In Ricci v. DeStefano, 129 S. Ct. 2658 (2009), this Court applied this standard to determine whether a public employer’s fear of disparate-impact liability was reasonable. In that setting, too, it arguably made little sense simply to credit the good-faith belief of the employer because the possibility of such liability lies squarely within the competence of the courts to evaluate - unlike the educational benefits to be obtained from particular admissions policies, an area in which the courts have no special expertise and have long deferred to universities’ judgments.

See also Parents Involved, 551 U.S. at 792 (Kennedy, J., concurring in part and concurring in the judgment) (“precedent support[s] the proposition that First Amendment interests give universities particular latitude in defining diversity”); Byrne, Academic Freedom: A “Special Concern of the First Amendment”, 99 Yale L.J. 251, 311 (1989) (“[T]he Supreme Court’s decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself ... largely to be free from government interference in the performance of core educational functions.”); cf. Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 232 (2000) (“It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.”).

This is not, as petitioner paints it (at 22), an argument for “unlimited deference to university administrators.” Strict scrutiny is properly demanding, but it should be applied so as not to deprive university officials of the right to exercise responsibly their expert educational judgments. See Grutter, 539 U.S. at 328 (strict scrutiny “is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university”).