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Section 5: Race

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V. Race

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Fisher v. University of Texas at Austin

14-981

Ruling Below: *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. Tex. 2014)

On July 15, 2014, in its second ruling on the case, a three-judge panel from the Fifth Circuit Court of Appeals rendered a 2-1 decision in *Fisher v. University of Texas at Austin*, holding that the consideration of race or ethnicity by the University of Texas at Austin's (UT) in its admission program was narrowly tailored to achieve UT's compelling educational interests and, therefore, justified under applicable constitutional standards. The Fifth Circuit reheard the case after the U.S. Supreme Court determined in June 2013 that the Fifth Circuit, in its first ruling, had not subjected the university's consideration of race to the required "strict judicial scrutiny" that applies whenever race conscious policies are challenged.

Question Presented: Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

Abigail Noel FISHER
Plaintiff –Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; WILLIAM POWERS, JR., President of the University of Texas at Austin in His Official Capacity; BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS, as Member of the Board of Regents in His Official Capacity; WILLIAM EUGENE POWELL, as Member of the Board of Regents in His Official Capacity; JAMES R. HUFFINES, as Member of the Board of Regents in His Official Capacity; JANIECE LONGORIA, as Member of the Board of Regents in Her Official Capacity; COLLEEN MCHUGH, as Member of the Board of Regents in Her Official Capacity; ROBERT L. STILLWELL, as Member of the Board of Regents in His Official Capacity; JAMES D. DANNENBAUM, as Member of the Board of Regents in His Official Capacity; PAUL FOSTER, as Member of the Board of Regents in His Official Capacity; PRINTICE L. GARY, as Member of the Board of Regents in His Official Capacity; KEDRA ISHOP, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; FRANCISCO G. CIGARROA, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,
Defendant – Appellees

United States Court of Appeals for the Fifth Circuit

Decided on July 15, 2014

[Excerpt; some footnotes and citations omitted]

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Abigail Fisher brought this action against the University of Texas at Austin, alleging that the University's race-conscious admissions program violated the Fourteenth Amendment. The district court granted summary judgment to UT Austin and we affirmed. The Supreme Court vacated and remanded, holding that this Court and the district court reviewed UT Austin's means to the end of a diverse student body with undue deference; that we must give a more exacting scrutiny to UT Austin's efforts to achieve diversity. With the benefit of additional briefing, oral argument, and the ordered exacting scrutiny, we affirm the district court's grant of summary judgment.

I A

Fisher applied to UT Austin for admission to the entering class of fall 2008. Although a Texas resident, she did not graduate in the top ten percent of her class. She therefore did not qualify for automatic admission under the Top Ten Percent Plan, which that year took 81% of the seats available for Texas residents. Instead, she was considered under the holistic review program, which looks past class rank to evaluate each applicant as an individual based on his or her achievements and experiences, and so became one of 17,131 applicants for the remaining 1,216 seats for Texas residents.

UT Austin denied Fisher admission. Kedra B. Ishop, the Associate Director of Admissions at the time of Fisher's application, explained that "[g]iven the lack of space available in the fall freshman class due to the Top 10% Plan, . . . based on [her] high school class rank and test scores," Fisher could not "have gained admission through the fall review process." As Ishop explained, any applicant who was not offered admission either through the Top Ten Percent Law or through an exceptionally high Academic Index ("AI") score is evaluated through the holistic review process. The AI is calculated based on an applicant's standardized test scores, class rank, and high school coursework. Holistic review considers applicants' AI scores and Personal Achievement Index ("PAI") scores. The PAI is calculated from (i) the weighted average score received for each of two required essays and (ii) a personal achievement score based on a holistic review of the entire application, with slightly more weight being placed on the latter. In calculating the personal achievement score, the staff member conducts a holistic review of the contents of the applicant's entire file, including demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race. No numerical value is ever assigned to any of the components of personal achievement scores, and because race is a factor considered in the unique

context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student.

To admit applicants through this holistic review, the admissions office generates an initial AI/PAI matrix for each academic program, wherein applicants are placed into groups that share the same combination of AI and PAI scores. School liaisons then draw stair-step lines along this matrix, selecting groups of students on the basis of their combined AI and PAI scores. This process is repeated until each program admits a sufficient number of students.

Fisher's AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1.15 And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants "were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded 3.5."

16 Accordingly, even if she had received a perfect PAI score of 6, she could not have received an offer of admission to the Fall 2008 freshman class.¹⁷ If she had been a minority the result would have been the same.

B

This reality together with factual developments since summary judgment call into question whether Fisher has standing. UT Austin argues that Fisher lacks standing because (i) she graduated from another

university in May 2012, thus rendering her claims for injunctive and declaratory relief moot, and (ii) there is no causal relationship between any use of race in the decision to deny Fisher admission and the \$100 application fee—a non-refundable expense faced by all applicants that puts at issue whether Fisher suffered monetary injury.

Two competing and axiomatic principles govern the resolution of this question. First, jurisdiction must exist at every stage of litigation. A litigant "generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." Even if "defendants failed to challenge jurisdiction at a prior stage of the litigation, they are not prohibited from raising it later." Indeed, the "independent establishment of subject-matter jurisdiction is so important that [even] a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding adverse results on the merits."

Second, the "mandate rule," a corollary of the law of the case doctrine, "compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." The Supreme Court, like all Article III courts, had its own independent obligation to confirm jurisdiction, and where the lower federal court "lack[ed] jurisdiction, [the Supreme Court has] jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit."

UT Austin’s standing arguments carry force, but in our view the actions of the Supreme Court do not allow our reconsideration. The Supreme Court did not address the issue of standing, although it was squarely presented to it. Rather, it remanded the case for a decision on the merits, having reaffirmed Justice Powell’s opinion for the Court in *Regents of the University of California v. Bakke* as read by the Court in *Grutter v. Bollinger*. It affirmed all of this Court’s decision except its application of strict scrutiny. The parties have identified no changes in jurisdictional facts occurring since briefing in the Supreme Court. Fisher’s standing is limited to challenging the injury she alleges she suffered—the use of race in UT Austin’s admissions program for the entering freshman class of Fall 2008.

II

We turn to the question whether we can and should remand this case. The Supreme Court’s mandate frames its resolution, ordering that “[t]he judgment of the Court of Appeals is vacated, and the case remanded for further proceedings consistent with this opinion.” The mandate must be read against the backdrop of custom that accords courts of appeal discretion to remand to the district court on receipt of remands to it for proceedings consistent with the opinion—a customary discretion not displaced but characterized by nigh boiler plate variations in phrasing of instructions such as “on remand the Court of Appeals may ‘consider,’” or “for the Court of Appeals to consider in the first instance.”

A

Fisher argues that the Supreme Court’s remanding language—“fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis”³¹—compels the conclusion that “fairness” must be achieved by having this Court, and not the district court, conduct the inquiry. Fisher relies on the Supreme Court’s statement that “the Court of Appeals must assess whether the University has offered sufficient evidence that its admissions program is narrowly tailored to obtain the educational benefits of diversity.” And Fisher argues that at summary judgment, all parties conceded that there were no genuine issues of material fact to be resolved and that the case should be decided on summary judgment.

UT Austin opposes this parsing of language, arguing that Fisher fails to credit (i) the entirety of the Supreme Court’s references which spoke, not just to the fairness of allowing this Court to correct its error, but also to the fairness to the district court, which first heard the case and was faulted for the same error as this Court; and, (ii) that the language used by the Supreme Court is the common language of remand orders and is often followed by a remand to the district court. UT Austin notes that in its remanding language, the Supreme Court cites *Adarand Constructors, Inc. v. Pena*, where the court of appeals remanded to the district court after the Supreme Court vacated the judgment of the court of appeals for failure to apply strict scrutiny. Finally, UT Austin argues that the

remand language, at best, is ambiguous and, given the custom of the courts of appeals, should not be read to foreclose the clear discretion of this Court to remand absent specific, contrary instructions from the Supreme Court.

Given the customary practice of the courts of appeals and the less than clear language of the Supreme Court's remand, we are not persuaded that the Supreme Court intended to foreclose our discretion to remand to the district court. A review of the Supreme Court's language lends but little support to each side. Yet, this is telling. Had the Supreme Court intended to control the discretion of this Court as to whether the district court should first address an error that the Supreme Court found was made by both courts, there would have been no uncertainty in the remand language. The question whether we should remand remains.

B

There is no clear benefit to remanding this case to the district court. The suggestion, without more, that discovery may be necessary given the Supreme Court's holding regarding proper scrutiny and deference adds nothing. Admittedly, this case differs from *Grutter*, in that *Grutter* went to trial. And evidence offered by live witnesses is far more likely to surface and resolve fact issues than summary judgment evidence crafted by advocates. But that too is far from certain. Indeed, UT Austin's argument goes no further than "factual questions or disputes may arise on remand." Notably, UT Austin does not argue that a trial will be necessary.

Rather its principal target on remand is standing, with questions that continue to haunt, but are foreclosed by the Supreme Court's implicit finding of standing, questions only it can now address.

We find that there are no new issues of fact that need be resolved, nor is there any identified need for additional discovery; that the record is sufficiently developed; and that the found error is common to both this Court and the district court. It follows that a remand would likely result in duplication of effort. We deny UT Austin's motion for remand, and turn to the merits.

III

A

In remanding, the Supreme Court held that its decision in *Grutter* requires that "strict scrutiny must be applied to any admissions program using racial categories or classifications"; that "racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." Bringing forward Justice Kennedy's dissent in *Grutter*, the Supreme Court faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity—whether UT Austin's efforts were narrowly tailored to achieve the end of a diverse student body. Our charge is to give exacting scrutiny to these efforts.

The Supreme Court has made clear that "a university's educational judgment that such diversity is essential to its educational mission is one to which we defer." The

“decision to pursue the educational benefits that flow from student body diversity that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*.” Accordingly, a court “should ensure that there is a reasoned, principled explanation for the academic decision.”

In both *Fisher* and *Grutter*, the Supreme Court endorsed Justice Powell’s conclusion that “attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education;”⁴⁰ that in contrast to “[r]edressing past discrimination, . . . [t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes”; that the “academic mission of a university is a special concern of the First Amendment . . . [and part] of the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation, and this in turn leads to the question of who may be admitted to study.” It signifies that this compelling interest in “securing diversity’s benefits . . . 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, with the remaining percentage an undifferentiated aggregation of students.” Rather, “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.” Justice Powell found Harvard’s

admissions program to be particularly commendable. There an applicant’s race was but one form of diversity that would be weighed against qualities such as “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” *Bakke* envisions a rich pluralism for American institutions of higher education, one at odds with a one-size-fits-all conception of diversity, indexed to the ways in which a diverse student body contributes to a university’s distinct educational mission, not numerical measures.

Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes. “[A] university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin” because that “would amount to outright racial balancing, which is patently unconstitutional.” Instead, *Grutter* approved the University of Michigan Law School’s goal of “attaining a critical mass of under-represented minority students,” and noted that such a goal “does not transform its program into a quota.”

B

In language from which it has not retreated, the Supreme Court explained that the educational goal of diversity must be “defined by reference to the educational benefits that diversity is designed to

produce.” Recognizing that universities do more than download facts from professors to students, the Supreme Court recognized three distinct educational objectives served by diversity: (i) increased perspectives, meaning that diverse perspectives improve educational quality by making classroom discussion “livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds”; (ii) professionalism, meaning that “student body diversity . . . better prepares [students] as professionals,” because the skills students need for the “increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”; and, (iii) civic engagement, meaning that a diverse student body is necessary for fostering “[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation[, which] is essential if the dream of one Nation, indivisible, is to be realized.” All this the Supreme Court reaffirmed, leaving for this Court a “further judicial determination that the admissions process meets strict scrutiny in its implementation”; that is, its means of achieving the goal of diversity are narrowly tailored.

A university “must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal.” And a university “receives no deference” on this point because it is the courts that must ensure that the “means chosen to accomplish the [university’s] asserted purpose . . . be specifically and narrowly framed to accomplish that purpose.” Although “a court

can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes,” it remains a university’s burden to demonstrate and the court’s obligation to determine whether the “admissions processes ensure that each applicant is evaluated as an individual, and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”

C

Narrow tailoring requires that the court “verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.” Such a verification requires a “careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” Thus, the reviewing court must “ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” It follows, therefore, that if “a nonracial approach . . . could promote the substantial interest about as well and at tolerable expenses, . . . then the university may not consider race.” And it is the university that bears “the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”

The Supreme Court emphasized that strict scrutiny must be balanced. That is, “[s]trict scrutiny must not be strict in theory, but fatal in fact,” yet it must also “not be strict in theory but feeble in fact.”

IV

A

Fisher insists that our inquiry into narrow tailoring begin in 2004, the last year before UT Austin adopted its current race-conscious admissions program. Looking to that year, Fisher argues that the Top Ten Percent Plan had achieved a substantial combined Hispanic and African-American enrollment of approximately 21.5%;⁶⁴ and that this is more minority enrollment than present in *Grutter*, where a race-conscious plan grew minority enrollment from approximately 4% to 14%. Because UT Austin was already enrolling a larger percentage of minorities than the Michigan Law School, the argument maintains, UT Austin had achieved sufficient diversity to attain the educational benefits of diversity, a critical mass, before it adopted a race-conscious admissions policy; that even if sufficient diversity had not been achieved by 2004, it had been achieved by 2007 when the combined percentage of Hispanic and African-American enrolled students was 25.5%. Thus, Fisher argues, the race-conscious admissions policy had a *de minimis* effect, at most adding 0.92% African-American enrollment and 2.5% Hispanic enrollment; that a slight contribution is not a “constitutionally meaningful” impact on student body diversity and is no more than an exercise in gratuitous racial engineering.

This effort to truncate the inquiry clings to a baseline that crops events Fisher’s claim ignores, as it must. The true narrative presents with a completeness both fair and compelled by the Supreme Court’s charge to ascertain the facts in full without deference,

exposing the *de minimis* argument as an effort to turn narrow tailoring upside down. We turn to that narrative.

B

In 1997, following the *Hopwood v. Texas* decision, UT Austin faced a nearly intractable problem: achieving diversity—including racial diversity—essential to its educational mission, while not facially considering race even as one of many components of that diversity. Forbidden any use of race after *Hopwood*, UT Austin turned to the Top Ten Percent Plan, which guarantees Texas residents graduating in the top ten percent of their high school class admission to any public university in Texas. Such a mechanical admissions program could have filled every freshman seat but standing alone it was not a workable means of achieving the diversity envisioned by *Bakke*, bypassing as it did high-performing multi-talented students, minority and non-minority.

With its blindness to all but the single dimension of class rank, the Top Ten Percent Plan came with significant costs to diversity and academic integrity, passing over large numbers of highly qualified minority and non-minority applicants. The difficulties of Texas’s and other states’ percentage plans did not escape the Court in *Grutter*, which explained that “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.”

Nor did these difficulties escape the Texas legislature. Opponents to the proposed plan noted that such a policy “could actually harm institutions” and “would not solve the problems created by [*Hopwood*].” So the legislature adopted a Top Ten Percent Plan that left a substantial number of seats to a complementary holistic review process. Foreshadowing *Grutter*, admission supplementing the Top Ten Percent Plan included factors such as socio-economic diversity and family educational achievements but, controlled by *Hopwood*, it did not include race. In short, a holistic process sans race controlled the gate for the large percent of applicants not entering through the Top Ten Percent Plan. Over the succeeding years the Top Ten Percent Plan took an increasing number of seats, a take inherent in its structure and a centerpiece of narrow tailoring, as we will explain.

C

We are offered no coherent response to the validity of a potentially different election by UT Austin: to invert the process and use *Grutter*'s holistic review to select 80% or all of its students. Such an exponential increase in the use of race under the flag of narrow tailoring is perverse. *Grutter* blessed an admissions program, applied to the entire pool of students competing for admission, which “considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.” Affording no deference, we look for narrow tailoring in UT's Austin's use of this individualized race-conscious holistic

review, applied as it is only to a small fraction of the student body as the rest is consumed by race-neutral efforts.

Close scrutiny of the data in this record confirms that holistic review—what little remains after over 80% of the class is admitted on class rank alone—does not, as claimed, function as an open gate to boost minority headcount for a racial quota. Far from it. The increasingly fierce competition for the decreasing number of seats available for Texas students outside the top ten percent results in minority students being *under-represented*—and white students being *over-represented*—in holistic review admissions relative to the program's impact on each incoming class. In other words, for each year since the Top Ten Percent Plan was created through 2008, holistic review contributed a greater percentage of the incoming class of Texans as a whole than it did the incoming minority students. Examples illustrate this effect. Of the incoming class of 2008, the year Fisher applied for admission, holistic review contributed 19% of the class of Texas students as a whole—but only 12% of the Hispanic students and 16% of the black students, while contributing 24% of the white students.⁶⁸ The incoming class of 2005, the year that the *Grutter* plan was first introduced, is similar. That year, 31% of the class of Texas students as a whole was admitted through holistic review (with the remaining 69% of incoming seats for Texans filled by the Top Ten Percent Plan)—but only 21% of the Hispanic Texan students in the incoming class were admitted through holistic review, and 26% of the incoming black Texan students, but 35% of the

incoming white Texan students. Minorities being under-represented in holistic review admission relative to the impact of holistic review on the class as a whole holds true almost without exception for both blacks and Hispanics for every year from 1996–2008.

Given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise. Data for the entering Texan class of 2005, the first year of the *Grutter* plan, show that Hispanic students admitted through holistic review attained an average SAT score of 1193, African-American students an 1118, and white students a 1295. For the entering class of 2007, the last class before Fisher applied for admission, the corresponding data were 1155 for Hispanic students, 1073 for African American students, and 1275 for white students, this from a universe of underperforming secondary schools. As we have explained, the impact of the holistic review program on minority admissions is already narrow, targeting students of all races that meet both the competitive academic bar of admissions and have unique qualities that complement the contributions of Top Ten Percent Plan admittees.

D

UT Austin did not stop with the Top Ten Percent Plan in its effort to exhaust racially neutral alternatives to achieving diversity. It also initiated a number of outreach and

scholarship efforts targeting under-represented demographics, including the over half of Texas high school graduates that are African-American or Hispanic. Programs included the Longhorn Opportunity Scholarship Program, the Presidential Achievement Scholarship Program, the First Generation Scholarship, and increased outreach efforts. Implemented in 1997, the Longhorn Opportunity Scholarship Program offers scholarships to graduates of certain high schools throughout Texas that had predominantly low-income student populations and a history of few, if any, UT Austin matriculates. It guarantees a specific number of scholarships for applicants who attend these schools, graduate within the top ten percent, and attend UT Austin. The Presidential Achievement Scholarship program is a need-based scholarship that is awarded based on the applicant's family income, high school characteristics, and academic performance as compared to his or her peers at that high school. The First Generation Scholarship Program targets applicants who are the first in their family to attend college. UT Austin invested substantial amounts of money in these scholarship programs. Between 1997 and 2007, UT Austin awarded \$59 million through these scholarships.⁷⁷ Indeed, in 2007, UT Austin awarded \$5.8 million for the Longhorn Opportunity and Presidential Achievement scholarship programs alone.

UT Austin also expanded its outreach and recruitment efforts by increasing its recruitment budget by \$500,000, by adding three regional admissions centers in Dallas, San Antonio, and Harlingen,⁷⁹ by engaging

in outreach programs that brought prospective students to UT Austin for day-long or overnight visits, and by hosting multi-day campus conferences for high school counselors. These regional admissions centers reflect a substantial investment by UT Austin: the Dallas Admissions center employed 4 new full-time staff, the San Antonio Admissions Center employed 4 new full-time staff, and the Harlingen Admissions Center employed 5 new full-time staff. The stated goal of these centers was “to increase [UT Austin’s] visibility and interaction with prospective students, parents and high school administrators within the geographic market they existed [sic]. These centers allowed for increased quality and quantity of counseling, face to face discussions, and programming within the prospective students’ home city.” Additionally, staff from these regional centers helped organize “over 1,000 College Night/Day events held at High Schools across the state” and “around 1,000 Day Visits to High Schools around the state in an effort to encourage prospective top 10% students to apply and enroll at [UT Austin].” Relatedly, the admissions office also held targeted recruiting events for students from the Dallas, San Antonio, Houston, and Rio Grande Valley areas. These events included the “Longhorn Lock-in,” wherein students from targeted high schools would spend the night at UT Austin; the UT Scholars Program, wherein scholarship recipients from targeted schools would spend the night at UT Austin; and “Longhorn for a Day,” wherein students from targeted schools would spend the day at UT Austin. Finally, the admissions office would hold four “Longhorn Saturday Events” on campus,

where thousands of prospective students and their families would come to UT Austin.

In addition to the admissions office’s efforts, UT Austin’s Office of Student Financial Services increased their outreach efforts by putting together the Financial Aid Outreach Group to visit high schools to help prospective students “understand the financial support offered by [UT Austin].” The goal of this Financial Aid Outreach Group “was to convince low income students that money should not be a barrier to attending college.”

“Narrow tailoring does not require exhaustion of every race neutral alternative,” but rather “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” Put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all.

E

Despite UT Austin’s rapid adoption of these race-neutral efforts, in 1997—the first freshman class after Hopwood—the percentage of African-American admitted students fell from 4.37% to 3.41%, representing a drop from 501 to 419 students even as the total number of admitted students increased by 833 students.⁹⁰ Similarly, the percentage of Hispanic admitted students fell

from 15.37% to 12.95%. With UT Austin's facially race-neutral admissions program and outreach efforts, the percentage of African-American and Hispanic admitted students eventually recovered to pre-Hopwood levels. By 2004, African-American admitted students climbed to 4.82% and Hispanic admitted students climbed to 16.21%. But minority representation then remained largely stagnant, within a narrow oscillating band, rather than moving towards a critical mass of minority students. The hard data show that starting in 1998 and moving toward 2004, African-American students comprised 3.34%, then 4.32%, then 4.24%, then 3.49%, then 3.67%, then 3.89%, and finally 4.82% of the admitted pool. Similarly, Hispanic admitted students represented 13.53%, then 14.27%, then 13.75%, then 14.25%, then 14.43%, then 15.60%, and finally 16.21% of the entering classes for those respective years.

V A

Numbers aside, the Top Ten Percent Plan's dependence upon a distinct admissions door remained apparent. With each entering class, there was a gap between the lower standardized test scores of students admitted under the Top Ten Percent Plan and the higher scores of those admitted under holistic review. For example, in 2008—the year Fisher applied for admission—81% of the seats available to Texas residents were taken up by the Top Ten Percent Plan. These Top Ten Percent students had an average standardized test score of 1219, 66 points lower than the average standardized test

score of 1285 attained by Texas students admitted under holistic review or on the basis of a high AI. A gap persisted not only among students overall and white students, but also among racial and ethnic minority students. This inheres in the reality that the strength of the Top Ten Percent Plan is also its weakness, one that with its single dimension of selection makes it unworkable standing alone.

B

The sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race. We assume, as none here contends otherwise, that this “segregation [is] not the ‘product . . . of state action but of private choices,’ having no ‘constitutional implications’” and therefore it is “a question for the political branches to decide[] the manner—which is to say the process—of its resolution.” In short, these demographics are directly relevant to the choices made by the political branches of Texas as they acted against the backdrop of this unchallenged reality in their effort to achieve a diverse student body. Texas is here an active lab of experimentation embraced by the Court in *Schuetz v. BAMN*. We reference here these unchallenged facts of resegregation not in justification of a racial remedy, but because the racial makeup and relative performance of Texas high schools bear on the workability of an alternative to any use of race for 80% of student admissions to UT Austin. The political branches opted

for this facially race-neutral alternative—a narrow tailoring in implementation of their goal of diversity.

Fisher’s claim can proceed only if Texas must accept this weakness of the Top Ten Percent Plan and live with its inability to look beyond class rank and focus upon individuals. Perversely, to do so would put in place a quota system pretextually race neutral. While the Top Ten Percent Plan boosts minority enrollment by skimming from the tops of Texas high schools, it does so against this backdrop of increasing resegregation in Texas public schools, where over half of Hispanic students and 40% of black students attend a school with 90%–100% minority enrollment.

Data for the year Fisher graduated high school show that gaps between the quality of education available to students at integrated high schools and at majority-minority schools are stark. Their impact upon UT Austin is direct. The Top Ten Percent Plan draws heavily from the population concentrations of the three major metropolitan areas of Texas—San Antonio, Houston, and Dallas/Fort Worth—where over half of Texas residents live and where the outcomes gaps of segregated urban schools are most pronounced. The San Antonio metropolitan area demonstrates this effect. Boerne Independent School District (“ISD”) achieved a “recognized status” and five “Gold Performance Acknowledgments” from the Texas Education Agency. At this relatively integrated school district, 79.9% of graduating students were white and 19.2% were black or Hispanic. Over 97% of

students graduated high school. They achieved an average SAT score of 1072, and 61% were deemed college-ready in both English and Math by the Texas Education Agency. San Antonio ISD, its neighbor, a highly segregated and “academically unacceptable” district, tells a different story. 86.8% of graduating students were Hispanic and 8.2% were black, and over 90% were economically disadvantaged. Only 59.1% of the high school class of 2008 graduated; SAT test takers achieved an average score of 811; and only 28% of graduates were college-ready in both English and Math.

A similar tale of two cities played out in the Houston area between integrated Katy ISD, where 7.8% of graduating students were black, 23.2% Hispanic, and 59.8% white, and segregated Pasadena ISD, where 6.5% were black, 64.8% Hispanic, and 24.3% white. At Katy, a “recognized” district with two “Gold Performance Acknowledgments,” 91.8% of students graduated, with an average SAT score of 1080 and 60% college readiness in both English and Math. At Pasadena, only 67.8% graduated; SAT test-takers achieved an average score of 928; and 40% were college-ready in both English and Math.

The narrative repeats itself in the Dallas/Fort Worth metropolitan area. For example, Keller ISD, a large and “recognized” school district with four “Gold Performance Acknowledgements,” is fairly integrated. 72.3% of graduating students are white, 12.2% are Hispanic, and 7.3% are African-American. The high school senior class of 2008 attained a graduation rate of 88.7% and an average SAT score of 1043, and 53% were

college-ready in both English and Math. The data for nearby Dallas ISD, one of the largest in the state with 157,174 students and 7,308 high school seniors, shows a highly segregated school in stark contrast. There, black and Hispanic students make up 90.9% of the graduating class, and 86.1% of all students are economically disadvantaged. Only 65.2% graduated high school; SAT test-takers achieved an average score of 856; and only 29% of graduating seniors were college-ready in both English and Math.

The top decile of high schools in each of these districts—including large numbers of students from highly segregated, underfunded, and underperforming schools—all qualified for automatic admission to UT Austin. That these students were able to excel in the face of severe limitations in their high school education and earn a coveted place in UT Austin's prestigious freshman class is to be commended. That other students are left out—those who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of UT Austin's educational experience—leaves a gap in an admissions process seeking to create the multi-dimensional diversity that *Bakke* envisions.

C

UT Austin's holistic review program—a program nearly indistinguishable from the University of Michigan Law School's program in *Grutter*—was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool

of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills. A variety of perspectives, that is differences in life experiences, is a distinct and valued element of diversity. Yet a significant number of students excelling in high-performing schools are passed over by the Top Ten Percent Plan although they could bring a perspective not captured by admissions along the sole dimension of class rank. For example, the experience of being a minority in a majority-white or majority-minority school and succeeding in that environment offers a rich pool of potential UT Austin students with demonstrated qualities of leadership and sense of self. Efforts to draw from this pool do not demean the potential of Top Ten admittees. Rather it complements their contribution to diversity—mitigating in an important way the effects of the single dimension process.

UT Austin persuades that this reach into the applicant pool is not a further search for numbers but a search for students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways including test scores, predicting higher levels of preparation and better prospects for admission to UT Austin's more demanding colleges and ultimately graduation. It also signifies that this is a draw from a highly competitive pool, a mix of minority and non-minority students who would otherwise be absent from a Top Ten Percent pool selected on class rank, a relative and not an independent measure across the pool of applicants.

VI

These realities highlight the difficulty of an approach that seeks to couch the concept of critical mass within numerical terms. The numbers support UT Austin's argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals, an opportunity denied by the Top Ten Percent Plan. Achieving the critical mass requisite to diversity goes astray when it drifts to numerical metrics. UT Austin urges that it has made clear that looking to numbers, while relevant, has not been its measure of success; and that its goals are not captured by population ratios. We find this contention proved, mindful that by 2011, Texas high school graduates were majority-minority.

UT Austin urges that its first step in narrow tailoring was the admission of over 80% of its Texas students through a facially race-neutral process, and that Fisher's embrace of the sweep of the Top Ten Percent Plan as a full achievement of diversity reduces critical mass to a numerical game and little more than a cover for quotas. Fisher refuses to acknowledge this distinction between critical mass—the tipping point of diversity—and a quota. And in seeking to quantify “critical mass” as a rigid numerical goal, Fisher misses the mark. Fisher is correct that if UT Austin defined its goal of diversity by the numbers only, the Top Ten Percent Plan could be calibrated to meet that mark. To do so, however, would deny the role of holistic review as a necessary complement to Top Ten Percent admissions. We are persuaded that holistic review is a necessary complement to the Top Ten Percent Plan,

enabling it to operate without reducing itself to a cover for a quota system; that in doing so, its limited use of race is narrowly tailored to this role—as small a part as possible for the Plan to succeed.

A

The Top Ten Percent Plan is dynamic, its take floating year to year with the number of Texas high school graduates in the top ten percent of their class that choose to capitalize on their automatic admission to the flagship university. Its impact on the composition of each incoming class predictably has grown dramatically, leaving ever fewer holistic review seats available for the growing demographic of Texas high school graduates. In 1996, when the Top Ten Percent Plan was introduced, it admitted 42% of the Texas incoming class; by 2005, when the *Grutter* plan was introduced, the Plan occupied 69% of the seats available to Texas residents; by 2008, when Fisher applied for admission, it had swelled to 81%. The increasing take of the Top Ten Percent Plan both enhanced its strengths and exacerbated its inherent weaknesses in composing the UT student body, as the overwhelming majority of seats was granted to students without the facial use of race but also without consideration of experiences beyond a single academic dimension. So as the take of the Top Ten Percent Plan grew, so also did the necessity of a complementary holistic admissions program to achieve the diversity envisioned by *Bakke*.

A quick glance in the public record of data since 2008 confirms that UT Austin's race-

conscious holistic review program has a self-limiting nature, one that complements UT Austin's periodic review of the program's necessity to ensure it is limited in time. For the entering class of 2009, the year after Fisher applied for admission, the Top Ten Percent Plan's take of the seats available for Texas residents swelled to 86% and remained at 85% in 2010.

This trend did not escape the Texas Legislature. Consistent with its long-standing view of holistic review as a crucial complement to the Top Ten Percent Plan, Texas passed Senate Bill 175 of the 81st Texas Legislature (SB 175) in 2009. SB 175 modified the Top Ten Percent Plan for UT Austin to authorize the University "to limit automatic admission to no less than 75% of its enrollment capacity for first-time resident undergraduate students beginning with admission for the entering class of 2011 and ending with the entering class of 2015." Pursuant to SB 175, UT Austin restricted automatic admissions to the top 7% for Fall 2014 and Fall 2015 applicants, to the top 8% for Fall 2011 and Fall 2013 applicants, and to the top 9% for Fall 2012 applicants. All remaining slots continue to be filled through holistic review. For the entering class of 2011, the first affected by SB 175, 74% of enrolled Texas residents were automatically admitted (with a higher percentage of offers of admission), a figure that again was pushed upward by inherent population forces, to 77% for the entering Texas class of 2013.

In the growing shadow of the Top Ten Percent Plan, there was a cautious, creeping numerical increase in minority representation

following the inclusion of race and ethnicity in the holistic review program, a testament, UT Austin says, to its race-conscious holistic review. We must agree. From 2004, the last facially race-neutral holistic review program year, to 2005, the first year that race and ethnicity were considered, the percentage of African-American students admitted to UT Austin climbed from 4.82% to 5.05%. The trend has continued since, climbing to 5.13% in 2006, 5.41% in 2007, and 5.67% in 2008. Similarly, the percentage of Hispanic admitted students climbed from 16.21% in 2004, to 17.88% in 2005, 18.08% in 2006, 19.07% in 2007, and 20.41% in 2008. The modest numbers only validate the targeted role of UT Austin's use of *Grutter*. Nor can they be viewed as a pretext for quota seeking—an assertion of Fisher's belied by the reality that over this time frame graduating Texas high school seniors approached being majority-minority. The small increases do not exceed critical mass nor imply a quota but instead bring a distinct dimension of diversity to the Top Ten Percent Plan. To be sure, critical mass can be used as a cover for quotas and proportionality goals, but it is not inevitable; UT Austin persuades that viewed objectively, under its structure, its efforts in holistic review have not been simply to expand the numbers but rather the diversity of individual contributions.

Turning in the opposite direction from her claim of racial quotas, Fisher faults UT Austin's holistic use of race for its *de minimis* contribution to diversity. UT Austin replies that this turns narrow tailoring upside down. We agree. Holistic review allows selection of an overwhelming number of students by

racially neutral measures and for the remainder race is only a factor of factors. Fisher's focus on the numbers of minorities admitted through the holistic gate relative to those admitted through the Top Ten Percent Plan is flawed, ignoring its role as a necessary complement to the Plan. The apt question is its contribution to the richness of diversity as envisioned by Bakke against the backdrop of the Top Ten Percent Plan. That is its palliative role claimed by UT Austin. So viewed, holistic review's low production of numbers is its strength, not its weakness.

In sum, Fisher points to the numbers and nothing more in arguing that race-conscious admissions were no longer necessary because a "critical mass" of minority students had been achieved by the time Fisher applied for admission—a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected. In 2007, Fisher emphasizes, there were 5.8% African-American and 19.7% Hispanic enrolled students, which exceeds pre-*Hopwood* levels and the minority enrollment at the University of Michigan Law School examined in *Grutter*. But an examination that looks exclusively at the percentage of minority students fails before it begins. Indeed, as *Grutter* teaches, an emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint. Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like

spokespersons for their race. *Grutter* defines critical mass by reference to a broader view of diversity rather than by the achievement of a certain quota of minority students. Here, UT Austin has demonstrated a permissible goal of achieving the educational benefits of diversity within that university's distinct mission, not seeking a percentage of minority students that reaches some arbitrary size.

Implicitly conceding the need for holistic review, Fisher offers socioeconomic disadvantage as a race-neutral alternative in holistic review. UT Austin points to widely accepted scholarly work concluding that "there are almost six times as many white students as black students who both come from [socio-economically disadvantaged] families and have test scores that are above the threshold for gaining admission at an academically selective college or university." At bottom, the argument is that minority students are disadvantaged by class, not race; the socioeconomic inquiry is a neutral proxy for race. Bakke accepts that skin color matters—it disadvantages and ought not be relevant but it is. We are ill-equipped to sort out race, class, and socioeconomic structures, and Bakke did not undertake to do so. To the point, we are ill-equipped to disentangle them and conclude that skin color is no longer an index of prejudice; that we would will it does not make it so.

We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that

contributes to its academic mission—as described by *Bakke* and *Grutter*.

B

Over the history of holistic review, its intake of students has declined, minority and non-minority, and changed the profile of the students it admits—the growing number of applicants and increasing take of the Top Ten Percent Plan raises the competitive bar each year, before race is ever considered, for the decreasing number of seats filled by holistic review. Those admitted are those that otherwise would be missed in the diversity mix—for example, those with special talents beyond class rank and identifiable at the admission gate, and minorities with the experience of attending an integrated school with better educational resources.

The data also show that white students are awarded the overwhelming majority of the highly competitive holistic review seats. As we have explained, the increasing take of the Top Ten Percent Plan is inherently self-limiting. UT Austin has demonstrated that it is on a path that each year reduces the role of race. After the Top Ten Percent Plan swallowed 81% of the seats available for Texas students in 2008, for example, white Texan students admitted through holistic review occupied an additional 12% of the overall seats. Only 2.4% and 0.9% of the incoming class of Texas high school graduates were Hispanic and black students admitted through holistic review. That is, admission via the holistic review program—overwhelmingly and disproportionately of white students—is highly competitive for

minorities and non-minorities alike. These data persuade us of the force of UT Austin’s argument that a limited use of race is necessary to target minorities with unique talents and higher test scores to add the diversity envisioned by *Bakke* to the student body.

Numbers are not controlling but they are relevant to UT Austin’s claimed need for holistic review as a necessary component of its admission program. In 2005, the first class that included race and ethnicity in holistic review, 176 (29%) of 617 total African-American admitted students were admitted via holistic review. Following years were similar, with 32% of admitted African-Americans in 2006, 35% in 2007, and 20% in 2008. Likewise, significant percentages of Hispanic admitted students were admitted through the holistic review program, making up 24% of the admitted Hispanic pool in 2005, 26% in 2006, 25% in 2007, and 15% in 2008. These numbers directly support UT Austin’s contention that holistic use of race plays a necessary role in enabling it to achieve diversity while admitting upwards of 80% of its Texas students by facially neutral standards, drawing as it does from a pool not measured solely by class rank in largely segregated schools.

C

Recall the 3.5 AI threshold that excluded Fisher. Holistic review for the colleges to which Fisher applied only admitted applicants—minority or non-minority—with a minimum AI score of 3.5. This effectively added to the mix a pool of applicants from

which those colleges could admit students with higher test scores and a higher predicted level of performance, despite being outside the top ten percent of their class, as part of a greater mosaic of talents. Insofar as some dispersion of minority students among many classes and programs is important to realizing the educational benefits of diversity, race-conscious holistic review is a necessary complement to the Top Ten Percent Plan by giving high-scoring minority students a better chance of gaining admission to UT Austin's competitive academic departments. Fisher's proffered solution is for UT Austin's more competitive academic programs to lower their gates. But this misperceives the source of the AI threshold for admission into the competitive colleges: These programs fill 75% of their seats from the pool of students automatically admitted under the Top Ten Percent Plan. The large number of holistic review candidates competing for the quarter of the remaining seats dictates the high AI threshold that all applicants—minority or non-minority—must meet to qualify for admission. Fisher also points to weak dispersal across classes as evidence of UT Austin's pursuit of numbers. It is precisely the opposite. We repeat, holistic review's search is for diversity, as envisioned by Bakke, one benefit of which is its attendant mitigation of the clustering tendencies of the Top Ten Percent Plan.

Fisher responds that, even if necessary, UT Austin could never narrowly tailor a program that achieves classroom diversity. In particular, Fisher suggests that it is impossible to obtain classroom-level diversity without some sort of fixed

curriculum or lower school- or major-level standards. This argument again misses the mark by defining diversity only by numbers. UT Austin does not suggest that the end point of this exercise is a specific measure of diversity in every class or every major. Instead, such measures are relevant but not determinative signals of a want of the array of skills needed for diversity. In other words, diversity in the student body surely produces a degree of intra-classroom and intra-major diversity, with the "important and laudable" benefit recognized in *Grutter* of "classroom discussion [being] livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." When the holistic review program was modified to be race-conscious, 90% of classes had one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students. This represented a decreasing degree of minority classroom dispersion since the adoption of the Top Ten Percent Plan. This does not mean that there will be some set percentage of African-American nuclear physics majors. But this does mean that UT Austin's effort to ensure that African-American students with a broad array of skills are in the mix is both permissible and necessary.

VII

Interlacing the Top Ten Percent Plan, with its dependence upon segregated schools to produce minority enrollment, with a plan that did not consider race until it had a universe of applicants clearing a high hurdle of demonstrated scholastic performance

strongly supports UT Austin’s assertion that its packaging of the two was necessary in its pursuit of diversity. This hurdle is a product of a growing number of applicants competing for an ever-shrinking number of holistic review seats, creating one of the most competitive admissions processes in the country. And when race enters it is deployed in the holistic manner of *Grutter* as a factor of a factor. Even then the minority student that receives some boost for her race will have survived a fierce competition. These minorities are in a real sense, along with the non-minorities of this universe, overlooked in a facially neutral Top Ten Percent Plan that considers only class rank. While outside the Top Ten Percent Plan’s reach, they represent both high scholastic potential and high achievement in majority-white schools. We are persuaded that their absence would directly blunt efforts for a student body with a rich diversity of talents and experiences.

“Context matters when reviewing race-based governmental action under the Equal Protection Clause,” and UT Austin’s admissions program is a unique creature. “[S]trict scrutiny must take relevant differences into account”—[i]ndeed, as [the Court has] explained, that is its fundamental purpose.” The precise context of UT Austin’s admissions demonstrates that Fisher’s charge is belied by this record. Her argument refuses to accept the admission of over 80% of its Texas students without facial consideration of race as any part of narrow tailoring, and critically refuses to accept that the process adopted for the remaining 20% is essential. It rests on the untenable premise that a *Grutter* plan for 100% of the admissions is to be

preferred. UT Austin’s efforts to achieve diversity without facial consideration of race, its narrow tailoring of its admission process, in one of the country’s largest states, offers no template for others.

VIII

In sum, it is suggested that while holistic review may be a necessary and ameliorating complement to the Top Ten Percent Plan, UT Austin has not shown that its holistic review need include any reference to race, this because the Plan produces sufficient numbers of minorities for critical mass. This contention views minorities as a group, abjuring the focus upon individuals—each person’s unique potential. Race is relevant to minority and non-minority, notably when candidates have flourished as a minority in their school—whether they are white or black. *Grutter* reaffirmed that “[j]ust 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 still matters.” We are persuaded that to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of *Bakke* and *Grutter*. The need for such skill sets to complement the draws from majority-white and majority-minority schools flows directly from an understanding of what the Court has made plain diversity is not. To conclude otherwise is to narrow its focus to a tally of skin colors produced in defiance of Justice Kennedy’s opinion for the Court which

eschewed the narrow metric of numbers and turned the focus upon individuals. This powerful charge does not deny the relevance of race. We find force in the argument that race here is a necessary part, albeit one of many parts, of the decisional matrix where being white in a minority-majority school can set one apart just as being a minority in a majority-white school—not a proffer of societal discrimination in justification for use of race, but a search for students with a range of skills, experiences, and performances—one that will be impaired by turning a blind eye to the differing opportunities offered by the schools from whence they came.

It is settled that instruments of state may pursue facially neutral policies calculated to promote equality of opportunity among students to whom the public schools of Texas assign quite different starting places in the annual race for seats in its flagship university. It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity. This interest is compelled by the reality that university education is more the shaping of lives than the filling of heads with facts—the classic assertion of the humanities. Yet the backdrop of our efforts here includes the reality that accepting as permissible policies whose purpose is to achieve a desired racial effect taxes the line between quotas and holistic use of race towards a critical mass. We have hewed this line here, persuaded by UT Austin from this record of its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race, faithful to the content given to it by the Supreme Court.

To reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing.

For these reasons, we **AFFIRM**.

EMILIO M. GARZA, Circuit Judge, dissenting:

In vacating our previous opinion, *Fisher v. Univ. of Tex. at Austin*, the Supreme Court clarified the strict scrutiny standard as it applies to cases involving racial classifications in higher education admissions: Now, reviewing courts cannot defer to a state actor’s argument that its consideration of race is narrowly tailored to achieve its diversity goals. Although the University has articulated its diversity goal as a “critical mass,” surprisingly, it has failed to define this term in any objective manner. Accordingly, it is impossible to determine whether the University’s use of racial classifications in its admissions process is narrowly tailored to its stated goal—essentially, its ends remain unknown.

By holding that the University’s use of racial classifications is narrowly tailored, the majority continues to defer impermissibly to the University’s claims. This deference is squarely at odds with the central lesson of *Fisher*. A proper strict scrutiny analysis, affording the University “no deference” on its narrow tailoring claims, compels the conclusion that the University’s race-conscious admissions process does not survive strict scrutiny.

I

As a preliminary matter, Fisher has standing to pursue this appeal, but not because, as the majority contends, the Supreme Court’s opinion does “not allow our reconsideration [of the issue of standing].”

Federal courts have an affirmative duty to verify jurisdiction before proceeding to the merits. Although standing was actively contested before the Supreme Court, and although the Court’s opinion is silent about the issue, the Supreme Court has specifically warned against inferring jurisdictional holdings from its opinions not explicitly addressing that subject. Accordingly, the issue of standing remains open, and this court is obliged to address it.

In our previous opinion, we held that Fisher had standing to “challenge [her] rejection and to seek money damages for [her] injury.” Only one relevant fact has changed since then—in 2012, Fisher graduated from Louisiana State University. The University contends that by graduating, “her forward-looking request for relief became moot” because she could no longer seek reconsideration of her undergraduate application. Fisher’s graduation does not alter our previous standing analysis because, as she correctly observes, that determination did not depend on a claim for forward-looking injunctive relief. We held that Fisher had standing to seek nominal monetary damages, and we should reach the same conclusion now.

The University relies on *Texas v. Lesage*, for the proposition that Fisher lacks standing because she would not have been admitted regardless of her race. But even if *Lesage* is a standing case (which is a debatable premise—the case seems to address statutory liability under § 1983), it does not affect the outcome here. *Lesage* stands for the proposition that a plaintiff challenging governmental use of racial classifications cannot prevail if “it is undisputed that the government would have made the same decision regardless” of such use. The University asserts that Fisher would not have been admitted even if she had a “perfect” PAI score. The majority agrees. While Fisher would have been denied admission during the 2008 admissions cycle even if she had a top PAI score, this is not the relevant inquiry. Rather, as Fisher explains, the proper question is whether she would have fallen above the admissions cut-off line if that line had been drawn on a race-neutral distribution of *all* applicants’ scores. This record does not indicate whether Fisher would have been admitted if race were removed from the admissions process altogether. At the least, this is a complex question that is far from “undisputed.” Even the University acknowledges that the answer to this question is practically unknowable: It concedes that re-engineering the 2008 admissions process by retroactively removing consideration of race is virtually impossible since race has an immeasurable, yet potentially material, impact on the placement of the final admissions cut-off lines for all programs. In sum, the record does not show that Fisher’s rejection under a race-neutral admissions process is “undisputed,” and remanding to

the district court could not alter the record in this regard.

The University further challenges Fisher’s standing on redressability grounds. The University’s theory is that even if Fisher had been admitted through the race-conscious admissions program, and had not suffered the injury of rejection, she still would have paid the non-refundable application fee. Thus, says the University, because the application fee has no causal link to her injury, any judicial relief would fail to provide redress. This argument misconstrues the nature of Fisher’s alleged injury—it is not her rejection, but the denial of equal protection of the laws during the admissions decision process. Fisher correctly explains that the application fee represents nominal damages for the alleged constitutional harm stemming from the University’s improper use of racial classifications. Because this harm would have befallen Fisher whether or not she was ultimately admitted to the University, the non-refundable nature of the application fee is irrelevant.

II

Having confirmed our jurisdiction, our task is to apply strict scrutiny without any deference to the University’s claims. Because *Fisher* effected a change in the law of strict scrutiny, and corrected our understanding of that test as applied in *Grutter v. Bollinger*, I first review the current principles governing this “searching examination.”

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.” It is canonical that the Constitution treats distinctions between citizens based on their race or ethnic origin as suspect, and that the Equal Protection Clause “demands that racial classifications . . . be subjected to the most rigid scrutiny.” Thus, strict scrutiny begins from the fundamental proposition that “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.” This is “because racial characteristics so seldom provide a relevant basis for disparate treatment.” “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.”

When a state university makes race-conscious admissions decisions, those decisions are governed by the Equal Protection Clause, even though they may appear well-intended. Simply put, the Constitution does not treat race-conscious admissions programs differently because their stated aim is to help, not to harm.

Under strict scrutiny, a university’s use of racial classifications is constitutional only if necessary and narrowly tailored to further a compelling governmental interest. It is well-established that there is a compelling governmental interest in obtaining the educational benefits of a diverse student body. *Grutter* and *Gratz v. Bollinger*, confirmed this. “The diversity that furthers a compelling [governmental] interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though

important element.” Thus, diversity cannot be defined by a “specified percentage of a particular group,” because such a definition would be “patently unconstitutional racial balancing.” In applying strict scrutiny, it is proper for courts to defer to a university’s decision to pursue the compelling governmental interest of diversity based on its “educational judgment that such diversity is essential to its educational mission.” But, deference to the University is appropriate on this point, and this point alone.

Once a university has decided to pursue this compelling governmental interest, it must prove that the means chosen “to attain diversity are narrowly tailored to that goal.” In this, the strict scrutiny test takes the familiar form of a “means-to-ends” analysis: The compelling governmental interest is the ends, and the government program or law—here, the University’s race-conscious admissions program—is the means. Strict scrutiny places the burden of proving narrow tailoring firmly with the government. And, furthermore, narrow tailoring must be established “with clarity.”

Before this case, the Supreme Court had issued only three major decisions addressing affirmative action in higher education admissions: *Bakke*, *Gratz*, and *Grutter*. In *Fisher*, the Court made clear that this line of cases does not stand apart from “broader equal protection jurisprudence.” Rather, “the analysis and level of scrutiny applied to determine the validity of [a racial classification] do not vary simply because the objective appears acceptable”

In *Fisher*, the Supreme Court modified the narrow tailoring calculus applied in higher education affirmative action cases. While the overarching principles from *Bakke*, *Gratz*, and *Grutter*—that a university can have a compelling interest in attaining the educational benefits of diversity, and that its admissions program must be narrowly tailored to serve this interest—were taken “as given,” the *Fisher* Court altered the application of those principles in a critical way. Now, courts must give “no deference,” state actor’s assertion that its chosen “means . . . to attain diversity are narrowly tailored to that goal.” In so doing, the *Fisher* Court embraced Justice Kennedy’s position on “deference” from *Grutter*. Thus, under the current principles governing review of race-conscious admissions programs, providing any deference to a state actor’s claim that its use of race is narrowly tailored is “antithetical to strict scrutiny, not consistent with it.”

Because the higher-education affirmative action cases do not stand apart from “broader equal protection jurisprudence,” strict scrutiny must be applied with the same analytical rigor deployed in those other contexts. Put simply, there is no special form of strict scrutiny unique to higher education admissions decisions. Accordingly, we must now evaluate narrow tailoring by ensuring that “the means chosen ‘fit’ the [compelling governmental interest] so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” Narrow tailoring further requires that “the reviewing court verify that it is necessary for a university to

use race to achieve the educational benefits of diversity.” To do so, we must carefully inquire into whether the University “could achieve sufficient diversity without using racial classifications.” Establishing narrow tailoring does not require the University to show that it exhausted every possible race-neutral option, but it must meet its “ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”

Of course, all of the above must be underscored by the principle that using racial classifications is permissible only as a “last resort to achieve a compelling interest.”

III

Here, the University has framed its goal as obtaining a “critical mass” of campus diversity. To uphold the use of race under strict scrutiny, courts must find narrow tailoring through a close “fit” between this goal and the admissions program’s consideration of race. Accordingly, the controlling question becomes the definition of “critical mass”—the University’s stated goal. In order for us to determine whether its use of racial classifications in the admissions program is narrowly tailored to its goal, the University must explain its goal, and do so “with clarity.” On this record, it has not done so.

The majority entirely overlooks the University’s failure to define its “critical mass” objective for the purposes of assessing narrow tailoring. This is the crux of this case—absent a meaningful explanation of its desired ends, the University cannot prove

narrow tailoring under its strict scrutiny burden. Indeed, the majority repeatedly invokes the term “critical mass” without even questioning its definition. Under *Fisher*, it is not enough for a court to simply state, as does the majority, that it is not deferring to the University’s narrow tailoring arguments. Rather, the reviewing court’s actual analysis must demonstrate that “no deference” has been afforded. Here, the majority’s failure to make a meaningful inquiry into the nature of “critical mass” constitutes precisely such deference.

Certainly, as explained below, I agree that “critical mass” does not require a precise numerical definition. But, to meet its narrow tailoring burden, the University must explain its goal to us in some meaningful way. We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends. We cannot tell whether the admissions program closely “fits” the University’s goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve “critical mass,” or whether there are effective race-neutral alternatives, when it has not described what “critical mass” requires.

At best, the University’s attempted articulations of “critical mass” before this court are subjective, circular, or tautological. The University explains only that its “concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.” And, in attempting to address when it is likely to achieve critical mass, the University explains only that it will “cease its consideration of

race when it determines . . . that the educational benefits of diversity can be achieved at UT through a race-neutral policy” These articulations are insufficient. Under the rigors of strict scrutiny, the judiciary must “verify that it is necessary for a university to use race to achieve the educational benefits of diversity.” It is not possible to perform this function when the University’s objective is unknown, unmeasurable, or unclear.

The exacting scrutiny required by the Supreme Court’s “broader equal protection jurisprudence” is entirely absent from today’s opinion, which holds that the University has proven narrow tailoring even though it has failed to meaningfully articulate its diversity goals.

A

The University’s failure to define meaningfully its “critical mass” objective is manifest in its various strict scrutiny arguments. The University claims that its use of racial classifications is necessary and narrowly tailored because (1) quantitative metrics reflect an inadequate minority presence; (2) qualitative diversity is lacking; (3) certain selective colleges are insufficiently diverse; (4) its periodic review demonstrates that its goals have not yet been achieved; and (5) its use of racial classifications is almost identical to that approved in *Grutter*. Each of these arguments falls short—either overlooking a more narrowly tailored alternative or eliding any articulation of how this specific use of racial classification advances the University’s objective.

1

First, while not defining its “critical mass” goal with reference to specific quantitative objectives, the University claims that quantitative metrics are relevant in measuring its progress. The University “based its critical mass determination on several data points, including hard data on minority admissions, enrollment, and racial isolation” and found that its use of racial classifications “does increase minority enrollment.” Accepting that such metrics bear some relevance to the University’s progress, this is insufficient to satisfy strict scrutiny. The University does not explain how admitting a very small number of minority applicants under the race-conscious admissions plan is necessary to advancing its diversity goal.

It is undeniable that the University admits only a small number of minority students under race-conscious holistic review. In 2008, the sole year at issue in this case, less than 20% of the class was evaluated under the race-conscious holistic review process. Even if we assume that all minority students who were admitted and enrolled in that year through the race-conscious holistic review process gained admission because of their race, this number is strikingly small—only 216 African-American and Hispanic students in an entering class of 6,322. The University fails to explain *how* this small group contributes to its “critical mass” objective. “Racial classifications are simply too pernicious to permit any but the *most exact* connection between justification and [racial] classification.” But here, the University has not established a clear and definite

connection between its chosen means and its desired ends of “critical mass.”

To be clear, I agree that a race-conscious admissions plan need not have a “dramatic or lopsided impact” on minority enrollment numbers to survive strict scrutiny, as the University reads Fisher’s arguments to suggest. But neither can the University prove the *necessity* of its racial classification without meaningfully explaining *how* a small, marginal increase in minority admissions is necessary to achieving its diversity goals. Thus, neither the small (and decreasing) percentage of minority holistic-review admittees, nor minorities’ “under-representation” in holistic review admissions relative to whites, taken alone, demonstrates narrow tailoring.

Under the Equal Protection Clause, diversity cannot be assessed by strictly quantitative metrics, and, to the extent that numbers could be relevant in assessing “critical mass,” the University leaves this relevance entirely unexplained.

2

The University advances a second understanding of “critical mass,” which I will refer to as “qualitative.” Under this theory, the University says its goal is not boosting minority enrollment numbers alone, but rather promoting the *quality* of minority enrollment—in short, diversity within diversity. The University submits that its race-conscious holistic review allows it to select for “other types of diversity” beyond race alone, and to identify the most “talented, academically promising, and well-rounded”

minority students. According to the University, these are crucial “change agents” who debunk stereotypes but who may fall outside the top 10% of their high school classes.

As a preliminary matter, these stated ends are too imprecise to permit the requisite strict scrutiny analysis. The University has not provided any concrete targets for admitting more minority students possessing these unique qualitative-diversity characteristics—that is, the “other types of diversity” beyond race alone. At what point would this qualitative diversity target be achieved? Because its ends are unknown to us, the University cannot meet its strict scrutiny burden.

But, even accepting the University’s broad and generic qualitative diversity ends, we cannot conclude that the race-conscious policy is constitutionally “necessary.” The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law. That is, the University does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats. The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite “change agents” are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes. There is no such evaluation despite the fact that Top Ten Percent Law admittees also submit applications with essays, and are even assigned PAI scores for purposes of admission to individual schools.

Evaluating the composition of these admittees—80% of the class in 2008—before deploying racial classifications in the holistic admissions program might well reveal that racial classifications are not necessary to achieve the University’s qualitative diversity goals.

In effect, the University asks this Court to assume that minorities admitted under the Top Ten Percent Law do not demonstrate “diversity within diversity”—that they are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review. Thus, the University claims, absent its race-conscious holistic admissions program, it would lose the minority students necessary to achieving a qualitative critical mass. But it offers no evidence in the record to prove this, and we must therefore refuse to make this assumption.

Regrettably, the majority firmly adopts this assumption—that minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University’s vision of a diverse student body. The majority reasons that race-conscious holistic review is a “necessary complement,” to the Top Ten Percent Law, which, on its own, would admit insufficient “students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways.” The majority’s discussion of numerous “resegregated” Texas school districts is premised on the dangerous assumption that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the

University of Texas to establish a meaningful campus diversity. In this, it has embraced the very ill that the Equal Protection Clause seeks to banish.

Moreover, the only fact from which the majority draws this alarming conclusion is the mere reality that these districts serve majority-minority communities. By accepting the University’s standing presumption that minority students admitted under the Top Ten Percent Law do not possess the characteristics necessary to achieve a campus environment defined by “qualitative diversity,” the majority engages in the very stereotyping that the Equal Protection Clause abhors.

The record does not indicate that the University evaluates students admitted under the Top Ten Percent Law, checking for indicia of qualitative diversity—diversity within diversity—before determining that race should be considered in the holistic review process to fill the remaining seats in the class. If the Top Ten Percent Law admittees were a sufficiently qualitatively diverse population, which they may well be so far as I can tell, then using race in holistic review to promote further diversity might *not* be necessary for the University to achieve its goal, and an up-front assessment of these admittees, before turning to race, could be a more narrowly-tailored option. And, in any event, the University offers no method for this court to determine when, if ever, its goal (which remains undefined) for qualitative diversity will be reached. Accordingly, the University has failed to carry its strict scrutiny burden of proving that its race-conscious admissions policy is necessary to

achieving its diversity objective of a “qualitative” critical mass.

3

In earlier stages of this case, the University framed its diversity goal as achieving “classroom diversity.” The University suggested that classroom diversity and the distribution of minority students among colleges and majors were meaningful metrics in determining whether “critical mass” had been attained. And, indeed, the Supreme Court has recognized that increased diversity of perspectives in the classroom provides for a “livelier, more spirited, and simply more enlightening and interesting” experience. However, the University has distanced itself from this previously asserted goal, now claiming it “has never pursued classroom diversity as a discrete interest or endpoint,” but merely as “one of many factors” to be considered in evaluating diversity. Given the University’s failure to press the classroom diversity argument in its briefing on remand, the issue is almost certainly waived.

Notwithstanding this waiver, the majority addresses the issue of classroom diversity, contending that the University’s race-conscious admissions policy is necessary to give “high-scoring minority students a better chance of gaining admission to UT Austin’s competitive academic departments.” Perhaps, based on the structure of the University’s admissions process, it is possible that the use of race as a factor in calculating an applicant’s PAI score incrementally increases the odds that a minority applicant will be admitted to a competitive college within the University.

But hypothetical considerations are not enough to meet a state actor’s burden under strict scrutiny. Rather, assuming that the University’s diversity goal is establishing classroom diversity, it is the University that bears the burden of proving that the use of race in calculating the PAI scores is necessary to furthering this goal. But instead of explaining how race enhances minority students’ prospects of admission to a competitive college or major, the University admissions officers’ deposition testimony specifically indicates that race could not be a decisive factor in any applicant’s admission, and that it is impossible to determine whether race was in fact decisive for any particular applicant’s admission decision. Absent any record evidence of the potential for race to be a decisive factor, the University cannot establish, as the majority claims, that its racial classifications could actually give any minority applicant “a better chance” of admission to a competitive college.

In short, the University has obscured its use of race to the point that even its own officers cannot explain the impact of race on admission to competitive colleges. If race is indeed without a discernable impact, the University cannot carry its burden of proving that race-conscious holistic review is necessary to achieving classroom diversity (or, for that matter, any kind of diversity). Because the role played by race in the admissions decision is essentially unknowable, I cannot find that these racial classifications are necessary or narrowly tailored to achieving the University’s interest in diversity.

4

The University further claims that its race-conscious admissions program is narrowly tailored because, with the help of a rigorous periodic review system, it will “cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved at [the University] through a race-neutral policy ‘at reasonable cost’ to its other educational objectives.” The University seeks to assure us that periodic review of its admissions policy considers enrollment data, “evidence of racial isolation and the racial climate on campus,” and “other data including the educational benefits of diversity experienced in the classroom.” In simple language, the University asserts that it knows critical mass when it sees it.

On one level, the University’s review process captures the essence of the holistic diversity interest established in *Bakke*, validated in *Grutter*, and left intact by *Fisher*. In fact, the *Grutter* Court discussed the important role that such reviews can play in determining whether racial classifications have continuing necessity under strict scrutiny.

Nonetheless, there are two distinct flaws with the University’s assurances that its own, internal, periodic review is sufficient to safeguard against any unconstitutional use of race. First, strict scrutiny does not allow the judiciary to delegate wholesale to state actors the task of determining whether a race-conscious admissions policy continues to be necessary. This is the very point made by the *Fisher* Court, in vacating our previous opinion for deferring to the University’s narrow-tailoring claims.

Second, while the University correctly considers a range of factors in its assessment of the necessity of its use of race, it has still not explained to us how this consideration takes place. In describing its periodic review process, the University never explains how the various factors are measured, the weight afforded to each, and what combination thereof would yield a “critical mass” of diversity sufficient to cease use of racial classifications.

In light of this, I cannot determine that the race-conscious admissions program is narrowly tailored to the University’s goal. The University, in effect, defines critical mass as a nebulous amalgam of factors—enrollment data, racial isolation, racial climate, and “the educational benefits of diversity”—that its internal periodic review is calibrated to detect. But, without more, the University fails to prove narrow tailoring with clarity. Such a bare submission, in essence, begs for the deference that is irreconcilable with “meaningful” judicial review.

5

Lastly, the University submits that its race-conscious admissions policy necessarily satisfies narrow tailoring because it is closely modeled on the admissions program upheld by the Supreme Court in *Grutter*. Similarly, the majority implies that the race-conscious admissions policy’s similarity to *Grutter* is, itself, a meaningful factor in our strict scrutiny analysis. This claim is unpersuasive.

Fisher confirms that we are obligated to consider the particular challenged race-

conscious program on its own terms and ask whether the University “could achieve sufficient diversity without using racial classifications.” Strict scrutiny is not a hypothetical undertaking, but rather “imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”

Certain aspects of the University’s admissions policy do parallel the features of the plan upheld in *Grutter*—race is only a sub-factor within a holistic, individualized review process, and the University’s goal is framed in terms of “critical mass.” But the University, under mandate by the Texas Legislature’s Top Ten Percent Law, admits the majority of its entering class through a separate, race-neutral scheme. This inevitably impacts the narrow tailoring calculus presently under consideration. That is, while the University’s race-conscious admissions policy is conceptually derived from the University of Michigan Law School’s approach, the two are quite distinct in practice: The University’s holistic review coexists with a separate process that admits a large population of students, a circumstance not contemplated in *Grutter*.

Similarity to *Grutter* is not a narrow-tailoring talisman that insulates the University’s policy from strict scrutiny. The University’s burden is to prove that its own use of racial classifications is necessary and narrowly tailored for achieving its own diversity objectives.

B

Ultimately, the record is devoid of any specifically articulated connection between the University’s diversity goal of “critical mass” and its race-conscious admissions process. The University has not shown how it determines the existence, or lack, of a “critical mass” of diversity in its student population. Rather, the University only frames its goal as “obtaining the educational benefits of diversity.” This is entirely circular reasoning that cannot satisfy the rigorous means-to-ends analysis required under strict scrutiny.

To be clear, my concern is not with the University’s use of the term “critical mass” itself. Even if the University were to adopt another rhetorical construct to explain its diversity objectives, it faces the same underlying problem—it does not offer a clear and definite articulation of its goal sufficient for a reviewing court to verify narrow tailoring. The University’s failure to meet its strict scrutiny burden is a function of its undefined ends, not its choice to label those ends as “critical mass.”

IV

The majority concludes that the University’s race-conscious admissions program is narrowly tailored because the University has exhausted all workable alternatives. Much of today’s opinion explores the historical “narrative” of the University’s admissions process, including many race-neutral recruitment programs intended to bolster minority enrollment. And, indeed, the University’s many efforts to achieve a diverse campus learning environment without resorting to racial classifications are

commendable. But, framing this history as something akin to a process of elimination, the majority finds that the University's race-conscious admissions program must be necessary and narrowly tailored to the University's diversity objectives. This is insufficient to satisfy strict scrutiny.

Certainly, the University's past experiences with race-neutral initiatives are relevant to the inquiry because the University must establish that "no workable race-neutral alternatives would produce the educational benefits of diversity," and because the University's "experience and expertise" provide some context to inform judicial review. However, we cannot conclude that the University's current race-conscious admissions program—the only matter before this court—is narrowly tailored to achieve the educational benefits of diversity because the University has failed to define what it means by "critical mass." In other words, the University's long history of purportedly unsuccessful alternatives is meaningless if we cannot discern the contours of the success it now seeks.

Additionally, the majority's sustained focus on the Top Ten Percent Law is misplaced. While the Law is indeed central to this case, here, as in our previous consideration of this appeal, "[n]o party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law." Nevertheless, the majority forcefully indicts the Law for frustrating the University's efforts to achieve well-rounded diversity. In the majority's view, the Law's shortcomings make a holistic review program more necessary. At most, the Law's mechanical

operation—admitting students based on the sole metric of high school class rank—might suggest that some form of holistic review is advisable to supplement the admissions process. But this issue is not before us at all. Our task is to determine whether the University's injection of *race* into its admissions process survives strict scrutiny.

The Top Ten Percent Law matters only insofar as it causes the University to admit a large number of minority students separate and apart from the holistic review process. That is, the Law creates a separate admissions channel for many minority students, which then calls into question the necessity of using race as a factor in the holistic review process for filling the remaining seats. Whether, in light of the Top Ten Percent Law, race-conscious holistic review is more or less necessary is an open question, and it is the University that bears the burden of explaining how the Law impacts its achievement of its diversity goal. Here, it has failed to do so, under any theory of "critical mass" it has proffered.

* * *

The material facts of this case have remained unchanged since the district court's grant of summary judgment, but the governing law has changed markedly. *Fisher* established that strict scrutiny in the higher education affirmative action setting is no different than strict scrutiny in other equal protection contexts—the state actor receives no deference in proving that its chosen race-conscious means are narrowly tailored to its ends. The majority fails to give *Fisher* its proper weight. Today's opinion sidesteps the

new strict scrutiny standard and continues to defer to the University's claims that its use of racial classifications is narrowly tailored to its diversity goal. Because the University has not defined its diversity goal in any meaningful way—instead, reflexively reciting the term “critical mass”—it is altogether impossible to determine whether its use of racial classifications is narrowly tailored.

This is not to say, however, that it is impossible for a public university to define its diversity ends adequately for a court to verify narrow tailoring with the requisite exacting scrutiny. After all, “[s]trict scrutiny must not

be strict in theory but fatal in fact.” It may even be possible for a university to do so while seeking a “critical mass.” What matters now, after *Fisher*, is that a state actor's diversity goals must be sufficiently clear and definite such that a reviewing court can assess, without deference, whether its particular use of racial classifications is necessary and narrowly tailored to those goals. On this record, the University has not “offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.” Accordingly, I would reverse and render judgment for *Fisher*. I respectfully dissent.

“Supreme Court to Weigh Race in College Admissions”

The New York Times

Adam Liptak

June 29, 2015

The Supreme Court agreed on Monday to take a second look at the use of race in admissions decisions by the University of Texas at Austin, reviving a potent challenge to affirmative action in higher education.

The move, which supporters of race-conscious admissions programs called baffling and ominous, signaled that the court may limit or even end such affirmative action. The advocates speculated that the court’s most conservative members had cast the four votes needed to grant review of the case in the hope that Justice Anthony M. Kennedy would supply the fifth vote to strike down the Texas admissions plan.

Justice Kennedy has never voted to uphold an affirmative action program.

The consequences would be striking if the court sided with the plaintiff in the case, a white woman named Abigail Fisher, and did away with racial preferences in higher education. It would, all sides agree, reduce the number of black and Latino students at nearly every selective college and graduate school, with more Asian-American and white students gaining entrance instead.

“Over the last few days, liberals have been celebrating a string of important victories involving health care and same-sex marriage,” said Justin Driver, a law professor at the University of Chicago. “But liberals

have also been bracing themselves for the other shoe to drop. This decision to grant review means, at a minimum, that the other shoe will remain suspended in midair for the next several months.”

A decision barring the use of race in admissions would undo a 2003 ruling that the majority said it expected to last for 25 years. In that 5-to-4 decision, in *Grutter v. Bollinger*, the Supreme Court said that public colleges and universities could not use a point system to increase minority enrollment but could take race into account in vaguer ways to ensure academic diversity.

The case that the court agreed on Monday to hear, *Fisher v. University of Texas*, No. 14-981, arose from a lawsuit filed by Ms. Fisher, who said the university had denied her admission based on her race. She has since graduated from Louisiana State University.

In a statement, Ms. Fisher said, “I hope the justices will rule that U.T. is not allowed to treat undergraduate applicants differently because of their race or ethnicity.”

Gregory L. Fenves, the president of the University of Texas at Austin, said his school’s admissions program was lawful.

“Under the Supreme Court’s existing precedent, the university’s commitment to using race as one factor in an individualized, holistic admissions policy allows us to

assemble a student body that brings with it the educational benefits of diversity for all students,” he said in a statement. “Our admissions policy is narrowly tailored, constitutional and has been upheld by the courts multiple times.”

When the court last considered Ms. Fisher’s case in 2013, supporters of affirmative action were nervous. But the court deferred conclusive action in what appeared to be a compromise decision.

In 2013, Justice Kennedy, writing for the majority, said the federal appeals court in New Orleans had been insufficiently skeptical of the Texas program, which has unusual features. The appeals court then endorsed the program for a second time.

In returning to the case, at least some justices seemed ready to issue a major decision on the role race may play in government decision making.

Most applicants from Texas are admitted under a part of the program that guarantees admission to top students in every high school in the state. (This is often called the Top 10 program, though the percentage cutoff can vary by year.)

The Top 10 program has produced significant racial and ethnic diversity. In 2011, for instance, 26 percent of freshmen who enrolled under the program were Hispanic, and 6 percent were black. Texas is about 38 percent Hispanic and 12 percent black.

The remaining Texas students and those from elsewhere are considered under standards

that take account of academic achievement and other factors, including race and ethnicity. Many colleges and universities base all of their admissions decisions on such “holistic” grounds.

In 2003, the Supreme Court endorsed such holistic admissions programs in *Grutter v. Bollinger*, saying it was permissible to consider race as one factor among many to achieve educational diversity. Writing for the majority in that case, Justice Sandra Day O’Connor said she expected that “25 years from now,” the “use of racial preferences will no longer be necessary.”

The question in the Texas case was whether the flagship state university was entitled to supplement its race-neutral Top 10 program with a race-conscious holistic one.

The Supreme Court’s 2013 decision in *Fisher v. University of Texas* reaffirmed that educational diversity is an interest sufficient to overcome the general ban on racial classifications by the government. But it added that public institutions must have good reasons for the methods they use to achieve that goal.

Colleges and universities, Justice Kennedy wrote, must demonstrate that “available, workable race-neutral alternatives do not suffice” before using race in admissions decisions.

Courts reviewing government programs that make distinctions based on race subject them to a form of judicial review known as “strict scrutiny,” which requires the government to

identify a compelling goal and a close fit between means and ends.

Last year, in its second encounter with the case, a divided three-judge panel of the United States Court of Appeals for the Fifth Circuit, in New Orleans, ruled that the Texas admissions plan satisfied strict scrutiny.

“We are persuaded that to deny U.T. Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience,” Judge Patrick E. Higginbotham wrote for the majority.

The Top 10 program is inadequate, he said, because it is a blunt instrument and a product of widespread segregation in Texas high schools.

In dissent, Judge Emilio M. Garza said the university’s justifications for using race were “subjective, circular or tautological.”

As in the earlier appeal, Justice Elena Kagan has recused herself from the case because she worked on it as United States solicitor general.

“Fisher v. Texas Dismissed Again; Is it Headed Back to Supreme Court?”

Forbes

Daniel Fisher

July 15, 2014

An appeals court dismissed the affirmative-action lawsuit of frustrated University of Texas applicant Abigail Fisher after reconsidering it in light of last year’s U.S. Supreme Court decision tightening the standards for race-conscious college admissions. The appeals-court ruling drew a strong dissent that suggested the majority got it wrong, however, and if Fisher follows up on her vow to appeal the question may wind up in front of the Supreme Court again.

In a decision released today, two of the three judges on a panel of the Fifth Circuit Court of Appeals in New Orleans held that Fisher failed to make her case that UT had engaged in unconstitutional discrimination by using race as a factor in some of its admissions decisions.

“We find force in the argument that race here is a necessary part, albeit one of many parts, of the decisional matrix,” Judge Patrick Higgenbotham wrote, in an opinion joined by Judge Carolyn Dineen King.

Fisher, who is white, was rejected by UT in 2004 and subsequently graduated from another university, but her case has lived on as a key challenge to the constitutionality of affirmative action. In a strong dissent, Judge Emilio M. Garza said the majority allowed the school to escape the strict scrutiny

required under the Supreme Court’s decision in *Fisher vs. University of Texas*.

“Simply put, the Constitution does not treat race-conscious admissions programs differently because their stated aim is to help, not to harm,” Garza wrote. By allowing UT to set a vague goal of “critical mass” for certain minorities — primarily black and Latino students — Garza said, the majority failed to give Fisher the opportunity to prove that the UT program wasn’t narrowly tailored to achieve a compelling state goal. “Critical mass” was never defined in the pleadings and the majority also failed to address the question of how anybody could determine when it has been achieved, he said.

“Accordingly, it is impossible to determine whether the University’s use of racial classifications in its admissions process is narrowly tailored to its stated goal — essentially, its ends remain unknown,” he said.

Fisher’s lawyer Edward Blum told the Los Angeles Times his client would appeal this latest decision.

“We are disappointed,” Blum said. “But this court was proven wrong by the Supreme Court in 2013 and we believe they will be proven wrong again.”

The Fifth Circuit majority opinion examined the recent history of UT admissions and concluded that the university had achieved substantial diversity by admitting the majority of students under the so-called Top Ten Percent plan, which requires UT to accept any students in the top 10% of their high school classes. That plan, required by state law, is designed to make a virtue out of the severe racial and ethnic segregation in Texas public schools by forcing the university to accept applicants from diverse backgrounds.

This race-neutral policy, which supplies more than 80% of students, works against black and Latino students who find themselves in majority-white schools and other well-rounded applicants outside the top 10% of their classes.

“With its blindness to all but the single dimension of class rank, the Top Ten Percent Plan came with significant costs to diversity and academic integrity, passing over large numbers of highly qualified minority and non-minority applicants,” Higgenbotham wrote.

To address the “nearly intractable problem” of racial and ethnic diversity, the school adopted a “holistic review” process that the Supreme Court approved in *Grutter v. Bollinger*, a 2003 decision upholding a University of Michigan Law School affirmative action program. That program considered race as one of a number of qualifications for admission; in UT’s case, race was among a bundle of factors that had a slightly higher weighting than essays.

Only a minority of students are accepted through the holistic review process and the majority of those are white. In the year Fisher applied, 17,000 applicants who applied outside the Top Ten Percent program competed for 1,200 remaining seats at the 38,000-student school.

Fisher argued the minimal impact of the holistic review process argued against it being an essential tool for achieving a policy goal, and Garza agreed. The university failed to explain, and the majority failed to require to it to explain, how the program advanced the goal of diversity, he said.

Garza also criticized the “alarming conclusion” of the majority that the Top Ten Percent plan didn’t accept enough minority students, or not the right type of candidates. The court assumes, he said, “that minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University’s vision of a diverse student body.”

The proper analysis would allow the university to determine that racial and ethnic diversity are important goals, he said, but leave to courts the decision of whether the tools the university uses are narrowly tailored to achieve them.

“Because the role played by race in the admissions decision is essentially unknowable, I cannot find that these racial classifications are necessary or narrowly tailored to achieving the University’s interest in diversity,” said Garza, a George H.W. Bush appointee.

The decision and dissent illustrate the almost intractable conflict between opponents and supporters of affirmative action as the Supreme Court continues to chip away at the allowable uses of race in government decisions. The majority, relying on earlier Supreme Court decisions, says UT can continue to pursue the goal of diversity, which it defines as some unspecified, higher number of black and Latino students. Garza hews to the absolutist line of Chief Justice John Roberts, who once famously declared: “The way to stop discrimination on the basis

of race is to stop discriminating on the basis of race.”

Garza, citing the landmark 1967 decision in *Loving v. Virginia*, striking down that state’s law against interracial marriages, said: “Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.”

It remains to be seen if the Supreme Court will find enough material in the majority’s decision to accept yet another appeal of this long-running case.

“Finally! The *Fisher* Decision in Plain English”

SCOTUSBlog

Amy Howe

June 24, 2013

Today the Court finally issued its decision in *Fisher v. University of Texas at Austin*, the challenge to that school’s use of race in its undergraduate admissions process. Since the Court announced last year that it would review the case, the university and supporters of affirmative action had feared the worst: that the Court would strike down not only the university’s policy, but affirmative action more generally. This morning the university learned that its admissions policy will at least live to fight another day, but it will face a tough test when the case goes back to the lower courts for further proceedings. Let’s take a look in Plain English.

As I explained in an earlier post, the case was filed by Abigail Fisher, a young woman from Texas who applied to the university but was rejected. Fisher, who is white, then filed a lawsuit, arguing that she had been a victim of racial discrimination because minority students with less impressive credentials than hers had been admitted. The university prevailed in the lower courts, but found a skeptical audience among the conservative Justices at oral argument at the Supreme Court. Although Fisher and her lawyers made clear that they were not asking the Court to overrule its 2003 decision in *Grutter v. Bollinger*, ruling that the University of Michigan Law School could consider race in its admissions process as part of its efforts to achieve a diverse student body, the Court

nonetheless seemed ready to put real restrictions on when and how universities can consider race.

Today a broad majority of the Court reinforced that affirmative action must be strictly reviewed, but it did not outlaw those programs. In an opinion that required only thirteen pages, the Court explained that a university’s use of race must meet a test known as “strict scrutiny.” Under this test, a university’s use of affirmative action will be constitutional only if it is “narrowly tailored.” The Court in *Fisher* took pains to make clear exactly what this means: courts can no longer simply rubber-stamp a university’s determination that it needs to use affirmative action to have a diverse student body. Instead, courts themselves will need to confirm that the use of race is “necessary” – that is, that there is no other realistic alternative that does not use race that would also create a diverse student body. Because the lower court had not done so, the Court sent the case back for it to determine whether the university could make this showing.

Justice Antonin Scalia joined the Court’s opinion, but he also wrote a separate, one-paragraph concurring opinion in which he made clear that, if Fisher and her lawyers had asked the Court to do so, he would have voted to overrule the 2003 decision in *Grutter* and eliminate the use of affirmative action altogether. Justice Clarence Thomas – who

in his autobiography blamed affirmative action for his problems finding a job after he graduated from Yale Law School in the 1970s – shared that view, but he opted to discuss his reasoning at length, in a twenty-page concurring opinion in which he suggested (among other things) that “the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists.”

Justice Ruth Bader Ginsburg was the lone dissenter, but she still managed to produce a few zingers of her own in her sparse four-page opinion. Most notably, she pooh-poohed the idea that the two alternatives to affirmative action suggested by Fisher and her lawyers – the school’s Top Ten Percent Plan, which offers automatic admission to any Texas high school student in the top ten percent of her class, and the review of applications without regard to race – are in fact “race-blind.” Because race was actually at the heart of the Top Ten Percent Plan, she suggests, and because universities will still consider race even if they need to do so covertly, “only an ostrich could regard the supposedly race neutral alternatives as race unconscious.”

How will the university’s policy fare in the

lower courts? Given the Top Ten Percent Plan’s success in achieving a diverse student body, the school could face an uphill battle in convincing the lower court that it *needs* to be able to consider race to fill the remaining slots. And it may soon have lots of company in court, if today’s ruling leads to new lawsuits by spurned applicants at other schools.

Given how long it took the Court to decide this case (nearly nine months), the seven-to-one vote came as somewhat of a surprise. Although it may be many years before we know for sure, it seems very possible that the end result was a compromise brokered to break a stalemate: affirmative action survives at least in theory (which would gain the support of Justices Breyer and Sotomayor), but will be far more difficult to implement in practice (which would gain the support of the Court’s more conservative Justices). But for now, and probably much to their relief, affirmative action is off the Justices’ plate – at least until fall, when they will hear oral arguments in a case challenging an amendment to the Michigan constitution that prohibits the use of affirmative action by public universities. Stay tuned . . . we’ll be back to cover that one in Plain English too.

“Easy AA”

Slate

Jamelle Bouie

June 29, 2015

In 2008, Abigail Fisher, who is white, sued the University of Texas at Austin for race discrimination. The school rejected her, and she blamed its affirmative action program, which considers race and ethnicity in a “holistic review” of certain candidates. “There were people in my class with lower grades who weren’t in all the activities I was in, who were being accepted into UT, and the only other difference between us was the color of our skin,” she explained.

Her rhetoric aside, however, Fisher and her lawyers couldn’t prove discrimination in court. In 2009, a federal district court upheld the university’s policy and rejected her lawsuit. She appealed the decision to the 5th U.S. Circuit Court of Appeals, which upheld the prior ruling. In a last grasp for success, her lawyers appealed their case to the Supreme Court, which—in a 7–1 decision—vacated the previous ruling and sent it back to the 5th Circuit for a second hearing. Writing for the majority, Justice Anthony Kennedy explained that the university hadn’t proved “its admissions program [was] narrowly tailored to obtain the educational benefits of diversity.” Everyone had to try again.

That was 2013. The 5th Circuit returned to the question, and last year it came to the same place: UT’s policy was constitutionally kosher. “It is equally settled that universities may use race as part of a holistic admissions

program where it cannot otherwise achieve diversity,” wrote the 2–1 majority. Undeterred, Fisher appealed to the Supreme Court again. And on Monday, the Supreme Court took her case, again.

What’s striking about this case—and what makes it frustrating to some observers—is the curious question of Fisher’s academic record. Put simply, as Nikole Hannah-Jones documented for ProPublica, affirmative action wasn’t her problem.

If you want entrance to UT Austin and you live in Texas, you have three options: You can score in the top 10 percent of your high school class, which grants you automatic entry; you can try for the non-top 10 slots; or, if your grades are weak, you can attend a satellite campus and transfer, provided good grades and a strong course load.

When Fisher applied in 2008, notes Hannah-Jones, the UT Austin filled 92 percent of its in-state spots with students from the top 10 program. She wasn’t among them. With a 3.59 grade-point average and a modest SAT score of 1180 out of 1600, she was a solid student but not a great one, not for a school with an overall acceptance rate of 40 percent and an extremely low acceptance rate (comparable to Harvard’s) for in-state students admitted outside of top 10.

For the remaining 8 percent of in-state spots, UT Austin used a comprehensive approach that weighed grades and test scores along with essays, leadership, activities, service to the community, and “special circumstances.” Those ranged from socioeconomic status and school quality, to family background and race. As the university’s director of admissions explained for the 5th Circuit, “[R]ace provides—like language, 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.”

Neither special circumstances nor grades were determinative. Of the 841 students admitted under these criteria, 47 had worse AI/PAI scores (a combination of the holistic measure, grades, and test scores) than Fisher, and 42 of them were white. On the other end, UT rejected 168 black and Latino students with scores equal to or better than Fisher’s.*

To call this discrimination is to say that Fisher was entitled to a space at the UT Austin, despite grades that didn’t make the cut. It’s worth pointing out that the university gave her the choice of transferring from a satellite school, which she rejected.

Fortunately for Fisher, this latest trip to the high court might be the try that sticks. At least four Supreme Court justices believe affirmative action is unconstitutional. In his concurrence to the first Fisher opinion, for instance, Justice Antonin Scalia wrote, “The Constitution proscribes government discrimination on the basis of race, and state-

provided education is no exception.” Likewise, on the same grounds, Justice Clarence Thomas attacked affirmative action as morally equivalent to Jim Crow. Justice Samuel Alito has sided with affirmative action opponents in the past, and in reference to a voluntary school desegregation plan—which he struck down—Chief Justice John Roberts has said that “the way to stop discriminating on the basis of race is to stop discriminating on the basis of race,” as if race consciousness is the same as racism. Meanwhile, a member of the court’s liberal wing, Justice Elena Kagan, will recuse herself from hearing the case because she worked on it when she was solicitor general.

Given all this, most liberals aren’t optimistic. With that said, there’s an argument—from Richard Kahlenberg of the Century Foundation—that an end to race-based affirmative action will spur the country toward class-based affirmative action, which would assist poor and working-class students of all backgrounds, who are underrepresented at selective colleges. Because of disparities of wealth and income, minorities are as likely as whites to benefit under a class-based arrangement.

On that score, Texas—with its top 10 program—is a pioneer. Top 10 doesn’t adjust for neighborhood or school quality; the best student at an older, rural school is just as qualified for admission as the best student at a gleaming, suburban complex. With that said, Top 10 comes with two serious problems: Highly qualified students at great schools miss the cutoff, on account of high competition, while the best students from

low-achieving schools are often unprepared for university work. Indeed, there's a certain perversity to top 10, which achieves its racial diversity by leveraging neighborhood—and thus public high school—segregation. But, under a legal regime that only tolerates a “narrow” use of racial preferences in education—forcing race-neutral means for race-conscious ends—that outcome is inevitable. As Justice Ruth Bader Ginsburg wrote in her Fisher dissent, “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.”

immigrant families who happen to be from lower social classes or who happen to live in low-income neighborhoods.” Race disadvantage is different than its class counterpart, and one affirmative action isn't a substitute for the other.

But even if it were, it's important to note that if the court ends race-based affirmative action, there's no guarantee that we'll see an alternative. Opponents of race-conscious policy in education are often opponents of “diversity” writ large and won't be fooled into accepting measures to help boost diversity by the use of the word class instead of race.

Finally, it's worth repeating a point from the Economic Policy Institute's Richard Rothstein, who notes—correctly—that “black families and their children suffer from compounded and inherited disadvantages that are unique, not like those of white or

“Looming Supreme Court Battle Could be a Major Blow to Affirmative Action”

Business Insider

Peter Jacobs

June 29, 2015

The Supreme Court announced Monday that justices would reconsider a case on the use of race in Texas college admissions that they originally heard in 2013.

The case — *Fisher v. University of Texas* — could provide a significant challenge to affirmative action policies because the court's key swing voter, Justice Anthony Kennedy, has never voted to uphold an affirmative action program.

The justices also seemed primed to rule against affirmative action the last time they heard the case, even though they sent it back to a lower court.

The dispute centers around Abigail Fisher, a white woman in her mid-20s, who in 2008 sued the University of Texas at Austin after she was denied admission to the state's flagship public university.

She claims she was discriminated against because of her race, and that UT Austin accepted non-white students with worse grades and fewer extracurricular activities.

Historically, the Supreme Court has held colleges have the ability to include race as a factor in admissions decisions. The key decision that seems to influence how the justices will approach Fisher's case is *Grutter v. Bollinger*, a 2003 ruling finding the University of Michigan Law School could

use race as part of a "holistic" admissions standard.

The makeup of the Supreme Court has changed since the *Grutter* decision, though. Perhaps most notably, former Justice Sandra Day O'Connor — who wrote the 5-4 decision allowing affirmative action in 2003 — retired and was replaced by Justice Samuel A. Alito Jr.

"Her replacement by Justice [Alito], who has been hostile to affirmative action programs, may have altered the balance on the court on whether such admissions programs are constitutional," The New York Times reported in 2012.

After hearing arguments in the Fisher case that year, The Times reported, "it seemed tolerably clear that the four members of the court's conservative wing" — Chief Justice John G. Roberts, Jr., as well as Justices Antonin Scalia, Clarence Thomas, and Alito — "were ready to act now to revise the *Grutter* decision."

Kennedy also seemed "prepared to limit the *Grutter* decision," according to The Times, while the court's more liberal Justices — Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor — all seemed to support the University of Texas. Justice Elena Kagan, who likely worked the case as

the US government's Solicitor General, has recused herself from hearing *Fisher*, as she did when the court last considered it.

The Supreme Court eventually decided 7-1 to send *Fisher v. University of Texas* back to a lower court to rehear the case with stricter scrutiny. Justice Ginsburg dissented, arguing that Texas was acting appropriately, while the other majority opinion held the lower court did not examine the necessity of UT Austin's affirmative action policy closely enough.

The Fifth Circuit Court of Appeals affirmed Texas' policy in a 2-1 panel decision, and dismissed *Fisher's* case last year.

Legal journalist Joan Biskupic's recent book on Justice Sonia Sotomayor — "Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice" — revealed that the 7-1 decision was actually a compromise and the court was ready to rule against the University of Texas. In a New York Times op-ed earlier this year, Supreme Court reporter Linda Greenhouse highlighted Biskupic book in terms of what it might mean if justices again took up *Fisher v. University of Texas*.

"In the *University of Texas* case, it initially looked like a 5-3 lineup. The five conservatives, including Justice Kennedy, wanted to rule against the Texas policy and limit the ability of other universities to use the kinds of admissions programs upheld in *Grutter v. Bollinger*. The three liberals were ready to dissent," Biskupic writes.

It's not clear that much has changed in the past few years. Noting the Supreme Court needs four votes to decide to hear a case, Greenhouse writes, it's likely the conservative justices "have persuaded themselves that Justice Kennedy will hold firm rather than seek another temperature-lowering compromise — and that the ensuing heat would be an institutional price worth paying."

To some extent the Texas case is unique, as public high school students in the top 10% of their class are automatically offered admissions to UT Austin, although high-performing students can still gain admission through the regular application process, which considers factors such as race and ethnicity.

In her lawsuit, *Fisher* and her lawyers argued that the "Top Ten" program naturally assures enough student diversity that affirmative action is not needed, Scott Jaschik points out at Inside Higher Ed.

A ruling against the program, however, could have a wide-reaching impact on current affirmative action policies, as well as future cases heard by the Supreme Court.

Affirmative action advocates do have at least one avenue to keep Texas' race-inclusive policy alive. If Kennedy does surprise and switches his vote this time around, the court could face a rare 4-4 tie, as Kagan has recused herself. In this situation, the Supreme Court's ruling would revert back to the lower court, which most recently upheld the Texas program.

Foster v. Humphrey

14-8349

Ruling Below: *Foster v. State*, 258 Ga. 736 (Ga. 1988)

Defendant was convicted in the Superior Court, Floyd County, John A. Frazier, Jr., J., of malice murder and sentenced to death, and he appealed. The Supreme Court, Marshall, C.J., held that: (1) a prospective juror's views against the death penalty supported a finding that she was disqualified, even though she stated that "maybe" she could change her mind; (2) a prospective juror's confusion about the automatic imposition of the death penalty, and his opinion that the police had "probably got the right man" when they arrested defendant, did not warrant disqualification; (3) the prosecutor successfully rebutted a prima facie case of racial discrimination in the exercise of peremptory challenges

Question Presented: Whether the Georgia courts erred in failing to recognize race discrimination under *Batson v. Kentucky* in the extraordinary circumstances of this death penalty case.

Timothy Tyrone FOSTER
Appellant
v.
The STATE
Appellee

Supreme Court of Georgia

Decided on November 22, 1988

[Excerpt; some citations and footnotes omitted]

MARSHALL, Chief Justice.

This is a death-penalty case. Queen Madge White, a 79-year-old widow, lived by herself in Rome, Georgia. Early in the evening of August 27, 1986, a friend took White to choir practice, and brought her home at 8:30 p.m. White talked to her sister by telephone at 9:00 p.m. and everything was normal. However, when the sister stopped by early the next morning, she discovered that White's house had been broken into and ransacked. The

sister called the police, who found White's body lying on the floor in her bedroom covered to her chin by a blanket. Her face was coated with talcum powder. Her jaw was broken. She had a severe gash on the top of her head. She had been sexually molested with a salad-dressing bottle, and strangled to death. A number of her possessions were missing from her home.

The appellant, Timothy Tyrone Foster, was arrested for White's murder a month later when he threatened his live-in companion and she responded by turning him in. The victim's possessions were recovered from their home and from Foster's two sisters. Foster was interrogated and confessed. A jury convicted him of malice murder and burglary, and sentenced him to death. This is his appeal.

The crime occurred August 27, 1986. Foster was arrested September 26 and indicted on October 17, 1986. The case was tried April 20 through May 1, 1987. A motion for new trial was filed May 28, 1987 and heard November 24, 1987. The trial court denied the motion on February 3, 1988. A notice of appeal was filed March 3, 1988, and the case was docketed in this court on March 21, 1988. Oral arguments were heard June 6, 1988.

1.

Foster first contends the trial court erred by excusing one prospective juror and by failing to excuse eight prospective jurors.

Prospective juror Black was excused because of her views against capital punishment. The test for excusal is "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "

Black's answers to questions about the death penalty, like those of many other prospective jurors, were somewhat contradictory. As she pointed out, she had never before been asked to express her views on capital punishment.

She did state, however, that, although she "maybe" could change her mind, she was opposed to the death penalty, and she stated repeatedly that she would automatically vote for a life sentence in a murder case. The trial court's finding that she was disqualified is not clearly erroneous.

We note that Black gave inconsistent answers to several attempts to ask a question in the exact language of the Witt test for excusal. Although the standard enunciated in *Witt* is the test for excusal, it is not necessarily the best or most comprehensible voir dire question. As is noted in *Witt*: "Relevant voir dire questions addressed to this issue [of death-qualification] need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will."

Foster contends that prospective juror

Tate should have been excused because he initially stated that he would vote automatically to impose a death sentence if the defendant were convicted, and because he had formed an opinion that the police had "probably got the right man" when they arrested Foster. However, it is clear that Tate was confused at first by the question about the automatic imposition of the death penalty. Further questioning cleared up the confusion and showed no disqualification in this respect. The previously-formed opinion as to guilt was not so "fixed and definite" as to necessitate an excusal for cause. Tate stated repeatedly that he could set aside his opinion, and decide the case strictly on the evidence.

Tate was not alone. Many of the prospective jurors stated at first that they would vote automatically for both a death sentence and a life sentence.

Foster also contends that prospective juror Holder should have been excused for his views on the death penalty. Any death-qualification issue here is moot, since this prospective juror was excused on other grounds.

Foster complains of the refusal to excuse six additional prospective jurors on the ground of bias. Some of these prospective jurors knew the victim, but none were close to her, and they all testified that they could be fair and impartial jurors and could decide the case on the evidence presented. The trial court did not err by overruling Foster's challenges for favor.

2.

The voir dire examination concluded on a Friday afternoon. The jury was selected Monday morning, giving the parties the weekend to plan their peremptory challenges. The qualified panel from which the jury was selected included four blacks. The district attorney exercised peremptory challenges against each of the four black jurors. Foster timely raised an issue of racial discrimination in the prosecution's exercise of peremptory challenges. The trial court ruled that a prima facie case had been established, and required the prosecutor to explain his exercise of peremptory challenges. See *Gamble v. State*. Foster contends the trial court erred by finding that the state successfully rebutted the

prima facie case. As we stated in *Gamble* (quoting from *Batson*):

The [prosecutor's] explanation [of his peremptory challenges] “need not rise to the level justifying exercise of a challenge for cause,” but it must be “neutral,” “related to the case to be tried,” and a “‘clear and reasonably specific,’ explanation of his ‘legitimate reasons’ for exercising the challenges.”

The defense in this case centered around Foster's deprived background and his use of drugs and alcohol. Many of the defendant's witnesses were social workers. Part of his defense was that when he was a juvenile he had not been committed to a Youth Development Center for the commission of armed robbery, notwithstanding the contemporaneous recommendation of a psychiatrist that only incarceration and strict discipline could possibly have any “lasting impact” on his anti-social behavior. Instead, he was returned by the state to an unsuitable and harmful family environment which included heavy drug use by his own parents and a girlfriend who “sold [her] body” for cocaine. Foster contended he was mentally ill and, further, that he was involuntarily intoxicated by alcohol, marijuana and cocaine.

The prosecutor was familiar with Foster's background and knew that Foster intended to assert a defense involving mental illness and drug usage. He explained his challenges of the four black prospective jurors as follows, taking them in the order in which they underwent voir dire:

The first juror has a son the same age as the defendant who has been convicted of a misdemeanor theft offense. His wife works at the Northwest Georgia Regional Hospital, a mental health facility. His brother was once a drug consultant. During the *Witherspoon* questioning, the juror appeared to be reluctant to say that he could vote for a death sentence, and he is a member of a church whose members, in the experience of the prosecutor, tend to be very reluctant to impose the death penalty.

The defendant concedes the prosecutor was justified in striking the second juror, who, among other things, had talked to the defendant's mother before entering the courtroom.

The third juror claimed to be the halfsister of the district attorney's chief investigator (who is black). The investigator, however, denied being related in any way to this juror. Moreover, the juror denied having a friend or relative accused or convicted of a crime of violence and denied knowing anyone with a drug or alcohol problem notwithstanding that her brother is a repeat offender whose crimes involve theft by taking, burglary and drugs, and that her husband has been convicted for carrying a concealed weapon.

The fourth juror is a social worker involved with low-income, underprivileged children. Her first cousin was arrested by the Metro Drug Task force on serious drug charges and the cousin lost her job as a consequence.

The prosecutor explained that he did not want social workers on the jury in a death penalty case, as they tended to sympathize with

criminal defendants, especially at the penalty phase. Moreover he preferred not to allow on the jury anyone who was closely related to someone with a drug or alcohol problem, since the defendant in this case planned to blame the crime on his own drug and alcohol problem. He further stated that he could not trust someone who gave materially untruthful answers on voir dire, as did the third juror. Finally, he was prepared to challenge peremptorily any juror who was reluctant to impose the death penalty as a matter of conscience where the juror's opposition to the death penalty did not rise to the level justifying a disqualification for cause.

The prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific. The trial court did not err by finding them to be sufficiently neutral and legitimate. The court's determination that the prosecutor successfully rebutted the prima facie case is entitled to "great deference," and is not clearly erroneous in this case.

3.

There was no abuse of discretion in the court's conduct of the week-long voir dire examination of prospective jurors.

4.

The trial court did not err by denying Foster's post-trial motion to review in camera the state's jury-selection notes. An attorney's work product is generally non-discoverable. A defendant's right to exculpatory evidence under *Brady v. Maryland*, is not involved here, and nonexculpatory information in an attorney's work product does not become

discoverable simply because the opposing attorneys might find it strategically useful.

5.

There was no error in the trial court's denial of funds for expert assistance to examine fingerprints, shoe prints and blood spatters.

6.

The evidence presented by the defendant in support of his motion for change of venue does not show such an inundation of pretrial publicity as would give rise to a presumption of prejudice. The voir dire examination and qualification of prospective jurors support the trial court's determination that a change of venue was unnecessary.

7.

On the day the crime was discovered, an investigator equipped with a video camera filmed the crime scene. The resulting videotape depicts the exterior of the victim's home (including the window through which the defendant entered), the path which he apparently took from the house (dropping things along the way and leaving footprints), the interior of the victim's home (and the extent to which it had been ransacked), and, finally, the victim's body (before and after the removal of the blanket covering her).

The trial court overruled Foster's objection that the videotape was inflammatory and duplicative of the still photographs of the scene and of the body which the state also introduced in evidence. The videotape clearly was relevant. There was no abuse of discretion in the court's ruling.

8.

Foster was interrogated by the police on the afternoon of the day he was arrested. Mike Reynolds, the lead investigator, testified it was "the first time I had ever talked with [Foster] ... [and] I really didn't expect a confession, [so] I didn't turn any of the video equipment on." However, after being advised of his rights, Foster confessed. Reynolds "didn't want to stop him ... to go turn everything on," so he let him confess, and this first confession was not recorded.

Reynolds showed Foster the crime scene photographs. Foster denied raping the victim, but admitted molesting her with a salad-dressing bottle. Foster stated that he took the air-conditioner out of one of the bedroom windows, set it on the ground, and entered the house. He found some suitcases and began filling them. He found two pocketbooks and searched them for valuables. The victim woke up and went to the bathroom, without turning on any lights. Then, Foster stated, she returned to her bedroom and, turning on the lamp by her bed, saw the defendant for the first time, in the living room. She came into the living room armed with a knife, and chased Foster around the living room chair. He got a piece of wood from beside the fireplace and hit her on the head. After being hit, she ran to the bedroom and fell to the floor. Foster denied strangling the victim, claiming that he had merely wrapped a sheet around her neck. He admitted dumping white powder on her, "because it cools the body off." He could not explain why he "stuck" the salad-dressing bottle "up her," but he covered her body with a blanket so he would not have to look at her. He left by the back door, and

hid what he had taken in a nearby empty house until he could return for it the next day.

After giving the above statement, Reynolds tried to persuade Foster to confess a second time with the video recording equipment turned on. Reynolds testified Foster “was a little hesitant about confessing a second time.” He and detective Craft spent “eight or nine minutes ... trying to talk him into confessing to us a second time.” Foster expressed concern that he might not say exactly the same thing the second time. The officers assured him that they were not trying to “trap” or “trick” him, and that “it would be better just to put it on tape ... and it will be correct.” The interview continued:

Craft: Just tell us again on tape one more time. It ain't going to hurt nothing.

Foster: Why can't we just leave it at that?

Reynolds: If ... you want to leave it at this and not put it on tape, that is fine with me.... Let's just leave it. What this means is that Wayne and I are going to have to sit up all night long and write about you.

Craft: Yeah. But if we put it on tape can't nobody change what the tape says, you know. Okay? This is—this is as much for your benefit as it is ours ... so let's just go through it right quick one more time and get it over with ... Okay?

Reynolds: Tim, I haven't lied to you through the whole night, and I haven't tried to trick you through the whole night, and I am not trying now.... [Y]ou [sat] in here and told two police

officers everything about it.... I am not trying to push you or bluff you or anything. It will just make it a lot easier on all of us.

Craft: Tim, let's go ahead and get this thing over with tonight. You told us about it already one time. Okay? Hey, let's run back through it right quick and get it over with and be done with it. Okay? ... Do you want to do that? It ain't going to hurt, not a thing.

Craft: [Y]ou told us about it one time already. It ain't going to hurt, you know. I mean I think you will agree that it ain't going to hurt, you know, for us to run back through it again right quick....

Thus encouraged, Foster was interviewed a second time on videotape. His second confession was identical in all material respects with the first.

(a) Foster contends first that his confessions were induced by a “hope of benefit,” because he was informed that he would not be charged with rape. There is no merit to this contention. Foster was simply told that no rape would be charged, based on his statement that no rape occurred. No benefit was offered to induce a confession.

(b) Foster contends further that it was error to admit the second statement in evidence because it was elicited only after he was told repeatedly that it was not going to hurt “a thing,” and that it would be “as much for your benefit as ours.” We agree. An accused must be warned that anything he says can and will be used against him in court. Telling him that a confession is not going to hurt and, on the contrary, will benefit him as much as the

police, is not consistent with the warnings required by *Miranda*.

Nevertheless, there is no reversible error. The videotaped confession was merely cumulative to the first, non-recorded confession, and that confession and the remaining evidence overwhelmingly establish Foster's guilt. Any error here is harmless beyond a reasonable doubt.

9.

A defense psychiatrist testified that Foster was so intoxicated from the ingestion of alcohol, marijuana and cocaine that he did not know the difference between right and wrong at the time of the crime. He also testified that Foster has an anti-social personality disorder, but that when he is sober he is neither insane nor mentally ill under Georgia law.

On cross-examination, the prosecutor asked the psychiatrist if it was true that most people in prison have an anti-social personality disorder. The psychiatrist agreed that it was true. Then the state asked:

So any one of those people that took cocaine and marijuana and beer in the quantities by his story that you say that this defendant took it, would be entitled to walk out of the courtroom as found acquitted on the basis of insanity. Is that what you're saying?

Foster objected and moved for a mistrial. The trial court denied the mistrial, but sustained the objection and instructed the jury to disregard the question. The court did not err by refusing to declare a mistrial.

10.

The court charged on voluntary and involuntary intoxication as follows:

Our law provides that voluntary intoxication shall not be an excuse for any criminal act. It provides further that if a person's mind when unexcited by intoxicants is capable of distinguishing between right and wrong and reason and acting rationally, and he voluntarily deprives himself of reason by consuming intoxicants and while under the influence of such intoxicants, he commits a criminal act, he is criminally responsible for such act to the same extent as if he were sober. Whether or not the defendant was voluntarily intoxicated at or during the time alleged in this indictment is a matter solely for you, the jury, to determine.

A person shall not be found guilty of a

crime when, at the time of the conduct constituting the crime, the person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to the criminal act.

Involuntary intoxication means intoxication

caused by (a) consumption of a substance through excusable ignorance, or (b) the coercion, fraud, artifice or contrivance of another person.

These instructions set forth the principles contained in OCGA § 16-3-4.

Foster contends the court erred by refusing his request to charge in addition:

If, because of the influence of alcohol, drugs, or narcotics, one's mind becomes so impaired as to render him incapable of forming an intent to do the act charged, or to understand that a certain consequence would likely result from it, he would not be criminally responsible for the act.

The law of intoxication contained in OCGA § 16-3-4 must be read in light of OCGA §16-3-2, which provides:

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence.

OCGA § 16-3-4 limits the reach of OCGA §16-3-2 so that the inability to distinguish between right and wrong is not a defense if the inability is a consequence of voluntary intoxication (but remains a defense if the inability is a consequence of involuntary intoxication).

Neither code section speaks of an inability to form an intent to commit the act. Persons are not excused from criminal liability under either of these code sections because they are incapable of forming criminal intent. As we observed in *Pope v. State*, a person can be capable of forming an intent to kill but incapable of understanding the difference between right and wrong. Lack of intent is a defense, but it is not implicated by either OCGA § 16-3-2 or OCGA § 16-3-4. In *Jones v. State*, this court explained:

Foster's own psychiatrist testified that although Foster was incapable of

distinguishing between right and wrong at the time of the crime, he was capable of forming the intent to do the acts he committed.

[T]he minimum of mind which can furnish the necessary mental element in crime, is a far smaller quantity than was claimed by the argument for the accused....

Whoever ... has mind enough to form the simple intention to kill a human being, has mind enough to have malice, and to furnish the mental constituents of murder....

And this brings [us] to a consideration of the great perversions which have been made of the doctrine that drunkenness is no excuse for crime. The foundation stone of these perversions, not distinctly shaped in the argument, but unconsciously assumed in it, is a feeling or notion that the exemption of insane persons and young children from criminal responsibility, is not the result of positive law excusing them, but is the simple consequence of their mental deficiency, which is supposed to be so complete as not to be capable of furnishing the mental element of crime; while the drunken man, with the same actual mental deficiency, is held responsible for his actions, not because they are crimes having the mental and physical element of crime, but by virtue of a certain destructive capacity infused into him, from reasons of policy, by the law which declares that drunkenness shall be no excuse for crime. The reverse of all this is the true philosophy of the law. The law deals with all of these classes of people, as having a sufficient quantum of mind to have bad passions, and evil intentions, and

carelessness in their actions, and so to furnish the mental element of crime, but as laboring also under an infirmity of reason, which serves to betray them into these evil intentions and carelessness, and at the same time breaks down this power of resisting temptation. The law comes in then, and excuses the young and the insane, out of tenderness towards an infirmity which is involuntary, and at the same time, to guard against the possibility that men might make the same excuse whenever there is the same infirmity of reason, the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary.

The result is, that the young and the involuntarily insane occupy a platform of their own, by virtue of an exception made in their favor, while the voluntary insanity of drunkenness being excluded from the exception, stands just as if no exception had been made, and the drunk man and sober man occupy the same great platform of responsibility for the crimes which they commit....

Foster's requested charge is misleading, because it implies that the intoxication defense involves a lack of intent to commit the crime, when intent is, in fact, a separate issue.

The trial court charged on intent, including the state's burden to prove intent beyond a reasonable doubt. The court did not err by refusing to give in addition the defendant's requested charge on inability to form intent as a result of intoxication.

11.

“The statutory provision that ... mental illness be proved beyond a reasonable doubt is not constitutionally infirm.

12.

The state urged the presence of two statutory aggravating circumstances at the sentencing phase of the trial: (1) the murder was committed while the offender was engaged in the commission of burglary, and (2) the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. The court's charge included an instruction that if the jury should find the § b(7) circumstance, its verdict should specify which of the three elements of § b(7)—torture, depravity of mind, or an aggravated battery—the jury found.

A type-written verdict form was submitted to the jury as follows:

The following aggravated circumstances as to Murder has [sic] been submitted by the State of Georgia and must have been proved to the satisfaction of the jury beyond a reasonable doubt before a verdict recommending the death penalty is authorized, to wit.

1. The offense of murder was committed while the offender was engaged in the commission of Burglary.

2. The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

The jury will answer the following questions:

1. Did you find beyond a reasonable doubt the aggravated circumstances to exist as to the murder?

2. If so, write the aggravated circumstances below as to murder.

3. As to murder: (A) We the jury recommend the death penalty. YES () NO ()

B. We the jury recommend Life Imprisonment. YES () NO ()

The jury filled in the form by writing “yes” after the first question, and by writing after the second question:

Torture—powdered body, eyes & nose, salad bottle in vagina, strangulation

Depravity of mind—powdered body, salad bottle in vagina, strangulation

Aggravated battery—hit with stick (log) disfigured face, strangulation

Finally, the jury checked “yes” to 3(A) and drew a line through 3(B).

The jury convicted Foster of burglary and answered “yes” to the question whether it had found beyond a reasonable doubt the proffered “aggravated circumstances”, one of which was burglary. However, the jury failed to list burglary in the space provided under the second “question”. Although it is likely that the jury meant to find that the commission of the offense of burglary was a statutory aggravating circumstance of the murder, we cannot be sure that the jury

intended to do so, and we shall not consider burglary as a statutory circumstance supporting the imposition of a death sentence.

That leaves the § b(7) circumstance. Since no one at trial objected to the form of the verdict, the question here is not whether the form of the verdict might be objectionable, but whether “the jury's intent [was] shown with sufficient clarity that this court can rationally review the jury's finding.” We are satisfied that the jury intended to find the § b(7) circumstance in its entirety and to follow the trial court's instructions by specifying in particular that it had found each of the three principal elements of § b(7).

The evidence showed that Foster hit the victim with a fireplace log hard enough to break her jaw, sexually molested her, poured talcum powder all

over her face, and then strangled her to death. The jury's § b(7) finding is supported by the evidence.

13.

The death sentence was not imposed under the influence of passion, prejudice or other arbitrary factor, and is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. OCGA § 17–10–35(c)(1) and (c)(3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

JUDGMENT AFFIRMED.

“High Court to Consider Appeal over Exclusion of Black Jurors”

Associated Press

May 26, 2015

The Supreme Court will consider whether prosecutors improperly singled out potential black jurors in notes and then excluded them all from the death penalty trial of a black Georgia man accused of murder.

The justices agreed Tuesday to hear an appeal from Timothy Foster, who was sentenced to death in 1987 after being convicted of murdering a 79-year-old white woman in Rome, Georgia.

Lawyers for Foster are relying on prosecutors' notes they discovered 19 years after the trial through an open records request.

The notes show that the name of each potential black juror was highlighted on four different copies of the jury list and the word "black" was circled next to the race question on questionnaires for the black prospective jurors. Three of the prospective black jurors were identified in notes as "B#1," "B#2," and "B#3."

The notes also show that the prosecutors' investigator ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." Prosecutors struck all four black

jurors out of the 42 qualified by the trial court to serve on the jury.

A Georgia state court sided with prosecutors who said they challenged each of the possible black jurors for legitimate, race-neutral reasons and did not rely on the highlighted jury lists to make their ultimate decisions. The Georgia Supreme Court affirmed.

Just one year before Foster's trial, the Supreme Court ruled in a landmark 1986 case that it is unconstitutional to dismiss a potential juror because of race.

Georgia officials argue that highlighting, circling or otherwise noting the race of a juror in notes does not show any intent to discriminate. The two prosecutors submitted an affidavit to the state court saying that neither one of them made the green highlight marks noting prospective black jurors.

The state also says the investigator's comments were not those of the prosecutors and do not indicate the state's intent.

Foster is being represented by the Southern Center for Human Rights, which provides free legal help to people facing the death penalty and challenges human rights violations in prisons and jails.

“Why is it So Easy for Prosecutors to Strike Black Jurors?”

The New Yorker
Gilad Edelman
June 5, 2015

Last week, the Supreme Court agreed to hear the case of Timothy Tyrone Foster, a black man sentenced to death by an all-white Georgia jury in 1987 for murdering an elderly white woman. Foster claims that the prosecution deliberately eliminated all four eligible black jurors. The state argues that race played no role in jury selection. It’s an odd argument in light of the evidence that emerged decades after Foster’s conviction: in their notes, the prosecutors highlighted the black jurors’ names in green; circled the answer “black” on the questionnaire where jurors had been asked to identify their race; labelled three black jurors “B#1,” “B#2,” and “B#3”; and identified which person to keep “if we had to pick a black juror.”

The Supreme Court may well grant Foster a new trial on the grounds that the state violated *Batson v. Kentucky*, a landmark 1986 case in which the Court declared it unconstitutional to strike potential jurors because of their race. But a victory for Foster won’t change the fact that, nearly thirty years later, prosecutors across the country, and especially in the South, continue to get away with intentionally striking black people from juries in trials of black defendants. The most remarkable thing about *Batson*, it turns out, is how easy it has been to ignore.

Jury selection occurs in two steps. First, the judge dismisses potential jurors “for cause” if they can’t be impartial. Second, after

questioning the remaining jurors, the defense and the prosecution each have a number of peremptory strikes (the number varies by state) to remove jurors they don’t like until twelve are left. The lawyers don’t have to give any justification for these strikes, and they don’t need the judge’s approval. That poses a problem for a legal system that forbids racial discrimination: If the prosecutor doesn’t have to give a reason, what’s to stop him from getting rid of a juror because he’s black?

The Supreme Court’s answer in *Batson* was to allow a defendant to force the prosecution to explain a strike if it seems to be racially motivated. When making a *Batson* challenge, as it soon came to be called, the defense must first convince the judge that there is reason to suspect that a strike was based on race, usually by pointing out the high proportion of black jurors being targeted. Next, the prosecutor has to give a race-neutral reason for striking the juror. Then it’s up to the judge to decide whether the reason is legitimate or a pretext for a race-based strike.

Justice Thurgood Marshall voted with the majority in *Batson*, but in a concurring opinion he warned that its procedure wouldn’t really solve the problem of race-biased jury selection: it would be too easy for prosecutors to make up race-neutral reasons for striking a juror.

Marshall's skepticism was quickly vindicated. As soon as *Batson* was decided, prosecutors started coming up with tactics to evade it. In a 1987 training video that became notorious when it was leaked years later, Jack McMahan, an assistant district attorney in Philadelphia, told new prosecutors, "When you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate later. . . . You may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race."

A consensus soon formed that the *Batson* remedy was toothless. In a 1996 opinion, an Illinois appellate judge, exasperated by "the charade that has become the *Batson* process," catalogued some of the flimsy reasons for striking jurors that judges had accepted as "race-neutral": too old, too young; living alone, living with a girlfriend; over-educated, lack of maturity; unemployed, employed as a barber; and so on. The judge joked, "New prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"

As it turns out, that really happens. In the nineteen-nineties, the North Carolina prosecutors' association held training sessions where prosecutors got one-page handouts such as "*Batson* Justifications: Articulating Juror Negatives," which listed reasons for striking jurors based on traits like age and body language. A similar list distributed in 2004 to Texas prosecutors included justifications like "Agreed with O.

J. Simpson verdict" and "Watched gospel TV programs."

Stephen Bright, the president of the Southern Center for Human Rights, who is representing Foster on its behalf, argued and won a *Batson* appeal at the Supreme Court in 2008. But Bright, a longtime capital trial and appellate lawyer, doesn't see that victory as a vindication of the procedure.

"It just makes such a farce of the system," he said. "Nobody—the judge, the prosecutor, the defense lawyers—nobody thinks the reasons are really the reasons they strike the people. They strike the people because of their race. I mean, we all know that. And then you try to come up with a good reason for doing it and see if you can get away with it."

"You're asking the judge to say that the prosecutor intentionally discriminated on the basis of race, and that he lied about it," he went on. "That's very difficult psychologically for the average judge."

There are no comprehensive statistics on how often prosecutors strike jurors based on race, but there is little doubt that the practice remains common, especially in the South. In Caddo Parish, Louisiana, prosecutors struck forty-eight per cent of qualified black jurors between 1997 and 2009 and only fourteen per cent of qualified whites, according to a review by the Louisiana Capital Assistance Center. In Jefferson Parish, where a quarter of the population is black, the split was even greater—fifty-five per cent to sixteen per cent—so that twenty-two per cent of felony trials between 1994 and 2002 had no black

jurors. According to a 2010 report by the Equal Justice Initiative documenting discrimination in eight Southern states, half of all juries that delivered death sentences in Houston County, Alabama, between 2005 and 2009 were all white; the other half had a single black juror. Houston County is twenty-seven per cent black.

In 2012, a North Carolina judge found that in capital cases between 1990 and 2010 prosecutors statewide struck potential black jurors at twice the rate of non-blacks.* A regression analysis showed that the disparity held even when controlling for other factors that correlate with race. In a pained opinion, the judge concluded, “Race, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government.”

Why do race-based peremptory challenges persist? Because race is an unfortunate but powerful basis for generalization. To state the obvious, black people are more likely to have been targeted or abused by police; to be affected by the extreme racial disparities in arrests, incarceration, and the death penalty; and to understand that crimes against black victims are prosecuted less vigorously than those against whites. All things being equal, a prosecutor has reason to think that a black juror is less likely to side with the government against a black defendant than a white one. (Former prosecutors with whom I spoke stressed that attorneys defending black clients are just as likely to strike whites in

order to get more blacks on the jury. The Supreme Court has held that defense strikes of white jurors also violate *Batson*.)

Research backs up the common-sense intuition that excluding black people from juries can influence verdicts. A 2004 study by the Capital Jury Project found that in cases with a black defendant and a white victim, having one or more black male jurors drastically lowered the chances of a death sentence. Experiments have shown that all-white mock juries spend less time deliberating, make more factual mistakes, and are more likely to convict a minority defendant than racially diverse juries. These studies suggest what some prosecutors have long assumed: striking potential black jurors raises the odds of a black defendant being convicted and increases the penalty he is likely to receive.

Even apart from trial outcomes, discriminatory strikes distort a basic premise of the jury system: the notion that a jury represents the whole community. “Maybe the most powerful thing that a citizen can do, more powerful than voting, is to serve on a jury,” Tye Hunter, the former director of the Center for Death Penalty Litigation, which brought the 2012 North Carolina case, said. “And the fact that black people are routinely over-excused from that duty is just another very public, very significant badge of inferiority and second-class citizenship.”

The defense bar celebrated *Batson* when it was decided. Even Justice Marshall, who had expressed concerns about its effectiveness, applauded the majority for taking “a historic

step toward eliminating the shameful practice of racial discrimination in the selection of juries.” It’s clear today, though, that *Batson* rested on faulty assumptions. The Court placed too much faith in trial judges and underestimated prosecutors’ motivation to circumvent the rule, possibly because it refused to recognize that there was any rational reason to strike jurors based on race. And once it became clear that the *Batson* test wouldn’t do the trick, the Court refused to strengthen it. In fact, later decisions did the opposite, holding that judges can accept even a “silly or superstitious” reason—like a lawyer thinking that a prospective juror’s mustache is “suspicious”—as long as it doesn’t explicitly invoke race.

What should be done? In his *Batson* concurrence, Justice Marshall argued that only banning peremptory challenges would solve the problem. While that idea has picked up support from academics and judges, including Supreme Court Justice Stephen Breyer, it’s a political nonstarter. Most trial

lawyers, even on the defense side, just don’t want to give up their ability to use strikes to shape the jury, and they have the clout to prevent it from happening.

Richard Bourke, who has worked on *Batson* appeals as the director of the Louisiana Capital Assistance Center, suggested that the most powerful, realistic reform would be to have states track the racial makeup of jury selection in the same way they track the racial statistics of traffic stops. He has a point. Neither courts nor legislatures will think seriously about replacing the feeble *Batson* procedure if there aren’t public objections to it. But cases like Timothy Tyrone Foster’s, where the defense uncovers the prosecution’s blatantly racist notes, are rare. Race-based peremptory strikes are almost always invisible, or at least, as *Batson* has shown, hard to prove. Only when such strikes are added up can they be seen. *Batson* is a reminder that a legal system formally blind to race is just as often blind to racism.

“Georgia Justice”

Slate

Mark Joseph Stern

May 27, 2015

The prosecutors seeking to send Timothy Tyrone Foster to death row went about their job in a curious manner. During jury selection, they highlighted each black prospective juror’s name in green—on four different copies of the jury list—and wrote that the green highlighting “represents blacks.” On each black juror’s questionnaire, prosecutors circled the response “black” next to a question about race. They also referred to three black jurors as “B#1,” “B#2,” and “B#3” in their notes. Finally, the prosecution’s investigator ranked each black juror against the others—in case “it comes down to having to pick one of the black jurors.”

The prosecutors struck each black candidate, one by one, from the jury pool until none remained.

At the end of the trial, prosecutors asked the jury to impose the death penalty on Foster, to “deter other people out there in the projects.” The all-white jury convicted Foster of murder and sentenced him to death.

Foster, a black man, appealed his conviction to the Georgia Supreme Court. Striking black jurors on account of their race is unconstitutional, and Foster believed he deserved a new trial. But the Georgia Supreme Court rejected his claim. Prosecutors had not “demonstrated purposeful discrimination” in striking black

jurors, the court held. There was no racial bias in the prosecution of Timothy Tyrone Foster. His execution could move forward.

On Tuesday, the U.S. Supreme Court announced it will review the Georgia Supreme Court’s decision. The case, *Foster v. Humphrey*, gives the justices a chance to correct a gross miscarriage of justice—the insidious racism that so often infects the prosecution of black defendants. A victory for Foster could put a dent in the kind of misconduct that unscrupulous prosecutors use to put black defendants behind bars.

A victory for Georgia, however, would be a huge setback for the criminal justice system. It could give prosecutors across the country free rein to employ the kind of warped Southern justice that helped send Foster to death row.

Black jurors were purportedly struck for having sons about Foster’s age, while white jurors were welcomed.

The Supreme Court articulated the current standard governing jury selection in the 1986 case *Batson v. Kentucky*. The court held that attorneys for both the prosecution and the defense may make a certain number of “peremptory challenges”—that is, they can strike prospective jurors during voir dire without giving a cause. However, prosecutors may not strike jurors on account of their race.

Such race-based strikes, the court held, violate the defendant's constitutional guarantee of equal protection, and undermine "public confidence in the fairness of our system of justice." (Since then, the court has also barred sex discrimination during jury selection, and the 9th Circuit has barred sexual orientation discrimination as well.)

But *Batson* has a problem. After the defendant has claimed the prosecution struck a juror on account of his race, the prosecution can put forward a race-neutral explanation for its decision. Then the trial judge must decide whom to believe. Higher courts must show "great deference" for the trial judge's decision on any *Batson* challenge. In practice, this rule means that prosecutors can usually toss out some pretext for striking a black juror. And if the trial judge buys it, the defendant must prove to an appeals court—sometimes years later—that the prosecutor's pretext masked a racist mindset.

Because it's so difficult to prove a state of mind, the Supreme Court has gradually allowed judges to look for clues that prosecutors struck jurors on account of their race. In one case out of Texas, the court cried foul when prosecutors used their peremptory strikes to exclude a stunning 91 percent of eligible black jurors at the trial of a black man. The court also noted some of the tricks the Texas prosecution used to keep blacks out of the jury. When a number of blacks sat toward the front of the room where the jurors were being chosen, for instance, the prosecutor "shuffled"—that is, rearranged where the candidates sat. Prosecutors usually evaluate potential jurors at the front of the

jury panel first, so people toward the back are more likely to be dismissed. The prosecutor clearly shuffled the jury to move blacks from the front to the back. (Somehow, this is legal under Texas law.)

Even worse, the prosecution attempted to dupe black jurors into disqualifying themselves. When querying prospective jurors about their opinion on capital punishment, the prosecution phrased the question graphically to 53 percent of blacks. (The so-called graphic script involved an explanation that, if sentenced to death, the defendant would be "taken to the death house and placed on a gurney and injected with a lethal substance until he is dead.") To 94 percent of whites, the prosecution said only that it was "actively seeking the death penalty." Clearly, the prosecution hoped that blacks would reflect some ambivalence about capital punishment after hearing about the "death house"—at which point the prosecution could strike them for opposing the death penalty, not for being black.

In 2008, faced with indisputable evidence of prosecutorial racism hidden behind a patina of neutrality, the court gave *Batson* an update in *Snyder v. Louisiana*. Writing for the court, Justice Samuel Alito (yes, that Alito) wrote that defendants need only prove a peremptory strike was motivated "in substantial part by discriminatory intent." In other words, racism didn't need to be the sole factor behind the strike—just a major part of it. And Alito cracked down on the obvious pretenses prosecutors employ, allowing judges to critically analyze "suspicious" justifications for striking black jurors.

The justifications for striking every black juror from Foster's trial aren't merely suspicious. They're laughable. For example, several black jurors were purportedly struck for having sons about Foster's age, while white jurors with sons the same age were welcomed. And in light of the prosecution's race-obsessed notes—which the trial court actually tried to keep secret—Foster should have a strong case at the Supreme Court.

But it's disturbing to think about how many other black men currently sit behind bars

because they couldn't find a paper trail to prove their prosecutor's racism. All-white juries are significantly more likely to convict black defendants than a jury with even one black person. Prosecutors know that. They also know that as long as they keep their racist strikes subtle, they're unlikely to be found out—and that even if they are, they probably won't face punishment. Foster was convicted in 1987; it took him nearly three decades to bring his case to the Supreme Court. Racist prosecutors break the law, and the targets of their lawlessness face execution. That's Georgia justice in action.

Dollar General Corporation v. The Mississippi Band of Choctaw Indians

13-1496

Ruling Below: *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. Miss. 2014)

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court held that generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court recognized as an exception to that rule that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members."

The Court subsequently recognized in *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that it has "never held that a tribal court had jurisdiction over a nonmember defendant" in any context, so that it remains an "open question" whether tribal courts may ever exercise civil jurisdiction over nonmembers. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), this Court granted certiorari to decide whether Montana's undefined "other means" include adjudicating civil tort claims in tribal court. However, the Court resolved the case on other grounds.

In this case, a divided panel of the Fifth Circuit held that tribal courts do have that jurisdiction. Five judges dissented from the denial of rehearing en banc. The case accordingly presents the issue the Court left open in *Hicks* and the Question the Court granted certiorari to decide in *Plains Commerce*.

Question Presented: Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members?

**DOLGENCORP, INC. & Dollar General Corp.,
Plaintiffs-Appellants**

v.

**THE MISSISSIPPI BAND OF CHOCTAW INDIANS; The Tribal Court of the Mississippi
Band of Choctaw Indians; Christopher Collins, in his official capacity; John Doe, a minor,
by and through his parents and next friends John Doe Sr. and Jane Doe,
Defendants – Appellees**

The United States Court of Appeals for the Fifth Circuit

Decided on October 3, 2013

[Excerpt; some citations and footnotes omitted]

**Before SMITH, HAYNES, and GRAVES,
Circuit Judges.**

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor, the petition for rehearing en banc is DENIED.

**JERRY E. SMITH, Circuit Judge, joined
by JONES, CLEMENT, OWEN, and
SOUTHWICK, Circuit Judges, dissenting
from the denial of rehearing en banc:**

The opinion for the panel majority, although well crafted, takes Indian law well beyond anything supported by applicable precedent. I respectfully dissent from the denial of rehearing en banc.

I have explained why the majority opinion is error. But error, indeed even grave error, as here, is ordinarily not enough to warrant en banc review. Such rehearing is justified if “the proceeding involves a question of exceptional importance.” That test is easily met here, because “[t]his ruling profoundly upsets the delicate balance that the Supreme Court has struck between Indian tribal governance . . . and American sovereignty.”

Until now, no circuit court of appeals had upheld Indian-court jurisdiction, under the so-called “first exception” announced in *Montana v. United States*, over a tort claim against a non-Indian defendant. The holding is ambitious, to say the least, coming from a circuit that decides little Indian law. If this court is to work such a change in established

PER CURIUM:

precedent, it should be the careful work of the full court and not just a two judge majority.

The panel majority emphasizes the reprehensible nature of the alleged act by opining that “[i]t is surely within the tribe’s regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees.” Even this horrendous deed, however, does not implicate “tribal self-government” or the tribe’s ability “to control internal relations.” Moreover, no remedy is lost, because it is undisputed that the state courts of Mississippi are fully empowered to vindicate the plaintiff’s rights; this is mainly a turf battle over whether Indian sovereignty trumps the right of a non-Indian to have its case tried in an American forum.

As I showed in dissent, all of the Supreme Court’s post-Montana decisions have tended to limit Indian-court jurisdiction in cases such as this. Nowhere has the Court endorsed no-holds-barred Indian jurisdiction requiring non-Indians to defend, on the basis of implicit consent by their presence and activity on a reservation, tort actions of whatever nature. The Supreme Court’s recent pronouncement is plain: Regulation of the affairs of non-Indians “must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.”

An act committed by a non-Indian on an Indian—even where the alleged facts are as distasteful as these—should not be a vehicle

for disrupting the carefully-drawn line separating tribal and U.S. sovereignty. I respectfully dissent.

“Supreme Court to Rule on Tribal Court Power Over Non-Indians”

The Associated Press

June 15, 2015

The U.S. Supreme Court has agreed to hear an appeal from Mississippi about the authority of tribal courts to try civil lawsuits involving non-Indians.

The justices on Monday stepped into a lawsuit over allegations of sexual abuse of a teenager at a Dollar General store on the Mississippi Band of Choctaw Indians reservation.

The family of the teen identified in court papers as John Doe filed a lawsuit in tribal court in 2005 seeking \$2.5 million from the owners of the store and the man who allegedly molested him. The man has since been dismissed from the suit. The teen was taking part in a tribe-run internship program.

The issue for the Supreme Court is whether the non-Indian owners of the store can be sued in tribal courts.

Dollar General operates a store on trust land on the central Mississippi reservation. The tribe issued a license to the business.

The company, as a non-Indian entity, refused to submit to the tribal court’s jurisdiction. Generally, tribes have no authority over nonmembers.

In a 1981 case from Montana, the Supreme Court provided two exceptions - one for “consensual relationships” and another for

activities that threaten the health or welfare of a tribe.

The 5th U.S. Circuit Court of Appeals in New Orleans ruled in 2014 that the “consensual relationships” exception applied to Dollar General.

“It is surely within the tribe’s regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business,” the 5th Circuit said.

Government attorneys said the 5th Circuit’s decision should be upheld.

“In the circumstances of this case, the tribal court has jurisdiction over the claims against petitioners because the allegedly tortious conduct occurred on tribal trust land and arose from a consensual relationship,” the government said in its brief.

Dollar General attorneys argued in briefs that the government gave “no good answer” to the tribal jurisdiction issue being raised.

“Permitting tribal court jurisdiction over tort claims against nonmembers constitutes ‘a serious step,’ given the Constitution’s premise of ‘original, and continuing, consent of the governed,’” the company’s attorneys said.

“Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians”

Harvard Law Review

January 12, 2015

As “domestic dependent nations,” Indian tribes retain all inherent sovereign powers “not withdrawn by treaty or [federal] statute, or by implication as a necessary result of their dependent status.” In *Montana v. United States*, the Supreme Court articulated the “general proposition” that Indian tribes’ exercise of civil regulatory authority over nonmembers is inconsistent with the tribes’ dependent status. Mindful of contrary precedent, the Court recognized two exceptions to the Montana rule: First, a tribe may regulate the “activities of nonmembers who enter consensual relationships with the tribe or its members.” Second, a tribe may regulate the conduct of non-Indians “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Recently, in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, the Fifth Circuit explored the outer boundaries of the *Montana* rule by becoming the first federal court of appeals to endorse a tribal court’s exercise of jurisdiction over a nonmember tort defendant under *Montana*’s consensual-relationship exception. In the course of its analysis, the Fifth Circuit held that federal courts have no independent obligation to identify defects in tribal courts’ subject matter jurisdiction. The *Dolgencorp* court’s characterization of limitations on tribal jurisdiction as waivable in federal court underscores the parallels between the rule of *Montana* and the

constitutional doctrine of personal jurisdiction.

Historically, tribes exercised broad sovereign authority within reservation boundaries, ordinarily limitable only by an explicit treaty provision or an act of Congress. That premise of territorial sovereignty was upended by the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*, which abrogated tribal criminal jurisdiction over non-Indians. Explaining its decision in *Oliphant*, the Court reasoned that the ability to prosecute non-Indians, like the ability to conduct foreign relations and alienate tribal lands, was “part of sovereignty which the Indians implicitly lost by virtue of their dependent status.” In 1981, the *Montana* Court invoked *Oliphant*’s “implicit divestiture” rationale to hold that Indian tribes’ civil regulatory authority does not typically extend to nonmembers. In the thirty-four years since *Montana* was decided, the Supreme Court has steadily narrowed both exceptions to the rule while extending *Montana*’s scope to tribes’ taxation powers and adjudicative authority.

Against this jurisdictional backdrop, *Dolgencorp, Inc.* (*Dolgencorp*), a Kentucky corporation, has for more than a decade operated a Dollar General store on tribal trust land located within the boundaries of the Choctaw Indian Reservation. The Dollar General store has operated pursuant to a lease agreement between *Dolgencorp* and the Mississippi Band of Choctaw Indians (the

Tribe), as well as a business license issued by the Tribe. In 2003, Dale Townsend, the store's non-Indian manager, volunteered Dolgencorp's participation in the Youth Opportunity Program (YOP), a work-experience program operated by the Tribe that seeks to place young tribal members in short-term, unpaid positions with local businesses in exchange for job training and mentorship. As part of the YOP, John Doe, a minor and member of the Tribe, was assigned to the Dollar General store for a temporary work placement. Doe subsequently reported Townsend to tribal authorities, alleging that Townsend had molested him while he worked in the store under Townsend's supervision.

In January 2005, Doe and his parents brought an action against Townsend and Dolgencorp in the Choctaw Tribal Court — the Tribe's trial court — seeking to recover compensatory and punitive damages for Townsend's allegedly tortious activity. The Does further asserted that Dolgencorp was independently liable for having negligently hired, trained, and supervised Townsend. Both Townsend and Dolgencorp moved to dismiss the Does' action, arguing that the tribal court lacked subject matter jurisdiction to hear the case under the rule of *Montana*. In an oral ruling in July 2005, Judge Collins rejected the defendants' arguments and held that the Choctaw Tribal Court could exercise adjudicative jurisdiction over the two nonmember defendants. Townsend and Dolgencorp appealed Judge Collins's jurisdictional ruling to the Choctaw Supreme Court, which found jurisdiction to be proper under both exceptions to *Montana*.

Having exhausted tribal court remedies, Dolgencorp and Townsend sought injunctive relief in the United States District Court for the Southern District of Mississippi, where they argued that the Choctaw Tribal Court lacked subject matter jurisdiction to hear the Does' complaint. Judge Lee first rejected the Choctaw Supreme Court's legal conclusion that Townsend's and Dolgencorp's allegedly tortious activity implicated tribal preservation or self-governance, finding such a conclusion to be "[m]anifestly . . . a far broader application of *Montana*'s second exception than is warranted." After finding that tribal court jurisdiction over Townsend was no more justified by *Montana*'s first exception, Judge Lee enjoined the Does' tribal court action against Townsend. Judge Lee subsequently granted the Tribe's motion for summary judgment as to Dolgencorp. Judge Lee reasoned that by allowing Doe to work as an apprentice in its store, Dolgencorp had created a consensual relationship with the Tribe. As the Does' tort claims were based on the conduct of a Dolgencorp employee during Doe's tenure at the store, Judge Lee concluded that the Does' action was sufficiently connected to that relationship to support tribal jurisdiction. Dolgencorp appealed Judge Lee's decision to the Fifth Circuit, challenging on a variety of grounds Judge Lee's legal conclusion that the Does and the Tribe had satisfied the requirements of *Montana*'s consensual-relationship exception.

A split Fifth Circuit panel affirmed in an opinion authored by Judge Graves. The majority first dismissed Dolgencorp's

contention that there existed an insufficient nexus between the Does' tort claims and Dolgencorp's participation in the YOP. "In essence," Judge Graves wrote, "a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace." For the court, Dolgencorp's decision to position an allegedly sexually dangerous individual in that workplace "ha[d] an obvious nexus to Dolgencorp's participation in the YOP." Next, the panel majority considered Dolgencorp's argument that the Supreme Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.* "provided additional strictures to be utilized in the 'consensual relationship' analysis" by implying that tribes may regulate only those consensual relationships that "intrude on the internal relations of the tribe or threaten tribal self-rule." The court declined to adopt Dolgencorp's reading of *Plains Commerce Bank*, reasoning that the *Plains Commerce Bank* dictum merely restated the proposition that the ability to regulate consensual relationships on reservation land is "plainly central to the tribe's power of self-government."

Lastly, despite having failed to raise the issue before Judge Lee, Dolgencorp argued on appeal that because its allegedly negligent hiring, training, and supervision of Townsend occurred off the Tribe's reservation — and the Does' tribal court complaint failed to allege otherwise — a decision affirming the Choctaw Tribal Court's authority to adjudicate the controversy would allow the Tribe to regulate off-reservation conduct, presumably in violation of federal common

law. Though the question of tribal court authority over a nonmember presented an issue of subject matter jurisdiction, Judge Graves disagreed that the new argument was properly before the court, writing, "Although it is true that defects in federal subject-matter jurisdiction cannot be waived in a federal case, a federal court has no independent obligation to 'correct' a tribal court's lack of subject-matter jurisdiction over another case." Because Dolgencorp failed to demonstrate "extraordinary circumstances," as required by Fifth Circuit precedent governing the consideration of forfeited arguments, the panel majority declined to consider Dolgencorp's untimely argument and affirmed Judge Lee's decision.

Judge Smith dissented. For Judge Smith, Fifth Circuit precedent governing the applicability of Supreme Court dicta required the court to apply the *Plains Commerce Bank* Court's statement that "*Montana* expressly limits its first exception to the 'activities of nonmembers,' allowing these to be regulated to the extent necessary 'to protect tribal self-government [and] to control internal relations.'" Even assuming that *Montana*'s first exception applied, Judge Smith found lacking the requisite nexus between Dolgencorp's participation in the YOP and the Does' tort claims and further posited that *Montana* may envisage only tribal regulatory, not adjudicative, jurisdiction over nonmembers.

After writing that the manifest nature of the common law prohibition against tribal regulation of nonmembers' off-reservation conduct constituted an "extraordinary circumstance" that warranted consideration

of Dolgencorp's untimely jurisdictional argument on appeal, Judge Smith concluded by admonishing the majority for expanding tribal jurisdiction "far beyond the scope permitted by the Supreme Court or any other appellate authority."

The nature of the Supreme Court's post-1978 limitations on tribes' adjudicative authority escaped characterization for some time. In *Nevada v. Hicks*, the Supreme Court explained that such limitations "pertain[] to subject-matter, rather than merely personal, jurisdiction, since [they] turn[] upon whether the actions at issue in the litigation are regulable by the tribe." That label has created the possibility that "courts will attach to tribal court jurisdiction all the incidents of federal subject matter jurisdiction," including, as Dolgencorp argued, federal courts' refusal to allow litigants to waive subject matter jurisdiction. The *Dolgencorp* court made an important contribution to federal Indian procedural law by concluding that federal courts have no independent obligation to ensure that tribal courts have subject matter jurisdiction in actions involving nonmember litigants. The Fifth Circuit's procedural decision, which responds to competing tensions in federal Indian jurisdictional law, suggests that *Hicks* notwithstanding, the source of restrictions on tribal courts' jurisdiction may render such limitations incompatible with some attributes of federal subject matter jurisdiction.

Well-established principles of Indian law recognize the tribes as "quasi-sovereign nations" whose broad authority over Indian

lands is ordinarily limitable only by Congress. Since Chief Justice Marshall's foundational opinion in *Worcester v. Georgia*, in which the Chief Justice recognized tribes' legitimate claims to territory and self-government by emphasizing that tribal sovereignty over Indian lands had survived European conquest, the Supreme Court has repeatedly held that tribal governments exercise the "inherent powers of a limited sovereignty which has never been extinguished." For nearly one hundred fifty years, the Supreme Court's understanding of tribal authority as sovereign authority limited judges' ability to restrict the exercise of tribal powers, notwithstanding the implications for individual rights or state authority; in the years between *Worcester* and the Court's 1978 decision in *Oliphant*, the only two judicial limitations on tribal sovereignty were those abrogating the tribes' authority to deal with foreign nations and extinguish land title.

At odds with the traditional rule that federal courts must "tread lightly" to avoid infringing upon tribal sovereignty is the Supreme Court's more recent willingness to restrain tribal authority to protect nonmember litigants. The *Oliphant* Court expressed concern over non-Indians' unfamiliarity with tribal law and customs. The Court justified its decision in *Duro v. Reina*— which extended *Oliphant*'s rule to nonmember Indians— by invoking doubts about the independence and institutional capacity of tribal courts. In *Strate v. A-1 Contractors*, the Court balked at defining a rule that would force nonmember defendants to appear in "unfamiliar" tribal courts. In *Plains Commerce Bank*, Chief Justice Roberts explained that due process

considerations justify Montana’s general rule and first exception:

Tribal regulation of the sale of fee land] runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. . . . The Bill of Rights does not apply to Indian tribes. . . . And nonmembers have no part in tribal government — they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.

The Supreme Court’s attention to fairness considerations in *Oliphant*, *Duro*, and *Strate*, as well as its emphasis on consent as a way to legitimate tribal civil authority in the face of those considerations in *Plains Commerce Bank*, has prompted some observers to draw parallels between the Supreme Court’s limitations on tribal courts’ jurisdiction and limitations on personal jurisdiction in state and federal courts. The Supreme Court’s desire to protect nonmember litigants from unfamiliar and inconvenient tribal forums bears striking similarity to the role of foreseeability and inconvenience to defendants in the personal jurisdiction context. The similarity is bolstered by the observation that the formulation of *Montana*’s two exceptions “mirror[s] the focus on the minimum contacts ‘bargain’ and on forum interests in personal jurisdiction.” Likewise, as the Ninth Circuit has recognized, *Montana* and *Hicks* coexist somewhat awkwardly in this respect, which is “evident in the fact that the Court has held that ‘consensual relationships’ may create

jurisdiction, a holding inconsistent with federal subject matter jurisdiction, though perfectly consistent with principles of personal jurisdiction.”

Dolgenercorp underscores the reality that the dissimilarities between tribal and federal subject matter jurisdiction extend to the purposes that each serves. Limitations on the types of actions that may be adjudicated in federal court have a distinct origin from those that restrict the authority of tribal courts. The former enforce a nonwaivable structural division of public authority among the limited powers of the federal government and the residual authority of the states. As federal courts’ adjudication of disputes that fall outside of narrowly defined jurisdictional boundaries necessarily infringes upon state sovereignty, the Constitution obligates federal courts to enforce a “harsh rule” of dismissing actions improperly before them, notwithstanding parties’ failure to raise jurisdictional defects. Restrictions on tribal adjudicative authority, however, evolved out of the due process considerations expressed by the Court in *Oliphant*, *Duro*, *Strate*, and *Plains Commerce Bank*. The Fifth Circuit’s procedural decision accommodates those considerations by requiring federal courts to consider any colorable jurisdictional arguments raised by nonmember litigants. The approach simultaneously remains faithful to federal courts’ traditional reluctance to infringe upon tribal sovereignty by ordinarily declining to inquire into tribes’ exercise of sovereign powers where nonmember defendants forego a particular jurisdictional argument in the district court.

In the thirty-four years since *Montana* was decided, the Supreme Court has punctuated a “backdrop of previous case law affirming tribal powers” with a series of fact-specific holdings abrogating Indian tribes’ authority over nonmembers. The jurisdictional law that has resulted has left lower courts to confront legal questions that fall outside the bounds of the Court’s recent abrogations of tribal jurisdiction and onto an uncertain background rule affirming the importance of tribal jurisdiction and sovereignty. The Fifth Circuit’s adjudication of such a question in *Dolgencorp* emphasizes the difficulties with the *Hicks* Court’s label of “subject matter jurisdiction.” By disclaiming any

independent obligation to verify that tribal courts have jurisdiction in actions involving nonmember litigants, the *Dolgencorp* court understood tribal subject matter jurisdiction as providing a right personal to the individual nonmember litigant. That right — like the right to contest a court’s personal jurisdiction— may be forfeited. Because the Fifth Circuit’s ruling resolves competing interests underlying federal Indian jurisdictional law as they relate to the question of jurisdictional waiver, *Dolgencorp* suggests that the distinctive nature of limitations on tribal courts’ jurisdiction may be incompatible with at least some attributes of federal subject matter jurisdiction.

“Dollar General Urges Justices to Tackle Tribal Jurisdictions”

Law360

Caroline Simson

May 21, 2015

Dollar General Corp. has told the U.S. Supreme Court it should take an opportunity to resolve the "festering question" of whether a tribe can subject a nonmember to litigation in a tribal court in the retailer's appeal of a sexual assault case involving a former store intern.

The retailer's supplemental brief to the high court filed Tuesday said that its petition presents an important and recurring question that warrants review given the “stark disagreement” within the Fifth Circuit over the meaning of the Supreme Court's tribal jurisdiction precedents.

Dollar General is seeking review of a Fifth Circuit decision affirming that a tribal court in Mississippi had the authority to decide the case of the intern, who is not named in court filings. The intern, a member of the Mississippi Band of Choctaw Indians, sued Dollar General in Choctaw tribal court in 2005, claiming he had been sexually assaulted by a store manager while participating in a tribal intern program.

Rebutting an argument advanced by the U.S. government in an amicus brief this month, Dollar General said that permitting tribal court jurisdiction over tort claims against nonmembers would constitute "a serious step," given the U.S. Constitution's premise of "original and continuing, consent of the governed."

Even though nonmembers may be present on reservation land, they have no part in tribal government and no say in tribal laws and regulations, the retailer said.

"When, if ever, a citizen of a state and the United States may be subject to the jurisdiction 'of a third entity to be tried for conduct occurring wholly within the territorial borders of the nation and one of the states,' is a question that should be resolved by this court, not left to the lower federal and tribal courts," the company said.

Although tribal courts generally lack the authority to decide cases involving nonmembers, a Mississippi federal court ruled that the so-called Montana exception applied in Dollar General's case, because the company's participation in the internship program established a consensual relationship between the store and the tribe.

But the Montana exception is limited, and courts must take care not to risk subjecting nonmembers to tribal regulatory authority without commensurate consent, Dollar General argued in its Tuesday brief.

The government claims that Dollar General consented to tribal tort jurisdiction by agreeing to do business on a reservation and by accepting the plaintiff intern. But the retailer said that argument would "swallow" the general rule that tribes have lost their right to govern nonmembers on their reservations.

The government also argued that the tribe had jurisdiction to regulate the allegedly tortious conduct even without the Montana exception because it took place on tribal trust land.

But Dollar General responded that although the Ninth Circuit has adopted such reasoning, the Fifth Circuit did not embrace that "extreme" view of the case.

"That the government, different courts, and individual judges can reach such radically different readings of this court's tribal jurisdiction precedents shows just how uncertain this area of the law has become," the retailer said.

The case against Dollar General dates back more than a decade. Dolgencorp LLC, which is also petitioning the Supreme Court, operates a Dollar General store on the Choctaw Indians' reservation. The store participated in the tribe's Youth Opportunity Program, which places young members in short-term jobs with local businesses.

The tribe is seeking to keep in place the Fifth Circuit ruling that its tribal court had the authority to decide the sexual assault claims, telling the high court last year that the Fifth Circuit's decision is in line with Supreme Court precedent.

Attorneys for the tribe were not immediately available for comment on Thursday. The government does not comment on pending litigation.

In 2003 the plaintiff, who was a minor at the time, participated in the program and was assigned to the local Dollar General Store. The plaintiff claims that while he was working at the store he was sexually assaulted by store manager Dale Townsend.

The intern sued Townsend, Dollar General and Dolgencorp in 2005 in the Choctaw tribal court. He claimed the store was liable for Townsend's conduct and sought at least \$2.5 million in damages.

The companies have argued that the tribal court lacked jurisdiction to hear the case because Dollar General and Dolgencorp are not members of the tribe. After the Choctaw Tribal Court refused to dismiss the case, the companies unsuccessfully sought an injunction in Mississippi federal court.

The Fifth Circuit affirmed the Mississippi federal court's ruling, prompting Dollar General's latest appeal to the high court.

“Dollar General Corporation v. Mississippi Band of Choctaw Indians”

Cultural Survival

Cass Madden

June 23, 2015

On June 15th, the Supreme Court of the United States agreed to hear the first Tribal jurisdiction case in 7 years. The Dollar General Corporation operates a store on land which belongs to the Mississippi Choctaw reservation; the Tribe issued a license to the store for use of the land. The manager of the store is accused of sexual assault of a minor working at the store through a youth training program. The parents of the minor brought charges against the corporation in Tribal court, suing Dollar General for \$2.5 million in damages.

Though the Tribal court ruled in favor of the minor and his family, the company refused to submit to the jurisdiction of the tribal court as a non-Indian entity. Previous cases have established that, generally, tribal authorities do not have jurisdiction over non-tribal members, but two important exceptions were established in the 1981 case *Montana v. United States*: tribal authorities have jurisdiction over non-tribal members who have entered into consensual relationships with Tribal members and have jurisdiction in regards to activities that threaten the political integrity, economic security, or health and well-being of the tribe.

Dollar General appealed the case in the 5th Circuit Court of Appeals, which ruled that the consensual relationship exception exists in this case, because the minor and the manager

had willingly and knowingly entered into a professional relationship and the Tribe has reasonable authority to prosecute the sexual assault of one of its members. Dollar General filed a petition with the Supreme Court, expressing that the tribal jurisdiction question had not been effectively resolved in the case. The case is up for argument in the current court term.

The Supreme Court summarizes the issue being discussed in the case as “[w]hether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.” Aside from the obvious fact that the case impacts tribes, the case is being anxiously watched by tribal authorities across the country because tribal interests have had such a poor record in recent court cases—since 2005, tribal interests have won only 2 cases and lost 9. Indeed, there has been a concerted effort on the part of tribes to keep cases out of a supreme court obviously unsympathetic to Indian issues.

In 2001, the Tribal Supreme Court Project was created in an attempt to ensure better representation and advocacy of indigenous issues in the US Supreme Court—the outcome of the current case may be an indicator of the progress of that work. The

Mississippi Band of Choctaw Indians filed an opposition brief urging the Supreme Court not to hear the case, heavily citing both the decision in *Montana v United States* and the decisions of the lower courts in the intervening years to argue that this particular case does not constitute an exception to the rules for tribal jurisdiction laid out in the 1981 case.

The Court ultimately accepted the petition of the Dollar General Corporation, but the Tribe introduces several key points about the limited jurisdiction of the Supreme Court in

deciding tribal issues (this bridges on legislation, which is the purview of congress) and the lack of abuses present in the tribal justice system which are sure to be key points in the arguments and deliberation of the case.

The continued existence of tribes is dependent on tribal sovereignty and tribal jurisdiction, which previous court decisions have severely limited; if the court rules in favor of Dollar General, the already limited reach of tribal jurisdiction will be further reduced.