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NOTES

BY THE CONTENT OF THEIR CHARACTER: GOOD-FAITH CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES IN AFFIRMATIVE ACTION UNDER *FISHER*

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"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today."

Dr. Martin Luther King, Jr.[1]

INTRODUCTION

Affirmative Action Plans ("AAPs") that give preferential consideration to racial minorities continue to be a point of contention among academics, the judiciary, and society at large.[2] This contention has led several states to ban such policies outright, while students rebuffed by race-conscious programs continue to challenge their constitutionality in the courts.[3] One such student, Abigail Fisher, challenged the AAP in effect at the University of Texas at Austin—claiming that it denied her equal protection under the law, as guaranteed by the Fourteenth Amendment of the U.S. Constitution.[4]

The Equal Protection Clause of the Fourteenth Amendment states, in part, that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws."[5] Over the course of several constitutional challenges to racially preferential AAPs, the U.S. Supreme Court has concluded that when a policy is facially discriminatory on the basis of race—as these AAPs unabashedly are—the policy must serve a compelling governmental interest and be narrowly tailored in its implementation as to avoid undue injury to parties affected by that

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1. Rev. Martin Luther King, Jr., I Have a Dream 5 (Aug. 28, 1963), *available at* http://www.archives.gov/press/exhibits/dream-speech.pdf [perma.cc/US8Z-CKXA].

2. *See infra* Part II.A-B.

3. *See infra* Part II.A-B.

4. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013), *remanded to* 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

5. U.S. CONST. amend. XIV, § 1.

discrimination.[6]

This Note assumes the validity of diversity as a compelling governmental interest and focuses on the recent developments in the narrow-tailoring analysis under *Fisher v. University of Texas at Austin* ("*Fisher*"), which abandons the Court's patently deferential approach in *Grutter v. Bollinger*.[7] This new standard requires a court's narrow-tailoring analysis not afford any deference to government entities which choose to implement race-based AAPs—effectively restricting previous standards and compelling government entities to provide more convincing justifications for their reliance on racial preferences in hiring and admissions policies.[8]

In light of these new restrictions, this Note argues that to demonstrate good-faith consideration of race-neutral alternatives—and thus satisfy the narrow tailoring requirement of the analysis—government entities should be required to provide a concrete, quantifiable definition of "critical mass" before rejecting race-neutral alternatives as unsatisfactory.[9] Further, even if a university soundly rejects one race-neutral alternative, it should be required to seek out actively, and draw from, the promising aspects of other race-neutral alternatives that other institutions have implemented.[10]

Part I of this Note provides a brief history of AAPs in the United States and discusses how prior litigation has set the stage for current and future constitutional challenges. Part II explores the current judicial and social climate as it relates to racially-preferential AAPs through an examination of *Schuette v. Coalition to Defend Affirmative Action* and *Fisher*—the former case confirming the constitutionality of affirmative action bans and the latter case challenging the constitutionality of racially-preferential AAPs as a whole.[11] Part III provides guidance regarding the establishment of a true critical mass by suggesting that universities observe a four-fifths rule that makes minority applicants *eligible* for admissions at *at least* four-fifths the rate that white students are eligible, while reserving the decision of which applicants are offered admission to a discretionary judgment by an admissions officer. Further, Part III demonstrates

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6. *See generally* U.S. CONST. amend. XIV, § 1; Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

7. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013), *remanded to*, 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

8. *Fisher*, 645 F. Supp. 2d at 590.

9. Critical mass is a term often used to define an ideal percentage of minorities represented in the student body of a university. *See id*. Accordingly, when the percentage of minorities represented at a university is lower under a race-neutral AAP than under a race-conscious AAP, universities often declare the former to be unworkable because it fails to meet its critical mass. Without requiring universities to define what their critical mass number is, they are able to arbitrarily manipulate it and, thus, have unfettered authority to reject any and all race-neutral alternatives on those grounds. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 667 (2014) (Garza, J., dissenting), *cert. granted*, 135 S. Ct. 2888 (2015).

10. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring).

11. *Id.* at 1623.

there are indeed workable race-neutral, socioeconomic alternatives available to universities. In fact, these race-neutral alternatives may be *more* inclusive of racial minorities than current race-conscious plans. Finally, Part III argues that a failure to seek out actively and implement promising aspects of these alternatives falls short of good-faith.

I. BACKGROUND

A. History of Affirmative Action

Affirmative action policies are policies in which an institution actively seeks to improve the representation and inclusion of groups historically discriminated against and not afforded the same benefits and privileges as the dominant majority.[12] These policies rose in popularity as a result of the Civil Rights Movement of the 1960s, leading President John F. Kennedy to issue Executive Order 10925, which mandated that government contractors take "affirmative action" to ensure an equal opportunity of hiring and inclusion to minorities.[13]

These policies, combined with the passage of the Civil Rights Act of 1964, were supposed to increase minority inclusion in both the workplace and institutions of higher learning substantially.[14] Because these initiatives had little effect, in 1965 President Lyndon B. Johnson issued Executive Order 11246, which required government contractors to implement an affirmative action policy for the purpose of *increasing* the number of minority employees.[15] Shortly thereafter, universities and other public institutions began to adopt and implement similar policies, which led to increased minority representation over time but failed to close the gap entirely between white higher-education enrollment and minority enrollment to this day.[16]

B. Prior Litigation

The Court established the current strict-scrutiny standard in *Grutter v. Bollinger*, a case which challenged the race-conscious AAP used by the University of Michigan Law School.[17] Strict scrutiny prior to *Grutter* is outside the scope of this Note, but it was essentially termed a "minimum necessary

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12. *Affirmative Action Overview*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/education/affirmative-action-overview.aspx [http://perma.cc/45Y3-QQYG] (last visited Oct. 4, 2014).

13. *Id.*; *A Brief History of Affirmative Action*, U. CAL.-IRVINE OFF. EQUAL OPPORTUNITY & DIVERSITY, http://www.oeod.uci.edu/aa.html [http://perma.cc/7H8-XLT4] (last visited Jan. 21, 2016); Establishing the President's Committee on Equal Employment Opportunity, 26 Fed. Reg. 1977 (Mar. 6, 1961).

14. *Affirmative Action Overview*, *supra* note 12.

15. *Id.*; *A Brief History of Affirmative Action*, *supra* note 13; Equal Employment Opportunity, 30 Fed. Reg. 12319 (Sept. 24, 1965).

16. *Affirmative Action Overview*, *supra* note 12.

17. Grutter v. Bollinger, 539 U.S. 306 (2003).

[racial] preference" standard.[18] *Grutter* effectively "jettisoned [the] minimum necessary preference standard" and replaced it with a standard which requires race-conscious AAPs to (1) "not unduly harm members of any racial group,"[19] (2) give "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,"[20] (3) be "limited in time,"[21] and (4) afford each applicant a "truly individualized consideration."[22]

However, until now the only element a university had to prove under the *Grutter* standard was the "truly individualized consideration" requirement.[23] In *Grutter,* the Court noted that providing individualized consideration to applicants automatically avoids doing undue harm to members of racial groups not receiving a preference, "thus making the first of these four requirements redundant with the fourth."[24] The Court went on to determine that "there were no workable race-neutral alternatives at the University of Michigan Law School" and decided it would probably rule the same way for other institutions, effectively "taking the bite out of"[25] the good-faith consideration of race-neutral alternatives requirement.[26] Further, the Court concluded that for the "near future," affirmative action would be necessary to achieve diversity in universities, thus dulling the edge of the "limited in time" element.[27] This gives credence to the assertion that, until now, the only element courts would realistically consider was the fourth: individualization.[28]

This "individualization requirement" essentially breaks down into three separate elements: "the extent to which racial preferences are (1) quantified, (2) undifferentiated, and (3) excessive."[29] The first "quantified" element aims to prevent universities from using explicit formulas to weight particular characteristics. The second "undifferentiated" element aims to moderate the first to the extent that courts may allow quantified formulas if the formulas are adequately sophisticated in the way they differentiate applicants. Lastly, the third "excessive" element scrutinizes the weights given in any consideration to certain factors—in other words, making sure no one is given too much deference based

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18. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 543 (2007). The minimum necessary preference iterated in *Bakke* continued to control until the Court in *Grutter* established a more elaborate standard in 2003. *Grutter*, 539 U.S. 306.

19. *Grutter*, 539 U.S. at 341.

20. *Id.* at 339.

21. *Id.* at 342.

22. *Id.* at 334; Ayres & Foster, *supra* note 18, at 543.

23. Ayres & Foster, *supra* note 18, at 543.

24. *Id.*; *Grutter*, 539 U.S. at 341.

25. Ayres & Foster, *supra* note 18, at 543.

26. *Grutter*, 539 U.S. at 340.

27. *Id.* at 342; Ayres & Foster, *supra* note 18, at 543.

28. Ayres & Foster, *supra* note 18, at 543.

29. *Id.* at 519.

on his or her race.[30]

This heightened, three-part test of the "individualized" element is applied *only* when a government entity discloses that it is quantifying its racial preferences.[31] Not surprisingly, universities avoid that scrutiny by not using *express* quantifications of racial preference.[32] That way, they are able to implement practically unfettered racial preference that could only be substantiated—and possibly invalidated—by an exhaustive retroactive analysis of admissions data.[33] This standard has been said to be too lenient on these "unquantified" AAPs because it "does not subject them to a meaningful constitutional calculus."[34] This problem presents itself in *Fisher*, where the court allowed the University of Texas to reject a race-neutral alternative by claiming that it did not provide a critical mass of minority students, without establishing a quantifiable critical mass.[35]

II. AFFIRMATIVE ACTION TODAY: *SCHUETTE* AND *FISHER*

*A. Race-Conscious Affirmative Action Post-*Schuette

Schuette determined that race-conscious AAPs are not a constitutionally-protected right and may legally be banned at the state level.[36] The case did not consider the merits of affirmative action or the methods through which it is affected, but it does help contextualize the problem of affirmative action and gauge the attitudes that this debate elicits on both sides.[37]

After the U.S. Supreme Court handed down the decision permitting race-conscious AAPs at the University of Michigan in *Grutter*, the people of Michigan took matters into their own hands, passing a constitutional amendment by voter referendum titled Proposition 2 ("Prop. 2").[38] This amendment, in pertinent part, "prohibits the use of race-based preferences as part of the admissions process for

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30. *Id.* at 545.

31. *Id.* at 519.

32. *Id.* at 519-20.

33. *Id.* Through this retroactive, statistical analysis of a university's admissions data, it is possible that a quantified preference could be extrapolated. For example, if a university claims it does not use a rigid, mathematical method for selecting its number of minority students, yet its admission statistics show that each incoming class invariably comprises exactly 20% minority students, a "quantified" racial preference could be found. In that case, that university could find itself subject to the more scrutinizing analysis reserved for programs that use rigid formulas.

34. *Id.* at 520.

35. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 667 (5th Cir. 2014) (Garza, J., dissenting), *cert. granted*, 135 S. Ct. 2888 (2015).

36. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1623 (2014).

37. *Id.* at 1625.

38. *Id.* at 1623-25; MICH. CONST. art. I, § 26.

state universities."[39]

Challenging the amendment, Plaintiffs brought suit alleging violation of the Equal Protection Clause, basing their claim on language contained in *Washington v. Seattle School District No. 1*, which stated "[w]here a government policy 'inures primarily to the benefit of the minority' and 'minorities . . . consider' the policy to be 'in their interest,' then any state action that 'place[s] effective decisionmaking [sic] authority over' that policy 'at a different level of government is' subject to strict scrutiny."[40] However, the Court firmly rejected the expansiveness of that standard and noted that not only did it invite overzealous application to otherwise acceptable state policy, but it was only applicable in cases where the referendum created a direct injury to minority groups by blocking the political process that would have allowed them to address their problems through remedial legislation.[41] In *Schuette*, there was no such "political process" issue—the referendum did not affect minorities' ability to change the law and "respondents [could not] prove that the action . . . reflects a racially discriminatory purpose, for any law expressly requiring state actors to afford all persons equal protection of the laws does not—*cannot*—deny" equal protection.[42]

In his concurrence, Justice Scalia showed his hand with respect to his opinion on current equal protection jurisprudence regarding racially-preferential AAPs—further evidence these policies are anything but well-settled.[43] He referred to precedent cases such as *Grutter* and *Gratz* as "this Court's sorry line of race-based-admissions cases," and taking their conclusions as a given, attempted to answer the question of whether a state is prohibited from "banning a practice that the [Equal Protection Clause] barely—and only provisionally—permits."[44] He went on to note that "some States—whether deterred by the prospect of costly litigation; aware that *Grutter*'s bell may soon toll, or simply opposed in principle to the notion of 'benign' racial discrimination—have gotten out of the racial-preferences business altogether."[45] He finally noted that "with [the Court's] *express encouragement*," universities in California, Washington, and Florida are experimenting with alternative, race-neutral policies for the purposes of promoting diversity and that universities in other States "can *and should* draw on the most promising aspects of these . . . alternatives as they develop."[46] All of this dicta demonstrates Justice Scalia believed that these policies, which give preferential treatment to minorities, should be seen as a privilege and not a right. At best, this privilege is a tenuous one, the constitutionality of which has been,

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39. MICH. CONST. art. I, § 26 (amended 2006); *Schuette*, 134 S. Ct. at 1624.

40. *Schuette*, 134 S. Ct. at 1625 (internal quotations omitted) (quoting Washington v. Seattle Sch. Dist. No. 1, 102 S. Ct. 3187, 3196-97 (1982)).

41. *Id.*

42. *Id.* at 1625-27 (alteration in original).

43. *Id.* at 1639-40 (Scalia, J., concurring).

44. *Id.* at 1639 (alteration in original) (referring to race-conscious AAPs).

45. *Id.* (Roberts, C.J., concurring) (internal citation omitted).

46. *Id.* (Scalia, J., concurring) (alteration in original) (first emphasis added).

and continues to be, frequently challenged.

B. Fisher *Revisits the Narrow Tailoring of* Grutter*, but Does It Make Any Meaningful Changes?*

Fisher arose out of the denial of a Caucasian applicant at the University of Texas ("UT") in 2008, who subsequently brought a lawsuit against the university alleging a violation of her equal protection rights.[47] This essentially mimicked the cause of action brought in *Grutter* due to the fact that UT modeled its program directly after the program used, and approved, in *Grutter*.[48] With deference and a "presumption of good faith" afforded to UT, presumably derived from the Court's language and analysis in *Grutter*, the district court granted summary judgment to UT.[49] The U.S. Court of Appeals for the Fifth Circuit affirmed shortly thereafter.[50] On appeal to the Supreme Court, "the Court's decision to vacate the lower court's decision and remand . . . rested almost entirely on the degree of deference" that the lower courts afforded to UT.[51] Again, this degree of deference derives from the Supreme Court's holding and reasoning in *Grutter*.[52]

The standard established in *Grutter* has been bemoaned as too lenient on universities and state actors that claim their AAPs have no "fixed" or rigid numerical calculus by which minority applicants are weighted.[53] Once a university makes that assertion, the *Grutter* standard essentially assumes the program meets the remaining considerations of fairness to those who are not granted preference (i.e., that there was good-faith consideration of race-neutral alternatives and that it was limited in time). In *Fisher*, however, the Supreme Court rebuked that degree of leniency, stating:

> The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis . . . [I]n determining whether summary judgment in favor of the University would be appropriate, *the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.* Whether this record—*and not "simple . . . assurances of good intention"*—is sufficient is a question for the Court of Appeals in the first instance.[54]

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47. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217-18 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013), *remanded to* 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

48. *Id.*

49. *Id.*

50. *Id.* at 231-32.

51. R. Lawrence Purdy, Fisher v. University of Texas at Austin*:* Grutter *(Not) Revisited*, 79 MO. L. REV. 1, 6 (2014).

52. *Id.* at 5-6.

53. *See supra* Part I.B.

54. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (emphasis added),

This direction, if it can be called that, leaves much to be desired for proponents of the *Grutter* standard and those who hoped for its demise.[55] Considering Justice Scalia's dicta in *Schuette* that "*Grutter*'s bell may soon toll," the latter may soon have their day.[56] Essentially, this decision tells the lower court "we do not know exactly what the standard is for determining whether a race-conscious AAP is narrowly tailored, but this (and consequently the *Grutter* standard) is not it." Accordingly, on remand from the Supreme Court, the Fifth Circuit had to decide just how much, or how little, deference should be given to UT in determining the "good faith" of their policy. Presumably, "the University receives no deference" when determining narrow tailoring.[57] Despite having those instructions, it appears that the Fifth Circuit labored, at least in some degree, to reaffirm its judgment in favor of the University's policy, stating that "[w]ith the benefit of additional briefing . . . and the ordered exacting scrutiny, we affirm the district court's grant of summary judgment."[58]

On remand, the Fifth Circuit noted that diversity is clearly a compelling governmental interest and reiterated that UT would receive no deference when determining narrow tailoring of serving that interest.[59] The court then stated that "narrow tailoring requires that the court verify that it is necessary for a university to use race to achieve the educational benefits of diversity."[60] This verification required a "careful judicial inquiry into whether a university could achieve sufficient diversity without . . . racial classifications."[61] The court continued with "[i]t 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*.'"[62] Finally, before diving into its analysis, the court placed a proverbial cherry on top of the standard through which it scrutinized UT's policy: its analysis "must not be strict in theory, but fatal in fact," but also must not be "strict in theory but feeble in fact."[63] It is the latter of these two principles that the court in *Fisher* disappoints.

In an attempt to show there was indeed a workable, race-neutral alternative, Plaintiff argued that the Top Ten Percent Plan ("TTPP"), already in place at UT

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remanded to 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

55. Purdy, *supra* note 51, at 14.

56. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring); Purdy, *supra* note 51, at 14.

57. *Fisher*, 133 S. Ct. at 2419-20.

58. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

59. *Id.* at 643-44.

60. *Id.* at 644 (internal citations omitted).

61. *Id.*

62. *Id.* (emphasis added).

63. *Fisher*, 133 S. Ct. at 2421.

before the race-conscious program was instituted, qualified as such.[64] Plaintiff noted that before 2004—the year that UT began considering the race of applicants in admission decisions—the TTPP had created a student body that included 21.5% Hispanic and African American students.[65] This was much larger percentage than the 14% accepted as "critical mass" in *Grutter*.[66] The TTPP essentially made a hardline rule that the university would automatically offer admission to any applicant who finished in the top 10% of his or her high school class and was used to fill approximately 80% of the freshman spots.[67] Before 2004, the remaining 20% of students not admitted via the TTPP were admitted using a holistic review process ("HRP"), which considered socio-economic status and family educational achievements, but *not* race.[68] After 2004, UT began to add race as a consideration to the HRP, which led to an increase in minority representation from 21.5% in 2004 to 25.5% in 2007—a rise of just 0.92% in African American enrollment and 2.5% in Hispanic enrollment.[69] This raises the question: is the 2004 TTPP, in conjunction with the race-neutral HRP, a policy that "promote[s] the substantial interest [of diversity] *about as well* and at tolerable expenses" as the race-conscious admissions policy utilized after 2004? If so, the university *may not consider race*.[70]

In decrying the race-neutral 2004 policy as inadequate, the court offered several explanations. First, using only the TTPP without a HRP mechanism would be too mechanical, and the plan would not allow a university to tailor its student body for any purpose, let alone diversity.[71] There is no fault in that assessment. However, the court then disapproved of the TTPP, in conjunction with a race-neutral HRP, because "given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual's contributions to . . . diversity . . . *including those that stem from race*" the HRP would "approach an all-white enterprise."[72] To that point, the court's reasoning is less persuasive.

Test scores are only one possible measure by which an applicant is gauged.[73] Other factors might include: (1) socio-economic status; (2) family educational accomplishment; (3) athletic achievement; (4) familial structure; (5) geographic location; (6) extracurricular engagement; (7) personal interests and hobbies; and (8) personal achievement.[74] When considering these other potential factors, the

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64. *Fisher*, 758 F.3d at 644-45.

65. *Id.*

66. *Id.* at 644.

67. *Id.* at 645-46.

68. *Id.* at 645.

69. *Id.* at 644-45.

70. *Id.* at 644 (alteration in original).

71. *Id.* at 645.

72. *Id.* at 647 (emphasis added).

73. *Id.* at 638, 647, 650 (explaining that consideration of test scores alone was unsatisfactory in creating a diverse class).

74. *Id.* at 638.

Fifth Circuit's assertion that *without race* minorities have no opportunity to distinguish themselves becomes pedestrian at best. Granted, many students will have similar achievements outside of test scores. Those test scores then become the single determining factor—a scenario which, statistically speaking, would undoubtedly disfavor minorities.[75] Yet, the problem lies in making *race* the measure that adjusts for this discrepancy in test scores, and thus, using race as a mechanism for including a higher number of minority students.

The Fifth Circuit gave an example of a student who is a minority relative to the majority race of his or her particular school (e.g., Caucasian in a predominantly African American school or vice versa) succeeding despite that environment, claiming this is a race consideration that contributes to diversity.[76] That situation easily could be classified as personal achievement and make no reference to race whatsoever beyond asking "was this applicant a minority compared to the majority in their school or town?" By specifically reserving race as a way to bolster a student's chances, UT allows a minority student who is *not* in that specific scenario to gain an advantage despite being perfectly within the majority in his or her respective environment. At the same time, UT could *deny* that special consideration to a white student in a school that has a majority of racial minority students.

Furthermore, 85% of Hispanics and 80% of African Americans admitted to UT in 2008 were admitted through the TTPP, which is race-neutral.[77] This means in this scenario—where an applicant is the racial minority relative to his or her cohorts—would contribute such a small percentage of the minorities granted admission that considering race for this sole purpose would be trivial. Such a scenario could be considered a "personal achievement" rather than an accomplishment achieved solely by virtue of being a certain race. Also, in cases like *Fisher* many racial minority applicants are actually among the majority racial class at their school due to *de facto* segregation geographically.[78] Therefore, presuming that someone is a social outcast because of his or her skin color would often be erroneous. The underlying point is that just because race plays a necessary, but not sufficient, role in the aforementioned scenario does not mean race is the only way to ensure the HRP is inclusive of racial minorities.[79]

An additional, and poignant, problem in the majority's analysis in *Fisher* is brought to light in the dissent.[80] The problem is the university's complete failure to identify or define its "critical mass" for minority representation adequately in order for the student body to be considered "diverse."[81] The majority, with its

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75. *See generally* THE BROOKINGS INST., THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998), *available at* http://www.nytimes.com/books/first/j/jencks-gap.html [http://perma.cc/K5BQ-M4X8].

76. *Fisher*, 758 F.3d at 653.

77. *Id.* at 657.

78. *Id.* at 650.

79. *See infra* Part III.B.

80. *See generally Fisher*, 758 F.3d at 661-76 (Garza, J., dissenting).

81. *Id.* at 666.

dubious "non-deferential" scrutiny, allowed UT to define its "critical mass" as a student body which provides the "educational benefits that diversity is designed to produce."[82] Further, UT will only "cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved at UT through a race-neutral policy."[83] In less cryptic but equally circular terms, the university is saying that it will not reach "critical mass" until it has a diverse student body and will not stop considering race until it can have a diverse student body without considering race. Pure applesauce.[84] How can the majority conclude using race is necessary in achieving this "critical mass" when the university cannot, and will not, define its "critical mass"? That looks suspiciously like deference to the university—something that the Supreme Court in *Fisher* expressly admonished and forbade the Fifth Circuit from engaging in.[85]

The scrutiny of the majority becomes more dubious when considering that the 21.5% of minority representation in 2004—achieved *without* racial consideration in the HRP--was only augmented by approximately 4% between 2004 and 2007 while race *was* being considered in the HRP.[86] Even that assumes that *every single additional minority* admitted through the HRP was admitted solely on the basis of race, something that the majority and UT appeared to admit was improbable. Therefore, the majority has allowed UT to use racial preference in its admissions process, despite its *marginal* effect, by declaring that this small gain in minority representation is the difference between "critical mass" and "not critical mass"—without ever indicating what critical mass is. This gives a lot of deference to the university where no deference is allowed.

III. GOOD FAITH CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

A. Doing Away with the Arbitrary Definition of Critical Mass as a Basis for Rejecting Viable Race-Neutral Alternatives

As noted in the previous section and raised in Judge Garza's dissent in *Fisher*, by allowing the university to reject a race-neutral alternative summarily by claiming it does not create a "critical mass" of minority students—without requiring a definition of that critical mass—the Fifth Circuit effectively tendered a blank check to all universities.[87] With this blank check, universities will be able to reject race-neutral alternatives at will by claiming that whatever minority representation a race-neutral AAP generates, it does not meet the ever-elusive "critical mass." Taken in conjunction with the "limited in time" requirement of

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82. *Id.* at 666-67.

83. *Id.* at 667.

84. *See* King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting); *see also In re* Experient Corp., 535 B.R. 386, 413 n.123 (D. Colo. 2015) (explaining that "pure applesauce" is commonly interpreted to mean nonsense).

85. *Fisher*, 758 F.3d at 662, 667 (Garza, J., dissenting).

86. *Id.* at 644-45 (majority opinion).

87. *Id.* at 667 (Garza, J., dissenting).

the *Grutter* standard, there must be a line drawn to prevent universities from continuing this practice in perpetuity.[88]

On this issue, the field of Industrial and Organizational Psychology provides sound guidance for potential solutions. This field is predominantly tasked with providing scientific research concerning human resource management processes, through which best practices are developed and implemented.[89] A chief concern of the field is ensuring fair representation and opportunity to minorities in the recruitment and selection practices of an organization.[90] To that end, consultants from the field typically advocate for a four-fifths or 80% rule in selection.[91] This rule is applied to the selection rate of applicants, meaning that the ratio of minorities *selected*[92] under the process versus the number of minorities who *applied* for the position should be roughly 80% of the same for dominant-group applicants.[93] To further illustrate this concept, if 100 white males apply for a job and ten are selected, the selection rate is 10%. If 100 black males apply for that same position, *at least* eight should be selected, which is four-fifths of the 10% selection rate of white applicants. However, if only fifty black males were to apply, then the four-fifths rule dictates that at least four black applicants be selected—because white applicants were selected at a rate of 10%, four-fifths of 10% is 8%, and 8% of fifty is four.

This rule could be of great benefit to the courts and to universities when scrutinizing race-conscious admissions policies and considering the viability of race-neutral alternatives. It avoids the rigidity of setting a hardline quota for how many minority students must be represented—a practice expressly prohibited by the "individualization" element of the *Grutter* standard.[94] By requiring that the admissions process only make a specific number of minorities *eligible* for admission, the four-fifths rule does not detract from any degree of individualization at the actual *decision* stage of the admissions process. The admissions board would have complete discretion regarding who is actually admitted. However, under this rule the board will *not* be able to reject the selection process as failing to meet critical mass if that process provides the board with eligible minority applicants at a minimum of four-fifths the rate it provides them with majority applicants.[95] In other words, the four-fifths rule would ensure

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88. Grutter v. Bollinger, 539 U.S. 306, 334, 339, 341-42 (2003).

89. SOC'Y FOR INDUS. & ORGANIZATIONAL PSYCHOL., http://www.siop.org/ [http://perma.cc/75LN-CSH6] (last visited Jan. 21, 2016).

90. WAYNE F. CASCIO & HERMAN AGUINIS, APPLIED PSYCHOLOGY IN HUMAN RESOURCE MANAGEMENT 167 (7th ed. 2011).

91. *Id.* at 169.

92. In the context of selection tests and measures, selection rate does not mean a guaranteed job offer. *Id.* at 167. It simply means that the test scores generated by the measurements make a candidate eligible for the offer based on the cutoff scores established by the organization. *Id.*

93. *Id.* at 169.

94. Grutter v. Bollinger, 539 U.S. 306, 334, 339, 341-42 (2003).

95. Again, it is important to emphasize that the four-fifths rule does not require that representation of minorities be 80% that of white students. The rate of selection, or eligibility, is

that the admissions process renders minorities *eligible* for admission about as often as it does for white applicants, but it leaves the decision of who exactly is *offered admission* to the officers themselves.

B. Combatting the Notion That There Are No Race-Neutral Criteria Which Are Inclusive of Racial Minorities

Although the four-fifths rule may preclude or bar universities from rejecting a viable race-neutral alternative for failing to hit a "moving-target" critical mass, it is important to recognize this was not the only basis for rejecting the race-neutral plan in *Fisher*. The Supreme Court declared that if a race-neutral AAP creates diversity about as well as a race-conscious plan, then racial preference cannot be used.[96] On remand, the Fifth Circuit accepted UT's argument that without race as a consideration in determining eligibility, there was simply no other way to admit minorities and create diversity.[97] In effect, that determination implies that even if the four-fifths rule was established as a firm way to determine what critical mass is, there is no conceivable way that minorities may prove themselves eligible at four-fifths the rate as white applicants without considering their race as a distinguishing factor. Fortunately, such a blatantly derogatory assumption has been put to rest by an experimental program implemented at four highly selective universities in Israel.[98]

For approximately the past ten years, four large and highly selective universities in Israel have implemented a completely need-blind and race-blind AAP.[99] The program gives preference to applicants who apply and are determined eligible for it based on three distinct parameters which identify them as disadvantaged, *not* as being a minority.[100] These three parameters are: (1) the structure of opportunity determined by neighborhood and high school attended; (2) family socioeconomic standing determined by parental education and family size, *not* by financial holdings; and (3) individual or adverse circumstances.[101] The application gathers this information with high fidelity, as all of the data is

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what is being used to generate that number. To illustrate, imagine a pool of minority applicants and a pool of white applicants. These two distinct applicant pools are subjected to the same battery of selection tests. The rate at which applicants from each pool pass these tests, and thus become eligible for admission—not the rate at which they are actually offered admission—would have to be within 80% of one another.

96. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 644 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

97. *Id.* at 647.

98. Sigal Alon & Ofer Malamud, *The Impact of Israel's Class-Based Affirmative Action Policy on Admission and Academic Outcomes*, 40 ECON. EDUC. REV. 123, 125-26 (2014).

99. *Id.* at 126.

100. *Id.*

101. The adverse circumstances metric is invoked when an applicant is orphaned, an immigrant, divorced, single parent, disabled, experienced the death of a sibling, has divorced parents, or has a parent or parents with a disability or chronic illness. *Id.*

verifiable via public record.[102] This information is then processed by an independent non-profit organization, where the responses are calculated and turned into a composite score representing the applicant's overall level of socioeconomic disadvantage.[103] This score ranges from zero to eighty-five and a cutoff score is set by the university to determine at what point on that scale applicants become eligible for preferential treatment.[104] This step, however, is only the first of a three-step process.[105]

The second step determines the academic eligibility of the applicant, meaning that even if the applicant does qualify for preferential treatment based on his or her socioeconomic disadvantage, the applicant must still demonstrate a particular degree of academic achievement to qualify for the preference.[106] The cutoff for eligibility at this stage is generally 0.5-1.0 standard deviations below the average cutoff point for students who qualify without the preference.[107]

Once both socioeconomic and academic eligibility are calculated, there is yet a third stage to overcome: the decision stage.[108] Unlike the TTPP used in *Fisher*, which automatically grants admission to students ranking in the top 10% of their high school class,[109] the Israel Plan ("IRP") does not guarantee admission to anyone.[110] As such, the IRP would likely satisfy the individualization requirement espoused by the Court in *Grutter*, especially considering that the decision process is not holistic.[111] A decision-maker may choose to give more weight to academic eligibility than socioeconomic eligibility, vice versa, or both equally.[112] Through these metrics—socioeconomic disadvantage based on neighborhood, high school, parental education, number of family members, and individual adverse circumstances—taken in conjunction with relative academic achievement and the discretion of admissions officers, these four universities have been able to become more diverse than they otherwise would have been.[113]

The true beauty of this program's design is realized when combined with the

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. This plan creates resentment among students who attend highly-competitive schools and fall outside the top 10% but have much better standardized test scores than lesser-school top ten "percenters." Sigal Alon, *The Diversity Dividends of a Need-Blind and Color-Blind Affirmative Action Policy*, 40 SOC. SCI. RES. 1494, 1495 (2011). It fails to create socioeconomic diversity because the top 10% in every school tend to be less disadvantaged than the others and it saturates the applicant pool with automatic admissions, thus curtailing a university's ability to exercise discretion in shaping its student body. *Id.*

110. Alon & Malamud, *supra* note 98, at 126.

111. *Id.*

112. *Id.*

113. Alon, *supra* note 109, at 1500-01.

legal restrictions placed on it by the four-fifths rule. If somehow the IRP failed to generate a pool of eligible minority applicants at four-fifths the rate of majority applicants,[114] it would fail to meet critical mass and thus race would have to be considered again. However, the IRP plan has a mechanism for adjusting the selection rate. Recall the three parameters for determining socioeconomic eligibility are statistically combined to create a composite score for each applicant and the university established a cutoff point for that score above which any applicant was eligible.[115] The same was done for academic achievement numbers.[116] In the event these cutoff scores do not generate eligible minority applicants at four-fifths the rate as majority applicants, the cutoffs may simply be manipulated to include more minorities. In simpler terms, the university may raise or lower cutoffs to, in effect, become more inclusive and qualify more historically marginalized applicants for admission.

Furthermore, even in the face of this manipulation in favor of minority applicants, the IRP program fails to violate equal protection rights because it does absolutely nothing in terms of automatic admissions to those students based on race. Race was never a consideration in the application process and manipulating the cutoff scores to include more ethnic minorities does nothing to guarantee admission. This process simply makes individuals eligible for further consideration based on their merits when they would otherwise be denied that opportunity. The decision to grant that applicant admission and in effect allow him or her the preferential treatment is still left to an experienced, human admissions officer based on the officer's individualized assessment of the applicant. To that point, admissions officers could craft their incoming classes in any way they see fit; whether that be admitting all, some, or none of the IRP-eligible applicants—a right that has been expressly confirmed by the Court in *Schuette*.[117]

Detractors of race-neutral admissions may have some reservations about using the IRP in the United States. After all, Israel is an entirely different country with an entirely different history, traditions, and cultural and societal dynamics than the United States. These are all good reasons to believe that what promotes diversity and alleviates racial disparities there, might not work equally well here. Thankfully, a similar plan was designed—and its effects simulated with a U.S. sample—by Dr. Matthew Gaertner in 2008.[118]

The plan was developed in response to fears that Colorado was going to

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114. The selection rate, or more appropriately termed in this context the "eligibility rate," for minorities could be found retroactively, as race is not a contemporaneous consideration while determining eligibility.

115. Alon & Malamud, *supra* note 98, at 126-27.

116. *Id.*

117. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1623 (2014).

118. Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action*, *in* THE FUTURE OF AFFIRMATIVE ACTION 175-76 (Jason Renker & Joe Miller eds., 2014), *available at* http://apps.tcf.org/future-of-affirmative-action [http://perma.cc/YRZ5-J5G5].

follow other states' lead and pass a constitutional referendum banning race-conscious admissions policies.[119] To preserve minority representation at the University of Colorado at Boulder, the university looked to Gaertner for help in creating socioeconomic factors which would be inclusive of the underprivileged.[120] His design measured factors such as the applicant's native language, single-parent status, parental education level, family income, number of dependents in the family, geographic location of the applicant's high school, percentage of students from the applicant's high school eligible for free or reduced-price lunch, school-wide student-to-teacher ratio, and the size of the twelfth-grade class.[121] Under the program, students who qualified for preferential treatment on a socioeconomic basis would get an even larger boost than racial minorities received under the race-conscious program.[122] That boost becomes even more pronounced when the applicant's academic achievement index shows that the applicant overachieved relative to similarly-situated peers.[123]

To test the hypothesis (that these socioeconomic factors would promote inclusion of racial minorities), simulations were run using sample subjects that were representative of the university's typical applicant pools.[124] Not surprisingly, the socioeconomic diversity of the simulated admits increased, bringing the acceptance rate for lower-class applicants from 70% under a race-conscious policy to 82% under the race-neutral policy.[125] What was surprising, however, was the acceptance rate for under-represented minorities.[126] The acceptance rate for these applicants increased from 56% under the *race-conscious* policy to 65% under the *race-neutral* policy.[127] In other words, this system of admitting applicants based on their socioeconomic adversity beat race-conscious affirmative action at its own game.

There are several distinctions to be made between the Colorado plan and the IRP. Because there are not multiple hurdles or a discretionary decision stage once applicants make it past those hurdles, the four-fifths rule applied to the Colorado plan would probably function as an unlawful quota. Although this particular policy does not lend itself as well to the aforementioned four-fifths rule as the IRP, that is hardly consequential. The four-fifths rule is only necessary to prevent universities from using the critical mass argument to reject race-neutral policies that qualify minorities almost as well as a race-conscious policy.[128] When the race-neutral policy qualifies racial minorities just as well—or in the case of the Colorado plan, *better* than a race-conscious policy—the university would not be

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119. *Id.*
120. *Id.*
121. *Id.* at 177.
122. *Id.*
123. *Id.* at 177-78.
124. *Id.* at 180-81.
125. *Id.*
126. *Id.* at 181.
127. *Id.*
128. *See supra* Part III.A.

able to avail itself of the critical mass argument in the first place. In those cases, the race-neutral policy would not only generate an acceptable critical mass, but an *improved* one.

Although the fair representation of minorities was obvious during the simulations, the policy itself was never implemented.[129] However, it is important to note it is possible that minority acceptance rates could suffer under the same plan. For example, if a university draws applications from hypothetical community *X* and community *X* is populated by well-established and financially-secure minorities and relatively less-privileged Caucasians, then the under-privileged Caucasians would receive the preferential treatment. But that would not necessarily result in less racial minorities being admitted because they would be financially secure and have the resources to be admitted based on standardized test scores and GPA alone—not their skin color.[130] The policy would work to ensure that an equilibrium of opportunity is kept between the privileged and the underprivileged, not along racial lines.

Far more likely would be the scenario that played out at UCLA Law School and other universities in California—a state with a constitutional ban on race-conscious affirmative action.[131] There, a race-neutral AAP, which used similar socioeconomic factors as the Colorado and IRP plan, greatly increased the socioeconomic diversity of admitted students.[132] However, the number of black and Hispanic enrollment decreased significantly.[133] This decrease could be the result of minorities simply not wanting to apply to the program. Virtually every other school competitive with UCLA was still able to offer racial preference in their admissions policy.[134] As such, these other schools were highly favored by minorities.[135] In such a situation, convincing minorities to apply through a race-neutral policy is not easy because other schools may simply tell minority applicants that they get an automatic boost.[136] Meanwhile, the race-neutral school is forced to tell them they *might* get a boost, provided that they satisfy certain socioeconomic and/or academic criteria. So, although these negative recruitment effects can be mitigated by essentially marketing directly to minorities, it will be a tougher sell than it used to be.[137]

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129. The proposed constitutional referendum was defeated, which led the University of Colorado to abandon the race-neutral plan. Gaertner, *supra* note 118, at 180, 185.

130. *Education and Socioeconomic Status*, AM. PSYCHOL. ASS'N, http://www.apa.org/pi/ses/resources/publications/factsheet-education.aspx [http://perma.cc/D7ZA-XZGT] (last visited Jan. 21, 2016).

131. Richard Sander, *The Use of Socioeconomic Affirmative Action at the University of California*, *in* THE FUTURE OF AFFIRMATIVE ACTION 99, 100-03 (Jason Renker & Joe Miller eds., 2014), *available at* http://apps.tcf.org/future-of-affirmative-action [http://perma.cc/YRZ5-J5G5].

132. *Id.* at 105.

133. *Id.* at 106.

134. *Id.*

135. *Id.*

136. *Id.*

137. Richard L. McCormick, *Converging Perils to College Access for Racial Minorities*, *in*

The only way to eliminate the minority recruitment issue truly is to level the playing field. As the UCLA Law School found out, when other schools are able to offer minority acceptance boosts for no reason other than skin color, minorities (like anyone else) may simply take the path of least resistance and apply to those schools. Thankfully, the Supreme Court has once again granted certiorari and now has the perfect opportunity to create this level playing field.[138] By deciding this case at the Supreme Court level rather than confining its import to the Fifth Circuit, the Court can mandate a concrete definition of critical mass and proactive pursuit of race-neutral alternatives on a *national* scale.[139] In doing so, the Court would limit universities' ability to continue offering unfettered racial preference to minority applicants at the expense of less appealing—but potentially more helpful—race-neutral programs. Accordingly, the minority enrollment statistics generated by race-neutral AAPs could be fully realized and the benefits of such programs fully appreciated.

In the event the Court fails to make that sweeping decision, as will likely be the case with the advent of Justice Scalia's death, the courts of each circuit must recognize the merits of these socioeconomic admissions plans and require universities under their jurisdictions to "draw on the most promising aspects" of race-neutral, socioeconomic AAPs.[140] In doing so, courts across the United States will create a uniform, level playing field where applicants cannot flock to schools that offer admission based merely on skin color. Instead all applicants would be evaluated based on their academic achievements, illuminated by the social and economic adversity which they—through their good character and resolve—have overcome to accomplish their goals. For that reason, these race-neutral policies should be implemented instead of the presumptuous racially-preferential policies.

C. Are the Costs of Implementing Race-Neutral Policies Tolerable?

Before remanding the case back to the Fifth Circuit, the U.S. Supreme Court stated that if a race-neutral approach can promote diversity about as well as a race-conscious one and at tolerable expenses, then racial preferences cannot be used.[141] As demonstrated by the preceding section of this Note, race-neutral AAPs

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THE FUTURE OF AFFIRMATIVE ACTION 110, 117-18 (Jason Renker & Joe Miller eds., 2014), *available at* http://apps.tcf.org/future-of-affirmative-action [http://perma.cc/YRZ5-J5G5].

138. Despite being rebuffed at the district court level, twice at the circuit court level, and again when petitioning the Fifth Circuit for en banc review, Abigail Fisher's petition for certiorari with the U.S. Supreme Court has been granted. Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015).

139. *Id.*

140. *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring); Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013), *remanded to* 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

141. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013), *remanded to* 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

may in fact create a racially diverse student body at an even higher rate than race-conscious AAPs.[142] Therefore, the next obstacle to the effective implementation of these policies is their cost.

Due to the fact that the race-neutral Colorado Plan was purely experimental, the cost of its implementation is unknown.[143] The socioeconomic policy used at UCLA Law School, which is still being used, was obviously not a financial fatality as the program is thriving and in 2011, UCLA had its highest bar-passage rate ever.[144] Furthermore, the Supreme Court generally does not view administrative costs as a legitimate basis for abrogating rights when applying the strict scrutiny test.[145] To illustrate, in *Saenz v. Roe*, the Court concluded that a "State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens."[146] This reluctance to accept costs as a justification has led experts to conclude that universities "should not assume that cost savings alone can justify the ongoing use of a race-conscious policy."[147] Because the cost of implementing a race-neutral policy is unlikely to, by itself, justify the rejection of the policy, the remainder of this section will demonstrate some costs of *not implementing* a race-neutral socioeconomic policy. In other words, it will demonstrate the pitfalls of current policies.

First, race-conscious AAPs engender resentment and feelings of unfairness among white peers.[148] In one clinical study, a group tested subjects to find out how their perceptions of "modern racism"[149] and "collective relative deprivation"[150] are affected by race-conscious AAPs. The experiment used two separate conditions: one involving an organization with a race-conscious AAP and the other involving a race-neutral Equal Employment Opportunity ("EEO") initiative that simply barred discrimination for any reason.[151] The results showed that white subjects under the race-conscious AAPs were significantly more likely to express beliefs of modern racism and collective relative deprivation.[152] This

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142. Gaertner, *supra* note 118, at 181.

143. *Id.* at 180.

144. Sander, *supra* note 131, at 107.

145. Arthur L. Coleman & Teresa E. Taylor, *Emphasis Added:* Fisher v. University of Texas *and Its Practical Implications for Institutions of Higher Education*, *in* THE FUTURE OF AFFIRMATIVE ACTION 43, 52-53 (Jason Renker & Joe Miller eds., 2014), *available at* http://apps.tcf.org/future-of-affirmative-action [http://perma.cc/YRZ5-J5G5].

146. Saenz v. Roe, 526 U.S. 489, 507 (1999).

147. Coleman & Taylor, *supra* note 145, at 53.

148. Garriy Shteynberg et al., *But Affirmative Action Hurts Us! Race-Related Beliefs Shape Perceptions of White Disadvantage and Policy Unfairness*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 5-6 (2011).

149. This term is defined as the belief that racial minorities are no longer discriminated against and instead receive undeserved special treatment. *Id.* at 1-2.

150. This term is defined as the extent to which an in-group (whites) believes that it is chronically disadvantaged in society. *Id.* at 2.

151. *Id.* at 4-5.

152. *Id.* at 5-6.

heightened belief in modern racism and collective relative deprivation subsequently led to an increased perception of unfairness within the organization itself.[153] Conversely, white subjects under the race-neutral ("EEO") condition showed no increase in modern racism or collective relative depravation beliefs and were in fact said to be completely "dormant."[154] Accordingly, their perception of organizational unfairness also remained dormant.[155] These results show that race-conscious AAPs essentially activate beliefs that racial minorities are not disadvantaged or discriminated against in society, and that minorities receive undeserved special treatment.[156] One can see how this creates racial tension between whites and minorities; each group feels it is being oppressed for the benefit of the other. That is a problem which, unfortunately, is made even worse by the next pitfall of race-conscious AAPs.

The next pitfall is this: racial minorities *are* disadvantaged. But they are not necessarily disadvantaged because of their skin color. Racial minorities are disadvantaged because they are disproportionately impoverished.[157] African-American and Hispanic communities suffer from poverty[158] at rates of 27% and 24%, respectively, while the poverty rate is 10% among Caucasians and 14% among remaining ethnicities.[159] Instinctively, someone might consider this discrepancy a reason to promote race-conscious AAPs. It seems to be a logical way of providing minorities with an opportunity to get a college education, a well-paying job, and leave poverty behind them for good. Unfortunately, under current race-conscious AAPs, that is not what happens.

At selective universities, 86% of minority students who are admitted are upper or middle class.[160] To make matters worse, race-conscious AAPs at these selective schools give a 28% admission boost to applicants for minority status and

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Poverty Rate by Race/Ethnicity*, HENRY J. KAISER FAM. FOUND., http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/ [http://perma.cc/7E9Z-CQRK] (last visited Jan. 21, 2016).

158. Individuals or families are in poverty if their annual pretax cash income falls below a dollar amount the Census Bureau determines using a federal measure of poverty that is recalculated each year. *What Are Poverty Thresholds and Poverty Guidelines?*, INST. FOR RES. ON POVERTY, http://www.irp.wisc.edu/faqs/faq1.htm [http://perma.cc/878K-YT45] (last visited Jan. 21, 2016) (demonstrating that Census Bureau poverty lines hover around $23,000 for a family of four).

159. *Poverty Rate by Race/Ethnicity*, *supra* note 157.

160. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 341 (Princeton Univ. Press 1998). Although middle, upper-middle, and upper class distinctions are nebulous and hard to define clearly, generally the dollar thresholds are $32,500, $100,000, and $150,000, respectively. David Francis, *Where Do You Fall in the American Economic Class System?*, U.S. NEWS (Sep. 13, 2012, 10:50 AM), http://money.usnews.com/money/personal-finance/articles/2012/09/13/where-do-you-fall-in-the-american-economic-class-system [https://perma.cc/X48B-9PNH].

a whopping 0% boost for low-income status.[161] In effect, this means that race-conscious AAPs like the one used at UT admit minorities who have performed well academically and also have the added benefit of being a "diverse" color. But that does nothing to address the one factor that definitely disadvantages minorities: poverty. Most minority students admitted to these schools were not disadvantaged at all as far as access to education, food, or finances are concerned.[162] Thus in effect race-conscious AAPs create all the resentment and perceptions of unfairness in white peers, while simultaneously ignoring the one factor that would be fair to address through affirmative action: poverty. It is like going to the dentist, enduring the pain and suffering of a procedure, only to leave with the same cavity that you needed to get fixed.

Because race-neutral alternatives indeed exist and have demonstrated their merit in both fairness and in utility, failure to entertain their implementation or to subscribe to their wisdom should be considered a violation of equal protection under the law. This is especially true considering how little weight courts give to the costs of implementation and what is at stake if race-neutral AAPs are not used. In *Fisher*, UT experimented with race-neutral alternatives only to the extent UT was barred from considering race as a matter of law.[163] As soon as the Court decided *Grutter*, that prohibition disappeared and universities reverted back to a race-based HRP.[164] The standard handed down in *Grutter* requires "good faith consideration of workable race-neutral alternatives,"[165] which was further constricted by the Court in *Fisher*, asserting that in determining the "good faith" aspect of these considerations, UT and other similarly situated universities are afforded *no deference*.[166] Abandoning the use of race-neutral AAPs the instant the law allows, despite substantial evidence that such programs may *increase* minority representation, cannot be deemed a "good faith" consideration.

Furthermore, in *Schuette*, Justice Kennedy (for the court) and Justice Scalia (in concurrence) both reaffirmed *Grutter*'s admonition that universities "can *and should* draw on the most promising aspects of these . . . alternatives as they develop."[167] This supports the notion that not only should universities justify the supposed inadequacy of race-neutral alternatives by setting a quantifiable "critical mass," but they should also actively seek out other alternatives and draw from their most promising aspects to satisfy narrow tailoring.[168]

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161. WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 105 (Univ. of Va. Press 2005).

162. BOWEN & BOK, supra note 160, at 341.

163. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 645 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

164. *Id.*

165. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

166. *See generally id.* at 306; *Fisher*, 758 F.3d at 633.

167. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1630 (2014) (emphasis added); *id.* at 1639 (Scalia, J., concurring).

168. *Id.*

The facts of *Fisher* demonstrate that not only is UT failing to seek out workable race-neutral alternatives, but it was only using race-neutral alternatives in the first place because it was controlled by a prior ruling in *Hopwood v. State of Texas*.[169] This cannot be the good-faith consideration of race-neutral alternatives" mandated by the Court in *Fisher*. The university has not attempted implementation of race-neutral alternatives of its own accord and summarily rejected the continuation of the mandated race-neutral TTPP by citing a mercurial "critical mass" that could not be met without considering race.[170] Taken in conjunction with the restrictive language used by the Court in *Fisher* that *no deference* would be afforded to the university in determining the narrow tailoring of these considerations, it cannot be said that its efforts—or lack thereof—are satisfactory. Thus, UT's policy must be struck down as unconstitutional under the Fourteenth Amendment.[171]

CONCLUSION

Since *Grutter*, the scrutiny of affirmative action has long drawn the ire of critics and support of proponents.[172] Now, in the face of the Supreme Court's more critical language in *Fisher*, both sides of the debate have come to an impasse. The Court effectively determined that the current state of strict scrutiny analysis for such policies is changing and affords government entities no deference.[173] However, the Court failed to create any workable standard for the supposed new scrutiny, whether it be with respect to good-faith consideration, undue burdens to those excluded from the racial preference, limited in time, or individuality elements of a narrow tailoring.[174] Therefore, the Fifth Circuit was tasked with determining whether UT met this new, ambiguous, and admittedly elusive standard.

Unfortunately, despite having the apparent authority to restrict the standard as much, or as little, as the Fifth Circuit wanted in accordance with the Court's instruction, the Fifth Circuit ultimately took the "strict in theory but feeble in fact" approach to the Fourteenth Amendment.[175] By allowing UT's race-based policy to pass, the Fifth Circuit has effectively declared that universities may discount effective race-neutral policies by merely asserting that compared to 25.5% minority enrollment, 21.5% minority enrollment does not meet critical mass while refusing to define what the critical mass threshold is. Furthermore, until 2004, the TTPP was the only race-neutral policy UT had attempted.[176] As

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169. 78 F.3d 932, 935 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

170. *Fisher*, 758 F.3d at 667 (Garza, J., dissenting).

171. U.S. CONST. amend. XIV, §1.

172. *See supra* Part I.B.

173. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419-20 (2013), *remanded to* 758 F.3d 633 (2014), *cert. granted*, 135 S. Ct. 2888 (2015).

174. Purdy, *supra* note 51, at 14.

175. *Fisher*, 758 F.3d at 644.

176. *Id.* at 667 (Garza, J., dissenting) (discussing why the rejection of UT's race-neutral AAP

soon as the law allowed, UT, citing arbitrary "critical mass" reasons, reverted back to using race and has not pursued another race-neutral policy since.[177]

Despite these facts, the Fifth Circuit denied Fisher's petition for en banc review in November, 2014. The ruling on remand in *Fisher* operates just as deferentially as the standard in *Grutter* and simply kicks the proverbial can down the road. In keeping with the old adage "if you want something done right, you've got to do it yourself," the Supreme Court now has the opportunity to demonstrate to the nation the proper strict-scrutiny analysis for race-conscious AAPs. The good-faith consideration element of narrow tailoring must be construed as requiring a concrete definition of what "critical mass" is in order to reject alternative measures that fall short of it. It must also require continued efforts to seek out and draw from the most promising aspects of alternative policies being implemented at other institutions.

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was premature and should not pass muster under strict scrutiny).

177. *Id.*