

MEASURING DIVERSITY

*Yuvraj Joshi**

INTRODUCTION

In *Fisher v. University of Texas* in June 2016, the Supreme Court upheld the use of race-conscious affirmative action in college admissions.¹ While recognizing a university's interest in the educational benefits that derive from a diverse student body, Justice Kennedy cautioned in the majority opinion: "A university's goals cannot be elusory or amorphous—they must be sufficiently *measurable* to permit judicial scrutiny of the policies adopted to reach them."²

Justice Kennedy's measurability requirement is the most important feature of his opinion. The constitutionality of race-conscious admissions is going to depend on how universities measure diversity.³ No wonder critics of affirmative action are clamoring for disclosure of ever more

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1. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2214–15 (2016). The 2016 opinion was the last in a saga of *Fisher* opinions. Abigail Fisher, a white woman, was denied admission to the University of Texas at Austin (UT Austin). Her grades were not strong enough to qualify for Texas's Top Ten Percent Plan, which guarantees admission to the top high school students across the state. She also failed to gain acceptance under the University's admissions process that considers many factors, including an applicant's talents, leadership qualities, family circumstances, and race. Fisher sued the University and alleged that its use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The district court upheld the University's admissions process as constitutional, and the U.S. Court of Appeals for the Fifth Circuit affirmed. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *aff'd* 645 F. Supp. 2d 587 (W.D. Tex. 2009). Fisher appealed to the Supreme Court, which remanded the case by holding that the appellate court had not applied the strict scrutiny standard to the University's admission policies. See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013). On remand, the Fifth Circuit again reaffirmed the lower court's decision by holding that the University of Texas's use of race in the admissions process satisfied strict scrutiny. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014). Fisher again appealed to the Supreme Court, which agreed to hear the case. *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (mem.).

2. *Fisher II*, 136 S. Ct. at 2211 (Kennedy, J.) (emphasis added).

3. See, e.g., Complaint at ¶ 205, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176-DJC), 2014 WL 6241935 ("[S]tatistical evidence establishes that Harvard is intentionally discriminating against Asian Americans by making it far more difficult for Asian Americans than for any other racial and ethnic group of students to gain admission to Harvard.").

data.⁴ The dilemma facing the nation's universities is how to measure diversity while knowing that opponents of race-conscious admissions will utilize those metrics in litigation to challenge affirmative action programs.⁵

In seeking to address this dilemma, university administrators reading *Fisher* may believe that they are required to measure diversity in more precise and even numerical terms. However, this Piece cautions against following that misguided impulse in the context of race-conscious admissions based on three primary observations. First, diversity-based affirmative action programs have survived past constitutional challenges in part *because* they are imprecise as to which individuals benefit from them and how much benefit those individuals receive. Second, this lack of precision may minimize some of the social divisiveness associated with race-conscious admissions policies, which may help diffuse political opposition to affirmative action and diminish the constitutional harms perceived by some Justices and potential litigants.⁶ Finally, *Fisher* does not actually require universities to measure diversity in more precise or numerical terms than previous affirmative action decisions. Given the current political climate, universities' ability to maintain affirmative action programs under *Fisher* will depend on their ability to grasp and apply these principles.⁷

To demonstrate the merits of imprecision in measuring diversity, this Piece proceeds in three parts. Part I surveys some key cases on affirmative action to show how and why the Court has been concerned with numerical considerations of race in college admissions. Part II examines two uses of numbers that have received scrutiny in cases leading up to *Fisher*: universities' gathering of data on minority enrollment and student-body diversity and use of metrics to describe diversity goals, especially the concept of "critical mass." Part III studies scrutiny of the University of Texas, Austin's (UT Austin) admissions program in *Fisher* and teases out lessons for how universities should structure their admissions programs in light of *Fisher*. The Piece concludes that a degree of imprecision remains a requirement of constitutionally permissible affirmative action after *Fisher*, and universities interested in enrolling a diverse student body should therefore measure diversity using educational values rather than numerical metrics.

4. In September 2016, a court ordered Harvard University to produce "comprehensive data" from six admissions cycles in the lawsuit it faces from anti-affirmative action group Students for Fair Admissions. See Brittany N. Ellis, Harvard to Release Six Years of Admissions Data for Lawsuit, Harv. Crimson (Sept. 6, 2016), <http://www.thecrimson.com/article/2016/9/9/admissions-data-release/> [<http://perma.cc/N8EW-RSDX>].

5. Because the Supreme Court's affirmative action cases were brought against public institutions, the Court has yet to rule on whether private institutions that accept federal funding are bound by this line of cases.

6. I write "some of the social divisiveness" because the concerns of minority communities also matter in healing social divisions and realizing the educational benefits of diversity.

7. This Piece proceeds on the premise that the Court's precedents on affirmative action will remain the law for the foreseeable future.

I. THE CONCERN WITH NUMBERS IN THE AFFIRMATIVE ACTION CASES

Fisher's talk of numbers has deep doctrinal roots. This Part shows how the Supreme Court's affirmative action jurisprudence, rooted in the rejection of racial quotas and the embrace of educational diversity, has been profoundly concerned with numerical considerations of race in admissions decisions.

A. *Diversity Interest*

In the 1978 case *Regents of the University of California v. Bakke*, the Court invalidated an admissions program at the University of California, Davis School of Medicine (UC Davis) that reserved sixteen of one hundred places in each entering class for "qualified" minorities.⁸ In doing so, Justice Powell approved the use of race in admissions decisions, but only to further "the attainment of a diverse student body."⁹ Setting aside a specified number of seats was not an appropriate means to achieve the goal of diversity because it failed to "consider all pertinent elements of diversity in light of the particular qualifications of each applicant" and because it failed to "treat[] each applicant as an individual in the admissions process."¹⁰

Although Justice Powell's opinion emphasized the value of holistic and individualized review out of concern for fairness to individual applicants, there are underlying social-cohesion concerns that supported the decision to veer away from racial quotas. Applying affirmative action policies in exact and explicit ways (like racial quotas) uncovers who will bear the cost of racial preferences, and the fact that those cost bearers are not wrongdoers poses an intractable political problem. This political problem becomes a legal problem when those cost bearers, typically white applicants who are denied admission, mobilize and bring cases that challenge racial preferences in college admissions. As their political resistance becomes inscribed into law, it imposes constraints on the permissible form of affirmative action or, even worse, proscribes the use of affirmative action altogether.¹¹

8. 438 U.S. 265, 271, 279 (1978) (plurality opinion) (Powell, J.).

9. *Id.* at 311–12.

10. *Id.* at 316–18.

11. Key constitutional challenges to affirmative action have involved white applicants alleging that they bore the burden of consideration of race in admissions decisions. See, e.g., *Fisher II*, 136 S. Ct. 2198, 2207 (2016) (describing petitioner Abigail Fisher, a white woman denied admission to the University of Texas at Austin in 2008, who "alleg[ed] that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants"); *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (summarizing the allegations of Barbara Grutter, a white woman denied admission to the University of Michigan Law School in 1997, who claimed she was rejected because the school gave "applicants [from] certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups'" (quoting Joint Appendix at para. 20, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 21523737, at

Justice Powell acknowledged the threat that racial preferences pose to social cohesion when he wrote in a footnote in *Bakke*: “All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious.”¹²

To mitigate the “deep resentment” likely to be felt by “innocent persons”¹³ who bear the cost of affirmative action, Justice Powell offered race-conscious diversity as a less salient and determinate means to achieve racial inclusion than racial quotas.¹⁴ In contrast to racial quotas, the diversity-based affirmative action scheme that Justice Powell endorsed was cast in universal and imprecise terms, allowing all students to bring “diverse” experiences or viewpoints into a classroom without specifying who benefited and by how much.¹⁵

Justice Powell’s *Bakke* opinion rendered the use of race in admission decisions less explicitly numerical in two important ways. First, a university could no longer seek a “simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups.”¹⁶ Second, it had to consider “race or ethnic background [as] simply one element—to be weighed fairly against other elements—in the selection process.”¹⁷

At the same time, Justice Powell quietly accepted a relationship between numbers and achieving the educational benefits of diversity. He endorsed Harvard College’s admissions plan as “[a]n illuminating example” of “[the] kind of program [that] treats each applicant as an individual in the admissions process.”¹⁸ He reproduced a description of the Harvard plan in the appendix to his opinion that acknowledged “some

*33)); *Bakke*, 438 U.S. at 277–78 (explaining that Allan Bakke, a white man denied admission to the University of California, Davis School of Medicine in 1973 and 1974, “alleged that the Medical School’s special admissions program operated to exclude him from the school on the basis of his race”).

12. *Bakke*, 438 U.S. at 294 n.34.

13. *Id.*

14. *Id.* at 316 (“The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end.”).

15. *Id.* at 317 (“Such qualities [relevant to educational diversity] could include 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.”).

16. *Id.* at 315.

17. *Id.* at 318.

18. *Id.* at 316, 318.

relationship between numbers and achieving the benefits to be derived from a diverse student body.”¹⁹

Justice Powell’s maneuver did not go unnoticed. Professor Paul Mishkin, who had served as special counsel for UC Davis in *Bakke*, delivered a lecture welcoming Justice Powell’s opinion,²⁰ even though it had rejected other justice-based interests supporting affirmative action that he had put forward, including remedying the underrepresentation of minorities and “societal discrimination” against them.²¹ Mishkin noted that “[t]he Court took what was one of the most heated and polarized issues in the nation, and by its handling defused much of that heat.”²² He further remarked that “Justice Powell’s vehicle for accomplishing this feat was acceptance of the importance of ‘diversity’ in the academic setting.”²³ Mishkin predicted that “[t]he indirectness of the less explicitly numerical systems may have significant advantages” in terms of “the felt impact of their operation over time” and “in muting public reactions to, and possible resentment of, the granting of preference on racial lines.”²⁴

In important ways, Mishkin’s prediction came true. The rubric of diversity allowed universities to continue considering race in admissions decisions while making these racial classifications less conspicuous.²⁵ It was another twenty-five years before the Supreme Court weighed in on the constitutionality of race-conscious admissions policies. Diversity-based affirmative action programs passed constitutional muster in part because they were imprecise as to which individuals benefit from them and how much benefit those individuals receive.²⁶ Once on precarious constitutional footing,²⁷ the pursuit of a diverse student body came to be accepted as a compelling interest sufficient to justify race-conscious

19. Id. app. at 323 (emphasis added) (quoting Brief for Columbia University et al. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007, at app. *3).

20. Paul J. Mishkin, Emmanuel S. Heller Professor of Law, Univ. of Cal. at Berkeley, Owen J. Roberts Annual Memorial Lecture: The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action (Oct. 21, 1982), in 131 U. Pa. L. Rev. 907, 930 (1983).

21. See Brief for Petitioner at *3, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187977.

22. Mishkin, *supra* note 20, at 929.

23. Id. at 923.

24. Id. at 928.

25. See *Fisher II*, 136 S. Ct. 2198, 2207 (2016) (noting that “race is but a ‘factor of a factor’ in the holistic-review calculus” (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009))).

26. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (“All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”).

27. See *Hopwood v. Texas*, 78 F.3d 932, 944, 962 (5th Cir. 1996) (declaring that “the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body” and that “Justice Powell’s argument in *Bakke* . . . has never represented the view of a majority of the Court”).

admissions.²⁸ Even Abigail Fisher, the white plaintiff who alleged that UT Austin improperly denied her admission based on her race, did not challenge the university's interest in the educational benefits of diversity.²⁹

B. *Measuring Diversity*

The recognition of educational diversity as a compelling interest came with the corollary problem of how diversity should be measured. Even as Justice Powell in *Bakke* rejected outright quotas, he remained quiet about who benefited from diversity-based affirmative action and by how much. His silence was no accident: Justice Powell understood that diversity's imprecision was its merit.³⁰

Twenty-five years later, in the 2003 case *Grutter v. Bollinger*, the Court upheld the race-conscious admissions program of the University of Michigan Law School.³¹ But even though the Court in *Grutter* endorsed Justice Powell's opinion in *Bakke*, *Grutter* diverged from *Bakke* in declaring that the Law School's policy of admitting a "critical mass" of minority students was a "narrowly tailored use of race."³² The Law School described critical mass as "meaningful numbers" or "meaningful representation" but did not ascribe a particular number, percentage, or range.³³ In accepting this definition, *Grutter* left open the question of exactly how the concept of critical mass should be quantified.

As some of the dissenting opinions in *Grutter* make clear, the concept of critical mass has become a lightning rod for the concern that race-conscious programs are thinly veiled racial quotas. At least some Justices on the right demand stricter scrutiny of specific admissions programs and greater measurability of diversity goals in the hopes that critical mass-based programs would be exposed as racial set-asides and deemed unconstitutional. In his lengthy and detailed attack on the University of Michigan Law School's admissions program, Chief Justice Rehnquist charged: "Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."³⁴

28. See *Grutter*, 539 U.S. at 325 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

29. See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013) ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. But the parties here do not ask the Court to revisit that aspect of *Grutter's* holding." (citations omitted)).

30. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (plurality opinion) (Powell, J.) ("One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.").

31. 539 U.S. at 306.

32. *Id.* (O'Connor, J.).

33. *Id.* at 318.

34. *Id.* at 379 (Rehnquist, C.J., dissenting).

Echoing Chief Justice Rehnquist, Justice Kennedy wrote: “[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”³⁵

This fixation on critical mass continued when the Court first considered *Fisher* in 2013: Chief Justice Roberts and Justices Alito and Scalia articulated concerns about the metrics used to measure critical mass. The latest *Fisher* decision brings this issue to a boil: Justice Kennedy’s majority opinion introduces a measurability requirement for affirmative action goals.³⁶ In his dissenting opinion, Justice Alito goes so far as to say that judicial scrutiny is impossible “without knowing in reasonably specific terms what critical mass is or how it can be measured.”³⁷ In so doing, Justice Alito’s dissent attempts to read an additional precision test into Justice Kennedy’s measurability requirement. Yet insofar as Justice Alito’s notion of “reasonably specific terms” amounts to clearly articulated numerical goals, it is in conflict with the legal aversion to numerical metrics evident in the Court’s affirmative action jurisprudence. To understand the ramifications of Justice Alito’s observation, Part II turns to the Court’s treatment of data and metrics used by universities in the past.

II. TWO USES OF NUMBERS BEFORE *FISHER*

Attending to the concern with numbers in the Court’s affirmative action jurisprudence reveals constitutionally permissible, impermissible, and precarious uses of numbers in race-conscious admissions. This Part describes two uses of numbers that have received scrutiny in cases leading up to *Fisher*: universities’ gathering of data on minority enrollment and student-body diversity and use of metrics to describe diversity goals. Sections II.A and II.B consider these two uses in turn.

A. *Diversity Data*

The prohibition on racial quotas concerns how an admissions program is *designed* and how it *operates*, and courts draw inferences about whether a program operates as a racial quota from the percentage of minorities enrolled at a particular school over time.³⁸ For this reason,

35. *Id.* at 389 (Kennedy, J., dissenting).

36. See *Fisher II*, 136 S. Ct. 2198, 2211 (2016) (“[A]sserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”).

37. *Fisher II*, 136 S. Ct. at 2222 (Alito, J., dissenting).

38. See, e.g., *Grutter*, 539 U.S. at 335 (majority opinion) (O’Connor, J.) (“We are satisfied that the Law School’s admissions program, like the Harvard plan described by Justice Powell, does not *operate* as a quota.” (emphasis added)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978) (plurality opinion) (Powell, J.) (“This case presents a challenge to the special admissions program of the petitioner, the Medical School of the

data on minority enrollment has been central to litigating the constitutionality of race-conscious admissions.

In *Bakke*, the University of California argued that UC Davis's admissions program neither was set up nor worked as a racial quota by citing its admissions practices and minority enrollment data.³⁹ In rejecting this argument, Justice Powell focused on how the program was set up as a "two-track system" of admissions that "insulat[ed] each category of applicants with certain desired qualifications from competition with all other applicants."⁴⁰ Rather than parsing through minority enrollment data, he concluded that the program was "*designed* to assure the admission of a specified number of students from certain minority groups."⁴¹

Grutter was a different story. Both sides relied on the University of Michigan Law School's admissions data to quantify the use of race in admissions decisions, including "cell-by-cell" comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates."⁴² Each of the four vehement dissents in *Grutter*—by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—drew inferences from these admissions statistics. Chief Justice Rehnquist charged that "the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of 'critical mass' is simply a sham" and that the "[p]etitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her."⁴³ Interpreting the same data differently, the Court in *Grutter* emphasized that "the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year"⁴⁴ and upheld the Law School's race-conscious admissions program.

As discussed later in the Piece, the attention to diversity data that emerged in *Grutter* resurfaces in *Fisher*.⁴⁵ UT Austin's data on minority enrollment and student-body diversity underpin Justice Kennedy's twenty-page majority opinion and Justice Alito's fifty-one-page dissent.

University of California at Davis, which is *designed* to assure the admission of a specified number of students from certain minority groups." (emphasis added)).

39. Brief for Petitioner, *supra* note 21, at *45–46 ("The Davis program sets a goal, not a quota. There is no floor below which minority presence is not permitted to fall Likewise, there is no ceiling on minorities The total of minority students [in the entire entering class] varies from year to year . . . no matter how admitted.").

40. *Bakke*, 438 U.S. at 315.

41. *Id.* at 269–70 (emphasis added).

42. *Grutter*, 539 U.S. at 320 (O'Connor, J.).

43. *Id.* at 383 (Rehnquist, C.J., dissenting).

44. *Id.* at 336 (majority opinion) (O'Connor, J.).

45. See *infra* Part III.

B. *Diversity Goals*

The constitutionality of diversity goals depends on how those goals are formulated, with numerical goals being suspect. Yet as the controversy surrounding critical mass illustrates, even diversity goals that do not *employ* but simply *evoke* numerical metrics arouse suspicion.

The concept of critical mass proved *Grutter*'s most controversial divergence from *Bakke*.⁴⁶ But the divergence was more form than substance. Justice Powell's endorsement of Harvard's admissions plan in *Bakke* implied an acceptance of "*some relationship* between numbers and achieving the benefits to be derived from a diverse student body" in order to address "a sense of isolation among . . . black students."⁴⁷ This sounds similar to the University of Michigan Law School's use of the term "critical mass" in *Grutter* as not a specific "number, percentage, or range of numbers or percentages" but instead "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."⁴⁸

Yet even as Justice Kennedy's *Grutter* dissent admired Justice Powell's opinion in *Bakke* that endorsed Harvard's plan, it derided the Law School's use of "critical mass" as "a delusion used . . . to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."⁴⁹ Indeed, Justice Kennedy appealed to Justice Powell's opinion in *Bakke* when he wrote: "Whether the objective of critical mass 'is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,' and so risks compromising individual assessment."⁵⁰

Why did the concept of critical mass prove controversial? Part of the reason must be that critical mass has a numerical connotation yet defies numerical definition. During the oral argument in the first *Fisher* case, Justice Scalia accentuated this apparent anomaly when he quipped: "We should probably stop calling it critical mass then, because mass, you know, assumes numbers, either in size or a certain weight Call it a cloud or something like that."⁵¹ But there is more to it than that. Critical mass is controversial less because there is a relationship between numbers and achieving the educational benefits of diversity and more because critical mass gives a label to that relationship.

46. See Yuvraj Joshi, *Bakke* to the Future: Affirmative Action After *Fisher*, 69 Stan. L. Rev. Online 17, 19 (2016), <http://review.law.stanford.edu/wp-content/uploads/sites/3/2016/09/69-Stan.-L.-Rev.-Online-17-Joshi.pdf> [<http://perma.cc/Z5NH-9Y4W>] (describing ways in which *Grutter* diverged from Justice Powell's opinion in *Bakke*).

47. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 app. at 323 (1978) (plurality opinion) (Powell, J.) (emphasis added).

48. *Grutter*, 539 U.S. at 318 (O'Connor, J.).

49. *Id.* at 389 (Kennedy, J., dissenting).

50. *Id.* at 391 (quoting *Bakke*, 438 U.S. at 289).

51. Transcript of Oral Argument at 70–71, *Fisher I*, 133 S. Ct. 2411 (2012) (No. 11-345).

Labels like critical mass take the relationship between numbers and diversity that is otherwise implicit in affirmative action programs and make that relationship explicit and shape how it is perceived by the public and decisionmakers. In a racially charged environment, a label that evokes images of race-based classifications and allocations may foster feelings of resentment and suspicion. As the University of California’s brief disputing the use of “quota” to describe UC Davis’s admissions program astutely observed, “this is an area where emotions are easily aroused and labels seem to develop a life of their own,” and “[q]uota’ is a label sometimes applied to this case, as by the court below, perhaps because that term stirs such emotions.”⁵²

As the Fifth Circuit recognized on remand in *Fisher*, critical mass “goes astray when it drifts to numerical metrics.”⁵³ Yet even where critical mass steers clear of numerical metrics, it brings to mind a numerical system of allocating benefits on the basis of racial and ethnic origin. In so doing, critical mass stirs emotions among members of disfavored groups and yields predictable, if sometimes also disingenuous, challenges to race-conscious measures. It provokes the ire of the Justices on the right (like Justices Scalia and Thomas) who are committed to colorblindness and prepared to strike down *any* race-conscious measures. Furthermore, it heightens the suspicion of the Justices in the center (like Justice Kennedy) who allow *limited* race-conscious measures to preserve social cohesion⁵⁴ yet fear that programs based on critical mass are “tantamount to quotas.”⁵⁵

III. *FISHER* AND THE FUTURE OF AFFIRMATIVE ACTION

To understand how *Fisher* colors existing law on race-conscious affirmative action, this final Part begins by studying the Court’s scrutiny of UT Austin’s consideration of race in admissions decisions. This Piece concludes with reflections on how universities should and should not alter their admissions programs in light of *Fisher*.

A. *Numbers in Fisher*

1. *Minority Enrollment and Student-Body Diversity.* — *Fisher* picks up where *Grutter* left off. The Court once again relied on minority enrollment data, albeit in a slightly different way that supported UT Austin’s

52. Brief for Petitioner, *supra* note 21, at *44.

53. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 654 (5th Cir. 2014).

54. See Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L.J. 1278, 1281 (2011) (showing that Justices in the political middle of the Court, like Justice Kennedy, have reasoned from an “antibalkanization” perspective that is “more concerned with social cohesion than with colorblindness”).

55. *Grutter*, 539 U.S. at 394.

assessment that race-neutral policies were not enough to achieve “sufficient racial diversity.”⁵⁶ As Justice Kennedy described:

[T]he demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002 [when the University used race-neutral measures] Although demographics alone are by no means dispositive, they do have some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.⁵⁷

The Court’s interpretations of minority enrollment data in these cases may serve as signposts to universities. *Fisher* suggests that while race-conscious measures are *not* being used, a measure of *stagnation* in minority enrollment may support the inference that race-conscious measures are necessary to enroll minority students.⁵⁸ Conversely, *Grutter* suggests that while race-conscious measures *are* being used, a measure of *fluctuation* in minority enrollment may avoid the inference that an admissions program operates as a racial quota.⁵⁹ Yet the Court’s reliance on minority enrollment data in this way also raises concern: It incentivizes universities to ensure fluctuations in, and even impose limits on, the number of minorities enrolled simply to avoid the inference that their admissions program is a racial quota.

Alongside data on minority enrollment, the Court has relied on data emerging from a university’s assessment of student-body diversity. *Fisher* underscores the relationship between data that universities gather on student-body diversity and the universities’ “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.”⁶⁰ Looking back, Justice Kennedy commended UT Austin for “engag[ing] in periodic reassessment of the constitutionality, and efficacy, of its admissions program.”⁶¹ Looking forward, he instructed that “assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan” and predicted that “[t]he type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”⁶²

UT Austin had gathered considerable data on student-body diversity, most notably a “classroom diversity” study on “whether there is a critical

56. See *supra* section II.A (discussing the use of quantitative data in *Grutter*).

57. *Fisher II*, 136 S. Ct. 2198, 2212 (2016) (Kennedy, J.).

58. *Id.*

59. *Grutter*, 539 U.S. at 336 (“[T]he number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.”).

60. *Fisher II*, 136 S. Ct. at 2209–10 (Kennedy, J.).

61. *Id.* at 2210.

62. *Id.*

mass of minority students in the educational setting, more specifically, in classrooms”⁶³ The study counted the racial and ethnic backgrounds of students in select undergraduate classrooms from 1996 through 2002 and concluded that the University had not reached a critical mass at the classroom level.⁶⁴ Justice Kennedy cited the study as “nuanced quantitative data” that “appears to have been done with care” to make “a reasonable determination . . . that the University had not yet attained its goals.”⁶⁵

By contrast, Justice Alito devoted over seven pages of his fifty-one-page dissent to criticizing the study, calling it “woefully insufficient” to support an interest in classroom diversity.⁶⁶ Presumably in anticipation of the litigation Harvard University faces from Students for Fair Admissions, an anti-affirmative action group alleging that Harvard’s admissions program discriminates against Asian Americans,⁶⁷ Justice Alito cited the classroom study’s findings to argue that the university discriminates against Asian Americans and “seemingly views the classroom contributions of Asian-American students as less valuable than those of Hispanic students.”⁶⁸

Discord about diversity data in cases like *Grutter* and *Fisher* should serve as a reminder that people are likely to interpret empirical data in ways that comport with their prior attitudes and beliefs and additional data can be polarizing.⁶⁹ While *Fisher* can be misread to endorse universities’ collection of progressively more data on student-body diversity, “[t]he type of data collected, and the manner in which it is considered”⁷⁰ is more consequential to universities’ ability to maintain affirmative action programs than the amount of data collected.

63. Joint Supplemental Appendix at 69a, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14–981), 2015 WL 8146395.

64. *Id.* at 70a.

65. *Fisher II*, 136 S. Ct. at 2212.

66. *Id.* at 2226 (Alito, J., dissenting).

67. See, e.g., Complaint at ¶ 205, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176), 2014 WL 6241935 (“[S]tatistical evidence establishes that Harvard is intentionally discriminating against Asian Americans by making it far more difficult for Asian Americans than for any other racial and ethnic group of students to gain admission to Harvard.”).

68. *Fisher II*, 136 S. Ct. at 2227.

69. See, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2105–06 (1979) (finding that death penalty supporters and opponents interpret the same new information containing mixed evidence about the death penalty as reinforcing their own beliefs); Charles S. Taber et al., *The Motivated Processing of Political Arguments*, 31 Pol. Behav. 137, 153 (2009) (finding that people, especially those with strong prior beliefs and political sophistication, are unable to ignore their prior beliefs when processing arguments or evidence).

70. *Fisher II*, 136 S. Ct. at 2210 (majority opinion) (Kennedy, J.).

2. *Critical Mass.* — In addition to denouncing UT Austin’s reliance on “classroom diversity,” Justice Alito condemned its use of “critical mass.” He charged that “UT has not explained in anything other than the vaguest terms what it means by ‘critical mass’” and that “[t]his intentionally imprecise interest is designed to insulate UT’s program from meaningful judicial review.”⁷¹ Although Justice Alito is certainly correct to notice critical mass’s imprecision, he is wrong in conflating constitutionally mandated imprecision with deliberate obfuscation and in demanding clearly and precisely articulated goals that likely run counter to the requirement of holistic and individualized consideration of applicants. As Justice Kennedy rightly points out, “since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.”⁷²

For his part, Justice Kennedy has tried to steer the affirmative action jurisprudence away from the concept of critical mass and toward the diversity interest formulated in *Bakke*.⁷³ Justice Kennedy’s *Fisher* opinion does not ridicule critical mass as his *Grutter* dissent did. In fact, the term does not appear until the final section of the *Fisher* opinion—and then only to respond to Fisher’s critique of the concept.⁷⁴

Fisher claimed that UT Austin had failed to define the level of minority enrollment that would constitute a critical mass.⁷⁵ Instead of tackling the definition of critical mass head on, Justice Kennedy responded, “this Court’s cases have made clear . . . the compelling interest” justifying university affirmative action programs “is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining ‘the educational benefits that flow from student body diversity.’”⁷⁶ Although Justice Kennedy cited *Fisher I* and *Grutter* as authorities, his words actually distill Justice Powell’s rule in *Bakke*.

Fisher also claimed that the university had “already ‘achieved critical mass’ . . . using the Top Ten Percent Plan and race-neutral holistic review.”⁷⁷ Once again, Justice Kennedy glossed over the question of what

71. Id. at 2222 (Alito, J., dissenting).

72. Id. at 2210 (majority opinion) (Kennedy, J.).

73. See Joshi, *supra* note 46, at 18 (“Justice Kennedy admired Justice Powell’s rule in *Bakke* yet detested its application in *Grutter* *Fisher* presented him with an opportunity to reset the shape and trajectory of affirmative action in line with *Bakke*.”).

74. See *Fisher II*, 136 S. Ct. at 2210.

75. Id.

76. Id. (quoting *Fisher I*, 133 S. Ct. 2411, 2419 (2013)) (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

77. Id. at 2211 (quoting Brief for Petitioner at 46, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 5261568).

it means to “achieve critical mass,”⁷⁸ instead merely detailing that “the University conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data,’ and concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful in achieving’ sufficient racial diversity at the University.”⁷⁹

It is striking that Justice Kennedy emphasized minority enrollment statistics and “nuanced quantitative data” on classroom diversity to support the university’s assessment that race-neutral policies were not enough to achieve “sufficient racial diversity.”⁸⁰ In so doing, Justice Kennedy seemed to allow that universities may employ race-conscious measures to enroll enough minority students to achieve the “educational benefits of diversity,” which sounds rather like employment of the “critical mass” standard that he disclaimed in *Grutter*.⁸¹

As mentioned earlier, however, Justice Powell’s endorsement of Harvard’s admissions plan implied an acceptance of “*some relationship* between numbers and achieving the benefits to be derived from a diverse student body.”⁸² By relying on minority enrollment numbers to demonstrate that race-neutral alternatives were insufficient, Justice Kennedy also seems to recognize a numerical component to the educational benefits of diversity, so long as that numerical component is implicit and imprecise and does not (as Justice Kennedy believes critical mass does) “attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”⁸³

B. *Lessons from Fisher*

Until now, this Piece has situated *Fisher*’s measurability requirement in longstanding debates over numerical considerations of race. This Piece now concludes with three lessons for how universities should structure their affirmative action programs in light of *Fisher*.

First, universities should reconsider the use of critical mass to justify race-based affirmative action. As Donald Verilli, then solicitor general arguing in support of affirmative action, conceded during the oral argument in the first *Fisher* case: “[T]he idea of critical mass has taken on a life of its own in a way that’s not helpful because it doesn’t focus the inquiry where it should be.”⁸⁴ While Justice Kennedy in *Fisher* did not repudiate the concept of critical mass as he did in *Grutter*, he did not endorse it either. Moreover, as both Justice Powell’s rule in *Bakke* and

78. See id. at 2210–11 (eliding any clear test for determining “critical mass”).

79. Id. at 2211 (alterations in original) (citation omitted).

80. Id. at 2211–12.

81. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

82. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 app. at 323 (1978) (plurality opinion) (Powell, J.) (emphasis added); see also *Grutter*, 539 U.S. at 336 (majority opinion).

83. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

84. Transcript of Oral Argument, *supra* note 51, at 71.

Justice Kennedy's opinion in *Fisher* suggest, the Court accepts a relationship between numbers and achieving the educational benefits of diversity, so long as that relationship remains implicit and imprecise.

Second, universities should define diversity in broad and inclusive terms. In *Fisher*, Justice Kennedy reminded UT Austin that “diversity takes many forms” and that “[f]ormalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.”⁸⁵ In delivering this reminder, Justice Kennedy was concerned in part with precedent: Justice Powell's opinion in *Bakke* emphasized that race “is only one element in a range of factors”⁸⁶ relevant to attaining the goal of a diverse student body and that universities should “consider all pertinent elements of diversity in light of the particular qualifications of each applicant,”⁸⁷ so the ways that universities gather and interpret data should also reflect that “diversity takes many forms.”⁸⁸

But when Justice Kennedy cautioned about “formalistic racial classifications” being “used in a divisive manner,”⁸⁹ he was concerned less with precedent and more with social cohesion.⁹⁰ Where universities seek to measure only racial and ethnic diversity using blunt numerical metrics, they may leave disappointed applicants with the impression that particular groups have gained unfair advantage and fuel resentment among disfavored groups. *Fisher* suggests that in order to observe constitutional constraints and preserve social cohesion, universities should formulate diversity in broad terms and seek to gather data that capture the “many forms” that diversity takes, including but not limited to racial and ethnic diversity.

Finally, universities should avoid measuring diversity in strictly numerical terms. While *Fisher* introduces a measurability requirement, the decision does not actually endorse numerical measures of diversity. Immediately before declaring that “[a] university's goals . . . must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them,”⁹¹ Justice Kennedy rejected Abigail Fisher's suggestion that increasing minority enrollment is “a goal that can or should be reduced to pure numbers.”⁹²

Then, immediately after calling for “sufficiently measurable” goals, Justice Kennedy concluded:

85. *Fisher II*, 136 S. Ct. at 2210 (Kennedy, J.).

86. *Bakke*, 438 U.S. at 314.

87. *Id.* at 317.

88. *Fisher II*, 136 S. Ct. at 2210.

89. *Id.*

90. See Joshi, *supra* note 46, at 23–26 (tracing how Justice Kennedy's concern with social cohesion has evolved from *Grutter* to *Fisher II*).

91. *Fisher II*, 136 S. Ct. at 2211.

92. *Id.* at 2210.

[T]he University articulated concrete and precise goals . . . [by] identif[ying] the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “promot[ion of] cross-racial understanding,” the preparation of a student body “for an increasingly diverse workforce and society,” and the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.”⁹³

Justice Kennedy further concluded that the program sought “an ‘academic environment’ that offers a ‘robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.’”⁹⁴ As evidenced by Justice Alito’s dissent, “These are laudable goals, but they are not concrete or precise”⁹⁵

In sum then, a degree of imprecision remains a requirement of constitutionally permissible affirmative action after *Fisher*. Under *Fisher*, a university considering race in admissions decisions to achieve the educational benefits of diversity is asked to articulate “concrete and precise goals” that are “sufficiently measurable.”⁹⁶ However, “sufficiently measurable” does not mean “specify[ing] the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.”⁹⁷ Instead, it is a goal articulated in terms of “the educational values [a university] seeks to realize through its admissions process.”⁹⁸ In other words, diversity may be measured through non-numerical goals rather than numerical standards. Thus, universities that wish to enroll a diverse student body consistent with constitutional constraints should measure diversity using broad and imprecise “educational values” rather than specific and quantifiable enrollment goals.

93. Id. at 2211 (fourth and fifth alterations in original) (quoting Joint Supplemental Appendix, *supra* note 63, at 23a).

94. Id. (quoting Joint Supplemental Appendix, *supra* note 63, at 23a).

95. Id. at 2223 (Alito, J., dissenting).

96. Id. at 2211 (majority opinion) (Kennedy, J.).

97. Id. at 2210.

98. Id. at 2211.