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Fisher v. Texas and the Irrelevance of Function in Race Cases

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ESSAY

Fisher v. Texas and the Irrelevance of Function in Race Cases

DEREK W. BLACK*

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INTRODUCTION

When the Supreme Court granted certiorari in Fisher v. Texas,1 scholars and commentators speculated that the Court was set to end affirmative action in higher education.2 This outcome seemed even

* Professor of Law, University of South Carolina School of Law. I want to thank my dear
friend, Aderson Francois, and the Howard Law Journal for extending me the opportunity to
think through Fisher v. Texas more deeply and publish this Essay. I am grateful to my dean, Rob
Wilcox, for supporting this and other research over the past year. Finally, without the continuing
conversations regarding Fisher with my colleagues, Danielle Holley-Walker and Eboni Nelson, I
may have had nothing to write. Unfortunately, any misdirection in this Essay is still my own.
2. See, e.g., Allen Rostron, Affirmative Action, Justice Kennedy, and the Virtues of the Mid-
from Fisher heightened fears that affirmative action would be coming to an end); Gerald Torres,
more likely given Justice Elena Kagan’s recusal. Without her, the best-case scenario required Justice Kennedy to affirmatively side with the three remaining “liberals.” A carefully crafted concurrence by Justice Kennedy in *Fisher*, akin to the one he authored in *Parents Involved in Community Schools v. Seattle*, would have no effect because the four other conservatives would have a majority over three dissents without Justice Kennedy. To the surprise of most, however, the final opinion in *Fisher* was neither a decisive win for the conservatives, nor a dramatic four-four split to save affirmative action. Instead, the Court delivered a dull seven-to-one decision in which the Court allowed *Grutter v. Bollinger*’s holding—that the educational benefit of diversity is a compelling interest—to survive, but remanded *Fisher* with an emphasis to apply a demanding narrow tailoring analysis.

The only language in *Fisher* that potentially adds something to the jurisprudence of higher education admissions is the Court’s statement that “[n]arrow tailoring also requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” The question is whether this is anything more than an emphasis of what the law already is. The Court in *Fisher* presents the “necessity” requirement as being procedural rather than substantive in nature. The lower courts had been

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6. *See id.* at 2419 (“[T]he parties here do not ask the court to revisit that aspect [approving diversity as a compelling interest] of *Grutter*’s holding.”). Justice Thomas concurred separately to emphasize that overturning *Grutter* was not before the Court and, thus, the holding is not an endorsement of *Grutter*. *See id.* at 2432 (Thomas, J., concurring). While the Justices are correct that overturning *Grutter* was not raised by the parties, the question of whether diversity is a compelling interest was necessarily bound up in the resolution of this case. If no compelling interest existed, narrow tailoring would be irrelevant. Likewise, if no compelling interest existed, the Court would be sanctioning what would otherwise be unconstitutional action by the University. Recognizing this problem, the Court has not hesitated in the past to reach out and address issues in race cases that were not squarely presented by the parties. *See, e.g., Missouri v. Jenkins,* 515 U.S. 70, 138 (1995) (Souter, J., concurring).


8. *Id.* at 2420.

9. *See Grutter,* 539 U.S. at 326 (indicating that government imposition of racial classifications is reviewed under strict scrutiny and is constitutional only if it is narrowly tailored to further compelling governmental interests).
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willing to assume the University of Texas's good faith and defer to its judgment in terms of the necessity of relying on race. The Supreme Court in Fisher indicated that the lower courts should examine the evidence on this point themselves rather than deferring to the University. The underlying question, however, remains the same after Fisher: has the university engaged in a "serious, good faith consideration of workable race-neutral alternatives" and established that "no workable race-neutral alternatives would produce the educational benefits of diversity"?

Yet, the term "necessity" in Fisher sounds stricter than Grutter. Those opposing affirmative action will surely seize on this point to argue that Fisher raises the bar. But to do so, they will need to ignore the Fisher Court's quote of Grutter immediately thereafter: "[N]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." For the moment, the final word rests with the federal government, which reads the case as I do. In their recent official guidance, the Departments of Justice and Education concluded that Fisher "preserved the well-established legal principle that colleges and universities have a compelling interest in achieving the educational benefits that flow from a racially and ethnically diverse student body and can lawfully pursue that interest in their admissions programs" and "did not change the [narrow tailoring] requirements articulated in Grutter v. Bollinger." If this reading of Fisher is correct, Fisher is either unimportant or important for some other reason than having changed the law.

I posit that Fisher did not change the law, but is, nonetheless, important for a far more subtle reason: it represents the continuing triumph of form over function in race cases, which, as a practical matter, works to the serious disadvantage of minorities. By form over function, I mean that how a program operates and the net results it produces are of relatively little importance compared to the racial

10. See Fisher, 133 S. Ct. at 2421.
11. Id. at 2420 (quoting Grutter, 539 U.S. at 339–40).
12. Id. ("If 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,' then the university may not consider race.") (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80, n.6 (1986)).
13. Id.
forms it employs. A majority of the Court is obsessed with the forms that racial considerations take. A majority of the Court finds formalistic uses of race extremely objectionable, even if they have very little real-world impact. At the same time, the Court passes on less obvious uses of race even though they have huge consequences—typically negative for minorities.

Careful examination of Fisher reveals that the role of form over function is just below the surface. Comparing the effect that racial classifications played in the University of Texas's admissions policy to the effect that race-neutral classifications played brings form over function into clearer view. First, the University operated a multilevel admissions process in which the explicit use of race could have only come into play and been decisive in a small fraction of the total admissions offers extended by the state. The functional weight of the use of race, however, has no effect on the Court's analysis. The Court indicated the program is only constitutional if the University can produce evidence that race-neutral alternatives are unworkable. Second, the Court did not pause for a moment to critically consider the far more significant racial impacts of Texas's Top Ten Percent Plan because the Plan did not rely on any explicit racial forms or classifications. Per this analysis, a state actor that avoids the use of prohibited racial forms can bestow any amount of good or harm on minorities that it wishes without drawing the serious concern of the Court.

In the context of Texas's Plan, this approach might seem fair enough. The Court scrutinized one racial impact but exempted another and, thus, the opinion does not work a net negative for minorities. But as a practical matter, Texas's Plan and motivations are not standard operating procedure for other state actors. States more frequently employ policies that harm, rather than benefit, racial minorities, making the elevation of form over function a net negative for minorities. Thus, while Fisher allowed affirmative action to live to fight another day and seemingly changed little in terms of explicit doc-

17. See Fisher, 133 S. Ct. at 2420.
18. See Fisher, 631 F.3d at 239–40 (mentioning that top ten applicants accounted for 8,984 of the 10,200 UT admittees, and they constituted eighty-eight percent of the admissions offers for Texas residents and eighty-one percent of enrolled UT freshman).
19. See generally THE LEADERSHIP CONFERENCE EDUCATION FUND, STILL SEGREGATED: HOW RACE AND POVERTY SYMIE THE RIGHT TO EDUCATION (2013) (reporting on the failure of U.S. laws to close the existing policy gap as it relates to economical, educational, and racial equality).
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trine, Fisher reaffirmed an underlying framework that is problematic on, at least, three levels. First, the effect that policies have on individual lives is just as important, if not more, as the symbolism of those policies. Form over function, however, gives enormous credence to symbolism and almost none to the effects. Second, by relying on racial forms as the primary trigger of judicial scrutiny, the Court discourages transparency and encourages the state to employ decision-making processes that obscure its real motivations. Those universities most seriously committed to diversity are unlikely to drop their motivations as a result of Fisher, but they are likely to hide the ways in which they achieve it. Thus, transparency and predictability, both of which are important and apparent in Texas’s Plan, are lost. Third, race-neutral forms of achieving diversity tend to be far blunter tools, and can work at odds with universities’ missions. The Court’s failure to appreciate this may force some universities to choose between equally valid goals: achieving diversity or operating nuanced, selective admissions programs.

This Essay proceeds in three parts. As background to Fisher, the first Part of this Essay analyzes the Court’s decision in Parents Involved, demonstrating the enormous role that racial forms played in the outcome and questioning whether the line between form and function is a meaningful one. It also points out that because this distinction between form and function may only be a technical one, sophisticated schools have found ways to consider race without relying on the technically prohibited racial forms, which calls into question the Court’s premise regarding the importance of racial forms. The second Part analyzes the form and function of race in university admissions, comparing the University of Michigan’s law school and undergraduate admissions programs to the University of Texas. This comparison demonstrates that the ways in which a program operates and the results it produces carry little weight. Again, the Court is primarily concerned with the form that racial considerations take. The final Part briefly discusses how the elevation of form over function has an even more significant negative effect on minorities when the racial considerations in question are insidious rather than benign. The Court’s current intentional discrimination standards leave the vast majority of racial inequity untouched so long as defendants avoid obvious racial forms.
I. VOLUNTARY SCHOOL DESEGREGATION: DRAWING A FINE LINE BETWEEN INDIVIDUAL RACE CLASSIFICATIONS AND RACE CONSCIOUSNESS

A full appreciation of the triumph of form over function in race cases must begin with an analysis of Justice Kennedy's controlling opinion in *Parents Involved v. Seattle Schools*; it is there that Justice Kennedy makes the point most clearly. *Parents Involved* produced a fractured opinion in which four justices would have held that neither diversity nor the elimination of de facto segregation in education is a compelling interest sufficient to justify the use of race in assigning students to public schools.20 Those four justices added that, even if diversity or eliminating de facto segregation was a compelling interest, the plans in question were not narrowly tailored.21 Conversely, the four dissenting justices would have held that the student assignment plans were supported by a compelling interest and were narrowly tailored.22 Justice Kennedy's concurring opinion rested in the middle. He agreed with the four dissenters that a compelling interest existed,23 but he also agreed with the four other justices in the majority that the plans were not narrowly tailored.24 Thus, Justice Kennedy's concurrence is the controlling opinion in the case.25

While Justice Kennedy indicated that the plans were not narrowly tailored, the language of his opinion revealed that his primary concern was the racial forms employed, not any specific impact suffered by students or any available alternative that would have worked better to achieve all of the schools' legitimate goals. Nowhere in his opinion did Justice Kennedy indicate he was striking down the plans because the use of race was overly broad or dominated the assignment process, nor could he have made such a claim. On a functional level, race played a relatively small role in the assignment of students, particularly when compared to the hundreds of desegregation plans that previously came before the courts in which race played a definitive role in

21. See *id.* at 726.
22. See *id.* at 855 (Breyer, J., dissenting).
23. See *id.* at 797–98 (Kennedy, J., concurring).
24. See *id.* at 786–87 (Kennedy, J., concurring).
the assignment of nearly every student in the district. Far more important than race in Louisville and Seattle was parental choice. The districts did not mandate that any student attend any school based solely on race. Rather, the districts operated a school choice plan in which parents' voluntary choices were the decisive factor in where the overwhelming number of students went to school. Race only became a factor in a small percentage of assignments—those in which a school was oversubscribed, other race-neutral factors had been exhausted, and the failure to consider race would produce a school enrollment that was significantly imbalanced in comparison to the district's overall demographics. But in most all instances, schools were not oversubscribed or non-racial tiebreakers were sufficient to determine enrollment in oversubscribed schools. In short, while these voluntary desegregation plans had a race-conscious goal, race was only infrequently considered in individual student assignments.

Of particular importance is also the fact that, at the most basic functional level of whether any student was denied educational opportunity, these plans produced a lot of good without substantially harming anyone. In Seattle, for instance, students got into their first or second choice of schools ninety-seven percent of the time. The remaining three percent were still assigned to a school in the district. This is the opposite of higher education admissions where only a small percentage is enrolled and those denied enrollment attend substantially different schools, potentially lower in quality and in distant locations. Because voluntary desegregation plans assign all students to some school within the district, Goodwin Liu has argued that volun-

26. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6, 29-31 (1971) (upholding the mandatory student assignment and busing of students, along with a reliance on statistics as a starting point for assessing appropriate integration).


28. See Parents Involved, 551 U.S. at 812, 818 (Breyer, J., dissenting).

29. See id. (discussing Seattle's and Louisville's choice programs). The overwhelming popularity of the district's voluntary desegregation plan was likewise a testament to the fact that parents, in large part, controlled their children's destiny, not their children's race. See, e.g., Emily Bazelon, The Next Kind of Integration, N.Y. TIMES, July 20, 2008, at 38 (discussing an eighty-eight percent parental support rating for Louisville's desegregation plan); see also Comfort ex rel. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 349 (D. Mass. 2003) (discussing actions to make the plan popular among all demographics).

30. See Parents Involved, 551 U.S. at 812, 818 (Breyer, J., dissenting).

31. See id. at 813.

32. See id. at 812-13.

tary desegregation plans are more akin to voter redistricting than affirmative action in higher education. In redistricting, individuals are “sorted” by race, but they are not granted or denied opportunities based on race. As such, the Court has applied a different legal analysis to voter redistricting. If schools in integrating districts were significantly unequal, the analogy to voting would fall apart, as a student might have the opportunity to receive an adequate education in one school but not another. The evidence in Parents Involved, however, showed that the districts went to great lengths to ensure quality educational opportunities in all their schools. Thus, the major concern of affirmative action opponents—the impact on innocent third parties—was essentially non-existent in Parents Involved.

The limited function of race in Parents Involved and the minimal practical consequences that students suffered, were trumped by Justice Kennedy’s concern with the particular racial forms employed by the districts. Justice Kennedy’s entire opinion rests on the premise that individual race classifications are stigmatic in and of themselves. Thus, they harm individuals, regardless of the motivations or precise practical effect of the classification. Justice Kennedy reasoned that, by drawing racial classifications, one is necessarily expressing a “racial preference” and using it to treat individuals differently. Drawing on

34. See Goodwin Liu, Seattle and Louisville, 95 CALIF. L. REV. 277, 311 (2007). Liu further explains:

In redistricting, however, there is no suggestion that government must “treat citizens as individuals” in an equally strict sense. A legislature does not violate equal protection when it assigns an individual voter or even a few voters to an electoral district predominantly based on race. The concern arises only when “race [is] the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district” in derogation of traditional districting principles.

Does this imply that de minimis racial discrimination is permitted in redistricting? Of course not. It implies that the stringent norm of individualized treatment developed in the admissions context does not extend to redistricting because the use of race in sorting does not present the same hazards as the use of race in selection.

Id. (alteration in original).


38. See Parents Involved, 551 U.S. at 793 (Kennedy, J., concurring in part and concurring in the judgment). And, of course, Justice Kennedy is not alone on this score. The characterization of racial classifications as racial preferences is littered throughout other Supreme Court opinions. See, e.g., Gratz, 539 U.S. at 267–68; Adarand Constructors, 515 U.S. at 220.
prior opinions, Justice Kennedy reiterated that “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” In other words, he, along with a majority of the Court, sees all racial classifications as roughly equivalent, not because they operate the same, but because they all share the same problematic form.

According to Justice Kennedy, even “benign” classifications stigmatize. Race classifications present a “danger to individual freedom” and “cause [a] hurt or anger of the type the Constitution prevents.” He explained:

To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

While well-intentioned, the districts’ use of racial classifications in assigning students to schools “reduce[d] children to racial chits.” They assigned value to race, whereby students, as “racial chits,” were “traded according to one school’s supply [of a particular race] and another’s demand.” This alone would have been sufficient for Justice Kennedy to find the voluntary desegregation plans unconstitutional, but Justice Kennedy went a step further and criticized the particular racial forms used. He repeatedly indicated that the districts’ chosen classifications—“white and non-white”—were “crude” labels on their face. They furthered a false racial binary of two racial

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40. See id. at 790.
41. Id. at 797.
42. See id. at 798.
43. See id.
groups and treated all non-white students as fungible.\textsuperscript{44} Thus, not only did they classify individuals by race, they classified individuals inaccurately and lumped them into catch-all groups that obfuscated their racial identity.

Justice Kennedy's concern with form over function was even clearer in his distinction between the foregoing uses of race and others that he would find less objectionable. In particular, he drew a sharp distinction between individual race classifications and general considerations of race. By individual classifications, Justice Kennedy was referring to instances in which the government identifies an individual student's race and relies on it in making a decision about that student. By general consideration of race, he was referring to a governmental policy that is race conscious or has racial motivations, but does not actually rely on individual students' racial classifications in making decisions about those students as individuals. Speaking of this distinction between individual race classifications and general uses of race, Justice Kennedy wrote:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.\textsuperscript{45}

A district might, for instance, consider the racial demographics of neighborhoods in making a "strategic site selection of new schools; drawing attendance zones . . . ; [and] allocating resources for special programs,"\textsuperscript{46} or consider race in "recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics."\textsuperscript{47} The formal distinction between individual classifications and general considerations of race is so significant to Justice Kennedy that he wrote "it is unlikely any of [these general considerations of race] would demand strict scrutiny to be found permissible."\textsuperscript{48}

\textsuperscript{44} See id. at 786, 788–89, 797–98.
\textsuperscript{45} Id. at 788–89 (citation omitted).
\textsuperscript{46} See id. at 789.
\textsuperscript{47} See id.
\textsuperscript{48} See id.
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Justice Kennedy is correct that these two uses of race are formally different. It is less clear, however, that this formal distinction is as normatively important as he declared. Following the decision in Parents Involved, districts committed to racial diversity or reducing racial isolation have adopted student assignment policies that are explicitly race conscious, but which do not rely on individual racial classifications. The most aggressive of these plans have been able to produce levels of integration nearly identical to those contemplated in Parents Involved. On the one hand, the effectiveness of some post-Parents Involved plans would appear to vindicate Justice Kennedy and those who would argue that race-neutral options are available and we should pursue them first. On the other hand, these race-neutral options have proven complicated, burdensome to administer, less transparent, and not necessarily politically more popular than plans that relied more directly on race. Most important, the line between these plans and those in Parents Involved is extremely thin.

One of the most prominent post-Parents Involved plans is in the Berkeley Unified School District. Its current student assignment plan does not rely on students’ individual racial classifications. Instead, the plan considers group level racial data. The district uses the demographic characteristics of the neighborhood in which a student lives—including the average household income, the average education level of adults, and the percentage of “students of color”—to calculate a diversity category for each student. The district then assigns students from each diversity category proportionately to individual schools so as to approximate the racial and socioeconomic diversity of the overall district. As a result, “[t]he actual personal attributes of students’ [are] not relied upon in determining student assignments.”

49. See generally Dep’t of Justice & Dep’t of Educ., supra note 25 (providing guidance to elementary and secondary schools on how they can voluntarily consider race to achieve diversity or avoid racial isolation).

50. Compare Parents Involved, 551 U.S. at 811–12 (implementing a student choice plan with a racial tie-breaker in order to achieve integration in schools), with Emily Bazelon, The Next Kind of Integration, N.Y. Times, July 20, 2008, at MM38 (implementing a class-plus-race formula plan to achieve integration in schools).


52. See id.

53. See id.

54. Id.
In this last respect, the assignment plan is formalistically distinct from the assignment plans in *Parents Involved*, but in all others, there is little difference. They are all race conscious; they all seek to achieve racial balance reflective of the district as a whole; and race does, in fact, play a role in where a student is assigned. The Berkley plan is distinct only in that it is the race of student's neighbors, not his own, that is determinative. Per Justice Kennedy's reasoning, this distinction is crucially important. Yet, Berkeley's consideration of race is barely removed from the individual student's race. It goes right to the edge of *Parents Involved*'s prohibition and stops short. Given existing housing segregation, a student's neighbors' race strongly correlates with the student's own race. This reality begs the question of whether the distinction between individual classifications and general race consciousness is one without meaning.

It is true that the Berkeley plan is race-neutral in regard to the individual. A white student living in a minority neighborhood would receive the same diversity category as his minority neighbors. But this fact is of more theoretical importance than practical. If this possibility were of significant practical relevance, the district would be thwarted in its attempt to produce diverse schools through its current plan. In this hypothetical world, the district could better achieve diversity by adopting a simple neighborhood school policy and ignoring race altogether. But we know neither of these things is true. Housing segregation is so prevalent in most metropolitan areas that the foregoing possibility is but a minor exception to the dominant rule. As such, the only real reasons for assigning students in the way Berkeley does are to avoid a technical breach of the prohibited individual classification form and present the illusion of race neutrality.

Most telling is the California appellate court's willingness in *American Civil Rights Foundation v. Berkeley Unified School District* to exploit form over function to the school district's advantage in fending off a challenge to the school assignment plan. Early on in its opinion, the court focused on the fact that "any preference given to

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56. See generally Reardon & Yun, *supra* note 55, at 1576 (exploring the high levels of educational and residential segregation in metropolitan areas).

57. See *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789, 792.
the student is not based on the student's race. White and African-American students from the same neighborhood receive the same diversity rating and the same treatment.\textsuperscript{5} It acknowledged that actual facts might make this point largely irrelevant, but in the context of a facial challenge to the policy, theoretical justifications were sufficient. The court wrote:

There is no indication that, in every case, a student from a category one planning area is more likely to be a student of color than is a student from a category three planning area. It appears mathematically possible that a category one planning area may have more White students than students of color depending on the area's household income and adult education levels.

While it is conceivable . . . that some neighborhoods are so racially segregated that using demographic data could potentially serve as a proxy for a student's race, that hypothetical possibility cannot sustain [Plaintiff's] facial challenge to the constitutional validity of the . . . assignment policy. On a facial challenge, we do not consider the policy's application to the particular circumstances of an individual. "[O]ur task is to determine whether the [challenged policy] can constitutionally be applied." "To support a determination of facial unconstitutionality, voiding the statute [or policy] as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" [Plaintiff] has not shown that the policy provisions challenged here inevitably pose a total and fatal conflict with section 31.\textsuperscript{59}

The trouble with the court's approach is that demographics can serve as proxy in almost every metropolitan area in the country, they do.\textsuperscript{60} In other words, for the facial challenge to be dismissed out of hand, the court had to assume a set of facts that do not exist.

None of the foregoing is a criticism of the assignment plan in Berkeley or any others that approximate it. These districts are committed to maintaining racially diverse schools and avoiding racially

\textsuperscript{58} Id. at 798.
\textsuperscript{59} Id. at 798–99 (alterations in original) (citations omitted).
\textsuperscript{60} See generally Reardon & Yun, supra note 55, at 1576 (discussing the relationship between demographics and segregation).
isolated schools. They understand the significant educational and social benefits that accrue from integrated schools. Justice Kennedy indicated that form matters more than function, and these districts responded accordingly. Instead, the point of the foregoing is to question whether there is any significant functional difference or motivation between the plans at issue in Parents Involved and race conscious plans that eschewed individual classifications afterward. If there is no functional difference, one must also query whether form is as significant as Justice Kennedy asserted. First, in striking down the most obvious means by which to achieve diversity and integration, the Court expressed a hostility toward integration that dissuades most districts because they are litigation averse as a general principle. Even those not generally dissuaded face an uphill battle. Pushing districts to use different forms imposes significant administrative burdens on them, which can be prohibitive for less sophisticated or less wealthy districts. These burdens might be justified if there were some significant benefit to the Court's move, but such a benefit is far from clear.

Justice Kennedy defends the negative effect of his holding in Parents Involved with the assertion that "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." The notion that elevating form over function will help eliminate prejudice or prevent entrenchment rests on questionable assumptions. First, eliminating formal individual classifications only matters if Justice Kennedy is correct that plans like those in Seattle or Louisville entrench prejudice. Logic and available evidence would suggest they do the opposite.

By creating integrated schools, race conscious student assignment plans ironically make race irrele-

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62. See Black, supra note 27, at 112 (discussing whether voluntary desegregation stigmatizes children).

63. See Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, 50 B.C. L. REV. 277, 280 (2009) (noting that the Court's decision will "make any consideration of race in student assignments so difficult and impractical" that few districts, if any, will continue to consider race in school assignment plans).

64. See id. at 288 ("Even if a district considers race-neutral alternatives, the necessity requirement will create a difficult burden for a school district to meet for several reasons.").

vant in parents’ choices of where to send their kids.\textsuperscript{66} If all schools are roughly equal in their racial composition, families necessarily must base their decision on factors other than race. But, when schools are imbalanced, race—rather than other legitimate educational considerations—becomes a major determinate of school choice for families and teachers.\textsuperscript{67}

Second, even if assignments based on individual race classifications stigmatized students for reasons overlooked here, nothing indicates that a Berkeley-style plan produces less stigma. Does anyone but attorneys, judges, and a few educational experts perceive Berkeley’s plan differently than Louisville’s? For Justice Kennedy’s assumptions to prove true, this distinction would need meaning beyond experts. It would need to matter to those purportedly stigmatized because, at the level of district motivations and actual results, the pre- and post-\textit{Parents Involved} plans are nearly identical, and the stigma is presumably the same.

Those who oppose the intentional integration—who are also often the ones raising the notion of stigma—do not appear to see a meaningful distinction between the Berkeley plan and the \textit{Parents Involved} plans. After all, the American Civil Rights Foundation, an anti-affirmative action group, brought suit against Berkeley.\textsuperscript{68} Similarly, when Wake County, North Carolina, began assigning students based on socioeconomic status rather than race, individuals filed a complaint with the Office for Civil Rights at the Department of Education that alleged that socioeconomic status was a proxy for race,\textsuperscript{69} even though the district had a robust research basis for relying on socioeconomic status.\textsuperscript{70} Thus, opponents’ fundamental objection to

\textsuperscript{66} See Black, supra note 27, at 181.

The unfortunate truth is that the history of de jure school segregation has not left us, and the invidious racial values that it indoctrinated continue to linger. As a result, parents and teachers make decisions based on race that only further exacerbate inequality. Voluntarily desegregating schools, however, does not run from this reality; it confronts it. By creating racially balanced schools, voluntary desegregation attempts to make our racial biases irrelevant. For once, it makes us choose our schools based on factors other than race. In short, it uses race to make race irrelevant.

\textit{Id.}

\textsuperscript{67} See id. at 107 (“The lingering effects of past school segregation continue to stigmatize predominantly minority schools. As a result, quality teachers and middle-income students flee to other schools, depriving minority schools of the key resources for success.”).

\textsuperscript{68} See American Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789, 792 (App. 1st Dist. 2009).

\textsuperscript{69} See \textit{Richard Kahlenberg, All Together Now: Creating Middle-Class Schools Through Public School Choice} 252 (2001).

\textsuperscript{70} See, e.g., \textit{id.}; see also \textit{James S. Coleman et al., Equality of Educational Opportunity} 21–22 (1966); Geoffrey D. Borman & Maritza Dowling, \textit{Schools and Inequality: A Mul-
these student assignment plans would seem to be their function, not their form. More bluntly, opponents of these plans tend to not really care how the district goes about achieving integration; what they care about is stopping the ends the districts seek to achieve: integrated schools and the transportation of students beyond the confines of their racially isolated neighborhoods. While Justice Kennedy's opinion stops short of their extreme anti-integration position. Justice Kennedy delivers a symbolic victory for opponents of integration by striking down the plans in Parents Involved. For this reason, some commentators question whether Justice Kennedy does, in fact, countenance race based programs. They suspect that Justice Kennedy is more concerned with being at the middle of the Court so that he can be the "decider" and narrowly avoiding a legacy as the justice who ended affirmative action. One can draw these inferences, although Justice Kennedy's opinion in Parents Involved includes passages so forceful that I have trouble doubting his sincerity. He struck out directly at the more conservative justices and their fundamental principle, writing that Justice Roberts' opinion in Parents Involved reflects:

[A]n all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plural-


72. Justice Kennedy split hairs so thin with his various distinctions in Parents Involved that some ignored his nuance and only focused on those aspects with which he agreed with the four other conservative members of the Court. For instance, the Office for Civil Rights, following the Court's decision, issued a Dear Colleague Letter that did not even acknowledge the avenues Justice Kennedy left open and implied that the districts were now barred from any sort of race conscious integration in the future. See Samuels & Lhamon, supra note 14.


74. See Stuart Taylor Jr. et al., The Power Broker, NEWSWEEK, July 16, 2007, at 36 (discussing an interview with Justice Kennedy regarding his critics who believe he is "perhaps a little too eager to play the role of Wise Man in the Middle.").
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ity opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since Brown v. Board of Education should teach us that the problem before us defies so easy a solution. School districts can seek to reach Brown's objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.75

Those words do not sound like those of a justice with an ulterior agenda. Rather, they reflect a justice who harbors a strong commitment to integration in theory and is willing to sanction state intervention to produce it. This would mean that the appropriate critique of Justice Kennedy is that his concerns are so dominated by theory that he disregards function and is inherently skeptical about forms, not that his uneasiness reflects a diabolic design to strike down every race-based plan that comes before the Court.76 After all, in Parents Involved, he explicitly points out that it is the form that troubles him, not the end, and he points the way toward other forms that he would not even subject to strict scrutiny.

II. UNIVERSITY ADMISSIONS: REFUSING TO TAKE FUNCTION AND CONTEXT INTO ACCOUNT

The triumph of form over function is not as explicit in Fisher v. Texas as Parents Involved because the Court did not strike down the University of Texas's admissions policy. Yet, the Court refused to uphold the plan, and a close examination of the opinion reveals the triumph of form. First, important racial aspects of the University's admissions program went largely unaddressed by the Court. A comparison of those aspects it ignored with those that drew its focus reveals the Court's continuing concern with form over function. Sec-

A functional comparison between the admissions plans in *Grutter*, *Gratz*, and *Fisher* reveals that there is little reason to be suspicious of the Texas policy. Rather, the Court's unwillingness to uphold the plan in *Fisher* grows out of formalistic rather than functional concerns.

A. The Holistic Operation of the University of Texas's Admissions Process

The predicate step to understanding the Court's formal rather than functional approach in *Fisher* is to understand the admissions process holistically. The Court's opinion focuses on the narrow aspect of the admissions process that explicitly relies on race, but the admissions process at the University of Texas is multilayered and complex. Focusing just on the explicit consideration of race distorts how admissions operate at the University of Texas and the role that race plays in the process. In fact, a full picture of the admissions program cannot be had from the Supreme Court opinion in *Fisher*. Rather, one must refer back to the lower courts' opinions, which detail the history and impact of the admissions program.77

After the Fifth Circuit struck down the University of Texas School of Law's consideration of race in admissions in *Hopwood v. Texas*78 in 1996, the entire University was forced to rethink how it might achieve diversity without considering race. Ultimately, the University of Texas adopted a "Personal Achievement Index" in its undergraduate admissions program.79 The personal achievement index takes into account things like students' leadership and work experience, awards, extracurricular activities, and community service.80 It also takes into account special circumstances that might have impeded a student's educational and life opportunities, such as growing up in a single-parent home, speaking a language other than English at home, significant familial responsibilities, and the low socioeconomic status of the student's family.81 This personal achievement index was considered in conjunction with a student's academic index, as measured by test scores and high school grades.82 By considering these personalized achievement factors, the University could both add context to

78. *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).
80. *See id.* at 597.
81. *See id.*
82. *See id.* at 596.
students’ raw achievement scores and identify personal traits that might add to the University’s diversity.

The Texas legislature also got involved in maintaining some level of diversity at the University and passed a statute whereby the top ten percent of each high school’s graduating class would be automatically admitted to any public college in the state, including the University of Texas. These two policies—the Top Ten Percent Plan and the personal achievement index—remained in place for nearly a decade. But after the Court upheld the consideration of race in admissions in Grutter—thereby reversing Hopwood—the University took steps to reinstitute the consideration of race in admissions. It reasoned, based on a formal study, that its admissions policy did not enroll a sufficient number of minorities to produce the educational benefits of racial diversity at the classroom level. The study revealed that, in fall 2002, nearly all of the University’s small classes “had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students.”

A survey of students also indicated that “[m]inority students reported feeling isolated, and a majority of all students felt there was ‘insufficient minority representation’ in classrooms for ‘the full benefits of diversity to occur.’”

In response, the University adopted an explicitly race conscious admission process that left the previous one intact, save one exception. The University added race as one of the factors for consideration in a student’s personal achievement index. Race was not assigned an explicit numerical value, but race was a meaningful factor. In terms of the overall group of admitted students, this consideration of race came into play only a small percentage of the time. For instance, in 2008, a total of 10,200 admissions slots were available for Texas residents. Students admitted under the Top Ten Percent Plan filled

83. See TEX. EDUC. CODE ANN. § 51.803 (West 2009).
85. See id. at 4.
86. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 225 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012), and vacated and remanded, 133 S. Ct. 2411 (2013).
87. Id.
89. See Fisher, 631 F.3d at 239.
8,984 of those slots. This left only 1,216 seats, or roughly twelve percent of the seats, available for more nuanced personalized review. Thus, the potential consideration of race was limited to a small portion of the student body.

As to the twelve percent of the student body where race could have played a role, race was embedded alongside various other equally relevant and significant factors in the personal achievement index. "The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file." Only on this third factor was race relevant. Even there, it was considered alongside with and in conjunction with other factors, including demonstrated leadership qualities, awards and honors, work experience, extracurricular activities, community service, the "socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, [and] the applicant's standardized test score compared to the average of her high school." Neither race nor any of these factors is "considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context." If one were to visualize the University's admissions policy and the basis upon which students are admitted as a pie chart, the Top Ten Percent Plan would absorb almost the entire pie. The remaining piece of the pie would be so small that one would struggle to list all of the factors that go into allotting this small piece of the pie on the chart's legend. If one managed to list all these factors on the legend, it would only be people who read very carefully and have good eyesight who would pick up the fact that race played a role in admissions. Such a person, however, would presumably also notice the asterisks at the end of the list noting that these factors are considered collectively, not individually. Such a person might then reasonably ask whether that small piece of the pie warranted so much ink. A simple "holistic competitive admissions" label might have sufficed. Of course, discrimina-
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tion based on race against just one person triggers constitutional protection. The foregoing is not meant to suggest otherwise. Rather, the point is that current jurisprudence permits universities to explicitly consider race in admissions, and one must seriously query whether the explicit consideration of race could play any smaller of a role than it already does at the University of Texas. The Court in Fisher, however, does not ask that question because its analysis hinges more on the formalistic than the functional use of race.

With that said, an honest functional approach reveals that race plays a much larger role in admissions than the Court or the foregoing sections of this Essay suggest. The foregoing analysis only explores the functional role that the explicit consideration of race through individual race classifications plays. But on the question of what role race functionally plays, regardless of whether it is achieved by individual race classifications, the answer is that the role is enormous. Given its analytical approach, the Court misses what is right below the surface of the purportedly race-neutral Top Ten Percent Plan: racial motivation and racial functionality. Neither was lost on the Fifth Circuit. On the Plan’s motivation, the Fifth Circuit wrote: “The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose.”95 On the Plan’s racial functionality, the Fifth Circuit acknowledged: “In 2004, among freshmen who were Texas residents, 77% of the enrolled African-American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students.”96

In her dissent in Fisher, Justice Ginsberg lambasted the majority for its formalistic approach and blindness to these realities. She wrote:

[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious. As Justice Souter observed, the vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.’

Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. [As the Texas House Research Organization’s bill analysis found prior to passing the law,] ‘[m]any regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a

95. Id. at 224.
96. Id.
single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities. It is race consciousness, not blindness to race, that drives such plans.97

Justice Ginsberg was not suggesting that the Court strike down the admissions policy on other grounds. She was pointing out the majority's formalistic framework for deciding race cases makes little sense. Justice Kennedy's majority opinion offered no response, nor did it need to. He made clear in Parents Involved that the formalistic use of race, not its function, matters most.

B. Comparing Texas's Process to Michigan's

A comparison of the admissions plans in Grutter, Gratz v. Bollinger,98 and Fisher yields the same conclusion: the Court ignored how race functions in Fisher. The admissions policies in these three cases are drastically different from one another. The only thing that binds them together is their form: they all relied on individual racial classifications as a factor in the admissions process.99 How they used the race classification varied significantly. The discussion of the University of Texas's use of race is above and need not be repeated here.100 Gratz involved the undergraduate admissions process at the University of Michigan. While Michigan considered a number of factors in making admissions decisions, those factors, including race, operated mechanically and automatically. "Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness

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97. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (citations omitted). Justice Ginsberg further wrote in a footnote:

The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

Id. at 2433 n.2 (Ginsburg, J., dissenting) (internal citation omitted).

98. 539 U.S. 244 (2003).

99. See generally Fisher, 133 S. Ct. 2411 (holding that burden of evidence primarily lies with the university "to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."); Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that student body diversity is a compelling state interest that can justify the use of race in university admissions); Gratz, 539 U.S. 244 (holding that a state university's admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its ranking system gave an automatic point increase to all racial minorities rather than making individual determinations).

100. See supra notes 75-95 and accompanying text.
of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership." Underrepresented minorities were awarded an additional twenty points based on race. A student with a total point value of one hundred or more was automatically admitted. Those with scores between ninety and ninety-nine were either admitted or postponed for a later decision. Those with scores between seventy-five and eighty-nine were postponed or delayed. Those below seventy-five were typically rejected or delayed for consideration.

With twenty additional points automatically allotted for race, a minority student, whose application would otherwise be denied or delayed, was instead automatically admitted or placed in the next highest category for admission. In addition, starting in 1999, the University instituted another level of review whereby applicants who were not already admitted would be flagged for special consideration if the student demonstrated one of several traits, one of which was being an underrepresented minority. The result of these two considerations of race was that "virtually" all underrepresented minorities that met the University's minimum qualifications were admitted.

Because race was automatic and decisive for most minimally qualified applicants, the Court's analysis in *Gratz* was easy. Both the form and function were problematic and the Court did not need to draw sharp distinctions to reach its conclusion. But the law school's consideration of race in *Grutter* was less obvious and required more nuanced analysis. The law school's admissions process was based on an assessment of "academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'" An applicant's undergraduate grade point average and Law School Admission Test score were used to measure academic ability. The law school stressed, however, that

102. See *id*.
103. See *id*.
104. See *id*.
105. See *id*.
106. See *id*.
107. See *id*. at 256–57.
108. See *id*. at 253–54.
110. See *id*. ("In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school.") (citation omitted).
high academic scores alone did not guarantee admission, nor did low scores automatically result in rejection. Rather, admissions officers "look beyond grades and test scores to other criteria that are important to the Law School's educational objectives." One of those objectives was a diverse learning environment. The policy recognized that many different characteristics and qualities contribute to a diverse environment and warrant substantial consideration, but the policy emphasized that "racial and ethnic diversity" are particularly important.

To ensure the educational benefits of diversity, the school sought to enroll a "critical mass" of underrepresented minorities. The University did not define a critical mass as any specific percentage of minorities, but roughly defined it as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." Consistent with this flexible goal, race was a soft variable and only one of several factors considered in the admission of minority applicants. The extent to which race played a role "varie[d] from one applicant to another. In some cases, . . . an applicant's race may play no role, while in others it may be a 'determinative' factor." In other words, race was considered as a "plus factor" that, while making the difference for a great number of minority applicants, did not result in automatic admission, did not lessen the need to evaluate an applicant's entire file, and did not isolate minority applicants from competition with other applicants.

A comparison of these three admissions programs reveals multiple functional differences that affect the significance of race in each. First, in Gratz and Grutter, race classifications effectively operated across the board to all students. The only students arguably unaffected were those undergraduate students, white and minority, who were automatically admitted without the consideration of race. In contrast, in Fisher, race classifications only operated in regard to twelve percent of the student body, at most.

Second, in Gratz, race had a predefined and automatic effect on an applicant's application. In Grutter and Fisher, the effect was

111. See id.
112. Id. (citation omitted).
113. See id. at 316.
114. See id.
115. Id. at 318 (citation omitted).
116. Id. at 319.
117. See id. at 334.
neither automatic nor predetermined. In *Grutter*, a white student could qualify for diversity consideration, just as a minority could. In *Fisher*, a poor white student could potentially have his or her life circumstances positively affect his or her personal achievement index in the same way as a minority. In none of these instances would one’s race, adversity, or diversity result in automatic admission or a predefined “bump.”

Third, in *Grutter*, the University emphasized race as a particularly important form of diversity and explicitly articulated its goals in regard to it. In other words, racial diversity appeared to be more important than other form of diversity or, at least, first among equals. This was not the case in *Fisher*. In *Fisher*, race was listed among various factors and was not given heightened importance, at least not explicitly. Moreover, none of the various factors were to be considered alone. Thus, students presumably were not reduced solely to their race. Rather, students would have been classified as low-income minorities, high-income minorities, low-income whites, whites from single-parent households, minorities who learned English as a second language, etc. In this respect, race, while very relevant, does not become a trait whereby individuals are essentialized.118

Fourth, the context in which race arose in *Fisher* and the factors alongside which it was considered indicate that racial considerations were motivated by serious efforts to identify student ability. The history of the University of Texas’s admissions policies makes it obvious that it had strong diversity motivations as well, but the admissions criterion, by its very name, was not “diversity.” It was “personal achievement,” which expresses the well-founded notion that a student’s admissions test score, high school course enrollments, and grade point average only tell part of the story of a student’s intrinsic capacity, ability, and potential. Additionally, a significant body of research indicates that socioeconomic status and racial bias are embedded in the typical measures of educational qualifications, particularly

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118. See Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 62–65 (2d ed. 2012) (discussing the notion that focusing solely on an individual’s race essentializes the individual). See generally Kevin Brown, Should Black Immigrants Be Favored over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?, 54 How. L.J. 255 (2011) (analyzing the modifications and breadth to which racial groups are defined and affirmative action is applied; pointing out important distinctions within the group currently labeled “black”).
the SAT.\textsuperscript{119} Thus, if one is going to consider admissions criteria like
the SAT, the only way to "compare apples to apples" when reviewing
student applications is to consider, among other things, race and pov-
erty. If an admissions officer is trying to assess ability, potential, or
overachievement, a 770 score by a high-income student on the reading
portion of the SAT is not equivalent to a 770 by a low-income score.
Rather, the low-income student with the same score as a wealthy stu-
dent—or even a lower but strong score—most likely has more apti-
tude than the wealthy student.\textsuperscript{120} Many are uncomfortable with
making the same point in regard to race, but if students are otherwise
similarly situated, a strong basis exists for reaching the same conclu-
sion in regard to race.\textsuperscript{121}

Based on these four functional distinctions, the admissions pro-
cess in \textit{Gratz} employed the broadest, most mechanistic, and most con-
sequential use of race, which, of course, rendered it unconstitutional.
The admissions process in \textit{Grutter} entailed a less consequential and
more flexible—although potentially equally broad—use of race. The
admissions process in \textit{Fisher} relied on race in the narrowest of circum-
stances and alongside equally relevant factors, making it the least con-
sequential consideration of race. These functional differences would
otherwise provide a strong basis for finding the Texas Plan constitu-
tionally permissible, given that the Court had already sanctioned the
program in \textit{Grutter}, and the Court in \textit{Grutter} had relied heavily on the
functional differences between the law school and undergraduate ad-
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missions programs. Moreover, the Court in *Grutter* specifically emphasized that:

[S]trict scrutiny must take 'relevant differences' into account. Indeed, as we explained, that is its 'fundamental purpose.' Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

The Court in *Fisher*, however, did not even begin to assess functional differences. The references to *Grutter* and *Gratz* in *Fisher* are limited to short quotes emphasizing the basic law of strict scrutiny, with a particular emphasis on a presumption against race classifications and the need to establish race-neutral alternatives. While the Court in *Grutter* did indicate that a race based policy is constitutional only when workable race-neutral policies are unavailable, the Court in *Grutter* did not elevate this to the most important inquiry or suggest a high standard for "workable." Many read the Court in *Fisher* as doing the opposite on both scores, directing the lower court to "verify that it is 'necessary'" to use race and that "no workable race-neutral alternatives would produce the educational benefits of

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123. *Grutter*, 539 U.S. at 327 (citations omitted).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not "abando[n] strict scrutiny[]." Rather, as we have already explained, we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account."

Id. at 333–34 (first alteration in original) (citations omitted).


125. See *Grutter*, 539 U.S. at 339 ("Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.") (citation omitted).

126. In fact, the Court's failure to demand a high standard was the primary criticism levied in Justice Kennedy's dissent in *Grutter*. See id. at 387 (Kennedy, J., dissenting).

diversity.” The Court is clear that, at the very least, the lower courts’ deference to the University on these points was an error.

The demand for race neutrality oversimplifies the practical task before the University in Fisher. The University’s choice is not simply between a race-neutral and race-based admissions process. Rather, the choice is also one between individualized admissions and more formulaic ones. No doubt, the University could have achieved or approximated its desired level of diversity through race-neutral measures. It could have enrolled its entire entering class through a top eleven percent plan rather than the Top Ten Percent Plan. But an eleven percent plan would have eliminated the University’s ability to exercise its professional judgment in actually picking any of the students in its class. This is important because it would also deprive the University of the ability to ensure that it rounded out its entering class with multifaceted diversity. A top eleven percent plan would have achieved geographic and racial diversity, but may have eliminated or under enrolled other types.

Dissenting in Grutter, Justice Thomas had made an analogous argument. He posited that Michigan Law School could have achieved diversity by doing away with its “elite” admissions standards and individualized review. In its place, the law school could have admitted students based upon, for instance, the completion of some minimum core curriculum prior to law school, or through a lottery among minimally qualified applicants. The majority rejected this option as being no real option at all because it forced the University to choose between a nuanced admission process designed to achieve multiple objectives that were part of its mission and a mechanical admissions process that might achieve diversity, but would eliminate other relevant considerations and goals. Presumably, the majority appreciated that although race played a formal role in the law schools’ admissions, its functional effect was minimal in comparison to the fundamental functional change that removing race would work in admissions.

128. Fisher, 133 S. Ct. at 2420.
129. See id. at 2421 (“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.”).
130. See Grutter, 539 U.S. at 368–69.
131. See id. at 340.
132. A similar quandary existed in Parents Involved. The student assignment places were both choice and race-based. But without some use of race, a choice-based program could make segregation worse rather than better. Without choice, a race-based assignment plan would have been unpopular. Without question, the district could have engaged in various types of race-

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What the Court missed in Fisher, ironically, the Texas public seemed to appreciate on some fundamental level. When the state first adopted the Top Ten Percent Plan, it was not without its critics. In fact, the Plan proved very controversial in the most privileged, whitest areas of the state. In the past, privileged families in Texas had grown accustomed to their children gaining admission to the University of Texas (or at least having a stronger chance). With higher average SAT scores, they had a far better chance of admission than students in high-poverty, racially segregated schools, as well as rural students, who had graduated at the top of their high school classes. The Top Ten Percent Plan significantly lowered the odds of admission for students from these privileged areas and schools, so much so that some families tried to game the system by transferring to a disadvantaged school prior to applying to college. The opposition to the Top Ten Percent Plan was strong enough that, at one point, there was serious talk of repealing or shrinking it.

Without conceding the Court is prescient in its elevation of form over function, it is important to acknowledge that dropping racial forms following Hopwood may have had a positive effect. The Top Ten Percent Plan survived politically in the face of opposition, and may have done so only because race had been removed from the process. This paved the way for the state to engage in a broader discussion of fairness. Racial diversity motivations aside, the state’s Top Ten Percent Plan represents an evolved sense of merit and fairness. It assesses merit based on past achievement in regard to a student’s immediate peers.

neutral mandatory assignments that would have integrated the schools. But those plans would have been pilloried. See Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 701–04 (2007). Thus, a flaw in Justice Kennedy’s opinion is the failure to appreciate how the plans really work. Instead, he simply assesses “how they look” in terms of the uses of race that they relied upon. See id. at 782, 787.

133. See Fisher, 133 S. Ct. at 2432.


136. See Leung, supra note 134.

137. See id. Although the state did not eliminate the policy, there was sufficient pressure to cap it. State law now limits the number of students admitted under the policy to no more than seventy-five percent of the total undergraduate admissions for that year. Thus, the exact effects of the policy will now vary from year to year. In 2011, for instance, there was only room for the top eight percent of graduating seniors. See The University of Texas at Austin to Automatically Admit Top 8 Percent of High School Graduates for 2011, U. OF TEX. AT AUSTIN (Sept. 16, 2009), http://www.utexas.edu/news/2009/09/16/top8_percent/.

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are more similarly situated than peers somewhere on the other side of the state. Thus, this comparison permits a more innate assessment of applicants.

The Top Ten Percent Plan also represents an acknowledgment that the University of Texas and other leading public institutions in the state are not private institutions open only to the privileged class. Rather, these state institutions should be open to and serve the state's entire population. Once the explicit consideration of race was out and the Top Ten Percent Plan in, the University was also confronted with a situation where admissions slots were scarce. If the University was truly committed to creating opportunity for the "best" or most "worthy" students, it needed to engage in a serious evaluation of merit. The final determination of how to do this was to refrain from evaluating raw SAT and GPA scores in a vacuum and, instead, to evaluate them in the context of a student's life chances and obstacles. Analogous arguments about proportional representation and merit could and have been made in regard to race, but those arguments are more easily cut short by labeling the proposals as racial quota systems, stereotypical, and/or essentialist. Thus, removing race as an explicit factor was likely a key factor in the state's willingness to adopt what amounts to a proportional or quota system based on geography—a proportional system that now better serves the collective people of Texas. Only by first envisioning merit and personal achievement in broader non-racial terms than it ever had before could the University later come back to defend race as a relevant consideration not just to diversity, but to merit and achievement.

None of this is to say that form over function is the legally appropriate principle. Racial forms have political salience that can overwhelm the fair consideration of an issue and, for this reason, removing racial forms from the conversation can have practical value. It does not follow, however, that race neutrality alone will necessarily lead to desirable outcomes. To the contrary, the facially neutral Top Ten Percent Plan may have never occurred without affirmative action advocates pressing for a work-around to ensure diversity. Disentangling these two factors and assigning preeminence to either is likely impossible. The Court in Fisher, nonetheless, comes down strong on the side of legal limitations on racial forms, regardless of their function.

139. See, e.g., Wessmann v. Gittens, 160 F.3d 790, 799, 800, 828 (1st Cir. 1998).
140. See DELGADO & STEFANIC, supra note 118, at 62–65.
III. WHEN STATE ACTORS INTENTIONALLY OBSCURE RACE

The Court’s form over function approach extends beyond affirmative action cases. One might assume workarounds in affirmative action and, thus, discount the impact of the approach there. But in other contexts, racial justice advocates have fewer alternatives and the impact of the Court’s approach has far more practical impact than affirmative action ever has. Most notable is the Court’s contraction of causes of action for disparate impact and its adoption of an intent standard as the touchstone of racial discrimination in nearly every statutory and constitutional context.

The Court’s first opinion to adopt the intent standard as a generally applicable standard was Washington v. Davis. The Court held that intent was necessary to establish an Equal Protection violation under the Fifth Amendment. The Court followed Davis with Village of Arlington Heights v. Metropolitan Housing Development Corporation, in which the Court held that the same standard applies to the Equal Protection Clause of the Fourteenth Amendment. More recently, the Court adopted the intent standard for Title VI of the Civil Rights Acts of 1964 in Alexander v. Sandoval. Title VI regulates discrimination in all programs—private and public—that receive federal funding. Thus, its reach is broader than the Fifth and Fourteenth Amendments.

All of these cases involved facially race-neutral policies that exacted huge practical tolls on minorities, but because none included a crucial racial form, none invoked the Court’s skepticism and scrutiny. In Davis, the City of Washington, D.C., had adopted a written exam that disproportionately excluded minorities from the opportunity to become a police officer. The exam, however, had not been shown to relate to job performance. In Village of Arlington Heights, the Village, a suburb outside of Chicago, had experienced significant population growth, but that growth was almost entirely white. Data

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141. 426 U.S. 229 (1976). Davis cited Keyes v. Denver School District No.1, 413 U.S. 189 (1973), as having first adopted the intent standard, but Keyes’s reliance on intent was more nuanced and also allowed for workarounds through a presumption of intent.
142. See id. at 240.
146. Id.
147. See Vill. of Arlington Heights, 429 U.S. at 260.
showed that only twenty-seven of the Village's 64,000 residents were African American. When a proposal to develop low and middle-income housing that would have drawn more minorities to the area came before the Village's housing authority, it denied the proposal. In Sandoval, the state of Alabama refused to administer its driver's license examination in any language other than English, the negative impact of which was felt almost exclusively by ethnic minorities.

In each of these cases, the policies in question had far greater racial impacts than any of the admissions policies at issue in Gratz, Grutter, Parents Involved or Fisher. The screening exam in Davis worked to limit the most visible and powerful aspect of local government from reflecting the community it served, which was particularly important to the community given the police department's historical role in oppressing African Americans. The facially neutral zoning policies in Arlington Heights maintained an entire political subdivision as a white enclave, notwithstanding the diversity of the overall metropolitan area. The English-only policy in Sandoval had almost no effect on whites (or African Americans), whereas ethnic minorities, particularly the newly emerging Latino population in the state, felt a significant impact.

In contrast, in Fisher and Grutter, the limited and holistic consideration of race only tipped the scales for a subset of minority applicants. Thus, whites continued to receive the predominant percentage of admissions and, as a group, were significantly advantaged by processes that heavily weighted factors like the SAT and LSAT. Likewise, the evidence in Parents Involved showed that race only infrequently played a decisive role in student assignments. In general, the process worked to the advantage of both whites and minorities, as it afforded them the opportunity to select and gain admission to their school of choice independent of race. These minimal

148. Id. at 255.
149. See id. at 256–58.
154. See generally SAT WARS, supra note 119 (discussing the socioeconomic bias of the SAT).
impacts, nonetheless, were subjected to the strictest of scrutiny and placed in serious jeopardy simply because they relied on racial forms. Whereas, in the absence of racial forms in Davis, Arlington Heights, and Sandoval, significant, if not extreme, racial impacts went un-checked. By placing so much weight on the presence or absence of racial forms, the Court severely discounts the importance of the contexts in which the forms arise, the result of which is judicial doctrine disconnected from reality and susceptible to obfuscation.

The intent standard is not the exact equivalent of a racial form standard because intentional discrimination can occur in the absence of a racial form, but, in practice, the intent standard amounts to a form standard. It is premised on historical discrimination, which was open, obvious, and explicit—in other words, formal—and presupposes a particular state of mind on the part of the discriminatory actor: a conscious or malevolent desire to disadvantage based on race.\(^{156}\) As the Court in Personnel Administrators of Massachusetts v. Feeney\(^{157}\) explained, a plaintiff must demonstrate that the defendant “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”\(^{158}\) With such a legal standard in place and the social unacceptability of obvious racism, state actors do not dare enact or rely on racial forms that would disadvantage minorities.\(^{159}\) In fact, most state actors are presumably well-intentioned and may not consciously intend to disadvantage minorities.\(^{160}\) Subconscious biases, however, do disadvantage minorities and generally escape judicial review under intentional discrimination standards.\(^{161}\) The net result is an intentional discrimination standard that does little to address racial inequality in the absence of a racial form, or its conscious equivalent in the mind of the state actor.\(^{162}\)

Treating racial forms or intent as the touchstone of discrimination has the added problem of incentivizing state actors to obfuscate their

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156. See generally Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 335 (1997) (discussing the Court’s difficulty in shifting from a “segregation mentality”).


158. Id. at 279.


160. See Lawrence, supra note 151, at 322.

161. See id.; Selmi, supra note 156, at 288.

motives to avoid judicial scrutiny. If a community like the Village of Arlington Heights is inclined to keep minorities out, identifying a legitimate non-discrimination goal to achieve this end is relatively easy. Although a non-discriminatory explanation may be pretextual, victims face a heavy burden in ferreting out the hidden agenda with hard evidence. Therein lays the irony. A well-intentioned school district might make minimal use of explicit racial categories to integrate schools, but if it does, the district will face an uphill battle in defending its policies. In contrast, a district that wants to maintain racially isolated schools can obfuscate its motives and assert an interest in neighborhood schools. Absent Freudian slips or poor judgment, it is highly unlikely that a court would find the policy racially discriminatory. To put it bluntly, form over function allows segregation on a national scale while impeding integration even in the narrowest of circumstances at the local level.

The same principle applies to higher education. Recognizing this, the well-intentioned but rational university may now have the same obfuscation motivation as the biased or malevolent actor. If universities actualize their motivations, the Supreme Court may have succeeded in ridding higher education admissions of racial forms, but it will not have rid the racial inequality and discrimination that necessitated race-conscious measures in the first instance. Rather, the primary effect will have been to stymie those that sought to counteract inequality and discrimination, and prompt the most committed progressives to act in the same shadows as their opponents.

CONCLUSION

On its surface, the Court's opinion in Fisher v. Texas borders on irrelevant. It announced no new doctrine. At best, it emphasized that lower courts must pay close attention to evidence regarding the pre-existing standard requiring the consideration of race-neutral alternatives. But below the surface, the case evidences a continued and growing infatuation with formalistic reasoning that largely ignores real-world impacts. The majority of the Court believes that, if we could just redact racial classifications—even benign ones—from our policies, race would soon enough leave our minds, and real-world inequality would follow the same course. The Court may have a point. In certain contexts, removing race from a policy debate may offer some benefit because its presence so easily distracts us from fair and reasoned thought. But it does not follow that race classifications are
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themselves the problem. Rather, it is our ineptness in dealing with race that is often the problem. Even when excised from explicit conversation and policy, the issues and problems of race lie right beneath the surface and require solutions. Unfortunately, rigid formalistic reasoning has, thus far, proved unsuited to provide such solutions.