Reversed Protection: A Discrimination Claim Gone Wild in *Fisher v. Texas*

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INTRODUCTION

The U.S. Supreme Court's decision in *Fisher v. University of Texas* (*Fisher II*)[1] marks the first time Justice Anthony Kennedy has ruled in favor of a racial

    1. Fisher v. Univ. of Tex. at Austin *(Fisher II)*, 136 S. Ct. 2198 (2016), *aff'g* 133 S. Ct. 2411 (2013).

affirmative action policy in the twenty-eight years he has served on the Court.[2] The *Fisher II* decision should be understood as both the affirmative action case that supporters of affirmative action could not afford to lose and the case that shows just how much its opponents have already won. The case epitomizes the reversed state of the Court's current equal protection jurisprudence after multiple decades of sustained attacks on racial affirmative action.[3] It also exemplifies the Court's willingness to afford reverse race discrimination claimants the greatest protection possible—by applying the most stringent level of judicial review—and traditional race discrimination claimants virtually none.[4] Although the Supreme Court ultimately found no equal protection violation,[5] its solicitous approach to evaluating Abigail Fisher's reverse discrimination claim demonstrates how reversed equal protection jurisprudence has become. Reverse discrimination plaintiffs like Fisher receive doctrinal super-empathy from the Court while traditional race discrimination claims are treated with doctrinal super-apathy even if the policy in question substantially favors whites.[6]

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2. Ariane de Vogue, *Justice Anthony Kennedy's Evolution on Affirmative Action*, CNN POLITICS (June 23, 2016, 2:21 PM) http://www.cnn.com/2016/06/23/politics/supreme-court-anthony-kennedy-affirmative-action/ [https://perma.cc/H7EN-PPFV]. It is indeed notable that *Fisher II* was the first time that Justice Kennedy found a race-conscious remedy to be within the bounds of the Equal Protection Clause. *See, e.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013); Ricci v. DeStefano, 557 U.S. 557 (2009); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

3. Here, I am referring to the Court's failure to treat statistically significant and racially disparate impact against nonwhites as racial classifications triggering heightened scrutiny absent proof of discriminatory intent under the doctrine set forth in cases like *Washington v. Davis*, 426 U.S. 229 (1976), *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), and *McClesky v. Kemp*, 481 U.S. 279 (1987), at the same time has demonstrated a willingness to treat any race-conscious policy, whether or not it constitutes an effective racial affirmative action policy, as a racial classification. *See, e.g.*, *Fisher II*, 136 S. Ct. 2198; *Fisher I*, 133 S. Ct. 2411; *J.A. Croson*, 488 U.S. 469; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

4. I am of the view that what makes an equal protection claim a "reverse discrimination" as opposed to a traditional discrimination claim is the fact that the plaintiff is challenging the constitutionality of an affirmative action policy or other policy designed to promote racial inclusiveness of historically excluded racial groups.

5. *Fisher II*, 136 S. Ct. at 2215.

6. In this article, I have compiled and analyzed the overall numerical admissions outcomes and admission rates for the Texas Ten Percent Plan and holistic review 2008 UT applicants by racial group—data that was not compiled nor presented by the parties in the *Fisher* case and, thus, not considered by the courts that ruled on the merits of the *Fisher* lawsuit. *See* Kimberly West-Faulcon, *Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in* Fisher v. Texas, *in* 29 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335, 353 (Steven Saltzman ed., 2013). The admission rate for white applicants was 22.3% whereas the admission rates for African American and Latino applicants were a much lower 8.8% and 10.4%, respectively. *See infra* Figure 2 and accompanying text.

The fact that the University of Texas at Austin (UT)'s[7] race-conscious "holistic review"[8] policy had a statistically and legally significant racially discriminatory effect on African American and Latino applicants failed to be raised during any stage of the *Fisher I* and *Fisher II* litigation. This Article fills that gap with analysis of UT selection rates by race that shows how wildly inappropriate it was for Abigail Fisher to challenge UT's minimal consideration of race as reverse discrimination. It also explains that, even though Justice Kennedy correctly recognized that the manner in which UT considered race satisfied strict scrutiny,[9] *Fisher II* is nevertheless emblematic of reversed protection.[10]

The key justification for applying strict scrutiny to racial affirmative action policies—to protect members of non-beneficiary racial groups from unfairness—is totally inapt to the facts in the *Fisher* case. This Article's analysis of UT selection rates by race shows that white (and Asian American[11]) applicants were selected at a significantly higher rate than African American and Latino

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7. The Court accepted UT's categorization of its use of race as but "a factor of a factor of a factor" in UT's holistic review. *Fisher II*, 136 S. Ct. at 2207 (citation omitted). Moreover, race could be considered positively for applicants of any race and the limited consideration of race was not a mandatory factor for any individual applicant:

> [A]lthough admissions officers can consider race as a positive feature of a minority student's application, there is no dispute the race is but a "factor of a factor of a factor" in the holistic-review calculus. 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009). Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. *Id.* at 606 ("Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are excluded from benefitting from UT's consideration of race in admissions.").

Id.

8. *Fisher II*, 136 S. Ct. at 2205.

9. *See id.* at 19. This conclusion was unexpected based on Kennedy's *Fisher I* opinion. In *Fisher I*, Kennedy essentially admonished the lower court for not applying strict scrutiny strictly enough. *See Fisher I*, 133 S. Ct. at 2421. Given how regularly critics mischaracterize restrained racial affirmative action policies as conferring large-scale racial preferences, *Fisher II*'s accuracy in its factual analysis of UT's policy is noteworthy and significant. An exaggerated and apocryphal version of UT's race-conscious holistic review was presented by various *Fisher* amici present in their briefs and public commentary. *See, e.g.*, Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, THE HERITAGE FOUNDATION (Aug. 31, 2015), http://www.heritage.org/research/reports/2015/08/a-dubious-expediency-how-race-preferential-admissions-policies-on-campus-hurt-minority-students [https://perma.cc/5ZY5-VHAW] (describing the facts in the 1978 *Regents of Univ. of Cal. v. Bakke* case); Brief for Richard Sander & Stuart Taylor as Amici Curiae in Support of Petitioner, *Fisher*, 133 S. Ct. 2411; Brief for Richard Sander & Stuart Taylor as Amici Curiae in Supporting of Neither Party, *Fisher*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3682 (U.S. June 29, 2015) (No. 14-981).

10. Russell Robinson has described the Court's equal protection jurisprudence as "unequal protection." *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154 (2016) (noting that "[d]uring the last thirty years, the Supreme Court has steadily diminished the vigor of the Equal Protection Clause in most respects. It has turned away people of color . . . because their oppression does not take the form of a 'racial classification'") (citing *McClesky*, 481 U.S. 279). My point here is similar. *Cf.* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1471 (2004).

11. *See* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590 (2017).

students the year Abigail Fisher applied for admission[12]—a factual scenario consistent with a legally cognizable degree of adverse impact against African Americans and Latinos under Title VI disparate impact law.[13]

Part I of the Article sets forth admissions data by race, my calculations of selection rates, and racial disparate impact analysis for UT's Fall 2008 admissions cycle,[14] showing that the disparity between the white selection rate and the African American and Latino selection rates was more than large enough to prove a prima facie case of discrimination under Title VI disparate impact law.[15] Part II presents significant but neglected factual details about UT's race-conscious holistic review process, such as the major role that SAT scores played in that component of admissions. It also critiques Justice Kennedy's use of strict scrutiny in reviewing UT's admissions policy as the application of doctrinal rules that have improperly reversed the protection conferred by the Equal Protection Clause.[16] In conclusion, I suggest the lesson from *Fisher II* is that the Court should impose a discriminatory effect requirement on claims of reverse discrimination that mirrors the effect requirement[17] the Court already imposes on traditional discrimination plaintiffs.[18]

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12. This point is different from the observation that UT's consideration of race did not negatively affect the admission chances of Abigail Fisher, individually. UT admitted members of historically poorly represented racial groups at lower rates than the two racial groups already well-represented among students applying, admitted, and enrolled at UT. To be considered effective, a racial affirmative action policy should have some positive discernable impact on the selection rates of members of racial groups in the numerical minority of applying, admitted, and enrolled students as compared to selection rates of members of racial groups who comprise the vast majority of the students applying, selected, and enrolling. A university's affirmative action policy has failed to operate effectively if, like UT's policy, it fails to significantly increase racial group inclusion—if members of historically poorly represented racial groups are admitted at significantly lower rates than whites.

13. Section 601 of Title VI, 42 U.S.C. § 2000d, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2012). U.S. Department of Education regulations promulgated to enforce Title VI set forth the "specific discriminatory actions" that recipients of federal funds must avoid. 34 C.F.R. § 100.3(b) (2008).

14. This admissions rate and disparate impact analysis was not presented by either party in the *Fisher I* case, and the Court's analysis in *Fisher II* erroneously relied on enrollment data rather than admissions data to evaluate holistic review outcomes. I filed an amicus curiae brief providing this analysis to the Court. *See generally* Brief of Kimberly West-Faulcon as Amicus Curiae Supporting Respondents, *Fisher I*, 133 S. Ct. 2411 [hereinafter West-Faulcon, *Fisher I* Amicus Brief].

15. *See infra* text accompanying note 63 (explaining requirements for proving a Title VI disparate impact prima facie case of discrimination).

16. By "racially inclusive purpose," I mean a policy that considers race for the purpose of including members of historically oppressed racial groups in the numerical minority of applying, selected, and enrolled students. The corollary would be the adoption of a facially race-conscious policy for a racially exclusionary purpose—to perpetuate animus toward or negative racial stereotypes about a racial group or solely to bring harm to members of a particular racial group.

17. For the discriminatory purpose requirement, see *Davis*, 426 U.S. 288. For the discriminatory effect requirement, see *Davis* as well as *Palmer v. Thompson*, 403 U.S. 217 (1971). *See also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

18. The Court's willingness to treat any and all race consciousness as capable of resulting in reverse discrimination against whites is a framing that has undoubtedly contributed to the current political climate in which many whites sincerely believe whites suffer greater levels of racial

I. STATISTICAL EVIDENCE THAT UT'S RACE-CONSCIOUS HOLISTIC REVIEW DISCRIMINATED AGAINST AFRICAN AMERICANS AND LATINOS

The Fall 2008 UT admissions policy challenged by petitioner Abigail Fisher had two components, one that Fisher challenged as violating the Equal Protection Clause and another that she argued constituted a race-neutral[19] alternative to the first.[20] The latter component of UT admissions was an example of admissions policies that have come to be known as "percentage plans."[21] These admissions policies guarantee college admission to a particular university or university system based on either a high school student's grade point average (GPA)-based class ranking of all students attending a particular high school or a student's placement within a designated percentage of a GPA-ranking of all high school students in his or her state—high school class rank or statewide GPA rank.[22]

The Texas state legislature adopted the high school class rank type of percentage plan when in adopted the Texas Ten Percent Law.[23] The state legislature

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discrimination than nonwhites. *See, e.g.*, Samuel Sommers & Michael Norton, *White People Think Racism is Getting Worse. Against White People*, THE WASH. POST (July 21, 2016), https://www.washingtonpost.com/posteverything/wp/2016/07/21/white-people-think-racism-is-getting-worse-against-white-people/ [https://perma.cc/Q6RB-AK5S]; John Blake, *Are Whites Racially Oppressed?*, CNN (Mar. 4, 2011, 9:01 AM), http://www.cnn.com/2010/US/12/21/white.persecution/index.html [https://perma.cc/C3NZ-SKGH].

19.   Petitioner Fisher characterized UT's Ten Percent Plan as not considering race despite the fact that the Texas state legislature was acutely aware that requiring UT to admit based on high school class rank would increase African American and Latino admissions due to the high levels of racial segregation in Texas public high schools. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 11, *Fisher I*, 133 S. Ct. 2411 (No. 1:08-cv-00263-SS) [hereinafter Second Amended Complaint] ("Neither race nor ethnic origin was considered in admissions to UT's incoming freshman class under the Top 10-AI/PAI Plan used for admissions from 1998 through 2004.").

20.   *Fisher II*, 136 S. Ct. at 2205.

21.   In this important sense—the fact that the Texas Ten Percent Law guarantees top ranked high school students' admission to the state's most selective university—the Texas law differs from other state university admissions "percentage plans." Significantly, the admissions percentage plans of states like California and Florida do not guarantee admission to those states' university systems' most selective and prestigious undergraduate universities. Instead, students ranking at the top of their high school classes in those states are guaranteed admission to *one of* the campuses in the university *system* but not guaranteed admission to their state's flagship campuses. *See* CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 19–22 (2003) (describing differences between Texas percentage plan and California and Florida percentage plans that guarantee only admission to the University of California *system*, not admission to its most selective campuses, to the top 4% of each California's high schools' graduates and only admission to the Florida State University *system*, again not to its most selective campuses, to the top 20% of each Florida high school class). Again, in contrast, Texas top 10% students are guaranteed admission to UT Austin—the most selective university in the Texas system.

22.   *Id.*

23.   Under this law, HB 588 (the "Texas Ten Percent Law"), admission to UT—the flagship campus in the University of Texas system—is guaranteed to Texas residents graduating with a class rank in the top 10% or better from a Texas high school and for Texas students ranking in the top 10% who attended a school outside the United States operated by the U.S. Department of Defense. *See* H.B. 588, 1997 Leg., 75th Reg. Sess. § 51.803 (Tex. 1997) [hereinafter Texas Ten Percent Law]. The Texas legislature passed the Ten Percent Law to remedy the effect of the Texas Attorney General's ruling that UT was prohibited from considering race as a factor in admissions after the Fifth Circuit ruling in

enacted the plan in 1997 subsequent to the Texas Attorney General's interpretation of a Fifth Circuit decision as requiring UT to eliminate any race-conscious components of its admissions process.[24] Several years later, in 2003, the Supreme Court reaffirmed in *Grutter v. Bollinger* that universities may legally consider race as a non-determinative factor in selective higher education admissions. After the *Grutter* ruling, UT reinstated a minimal degree of race consciousness to the then-race-blind holistic review component of its admissions process. It is that aspect of UT admissions that the Court upheld as constitutional in *Fisher II*.

Reverse discrimination petitioner Abigail Fisher was ineligible for admission to UT under the high school class rank percentage plan—Texas Ten Percent Plan[25]—because she ranked 81 out of 680 students at her high school.[26] Fisher's high school GPA ranking placed her in the top 12% of her graduating class, but not the top 10%. So, as the Court observed in *Fisher II*, Fisher had no chance of admission under UT's race-blind top 10% admissions policy. Because the Ten Percent Plan made Fisher "categorically ineligible for more than three-fourths of the slots in the incoming freshman class,"[27] she "would have had a better chance of being admitted to the University [of Texas] if the school used race-conscious holistic review to select its entire incoming class."[28] Nevertheless, Fisher claimed that UT's race-conscious holistic review discriminated against her because she was white. The fact that UT's race-conscious holistic review resulted in a significant white admissions advantage, not disadvantage, went unmentioned by the parties and the Court's decision in *Fisher II*.

Hopwood v. Texas. In her dissenting opinion in *Fisher I*, Justice Ginsburg offered a pointed and valid critique of the characterization of the Texas Ten Percent Law as "race neutral." As Justice Ginsburg and scholars like Michelle Adams have observed that it may be incorrect to view the law as race neutral given that the racially inclusive effect of the Texas Top Ten Percent Plan is the result of exceedingly high degrees of racial segregation in Texas public high schools. *See Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting); Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1767 (2001) (explaining that percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated).

24. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Effect of Hopwood v. Texas on Various Scholarship Programs of the University of Houston, 97 Op. Att'y Gen. 001 (1997), https://www.texasattorneygeneral.gov/opinions/opinions/48morales/lo/1997/pdf/lo1997001.pdf [https://perma.cc/4PEZ-UWAB].

25. *See* Texas Ten Percent Law, *supra* note 23 and accompanying text; Adams, *supra* note 23; HORN & FLORES, *supra* note 21, at 19–22.

26. Fisher's complaint alleges she ranked 82 out of 674 students who attended her high school. Second Amended Complaint, *supra* note 19, at 3. UT's answer states she was ranked 81 out of 680 students in her class. Answer of Defendants to Plaintiffs' Amended Complaint at 3, Fisher v. Univ. of Texas at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 08-cv-00263).

27. *Fisher II*, 136 S. Ct. at 2209.

28. *Id.* at 8 (observing that "it seems quite plausible" that Abigail Fisher "would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class").

*A. Racial Outcomes Under UT Percentage Plan and Race-Conscious
Holistic Admissions Compared*

Many facts about UT's Fall 2008 admissions outcomes support the conclusion that the race-consciousness component of holistic review was not the cause of Fisher's rejection. First, no African American or Latino applicant with lower admissions scores than Fisher was selected for Fall 2008 admission.[29] Second, forty-two white applicants with scores "identical to or lower than" Fisher were admitted.[30] The fact that higher-scoring nonwhites were rejected along with Fisher belies the notion that race was the determinative factor in her rejection. Likewise, the fact that other white applicants—some white applicants with identical scores and others with lower scores than Fisher—were admitted, strongly suggests Fisher was rejected for the simple reason that admissions officers were more impressed by other white and nonwhite candidates, not because Fisher was harmed by diversity-motivated race consciousness. Third, 168 African American and Latino students with credentials "identical to or *higher* than" Abigail Fisher were denied admission,[31] showing that UT's consideration of race was of such a small degree that significant numbers of well-qualified African American and Latino applicants were, like Fisher, rejected.

Despite these realities, the complaint filed by Fisher invoked the familiar reverse discrimination allegation that UT's use of race operated as a "racial preference" that had "a pervasive negative effect on non-minority applicants."[32] Fisher also relied on the average-test-score-of-admitted-students fallacy[33]—the erroneous conclusion that the existence of differences in the group average SAT scores of either all admitted African American or all admitted Latino students and the group average SAT score of all admitted white students proves the university in

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29.   *See* Brief for Respondents at 15–16, 16 n.6, *Fisher I*, 133 S. Ct. 2411 [hereinafter Brief for Respondents].

30.   *See id.* at 16 n.6 (UT Austin responding to petitioner Fisher's assertion that her "academic credentials exceeded those of many admitted minority applicants" and correcting the district court's incorrect statement that sixty-four minority applicants with lower Academic Index (AI) scores than petitioner were admitted to the Liberal Arts major).

31.   *Id.* at 16 n.6. Only one African American and four Latino students with lower scores than Fisher were offered admission. *Id.* at 15–16.

32.   Second Amended Complaint, *supra* note 19, at 22. Though Fisher alleged "on information and belief" in the Second Amended Complaint that "but for" being white she would have been admitted to UT Austin. *See id.* at 25. Apparently, the evidence produced in discovery did not support this contention. Fisher's lawyers made no such allegations in their briefs to the U.S. Supreme Court and Fifth Circuit Court of Appeals, adding to the litany of reasons the *Fisher* case should have been dismissed. For other reasons, see Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85 (2012), http://yalelawjournal.org/2012/10/01/chandler.html. However, atypical for "reverse discrimination" plaintiffs, Fisher's Supreme Court brief touted the fact that "many" of the accepted African American and Latino who enrolled at UT Austin would have been admitted "without regard to their race." Brief for Petitioner at 9, *Fisher I*, 133 S. Ct. 2411 [hereinafter Brief of Petitioner]. Fisher's brief also noted that "some [minority enrollees] were admitted based solely on high AI [academic index] scores" and that "[m]any more" would have been admitted under the non-automatic admissions process without their race being considered at all. *Id.*

33.   Second Amended Complaint, *supra* note 19, at 17. *See* West-Faulcon, *supra* note 11, at 601.

question applied its test score standard in a racially discriminatory manner.[34] There is no factual support for either of these conclusions.[35]

Figure 1 shows the overall number of applicants by race and for international students admitted, combining the class rank-based portion of UT admissions and the race-conscious holistic review admissions component.[36]
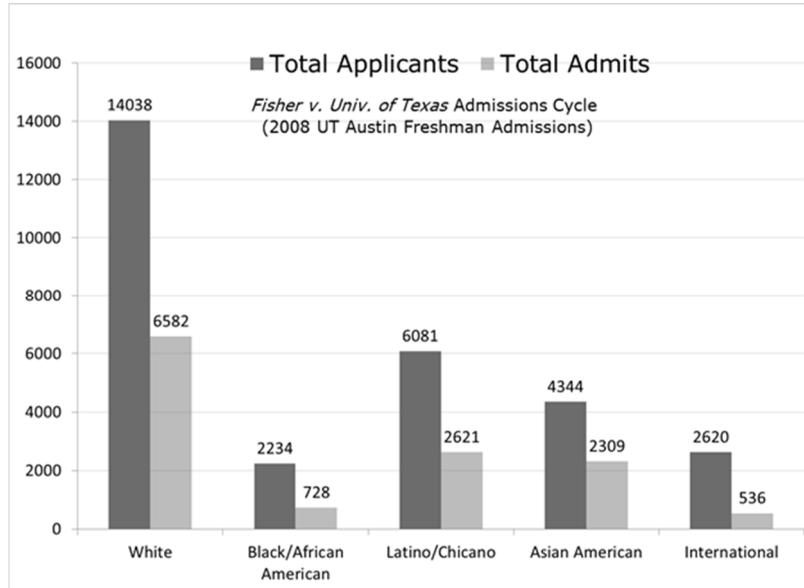
Figure 1. [37]

Figure 1 also shows that the total number of white applicants (including top 10% and non-top 10%) to UT Austin was 14,038[38] and that, of those white applicants, 6582 were admitted.[39] Of the 2234 African American applicants, 728 were admitted.[40] For Latinos, the overall number of applicants was 6081 and, of those, 2621 Latino students were admitted.[41] Of the 4344 Asian Americans who

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34. *See* West-Faulcon*, supra* note 11.

35. *See id.* at 601–06.

36. UT Austin's report on the 2008 UT admissions does not include data on the racial composition of the international student applicants and admits. *See generally* THE UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN 6, 8 (2008) [hereinafter UT FRESHMEN FALL 2008 REPORT].

37. The data presented in Figure 1 is based upon my analysis of publicly available UT Austin admissions data. *See id.* at 6, 8; *see also* West-Faulcon, *supra* note 6, at 347.

38. *See supra* Figure 1.

39. *See supra* Figure 1.

40. *See supra* Figure 1.

41. *See supra* Figure 1.

applied, an overall 2309 Asian Americans were admitted.[42] Figure 1 also shows that white applicants were admitted in higher numbers overall than any other racial group—specifically, the admission of 6582 white students exceeded the number of Latino and Asian American students admitted by 4000 and exceeded the number of admitted African American students by close to 6000.

Figure 2 below compares the number of students who applied and were selected under the Ten Percent Plan component of UT admissions and the race-conscious holistic review component. In accordance with the legislatively-imposed requirements of the Texas Ten Percent Law,[43] UT's race-blind Ten Percent Plan had the exact same results for all racial groups—all top 10% high school students were selected. But, whites fared better than nonwhites under the race-conscious holistic review selection process that Abigail Fisher challenged in the *Fisher* litigation.

Figure 2.[44]

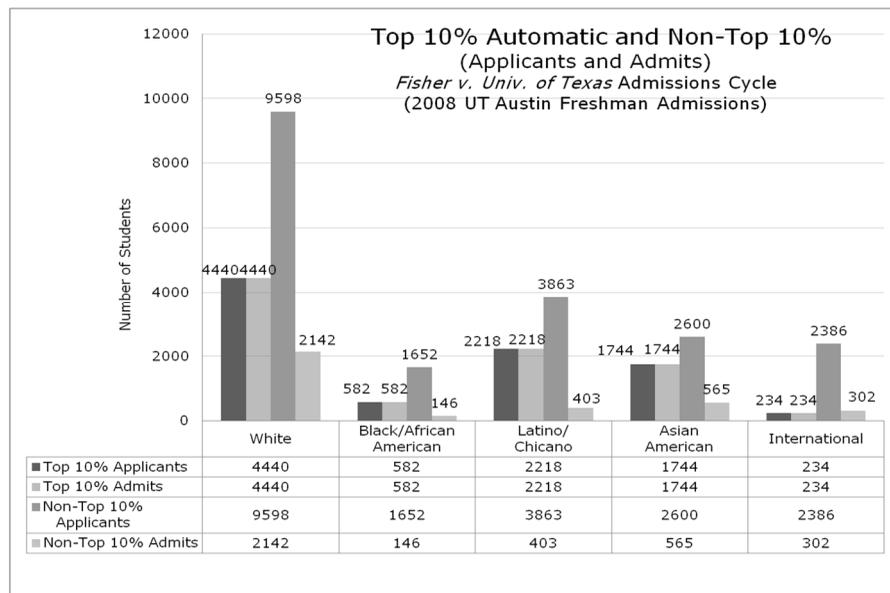|	White	Black/African American	Latino/Chicano	Asian American	International
Top 10% Applicants	4440	582	2218	1744	234
Top 10% Admits	4440	582	2218	1744	234
Non-Top 10% Applicants	9598	1652	3863	2600	2386
Non-Top 10% Admits	2142	146	403	565	302

Figure 2 shows that the 4440 white students ranked in the top 10% were automatically admitted, as were 582 top 10% African American applicants.[45] There were 2218 top 10% Latino applicants admitted along with the 1744 Asian American

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top 10% automatic admits.[46] Under the race-conscious holistic review component of UT admissions, Figure 2 shows that whites made up the overwhelming majority of students selected: 2142 of the 9598 white non-top 10% applicants were admitted.[47] But far fewer non-top 10% nonwhites were selected—565 of 2600 Asian Americans; 403 of 3863 Latinos; and only 146 of 1652 African Americans.[48] The total number of non-top 10% accepted white students (2142) not only far outnumbered the total number of accepted African Americans (146), Latinos (403), and Asian Americans (565), individually, the 2142 total number of non-top 10% whites admitted was almost twice the number of non-top 10% students from all other racial groups combined (1114).[49]

B. Selection Rates for Ten Percent Plan and Race-Conscious Holistic Review by Race

Because top 10% applicants from all racial groups were selected at a rate of 100% based on their high school class rank,[50] there was no racial disparity in selection rates under the Ten Percent Plan component of UT admissions.[51] However, Figure 3 shows UT's race-conscious holistic review process had a much lower overall selection rate—17.7%[52]—and, significantly, the holistic review selection rate varied by race, with white applicants selection at the highest rate of all other racial groups under the race-conscious policy.[53]

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46.   *See supra* Figure 2. All 234 of the Top 10% international student applicants were also accepted for admission. *See supra* Figure 2.

47.   *See supra* Figure 2.

48.   *See supra* Figure 2.

49.   *See supra* Figure 2. The sum of the 146 African-American non-top 10% admits, 403 Latino non-top 10% admits, and 565 Asian American non-top 10% admits is 1114, which is a little over half of the 2142 total number of white non-top 10% admits. *See supra* Figure 2.

50.   Over three-fourths of the Fall 2008 UT admission slots were awarded under the Ten Percent Plan. *Fisher II*, 136 S. Ct. at 2209. Only class rank or high Academic Index (AI) score were considered for about 83% of all the Fall 2008 UT admits, making the UT admissions process completely race-blind for 9359 out of 10,200 available spaces. Defendant's Statement of Facts at 5, *Fisher*, 645 F. Supp. 2d at 587 (explaining that the vast majority of Texas residents were admitted without any consideration of the PAI (Personal Achievement Index) such that "for the class entering fall 2008, only 841 available spaces in the freshman class remained available for Texas residents (out of 10,200) available spaces) after all automatic admissions based on" either class rank or a high predicted freshman-year GPA were admitted).

51.   *See supra* Figure 2. All Top 10% applicants of all races were accepted. Therefore, the 10% admission rate for all races was 100%. *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 8.

52.   *See infra* Figure 3.

53.   *Id.*

Figure 3.[54]
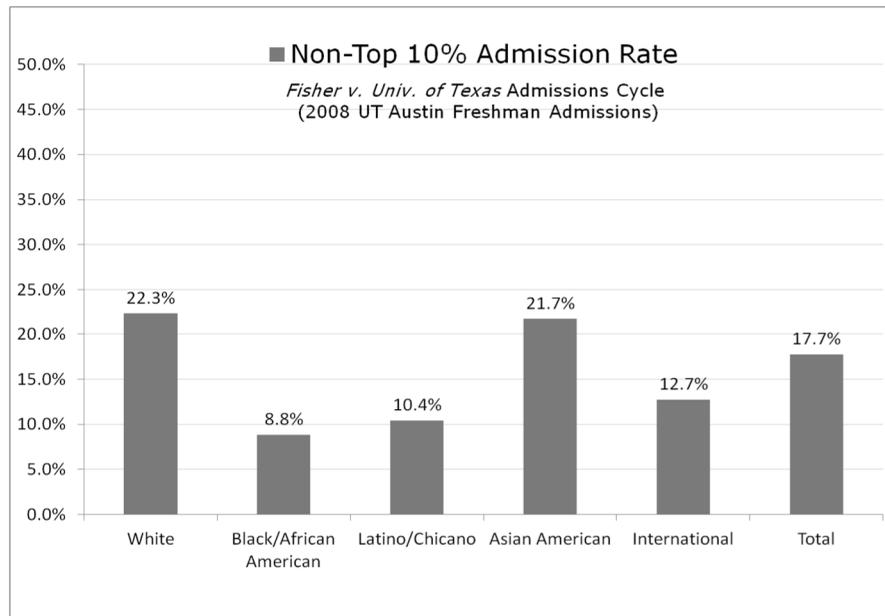
The selection rate for white applicants under UT's race-conscious, holistic review was 22.3%.[55] That was somewhat higher than the selection rate of 21.7% for holistic review Asian American applicants.[56] The 22.3% white selection rate was much higher than—over twice as high as—the 10.4% selection rate for Latino applicants and two-and-a-half times greater than the 8.8% selection rate of African American applicants.[57] Thus, Abigail Fisher's admissions chances, as a white holistic review applicant, were over twice as high as they would have been for an African American or Latino applicant.[58]

UT's race-conscious holistic review also favored Abigail Fisher in another respect beyond the higher white selection rate—Figure 4 below shows Fisher had a better shot at holistic review admission than nonwhites because the proportion of white applicants accepted through UT's holistic review process was greater than the

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54.   The data presented in Figure 3 is based upon my analysis of publicly available UT Austin admissions data. *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 6, 8; West-Faulcon, *supra* note 11, at 614, Figure 2.

55.   *See supra* Figure 3.

56.   *See supra* Figure 3. The white non-top 10% admissions rate was also almost 10 percentage points higher than the admissions rate for international non-top 10% applicants. *See supra* Figure 3.

57.   *See supra* Figure 3. The 12.7% admission rate for non-top 10% international students was higher than the 8.8% African American admission rate and the 10.4% Latino admission rate. *See supra* Figure 3.

58.   Scholars like Goodwin Liu have long concluded that racial affirmative action is highly unlikely to cause the rejection of an individual white applicant like Abigail Fisher. *See generally, e.g.,* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

proportion of nonwhites accepted holistically.[59] Of the white students admitted to UT when Abigail Fisher applied, a greater percentage were admitted under the race-conscious holistic review component of the UT admissions process than the percentage of nonwhites selected under holistic review.

Figure 4.[60]

Percentage of Non-Top 10% Admits of Total Number of Admissions by Race and International
Fisher v. Univ. of Texas Admissions Cycle (2008 UT Austin Freshman Admissions)

	White	Black/African American	Latino/Chicano	Asian American	International
■ Number of Top 10% Admits	4440	582	2218	1744	234
■ Percentage of Top 10% Admits of Total Admits	67.5%	79.9%	84.6%	75.5%	43.7%
▨ Number of Non-Top 10% Admits	2142	146	403	565	302
▨ Percentage of Non-Top 10% Admits of Total Admits	32.5%	20.0%	15.4%	24.5%	56.3%

Thus, the percentage of students from each racial group admitted under race-conscious holistic review in Figure 4 reveals yet another white advantage. Whereas one out of three (32.5%) of white applicants were admitted to holistic review slots, only about one out of four (24.5%) of Asian American students, one out of five (20.0%) Latino students, and less than one out of six (15.4%) African Americans were selected under the race-conscious component of UT admissions.[61] Within

59. The fact that white students had a numerical advantage in UT's race-conscious process is consistent with Justice Kennedy's conclusion that Abigail Fisher would have had a better chance of admission if UT had used its race-conscious holistic review to evaluate all Fall 2008 applicants. *Fisher II*, 136 S. Ct. at 2202 (explaining that Abigail Fisher applied for admission to UT's 2008 freshman class but "was not in the top 10 percent of her high school graduating class, so she was evaluated for admission through holistic, full-file review" and was rejected).

60. The data presented in Figure 4 is based upon my analysis of publicly available UT Austin admissions data. *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 6, 8.

61. *See supra* Figure 4. Far from being a racial affirmative action policy that operated as a "set-aside" for African American and Latino applicants, it could be argued that the holistic non-top 10% component of UT Austin's admission policy had the practical result of "setting-aside" more non-top 10% admission slots for whites than it did for nonwhites. Close to one-third of all the white applicants admitted to UT Austin when Abigail Fisher applied were non-top 10% applicants whereas only one-

racial groups, admitted white students were more likely to have been admitted under UT's race-conscious holistic review process than nonwhites. Alternatively, African American, Latino, and Asian American students were more likely than whites to have been selected solely based on class.

Figures 1–4 show that Fisher's white racial group membership was an advantage under UT's race-conscious non-top 10% holistic review, not a hindrance. Contrary to Justice Alito's proclamation in his *Fisher II* dissent that UT's policy constituted affirmative action "gone wild,"[62] the policy admitted substantially more white students, numerically and by percentage, than African American, Latino, and Asian American students.[63] Far from constituting a racial classification that reduced the admissions chances of whites, UT's race-conscious holistic review resulted in admission rate disparities sufficient to establish a prima facie case under Title VI disparate impact law.[64]

C. The Racial Disparity Fisher II Should Have Considered

By applying strict scrutiny*,* Justice Kennedy adopts the framing that UT's holistic review was racial affirmative action that presumptively violated the equal

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fifth or less of the African American and Latino students admitted were not ranked in the top 10% of their high school graduating class.

62.   *Fisher II*, 136 S. Ct. at 2232 (Alito, J., dissenting) (describing UT's holistic review admissions policy as affirmative action "gone wild").

63.   *See supra* Figures 1, 2, and 3. It also admitted substantially more white students than Asian American students numerically, although not by percentage. *Id.*

64.   In 2001, in *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), Justice Scalia issued a ruling on behalf of the Court that no private right of action exists to enforce Title VI disparate impact regulations. In a dissent to the majority opinion in *Sandoval*, Justice Stevens suggested that rejected applicants could bring Title VI effect discrimination cases under the 42 U.S.C. § 1983 civil rights statute even though the *Sandoval* decision had eliminated plaintiffs' direct cause of action to sue for Title VI disparate impact discrimination. *Id.* at 300 (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . ."). Whether a rejected applicant can privately sue a university under § 1983 for violating Title VI disparate impact regulations has been rejected in some circuits but remains a possibility in others. Specifically, the rule established by the Court in *Gonzaga Univ. v. Doe* presents a considerable hurdle to plaintiffs seeking to enforce disparate impact regulations using § 1983. *See* 536 U.S. 273, 287–88 (2002) (discussing only individual entitlements as being enforceable under § 1983). In fact, a number of circuits have rejected Justice Stevens's approach. *See, e.g.*, Johnson v. City of Detroit, 446 F.3d 614, 629 (6th Cir. 2006) (overruling Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994), and relying on a combined reading of the Court's decisions in *Gonzaga* and *Sandoval* to hold that a federal regulation such as the U.S. Housing Act cannot independently create an enforceable § 1983 right); Save Our Valley v. Sound Transit, 335 F.3d 932, 944 (9th Cir. 2003) (holding that disparate impact regulations are unenforceable under § 1983); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (same); Harris v. James, 127 F.3d 993, 1010–11 (11th Cir. 1997) (same). However, even if private enforcement of Title VI regulations is precluded by the Court's ruling in Sandoval, students rejected for admission may still file complaints with the U.S. Department of Education Office of Civil Rights (OCR) alleging that the admissions policies of the university that rejected them had a Title VI discriminatory effect on the basis of race.

protection rights of white applicants.[65] Kennedy applies strict scrutiny despite the fact that UT's race-conscious admissions policy did not negatively impact plaintiff Abigail Fisher's chances of admission to UT because she was white and despite the fact that the holistic review process did not have any proven negative impact on whites as a racial group. Figures 1–4 also show that the admissions outcomes under UT's race-conscious holistic review process bear no resemblance to the racial breakdown of admissions rates to be expected under a robust and effective racial affirmative action policy—a minimum of equal and, more likely, even higher selection rates for the racial groups being targeted for inclusion by the affirmative action policy. UT's race-conscious holistic review had the exact opposite statistical outcome.

UT admitted white holistic review applicants at not just a higher rate, but a statistically significant higher rate, than similarly situated African Americans and Latinos.[66] Table 1 below shows UT's race-conscious holistic review had a negative impact on African American and Latino admission rates, not a positive one. The table sets forth my original Title VI disparate impact analysis of the racial disparities in Fall 2008 UT non-top 10% holistic review admissions.[67] It reveals a magnitude

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65. Kennedy does this when he treats the policy's race consciousness at a racial classification warranting strict scrutiny. *See, e.g.*, Erwin Chemerinsky, Constitutional Law: Principles and Policies (5th ed. 2015) (explaining presumptions embedded in application of strict scrutiny standard of review).

66. Justice Alito is incorrect in his *Fisher II* dissent when he asserts repeatedly that UT's admissions policy racially discriminated against Asian Americans. The fall 2008 outcomes do not bear that out. As I examine in detail in *Obscuring Asian Penalty with Illusions of Black Bonus*, Asian American applicants were admitted at rates similar to white applicants under both the percentage plan and race-conscious holistic review admissions processes. *See* West-Faulcon, *Obscuring Asian Penalty*, *supra* note 11; *see also Fisher*, 136 S. Ct. at 2207 ("the contention that the University discriminates against Asian-Americans is 'entirely unsupported by evidence in the record or empirical data'") (citing Brief of Asian American Legal Defense and Educational Fund et al. as *Amicus Curiae* 12).

67. U.S. Department of Education regulations promulgated to enforce Title VI have been interpreted to require federally funded universities to justify large racial disparities in admission rates. *See* Title VI of the Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI disparate impact regulations prohibit federally funded universities from using selection criteria in a manner that constitutes effect discrimination. 34 C.F.R. § 100.3(b)(vii)(2) (2008) (stating that a recipient of federal funds may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin"). *Id.* A violation of Title VI regulations does not require proof of purposeful discrimination. *See* Alexander v. Choate, 469 U.S. 287, 293–95, 295 n.11 (1985) (explaining Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)). In *Guardians*, a majority of the Court held that liability under Title VI itself is identical to the Fourteenth Amendment Equal Protection Clause in its requirement that plaintiffs prove discriminatory purpose, while a different majority held that proof of discriminatory effect suffices when the suit is brought to enforce regulations issued pursuant to Title VI. *See Guardians*, 463 U.S. at 608 n.1 (1983) (Powell, J., concurring) (detailing the multiple holdings of the Court). In *Alexander v. Sandoval*, the Court assumed that proof of discriminatory impact was sufficient to demonstrate a violation of the Title VI regulations. *See* Alexander v. Sandoval, 532 U.S. at 281–82 ("[R]egulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups . . . ."); *see also* Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 949 (1990) ("The

of racially statistical disparity large enough to establish a prima facie violation of Title VI disparate impact law and requiring justification if the university in question receives federal funds.

Table 1.

Racially Disparate Impact Analysis of Fall 2008 UT Holistic Review[68]

Non-Top 10% Applicants	% Admitted (selection rate)	4/5th Rule Violated (< 80% or 0.80)	Chi Square p value<0.01 is significant
African American	8.8%	8.8/22.3 = 0.40 Yes, African Americans selected at less than 80% (40%) of white selection rate	158.06 *p*<0.00 *(disparity in rates is significant)*
White	22.3%		
Latino	10.4%	10.4/22.3 = .47 Yes, Latinos selected at less than 80% (47%) of white selection rate	253.76 *p*<0.00 *(disparity in rates is significant)*
White	22.3%		
Asian American	21.7%	21.7/22.3 = .97 No, Asian Americans selected at 97% (*not* less than 80%) of white selection rate	0.41 *p*=0.52 *(disparity in rates is NOT significant)*
White	22.3%		

Table 1 applies the "four-fifths (80%) rule"[69] and the Pearson chi-square[70] statistical test and finds a significant racially discriminatory effect against African

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issue of whether Title VI and its implementing regulations proscribe unintentional discrimination with a disproportionate adverse impact has had a tortured history in the Supreme Court.").

68.   *See* West-Faulcon, *Forsaking Claims of Merit*, *supra* note 6, at 353.

69.   *See* 29 C.F.R. § 1607.4(D) (2015) (explaining the "four-fifths rule" for adverse impact).

70.   The more sophisticated chi square statistical test assesses the likelihood that the racial disparity in the admission rate outcomes of UT's fall 2008 admissions cycle—the fact that whites were admitted at twice the rate as Blacks and Latinos—was a random or chance event. Chi-square analysis tests the likelihood that the racial disparities in UT admission rates are a product of random chance versus potential evidence of racial discrimination. The chi-square analysis in Table 1 rejects the

Americans and Latinos within the meaning of Title VI disparate impact law.[71] It does not reveal a statistically significant difference between the Asian American admission rate and the white admission rate.[72]

The "'% Admitted" column in Table 1 compares the African American, Latino, and Asian American selection rates to the selection rate for white race-conscious holistic review applicants. The "4/5th Rule Violated" column is my calculation of the ratio of the African American, Latino, and Asian American selection rates and the higher white selection rate. The "Chi Square" column shows the chi square value and whether the corresponding *p* value is less than 0.01. A *p* value less than 0.01 means the racial disparity between the nonwhite admission rate and the white admission rate did not happen by chance.

Under the 80% rule, the selection rate ratio comparing the selection rate for non-top 10% African American applicants to the white selection rate is 40% (8.8% divided by 22.3%)—far less than 80%; the Latino-white selection rate ratio is only 47% (10.4% divided by 22.3%)—also far less than 80%. By contrast, the ratio comparing the white-Asian American holistic review selection rate is 97% (21.7% divided by 22.3%)—significantly higher than 80%.[73] The chi square analysis results of 158.06 and 253.76 for the comparisons of the white selection rate to the African American and Latino selection rates, respectively, result in *p* values much lower than 0.01 in both instances and thus are statistically significant. By contrast, the *p* value of 0.52 associated with the chi square of 0.41 for the small difference between the Asian American selection rate and the white selection rate is greater than 0.01 and therefore not statistically significant. The analysis in Table 1 shows that the disparities between the African American and Latino holistic review selection rates and the white holistic review selection rate are of such a magnitude that an African American or Latino student denied admission along with Abigail Fisher could establish sufficient adverse impact to allege UT's race-conscious holistic review violated their civil rights under Title VI disparate impact law.

Table 1's analysis also confirms what is intuitive. Selecting African American or Latino applicants at half of the rate of white applicants constitutes a degree of

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hypothesis that the disparities between the lower African American and Latino admission rates are the result of random chance. *See supra* Table 1.

71. The Court has treated the 80% test as a "rule of thumb" that permits plaintiffs to establish a prima facie case of discrimination under Title VI disparate impact law when a racial group is admitted at less than 8% of the admit rate of the racial group with the highest selection rate. *See* Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) (observing that when expected results and actual results differ by more than two or three standard deviations, the statistical disparity in selection rates constitutes evidence of a Title VI disparate impact). Courts have interpreted Title VI to require that the racial disparity exist not just within the overall applicant pool but also within the subpopulation of "qualified" applicants. In other words, there is proof of Title VI discriminatory effect if, considering only qualified applicants, the racial disparities are large enough to be statistically significant. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination.").

72. *See* West-Faulcon, *Obscuring Asian Penalty*, *supra* note 11.

73. *Id.*

disparity of a magnitude that is exceedingly unlikely to be due to chance. Yet, in *Fisher II*, UT's policy was subject to the doctrinal presumption that UT violated the equal protection rights of rejected white applicant Abigail Fisher—by the Court's application of the strict scrutiny standard. The Court's treatment of UT's holistic review as a racial classification warranting strict scrutiny to protect Fisher from racial discrimination demonstrates how strongly equal protection doctrine favors reverse discrimination claims, even if whites suffer no disadvantage from a policy's race consciousness.

II. THE NON-CLASSIFYING RACE CONSCIOUSNESS OF UT'S HOLISTIC REVIEW

Contrary to claims of Fisher and several amici that UT employed anti-white and anti-Asian American racial preferences,[74] Part I demonstrated quantitatively that UT's holistic review was racially preferential to whites, not African Americans and Latinos—admitting the former at twice the rate of the latter two groups. This Part takes a qualitative look at the Fall 2008 UT admissions process to further illuminate the inappropriateness of the Court's categorization of UT's minimally race-conscious holistic review as a racial classification under equal protection analysis.[75] Next, this Part asserts that the Court's current reversed equal protection doctrine should be corrected to avoid the perverse doctrinal double standard exposed by *Fisher II*—an inappropriately low evidentiary burden on reverse discrimination plaintiffs to demonstrate the existence of a racial classification and an inappropriately high one for traditional discrimination plaintiffs.

Over the strong objection of dissenting justices,[76] the Court treats all race-based affirmative action policies as racial classifications without regard to the

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74. Second Amended Complaint, *supra* note 19, at 22; Brief for Richard Sander and Stuart Taylor as Amici Curiae Supporting Petitioner, *supra* note 9, at 3–5.

75. For the Court's early articulation of the rationale for applying heightened scrutiny to racial classifications, see *U.S. v. Korematsu*, 323 U.S. 214 (1944). The Court's flawed application of strict scrutiny in *Korematsu* led the Court to hold that the race and national origin-based internment of all persons of Japanese descent was justified under the Equal Protection Clause. *Id.* In *Fisher II*, the Court treated UT's holistic admissions policy as a racial classification but held that the UT policy considered race in a sufficiently restrained manner to satisfy the *Grutter*, 123 S. Ct. 2325, "narrowly tailored" requirement. Prior to 1996, UT's law school considered race as an admissions criterion for the purpose of increasing the admission rate of African American and Latino applicants. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). In 1992, Cheryl Hopwood, a white applicant denied admission to the University of Texas School of Law, sued the law school contending its consideration of race to benefit nonwhite applicants violated her rights under the Equal Protection Clause. *Id.* at 938. After the Fifth Circuit Court of Appeals ruled that the law school's consideration of race constituted a "racial preference" in violation of the Equal Protection Clause, UT completely eliminated race as an admissions criterion. In 1997, after UT eliminated all race consciousness from its admissions policy, the Texas Legislature passed HB 588, a law that defined admissions-related merit exclusively as having a high class rank. *See id.* at 962.

76. *See, e.g., J.A. Croson Co.*, 488 U.S. at 535-536, 552 (Marshall, J., dissenting) (arguing that intermediate scrutiny should apply to "race-conscious classifications designed to further remedial goals," and critiques the application of strict scrutiny because doing so renders the seemingly illogical conclusion "that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism").

magnitude of the policy's race-consciousness and has not required the reverse discrimination claimant to prove the affirmative action policy in question unjustifiably reduced his or her admission chances on the basis of race.[77] In so doing, the Court has transformed the Equal Protection Clause—a provision conferring full citizenship to all persons born in the U.S. and protecting them from government-driven racial subordination[78]—into a weapon for eradicating race-conscious affirmative action on the theory that any consideration of race poses imminent danger of race discrimination against whites.[79] As a result, the theory that a race-conscious effort to include nonwhites is, in and of itself, a form of race discrimination against whites has gained wider acceptance.[80] The facts in *Fisher* offer a strong counter to the presumption that any degree of race-consciousness warrants the Court's most stringent level of review. UT's holistic review limited the degree to which admissions officers could consider race and also relied so heavily on non-racial considerations that both should have prompted the Court to adopt a more nuanced doctrinal approach.

A new impact requirement for reverse discrimination claims should require a showing of a particular degree of racially adverse impact on whites as a racial group in order for the Court to treat the race-conscious policy in questions as a racial classification triggering strict scrutiny.[81] If the Court were to adopt such an evidentiary standard, it would be more consistent with Justice Kennedy's acknowledgement in *Fisher II* that UT's race-conscious holistic review offered more advantages to Abigail Fisher than the race-blind class rank-based top 10% policy. Details missing from Kennedy's analysis in *Fisher II* could have driven this point even further. Factual details about the specific degree of race consciousness and the

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77.   *See, e.g.*, *Gratz*, 539 U.S. 244 (highly selective nature of Univ. of Michigan's undergraduate admissions policy made it difficult for students with Gratz's credentials to gain admission); *J.A. Croson Co.*, 488 U.S. 469 (policy only required white contractors hire a relatively small percentage of nonwhite subcontractors and also permitted waivers for white contractors unable to do so); *Bakke*, 438 U.S. 265 (age not race most likely reason for Allan Bakke's rejection).

78.   *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 490 (1954) (citing Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880)) ("The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."). In *Strauder v. West*, the Court observed, "[t]he true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted and the general objects they plainly sought to accomplish." 100 U.S. at 306.

79.   *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) (expressing concern that racial affirmative action violates the Equal Protection Clause because it is operates to "act to the detriment" of whites based on their race).

80.   *See, e.g.*, *Bakke*, 438 U.S. at 288–300 (explaining rationale for applying strict scrutiny to UC Davis medical school race-based affirmative action policy).

81.   Robinson, *supra* note 10, at 172 ("[R]ace-conscious policies that seek to promote diversity or remedy past discrimination are the primary site of contemporary racial classification and Supreme Court scrutiny."). Professor Robinson has observed that "when strict scrutiny appears in the Court's race jurisprudence today, it is almost invariably on behalf of white litigants such as Abigail Fisher, who wield it to dismantle affirmative action policies." *Id.*

overall context and manner in which a policy permits race to be considered are factors that should be used to limit strict scrutiny to policies that have harmed or have some realistic potential to harm whites.

A. Missing Details of UT's Holistic Review

UT's holistic review was substantially more limited in its race consciousness than Justice Kennedy's *Fisher II* description suggests. While Kennedy set forth important details about how UT considered race to derive the only permissibly race-conscious factor in UT's holistic review—an applicant's Personal Achievement Index (PAI) score, he omitted the key contextual detail that the PAI score had only a limited role in where an application landed on an admissions decision grid.[82]

1. AI Score Columns, PAI Score Rows, and the Decision Line

The Academic Index (AI) score was an SAT- and class rank-driven prediction of the future college freshman-year GPA of the applicant, ranging from 0.00 to 4.10.[83] To calculate AI score, admissions officers inputted high school class rank, high school class size, SAT verbal score, and SAT math score into one of four possible regression equations depending upon the applicant's intended undergraduate major.[84] For instance, the AI score of an applicant applying to UT's undergraduate business major was generated using the following equation: Predicted Freshman GPA = -2.31253 + (SAT V * 0.00157) + (SAT M * 0.00229) + (HSR * 0.03419). An additional tenth of a point could be added to the resulting

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82. *Cf.* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 3 (explaining that academic index scores and personal achievement index scores "are then plotted on an admissions decision grid" and "[a]dmissions liaisons, and/or representatives of Deans' offices or faculty, then make decisions as to which cells [of the admissions decision grid] to select as admitted students").

83. Fisher, 645 F. Supp. 2d at 596.

84. The four AI score equations used by UT in Fall 2008 were as follows. For Liberal Arts, Communications, Fine Arts, Social Work, and Education Majors: Predicted Freshman GPA = -0.19949 + (SAT V * 0.00142) + (SAT M * 0.00191) + (HSR * 0.01459). For Nursing, Natural Sciences, and Architecture Majors: Predicted Freshman GPA = -1.10339 + (SAT V * 0.00088166) + (SAT M * 0.00230) + (HSR * 0.02416). For Engineering Majors: Predicted Freshman GPA = -1.53545 + (SAT V * 0.00072937) + (SAT M * 0.00313) + (HSR * 0.02285). For Business Majors: Predicted Freshman GPA = -2.31253 + (SAT V * 0.00157) + (SAT M * 0.00229) + (HSR * 0.03419). *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 5. A significant portion of selective universities use a regression equation combining applicant SAT scores with high school grade point averages (not necessarily class rank as done by UT) to create a numerical composite index score that predicts freshman-year college grades for the applicant, then proceed to use those predictions to compare and rank applicants quantitatively. Abigail Fisher may very well be an example of a candidate for whom a university's overreliance on SAT scores unfairly undermined her selection because, as I have explained elsewhere, this by-the-numbers, formula-driven prediction of a high school applicant's future grades in college is useful but imperfect. *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1114–15 (2009) ("A major ostensible reason that colleges require applicants to take the SAT is that an applicant's SAT score offers admissions officers information that assists them in predicting whether a student is likely to succeed at their institution. Educational-measurement experts produce institution-specific data about the future success of high-school students by comparing the entering SAT scores of prior applicants with their first-year grades during college.").

number if the applicant "exceeded UT's required high school curriculum."[85] The record in the *Fisher* litigation did not reveal the predictive power of UT's AI score. Generally, such regression equation-based predictions of first-year college GPA explain less than one quarter of the variation in high school students' early college grades.[86]

UT used a different equation to generate an applicant's PAI score. That equation was PAI = [(PAS *4)+(essay score average*3)]/7,[87] requiring admissions officers to input the average of an applicant's scores on two required essays and the applicant's assigned Personal Achievement Score (PAS). The PAS was a score assigned by admissions officers based on evaluation of information the applicant submitted relevant to six non-academic personal achievement categories. Those six PAS categories were (1) leadership, (2) extracurricular activities, (3) awards/honors, (4) work experience, (5) service to school or community, and (6) special circumstances.[88] Both the PAI score and the PAS ranged from 1.0 to 6.0.

The last PAS category—"special circumstances"—permitted, but did not require, admissions readers to increase an applicant's PAS based on an evaluation of some, all, or none of seven special circumstances factors. Those seven factors were (1) the socioeconomic status of the applicant's family, (2) the socioeconomic status of the applicant's school, (3) the applicant's family responsibilities, (4) whether the applicant lives in a single-parent home, (5) the applicant's SAT score in relation to the average SAT score of the applicant's high school, (6) the language spoken at the applicant's home, and (7) the applicant's race.[89]

Kennedy's *Fisher II* description of "admission officers from each school within the University set[ting] a cutoff PAI/AI score combination for admission, and then admit[ting] all of the applicants who are above the cutoff point"[90] obfuscates how little potential there was for race to impact the ultimate grid-based UT admissions decision. Even though UT's holistic review did involve an admissions officer conducting a "full-file review,"[91] whether an application was

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85. *Fisher*, 645 F. Supp. 2d at 596.

86. The vast majority of variation among the grades of college freshman is explained by variables other than SAT score and class rank.

87. *See* Affidavit of Kedra B. Ishop at 2, *Fisher*, 645 F. Supp. 2d at 587 (No. 1:08-CV-00263-SS) [hereinafter Ishop Affidavit].

88. *Id.*

89. The *Fisher* litigation was an equal protection challenge of UT's inclusion of race as the last of seven non-mandatory, permissible special circumstances factors.

90. *Fisher II*, 136 S. Ct. at 2207. The Court elaborated on the fact that admissions officers did not consider race in any way in selecting the AI-PAI cutoff score. On this point, the Court noted that "[i]n setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination." *Id.* ("The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race.").

91. *Id.* at 6.

to the left (accepted)[92] or right (rejected)[93] of a "decision line"[94] determined admission. The decision line was drawn by admissions officers to choose enough applications to fill the small number of admissions slots in each major that were left after automatic Ten Percent Plan admissions.[95] Figure 5 is an example of a UT admissions decision grid.

Figure 5.

The one-digit numbers on the grid in Figure 5 indicate the number of applications with the AI score and PAI score combination corresponding to particular AI column and PAI row coordinates on the grid.[96] This means, for example, the number "1" in AI score column labeled "370" and the top PAI score row (not labeled) indicates one holistic review applicant was assigned an AI score of 370 and the highest PAI score of 6 (indicated by placement in the 6th highest row).[97] Since admissions officers had only knowledge of the *number* of applicants within each grid cell[98] and had no knowledge of the race or any other aspect of the

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92. *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 3 ("The most-qualified candidates are located in the cells closest to the upper left corner."); *see also* Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 17, *Fisher*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-CV-00263-SS).

93. *See* UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 3 (describing how rejected applicants are either: (1) "cascaded" to their second-preferred major; (2) offered Summer Freshman Admission; or (3) offered CAP at another UT system school).

94. *See* Brief for Respondents, *supra* note 29, at 26.

95. Ishop Affidavit, *supra* note 88, at Ex. B.

96. *Id.* The grid columns are labeled with numbers corresponding with the range of AI scores, predicted freshman GPA, (0.0 to 4.10) multiplied by 100 across the top horizontally—the highest possible number was 410 and the lowest was 000 (although the grid stopped at <240). The grid rows from bottom to top correspond with the range of PAI scores (1 to 6)—the highest row corresponds to the highest PAI score.

97. Cells closer to the top left corner of the grid, those corresponding with a higher AI and higher PAI scores, were the most likely to be admitted, space permitting. *See* UT Freshmen Fall 2008 Report, *supra* note 36, at 3.

98. *See id.* ("Admissions liaisons, and/or representatives of Deans' offices or faculty, then make decisions as to which cells to select as admitted students.").

identity of the individuals in the cells being selected for admission,[99] the decisional stage of UT's holistic review was not race conscious.[100]

2. Heavy Weight and Impact of AI Score

Although Justice Kennedy was correct to observe that Fisher's chances of admission to UT would have been improved if UT had used holistic review to admit a larger proportion of the class, Kennedy did not point out how minimally the discretionary consideration of race factored in UT's holistic review or how much SAT score and class rank predominated which students were selected for holistic review admission. Holistic review factors such as student essays, leadership participation, sports involvement, community service, and letters of recommendation influenced an applicant's selection or rejection under holistic review far less than SAT scores, GPA, and class rank. The great weight afforded the AI score—the completely race-blind, SAT score-driven component of holistic review—meant an applicant's AI score influenced final positioning on the admissions decision grid much more than the personal-achievement-focused and potentially race-conscious PAI score, further demonstrating the minimal role race played in UT's holistic review.[101]

In addition, Kennedy's *Fisher II* opinion neglected to explain how much more the AI score, as compared to the PAI score, impacted whether an application fell in an "accepted" position on the UT decision grid. As can be seen in Figure 5 above, it took a ten times greater difference in an applicant's PAI score—one whole point—to move the applicant into a higher row on the grid.[102] As a consequence, only a large difference in PAI score, which would be contingent on a very large difference in PAS, would be sufficient to impact the ultimate admissions decision for a particular applicant. In stark contrast, a very small difference in an applicant's AI score—just one tenth of a point (since AI scores were multiplied by 100 before plotting on a grid)—could change the right-to-left column position of an application on the UT admissions decision grid. In other words, if an applicant's race-blind AI score was low, having a high PAI score did not matter at all.

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99. Again, admissions officers only knew how many applicants "landed" in that cell after their combination of the first-year college predicted GPA and personal achievement overall score had been plotted on the UT admissions grid. *See id.*

100. Justice Kennedy's description of the holistic process in *Fisher II* failed to explain that the final stage of that process was based on the drawing of a decision line on the admissions grid for the majors to which Fisher applied and was thus a completely race-blind decision.

101. Because Fisher was ineligible for Ten Percent Plan automatic admission and also ineligible for high AI score automatic admission, her only route to admission was through UT's holistic review process.

102. The highest PAI score of 6.0 would locate an application in the top row on the admissions decision grid whereas a PAI score of 1.0 would place an application in the lowest row of the grid. *See* Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment at 20, *Fisher*, 645 F. Supp. 2d at 587 (No. 1:08-CV-00263-SS) [hereinafter Plaintiff's Statement of Facts]. ("One-tenth of an AI [academic index score] point or one PAI [personal achievement index score] point can be determinative as to whether an applicant is admitted or not admitted.").

Abigail Fisher's rejection by UT bears this out. It was Fisher's AI score, not her potentially race-conscious PAI score, that resulted in her rejection. With an AI score of 3.1, Fisher's application would have been located in the AI column labeled "310." Because so many applicants with significantly higher SAT scores had applied to both the Liberal Arts and Business school majors, Fisher's application location would have been too far right on the admissions grid to be on the left side of the decision line, irrespective of whether it was located in the highest PAI row of six. As explained by UT, Fisher "would not have been admitted to the Fall 2008 freshman class even if she had received 'a "perfect" PAI score of 6.'"[103] Thus, not only was there a mathematical limit on how much the minimally race-conscious PAS could impact the PAI score—the PAI score (itself, even less determined by race than PAS) counted for only four-sevenths of an applicant's PAS and not more,[104] there was a mathematical limit on how much the PAI score could impact the location of an application on the decision grid.

Other details of UT's admissions policy also demonstrate how significantly an applicant's race-blind, SAT-driven AI score impacted admission. AI score alone determined the admission of some applicants. If they had a sufficiently high AI score, applicants were called "'A' group applicants" and were automatically admitted while applicants whose AI scores were deemed too low were referred to as "'C' group applicants" and were deemed "presumptively inadmissible."[105] For Fall 2008 admissions, applicants with an AI score of 2.599 or lower were designated "C" group applicants and, thus, considered presumptively ineligible for admission.[106] Those applicants fitting in neither the "A" nor "C" groups—presumably "B" group applicants—were eligible to be considered under holistic review. Despite it further demonstrating the exceedingly minimal role that race played in UT admissions, the fact that holistic review was actually conducted for only a subset of holistic review applicants—such B group applicants—was not mentioned in the *Fisher II* majority opinion.

The Court's *Fisher II* decision likewise made no mention of, nor did UT emphasize, the fact that five of UT's undergraduate majors "admitted applicants automatically on a rolling basis if their AI score exceeded a particular threshold (so-

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103. Brief for Respondents, *supra* note 29, at 15 ("The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had received 'a "perfect" PAI score of 6.'"). This suggests that Abigail Fisher did not have particularly high written essay scores or her AI score was so low that it situated her on the wrong side of the applicable decision line on the admissions decision grid for the UT majors to which Fisher applied. Even an applicant with a perfect personal achievement sub-score of 6.0 would not have a high personal achievement overall score if that applicant's two written essay scores were middling on the scale of one to six points.

104. Because PAI = [(PAS * 4)+(essay score average * 3)]/7, PAS was four-sevenths of PAS and the average of the applicant's two essay scores was three-sevenths. *See* Ishop Affidavit, *supra* note 88.

105. Defendants' Statement of Facts at 16, *Fisher*, 645 F. Supp. 2d at 587 (No. 1:08-CV-00263-SS).

106. *Id.*

called "A" group applicants)."[107] UT never disclosed the number of such automatically admitted students for Fall 2008—the number of applicants admitted based solely on "high AI" score.[108] What is known is that applicants to Natural Sciences were admitted automatically if they had an AI score of 3.5 or higher, to Geosciences with an AI score of 3.6 or higher, to Liberal Arts with an AI score of 3.9 or higher, to Social Work with an AI score of 3.6 or higher, to Education in Applied Learning & Development with an AI score of 3.6 or higher, and to Education in Special Education with an AI score of 3.4 or higher.[109]

The major role that the SAT score-driven AI score had on admission is clear from how it impacted Abigail Fisher's application to UT. Fisher's SAT score was 1180 (out of 1600),[110] whereas the average SAT score of all Fall 2008 non-top 10% applicants who went on to enroll at UT was 1285.[111] Fisher's less than stellar SAT score resulted in a less than stellar AI score—a predicted freshman-year GPA of 3.1.[112] Since Fisher applied to UT to major in either Liberal Arts or Business, she was compared to a particularly high AI score cohort.

The School of Business, in particular, was so popular among UT applicants that the number of Top Ten Percent Plan admissions was capped at "75% of the program's available admission slots" such that only a small portion of even the top 10% applicants who wished to major in Business could be admitted. As a result, only those applicants who "graduated within approximately the top 4% of their high school class and selected a business major as their first choice"[113] were actually admitted to UT's Business major through the top 10% automatic process. The

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107. *Id.* ("After all admissions offers based solely on academic performance (either pursuant to the Top ten percent rule or due to the applicant's high AI) were made for the Fall 2008 entering freshmen class, only 841 available admissions slots (out of a possible 10,200) remained open for Texas residents.").

108. *Id.* at 14.

109. *Id.*

110. Fisher's score on the verbal/reading section of the SAT was 500, and her score on the math section was 680. Second Amended Complaint, *supra* note 19, at 22. The year before Fisher applied, only 33.3% of the students admitted for non-top 10% fall admission had SAT scores as low as or lower than Fisher's 1180. *See* THE UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, THE PERFORMANCE OF STUDENTS ATTENDING THE UNIVERSITY OF TEXAS AT AUSTIN AS A RESULT OF THE COORDINATE ADMISSION PROGRAM (CAP) STUDENTS APPLYING AS FRESHMEN 2007 REPORT 7, at 4 tbl.5 (Feb. 8, 2010) [hereinafter APPLYING AS FRESHMEN 2007], https:// s3.amazonaws.com/zanran_storage/www.utexas.edu/ContentPages/55689852.pdf [https:// perma.cc/35SB-QTJU]. The percentage was even lower for 2007 Summer Freshmen admissions— only 29.3% had SAT scores of 1190 or lower. *Id.*

111. *See* Second Amended Complaint, *supra* note 19, at 4; UT FRESHMEN FALL 2008 REPORT, *supra* note 36, at 9.

112. *See* Brief for *Amici Curiae* National Association for the Advancement of Colored People, Texas State Conference of NAACP Branches and Barbara Bader in Support of Respondents at 6, *Fisher*, 645 F. Supp. 2d at 587 (No. 1:08-CV-00263-SS) (explaining that Fisher's AI score of 3.1 was too low to qualify for "A" group admission). The Texas State NAACP amicus brief also noted: "Race played no part whatsoever in the calculation of the AI. 'A' group applicants had high AIs, and were offered admission to UT automatically on a rolling basis. JA 434a. Petitioner was not an 'A' group applicant, thus, she again failed to qualify for automatic admission." *Id.*

113. *Id.* at 15.

"remaining 25% of the slots" to the School of Business were filled using holistic review. Non-top 10% applicants like Abigail Fisher seeking to be Business majors had to compete against the remaining top 10% applicants who selected Business as their first choice major but were not admitted under the Ten Percent Plan. This meant Fisher's class rank of 12% and her AI score of 3.1 was significantly lower than many applicants to the Business major who were students ranked between the top 5% and 10% of their graduating class. Fisher's situation was similar with respect to the Liberal Arts major. The cutoff for automatic admission as a UT Liberal Arts major was an AI score of 3.9 or higher. Here again, Fisher's AI score of 3.1 did not make her particularly competitive.

Given the explicit mathematical limitations on the weight that race could have on any applicant's PAI score and the decision grid coordinate location limitations on the impact an applicant's PAI score could have on whether he or she was ultimately admitted, the *Fisher* case presented a novel legal question that the Court treated with its traditional presumption that any race-conscious policy is necessarily a racial classification. When a government policy is, first, only facially very minimally race conscious as well as adopted for a racially inclusive purpose and, second, the plaintiff presents no evidence that the challenged policy has had a racially disparate impact on the racial group to which the plaintiff belongs, the Court should reexamine its current approach of presuming such a policy constitutes a racial classification.

B. *High Doctrinal Hurdle Imposed on Traditional Discrimination Claims*

The amount of weight UT's holistic review process gives to SAT scores is unlikely to be scientifically justified given that SAT scores only explain 13% of the variation in high school students' first-year college grades.[114] Other admissions criteria, particularly high school GPA, explain more of the variation in first-year college grades, are equally-available, and would likely result in a less racially disparate impact on African American and Latino applicants.[115] Since as much as 87% of the

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114. Because the SAT test, considered alone, explains only approximately 13% of the variation in a test-taker's college grades, it leaves 87% of the difference in freshman grades "unaccounted for and unexplained by consideration of applicants' SAT score by itself." Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1264–68 (2011); *see also* West-Faulcon, *The River Runs Dry*, *supra* note 85, at 1116 (explaining that the SAT explains an additional 13% of the variance in first-year college grades as compared to the predictive power of relying on applicants' high school grades alone).

115. "At the end of the roughly hundred-year period that mass-marketed standardized tests have been in existence, their predictive power still leaves substantial room for improvement." Far from perfect in its prediction, the 13% power of predicting first-year college GPA based on SAT score and the 23% predictive power of using SAT score combined with high school GPA to predict the same early college outcome is helpful but not complete information for universities to use in assessing the academic merit of applicants. *See* West-Faulcon, *More Intelligent Design*, *supra* note 115, at 1264–69 (examining modern innovation in mental testing in light of the fact that conventional standardized tests like the SAT "leave more of the variation in intelligence and future academic success unexplained than they actually explain"). Richard Atkinson is the former president of the University of California and an expert in cognitive science and psychology. During his presidency, Atkinson gave a speech critical of

variation in freshman-year college grades is explained by non-SAT factors,[116] racial disparities in selection stemming from over-reliance on SAT scores likely require justification under disparate impact law.[117]

　　If one of the many African American and Latino applicants denied admission the year Fisher applied had sought to challenge his or her rejection as violating the Equal Protection Clause because UT's holistic review process inappropriately over-relied on SAT scores, the Court's current doctrine imposes an evidentiary burden on traditional discrimination plaintiffs—the discriminatory purpose requirement—that essentially dooms their claim from the outset.[118] The purpose requirement imposed on such traditional discrimination plaintiffs, but not reverse discrimination plaintiffs, is a nearly impenetrable barrier to traditional race discrimination claims.[119] The reasons it is difficult to prove racially discriminatory purpose include: (1) the fact that perpetrators of purposeful race discrimination are increasingly sophisticated in camouflaging it with facially race neutral explanations,[120] (2) that much of modern race discrimination is the product of implicit or unconscious racial bias,[121] and (3) that many decision-making systems rely on racially-skewed standardized test results in a scientifically unjustified, but not purposefully racially discriminatory, manner.[122]

　　As noted in Justice Samuel Alito's *Fisher II* dissent,[123] questions about the predictive value and potential racial bias in how UT holistic review relied upon SAT

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the amount of weight placed on SAT scores in college admissions and announced plans to no longer require students applying to take the SAT I. *See* Richard C. Atkinson, President, Univ. of Cal., Standardized Tests and Access to American Universities, The 2001 Robert H. Atwell Distinguished Lecture at the 83rd Annual Meeting of the American Council on Education (Feb. 18, 2001), http://www.ucop.edu/news/sat/speech.html [https://perma.cc/MLR5-YQTN].

　　116.　*See* West-Faulcon, *More Intelligent Design*, *supra* note 115, at 1268.

　　117.　*Id.* at 1291 (describing potential claims by "such rejected African-American and Latino applicants [who] could file Title VI disparate impact complaints with the Department of Education Office of Civil Rights").

　　118.　*See* Davis, 426 U.S. 229; Feeney, 442 U.S. 256.

　　119.　Most challenges of a racial classification under the Equal Protection Clause decided by the U.S. Supreme Court in the last forty years have been reverse discrimination claims. *See, e.g.*, *Fisher II*, 136 S. Ct. 2198; *Fisher I*, 133 S. Ct. 2411; *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *Bakke*, 438 U.S. 265; DeFunis v. Odegaard, 416 U.S. 312 (1974); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987) (describing this pattern).

　　120.　*See id.*

　　121.　*See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

　　122.　*See* West-Faulcon, *More Intelligent Design*, *supra* note 115, at 1269*; see also* West-Faulcon *Fisher I* Amicus Brief, *supra* note 14, at 19–20 (discussing the predictive limitations of the SAT scores and contrasting them with more predictive and less racially skewed standardized tests based on more accurate theories of intelligence).

　　123.　Justice Alito's dissenting opinion in *Fisher II* actually focuses heavily on the role that SAT scores play in UT's holistic review and even connects the SAT-driven nature of UT's holistic review with the exclusion of African American and Latino applicants. *Fisher II*, 136 S. Ct. at 2227 n.5. However, it should be noted that Alito includes this discussion in service of his overarching, incorrect claim that UT's race-consciousness in holistic review racially discriminates against Asian American

scores warrant consideration.[124] Alito scrutinizes UT's use of SAT scores to challenge the university's assertion that it needed to be race conscious in order to admit African American and Latino high school students with high SAT scores. Although Justice Alito only discusses the SAT to demonstrate why Abigail Fisher's reverse discrimination claim should have succeeded,[125] it is worth noting that Alito's SAT discussion in *Fisher II* illuminates the doctrinal implications of the Court's reversed equal protection jurisprudence as well as the types of racially disparate impacts that stem from over-reliance on SAT scores.

Alito's *Fisher II* dissent challenges whether UT needs to use SAT scores and whether using them racially discriminates against African American and Latino applicants to support his view that UT failed to proffer a compelling purpose for its use of race. However, had Alito been analyzing the claim of a rejected African American applicant who contended UT's over-reliance on the SAT violated her equal protection rights, the Court's equal protection doctrine would have warranted only rational basis review,[126] according to *Washington v. Davis* precedent.[127] Under weak rational basis review, Justice Alito would no doubt accept UT's contention that it needed to maximize SAT scores and thereby reject the African American applicant's discrimination claim. By contrast, under the stringent strict scrutiny review automatically afforded to reverse discrimination claimants without regard to whether race actually affected white applicants, Alito was no doubt willing to use strict scrutiny to doctrinally second-guess UT's claim that it needed to maximize SAT scores. Ironically,[128] Alito invoked the notion that UT's reliance on SAT scores

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applicants to UT. *Id.* As the analysis in Figures 1-4 and Table 1 show clearly, there is no empirical support for Justice Alito's assertions regarding massive discrimination against Asian Americans.

124.   Alito does so to support his claim that UT's interest in intraracial diversity or "diversity within diversity" is not a compelling interest. *Id.* at 2238 (Alito, J., dissenting). Alito's opinion is replete with bald assertions that Asian Americans were the victims of racial discrimination based on no statistical evidence of the rate at which Asian Americans were admitted. *Id.* at 2209, 2218, 2223–27.

125.   In other words, my use of Alito's SAT critique herein is vastly different from his own. Alito's opinion paints UT as an institution that racially discriminates against Asian Americans, a claim that is inconsistent with the data presented in Figures 1–4 above. *Id.* at 2223–27. Here, I reference Alito's observations about the SAT as the type of claims a rejected African American or Latino applicant might rely upon in challenging UT's holistic review as racially discriminating against his or her race. Even though Justice Alito explicitly rejects "maximizing admittees' SAT scores" as a compelling government interest and distinguishes UT's interest in high SAT scores from UT's true compelling interest "in admitting students who will achieve academic success," *id.* at 2234, he only does so in service of Fisher's reverse discrimination claim.

126.   *See* Railway Express v. New York, 336 U.S. 106, 111–17 (1949) (setting forth the Court's highly deferential rational basis standard of review).

127.   In *Washington v. Davis*, the Court deferred to the District of Columbia's use of a test that rejected African American applicants claimed was not job-related. *Davis*, 426 U.S. at 288 (applying rational basis review to reject claim of African American applicants contending test use to select police officers was not "job-related").

128.   While Justice Alito finds it "more than a little ironic" that UT asserts a compelling interest in considering race so as to admit African American and Latino applicants with high SAT scores, Alito's invocation of the fact that the SAT has "often been accused of reflecting racial and cultural bias" against African Americans and Latinos to explain why he would have ruled in favor of a white applicant claiming race discrimination is itself quite ironic. *Fisher II*, 136 S. Ct. at 2234, 2234 n.11 (citing Roy

could be biased against African Americans and Latinos to support Abigail Fisher's claim of anti-white bias.

Thus, despite the evidence of racially discriminatory effect on African American and Latino applicants shown in Table 1,[129] the Court's requirement that traditional equal protection plaintiffs prove discriminatory purpose operates to absolve UT of any obligation to justify it systematically lower acceptance rates for those groups.[130] The upshot is that the Court's reversed equal protection doctrine permits Abigail Fisher's equal protection challenge to proceed, irrespective of her admissions-related merit and irrespective of the fact that race played no role in Fisher's rejection. The fact that UT's holistic review had a racially disparate impact on African Americans and Latinos, that UT's holistic review relied very heavily on SAT scores, and that UT's holistic review made SAT scores determinative of admission in a manner unlikely to be scientifically justifiable would be doctrinally insufficient to trigger the plaintiff-friendly strict scrutiny standard of review were a rejected African American or Latino applicant to sue UT for violating the Equal Protection Clause.

C. Justice Kennedy's Continued Empathy for Reverse Discrimination Claims and Claimants

Although Justice Kennedy observed in *Inclusive Communities* that "mere awareness of race" in attempting to solve a problem "does not doom the endeavor at the outset,"[131] he has long had concerns about "the dangers" presented by government use of "individual [racial] classifications."[132] In rejecting Abigail

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O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. ED. REV. 1 (2003)).

129.	*See supra* Table 1.

130.	Under the Court's reversed equal protection jurisprudence, empirically-substantiated race impacts in death penalty sentences were reviewed under the weak rational basis standard. *See McCleskey*, 481 U.S. at 297–99.

131.	In *Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project Inc.*, Justice Kennedy explicitly rejected the notion that government race-consciousness is a per se constitutional or statutory violation when observed that "race may be considered in certain circumstances and in a proper fashion" and "mere awareness of race" in attempting to solve a problem "does not doom that endeavor at the outset." 135 S. Ct. 2507, 2512 (2015). UT's holistic review policy evidently satisfied Kennedy's requirement that government refrain from race consciousness such that an individual may "find his own identify, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1, 551 U.S. 701, 797 (2007).

132.	*Parents Involved in Cmty. Sch.*, 551 U.S. at 797 (Kennedy, J., concurring). In *Fisher I*, Kennedy criticized the lower court for being too deferential in its application of the strict scrutiny standard. *Fisher I*, 133 S. Ct. at 2421. It is beyond the scope of this Article to challenge Justice Kennedy's application of strict scrutiny to the race consciousness of UT's admissions policy, although I believe there is a strong argument to be made that the minimal consideration of race employed by the institution does not warrant treatment as a racial classification warranting the application of strict scrutiny. *See, e.g.*, *Bakke*, 438 U.S. 265; West-Faulcon, *The River Runs Dry*, *supra* note 85, at 1153–54 (describing Powell's observation that race consciousness for the purpose of ameliorating the effects of racially unfair admissions criterion need not be treated as racial classifications subject to strict scrutiny).

Fisher's claim, Kennedy observed near the end of the *Fisher II* opinion that "it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[133] With this statement, Kennedy frames race-conscious efforts to increase racial diversity as a threat to white equal treatment and dignity,[134] even though he is acutely aware that UT's race consciousness had no demonstrable negative impact on white applicants. Thus, in an opinion upholding a racial affirmative action policy, Kennedy reveals that he continues to make rejected white plaintiffs, even those with less than stellar credentials like Abigail Fisher, the central benefactors of the "constitutional promise" of the Equal Protection Clause.[135]

No evidence was presented in the *Fisher* litigation that demonstrated that UT's minimal race consciousness[136] decreased white or Asian American rates of selection or, for that matter, increased African American and Latino rates of selection.[137] Although Justice Kennedy observed that race was a "meaningful factor that can make a difference in the evaluation of a student's application,"[138] he only supported this statement with UT student enrollment data, not the selection rate data that is set forth in Part I of this Article.[139] Kennedy failed to recognize the empirical reality that UT's holistic review had three attributes that warranted the judicial deference that accompanies the more defendant-friendly rational basis and intermediate scrutiny standards of review. First, UT's holistic review was only very minimally race conscious; second, UT's holistic review was facially heavily reliant on SAT scores, and; third, the overwhelming majority of holistic review admission slots went to whites and did so at twice the selection rate for African Americans and Latinos.[140]

Fisher II's treatment of UT's holistic review as a racial classification and its default application of strict scrutiny analysis exemplify the reversed equal protection doctrine I critique here. The Court applies its most rigorous protection to Abigail Fisher's claim even though there is good reason to suspect UT's lower admission

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133. *Fisher II*, 136 S. Ct. at 2214.

134. *Id.*

135. *Id.*

136. The Court was correct to note that "it is not a failure of narrow tailoring for the impact of racial consideration to be minor." *Id.* at 15.

137. In its *Fisher II* Supreme Court brief, UT responded to Fisher's claim that its race conscious admissions process had minimal impact on its admission of African American and Latino applicants by pointing to increases in enrollment, not admission rates. Brief for Respondents at 8, *Fisher II*, No. 14-CV-981 [hereinafter *Fisher II* Brief for Respondents] ("[B]y 2007, the number of enrolled African-American students admitted through holistic review had nearly doubled from 2004, climbing from 3.6% of the holistic class in 2004 to 6.8% in 2007. SJA 157a. Enrollment of Hispanic students likewise increased."). Similarly, UTs observation that "20% of all African-Americans students offered admission to the 2008 class, and 15% of all Hispanic students, were admitted through holistic review," *id.* at 11, ignores my analysis in Figure 4 which shows the percentage of white students admitted through holistic review was significantly higher—32.5%. *See supra* Figure 4.

138. Brief for Respondents, *supra* note 29, at 10 (citing Petitioner Appendix at 281a and 180a).

139. *See supra* Part I. The Court's discussion of this point mirrored UT's reliance on Petitioner's description of UT's policy and enrollment, not admissions data. *Fisher II*, 136 S. Ct. at 2212.

140. *See supra* Figure 1.

rates for African American and Latino students are the result of inappropriate over-reliance on SAT scores in UT's holistic review. Kennedy's vote to uphold UT's holistic review is far from a harbinger of a more affirmative-action-friendly Kennedy jurisprudence. As striking as Kennedy's vote against Abigail Fisher was as a deviation from his past votes in affirmative action cases,[141] the *Fisher II* case does not reveal any cognizable shift in the Court's or Kennedy's hyper-empathy for reverse discrimination claimants. Instead, Kennedy's treatment of UT holistic review as a racial classification warranting strict scrutiny reflects the Court's reversed equal protection doctrine.

For Kennedy, the mere fact that UT's policy was even minimally race conscious was sufficient to treat the policy as a doctrinal threat to whites—a racial classification warranting strict scrutiny review.[142] Based on little more than the fact that the doctrine is now "well established,"[143] Kennedy has remained committed to treating any and all race consciousness challenged by a reverse discrimination plaintiff as a racial classification. He has expressed the view that "there is simply no way of determining" whether "race-based measures" are motivated by a desire to be racially inclusive or "motivated by illegitimate notions of racial inferiority or simple racial politics."[144] However, Kennedy has never confronted the theoretical incoherence of holding the view that the Supreme Court lacks the capacity to determine whether a policy is motivated by inclusive purpose or invidious purpose if the policy is facially race-conscious yet viewing the Court as possessing that very capacity if the policy in question is facially race-neutral.[145] The empirical analysis in Part I of this Article offers a concrete method by which the Court can

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141. For Kennedy, the combination of Fisher's lower SAT score and UT Austin's heavy reliance on such scores demonstrates that Fisher did not have the "high, and justified, expectation[ ]," *Ricci*, 557 U.S. at 593, of admission that she would need in order to persuade Justice Kennedy that race predominated the decision not to admit her. *Fisher I*, 133 S. Ct. at 2433; *Ricci*, 557 U.S. at 627; *see also* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 654 (2015) ("[T]he [Roberts] Court has demonstrated that government may change the selection standards in competitive processes without triggering strict scrutiny if the government acts (1) with a race-conscious goal of promoting equal opportunity; (2) the government requires a selection standard that is appropriate for the context; and (3) the standard does not classify individuals by race."); Reva B. Siegel, *The Supreme Court 2012 Term Foreword: Equality Divided*, 127 HARV. L. REV. 1, 45 (2013) (arguing that "[t]he justifications for strict scrutiny in affirmative action cases no longer emphasize the importance of protecting innocent victims of affirmative action," but rather focus on constraining uses of race in order to "protect[ ] expectations of fair dealing that citizens have in interacting with the government").

142. In *Fisher I*, he admonished the Court of Appeals for not being strict enough in its application of strict scrutiny. *See* 133 S. Ct. at 2433.

143. *Parents Involved in Cmty. Sch.*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment) (noting that it is well established that when a governmental policy is subjected to strict scrutiny, the government has the burden of proving that racial classifications are "narrowly tailored" measures that further compelling governmental interests) (citing Johnson v. California, 543 U. S. 499, 505 (2005)).

144. *Id.*

145. *C.f.*, Ian Haney-Lopez, *Intentional Blindness*, N.Y.U. L. REV. 1779, 1784 (2012) ("Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose").

indeed distinguish between race-conscious admissions practices that warrant doctrinal treatment as a racial classification and race-conscious policies, like UTs holistic review, so meek they still manage to advantage whites and thus should not trigger strict scrutiny.

While there could, in theory, come a time when it would be difficult for the Court to determine whether a university added a race-conscious component to its admissions policy to disproportionally exclude whites based on a theory of white inferiority because it viewed whites as racially inferior, this was obviously not the scenario in *Fisher II*.[146] The race consciousness employed by selective American universities today is, at best, diversity-motivated and, at worst, motivated by a desire to maximize SAT scores without replacing standardized test scores with equally effective but less racially skewed admission criteria.[147]

Applying equal protection analysis in a reversed manner—favoring claims by whites, a racial group that has not been the victim of historical race discrimination in America, over the claims of nonwhites—results in a doctrinal empathy for reverse race discrimination claims and a doctrinal apathy for traditional race discrimination claims.[148] The Court should find this double standard untenable. The facts in *Fisher II*—a race-conscious policy touted as racial affirmative action that confers a white admissions advantage being challenged by a white applicant rejected for non-racial reasons—is a scenario likely to be presented to the Court in a future legal challenge. In fact, Kennedy's decision to treat UT's holistic review as a racial classification without discussion will likely embolden more rejected white and Asian American applicants to sue universities over facially race-conscious admissions policies even when the race consciousness had no negative impact on their admission.[149]

The Court should adopt a doctrinal rule that discourages a parade of future equal protection claims like Fisher's. Under this new rule, reverse discrimination claimants like Fisher whose lawsuits are based solely on claim to a race-blindness entitlement,[150] not a merit-driven claim, would be required to present evidence that the race-conscious policy they seek to challenge had a cognizable exclusionary effect

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146.   UT did not add race consciousness to its holistic review because the institution harbored the view that whites are racially inferior, nor does its minimal race consciousness disproportionately exclude white applicants at any stage. The reality is that UT is not many decades removed from an explicit legal regime that endorsed a Jim Crow racial hierarchy with whites at the top as racially superior to nonwhites. The racial composition of UT's undergraduate campus was all-white under Jim Crow laws and whites have been the most well-represented racial group at UT since then. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 633 (1950).

147.   *Cf.* West-Faulcon *Fisher I* Amicus Brief, *supra* note 14 at 27–29 (explaining theoretical deficiencies in traditional *g*-based standardized test and greater predictive power and smaller racial skew of tests based on more accurate, modern theories of intelligence).

148.   *See, e.g.*, *Davis*, 426 U.S. at 242–46 (discussing *Palmer v. Thompson* and the requirement that plaintiffs prove discriminatory effect of policy challenged under the Equal Protection Clause).

149.   *See, e.g.*, Complaint, Students for Fair Admissions Inc. v. Univ. of N.C., No. 1:14-CV-00954, 2017 WL 213940 (M.D.N.C. Jan. 13, 2017); Complaint, Students for Fair Admissions, Inc. v. President of Harvard Coll., No. 14.-CV-14176, 2015 WL 3683230 (D. Mass. June 15, 2015).

150.   *See generally* West-Faulcon, *Forsaking Claims of Merit*, *supra* note 6.

on whites.[151] The current untenable doctrinal double standard could be resolved by requiring reverse discrimination claimants to demonstrate race has had some empirically verifiable impact on the outcomes of the admissions policy at issue in order to constitute a racial classification triggering strict scrutiny. Doctrinally, reverse discrimination claimants should be required to prove racially discriminatory impact.[152] Otherwise, the Court will no doubt be faced with deciding more reverse discrimination claims "gone wild."[153]

CONCLUSION

The equal protection doctrine the Court has developed in affirmative action cases over the past four decades has lost its logical connection to its articulated goal of protecting non-beneficiary races from the harms of racial affirmative action. Kennedy's unquestioned application of strict scrutiny to rejected white applicant Abigail Fisher's equal protection challenge of an admissions policy that selected whites at twice the rate it selected African Americans and Latinos indicates the Court's equal protection jurisprudence is no longer tethered to correcting racialized harm. While the outcome in *Fisher II* was cause for celebration by proponents of racial affirmative action, the doctrinal rule—strict scrutiny—applied by the Court shows Justice Kennedy remains tied to a reversed theory of equal protection that is intensely sensitive to concerns of reverse discrimination and remains unwelcoming to the application of equal protection limits to facially race-neutral policies that unjustifiably exclude African Americans and Latinos.

Contrary to Abigail Fisher's claim that UT's holistic review process constituted reverse discrimination against her, this Article has presented admissions rate analysis that shows that white students evaluated under UT's race-conscious holistic review were admitted at a higher rate than all other racial groups—22.3%. This was more than double the admission rate for Latino and African American applicants and the racial disparity in selection was so large that it likely constitutes prima facie evidence of Title VI disparate impact discrimination against African Americans and Latinos, particularly when considered in light of the heavy weight UT's holistic review gave to SAT scores.

Giving such a high degree of reverse discrimination judicial scrutiny to an admissions policy that selected white students twice as often as African American

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151.   *Cf.* Robinson, *supra* note 10, at 184 (considering "how radically different the law would be" if Abigail Fisher "had to establish not that Texas applied a racial classification, but that Texas harbored animus toward white people").

152.   The Court has never required reverse discrimination plaintiffs to demonstrate racially discriminatory effect against members of their racial group. *See, e.g.*, *Fisher II*, 136 S. Ct. 2198; *Fisher I*, 133 S. Ct. 2411; *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *J.A. Croson Co.*, 488 U.S. 469; *Bakke*, 438 U.S. 265. My point here is that a lesson to be taken from the *Fisher* litigation is that the Court should start doing so. Justice Kennedy discussed the lack of evidence that UT's race conscious had a negative impact on Fisher's rejection but never suggested that fact should have a doctrinal consequence.

153.   *Fisher II*, 136 S. Ct. at 2232 (Alito, J., dissenting) (describing UT's holistic review admissions policy as affirmative action "gone wild").

and Latino students puts the Court's interpretation of the Equal Protection Clause at war with the original purpose of the clause—protecting the victims of racial subjugation. This makes *Fisher II* emblematic of the perverse results of the reversing of equal protection. Although it ultimately upholds UT's holistic review as constitutional, Kennedy's application of strict scrutiny in *Fisher II* exalts the reverse discrimination claims of whites and makes no mention of how poorly African Americans and Latinos fared under holistic review compared to whites and Asian Americans. Requiring reverse discrimination plaintiffs to demonstrate a policy's cognizable group-based racialized impact in order to trigger strict scrutiny would be an important first step in righting the Court's enduring equal protection reversal.