WHATEVER HAPPENED TO THE *GREEN* FACTORS? AFFIRMATIVE ACTION THROUGH THE LENS OF DESEGREGATION LAW

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I.
INTRODUCTION

The use of race in university admissions remains one of the most contentious issues brought before federal courts in the United States. Race-conscious admissions policies evoke two diametrically opposed notions: painful, troubling, and often poorly-confronted history of racial inequality in this country; and the desire to remedy or otherwise correct for past and recurring injustices through the acknowledgement of racial identity in government programs. The latter notion is the basis for what are known as affirmative action policies.

Although affirmative action policies aim to end racial discrimination and encourage racial diversity in response to historical inequities,1 the Supreme Court's Fourteenth Amendment jurisprudence requires that any state actor

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[1] *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 328 (1978) (5-4 decision) (Brennan, J., dissenting in part).

promulgating a racial classification pass strict scrutiny: requiring a state actor, in this case the university, to demonstrate that the action in question is narrowly tailored to further a compelling government interest.2 That test strikes an uneasy compromise between the purpose of the Reconstruction Amendments—to eliminate the vestiges of slavery and discrimination—and the purpose of a diverse, integrated student body.

The Supreme Court has in recent years focused on whether affirmative action policies meet the second requirement of strict scrutiny: the "narrow tailoring" requirement.3 After being put on notice by the Court's earlier decisions that outright quotas or boosts are unconstitutional,4 universities have attempted to justify their policies by arguing that they are not quotas, but simply aimed at achieving a "critical mass" of diversity.5 The failure to define or properly cabin critical mass has been met with skepticism and incredulity from the Court.6

The benefits of racial diversity in education, and the need for affirmative action policies to improve minority enrollment in higher education, cannot be understated.7 As such, American society seemingly remains at an impasse where a desirable but vague policy goal cannot be reconciled with the strictures of the law.

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[2] *See generally* Korematsu v. United States, 323 U.S. 214, 216 (1944); Shaw v. Hunt, 517 U.S. 899, 902 (1996) (articulating the standard for strict scrutiny as narrowly tailored to serve a compelling government interest).

[3] For example, at oral argument in *Fisher v. University of Texas at Austin*, attorneys supporting the University of Texas's race-conscious admissions policies faced relentless questioning on the second prong of the strict scrutiny test: whether the program was narrowly tailored to the university's interest in student diversity. Transcript of Oral Argument at 14, 16, 19, 34, 35, 39, 45–50, Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411 (2013) (No. 11-345).

[4] *See* Fisher I, 133 S. Ct. at 2416, 2418 (discussing the unconstitutionality of quotas and automatic admission points awards for minority students).

[5] *See* Grutter v. Bollinger, 539 U.S. 306, 318 (2003) (discussing testimony of Dennis Shields, then Director of Admissions at the University of Michigan School of Law, in which Mr. Shields testified that the admissions policy aimed to achieve a critical mass of minority representation).

[6] *Id.* at 48 (Chief Justice Roberts: So, I say—when you tell me, that's good enough.).

[7] *See generally* Patricia Gurin, Eric L. Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 362 (2002). Some theorists, and at least one Justice, vehemently oppose affirmative action. *See* Mark T. Terrell, *Bucking Grutter: Why Critical Mass Should Be Thrown off the Affirmative Action Horse*, 16 TEX. J. ON C.L. & C.R. 233 (2011); *Fisher I*, 133 S. Ct. at 2422 ("I write separately to explain that I would overrule *Grutter v. Bollinger* . . . .") (Thomas, J., concurring). Yet studies show that minority enrollments in many large public universities increase as a result of affirmative action admissions programs. *See generally, e.g.*, David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STANFORD L. REV. 1855 (2005). These increases are considered positive improvements, given that minority representation in higher education is significantly lower than minority representation in the general population.

Affirmative action has received a barely passing grade from the Court in the latest round of legal challenges.8 Currently, that affirmative action continues to pass constitutional muster is in no small part a function of the make-up of the Court. Justice Kennedy, despite having dissented in *Grutter*—the seminal case upholding affirmative action in college admissions, has upheld the affirmative action program at the University of Texas (UT).9 But new challenges to the policies of other universities are underway, and this time they seek to pit Asian-American plaintiffs against other minority students, breaking the traditional mold of a white student plaintiff. Two complaints have been filed, one against Harvard University and another against the University of North Carolina at Chapel Hill. Both challenge the race-conscious admissions policies of the universities, but this time seek to pit one racial minority—Asian Americans—against the others.10 Worse still, the current administration under President Trump has clearly indicated that universities' affirmative action policies will be independently scrutinized for their alleged discrimination against white applicants.11

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[8] Although the Court upheld the University of Texas's affirmative action program, it admonished against "elusory or amorphous" goals in achieving diversity. Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198, 2211 (2016).

[9] *See* Grutter, 539 U.S. at 387 (Kennedy, J., dissenting).

[10] *See* Compl. ¶ 5, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176-ADB) (arguing that Harvard's affirmative action policies, lauded by the Supreme Court in *Regents of the University of California v. Bakke*, were nothing more than "invidious discrimination against Asian Americans"). Students for Fair Admissions (SFAA) filed a similar complaint three days later against the University of North Carolina. *See* Compl. ¶ 2, SFAA, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. Jan. 13, 2017) (No. 14-cv-00954-LCB-JLW). Commentators have suggested that Justice Alito's dissent in *Fisher II* effectively invited suits from racial minorities challenging the impact of affirmative action policies in higher education. *See* Stephanie Mencimer, *Affirmative Action Won, but Now it Faces a Far Bigger Threat*, MOTHER JONES (Jun. 24 2016), http://www.motherjones.com/politics/2016/06/samuel-alito-fisher-v-texas-affirmative-action/ [https://perma.cc/4XKJ-RVLD]. The United States District Court for the District of Massachusetts has not rendered a decision on the merits of the Harvard lawsuit, but last June it denied a motion to intervene filed on behalf of Harvard students who argued that "Harvard's defense of its admissions procedures . . . would not be as zealous as [the students' defense of those procedures]." *President & Fellows of Harvard Coll.*, 308 F.R.D. at 44. The response to this new chapter in the effort to end affirmative action has been mixed, but a growing chorus of commentators argue that Asian Americans should not be used as pawns in any legal challenge to undo affirmative action. *See* Stewart Kwoh & Mee Moua, *On Affirmative Action, Asian Americans "Are Not Your Wedge"*, NBC NEWS (Jul. 19, 2016), http://nbcnews.to/2aqf2dg [https://perma.cc/X5M8-4843]; Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian Americans*, NEW YORKER (Aug. 10, 2017), https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans [https://perma.cc/7Q2Y-TUNN] (arguing in favor of race-conscious admissions because of their positive impact on Black and Latino student enrollment); Jennifer Lee, *Ending Affirmative Action Will Hurt us all*, NBC NEWS (Jun. 28, 2017), https://www.nbcnews.com/think/news/opinion-ending-affirmative-action-will-hurt-us-all-ncna777751 [https://perma.cc/6JZ3-ZHAB].

[11] Although the Department of Justice has not claimed that its investigations amount to a policy shift, the calls for volunteers to assist in an investigation of affirmative action policies is a remarkable

The legitimacy of affirmative action policies, on which thousands of students of color depend to overcome systemic racism and other socioeconomic barriers, cannot turn on the pendency of a single Justice on the Supreme Court. Proponents of affirmative action need a better way to justify the policy before the courts and under the Constitution.

The heart of the criticism of "critical mass" is the term's vagueness. And when viewing affirmative action as a line of cases beginning with *Bakke* and ending with *Fisher II*, the criticism of critical mass appears justified. Within affirmative action cases alone, the Court has never before had to contend with defining a concept such as critical mass. More broadly within racial justice and education, however, vagueness is not a new challenge.

When assessing the progress of school boards under court orders to desegregate in the aftermath of *Brown v. Board of Education*,12 the Court not only endorsed but actively welcomed the use of similarly vague metrics to determine if school boards had sufficiently desegregated. These metrics are commonly referred to as the *Green* factors: a set of factors by which a federal court could qualitatively, and rather vaguely, ascertain whether a school has sufficiently complied with the mandate of *Brown*.

This article proposes a novel but jurisprudentially sound way of justifying a standard such as critical mass: by increasing the generality with which courts view affirmative action and placing these policies in context with desegregation, vagueness becomes less constitutionally perilous and a more well-founded compromise between courts and schools. Part I briefly reviews the outcomes of affirmative action and desegregation case law; Part II draws connections between assessing unitary status and assessing critical mass, demonstrating that there is no meaningful distinction between the two approaches; Part III concludes by suggesting that the Court can resolve one of the central uncertainties in affirmative action jurisprudence by looking no further than its own precedent.

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break from prior policy. *See* Libby Nelson, *The Trump Administration's New War on Affirmative Action, Explained*, VOX (Aug. 2, 2017), https://www.vox.com/policy-and-politics/2017/8/2/16084740/trump-affirmative-action-justice-department-college-admissions [https://perma.cc/4SSE-SPG4]; Katie Reilly, *The Trump Administration Is Set to Probe College Affirmative Action for Discriminating Against White Students*, TIME MAGAZINE (Aug. 3, 2017), http://time.com/4883793/justice-department-college-admissions-affirmative-action/ [https://perma.cc/3HXK-SKX8]; Alia Wong, *The Thorny Relationship Between Asians and Affirmative Action*, ATLANTIC (Aug. 3, 2017), https://www.theatlantic.com/education/archive/2017/08/asians-affirmative-action/535812/ [https://perma.cc/Q93N-G8KW].

[12] Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954).

II.
BACKGROUND

A. Affirmative Action Today

Affirmative action is a concept that refers to the executive orders of multiple administrations, which required public employers and government agencies not simply to refrain from racial discrimination (i.e., negative action), but to actively increase the representation of minorities in public contracting.13 The link between affirmative action, racial equality, and public education was codified in the comprehensive Civil Rights Act introduced and signed into law by President Lyndon B. Johnson.14

The consideration of race by state actors and the import of such considerations in legal challenges pre-dates the surge in affirmative action policies of the 1950s and 1960s. In fact, far from the remedial, conciliatory, and positive message behind affirmative action and the Civil Rights Act, consideration of an individual's racial identity evokes a painful, troubling, and conflicted past within the Supreme Court's jurisprudence and the American sociopolitical conscience writ large.15 The need for "more searching scrutiny" was born of this past.16

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[13] *See* Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965); Exec. Order No. 11625, 36 Fed. Reg. 19,967 (1971); Exec. Order No. 12138, 44 Fed. Reg. 29,637 (1979). Notably, affirmative action is not a policy choice expressly reserved for racial equality. In the first instance, it was used as a tool of achieving labor equity. *See* National Labor Relations Act, 29 U.S.C. § 150 *et seq.* (1935). More directly applied to racial inequality, the Truman Administration also began issuing executive orders requiring integration of the United States Armed Forces as early as 1948, and later extending the requirement of affirmative steps towards non-discriminatory state action to the arena of federal contracts bidding. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948); Exec. Order No. 10308, 16 Fed. Reg. 12,303 (1951). Specific reference to affirmative action could be found, more prominently referencing race and national origin, in President Kennedy's order that government contractors take "additional affirmative steps . . . to realize more fully the national policy of non-discrimination," Exec. Order No. 10925, 26 Fed. Reg. 1977, §§ 201 (1961),and "take affirmative action to ensure that applicants . . . and employees are treated during employment[] without regard to their race, creed, color, or national origin," *id.* § 301.

[14] Civil Rights Act, 42 U.S.C. § 2000 *et seq.* (1964). The act was controversial; indeed, its sheer reach, as opposed to that of previous executive orders (which could be undone by subsequent presidents), sparked debate about whether the act merely required racial quotas—a fixed number of members of a racial minority that would signify compliance with the relevant executive order or provision of the act—or whether it simply codified an interest previously expressed only by the executive branch. *Id.* at § 2000e-2; TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 39 (2004) (tying the Civil Rights Act to the desegregationist and egalitarian policies advocated by the seminal report titled "To Secure These Rights," issued by the President's Committee on Civil Rights, established during the Truman Administration); *see also* Exec. Order No. 9808 (1946) (establishing Committee on Civil Rights).

[15] *See* United States v. Amistad, 40 U.S. 518, 518 (1841) (referring to enslaved Black individuals as "property"). In *Dred Scott v. Sandford*, the Court held that no Black individual, even someone freed from slavery, could be considered a citizen of the United States. 60 U.S. 393, 400 (1856). But the passage of the Fourteenth Amendment was hardly the harbinger of a post-racial America, and the promise of "equal protection under the law" on paper was neither a shield from, nor a sword against,

The reason behind the strict scrutiny standard's unwillingness to differentiate between malicious and remedial measures can be found in the standard's evolution from a footnote to a meticulous standard.17 By 1973, the Court reached the current form of the test, which asks whether there is a compelling state interest and whether the action or statute has been narrowly tailored to that interest.18

Race-conscious government policies backed by good intentions received no special treatment by the Court. The exact nature of these policies has varied over the past four decades, beginning with an outright quota that created a wholly separate "special admissions program" for minority or economically disadvantaged students, who would be admitted in specific prescribed numbers by the admissions committee.19 In *Bakke*, Justice Powell reasoned that consistency required an application of strict scrutiny regardless of the motivation for the racial classification.20 The Court considered and rejected the argument, advanced by the University of California in that case, that a racial classification that was motivated by benign or remedial interests did not warrant strict scrutiny.21

The *Bakke* Court identified the only two remaining justifiable compelling interests on which institutions of higher education may rely to satisfy the first

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perverse incentives to segregate Black Americans from white Americans. In interpreting the Fourteenth Amendment some thirty years after its ratification, the Court resisted mingling races by upholding separate-but-equal policies in nearly all public fora, including education. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

[16] United States v. Carolene Prods. Co., 304 U.S. 144, 151 n.4 (1938). Justice Stone recognized that the reason for applying higher standards of scrutiny to regulations considering race or national origin was that the "political processes ordinarily to be relied upon to protect minorities" were at risk of being abrogated.

[17] However, the first instance of the Court's highest test, strict scrutiny, was applied six years later in *United States v. Korematsu*. 323 U.S. 214 (1944). Challenging internment of Japanese individuals during World War II on the basis that it violated the Equal Protection Clause of the Fourteenth Amendment, Korematsu alleged that his internment was predicated solely on his national origin. *Id.* at 215–16, 223. The language of this test has varied in some degree, but at least three lines of inquiry have always been absolutely clear: (1) whether there was a fundamental right or constitutional guarantee at stake; (2) whether the statute or state action furthered a compelling state interest; and (3) the breadth of the regulation furthering said interest. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526, 533 (1963).

[18] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17, 31 (1973).

[19] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 265–66 (1978). The program aimed to achieve a quota of racial minority medical students, prescribing eight students through the special program when the class size was fifty, and sixteen when the class size increased to one hundred. *Id.* at 275 ("[I]n 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16.").

[20] *Id.* at 299 ("When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is *precisely* tailored to serve a *compelling* governmental interest.") (emphasis added).

[21] *Id.* at 298–99 ("First, it may not always be clear that a so-called preference is in fact benign.") (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 172–73 (1977)). The Court also rejected generalized remedial interests, noting that there was no evidence that the "[u]niversity engaged in a discriminatory practice requiring remedial efforts." *Id.* at 305.

prong of the strict scrutiny test. First, the Court recognized that a compelling interest was met where a university enacted its policy to combat or address past or ongoing *de jure* racial discrimination.22 Second, a university has a compelling interest in the benefits that flow from student body diversity.23

Although the University of California admissions policy advanced a compelling interest, the Court rejected an explicit quota system because it was not narrowly tailored. The consideration of racial identity needed to be one of several factors considered by an admissions program, and the program could "not insulate the individual from comparison with all other candidates for the available seats."24

Subsequent developments further solidified the idea that an admissions policy that favored applicants of color *automatically* would never pass strict scrutiny. The two cases, reported in sequence and decided on the same day, involved the University of Michigan's undergraduate admissions program (*Gratz*) and its law school admissions program (*Grutter*).25

The undergraduate program at issue in *Gratz* admitted applicants who received at least one hundred points on the admissions scale. While applicants were evaluated on a myriad of factors, applicants of a particular racial minority were automatically awarded a "twenty point boost."26

The law school program at issue in *Grutter* did not employ a point system, but instead used a holistic admissions process that took into account LSAT scores, grades, personal statements, letters of recommendation, and various diversity factors, which included consideration of an applicant's race.27

The *Gratz* Court rejected the undergraduate admissions program for not being narrowly tailored, because the program automatically gave a twenty-point boost to anyone self-identifying as a member of a racial minority group. The program failed in significant part because the Court deemed the *number* of points awarded to be "decisive for virtually every [minority] applicant."28 A different result obtained in

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[22] *Id.* at 307 ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.").

[23] The justification for this interest is grounded in universities' right, derived from the First Amendment, to shape their academic environment as they see fit. *Id.* at 312. In doing so, the basis for using diversity as a compelling interest is because universities, under the First Amendment, must be given freedom to "make [their] own judgments . . . who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

[24] *Id.* at 317.

[25] Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[26] *Gratz*, 539 U.S. at 255–56 ("During 1999 and 2000, the [Office of Undergraduate Admissions] used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points.").

[27] *Grutter*, 539 U.S. at 314–15.

[28] *Gratz*, 539 U.S. at 274 (O'Connor, J., concurring). While we are left to ponder whether awarding a smaller number of points, so that race would no longer be a "decisive" factor, would have passed constitutional muster, it is likely that no affirmative action program that awarded points for racial minority status would be upheld today.

Grutter, where the admissions plan appeared to be a paraphrase of Justice Powell's opinion in *Bakke*.29 All of the administrators who testified regarding the specifics of the law school's admissions program stated that the university's aim was to achieve a diverse student body by enrolling a critical mass of minority underrepresented students.30

The *Grutter* majority grappled with the definition of critical mass, without much success. Definitions offered in testimony ranged from defining critical mass as "meaningful representation," such that no member of a minority would feel like a spokesperson for her race, to the need to consider race in order to prevent isolation and encourage a diversity of perspectives in the classroom.31

The Court attempted to define critical mass by what it was *not*. It noted that only quotas or automatic point systems were constitutionally proscribed, and because the critical mass of students of different racial backgrounds varied substantially from year to year, the program was not a front for an impermissible quota system.32 But the dissenters took the majority to task, roundly criticizing critical mass as a quota shrouded in smoke and mirrors.33 The questioning of the university's attorneys was particularly pointed on the issue of what constituted critical mass, resulting in memorable quotes from the late Justice Scalia.34

The vagueness of critical mass was also roundly criticized in *Fisher I*, the UT at Austin admissions case, despite the fact that race was a "factor of a factor of a factor."35 Affirmative action in the UT system has a fraught history. Before 1996,

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[29] *Grutter*, 539 U.S. at 314 ("[T]he Law School sought to ensure that is efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admission.") (citing *Bakke*, 438 U.S. 265)).

[30] *Id.* at 306.

[31] *Id.* at 318–19. A former professor of the law school stated that *when* a "critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 319–20.

[32] *Id.* at 336 ("[B]etween 1993 and 1998, the number of [underrepresented minority] students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.").

[33] *Id.* at 349 (Scalia, J., concurring in part and dissenting in part) ("[O]ther suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved 'critical mass.'"). Justice Thomas took a different approach in his dissent, arguing that the Court could not claim that historically Black colleges produced educational benefits while advocating racial diversity. *Id.* at 365 (Thomas, J., concurring in part and dissenting in part) ("It follows, therefore that an [historically Black college]'s assessment that racial homogeneity will yield educational benefits would similarly be given deference.").

[34] Transcript of Oral Argument at 39–40, *Grutter*, 539 U.S. 306 (No. 02-241).Justice Scalia eventually asked the attorney point-blank whether he thought that the Constitution prohibited fixing the proportion at ten percent, but permitted a range between eight and twelve percent. *Id.* at 40 (Justice Scalia: "If you said 10 it's bad you [sic] but between 8 and 12 it's okay, because it's not a fixed number? Is that—that's what you think the Constitution is?").

[35] *See Fisher I*, 133 S. Ct. 2411, 2434 (2013). The history of affirmative action at the University Texas is particularly fraught, beginning with a race-neutral policy, then grappling with a race-conscious program, and finally ending with some hodgepodge hybrid of both. *Id.* at 2415–16.

UT considered the academic credentials of its students and ranked them on an "Academic Index."36 Dissatisfied with the potential minority enrollment as a result of this index, UT began considering race as a secondary element. Later, in *Hopwood v. Texas*, the Court of Appeals for the Fifth Circuit prohibited any consideration of race in UT's admissions decisions, effectively barring affirmative action at the university.37 UT responded in a way that most opponents of affirmative action suggest as the appropriate alternative: by implementing a facially race-neutral "Personal Achievement Index" to complement the Academic Index, which considered socioeconomic factors that would disproportionately implicate minority applicants.38 A year later, Texas legislators enacted the "Top Ten Percent Law," which automatically awards admission into UT to the top ten percent of students from each high school in the state.39 While this race-neutral approach has increased minority enrollment, Justice Ginsburg has pointed out that this increase is likely the consequence of segregation in Texas high schools.40 The UT system admits nearly eighty percent of students using the race-neutral Top Ten Percent Law. The remaining seats are awarded through a holistic admissions process in which race is a factor of a factor (the personal achievement score) of a factor (the Academic Index and Personal Achievement Index).41

In *Fisher I*, challenging UT's current program, Justice Kennedy wrote for the Court, concluding that insufficient data and consideration of race-neutral alternatives warranted a remand of the case. No clear decision was rendered on whether "critical mass" was constitutional.

The term critical mass appeared eight times at oral argument during *Grutter*.42 In the decision validating that concept, it appeared fifty-seven times.43 Thirty of those appearances were in dissenting opinions, indicating the *Grutter* Court's frustration and bewilderment with the concept. In contrast, critical mass was used

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[36] *Id.* at 2415.

[37] Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. 306. The *Hopwood* decision was predicated on the idea that diversity was not a compelling state interest. *Id.*at 948.

[38] *See Fisher I*, 133 S. Ct. at 2415–16.

[39] *See* TEX. EDUC. CODE ANN. § 51.803(a) (West 2009) ("[E]ach . . . institution shall admit an applicant . . . if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class . . . .").

[40] Presumably some contributing factor to the success of the Top Ten Percent Law is that there may be de facto segregation in Texas high schools. *See Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (noting that the House Research Organization's Bill Analysis found that the Top Ten Percent Law produced diversity because it took advantage of de facto segregation in Texas high schools); *see also* Proposal to Consider Race and Ethnicity in Admissions, *Fisher I* Supp. App. 1a.

[41] Fisher v. Univ. of Tex., 758 F.3d 633, 656 (5th Cir. 2014) ("Holistic review allows selection of an overwhelming number of students by facially neutral measures and for the remainder is only a *factor of factors*.") (emphasis added).

[42] *See* Transcript of Oral Argument, *Grutter*, 539 U.S. 306 (No. 02-241).

[43] *See Grutter*, 539 U.S. 306.

forty-nine times at oral argument in *Fisher I*, but only appeared *twice* in the opinion.44

After the Supreme Court remanded the case to the Court of Appeals, the Fifth Circuit once again considered the UT program.45 Rejecting Fisher's proffered race-neutral alternative—the consideration of socioeconomic status instead of race46—the Court of Appeals noted that many more white students would be admitted over a Black student of the same income bracket.47 Here too, the Court of Appeals did not engage with critical mass, which dissenting Judge Garza noted.48

In *Fisher II*, UT's admissions program went before the Supreme Court a second time.49 Critical mass received less focus at oral argument.50 Questioning focused instead on the nature of the program itself, and whether it was necessary in light of how many minority applicants were admitted via the Top Ten Percent Law program.51 The term critical mass only appeared twice in the majority opinion upholding the policy, but featured heavily in Justice Alito's bristling dissent.52

The majority was fairly conciliatory to the university's predicament, stating that "[the university] cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained," primarily because doing so would render the program an unconstitutional quota under *Bakke*.53 But that does not amount to an endorsement

[44] At oral argument, the lawyer arguing for UT was assailed with questions about the concept. Transcript of Oral Argument at 39–42, 45–48, 51–52, 69–70, *Fisher I*, 133 S. Ct. 2411 (No. 11-345). When then Solicitor General Verrilli, arguing as amicus curiae in support of UT, failed to provide an adequate explanation of critical mass and what factors UT would use to know that it achieved critical mass, Justice Scalia mockingly suggested that he instead call it a "critical cloud." *Id.* at 72 (Justice Scalia: "Call it a cloud or something like that."). Petitioners were not spared the Court's grilling, either. *Id.* at 10–11, 14 (questioning why findings of racial isolation were not germane to whether critical mass was necessary, and whether petitioner could provide a definition of critical mass).

[45] *Fisher*, 758 F.3d at 633.

[46] *Id.* at 656–57.

[47] *Id.* ("To the point, we are ill-equipped to disentangle [race, class, and socioeconomic structures] and conclude that skin color is no longer an index of prejudice.").

[48] *Id.* at 667 n.9 (Garza, J., dissenting) ("To conduct our own independent assessment of narrow tailoring . . . we must question the University's explanation of 'critical mass' . . . .").

[49] Fisher II, 136 S. Ct. 2198 (2016).

[50] *Compare* Transcript of Oral Argument, Fisher I, 133 S. Ct. 2411 (2013) (No. 11-345) ("critical mass" appearing forty-six times) *with* Transcript of Oral Argument, Fisher II, 136 S. Ct. 2198 (No. 14-981) ("critical mass" appearing only seven times).

[51] *See generally* Transcript of Oral Argument at 39, 47, 50-51, Fisher II, 136 S. Ct. 2198 (2016) (No. 14-981) (questioning attorney for Respondents on the necessary inquiry for the race-conscious policy).

[52] *Compare* Fisher II, 136 S. Ct. 2198, 2198 (majority opinion) (using term 'critical mass' twice), *with id.* at 2215 (dissenting opinion of Alito, J.) (Alito, Thomas, JJ., and Roberts, C.J., dissenting) (discussing critical over twenty-five times).

[53] *See Fisher II*, 136 S. Ct. 2198, 2210 (2016).

of critical mass. Indeed, the unique situation of UT's admissions program might have been the reason that its consideration of race was upheld.54

The *Grutter-Fisher* basis for critical mass is a tenuous precedential foundation at best, and its future may depend entirely on the retirement or death of Justice Kennedy, a notion widely discussed among media publications.55

Nevertheless, *Grutter*, *Fisher I*, and *Fisher II* suggest that the concept of critical mass is here to stay. A university cannot refuse to describe its affirmative action policy because that would flout the purpose of the tailoring requirement. It also cannot pinpoint a number or percentage of minority enrollment that constitutes critical mass because that would constitute a quota. The catch-22 of affirmative action has seemingly left universities with no option.

In sum, what little is known about the features of critical mass is underwhelming: (1) minority students' participation in the classroom, without feelings of being racially isolated or spokespeople for their race;56 (2) improved educational quality as a result of more diverse viewpoints in the classroom fostering "spirited, and simply more enlightening" discourse;57 (3) attainment of a higher degree of professionalism among students, preparing them for a diverse workforce;58 and (4) civic engagement within the school and at large.59 Achieving the foregoing is unlikely to face controversy or broad disagreement. Therefore, if programs or policies could be implemented to attain those four features without a race-conscious admissions program, then the debate over affirmative action would be resolved.

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[54] *Id.* at 2212 ("It is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a *hallmark* of narrow tailoring, not evidence of unconstitutionality.") (emphasis added).

[55] Commentators have discussed the potential impacts of Justice Kennedy's departure from the Court. *See, e.g.*, Ruth Marcus, *The Terrifying and Terrible Prospect of Justice Kennedy Retiring*, THE WASH. POST (Jun. 23, 2017), https://www.washingtonpost.com/opinions/the-terrifying-and-terrible-prospect-of-justice-kennedy-retiring [https://perma.cc/S8WH-ZCDS]. These opinions are not exaggerated; currently, four Justices can reliably be expected to vote in favor of affirmative action: Justices Breyer, Ginsburg, Kagan, and Sotomayor. Justice Thomas has been consistent in his calls for *Grutter* to be overruled, though for different reasons than Justice Alito and Chief Justice Roberts. *See Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) ("I write separately to reaffirm that 'a State's use of race in higher education admissions is categorically prohibited by the Equal Protection Clause.'") (quoting *Fisher I*, 133 S. Ct. 2411, 2422 (Thomas, J., concurring)). Newly-confirmed Justice Gorsuch has not previously opined on affirmative action, but is expected to be "reliabl[y] conservative" on the topic. *See* Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html?_r=0 [https://perma.cc/F46T-TTYQ].

[56] Grutter v. Bollinger, 539 U.S. 306, 319 (2003).

[57] *Id.* at 330.

[58] *Id.*

[59] *Id.* at 330–33.

B. The Impact of Affirmative Action Bans and Race-Neutral Alternatives

It would be imprudent to take as a given the need or positive impact of affirmative action policies. If, empirically, affirmative action fares no better than race-neutral alternatives with respect to improving minority enrollment, then the task of justifying critical mass becomes irrelevant. Conversely, if the potential loss of affirmative action as a tool to increase student diversity could negatively impact minority enrollment, then it would be useful to attempt to justify the only means of achieving student diversity that has withstood the narrow tailoring prong. Enrollment gaps and demographic representation are a good estimate of whether higher education admissions reflect the representation of society at large. Over the past few decades, both academics and the judiciary have examined the data.

The *Bakke* Court noted that when the University of California Medical School at Davis opened in 1968, there were three Asian students out of a class of fifty; the rest were white.60 Once the quota system was implemented, minority enrollment greatly increased.61 But for the affirmative action policy, eighty-nine percent of the class would have been white.62

Minority enrollment data is often best contextualized with demographics of the general population, specifically through the measure of enrollment gaps. Enrollment gaps are the difference between the proportion of a certain demographic in the general population and the proportion of that same demographic in higher education. In 1970, the California Department of Finance estimated that the Latino population comprised twelve percent of the total population of California, the Black population comprised close to seven percent of the total, and Asians comprised three percent of the total.63 When Californians voted to abolish affirmative action,64 Latino enrollment in higher education

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[60] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 272 (1978).

[61] The number of minority students admitted between 1971 and 1974 was sixty-three, essentially an average of sixteen students per year. *Id.* at 275–76 n.6.

[62] University of California, Davis admitted twenty-one Black students, thirty Latino students, and twelve Asian students through its two-track program. *Id.* at 275. Those minority students admitted through the regular program numbered only forty-four: one Black student, six Latino students, and thirty-seven Asian students. *Id.* at 275–76. Including the special program, the actual average graduating class for a given year was 5.5 percent Black, 9 percent Latino, and 12.25 percent Asian. In any given year, without the special program, a graduating class would on average have been 0.25 percent Black, 1.5 percent Latino, and 9.25 percent Asian.

[63] BELINDA I. REYES, JENNIFER CHENG, ELLIOT CURRIE, DANIEL FRAKES, HANS P. JOHNSON, ELIZABETH BRONWEN MACRO, DEBORAH REED, JOSÉ SIGNORET & JOANNE SPETZ, A PORTRAIT OF RACE AND ETHNICITY IN CALIFORNIA 9 (2001).

[64] CAL. CONST. art. I § 31(a), (f) (West 2015) ("The State shall not discriminate against, or grant preferential treatment to, any individual group on the basis of race . . . in the operation of public employment, public education, or public contracting."). This provision did not pass without challenge. On two separate occasions, the Ninth Circuit heard challenges to Proposition 209 on the basis that it violated the Equal Protection Clause, and in both occasions the challenges were denied. Coal. for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997); Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012) [hereinafter CDAA]. In *CDAA*, the Ninth Circuit upheld

increased in terms of absolute numbers,65 but the enrollment gap for Latino students increased by about ten to fifteen percent between 1996 and 2010.66 For Black students, enrollment decreased, although the enrollment gap increased.67 In one instance in California, the affirmative action ban led to drastic results: not a single Black student enrolled in the California Institute of Technologyfor the fall of 1999.68

California is but one example. Texas temporarily banned affirmative action after *Hopwood*,69 but UT remarked that because of the ban, "diversity plummeted."70 When the policies were later reinstated after *Grutter*, Black student representation at UT increased from 3.6 percent in 2004 to 6.8 percent in 2007.71 Texas nearly perfectly demonstrates the cause and effect of permitting affirmative action, banning it, and reinstating it.

In 2006, despite *Grutter*, Michiganders voted to amend their state constitution via Section 26 (or Proposal 2), and they banned affirmative action in the state. In *Schuette v. Coalition to Defend Affirmative Action*, the Court upheld Michigan's ban on affirmative action.72 The Court was careful to state that the case was not a pronouncement on the merits of race-conscious admissions policies, but simply a ruling on the issue whether a state legislature may vote to ban a certain state practice.73

Section 26 drove minority enrollment down once it took effect, with Black students representing only 4.4 percent of the 2012 graduating undergraduate class at the University of Michigan, the lowest since 1991. The enrollment gap increased

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Proposition 209 against the challenge that public universities were still allowed to use legacy status as a factor in admissions, which would disproportionately prefer white applicants over applicants of color. It has been empirically shown that legacy status is a highly accurate proxy for white students, and that in several universities, students who have legacy status outnumber students of color.

[65] UNIV. OF CAL. OFFICE OF THE PRESIDENT, APPLICANTS, ADMITS, AND NEW ENROLLEES BY CAMPUS, RACE/ETHNICITY (2012).

[66] Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. TIMES (June 24, 2013), http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html [https://perma.cc/4ZF7-XTFR].

[67] *Id.* Affirmative action policies dramatically improve Black representation at California universities. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (Princeton University Press ed., 1998).

[68] Leo Reisberg, *A Top University Wonders Why It Has No Black Freshmen*, CHRONICLE OF HIGHER EDUC., Apr. 28, 2000, at A52 [available online with subscription].

[69] Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

[70] Br. for Respondents 5–6, Fisher II, 136 S. Ct. 2198 (2016) (No. 14-981) ("After the Fifth Circuit invalidated UT's consideration of race . . . diversity plummeted."). Black student enrollment in 1997, compared to 1995, dropped forty percent, and Latino student enrollment dropped five percent. *Id.* at 6. The enrollment gap in 1995 was twenty-three percent for Latinos and eight percent for Black students. In 1997, it was twenty-six percent and eleven percent, respectively. *Id.*

[71] *Id.* at 10–11.

[72] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014).

[73] *Id.* at 1625 ("This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education.").

from ten percent to fifteen percent for Black students and increased from nine percent to twelve percent once Section 26 took effect in 2008.74

There is a growing trend toward enacting affirmative action bans via state ballot initiatives and popular referenda. Nebraska, Arizona, and most recently Oklahoma have all banned affirmative action.75 For at least some of these states, enacting a ban may simply be a pre-emptive measure to avoid legal challenges over the means used to achieve student diversity.

III.
HOW AFFIRMATIVE ACTION AND DESEGREGATION ARE LINKED BY HISTORY, RACIAL JUSTICE, AND AMBIGUITY

As discussed in Part I, critical mass remains the only constitutional metric for the achievement of diversity in the classroom, and that diversity almost wholly depends on the existence of a constitutional affirmative action program. The central objection to the use of critical mass as a metric is that it is too vague. The changing landscape of the Supreme Court also makes the danger of *Grutter* being overruled palpable and real. Proponents of affirmative action can also not overlook the role that the unique nature of UT's admissions program played in the *Fisher II* decision. Admissions programs where affirmative action is not a factor of a factor of a factor, or programs where *all* students are admitted under one race-conscious program, may not find much constitutional support from *Fisher II*. With the aim of finding greater constitutional support for affirmative action and critical mass, this Part examines the treatment of racial diversity in schools in a different context: integration policies in school districts evaluated by federal courts after *Brown*.

A. Integration in the Aftermath of Brown

One scholar has stated that the unifying theme between cases such as *Dred Scott*, *Brown*, *Plessy*, *Bakke*, *Grutter*, and *Fisher I/II* is that these cases "wrestled with race, equity, and opportunity in America."76 While the Court has parsed these cases based on the nature of the compelling interest, ultimately the impetus to end segregation is inextricably linked to the impetus to institute affirmative action. One policy proscribes a behavior, while the other prescribes a behavior, but both stem from the same core idea.

In *Brown I*, the Court fundamentally altered the rights of people of color in the United States.77 Recognizing that the doctrine of "separate but equal" upheld in *Plessy* only served to perpetuate racial discrimination, the Court declared that the

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[74] *See* Fessenden & Keller, *supra* note 66.

[75] Peter Arcidiacono, Michael Lovenheim & Maria Zhu, *Affirmative Action in Undergraduate Education*, 7 ANN. REV. ECON. 487, 493 (2015).

[76] Walter R. Allen, *A Forward Glance in a Mirror: Diversity Challenged—Access, Equity, and Success in Higher Education*, 34 EDUC. RESEARCHER 18, 18 (2005).

[77] Brown I, 347 U.S. 483, 495 (1954).

segregation of Black and white elementary and high school students was a violation of the Fourteenth Amendment.78 Chief Justice Warren's opinion was short, but it astutely acknowledged that equality should be measured not just by concrete factors such as buildings and curricula, but also by the subjective, qualitative impacts of "segregation itself on public education."79

Brown merely began the process that shaped the contours of desegregation.80 Desegregation aimed to bar school districts from continuing to separate students by race. "Unitary status" was coined to denote a school district that had successfully unified previously-segregated classes.81 The *Brown II* Court imposed indefinite preliminary injunctions against segregating school districts, noting the equitable remedy's "practical flexibility."82 The Court also placed "primary responsibility" for implementing the policy on schools.83 Desegregation was thus founded on principles of flexibility, local school authority, and court guidance.

Later cases began to contend with the nature of this flexibility principle, which led to the famous "*Green* factors." In *Green v. County School Board of New Kent*, the Court considered a freedom-of-choice program in which formerly segregated school pupils could attend the public school of their choice within the district.84 The *Green* Court acknowledged that attaining unitary status involved "complex and multifaceted problems," requiring "time and flexibility" to solve.85

To assess unitary status while respecting flexibility and school authority, the *Green* Court enumerated a non-exhaustive list of factors: (1) school administration;

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[78] *Id.*

[79] *Id.* at 492–93. Focusing on the "cultural values" and "good citizenship" that were indispensable elements of academic preparation for the professional world, the Court stated that segregation necessarily deprived students of those intangible benefits. *Id.* at 493; *see also* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641 (1950) ("Such restrictions impair and inhibit [petitioner's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."). The stigma and sense of inferiority caused by segregation was also at the heart of the concern. Quoting a lower court opinion, the *Brown I* Court stated that "[t]he impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [Black] group. A sense of inferiority affects the motivation of a child to learn." *Brown I*, 347 U.S. at 494.

[80] Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294 (1955). A search of the caselaw reveals that several dozen Supreme Court cases citing *Brown I* and *Brown II* deal squarely with the question of how to shape desegregation. There are many appellate and district court cases that even now, continue to grapple with that field of law. At the very least, this demonstrates that desegregation may been ordered in a day, but the process of achievement continues half a century later.

[81] The first time the Supreme Court used the term 'unitary status' was in 1968. Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, (1968). It is possible that the term is derived from the description of segregated schools as "dual"—desegregation therefore, was aimed at making these dual systems "unitary."

[82] *Id.* at 300.

[83] *Id.* at 299 ("School authorities have the primary responsibility for elucidating, assessing, and solving [problems of implementation].").

[84] Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 433–34 (1968).

[85] *Id.* at 437.

(2) the physical condition of the school; (3) transportation and busing; (4) personnel and faculty; (5) revision of districts and attendance areas; and (6) revision of local laws and regulations.86

These factors were guideposts by which a reviewing court could make the decision to lift the injunction on any given school district. As desegregation efforts became increasingly complex, the flexibility afforded to schools and lower courts increased. In *Swann*,87 the Court considered the scope of a district court's power to order school boards to take specific actions to attain unitary status. The North Carolina school board in that case had initiated a desegregation plan that was based solely upon geographic zoning, which the lower courts had found inadequate.88 The plans that were later submitted involved such actions as closing schools and reassigning students and faculty, restructuring attendance zones to achieve outright racial balance, creating a single athletic league, and integrating the bus system.89 The Court built upon the *Green* factors and carved out greater leeway for district courts to fashion school-specific remedies to attain unitary status.90

The *Swann* Court was careful to respect school boards' "broad power to formulate and implement educational policy."91 In doing so, it elevated the role of schools to primary actors in determining how unitary status would be achieved. The second principle of *Swann* was to elaborate on the *Green* factors. The Court pointed out that "faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system."92 Eschewing a quota system here too, Chief Justice Burger reasoned that Black-to-white student ratios were merely a starting point, and not an "inflexible requirement."93

In subsequent cases, the Court increasingly emphasized the importance of flexibility with respect to unitary programs and the use of broad factors to assess unitary status. Although the Court was divided over how much flexibility to afford to schools, the trend towards flexibility was unmistakable.94

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[86] *Id.* at 436.
[87] Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1 (1971).
[88] *Id.* at 7.
[89] *Id.* at 8.
[90] *Id.* at 15.
[91] *Id.* at 16.
[92] *Id.* at 18.
[93] *Id.* at 25.
[94] After *Swann*, the Court increasingly favored flexible approaches over a rigid scheme for assessing unitary status. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 423–-24 (1977) (noting that the judicial decree to accomplish what was reiterated in *Swann* "must be formulated with great sensitivity to the practicalities of the situation" and that the "[court] should be flexible but unflinching in its use of its equitable powers") (Brennan, J., concurring); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 442–-43 (1976) (Marshall, J., dissenting) (arguing that unless attenuation between the violations and current factual predicate was overwhelming, federal courts should not be restricted in the remedies they could prescribe). However, members of the Court disagreed with this trend, as it applied to district courts and as to schools. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 490

In the 1990s, school boards began petitioning for declarations of unitary status. In the few cases that reached the Supreme Court, desegregation jurisprudence underwent a focal shift, from defining unitary status to actual assessment of whether that status had been reached. These cases not only upheld the principle of flexibility, but refused to impose rigid requirements on what was ultimately a fact-specific determination.95 At the time of the decision in *Flax v. Potts*, a case in which the NAACP challenged a declaration of unitary status, circuits had split over the question of whether unitary status could be achieved incrementally.96 The Fifth Circuit adopted the position that, even where some indicia of segregation existed, a district court could still make a valid determination of unitary status.97

Through the early 1990s, the Supreme Court not only acknowledged the ambiguity of unitary status evaluations, but in fact welcomed it. In *Board of Education of Oklahoma City Public Schools v. Dowell*,98 the Court began by highlighting the ambiguity and variation in how unitary status was assessed among the courts of appeals. Some appellate courts defined unitary status as when a school district "completely remedied all vestiges of past discrimination."99 Others found unitary status when school districts were simply not operating a dual system.100 The lack of a clear definition of unitary status is properly summarized in a passage from the Eleventh Circuit:

(1979) (Rehnquist, C.J., dissenting) (finding that federal court intervention and prescription of remedies should only be allowed where local control was insufficient and actual discrimination proven).

[95] Flax v. Potts, 915 F.2d 155, 157 (5th Cir. 1990) ("Unitariness is a finding of fact which we review under the clearly erroneous standard.") (citing Pullman-Standard v. Swint, 456 U.S. 273 (1982); *see* Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 225–26 (5th Cir. 1983)).

[96] *Compare* United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (rejecting the notion that school systems cannot achieve unitary status in incremental fashion); *Ross*, 699 F.2d 218 (same); Keyes v. School Dist. No. 1, 895 F.2d 659 (10th Cir. 1990) (same); Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) (same), *with* Pitts v. Freeman, 887 F.2d 1438, 1446–47 (11th Cir. 1989) (rejecting the First, Fifth, and Tenth Circuits' rule on incremental unitariness).

[97] *Flax*, 915 F.2d at 161–62. The Fifth Circuit examined findings of fact that a dozen schools still had class representation that was over eighty-five percent Black and that the school board was constructing schools in predominantly Black neighborhoods, risking the creation of all-Black schools once again. Overall, the Fifth Circuit granted great deference to the district court's assessment of these issues and of faculty and staff assignments, and it upheld the conclusion that unitary status was achieved. A footnote in the opinion cited to several cases in the lower courts which stood for the proposition that "depending on circumstances, different percentages [of Black students] may define a school as a one-race school." *Id.* at 161 n.8.

[98] Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237 (1991).

[99] *See, e.g.*, *Overton*, 834 F.2d at 1175; Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 533–34 (4th Cir. 1986); Vaughns v. Bd. of Educ. of Prince George's Cty., 758 F.2d 983, 988 (4th Cir. 1985).

[100] *See, e.g.*, Castaneda v. Pickard, 648 F.2d 989, 996–97 (5th Cir. 1981) (describing a unitary school as one that has removed its dual system, but not mentioning "vestiges of discrimination").

> [A] unitary school system is one which has not operated segregated schools as proscribed by *Swann* and *Green*, for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.101

Despite the ambiguity, the Supreme Court reasoned that "it [was] a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution."102 The Court went on to state that it was "not sure how useful it is to define these terms more precisely, or to create subclasses within them."103 This explicit endorsement of vagueness within the unitary status assessment framework threw open the list of factors to be considered under *Green*,104 and it in fact encouraged lower courts to "inquire whether other elements ought to be identified" in assessing unitary status.105

To be sure, the vague and ambiguous *Green* factors were not restricted to primary education. *United States v. Fordice* was an important decision if only to demonstrate that the Court understood the command of *Brown* to extend to all levels of education. 106

B. Comparing Critical Mass and Unitary Status

Desegregation jurisprudence and affirmative action jurisprudence begin with a simple yet pivotal notion: that racial diversity and integration are inextricably linked to successful educational experiences for all students of all races.

In both contexts, the injury or undesirable outcome was based on a harm to one's dignity and self-esteem. Justice Marshall emphasized that desegregation was a necessary judicial endeavor because of the stigma of separate-but-equal, and

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[101] Ga. State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985).
[102] *Dowell*, 498 U.S. at 245–46.
[103] *Id.* at 246. Justice Marshall consistently took a stronger view of what constituted unitary status and dissented from decisions that he felt granted unitary status too lightly. For Justice Marshall, as long as there was a risk of inflicting the "stigmatic injury" of discrimination, school districts could not be released from their obligations under *Brown I* and *Brown II*. *Dowell*, 498 U.S. at 252 (Marshall, J., dissenting). Noting that both "remedying *and* avoiding the recurrence of this stigmatizing injury" were the ultimate aims of desegregation case law, Justice Marshall emphasized that the stigma of racial discrimination "can persist even after the State ceases to actively enforce segregation." *Id.* at 261 (Marshall, J., dissenting) (emphasis added).
[104] Freeman v. Pitts, 503 U.S. 467, 467 (1992). One challenge in *Freeman* was that a district court considered factors outside those enumerated in *Green* to conclude that a finding of unitary status not be made.
[105] *Id.* at 492–93 ("It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether *other elements ought to be identified* . . . .") (emphasis added).
[106] United States v. Fordice, 505 U.S. 717, 743 (1992).

more recently Justices have emphasized similar problems of racial isolation and stereotypes that necessitate affirmative action.107

The Court's treatment of desegregation and affirmative action also overlaps with respect to the role of the educational actor. While district courts retained considerable authority in equity to fashion remedies for segregation, the Supreme Court repeatedly affirmed that at some point, unitary status would have to be assessed and achieved. At that point of achieving unitary status, the permanent injunction would be lifted and the relevant presiding district court's involvement would, theoretically, end. Maintaining that status would then be the responsibility of the schools themselves. With affirmative action, the Court couched the responsibility and freedom of the university within the protection of the First Amendment. While this allowed reviewing courts to retain considerable power to analyze individual school policies under strict scrutiny, the Court contemplated a "logical end point" to affirmative action as well.108 In both contexts, then, the Court envisioned control of the educational forum to be returned, in totality, to the schools.

In contemplating these two end points, the Court required definitions of unitary status and critical mass. Absent an understanding of what unitary status and critical mass look like, no reviewing court can know when a natural end point has been reached. But achieving critical mass and unitary status depend upon so many qualitative and subjective factors that demanding a formula or recipe for assessing those concepts is futile. Both these concepts involve vague factors: extracurricular activities, quality of education, whether minorities feel they are spokespeople for their races, whether racial stereotypes have been diminished, student and faculty perspectives on diversity, the racial breakdown of teachers, and others. Both concepts also include quantitative factors: an awareness of how many minority and how many white students were enrolling or in attendance each year.

These practical similarities notwithstanding, there is a doctrinal schism in the Court's treatment of critical mass as compared to unitary status. The Court readily accepted that, even in light of the *Green* factors, unitary status was not to be defined rigidly, but rather its vagueness embraced as a means of affording both

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[107] *Compare Dowell*, 498 U.S. at 252 (Marshall, J., dissenting) ("Remedying and avoiding the recurrence of this stigmatizing injury have been the guiding objectives of this Court's desegregation jurisprudence ever since [*Brown I*].") *with* Fisher I, 133 S. Ct. 2411, 2418 (2013) ("The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.").

[108] *Compare* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.") *and* Milliken v. Bradley, 433 U.S. 267, 281–82 (1977) (upholding freedom of district courts to order compensatory relief and funding of certain programs), *with* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) ("We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.") *and* Dowell, 498 U.S. at 248 ("[Desegregation injunction] decrees . . . are not intended to operate in perpetuity . . . .").

schools and reviewing courts the flexibility to contextualize and individualize unitary status determinations. In *Freeman v. Pitts*, the Court allowed the use of factors as intangible and vague as "quality of education."109 Additionally, such vagueness did not come with continued judicial supervision.110

The best explanation for accepting vagueness in assessing unitary status is that the Court understood that attempting to provide strict definitions of unitary status could not square with the unique nature of each school. Instead, shifting from a rigid doctrinal analytical structure to a more flexible, subjective form of inquiry would allow both schools and federal courts to remain true to the original promise of *Brown*. One would expect that a similarly understanding approach is merited with respect to affirmative action. But that has not been the case.

There is no doctrinal or practical basis by which to reject ambiguity and subjectivity when making determinations of critical mass, if that ambiguity and subjectivity is acceptable when making determinations of unitary status. That the amorphous nature of critical mass and the vague factors used to characterize it suggest that the university will know critical mass "when it sees it" is equivalent to district courts' current practice regarding unitary status.111 The fact that unitary status cases have not recently made it to the Supreme Court suggests that courts are comfortable "knowing unitary status when [they] see it."112 And the fact that

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[109] *Freeman*, 503 U.S. at 492.

[110] *See Dowell*, 498 U.S. at 248 (reaffirming that "local control of public school systems dictates that [the injunctions need] not extend beyond the time required to remedy the effects of past intentional discrimination").

[111] *See* Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1340 (11th Cir. 2005) (interpreting *Dowell* to have eschewed a precise definition for unitary status and noting that the obligation of equal protection, "not whether a school district may be labeled 'unitary,' is the proper focus of judicial inquiry"); Hart v. Cmty. Sch. Bd., 435 F. Supp. 2d 274, 280 (E.D.N.Y. 2008) (finding that the Supreme Court emphasized that unitary status was "not a precise concept"); Tasby v. Woolery, 869 F. Supp. 454, 459 (N.D. Tex. 1994) (noting that judicial inquiry into unitariness should be away from the term itself, and more toward whether "a school board . . . has eliminated the vestiges of past discrimination to the extent 'practicable'") (quoting Hull v. Quitman Cty. Bd. of Educ., 1 F.3d 1450 (5th Cir. 1993)); Hampton v. Jefferson Cty. Bd. of Educ., 72 F. Supp. 2d 753, 770–71 (W.D. Ky. 1999) (analyzing *Dowell* and noting that "[i]nterestingly, *Dowell* did not disapprove of [the many uses] of the term unitary; instead it simply noted the different uses and went on to examine the effect of each"). The cited cases indicate a widespread consensus among federal courts that unitary status is a fluid concept and that each evaluating judge can make a determination of what unitary status "looks like." *Compare Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part) ("This 'we know it when we see it' approach to evaluating state interests is not capable of judicial application.") *with Dowell*, 498 U.S. at 245–46 (noting the similar lack of positive constitutional source for unitary status evaluation and that "it [was] a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution").

[112] *See, e.g.*, Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 451 F.3d 528 (8th Cir. 2006) (finding that unitary status had not yet been achieved); Cavalier v. Caddo Par. Sch. Bd., 403 F.3d 246 (5th Cir. 2005) (finding unitary status and overturning race-based admissions policy); Brown v. Bd. of Educ., 978 F.2d 585 (10th Cir. 1992) (finding that unitary status had not yet been achieved); Coal. to Save Our Children v. State Bd. of Educ. of Del., 90 F.3d 752 (3d Cir. 1996) (finding school had satisfactorily achieved compliance with *Green* factors and achieved unitary status); Belk v. Charlotte-

affirmative action policies should be narrowly tailored is not at issue; indeed, they should be narrowly tailored, just as desegregation plans were required to be "tailored" to the nature of the violation.113

Critical mass as a concept could better withstand legal challenges if it were justified by broader and more generally established precedent. Desegregation jurisprudence is exactly that line of cases. In that context, ambiguity and subjectivity are not weakness, but rather the strength and one of the most positive attributes of the doctrine. This is the solution that critical mass has long sought.

C. Objections to Embracing the Concept of Critical Mass

Linking desegregation and affirmative action bridges two areas of the law long-considered distinct. One argument against a comparison between desegregation and affirmative action is that *Bakke* disapproved of such a comparison. But that argument misreads *Bakke*; the distinction drawn between desegregation and affirmative action in *Bakke* was that affirmative action policies would undergo strict scrutiny, while desegregation policies would not.114 And the requirement that affirmative action policies meet strict scrutiny's narrow tailoring prong is not fatal to critical mass, either. In *Fisher I*, the Court clarified that what it was looking for in narrow tailoring was an honest and comprehensive inquiry into whether race-neutral alternatives would serve the school's compelling interest in student diversity.115 Such a requirement can be squared with a reliance on critical mass.

A second argument is that because desegregation is an equitable remedy prescribed by federal courts, the ambiguity is more palatable coming from the judiciary than from a school. That is to say, federal courts can know unitary status when they see it, but university admissions offices cannot know critical mass when they see it. That argument rests on the premise that ambiguity is only acceptable *because* of the broad discretion enjoyed by the district courts. This objection is only partially true. While federal courts enjoy discretion to fashion equitable remedies, the ambiguity of factors used to assess unitary status is not necessary to preserve that discretion.

A third argument is that the Court's precedent in *Parents Involved in Community Schools v. Seattle School District No. 1* expressly withdrew the

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Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001) (finding school system had achieved unitary status).

[113] See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971) (providing district courts broad authority to design equitable remedies to encourage school desegregation when school districts have defaulted on their duty to design an operative desegregation plan).

[114] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 300 (1978) ("Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny.").

[115] Fisher I, 133 S. Ct. 2411, 2419 (2013) ("[N]arrow tailoring . . . does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'") (quoting *Grutter*, 539 U.S. at 339).

flexibility afforded to unitary status from judicial review of affirmative action.116 In *Parents Involved*, a Kentucky and a Seattle school district employed a student assignment program where race only served as a "tiebreaker" after considering a student's first-choice school.117 The districts argued that racial diversity was a compelling interest, but the Court did not accept that argument, distinguishing racial diversity from the broader diversity interest.118

Justice Breyer dissented, on the grounds that school districts, including those voluntarily implementing desegregation plans, should be accorded deference on the means they choose to achieve unitary status.119 Justice Breyer pointed out that the Court in *Swann* defended the flexibility school boards have to formulate their own educational policy with respect to achieving racial integration.120 Justice Breyer's analysis suggested that schools voluntarily engaging in desegregation were never categorized under *de jure* or *de facto* discrimination.121

The disagreement in *Parents Involved* is not properly read as a rejection of ambiguity and vagueness in situations where race-conscious policies are evaluated under strict scrutiny. Although Chief Justice Roberts's opinion could be understood as limiting flexibility and vagueness to schools under court-ordered desegregation plans, and not under voluntary desegregation, Justice Breyer's analysis in dissent called that distinction into question.122 In fact, the Court did

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[116] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007). The *Fisher I* Court relied on language from *Parents Involved*. *See Fisher I*, 133 S. Ct. at 2419 ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'") (quoting *Parents Involved*, 551 U.S. at 732).

[117] *Parents Involved*, 551 U.S. at 723 ("[In this case, race] is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor.") (plurality opinion); *see also id.* at 713 (discussing a variety of tiebreakers, one of which is racial identity).

[118] *Id*. at 723 (plurality opinion) (noting that *Grutter* had expressly limited its holding to the broad diversity interest in which race was only a factor, and not the decisive factor); *see also id.* at 726–27 (Roberts, C.J.) (criticizing the school district plans for being tied to racial demographics rather than a "pedagogic concept" of diversity for the sake of educational benefits).

[119] *Id.* at 804–05 (Breyer, J., dissenting) (noting that school authorities enjoyed broad discretion to make educational policies, including the discretion to prescribe ratios of certain minority students) (citing Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971)).

[120] *Id.* at 831 (Breyer J., dissenting) (criticizing the plurality for dismissing statements in *Swann* as dicta because those statements were in a unanimous opinion). Importantly, the decision in *McDaniel* implicitly expanded the availability of a flexible approach to schools that had voluntarily elected to desegregate. *Id.* at 752 n.5 (Thomas, J., concurring) (noting one Georgia school district's adoption of desegregation policies voluntarily); *see also* McDaniel v. Barresi, 402 U.S. 39 (1971).

[121] *Parents Involved*, 551 U.S. at 827–28, 844 (Breyer, J., dissenting). Chief Justice Roberts's plurality heavily relied upon that latter distinction, arguing that the absence of de jure discrimination precipitated strict scrutiny of the *Parents Involved* plans. *Id.* at 721 (majority opinion) (noting that the school districts could not rely on the remedial interest because they had either never engaged in de jure segregation or were no longer under a court mandate to desegregate).

[122] Because *Parents Involved* can be reconciled on less burdensome terms, I will not consider whether Justice Breyer's argument is defensible. *Id.* at 836 (Breyer, J., dissenting) (noting that historical considerations of race in Seattle prompted an application of judicial review in the lower courts that was less than strict scrutiny which did not conflict with Court precedent).

not invalidate the district plans because they were too vague. The plans failed the narrow tailoring prong of strict scrutiny because statistically, it did not appear that the plans were *necessary*.123

In sum, the primary objections to the critical mass concept either misunderstand what *Bakke* taught, assume an unnecessary premise for the equitable discretion of federal courts, or fail to understand the *Fisher I* Court's holding. At the point at which a university has dutifully examined race-neutral alternatives and has shown its policy is necessary, it has satisfied the narrow tailoring prong, and the validity of such a policy should not turn on whether it was an equitable remedy or a university-created admissions program.

IV.
CONCLUSION

Both desegregation and affirmative action have attempted to rectify what was eloquently referred to by Justice Marshall as "the stigmatic injury condemned in *Brown I*."124 *Bakke* recognized that racial isolation risked minority students not achieving their true potential.125

Affirmative action is a necessary component of admissions in higher education. These policies which consider race as a factor serve to provide access to higher education to those minorities who were, and continue to be, marginalized and subject to prejudice in many areas of American life. *Grutter*, and now *Fisher II*, represent the two instances in which this Court has upheld an affirmative action program. Both programs relied heavily on the determination that student diversity had reached a critical mass.

Evaluating critical mass involves a consideration of subjective criteria. But such an evaluation is not foreign to federal courts. When evaluating unitary status of schools and universities ordered to desegregate, courts have welcomed vague criteria. As a variety of forces move to end affirmative action in the United States, the constitutional strength of these programs cannot rise and fall with the make-up of the Supreme Court. Nor can every university rely on a state law like the Top Ten Percent Law to reduce its consideration of race to a "factor of a factor of a factor."126

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[123] *Id.* at 728 (plurality opinion). If such consideration is not necessary, it fails the narrow tailoring prong of strict scrutiny. *Id.* at 733 (majority opinion) ("The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends."). The plurality criticized the use of defined target ranges for minority student representation, observing that the *Grutter* majority found it favorable that the University of Michigan Law School did not "count back from its applicant pool to arrive at the meaningful number." *Id.* at 729 (plurality opinion) (citing *Grutter*, 539 U.S. at 335–36). Third, the plurality found that because the racial balancing efforts of the districts actually had a marginal impact on the demographics, it was questionable whether such an "extreme" measure was necessary. *Id.* at 278 (plurality opinion).

[124] Bd. of Educ. Of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 252 (Marshall, J., dissenting).

[125] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (Powell, J.).

[126] *See* Fisher I, 133 S. Ct. 2411, 2434 (2013) (Ginsburg, J., dissenting).

A better justification for critical mass is required than what *Grutter* and *Fisher II* provide. The impending legal challenges, and statements from the Trump Administration, suggest that the effort to provide educational opportunity to those marginalized in American society is far from over. Challengers of affirmative action now argue that despite increasing numbers in Asian-American student applications, Asian-American admission numbers have not proportionally increased, suggesting bias or racially-motivated discrimination.127 By pitting one racial minority against another, opponents of affirmative action have now found a way to tokenize the Asian-American narrative and coopt it for the purpose of undoing *all* affirmative action policies. Scholars have recognized this strategy before.128 These lawsuits will soon argue that universities must be using illegal quotas to keep Asian-American enrollment constant despite increasing applications from that demographic.129 However, opponents of affirmative action seek to undo *any* consideration of race, which drastically reduces the number of Black, Latino, and Native-American students in colleges.130

For affirmative action to survive in future cases, we need well-founded precedent that conceptualizes critical mass and that acknowledges the political and historical reasons for affirmative action: that all non-white demographics in this country have faced systematic marginalization and exclusion from all sectors of society, and that colorblind admissions only reinforce privilege and ignore reality. In desegregation cases, that precedent is both available and highly relevant.

By acknowledging the logical contradiction of criticizing the vagueness of critical mass while defending the vagueness of unitary status, the Court can re-align desegregation with affirmative action. As Justices Brennan, White, Blackmun, and Marshall stated in their partial dissent from *Bakke*: "we cannot . . . let colorblindness become myopia which masks the reality that many 'created equal'

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[127] *See* Alia Wong, *Asian Americans and the Future of Affirmative Action*, ATLANTIC (June 28, 2016), https://www.theatlantic.com/education/archive/2016/06/asian-americans-and-the-future-of-affirmative-action/489023/ [https://perma.cc/7TGG-SE6E] (describing two pending lawsuits accusing Harvard University and the University of North Carolina, Chapel Hill of setting caps on the number of Asians admitted).

[128] A more critical view of these lawsuits might argue that they are making use of the racist "model minority" myth attributed to Asian Americans. *See, e.g.*, Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 REPRESENTATIONS 155, 160 (1996) ("For the Right, the Asian American 'model minority' figures as the Allan Bakke replacement for the 1990s assault on affirmative action.").

[129] *See* Anemona Hartocollis, *Harvard Agrees to Turn over Records amid Discrimination Inquiry*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/harvard-justice-department-discrimination.html [https://perma.cc/7UHL-JYWC].

[130] *See* Jeremy Ashkenas, Haeyoun Park, and Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017) (noting the drops in enrollment numbers for Black and Latino students in response to affirmative action bans).

have been treated within our lifetimes as inferior both by the law and by their fellow citizens."131 Countless educations depend on it.

[131] *See Bakke*, 438 U.S. at 327 (concurring opinion).