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The New Affirmative Action after *Fischer v. University of Texas*: Defining Educational Diversity through the Sixth Amendment's *Cross-Section* Requirement

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THE NEW AFFIRMATIVE ACTION AFTER
FISHER V. UNIVERSITY OF TEXAS:
DEFINING EDUCATIONAL DIVERSITY
THROUGH THE SIXTH AMENDMENT'S
Cross-Section Requirement

Adam Lamparello* & Cynthia Swann**

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹

ABSTRACT

Skin color and diversity are not synonymous. Furthermore, race provides no basis upon which to stereotype individuals or groups, regardless of whether the reasons are malevolent or benign.

Affirmative action policies in higher education should focus on the things that individuals have overcome, not the traits that individuals—and groups—cannot change. Currently, the opposite is true, as such policies equate racial diversity with educational diversity, thus precluding sufficient consideration of factors such as family and personal background, life experience, and the overcoming of adversity that would result in true educational diversity. This is not to say that race is irrelevant, as studies have shown that race contributes in part to achieving a diverse student body. It is to say that, by foreclosing a more searching review of every applicant's background, universities achieve, at best, an incomplete form of diversity that undermines, rather than furthers, the goal of creating a diverse and intellectually stimulating classroom environment.

This essay proposes that affirmative action programs should reflect a more comprehensive and empirically-sound definition of diversity. To do so, universities should adopt the framework created by the United States Supreme Court when interpreting the Sixth Amendment's jury-trial requirement. Specifically, the Court has held that defendants are entitled to a jury that represents a cross-section of the community, although such cross-sections need not mirror a community's racial and ethnic composition. By refusing to construe the cross-section requirement along racial and ethnic

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1. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

lines, the Court has implicitly recognized that a cross-section of the community can be realized by considering individual factors, not immutable characteristics.

Affirmative action policies that embrace the concepts underlying the Court's cross-section jurisprudence would achieve a more meaningful type of educational diversity that reflects the various life experiences, adversities, and backgrounds that shape an individual's perspective and worldview. This approach would also recognize that race is neither a proxy for diversity nor a basis upon which to make judgments about individuals. Indeed, until affirmative action programs employ more holistic and individualized admissions practices, race and ethnicity will continue to be as prevalent in modern society as they were during the Jim Crow era. Moreover, it should not matter that, unlike Jim Crow laws, university admissions action policies rely on race and ethnicity for "benign" purposes. The use of race, however well-intentioned, ultimately precludes a truly individualized—and holistic—consideration of applicants, and prevents universities from emphasizing the content of an individual's character, rather than the color of an individual's skin.

INTRODUCTION

IN *Fisher v. University of Texas at Austin*,² (Fisher II) the Supreme Court will decide the constitutionality of the University of Texas at Austin's (University) affirmative action program, a decision that will have ramifications for affirmative action programs nationwide.³ The University's program strives to enroll a diverse student body by focusing disproportionately on race and ethnicity. First, the University grants automatic admission to high school students who graduate in the top ten percent of their classes (Top Ten Program), which results in the admission of a substantial number of African-American and Hispanic applicants.⁴ Second, the University employs a holistic review process for applicants who are not admitted through the Top Ten Program, but possess other qualities (e.g., work experience, community service, socio-economic status) that warrant admission.⁵

2. 135 S. Ct. 2888 (Mem) (2015).

3. See *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2417 (2013) (*Fisher I*). In *Fisher I*, the Supreme Court reversed a decision by the United States Court of Appeals for the Fifth Circuit upholding the University's program on the ground that the Fifth Circuit did not properly apply strict scrutiny. On remand, the Fifth Circuit again upheld the program and the Supreme Court again granted certiorari to consider the program's constitutionality. See *id.*

4. See *Fisher v. University of Texas*, 758 F.3d 633, 650–51 (noting that the "Top Ten Percent Plan gains diversity from . . . [t]he de facto segregation of schools in Texas [and] enables the Top Ten Percent Plan to increase minorities in the mix"). The University also uses an Academic Index to admit applicants who are not in the top ten percent of their high school classes, but who possess extremely high SAT scores and grade point averages. *Id.* at 638.

5. See *id.* at 638.

However, approximately ten years ago, the University included race as a factor in its “holistic review” process to ensure the “dispersion of minority students among many classes and programs,”⁶ and for the purpose of obtaining “qualitative diversity.”⁷ The University’s justifications highlight the defects in many affirmative action programs, as these programs place excessive emphasis on enrolling a specific number or “critical mass” of minority applicants to achieve educational diversity. As discussed below, such programs rest on invidious stereotypes about applicants based on skin color and ethnicity, and these stereotypes harm, rather than help, minority applicants.

Part of the problem is that, rather than striving to achieve educational diversity, the University’s affirmative action seeks to remedy past discrimination against minority groups, which the Court has repeatedly disallowed in the affirmative action context.⁸ This approach perpetuates a cultural attitude that equates applicants’ race with his or her identity and fosters a climate that elevates immutable characteristics above individual accomplishments. For these and other reasons, the Supreme Court will likely hold that the University’s affirmative action program is not narrowly tailored to achieve educational diversity,⁹ and in so doing, the Court will lay the foundation for a new type of affirmative action in higher education that enrolls a truly diverse student body and enhances the educational experience for students of all backgrounds. In short, although race should still be considered in the admissions process, it should be one part of a broader—and more individualized—consideration of applicants.

More specifically, race-conscious admissions policies in a post-*Fisher* world should be based on the Sixth Amendment’s cross-section requirement, which entitles a defendant to a jury representing a cross-section of the community.¹⁰ When applying the cross-section requirement, the Supreme Court has expressly rejected the notion that a jury must mirror the racial and ethnic demographics of a particular community.¹¹ In doing so, the Court has implicitly recognized that a true cross-section of the community can be—and is—realized through an individualized consideration

6. *Id.* at 658.

7. *Id.* at 667; *see also* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (upholding the University of Michigan Law School’s affirmative action program and stating that universities may seek to enroll a “critical mass” of minority students).

8. *See Fisher I*, 133 S. Ct. at 2417 (“Redressing past discrimination could not serve as a compelling interest, because a university’s ‘broad mission [of] education’ is incompatible with making the ‘judicial, legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification.’”) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 307–09 (1978)). In *Bakke*, the Court upheld the University of California’s affirmative action program on the ground that the interest in achieving a diverse student body was sufficiently compelling to justify the use of race as one factor in the admissions process).

9. *See Fisher*, 758 F.3d at 664 (Garza, J., dissenting) (the inclusion of race must be “necessary and narrowly tailored to further a compelling governmental interest [achieving educational diversity]”).

10. *See Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

11. *See Holland v. Illinois*, 493 U.S. 474, 480–81 (1990).

of potential jurors that transcends race and ethnicity. Affirmative action programs in higher education do the opposite because such programs equate race and ethnicity with educational diversity. As a result, universities ignore, or do not sufficiently emphasize, characteristics such as family upbringing, geography, socio-economic status, physical disability, and mental illness that influence an individual's perspective, values, and worldview. Put simply, diversity is about so much more than the color of an individual's skin, and skin color alone reveals nothing about the content of one's character. By weighing race so heavily, universities have inadvertently made the educational environment less diverse and perpetuated precisely what affirmative action programs strive to avoid: stereotypes of individuals based on the traits they cannot change, rather than the personal circumstances they have overcome.

Instead of engaging in impermissible racial balancing, universities should strive to enroll a student body that reflects a true cross-section of the community. Part II discusses *Fisher II*, where the Supreme Court will decide the constitutionality of the University of Texas at Austin's affirmative action program. Part III argues that the University's program is unconstitutional, and that to achieve true educational diversity, universities should design affirmative action programs using a framework analogous to that created by the United States Supreme Court when interpreting the Sixth Amendment's requirement that juries represent a cross-section of the community.¹²

PART II: RACE ALONE CANNOT ACHIEVE EDUCATIONAL DIVERSITY

The University's affirmative action program suffers from two fatal defects that plague affirmative action programs across the country. First, such programs conflate race with educational diversity, and second, they lead to racial and ethnic stereotyping.

A. RACE SHOULD NOT BE A PROXY FOR DIVERSITY

In *Fisher I*, the Court relied on *Regents of the University of California v. Bakke*¹³ to hold that educational diversity is the only interest sufficiently compelling to justify the use of race in the admissions process.¹⁴ As the Court held in *Fisher I*, "[r]edressing past discrimination could not serve as a compelling interest because a university's 'broad mission [of] education' is incompatible with making the 'judicial, legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification.'"¹⁵

The University's emphasis on race in the admissions process runs afoul of *Fisher I* because it strives, at least in part, to remedy past discrimina-

12. See *Taylor*, 419 U.S. at 527.

13. 438 U.S. 265 (1978).

14. See *Fisher I*, 133 S. Ct. at 2417.

15. *Id.* (quoting *Bakke*, 438 U.S. at 307-09).

tion, not achieve educational diversity. Furthermore, the University's affirmative action program includes a quantitative aspect that seeks primarily to increase the number of minority admittees, not to enroll a student body from a variety of, among other things, socio-economic, geographic, and familial backgrounds. Nowhere is this more evident than by the University's goal to ensure the "dispersion of minority students among many classes and programs."¹⁶ This justification places the University's affirmative action program squarely at odds with *Bakke*, as it fails to promote "values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."¹⁷

Part of the problem can be traced to the Court's decision in *Grutter v. Bollinger*,¹⁸ where the Supreme Court, in a 5-4 decision, veered away from *Bakke* and upheld the University of Michigan Law School's (Law School) affirmative action program, even though the program conflated educational diversity with redressing past discrimination and sought to enroll a "critical mass" of minority applicants.¹⁹ Indeed, the Law School acknowledged that the primary objective of its affirmative action program was "one particular type of diversity,"²⁰ namely, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."²¹

This approach is problematic for a number of reasons, most notably that it encompasses only a fraction of what properly constitutes diversity, and cannot, by itself, achieve the benefits of educational diversity. In fact, scholars have identified six constructs of diversity, of which race is merely a part. They include the following:

Diversity of personal background. This includes "gender, race, geographic origin, marital status, religion and spirituality, education, work experience and economic status."²²

Diversity of family background. This includes "demographic and social factors such as family size, socio-economic status, culture, customs and traditions that influence students' perceptions and interpretations of events in one's life."²³

Diversity of experience. This refers to "positive and negative life experiences that each student brings to the classroom and the campus. These might include exposure to a variety of customs, cultures and perspectives

16. *Fisher*, 758 F.3d at 658 (emphasis added).

17. *Fisher I*, 133 S. Ct. at 2418 (emphasis added).

18. 539 U.S. 306 (2003).

19. *See id.* at 329-30.

20. *Id.* at 316 (internal quotations omitted).

21. *Id.* (internal quotations omitted).

22. Charles E. Daye, et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 RUTGERS RACE & L. REV. 75-S, 95-96-S (2012).

23. *Id.*

as well as experiences of prejudice and disadvantage that might influence a student's outlook on the social order."²⁴

Diversity of perspective. This "includes, among other things, differences in values, beliefs, conceptions of the world and political orientation. It has been persuasively argued that a group of students whose members hold different beliefs about what is important, worthy, beautiful and good in life will be more likely to discover for themselves the depth and in-terminability of the disputes in which human beings find themselves en-tangled, than a group of students whose members share values that are homogenous within the group."²⁵

Diversity of educational expectations. This "refers to predispositions that students bring to both curricular interpretations and classroom inter-actions. These predispositions will be manifested in rates of class partici-pation, [how] assignments and class projects are prepared and presented, and whether students participate in such study groups . . . and social interactions."²⁶

Diversity of career goals and aspirations. This "ties differences in rea-sons for pursuing higher education to different foci that students bring to issues. These items collect data about the ways students foresee that their education will be beneficial to themselves or to their communities after they leave the formal educational setting."²⁷

Furthermore, empirical data suggests that "students' personal back-ground and family background will influence the students' experi-ences,"²⁸ which in turn affects students' perspectives and "influence expectations for the educational setting."²⁹ Thus, a university that was truly committed to, and mindful of, *Bakke's* commitment to educational diversity would incorporate the above constructs into its admissions policy.

Of course, this is not to say that race and ethnicity are irrelevant. Em-pirical data suggests that an individual's racial and ethnic background is "associated with differences of sociopolitical attitudes, experiences, dis-crimination histories, behaviors during law school, and professional aspi-rations. . . . matters to [achieving] educational diversity."³⁰ In fact, without a racially diverse student body, "useful expressions of different perspectives may be unavailable with consequent loss of insight, richness, and understanding."³¹

For these reasons, a racially diverse student body, while necessary, is not sufficient to enroll a diverse student body, or to achieve the benefits of educational diversity. As one scholar notes, a "law school that sees any

24. *Id.*

25. *Id.*

26. *Id.*

27. Daye, *supra*, note 22, at 95-96-S.

28. *Id.* at 99-S.

29. *Id.*

30. *Id.* at 188-S

31. *Id.* at 189-S.

cohort of students of color as presenting a satisfactory diversity of background, experiences, family circumstances, perspective and expectations is very likely to miss significant aspects of educational diversity.”³² In addition, African-American students “do not always share the same perspectives . . . as other students of color,”³³ thus making it inadvisable to make assumptions about an applicant’s beliefs based solely on the color of his or her skin. Perhaps most importantly, as the Supreme Court has recognized, “[c]lassifications based on race carry a danger of stigmatic harm,”³⁴ and “[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”³⁵

At bottom, by adopting a narrow, race-based definition of diversity, universities fail to create educational diversity in a complete or even meaningful sense. In *Grutter*, for example, the Law School defined diversity almost exclusively along racial lines, yet simultaneously claimed that its affirmative action program achieved “that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”³⁶ But how can the Law School claim that it is achieving educational diversity when several categories comprising diversity itself are given little, if any, weight? Of course, the Law School tried to comport its program to *Bakke* by arguing that diversity is not defined “solely in terms of racial and ethnic status.”³⁷ Yet, given the stated goal of its program, it is highly likely that this statement paid mere lip service to the notion that diversity is comprised of factors other than race. This is particularly true given the Law School’s concession that the color of an applicant’s skin was “an extremely strong factor in the decision for acceptance,”³⁸ and that minority applicants “are given an extremely large allowance for admission.”³⁹

Unfortunately, when one considers that race in itself reveals little, if anything, about an individual, it becomes clear that the Law School’s focus on race precludes the type of individualized consideration of applicants that would result in truly diverse student body. For example, a white female from the Bronx, New York, a neighborhood overridden with poverty, would almost certainly offer unique perspectives that an African-American male from Beverly Hills, California would not. In other words, race, when divorced from an individual’s personal experiences, provides little insight into whether an individual will offer perspectives that enhance the diversity of a student body. As such, how can

32. *Id.* at 188-S.

33. Daye, *supra*, note 22, at 188-S.

34. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

35. *Id.*

36. *Grutter*, 539 U.S. at 315.

37. *Id.* at 316.

38. *Id.* at 320 (internal quotations omitted).

39. *Id.* (internal quotations omitted).

the University claim that its goal is educational diversity when the basis for achieving that diversity is primarily skin color?

The short answer is that it cannot, unless the Court in *Fisher II* holds that the goal of affirmative action in higher education is “to assure within its student body some specified percentage of a particular group, merely because of its race or ethnic origin.”⁴⁰ Given the language in *Bakke* and the criticism that has persisted in *Grutter*’s wake, the Court will likely decline to do so. After all, if the unspoken goal of affirmative action programs is to cultivate a society that looks beyond skin color, it is difficult to achieve that goal when the focus is on skin color. As Chief Justice Roberts stated in *Seattle School District No. 1*, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁴¹ Ultimately, by upholding the Law School’s affirmative action program, the *Grutter* Court disregarded Justice Powell’s admonition in *Bakke* that diversity encompasses “a far broader array of qualifications and characteristics of which racial or ethnic origin is, but a single though important element.”⁴² The Law School’s program embraced, rather than eschewed, “an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups.”⁴³ In doing so, the Law School ignored the fact that Justice Powell explicitly rejected the goal of “‘reducing the historic deficit of traditionally disfavored minorities’ . . . as an unlawful interest in racial balancing,”⁴⁴ and in “remedying societal discrimination, because such measures would risk placing unnecessary burdens on innocent third parties ‘who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.’”⁴⁵ Thus, if educational diversity—not remedying past discrimination—is the only permissible goal of affirmative action programs, how can the Law School’s program, along with other race-conscious affirmative action programs, be justified?⁴⁶ Again, the short answer, and the one most likely to come from the Supreme Court in *Fisher II*, is that it cannot. At bottom, the Court’s decision in *Grutter* ensured that future litigation would be focused on the extent to which race is permissible in the admissions process, not on whether such a process results in a truly diverse incoming class and therefore achieves the benefits of educational diversity.

40. *Bakke*, 438 U.S. at 307.

41. *Seattle Sch. Dist. No. 1*, 551 U.S. at 748.

42. *Id.* at 315; see *Grutter*, 539 U.S. at 339–40.

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

44. *Grutter*, 539 U.S. at 323 (quoting *Bakke*, 438 U.S. at 306) (internal quotations omitted).

45. *Id.* at 323–24 (quoting *Bakke*, 438 U.S. at 310).

46. *Id.*

B. THE UNIVERSITY'S RACE-CONSCIOUS ADMISSIONS POLICY:
PERPETUATING RACIAL AND ETHNIC STEREOTYPING

The disproportionate use of race in affirmative action, whether consciously or not, fosters an attitude that views and judges individuals based on unchangeable characteristics rather than the unique aspects of an individual's character and background. Inevitably, this leads to impermissible stereotyping and assumptions of applicants based on their skin color.

Nowhere is this more evident than in the University's affirmative action program. Indeed, in arguments before the Fifth Circuit Court of Appeals, the University argued that the inclusion of race in holistic review is necessary because the minority applicants admitted through the Top Ten Percent Program that graduate from largely segregated high schools in poor communities are not as qualified as those who graduate from predominantly white high schools in affluent neighborhoods.⁴⁷

This objective rests on a qualitative assumption that minority applicants admitted through the Top Ten Percent Program "are somehow more homogenous, less dynamic and more undesirably stereotypical than those admitted under holistic review."⁴⁸ Even worse, the Fifth Circuit's acceptance of the University's argument was "premised on the dangerous assumption, that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish meaningful campus diversity."⁴⁹

In essence, the University's affirmative action program, which like many others is laden with the very stereotypes of minority applicants that haunted the Jim Crow era, "promote[s] notions of racial inferiority[,] . . . lead[s] to a politics of racial hostility,"⁵⁰ and "embrace[s] the very ill that the Equal Protection Clause seeks to banish."⁵¹ Simply put, the University's blatant stereotyping of minorities who graduate from segregated schools fails to recognize that race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body,"⁵² and that diversity encompasses "a far broader array of qualifications and characteristics of which racial or ethnic origin is, but a single though important element."⁵³ In *Grutter*, for example, the Petitioner highlighted the evils that result when universities rely on skin color as a proxy for diversity:

The way in which the [University of Michigan] Law School defines its interest in diversity proves how it is tied to crude stereotypes. It deems that mere membership in one of the specified racial or ethnic

47. *Fisher*, 738 F.3d. at 669–70 (Garza, J., dissenting).

48. *Id.* at 670.

49. *Id.*; see also *J.A. Croson*, 488 U.S. at 493 (holding that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

50. *J.A. Croson*, 488 U.S. at 493.

51. *Fisher*, 738 F.3d at 670.

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

53. *Grutter*, 539 U.S. at 307 (quoting *Bakke*, 438 U.S. at 315).

groups will make it “particularly likely” that students will have had “experiences and perspectives of special importance” to the Law School’s “mission.” Thus, the Law School “impermissibly value[s] individuals because [it] presume[s] that persons think in a manner associated with their race.” The “corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity.”⁵⁴

Perhaps most importantly, the University’s affirmative program is predicated largely on “[d]istinctions between citizens solely because of their ancestry,”⁵⁵ which are “by their very nature odious to a free people.”⁵⁶

Moreover, if, as the University argues, its holistic review process “allows it to select for ‘other types of diversity’ beyond race alone,”⁵⁷ what possible justification supports including race as a factor, particularly when the University admits a substantial number of minority applicants through its Top Ten Percent Program? The belief, without a shred of supporting evidence, is that minorities from segregated schools are not as qualified as those attending predominantly white high schools and living in affluent neighborhoods. Even the most ardent supporters of affirmative action would not countenance such a blatant example of masking racial and ethnic stereotyping with “benign” motives.⁵⁸ This is precisely why racial classifications are “too pernicious to permit any but the most

54. *Grutter v. Bollinger*, Petitioner’s Brief 38 (quoting *Metro Broadcasting, Inc., v. F.C.C.*, 497 U.S. 547, 618–19 (1990) (O’Connor, J., dissenting)).

55. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)); *cf. U.S. v. Virginia* 518 U.S. 515, 533, 541 (1996) (states may not enact laws that rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females,” particularly when the states control the “gates to opportunity”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”).

56. *Rice*, 528 U.S. at 517; *see also Fisher*, 738 F.3d at 669–70. In his dissent, Judge Garza stated as follows:

The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law [Program]. That is, the University does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats. The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite “change agents” are among them, [or] whether these admittees are able, collectively or individually, to combat pernicious stereotypes. There is no such evaluation despite the fact that Top Ten Percent Law admittees also submit applications with essays, and are even assigned PAI scores for purposes of admission to individual schools. *Id.* at 669.

57. *Fisher*, 758 F.3d at 669 (Garza, J., dissenting).

58. The fact that such stereotypes are now used to include, rather than exclude, minorities does not matter. *See Fisher I*, 133 S. Ct. at 2421 (“[t]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable”) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9 (1982)); *see also J.A. Croson*, 488 U.S. at 500 (“the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable”).

exact connection between justification and classification.”⁵⁹

Additionally, by equating race with diversity, universities give insufficient consideration to the many factors that shape an individual’s life and inform their perspective. This includes family upbringing, military and work experience, a history of overcoming adversity, physical and mental disabilities, socio-economic status, and geography. Unfortunately, by narrowly viewing diversity through the lens of race, affirmative action programs prohibit the type of inclusion that results from an admissions process that looks beyond race and unchangeable characteristics. The Court noted in *Grutter*, “classroom discussions . . . [are] simply more enlightening and interesting,” when students have “the greatest possible variety of backgrounds.”⁶⁰

At bottom, to hold that the University’s affirmative action program is narrowly tailored would require the Court to countenance the stereotyping of African-American and Hispanic applicants based on their socio-economic status, based on the fact that they graduated from segregated schools, and based on the disadvantages they face due to past discrimination. This would make *Brown v. Board of Education*⁶¹ seem like an advisory opinion, and makes it difficult, if not impossible, to stop discriminating on the basis of race. Ultimately, by adopting the framework used by the Court in the Sixth Amendment’s “cross-section” context, universities can design affirmative action programs to further the goal of enhancing educational diversity, while eschewing a disproportionate emphasis on race and ethnicity.

PART III: AFFIRMATIVE ACTION PROGRAMS SHOULD STRIVE TO ACHIEVE A TRUE CROSS-SECTION OF THE COMMUNITY

As the above discussion illustrates, current affirmative action programs rest on fundamentally incompatible principles that frustrate, rather than facilitate, the attainment of true educational diversity. The core problem is that universities have largely disregarded the only permissible goal of affirmative action programs—educational diversity⁶²—in favor of remedying past discrimination.⁶³ In doing so, race and other immutable characteristics have become proxies for a diverse student body at the expense of the many factors that more directly influence an individual’s perspec-

59. *Seattle School Dist. No. 1*, 551 U.S. at 720 (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

60. *Grutter*, 539 U.S. at 330.

61. 347 U.S. 483 (1954).

62. See *Bakke*, 438 U.S. at 311–12 (“the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education”).

63. See *Fisher I*, 133 S. Ct. at 2417 (“Redressing past discrimination could not serve as a compelling interest, because a university’s ‘broad mission [of] education’ is incompatible with making the ‘judicial, legislative, or administrative findings of constitutional or statutory violations’ necessary to justify remedial racial classification.”) (quoting *Bakke*, 438 U.S. at 307–09).

tives, like values and world view, that would enable that individual to offer unique perspectives in the classroom.

Put differently, universities must consider the purpose of diversity before they can design race-conscious admissions programs that will produce a diverse student body. Indeed, meaningful classroom diversity enhances constructive dialogue between individuals to improve understanding, elaborate on meaning, and effectuate individual and group learning.⁶⁴ As one scholar notes, dialogue “is much more than a conversation,”⁶⁵ as “understanding is dialogic because understanding is by its nature responsive,”⁶⁶ and “we elaborate meaning by ‘lay[ing] down a set of our own answering words’ in response to the words of others.”⁶⁷ Furthermore, dialogue fosters understanding when participants have an “immense plurality of experience”⁶⁸ that is “based upon, among many other things, ‘parent, clan, class, religion [and] country.’”⁶⁹ In this way, a “complex array of sociological, ideological and historical factors determine the parameters of dialogue, and thus informs meaning.”⁷⁰

Consequently, affirmative action programs that increase only one type of diversity, whether racial, socio-economic, or geographic, fail to obtain the necessary “plurality of experience” to enrich the learning environment.⁷¹ Additionally, when affirmative action programs strive to remedy past discrimination, universities fail to meaningfully consider the characteristics that develop classroom dialogue, and thereby fail to advance the core purpose of attaining a diverse educational environment. As a result, the unintended consequence of race-conscious affirmative action is that it frustrates, rather than advances, the educational benefits of diversity because it leads to a student body that is diverse in only one respect. As Justice Powell recognized in *Bakke*, affirmative action programs that focus “solely on ethnic diversity . . . hinder, rather than further attainment of genuine diversity.”⁷²

The logical choice, therefore, is to develop affirmative action programs that encompass all six categories of diversity and eschew a disproportion-

64. See Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 *DICK. L. REV.* 3, 7–8 (1996).

65. *Id.* at 7.

66. *Id.*

67. *Id.* (quoting V.N. Voloshinov, *Marxism and the Philosophy of Language* 102 (Ladislav Matějka & I.R. Titunick trans., 1973)).

Given that understanding is dialogic, the elaboration of meaning is an extraordinarily complex process. Any utterance comes from “another’s voice and filled with that other voice,” and “enters [the hearer’s] context from another context, permeated with the interpretations of others.” Stated another way, meaning “must find itself, reveal itself among other words, within an intense field of interorientations.” *Id.* at 8.

68. *Id.* at 8.

69. *Id.* (quoting Wayne C. Booth, Introduction to Mikhail Bakhtin, *Problems of Dostoyevsky’s Poetics* 26 (Caryl Emerson ed. & trans., 1984)).

70. *Id.* at 9.

71. *Id.*

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

ate emphasis on any single factor. An ideal way to design such a framework is by analogy to the Supreme Court's cross-section jurisprudence.

A. THE SIXTH AMENDMENT'S CROSS-SECTION REQUIREMENT
ENABLES UNIVERSITIES TO CONSIDER ALL SIX COMPONENTS
OF DIVERSITY WITHOUT EXCLUDING RACE

The Supreme Court's cross-section jurisprudence provides a principled framework to design affirmative action programs that attain true educational diversity. The Court has repeatedly held that the right to a "jury trial contemplates a jury drawn from a fair cross section of the community,"⁷³ and not "the organ of any special group or class."⁷⁴ As the Court has noted, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."⁷⁵

Importantly, the Court has interpreted the cross-section requirement to encompass primarily a negative right against the systematic exclusion of jurors on the basis of race.⁷⁶ In *Lockhart v. McCree*,⁷⁷ the Court stated as follows:

[T]he exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.⁷⁸

A defendant alleging improper exclusion must demonstrate that: "(1) the group allegedly excluded is a distinctive part of the community, (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community,⁷⁹ and (3) the underrepresentation is due to systematic exclusion of the group in the jury-selection process."⁸⁰ In conducting this analysis, courts may "infer that unconstitutional exclusion of cognizable

73. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

74. *Glasser v. United States*, 315 U.S. 60, 86 (1942).

75. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

76. *Id.* (holding that excluding members of different racial groups from jury service is "at war with our basic concepts of a democratic society and a representative government").

77. 476 U.S. 162 (1986).

78. *Id.* at 175.

79. Regarding the second prong, courts often rely on the concept of absolute and comparative disparity. Absolute disparity "measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members on the jury wheel." *U.S. v. Royal*, 174 F.3d 1, 6-7 (1st Cir. 1999). Comparative disparity "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Id.* (quoting *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992)). Most courts rely on absolute rather than comparative disparity when determining if the cross-section requirement has been violated. *Id.* at 7.

80. *U.S. v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001).

groups exists when there is a disparity between a group's population figures and its representation in the jury venire sufficiently large that it is extremely unlikely that the disparity results from random chance."⁸¹ However, the rule against improper exclusion does not entitle a defendant to a racially diverse jury, but instead gives criminal defendants "a fair possibility for obtaining a representative cross-section of the community."⁸² As discussed below, the Court's interpretation of the cross-section requirement implicitly recognizes that, at least in some circumstances, a cross-section of the community can be reflected by characteristics independent of race and ethnicity. The same should hold true in the affirmative action context.

A. THE CROSS-SECTION REQUIREMENT DOES NOT CONTEMPLATE JURIES THAT MIRRORS A COMMUNITY'S RACIAL AND ETHNIC DEMOGRAPHICS, OR THAT RACE SHOULD BE A PRIMARY FACTOR IN SATISFYING THIS REQUIREMENT.

The Supreme Court has held that the requirement of a fair cross-section does not guarantee that juries be "of any particular composition,"⁸³ or that venires be a substantially true "mirror" of the community.⁸⁴ Accordingly, the cross-section requirement does not require that juries must "mirror the community" and reflect the various distinctive groups in the population.⁸⁵ Indeed, "[d]efendants are not entitled to a jury of any particular composition,"⁸⁶ and although "the right to a jury trial guarantees the criminal defendant a fair trial by a panel of impartial, 'indifferent' jurors, there is no requirement that a venire or jury mirror the general population."⁸⁷ Thus, the negative right to improper exclusion is grounded in a right to equal opportunity, not a requirement that outcomes reflect every immutable characteristic of the community.

B. IN THE AFFIRMATIVE ACTION CONTEXT, THE CROSS-SECTION REQUIREMENT CAN ACHIEVE EDUCATIONAL DIVERSITY WITHOUT PLACING DISPROPORTIONATE WEIGHT ON RACE AND ETHNICITY

In *Grutter*, the Court noted that "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"⁸⁸ A race-conscious

81. *Ramseur*, 983 F.2d at 1231.

82. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

83. *Taylor*, 419 U.S. at 538.

84. *Id.*

85. *Duren v. Missouri*, 439 U.S. 357, 364, n.20 (1979); see also *Lockhart*, 476 U.S. at 173 (the Court has not required that petit juries "reflect the composition of the community at large").

86. *Holland v. Illinois*, 493 U.S. 474, 483 (1990).

87. *Phillips*, 239 F.3d at 842 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

88. *Grutter*, 539 U.S. at 330 (emphasis added).

admissions policy that is analogous to the cross-section requirement would result in a meaningfully diverse student body and enhance the educational experience for applicants of all races and ethnicities.

To begin with, the cross-section requirement facilitates a holistic view of diversity. By not mandating that juries mirror the racial and ethnic demographics of a community, the Court implicitly recognizes that characteristics beyond race and ethnicity are vital to empaneling juries that reflect a cross-section of the community.⁸⁹ At the same time, the Court's prohibition on the improper exclusion of jurors and, more particularly, the permissibility of inferring improper exclusion based on a significant "disparity between a group's population figures and its representation in the jury venire,"⁹⁰ reflects an understanding that race and ethnicity *are* components of a meaningful cross-section of the community. Thus, where a community is racially and ethnically diverse, members of each group should ordinarily be represented in the jury pool. However, because the cross-section requirement does not mandate that juries actually mirror a community's racial and ethnic demographics, it avoids the quantitative approach to diversity that *Grutter's* "critical mass" standard creates.⁹¹ In doing so, the cross-section requirement facilitates a consideration of factors such as personal and family background, life experience, political views, values, and perspectives, and thus embraces a more holistic view of diversity.⁹²

C. THE VOIR DIRE OF ADMISSIONS: CREATING A DIVERSITY QUESTIONNAIRE

Universities can—and should—embrace a holistic approach to diversity by first eliminating the portion of every application that simply requires candidates to check boxes that reveal skin color or ethnicity. Instead, applications should contain a diversity questionnaire that probes, among other things, an individual's background, family circumstances, the overcoming of adversity, and life experiences. This approach will enable schools to more fully evaluate candidates based not on the color of their skin, but on the content of their character, and will allow schools to reward individuals for what they have overcome, not for what they cannot change. In short, the goal of enrolling a diverse student body should be achieved through a process that is as noble as the end it seeks. That process should embrace the principle that all people should be treated equally.

Most importantly, a diversity questionnaire will allow admissions officials to conduct an individualized consideration of each applicant, admit a diverse student body, and create a classroom environment that will enrich the educational experience for students of all backgrounds. Below is a

89. *Holland*, 493 U.S. at 483.

90. *Ramseur*, 983 F.2d at 1231.

91. *Fisher I*, 539 U.S. at 340.

92. *See id.* at 338.

non-exhaustive list of questions that might be included in a diversity questionnaire. Questions like those below would identify the life experiences, challenges, and environmental factors that shaped the candidates' perspectives and will enable them to enrich the classroom environment.

1. Please describe a significant life experience that impacted your values and influenced your life and career choices.
2. Please explain how your background and life experiences including, but not limited to, race, ethnicity, disability, socioeconomic status, family and background, have prepared you to contribute diverse perspectives to the classroom environment.
3. Please identify a life experience in which you overcame significant adversity, and explain how you reflected upon and grew from that experience.
4. Identify a conflict that you have had with a friend, family member, or colleague, and explain how you resolved this conflict.
5. Please describe your experiences with individuals of diverse backgrounds that offered perspectives different than yours. Please include in your answer how you reacted to this experience, what you learned, and how it contributed to your growth as a person.
6. Identify what you would consider a mistake or lapse in judgment in your life, and describe how you reflected upon and learned from that event.
7. Have you ever been subject to discrimination on the basis of, among other things, your race, ethnicity, gender, sexual orientation, or religious background? If so, explain how this experience impacted you as a person and influenced your conduct toward individuals of different backgrounds.
8. Do you believe diversity is an important educational objective? Why or why not?
9. How would you define "diversity," and in your view what factors are essential to creating a diverse and stimulating classroom environment?

The table below summarizes the connection between the jury and applicant selection process and sets forth the process by which a diverse jury and educational environment are achieved.

Group	Method of Selection	Outcome
Jury Pool	Voir Dire	A cross-section of the community, but the jury need not reflect the racial and ethnic demographics of the community ("Jury diversity")
Applicant Pool	Diversity Questionnaire	A diverse student body that reflects a cross-section of the community that is based on factors beyond race and ethnicity alone ("Educational diversity")

CONCLUSION

Affirmative action programs will likely never gain widespread acceptance because the use of race, whether for prejudicial or preferential purposes, is fundamentally at odds with principles of equality and fairness. This is particularly true where affirmative action programs strive to remedy past discrimination, not create a truly diverse educational environment where the classroom reflects cross-section of the community.

Ironically, such policies harm students they are intended to benefit and those, like Abigail Fisher, who claim that they result in cognizable legal harm. For example, the University of Texas justified its affirmative action program by assuming that African-American and Hispanic applicants from segregated schools and poor neighborhoods were inferior. That assumption bears a striking resemblance to the beliefs that fueled “separate but equal,” and the prejudice that prompted former Governor George Wallace to proudly declare “segregation now, segregation tomorrow, and segregation forever.”⁹³

Individuals of all races should be offended when judgments are driven by skin color, regardless of whether the reasons are grounded in disapproval and discrimination or acceptance and advancement. At bottom, affirmative action programs lead, at least in some cases, to the admission or denial of applicants based primarily on their skin color. Those who might disagree need only look to the University of Michigan Law School’s statement that minority status is “an extremely strong factor in the decision for acceptance.”⁹⁴

Sadly, whatever benefit might result from race-based affirmative action likely pales in comparison to the cost to all students of all races: a less educationally diverse classroom and a message that the color of an applicant’s skin matters more than the content of an applicant’s character. In *Fisher II*, the Supreme Court will likely invalidate the University’s affirmative action program and will thus send a different message: “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹⁵ If that happens, an honest and inclusive march to equality can finally begin.

93. Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES (Sept. 14, 1998), <http://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html?pagewanted=all>.

94. *Grutter*, 539 U.S. at 320.

95. *Seattle Sch. Dist. No. 1*, 551 U.S. at 748.

