

The University of Texas at Austin's Defense of Affirmative Action in *Fisher v. University of Texas*: Lessons for Institutional Policies and Practices

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Abstract

In *Fisher v. University of Texas at Austin* (2013), the U.S. Supreme Court most recently recognized the right of universities to pursue a mission-centered interest in the educational benefits of student body diversity. The decision, however, also reminded institutions of the limited ways they are allowed to consider race in admissions policies to advance this goal. As institutions assess how to proceed in the aftermath of *Fisher*, it is important to consider any lessons learned from the case that can guide future efforts. In this article, I consider how the University of Texas at Austin's arguments in support of its policy can guide future efforts to support Latina/os in higher education. The university's arguments offer a more contextualized way to think of diversity-related policies, which can support the educational experiences of Latina/os more effectively and advance the long-term interests of this community and other underrepresented populations in higher education.

Introduction

The debate over affirmative action is frequently a central issue at highly selective undergraduate institutions and graduate and professional schools (see, Bowen & Bok, 1998).¹⁹ This is not surprising as these are the primary institutions that provide pathways to positions of power and influence in the United States. The college a student attends matters a good deal in terms of shaping their future opportunities, particularly for students of color. For example, research shows that students of color who attend selective institutions are more likely to graduate than their peers who attend less selective institutions (Bowen, Chingos, & McPherson, 2009; Carnevale & Strohl, 2013; Melguizo, 2008; Small & Winship, 2007), to have higher earnings (Dale & Kruger, 2002, 2014), to become leaders in their chosen professions and to initiate and lead activities that assist communities of color and contribute to the social and economic health of our nation (Bowen & Bok, 1998). For these reasons, race-conscious admissions policies at selective postsecondary institutions remain a critical factor in advancing the educational opportunities and interests of Latina/os across the nation. While the U.S. Supreme Court's decision in *Fisher v. University of Texas at Austin* (2013) recently recognized the right of universities to pursue a mission-centered (i.e., "compelling") interest in the educational benefits of student body diversity, it also reminded institutions of the limited ways they are permitted to consider race or ethnicity in that process. As institutions assess how to proceed in the aftermath of *Fisher*, it is important to consider lessons learned from the case that can guide future efforts.

Therefore in this article, I outline how the arguments the University of Texas at Austin (UT-Austin) and its supporting *amici curiae* (friends-of-court)—advanced in support of the university's race-conscious admissions policy—can inform institutional policies and practices aimed to support Latina/os in higher education.²⁰ The context within which UT-Austin sought to implement and defend its race-conscious admissions policy—in Texas—is particularly relevant for informing policies that seek to address educational inequities for Latina/os in the nation. In Texas, as in the nation as a whole, Latina/os are the largest minority

19. For the purpose of this article, I employ the terms "affirmative action," "race-conscious admissions policies," and "race-sensitive admissions policies" interchangeably; they refer to the consideration of race as one among many factors in admissions decisions.

20. These friend-of-the-court (*amicus curiae*) briefs are filed by individuals or organizations that are not direct parties in the lawsuit but have an interest in the outcome of the case. In this analysis, I focus primarily on an *amicus* brief filed by American Social Science Researchers in support of the university, as it was one of the primary briefs that summarized many of the research findings that supported the arguments by UT-Austin that are highlighted in this article.

group.²¹ Yet at UT-Austin (and at other selective institutions across the nation), they remain underrepresented in the student body (about 15% at UT-Austin) relative to their representation in the state (about 38% in Texas). In addition, the educational disparities for Latina/os in Texas reflect educational disparities for this population across the nation. In 2002, amongst 18 year olds in Texas, only 33% of Latina/os had a high school degree (compared to about 50% of whites) and 18% held a college degree (compared to 65% of whites) (NCHEMS). In 2010, amongst adults 25 years old and over in the U.S., only 63% of Latina/os had a high school degree (compared to about 88% of whites) and 14% held a college degree (compared to about 30% of whites) (U.S. Census Bureau, 2012). And as is the case in the U.S., pathways to leadership positions for Latina/os in the state are notably lacking. In Texas for instance, Latina/os make up 37.6% of the population (Ennis, Rios-Vargas, & Albert, 2011), but only 7.3% of the leadership in state and local government (Brief of National Latino Organizations, 2013). Considering these inequities and demographic realities in the state, UT-Austin implemented race-conscious admissions policies to further its mission of “preparing educated, productive citizens who can meet the rigorous challenges of an increasingly diverse society and an ever-changing global community”²² —a mission that closely matches those of other selective postsecondary institutions across the nation. The university’s defense of its policy in *Fisher*, thus, can offer important lessons for institutional policies that seek to increase access for Latina/os in higher education.

In my analysis, I argue that the university’s arguments in defense of affirmative action in *Fisher* call for a more contextualized understanding of diversity and its justifications in a manner that can more effectively advance the long-term interests of Latina/os and other underrepresented populations in higher education. This more contextualized understanding of diversity and its justifications can help guide institutional efforts post-*Fisher* in three main areas. First, as with UT-Austin, postsecondary institutions that seek to increase access to higher education for Latina/os and other underrepresented populations will not only need to pay attention to their admissions practices, but also to the learning environments on campus and to the conditions that are necessary to support a positive learning environment throughout their students’ educational journeys. Second, as the demographics of the nation shift and Latina/os represent a larger percentage of the population, institutions will need to consider how policies intended to further institutional missions need to change to address these changing demographics in a broader societal context within which racial and ethnic inequalities persist. Finally, as legal decisions restrict the consideration of race in admissions and reinforce a “color-blind” approach in education policy, institutions will need to craft policies and engage in practices that address the real ways in which race continues to operate to shape educational access and success.

Before I turn to UT-Austin’s arguments in *Fisher* and the lessons for institutional policies and practices, I first outline the legal background that led to *Fisher*, as it illuminates the contentious and complex legal terrain underlying the efforts selective institutions are making to implement race-conscious admissions practices in order to further their educational missions.

Legal Background: The Path toward *Fisher* in Texas

The Court of Appeals Prohibits Affirmative Action in *Hopwood*

In Texas, the controversy over the legality of affirmative action dates back to the now well-documented case of *Hopwood v. University of Texas Law School* (1996). In *Hopwood*, which took place two decades after the U.S. Supreme Court narrowly upheld the constitutionality of affirmative action in *Regents of the University of California v. Bakke* (1978), the Fifth Circuit departed from *Bakke*, finding that the consideration of race or ethnicity as a

21. By 2011, Latina/os made up the largest minority group among the nation’s four-year colleges and universities (Fry & Lopez, 2012). Texas registered the second largest number of Latina/os (after California) and third largest number of African Americans (after New York and Florida) [Ennis, Rios-Vargas, & Albert, 2011]. Indeed, by 2020, Latina/os and African-Americans will represent roughly half of the total population ages 25 to 64—with both populations projected to grow at much higher rates than whites (NCHEMS). By the year 2050, Latina/os will make up 30 percent of the U.S. population (U.S. Census, 2008).

22. See Mission Statement: The University of Texas System, available at <http://www.utsystem.edu/osm/mission.htm>

factor in admissions did not serve a compelling interest.²³ The case involved a challenge by Cheryl Hopwood and three other white students who had been denied admission to the University of Texas Law School in 1992. The law school based its admissions on the Texas Index Score, a composite of grade point average and standardized test scores, and an interpretation of the index score that took into consideration an applicant's race. Cheryl Hopwood argued that the admissions policy violated the Equal Protection Clause of the 14th Amendment because minority applicants who had lower Texas Index Scores than white applicants were admitted, and because the law school had separate admissions committees for white and minority applicants. The law school defended its policy on the grounds that it met the requirements of the Court's decision *Bakke*, which had endorsed a compelling interest in diversity.

The Fifth Circuit, however, disagreed, finding that the law school did not have a compelling interest in student body diversity. The Fifth Circuit rested its finding in part on the argument that *Bakke* had been a divided opinion, as Justice Powell was the only justice who recognized student body diversity as a compelling interest. Moreover, the sitting U.S. Supreme Court at the time was more conservative than the one that had decided *Bakke*, and it had fallen short of endorsing affirmative action in cases decided in the employment context (see, *Adarand Constructors, Inc. v. Peña*, 1995). These factors led to the unusual circumstance in which a lower court failed to apply an otherwise binding U.S. Supreme Court ruling to a case that raised a similar legal issue. In 1997, the Texas attorney general interpreted the *Hopwood* decision to apply to both public and private institutions in the state and to extend to admissions decisions, financial aid, scholarships, and recruitment and retention practices (Chapa et al., 1997).

Following *Hopwood*, higher education institutions in Texas, and those in Mississippi and Louisiana that were not under orders to desegregate, replaced the consideration of race with other criteria intended to increase the representation of students of color on their campuses. UT-Austin, for instance, began to use a Personal Achievement Index, which considered such factors as a student's socioeconomic status, whether the student spoke a language other than English at home, and whether the student lived in a single-family home. The Texas state legislature also adopted related initiatives and in 1997 passed the Top Ten Percent Plan (HB 588), which granted high school seniors in the top 10 percent of their class automatic admission to the state's universities, including their campus of choice, which generated a hyper-competitive admissions process at UT-Austin. The plan's creators noted that the law was not intended to become an alternative to affirmative action, nor was it likely to reverse the decline in racial and ethnic diversity at undergraduate institutions in the state following the prohibition of affirmative action under *Hopwood* (Brief of the Authors of the Texas Ten Percent Plan, 2003, p. 3).

In addition, the state's public flagship institutions, particularly UT-Austin, supplemented the Top Ten Percent Plan with targeted scholarships and retention programs intended to increase representation of students of color (Horn & Flores, 2003). During this time, UT-Austin was able to regain some of the losses in racial and ethnic diversity that had taken place after *Hopwood* banned the consideration of race as a factor in admissions, although not to the level it had achieved with its pre-*Hopwood* race-conscious policy (Long & Tienda, 2008).

The Court Overrules *Hopwood*: Another Challenge is Brought in Texas

In June 2003, six years after *Hopwood* went into effect, the U.S. Supreme Court again upheld the constitutionality of considering race in admissions, relying in part on research documenting the benefits of student body diversity (see, e.g., Chang, Witt, Jones, & Hakuta, 2003). The case, *Grutter v. Bollinger*, involved a challenge to a holistic admissions policy at the University of Michigan Law School that considered race, among

23. In considering the constitutionality of a policy under the 14th Amendment of the U.S. Constitution, a court will apply one of three standards of review: 1) rational basis, 2) intermediate scrutiny, or 3) strict scrutiny. Under a rational basis standard, the lowest level of review and easiest standard to satisfy, the Court will uphold the policy if the institution is pursuing a "legitimate" objective and there's a "rational relation" between the means chosen and the objective. Under intermediate scrutiny, the objective needs to be "important" and the means need to be "substantially related" to the objective. Strict scrutiny, which requires a "compelling" interest and means that are "narrowly tailored" to this objective, involves the Court's highest level of review and it is the hardest one to meet. The Court applies the strict scrutiny standard to "smoke out" illegitimate uses of race by assuring that the institution "is pursuing a goal important enough to warrant use of a highly suspect tool" (*Johnson v. California*, 543 U.S. 499, 506 (2005)). These requirements apply to any institution that receives federal funding, which include the majority, if not all, of the nation's private postsecondary institutions.

other factors, as a circumstance that could enhance an applicant's chances of admission. Barbara Grutter, a white female applicant who had been denied admission, argued that the policy violated the Equal Protection Clause of the 14th Amendment because a higher percentage of minority applicants were admitted than non-minority applicants with similar test scores, even though the minority applicants had lower grade point averages. The law school argued that the policy was needed to further a compelling interest in student body diversity, which required the enrollment of a "critical mass" of students of color (i.e., more than a token number of minority students to help diminish the threat of stereotypes²⁴) (see Garces & Jayakumar, 2014, for an extended analysis of the concept of critical mass). The law school also argued that the admissions process met the narrow tailoring requirements of strict scrutiny because it was based on individualized consideration of every applicant.

The U.S. Supreme Court agreed, in a 5-4 majority opinion authored by Justice O'Connor.²⁵ As Justice Powell had found in *Bakke*, the Court in *Grutter* found that universities had a compelling interest in student body diversity. Importantly, by acknowledging the broad implications of diversity for society and our democracy, the Court's decision also expanded the justification for affirmative action beyond the educational benefits of a diverse student body. The majority opinion emphasized the role of universities—professional schools such as law schools, in particular—in providing "the training ground for a large number of our Nation's leaders" (*Grutter*, 539 U.S. at 332). The Court also stressed the need for these institutions to be inclusive of individuals of all races and ethnicities so that all members of our society can have "confidence in the openness and integrity of the educational institutions that provide this training" (*Grutter*, 539 U.S. at 332). With this expanded rationale, the Court recognized the important role postsecondary institutions play in sustaining the health of our democracy by creating pathways to leadership for a racially diverse student body. *Grutter* thus overruled *Hopwood*, which allowed higher education institutions in Texas (as well as Louisiana and Mississippi) to again consider race as a factor in their admissions decisions in a narrowly tailored manner.²⁶

In 2005, after *Grutter* had lifted the prohibition on affirmative action policies at postsecondary institutions in Texas, UT-Austin reintroduced the consideration of race in admissions. It did so only after commissioning two studies that explored racial diversity in its classrooms and across its campus. One study showed that African-American and Latina/o students remained underrepresented in small to average-sized undergraduate classes, which offered the best opportunity for classroom discussion. The study found that "90% of undergraduate classes of the most common size at UT—sections with 10-24 students—enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one [Latina/o] student" (Brief for Respondents, 2013, p. 10). UT-Austin also conducted a student survey, which revealed that minority students were feeling isolated and that a majority of all students felt there was "insufficient minority representation" in their classrooms for "the full benefits of diversity to occur." In light of these findings, UT-Austin concluded that it had yet to achieve "the critical mass" of underrepresented students necessary to obtain the full educational benefits of diversity under the Top Ten Percent Plan.

Following the implementation of the race-conscious policy in 2005, Abigail Fisher, a white female applicant who had been denied admission to UT-Austin sued the university, arguing that UT-Austin's policy did not follow the parameters of *Grutter*, and therefore, violated the Equal Protection Clause of the 14th Amendment. The main legal issues involved were not whether the educational benefits of diversity were a compelling interest, one of the primary legal issues in *Bakke*, *Hopwood*, and *Grutter*, but whether the individualized consideration of race

24. Steele (2010) defines stereotype threat as "a situational threat—a threat in the air—that, in general form, can affect the members of any group about whom a negative stereotype exists. Where bad stereotypes about these groups apply, members of these groups can fear being reduced to that stereotype. And for those who identify with the domain to which the stereotype is relevant, this predicament can be self-threatening" (p. 614).

25. A separate case involved a challenge to an admissions policy at the undergraduate College of Literature, Science, and the Arts, which awarded extra points to candidates on the basis of their race. In that case, *Gratz v. Bollinger* (2003), the Court issued a separate decision striking down the undergraduate admissions policy on the grounds that the policy's point system was not flexible enough to comply with the individualized consideration outlined in *Grutter*.

26. The Court has not articulated a fixed or singular measure for determining whether a policy is "narrowly tailored," but has instead outlined a number of relevant criteria, which are ultimately context-specific. These criteria include making sure that the policy: (a) does not operate as a quota; (b) is adopted after an institution's good faith consideration to workable race-neutral alternatives; (c) involves a flexible, individualized consideration of applicants so that race, while important, is only one of a number of factors being considered; (d) does not unduly burden disfavored groups; and (e) is limited in time or includes a periodic review to assess its continued necessity. In *Fisher*, the Court clarified that this narrow tailoring determination is one that courts need to make themselves, with great care, while taking account of a university's experience and expertise.

was necessary to attain the goal of diversity. Abigail Fisher argued that the university had reached an adequate level of racial and ethnic diversity through race-neutral means, the Texas Top Ten Percent Plan, so that the consideration of race as a factor in admissions decisions was not necessary and thereby unconstitutional. UT-Austin, on the other hand, argued that it needed the race-conscious policy so that it could attain a more racially and ethnically diverse student body than it had been able to attain under the Top Ten Percent Plan.

In the next section, I summarize the Court's decision in *Fisher* before considering these arguments in more detail and the lessons for institutional policies and practices.

The Court's Ruling in *Fisher*

After considering all the arguments in *Fisher*, the Court, in a 7-1 majority opinion written by Justice Kennedy, with Justice Kagan recused, endorsed the right of universities to pursue diversity as a compelling educational interest, leaving in place prior holdings in *Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003). However, the Court also remanded the case back to the lower courts for further deliberation on whether the race-sensitive admissions policy is necessary to further that compelling interest—that is, whether the policy was narrowly tailored. It clarified that prior cases like *Bakke* and *Grutter* required closer examination to determine whether the university used race in a careful and limited manner to achieve a compelling interest in diversity. The Court was concerned that the lower court had reached this conclusion by relying primarily on the university's judgment without conducting its own independent assessment. The Court thus sent the case back to the lower court to undertake an independent review, guided by the expertise and experience of the university. On July 15, 2014, the Fifth Circuit Court of Appeals issued a ruling in the case affirming the lower court's ruling that UT Austin's plan met strict scrutiny requirements. Following the Fifth Circuit's decision, Abigail Fisher filed a petition for review by the full circuit (i.e., petition for en-banc review), which the Fifth Circuit denied. She and her legal team thereafter filed another request for the U.S. Supreme Court to hear the case (i.e., petition for certiorari), which the Court granted June 29, 2015.²⁷

Because *Fisher* resulted in a remand, there has been some disagreement as to whether the case established any new precedent. Some commentators have described the case as establishing a tighter narrow-tailoring requirement than the one articulated in *Grutter* (see, e.g., Somin, 2013). Conservative organizations have used this interpretation of *Fisher* to threaten institutions with future litigation. For example, the Center for Equal Opportunity (2013) issued a press release in response to the *Fisher* decision, stating that “we wish the Supreme Court itself had concluded that all racial preferences in university admissions are illegal, but it certainly has left the door open to that possibility in this case and future cases,” which means that the group “will continue to work toward that end.” The U.S. Department of Justice (2013), however, clarified that *Fisher* did not change the legal standards in *Grutter*.

Putting aside the legal nuances of whether *Fisher* established a different standard than *Grutter*, however, the practical reality is that the decision reminded institutions of the importance of documenting the reasons *why* the consideration of race as one of many factors in admissions is necessary or justified on their specific campuses. This is because, as lower courts undertake an independent review of the need for such policies, they will be relying on evidence that supports the judgment of institutions within their specific contexts that the institutions themselves are in the best position to provide. The arguments that UT-Austin and *amici* advanced in support of race-sensitive admissions can help guide future efforts (see, e.g., Jayakumar & Garcés, 2015). These arguments also guide institutional policies and practices that can support the educational experiences of Latina/os more effectively and advance the long-term interests of this community and other underrepresented populations in higher education. Next, I outline these arguments in more detail before turning to the lessons for institutional policies and practices.

27. The case will be argued during the Court's 2015-2016 Term.

UT-Austin's Arguments in *Fisher*

To justify its policy, UT-Austin specifically highlighted the need to address students' feelings of racial isolation, the need to have more racially and ethnically diverse classrooms and broader diversity within racial groups, and the need to further its educational mission of training future leaders of the state. These arguments can be placed in three main categories: (1) the importance of attending to the conditions institutions need to leverage the educational benefits of diversity; (2) the need for institutional policies to account for the broader local and national demographic context in which they operate and for the lingering effects of historical discrimination; and (3) the limits of race-neutral policies in expanding access for underrepresented populations in a society where race continues to matter.

Attending to the Conditions Necessary to Obtain Educational Benefits of Diversity

At the time of the *Fisher* litigation, Latina/os made up about 15% of the student body at UT-Austin and African-American students made up about 5%.²⁸ Opponents of UT-Austin's efforts argued that these percentages indicated that the institution was sufficiently diverse so that the use of race-conscious admissions practices in addition to the Top Ten Percent Plan was not constitutionally permitted or justified. UT-Austin, however, pointed to the fact that despite their current level of representation, students of color reported feeling isolated on campus and that African-American and Latina/o students remained underrepresented in undergraduate classes that offered the best opportunity for classroom discussion. In its legal brief, UT-Austin argued that it was important to consider each group's representation on campus separately and highlighted the fact that African-American and Latina/o students who were admitted through the Top Ten Percent Plan possessed a different range of personal and educational experiences than other applicants. Thus, UT-Austin argued that it needed a higher level of diversity—as well as more diversity within each racial group—to further its institutional mission and obtain the educational benefits of diversity. With these arguments, UT-Austin put a renewed focus on the importance of furthering a positive racial climate on campus, on attending to students' experiences in the classroom, and on realizing the educational benefits of diversity by admitting individuals from each racial group who had a diverse range of experiences. I discuss each of these in turn below.

A positive/healthy racial climate. As noted previously, UT-Austin reintroduced the consideration of race as a factor in its holistic admissions process after learning that minority students reported feeling isolated on campus. With this argument, UT-Austin emphasized the importance of considering the campus racial climate to further the educational benefits of diversity. Racial climate is an important part of the institutional context and includes community members' perceptions of "issues of race, ethnicity, and diversity" (Hurtado, Alvarez, Guillermo-Wann, Cuellar, & Arellano, 2012). To support UT-Austin's argument, the American social scientists *amici* presented evidence that summarized the importance of a positive racial climate in obtaining the educational benefits of diversity and demonstrated how low levels of racial and ethnic diversity harmed a campus's racial climate, thereby impeding students' ability to benefit from diversity (Brief of American Social Science Researchers as *Amicus Curiae* in support of Respondent in *Fisher*, 2013; see also Elgart, Plaut, Hirsch, & Paterson, (2015); Garces & Jayakumar, 2014).

The *amicus* brief cited, for example, data from a survey of 31 institutions across the U.S. showing that a low level of racial and ethnic diversity at colleges (e.g., when underrepresented minorities make up 0% to 20% of the student body) reinforced stereotypes and discrimination, and thus had a detrimental effect on the campus climate (Hurtado & Ruiz, 2012). The findings from this survey showed that minority students were more likely to feel excluded from campus events and activities at institutions with this low level of racial diversity than they did at institutions with a higher level of underrepresented minorities (21%-35%) in the student population. The brief also highlighted the fact that institutions that were not able to consider race in their admissions policies, such as those in California where Proposition 209 banned affirmative action, experienced

28. These figures are below the representation of Latina/os and African-American high school graduates. In 2010, 38% and 13% of Texas' high school graduates were Latina/os and African Americans, respectively.

a more difficult racial climate than UT-Austin (Brief of American Social Science Researchers, 2013). The Brief of American Social Science Researchers (2013) cited national survey data demonstrating that the racial climate for underrepresented minority students at the University of California, which has not been able to consider race as a factor in admissions since Proposition 209 passed in 1996, was worse than at UT-Austin. “Only 62.2% of African-American students on eight of the University of California campuses reported feeling that students of their race are respected on campus, compared to 72.3% of African-American students at the University of Texas” (p. 37, referencing Appendix Figure B). The brief further noted that “the comparison for Latino students also reveals a more difficult racial climate when institutions are prohibited from considering race as a factor in admissions (77.2% for Latinos at the University of California, compared to 89.9% at the University)” (p. 37).

Classroom diversity. UT-Austin also sought to justify the consideration of race as a factor in its holistic admissions policy after learning that a majority of all students felt there was “insufficient minority representation” in the school’s classrooms for “the full benefits of diversity to occur,” and that African-American and Latina/o students remained underrepresented in undergraduate classes that offered the best opportunity for classroom discussion. With these arguments, UT-Austin introduced the importance of considering racial and ethnic diversity in learning spaces where cross-racial interactions can take place, such as the classroom. Before *Fisher*, arguments for diversity had focused on the importance of having a critical mass of students on college and university campuses, without necessarily giving specific attention to racial and ethnic diversity at the classroom level. In light of these arguments, the *amicus* brief of the American Social Science Researchers summarized research studies, noting that classroom diversity was essential in many instances to provide the educational benefits of diversity endorsed in *Grutter*.

Some of these findings demonstrated that racially diverse students’ presence and participation in the classroom enhanced curricular content (Milem et al., 2012), class discussions (Deo, 2011), and cross-racial understanding (Chang, Denson, Sáenz, & Misa, 2006; Gurin, Nagda, & Zúñiga, 2013; Saenz, Ngai, & Hurtado, 2007; Zúñiga, Williams, & Berger, 2005). The findings also showed that racial diversity at the classroom level improved the quality of solutions envisioned collectively for solving complex problems (Page, 2007) and helped avoid the harm caused by racial isolation and tokenism, which can prevent institutions from attaining the educational benefits of diversity (Hurtado et al., 2012; Steele, 2010). Studies also showed that students who reported having had negative racial experiences in the college classroom or elsewhere on campus were more likely to express overall dissatisfaction with their college experience (Harper & Hurtado, 2007; Hurtado, Han, Sáenz, Espinosa, Cabrera, & Cerna, 2007; Miller & Sujitparapitaya, 2010). Thus, these studies demonstrated that racial diversity in the classroom helped institutions retain minority students, improve graduation rates, and create a learning environment that improved white and minority students’ ability to gain the educational benefits of diversity (Jayakumar, 2008).²⁹

Diversity within racial groups to help break down stereotypes. In *Fisher*, UT-Austin also pointed to the fact that its holistic policy was needed to obtain diversity within racial groups, or what UT-Austin termed “diversity within diversity.” The university noted that the degree to which the Top Ten Percent Plan contributed to racial diversity at UT-Austin was primarily the result of de facto segregation throughout Texas high schools. Because this segregation produced clusters of overwhelmingly majority-minority schools, the plan yielded a large number of minority students from these schools who were eligible for admission to UT-Austin. These students clearly contributed to racial diversity at the university in important ways, but UT-Austin argued that admitting Latina/o and African-American students who had varied backgrounds and perspectives was necessary to promote cross-racial understanding and help break down stereotypes.

To support this argument, the social science researchers’ *amicus* brief explained that, due to factors beyond their control, such as tracking, African-American and Latina/o applicants from educationally demanding

29. Many of the briefs submitted in support of UT-Austin summarized the extensive body of research on the educational benefits of student body diversity that had accumulated since the Court’s 2003 ruling in *Grutter*. As had been documented by social science research in *Grutter*, this body of work continued to demonstrate that student body diversity leads to important educational benefits, including increased cross-racial interaction among students, reduced prejudice, improved cognitive abilities, critical thinking skills and self-confidence, greater civic engagement, and improved leadership and workplace skills (see, e.g., Brief of American Educational Research Association et al., 2013; Sturm & Johnson, 2015).

and racially integrated or largely white schools might not find themselves in the top 10 percent of their class (Card & Rothstein, 2007; Oakes, 2008; Schmidt, 2012; Venezia & Kirst, 2005). The brief argued that these students' presence in the classroom could help to dismantle stereotypes and bridge the gaps that exist between white and non-white students in racially isolated schools. These arguments brought a much more nuanced approach to the consideration of diversity in higher education, and they pointed to the need to consider each individual's personal, family, community, and academic histories to build truly diverse learning environments (Brief of American Social Science Researchers, 2013).

Aligning Policies with Societal and Institutional Contexts

In addition to focusing on students' experiences on campus and in the classroom, UT-Austin sought to implement a race-conscious admissions policy as a way to align its policies more fully with the broader context in which it sought to further its educational mission. For instance, the university sought to increase Latina/o representation to further its goal of producing "future educational, cultural, business and sociopolitical leaders" in a state where Latina/os make up 38% of the population but only 15% of the student body (Brief for Respondents, 2013), and where pathways to leadership positions for Latina/os were also notably lacking (Brief of National Latino Organizations, 2013).

UT-Austin was well aware that it was seeking to promote racial and ethnic diversity in a state that had legally enforced the racial segregation of students during the first 70-plus years of the university's existence. The first African-American student, Heman Sweatt, was not admitted to UT-Austin until 1950 after the U.S. Supreme Court held in *Sweatt v. Painter* (1950) that the university could not exclude him on the basis of his race. For decades after *Sweatt* and another landmark Court opinion, *Brown v. Board of Education* (1954), which outlawed legally enforced racial segregation in public schools, discrimination persisted against African Americans and Latina/os in Texas public schools. UT-Austin noted concerns over the lingering effects of state-mandated segregation policies that were in existence through 1969 and of the university's subsequent years of discriminatory practices against African Americans and Latina/os. The university stated in its brief that "UT is painfully aware of that history, and the lingering perception that '[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students'" (Brief for Respondents, 2013, p. 4). By adopting a policy that considered race as one of many factors in admissions, UT-Austin sought to send a welcoming signal to students of color. These arguments highlight the importance of implementing admissions policies that account for past racially discriminatory practices and their ongoing effects in order to improve the educational experiences of students of color by helping them feel welcomed on campus (Brown-Nagin, Guinier, & Torres, 2015).³⁰

The Limits of Race-Neutral Policies when Race Continues to Matter

Another important line of argument that UT-Austin advanced highlighted the decline in racial and ethnic diversity that has taken place at institutions that are no longer allowed to consider race as a factor in admissions practices due to statewide bans on affirmative action policies, despite myriad efforts to implement "race-neutral" policies as a way to maintain racial diversity (see Brief of American Social Science Researchers, 2013). The arguments were presented to demonstrate that race-neutral policies have not been an effective alternative to race-sensitive admissions policies in maintaining a racially and ethnically diverse student body.

The Brief of American Social Science Researchers (2013), for example, demonstrated that bans on affirmative action led to a decline in the racial and ethnic diversity of student bodies at selective undergraduate

30. It is important to note that UT-Austin faced an uphill legal battle in justifying its policy based on the lingering effects of this history. This is because Justice Powell's opinion in *Bakke* invalidated past racial discrimination as a rationale for affirmative action policies. The arguments were nevertheless important to consider because the Court had also clarified that strict scrutiny review is a contextual determination. These arguments were relevant, therefore, because UT-Austin is seeking to promote the educational benefits of diversity in an environment in which students of color continue to experience racial and ethnic tensions that can be traced back to a history of racial discrimination. For a more detailed account of the ongoing racial and ethnic tensions on UT-Austin's campus and UT-Austin's history of racial discrimination, see Brown-Nagin, Guinier, & Torres (2015).

institutions, in the professions of law and medicine, and in other graduate programs critical to our nation's future economic success (see, e.g., Garces, 2012, 2013; Garces & Mickey-Pabello, 2015). The brief summarized some of this decline at selective university campuses in states with bans on the policy. At the University of Michigan, for instance, from 2006 (the year before Proposal 2, which banned affirmative action, could have affected enrollment) to 2010, the percentage of African-American students enrolled decreased from 6% to just over 4%, a relative decrease of more than 25%. In addition, the percentage of Latina/os enrolled at the University of Michigan in that period fell from more than 5% to just over 4%, nearly a 20% change (Yun, Moses, & Marin, 2012). The brief described a similar trend in California, where minority enrollment at the University of California's (UC) flagship campuses also declined after the use of affirmative action was banned. According to data from the UC president's office, "between 1997 and 1998, enrollments of African-American freshman at UC Berkeley declined by 53% and Latina/o enrollees fell by 45%. In the same period, African-American enrollments at UCLA dropped by 38%, while Latina/o enrollments declined by 30%" (Brief of American Social Science Researchers, 2013, p. 30) (see also Kurlaender, Friedmann, & Chang, 2015).

The Brief of American Social Science Researchers (2013) also highlighted the fact that bans on affirmative action have shifted student of color enrollment to less selective institutions, thereby harming the educational opportunities of these students, who are being denied the greater benefits associated with attending more selective institutions. The brief cited studies documenting these benefits, such as higher graduation rates, graduate or professional school attendance, and higher incomes and job success, particularly for Latina/o and African American students. In Texas specifically, one study showed that freshmen retention and the college graduation rates of minority students not in the top 10 percent of their class declined after *Hopwood* and during the implementation of the percent plan (Cortes, 2010). The study's author argued that lower-ranked minority students had lower admission rates to selective public colleges under the percent plan, thus they "cascaded down" and ended up attending less selective institutions after the plan was instituted.

The brief further argued that mechanistic "race-neutral" policies like percent plans do not yield the level of racial diversity that could be accomplished by race-sensitive admissions. For one, as the Court recognized in *Grutter*, percent plans are unsuitable for graduate and professional school admissions, which cannot rely on high school rankings. In addition, studies show, for example, that replacing a race-conscious policy with a top 10 percent plan nationwide would not successfully restore a comparable presence of students of color at the most selective four-year campuses (Espenshade, & Radford, 2009; Howell, 2010; Long, 2004). Moreover, these plans depend on a number of other policies for their success. For instance, it was not until UT-Austin complemented the percent plan with outreach, recruitment, and retention strategies that it began to see the increased enrollment of Latina/o and African-American students eligible for admission under the Top Ten Percent Plan (Domina, 2007).

Lessons of UT-Austin's Arguments in *Fisher* for Institutional Policies and Practices

UT-Austin's various arguments provide a helpful guide for institutional efforts going forward, as they highlight: (1) the need to consider students' educational experiences by attending to learning environments and diversity within racial groups; (2) the broader societal and institutional contexts that require aligning institutional missions with changing demographics; and (3) the importance of addressing the ways in which race continues to matter in shaping students' educational opportunities and their experiences once on campus.

Attending to Learning Environments and Diversity within Racial Groups

As with UT-Austin, postsecondary institutions that seek to increase access to higher education for Latina/os and other underrepresented populations will not only need to pay attention to their admissions practices but to support these students once they are on campus. Admissions decisions are important, as they can increase the number of students of color on a campus. And the number does matter, as it signals that diversity is valued, helps students of color feel welcome, and helps prevent tokenism and racial isolation, all of which lead to more positive learning experiences, participation, and engagement for students of color (see, e.g.,

Garces & Jayakumar, 2014). However, numbers alone do not produce educational benefits; what institutions do during a student's years of education matters in terms of generating the educational benefits of racial diversity. Practically speaking, this means that institutions should be conducting studies of their campus racial climate, of students' experiences, and of the opportunities students have to engage in productive cross-racial interactions (Garces & Jayakumar, 2014). These are some of the factors that Garces and Jayakumar (2014) call for to help generate "dynamic diversity," as they can provide evidence of the ongoing need to consider race as one of many factors in admissions decisions. Institutions can use tools from models such as The Culturally Engaging Campus Environments Project (Museus, 2014), which is intended to help administrators achieve environments in which students from all backgrounds can thrive.

Like UT-Austin, other institutions of higher education should seek ways to attain "diversity within diversity"; that is, to consider the diverse experiences of Latina/o students, which can range across various social dimensions, such as language, culture, social class, and citizenship or immigration status, among others. Having a meaningful representation of students across these dimensions can help break down racial stereotypes and contribute to students' sense of belonging and their college success (see, e.g., Garces & Jayakumar, 2014). Núñez's (2014) framework of intersectionality is particularly promising for helping institutions identify the complex ways in which identity, context, and systems of interlocking power and oppression shape individual experiences. The model is especially promising for understanding the experiences of an increasingly diverse Latina/o population. For example, by considering social dimensions of geography and history, institutions can better understand that the experiences of Latina/o immigrant students in California could be very different from those of their Latina/os counterparts who live in states that have seen more recent immigration of Latina/os, such as Georgia, North Carolina, Mississippi, South Dakota, Pennsylvania, Tennessee, Virginia, and Wisconsin (Núñez, 2014). By understanding the multiple dimensions across which Latina/os' experiences can vary, institutions can be better positioned to support students' educational experiences and promote productive cross-racial interactions on campus.

Considering the Broader Societal and Institutional Context

Postsecondary institutions can also learn from UT-Austin's efforts to align its institutional policies with its mission, a process that necessarily involves acknowledging the changing demographics in the state of Texas and the nation. Through its admissions policies, UT-Austin has sought to further its mission of "preparing educated, productive citizens who can meet the rigorous challenges of an increasingly diversity society and an ever-changing global community" (University of Texas System, 2014)—a mission that closely matches those of other selective postsecondary institutions across the nation.

Opponents of the university's admissions policy challenged the notion that Latina/os remained "underrepresented" at UT-Austin because they made up about 15% of the student body. However, as noted, UT-Austin's determination was made in a state/local context where Latina/os made up about 38% of the population, and where pathways to leadership positions for Latina/os are notably lacking (Brief of National Latino Organizations as *Amici Curiae*, 2013). The university, moreover, noted concerns over lingering effects of state-mandated segregation policies through 1969 and its subsequent years of discriminatory practices against Blacks and Latina/os (Brief for Respondents, 2013). These contextual factors can be considered to support a determination that the representation of Latina/os on campus is not sufficient. The determination may be different in another state, local, and institutional context—where pathways to leadership are visibly open (e.g., the presence of Latina/os in leadership roles is not grossly discrepant with state demographics) and ongoing effects of state-mandated segregation do not persist (Garces & Jayakumar, 2014).

UT-Austin's arguments thus demonstrate that, as Latina/os make up a growing percentage of the population in Texas, other states, and the nation, it will become increasingly important to consider their representation in different areas of leadership, as well as the role selective institutions, including graduate and professional schools, play in providing them with pathways to these positions. This is particularly important in light of the ruling in *Grutter*, which stressed the need for postsecondary institutions to be inclusive of individuals of all races and ethnicities so that members of our society can have "confidence in the openness and integrity of

the educational institutions that provide this training” (*Grutter*, 539 U.S. at 332). By examining the representation of Latina/os at selective institutions within a broader understanding of whether pathways to leadership remain visibly open for this population, institutions can make informed determinations as to whether this population remains underrepresented to justify the ongoing need for race-conscious admissions to further their institutional missions.

Addressing the Ways Race Continues to Matter

UT-Austin’s defense of its race-conscious policy also illuminates the challenges institutions will face as legal decisions like *Fisher* continue to restrict their ability to explicitly consider race in admissions policies and reinforce a “color-blind” approach toward education policy (Garces, 2014). Institutions that turn to “race-neutral” policies over race-conscious ones in order to satisfy the requirements of *Fisher* may experience a decline in the racial and ethnic diversity of their student bodies, as has been the case at institutions in states with bans on affirmative action. As scholars who focus on racial inequity have demonstrated (see, e.g., Bonilla-Silva, 2014; Lopez, 2007), a color-blind approach is an illusion, and obscures the ways in which race continues to matter in shaping students’ experiences, educational opportunities, and the mechanisms that advantage whites within and outside education in American society. This approach also ignores the persistent, stubborn link between historical racial and ethnic exclusion and contemporary reasons for racial and ethnic inequality.

Institutions will therefore need to consider and address the ways in which race continues to matter in shaping students’ educational opportunities and their experiences once on campus. As much as we aspire to a society where it does not, the reality is that race continues to matter (Orfield, 2014). Indeed, much of U.S. history is characterized by stratification on the basis of race in housing, education, and employment. These policies perpetuate racial inequalities and the salience of race in the lives of millions of Americans. Given that race/ethnic background can help predict key social outcomes, such as availability to health care (Institute of Medicine, 2002), education (Orfield, Losen, Wald, and Swanson, 2004), wealth (Shapiro, Meschede, & Osoro, 2013), poverty (Macartney, Bishaw, & Fontenot, 2013), quality of work (Mishel, Bernstein, & Allegreto, 2005), civic participation (Lien, 2000), and imprisonment rates (Alexander, 2012), members of racial minority groups can “feel the often negative impact of their racial background on their identities, life experiences, and outcomes, while majority group members continue to receive privileges on the basis of theirs” (Peery, 2011, citing McIntosh, 1989, p. 482). When racial inequities are properly understood to be a consequence of social and legal structures that perpetuate them, it becomes clear that the mere fact of stopping classifications on the basis of race will not address the many broader ways that race matters in U.S. society (e.g., Gross, 2008).

Addressing this reality requires an understanding of the complex and nuanced ways in which race can influence our everyday interactions, particularly in subconscious ways, and the lingering effects of past discrimination. Going forward, therefore, it will be important for institutions to consider ways that their institutional context (i.e., predominantly white institutions with a history of de jure or de facto segregation) may have lingering effects that shape the campus climate and students’ educational experiences (Garces & Jayakumar, 2014). To facilitate such efforts, higher education institutions might consider a critical framework or approach that places race at the center of discussions about social justice. One promising approach would be for these institutions to view their policies through a “critical race theory” perspective. Based on the assumption that race is a social construction that permeates all aspects of social life, the theory helps promote social justice and transformation by legitimizing the voice of marginalized communities and highlighting students’ multiple identities through the concept of intersectionality (e.g., Crenshaw, 1991; Delgado & Stefancic, 2001; Núñez, 2014; Solórzano & Yosso, 2002). Viewing institutional policies through this lens would highlight the salience of race and racism in students’ lives, and in certain aspects of institutional structures and actions that perpetuate racial inequities, even though they may not be intended to be racist or exclusionary (e.g., Bonilla-Silva, 2014).

Institutions could consider how to build in educational programs and structures that facilitate conversations around race, which are often difficult and can generate intense and uncomfortable emotions (Pollock, 2004). Students of color, for example, may become tired of reporting acts of racism and of not being believed by fellow white students or faculty, or by having to educate their peers on racial issues (Quaye, 2012). For white

individuals in particular, conversations around race can generate feelings of guilt, resistance to discussions of privilege and power, a lack of trust, and general avoidance of the topic (Singleton, 2013). For these reasons, discussions around race and racism are difficult to sustain. However, we can learn from strategies educators have employed to facilitate these conversations, including shifts in perspective from “educator” to “facilitator,” developing ground rules, considering students’ comfort and developmental readiness, and structuring racially/ethnically diverse groups (Quaye, 2012). Institutions, moreover, will need to consider how they can empower and support educators in engaging in these practices. These efforts require supportive protocols that provide a common language for discussing race and a shared understanding of systems of privilege that exacerbate inequities.

As Justice Sotomayor stated in her compelling dissent in *Schuetz v. Coalition to Defend Affirmative Action* (2014), the Court’s most recent decision evaluating the constitutionality of bans on affirmative action, “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race” (p. 46). Institutions will need to implement policies and practices with “eyes open to the unfortunate effects of centuries of racial discrimination” (Schuetz, p. 46) and the ways race matters in shaping our experiences and identity in multifaceted ways.

While the effect of the Court’s decision in *Fisher* remains to be seen, UT-Austin’s defense of its race-conscious admissions policy in the case offers important lessons for institutional efforts that seek to expand access to Latina/os going forward. As the debate over affirmative action continues in the struggle for access to the resources selective institutions can provide, institutions will need to rise to the challenge if they are to advance the nation’s best interests in a society in which Latina/os constitute one of the largest and fastestgrowing population, yet face persistent inequities in educational opportunity and attainment.

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