No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR RICHARD SANDER IN SUPPORT OF NEITHER PARTY

STUART TAYLOR, JR.
Counsel of Record
3911 Jocelyn Street, NW
Washington, DC 20015
(202) 966-0677
stuarttaylorjr@gmail.com

Attorney for Amicus Curiae

261598

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The past twelve years have witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 549 U.S. 244 (2003), and *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). Amicus curiae has written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher II*, and to suggest ways that a research perspective could help clarify the circumstances under which the use of racial preferences is constitutionally permissible.

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of higher education. He has collaborated with other scholars on several peer-reviewed articles on affirmative action, and is the author, along with Stuart Taylor, Jr., of Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It (Basic Books, 2012).

---

[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief outlines three distinct arguments, each of which attempts to provide an empirical and analytic context relevant to the Court's deliberations in the present case.

First, the University of Texas is not operating in an institutional vacuum. It is relevant to consider how higher education practices in the realm of racial preferences have (or have not) evolved in the twelve years since the *Grutter* and *Gratz* decisions by this Court. Of particular note is the striking gap between the rhetoric of universities and their actual practices, and their failure to take even elementary substantive steps towards implementing the practices this Court says are required to survive strict scrutiny.

Second, evidence on the "mismatch effect" continues to mount, and several authoritative analyses of mismatch have appeared over the past two years. The breadth of mismatch effects, and the failure of higher education institutions to grapple with the problems they raise, reinforce the importance of not deferring to the rhetoric of universities that pervades preference programs, and of pushing universities to be transparent and to demonstrate empirically the specific benefits they contend will flow from racial preferences in admissions.

Third, the tests laid out in *Fisher I* and *Grutter* need a clearer, more coherent grounding in empiricism and transparency if they are to actually influence university behavior and provide unambiguous guidance to lower courts.

ARGUMENT

I. *Fisher I* and *Grutter* mandate that universities take at least three basic steps – each of which we can evaluate empirically -- if they with to use racial preferences in admissions

The Supreme Court subjects the use of racial preferences in university admissions to strict scrutiny, requiring that the use of such preferences be narrowly tailored to achieve a compelling interest. The dispute in *Fisher v. University of Texas* is, in large part, about exactly what these standards mean in terms of actual university practices. But it seems reasonable to contend that they mean, at a minimum, at least three things:

A. A deliberative effort to determine the ways in which racial diversity furthers the school's educational mission. "Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence." *Grutter* v. *Bollinger*, 539 U.S. 306, 387-88 (Kennedy, dissenting). "A court, of course, should insure that there is a reasoned, principled explanation for the academic decision [that racial diversity produces educational benefits at a school]." *Fisher v. University of Texas*, 133 S.Ct. 2411, 2419 (2013). It seems a logical inference that universities must engage in some sort of research to examine how the use of racial preferences will produce definable benefits to the school's education goals, and that the

university's analysis of this evidence, and the conclusions that lead it to embrace racial preferences, must be expressed in writing.

B. A good-faith effort to explore race-neutral alternatives to achieve diversity, and a strategy for reducing reliance on the use of race in admissions over time.[2] It has been repeatedly established that selective colleges in general have (a) far more racial diversity than SES diversity,[3] (b) that greater SES diversity produces dividends of greater racial diversity,[4] and (c) that greater SES diversity might be even more effective than racial diversity in producing the sort of breadth of life experiences and perspectives that generate the compelling educational benefits that justify racial preferences in the first place.[5] It

---

[2] "Narrow tailoring….involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." *Fisher* at [10]

[3] For example, consider the analysis in Sander, Richard. "Class in American Legal Education," 88 Denver L. Rev. 631 (2011), at 649, Table 11, showing that at elite law schools, the representation rate (compared to presence of different groups in the pool of college graduates, from which law schools admit, and using whites as a comparison group) is 88% for blacks and 102% for Hispanics, but is only 9% for students whose socioeconoimic status ("SES") is in the bottom half of the population.

[4] Carnevale, Anthony et al. "Achieving Racial and Economic Diversity with Race-Blind Admission Policy," chapter – in Kahlenberg, ed., *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* (2014).

[5] See, for example, the discussion in Sander, Richard. "Listening to the Debate on Reforming Law School Admissions Preferences," 88 Denver L. Rev. 889 (2011) at 906-909, and Park, Julie J. et al. "Does Socioeconomic Diversity Make a

is almost axiomatic, then, that schools that are making a good-faith effort to find alternatives to racial preferences will gather data on the SES of their applicants and will at least determine what effect greater attention to SES in the admissions process would have upon racial diversity, and upon diversity in general.

C. An individualized consideration of the diversity contribution of each student. As the Court has held, a race-conscious admissions policy cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." (*Grutter* at 334, citing *Bakke* at 315). The admissions process "must ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter* at 337[6] This would seem to imply, at a minimum, three things: (a) that there be no group of minority students who, strictly on academic grounds, are automatically favored over "majority" students; (b) that there be no group of "majority" students who, strictly on academic grounds, are automatically disfavored relevant to minority students; and (c) that the admissions process be sufficiently flexible and informed to take into account individual contributions to diversity.

Difference? Examining the Effect of Racial and Socioeconomic Diversity on the Campus Climate for Diversity," 50 Educational Research Journal 466 (2013).

[6] Also quoted in *Fisher* at 2418.

D. There are, of course, other requirements in Court doctrine (i.e., avoidance of "racial balancing", "quotas", etc.), but these three criteria are ones where it is possible to actually test university compliance.

II. Our research shows that selective public universities always fail on at least one of these counts, and usually on all three.

A. In 2007-08, Project Seaphe[7] undertook a survey of admissions practices at moderately-to-very selective public universities in the United States. Project staff identified states in which universities were covered by disclosure laws requiring disclosure of admissions data and policies in response to public records requests. We sent letters to all of the public law schools in such states (approximately sixty schools), and to fifty of the most selective undergraduate programs. We sought data on the academic credentials of applicants, their ethnicity, socioeconomic status, whether they were considered as an athlete, any index the schools used in summarizing their evaluation of applicants, and data on which students were accepted or enrolled.[8]

B. In 2013-14, I conducted a similar survey, which was different in a few respects. As in

---

[7] "Seaphe" stands for "Scale and Effects of Admissions Preferences in Higher Education;" see http://seaphe.org/ for project details.

[8] Results of the two surveys discussed here are summarized in my report, Sander, Richard. "Admissions Practices at Public Universities," UCLA Working Paper (2015), posted at https://law.ucla.edu/faculty/faculty-profiles/richard-h-sander/bibliography/

the earlier survey, I sent letters to each institution seeking anonymized, individual-level data on applicants in the schools' two most recent admissions cycles, including student academic, racial and socioeconomic characteristics, and the school's disposition of their applications. In this survey, however, I (a) asked much more specifically about whether the schools collected any systematic data on the socioeconomic background of students (such as levels of parental education); and (b) asked for documents concerning any inquiry or policy the school had developed concerning race-conscious admissions (citing the Supreme Court's directives that schools do this). I also sampled a smaller number of law schools, and added medical schools to the range of institutions contacted.

C. These two surveys together produced substantive responses from roughly one hundred and twenty educational programs, including a majority of all public law schools in the United States, and more than half of the fifty leading flagship state universities. Let us first consider just those schools that operate in the forty-odd states that have not restricted the use of racial preferences. In other words, these initial points apply to schools whose use of racial preferences is, in effect, regulated by Supreme Court doctrine. These practices contrast sharply with the principles we summarized in Part I(a), above:

1. If we consider selective public institutions – those that admit fewer than 40% of their applicants – in states that have not banned

the use of racial preferences, we find that virtually all of these schools use fairly large racial preferences. Virtually all (i.e., 98%) of the fifty-odd such selective institutions in our survey used racial preferences that admitted African-Americans at more than three times the rate of academically comparable white students. At most schools, the preferences gave blacks a more than five-to-one advantage over whites.

2. ***None*** of the institutions we surveyed disclosed any document that suggested the university had engaged in any deliberative process to determine that it needed to use racial preferences, to define the scope of racial preferences, or to compare the effectiveness of race-neutral with race-conscious strategies in achieving a diverse campus environment. The official documents that universities sent us generally did not mention racial preferences at all. Fewer than ten percent of the universities provided statements explaining why they used racial preferences, and in every case these statements were entirely conclusory – that is, they simply concluded that they should take race into account to create a diverse student body.[9]

3. Every school in our sample gathered data on the race of applicants (and reported that data to other institutions). But fewer than

[9] For example, the University of Oregon simply noted that it considered race to promote "a diverse student body."

twenty percent of these universities gathered any systematic admissions data on the socioeconomic background of applicants – i.e., data on whether they were the first in their family to attend college, or on the educational background of their parents, or on family income, or on parental occupations, or on whether an applicant lived in a single-parent household. Of course, many of these schools probably do take socioeconomic background into account when, for example, an applicant writes a particularly compelling essay about hardships she has overcome. But any serious effort to even consider the potential for socioeconomic disadvantage as an alternative to race requires some type of systematic data. For the vast majority of public selective universities, such data apparently do not exist.

4. Among those schools that do collect systematic data on socioeconomic status, less than half (in other words, less than 10% overall) appear to use this data in admissions. Among the roughly twenty-five public, flagship universities that provided us with data on undergraduate admissions, only the University of Wisconsin appeared to give any systematic consideration to SES in its admissions decisions. (Notably, the University of Wisconsin also reduced the weight given to race between 2007 and 2013).

5. Many of the schools in our sample produced data which, on its face, strongly suggests that race virtually guarantees admission for some students, and virtually guarantees rejection for others. For example, the University of North Carolina (Chapel Hill) provided data on 2005-06 and 2006-07 admissions for the Project Seaphe analysis (it did not respond to our 2013 request). In 2006, UNC Chapel Hill assigned an academic index to all students, based on such factors as test scores and high school grades. For black applicants with an academic index between 3.1 and 3.2, the admissions rate was 100% -- that is, all 66 black applicants in this academic index range were admitted. However, for white students in this academic range, the admissions rate was only 42%, and for Asians it was 43%. The strong implication is that UNC Chapel Hill did not submit blacks in this index range to an individualized, searching inquiry of their ability to contribute to campus diversity; they were admitted because they were above UNC Chapel Hill's academic floor for admissions, and they checked the "African-American" box on their application form. Or, consider the University of Oregon School of Law. When we compute a simple "academic index" based on the LSAT scores and undergraduate GPA of applicants, generating a very simple, 0-to-1000 scale that crudely summarizes the academic

credentials of applicants,[10] we find that the University of Oregon admitted 100% of all black applicants with an index above 600. In contrast, white applicants with an index between 600 and 649 were admitted at a rate of 2.4%. Using the same mode of anlaysis for applicants to the University of Arizona's School of Law, we find that the school admitted 100% of black applicants with academic index scores above 700, in the 2007 admissions cycle, but only 10% of white applicants in the index range from 700 to 749. (in 2007, Arizona had not yet adopted a ban on the use of race by public institutions). In each of these cases, and many other examples we could provide, universities clearly are making race the defining feature of applications.

D. The data and materials produced by these universities is in striking contrast to what we received from universities in states that have banned the use of racial preferences, such as the University of California, the University of Michigan, and the University of Washington. At these institutions, it is the norm rather than the exception for the university to produce planning documents on how to achieve diversity through race-neutral means. All of the selective universities in our sample that are subject to state race-bans collect systematic data on the socioeconomic background of applicants, and appear to use

[10] This index was introduced in Sander, Richard. "A Systemic Analysis of Affirmative Action in American Law Schools," 57 Stanford L. Rev. 367 (2004), 393.

this data in making admissions decisions. And although the evidence is quite strong that many of these institutions continue to (illegally) grant racial preferences, they do so in a far more nuanced and "individualized" way than do many of the universities in unregulated states.

E. In short, it is the universities in states that have imposed "bans" on the use of racial preferences where actual behavior seems closest to what the Supreme Court mandated in *Fisher*: systematic consideration of socioeconomic background, considered exploration and measurement of race-neutral alternatives, and a continued, but more individualized, consideration of race. Where states have not limited university racial preferences, standard practices essentially ignore the Supreme Court's guidance on the permissible use of racial preferences.

III. It is instructive to compare this analysis of actual behavior at selective universities, with what universities report they are doing in response to a survey.

A. The American Council on Education ("ACE") recently published a report on higher education admissions practices, entitled Race, Class, and College Access: Achieving Diversity in a Shifting Legal Landscape (2015).[11] The report was based on a survey of colleges nationwide, but, unlike the study we

[11]Espinosa, Lorelle L. et al. *Race, Class, and College Access: Achieving Diversity in a Shifting Legal Landscape,* American Council on Education, (2015)

conducted, the ACE survey directly asked college administrators a wide series of questions about their admissions and recruitment practices. The ACE scholars sent their survey to over 1500 colleges and universities, and received more than 300 responses; the number of public-sector selective schools that responded to their survey, however, was apparently only around one dozen. Of course, the identity of the schools in their survey is confidential and undoubtedly different than the identity of the schools in ours, so we cannot compare results directly. Nonetheless, it is enlightening to broadly compare how selective universities say they deal with issues of racial and socioeconomic diversity, with what the actual data disclosed by similar institutions reveals about their practices. For example:

1. Only 60% of the more selective schools in the ACE sample reported that they considered race in admissions.[12] We find that virtually all of the schools in this category consider race in admissions.

2. Some 86% of the schools that said they used race in admissions reported that they engage in "targeted recruitment" of low-SES students, and 74% reported that they took low-SES into account in admissions.[13] These percentages are completely at odds with the percentage of selective institutions in our sample that gathered systematic

[12] Id. at 15.
[13] Id. at 21.

data on the socioeconomic status of applicants (under 20%) or use it in make any measureable use of it in admissions (under 10%). It is possible, of course, that some schools use low SES in very casual ways in both outreach and admissions efforts, but such efforts would of course fall dramatically short of the very systematic way in which race is used by these schools.[14]

3. Only 13% of the institutions in the ACE survey reported that they were changing their admissions practices in response to *Fisher*.[15] This is consistent with the finding of a 2013 survey by Insider Higher Ed, which found that 92% of higher education institutions "indicated that their admissions process met the narrow tailoring requirements of *Fisher*, and that they thus had no reason to alter their selection approaches."[16] Interestingly, although nearly all respondents to the ACE believed they were knowledgeable about *Fisher*, they thought that only a little more than half of their colleagues at other universities were familiar with *Fisher*'s requirements.

---

[14] It is highly revealing that the ACE survey, the general thrust of which was to determine how widely schools used more nuanced approaches to racial preferences, had (among selective public universities) a dramatically higher response rate in states that had banned the use of racial preferences. Id at. 10.

[15] Id. At 32.

[16] Jaschik, Scott. "Feeling the Heat: the 2013 Survey of College and University Admissions Directors," *Inside Higher Ed,* (September 18, 2013).

B. Our research indicates that universities are becoming steadily less transparent in making admissions data publicly available.

1. Among flagship state universities that were required under state law to provide anonymized data in response to public records requests, 60% of undergraduate programs provided fully responsive data for the 2007-08 Project Seaphe study, but only 31% provided fully responsive data in my 2013-14 follow-up study. Among public law schools, the rate of providing responsive data fell from 56% to 15%. This is a dramatic change in the willingness of universities to provide even minimal transparency for their admissions process in compliance with state laws.

2. The bad faith behavior of institutions in responding to requests also rose dramatically between the 2007-08 study and the 2013-14 study. In the first study, a large majority of institutions provided admissions datasets and other records without charge, or with a nominal charge reflecting the small amount of time required to download admissions data and remove personal identifiers. In the later study, nearly all schools that provided data sought some sort of payment, and the number of institutions seeking large payments for the data – as high as $30,000 for the University of Maryland – increased sharply. Several institutions, including the University of Minnesota School of Medicine and the undergraduate program at the

University of Georgia, asked for substantial fees and then refused to provide data after the fees were paid. The University of California, which provided extensive data on undergraduate admissions and outcomes in the 2007-08 study – data which generated important academic research – simply ignored requests for data in the later study, and then aggressively litigated a suit to demand the data for several months, before capitulating, providing the data requested, and paying our legal expenses.

3. All of the examples and analysis discussed in this section point to an overarching pattern: a tendency of selective public universities to operate well beyond the boundaries of legal restrictions on the use of racial preferences, to dissemble about their activities, and to become increasingly evasive of legal transparency requirements just as Supreme Court doctrine is becoming more specific about the requirements schools must meet to survive strict scrutiny.

IV. The evidence for the link between large preferences and mismatch effects continues to grow stronger, and universities continue to ignore the issue. It is important for the Court to be mindful of the strong potential for large racial preferences to be harmful to their intended beneficiaries, thus weakening the distinction often drawn between "benign" and "invidious"

discrimination. It is equally important to recognize that the size of preferences used by a university directly affects the potential benefits – to persons of all races -- of a diverse learning environment.

A. Scholarly understanding of the "mismatch" problem continues to deepen and grow. Beginning in the mid-1990s, many scholars found evidence that when schools use large preferences to admit students, the students (and the school's diversity environment) suffer a variety of adverse effects. The literature (which has become a fairly large literature in economics in particular) is often called the "peer effects" literature; the adverse consequences of large preferences are often called "mismatch effects." It is useful to categorize three types of mismatch effect that find strong support in the literature.[17]

B. In "learning mismatch", students receiving large preferences actually learn less in the classroom than they would if they attended a school where the student's level of academic preparation was closer to the median student. For example, students who receive large preferences into law school tend to perform worse on bar exams than do otherwise comparable students who attend a less elite law school with peers who have more similar levels of academic preparation.[18]

---

[17] This categorization, and its utility in understanding the mismatch literature, is described in Sander, Richard. "The Stylized Critique of Mismatch," 92 *Texas L. Rev*. 1637 (2014).

[18] See Williams, Doug. "Do Racial Preferences Affect Minority Learning in Law Schools?" 10 *Journal of Empirical Legal*

C. In "competition mismatch", students receiving large preferences are at a competitive disadvantage, tend to receive lower grades, and become academically discouraged, which can lead to switching to a less competitive field of study or dropping out of school. A common example of "competition mismatch" occurs in the sciences at selective schools.[19] Students with an interest in science who are admitted to a very competitive school via a large preference tend to drop out of the sciences at a much higher rate than do otherwise similar students who attend somewhat less competitive programs. Competition mismatch appears to be a major factor in the low rate at which African-American students become scientists, despite high levels of interest in the sciences.

D. Finally, "social mismatch" describes the tendency of students, regardless of race, to form friendships at much higher rates with fellow students at the same school who have similar levels of academic preparation (or

---

Studies 171 (2013); Duflo, Esther et al. "Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya," 101 *Amer. Ec. Rev*. 1739 (2011).

[19] See Smyth, Frederick and John McArdle, "Ethnic and Gender Differences in Science Graduation at Selective College With Implications for Admission Policy and College Choice," 45 *Research in Higher Education* 353 (2004); Luppino, Mark and Richard Sander, "College Major Peer Effects and Attrition from the Sciences," 4 *IZA Journal of Labor Economics* – (2015) [check citation].

similar levels of academic performance).[20] If academic preparation (or grades at college) are highly correlated with race, then social mismatch will tend to produce racially segregated social interactions, defeating a core purpose of campus racial diversity.

E. "Learning mismatch," "competition mismatch," and "social mismatch" are all "first-order" effects of large preferences – that is, there is a straightforward, direct causal link between the preferences and the effects. Scholars very consistently find evidence of these effects whenever there is credible data that directly measures both the size of preferences and the effect in question. Most of the debate about whether mismatch exists actually concerns "second-order" effects – harmful effects that happen more indirectly, as a consequence of some first-order effect. Perhaps the best example concerns college graduation rates. "Mismatch" does not directly cause anyone to have a lower graduation rate; rather, learning mismatch might cause a student to learn less, which could lower grades and cause the student to flunk out of college; or competition mismatch might cause a student who does poorly in her preferred science major to decide to drop out of college altogether. But a college can fairly

---

[20] See Arcidiacono, Peter. et al. "Representation versus Assimilation: How do Preferences in College Admissions Affect Social Interactions?" 95 *Journal of Public Economics* 1 (2011); Carrell, Scott et al. "From Natural Variation to Optimal Policy? The Importance of Endogenous Peer Group Formation," 81 *Econometrica* 855 (2013).

easily counteract these second-order effects by providing counseling to discouraged students, or having such liberal grading policies that students almost never fail to graduate. Thus, a second-order mismatch effect upon graduation might, in many contexts, either not exist or be too small to observe. This doesn't mean that students are not harmed by the first-order effects; it means that some ordinary consequences of first-order mismatch can be effectively offset or disguised.[21]

F. Briefs submitted in the Court's initial hearing of *Fisher*, including one coauthored by the present author, summarized some of the then-current evidence on mismatch. In the three years since, the evidence of mismatch effects has continued to deepen, as has the academic consensus among scholars who have studied mismatch. For example:

1. In 2013, the Journal of Empirical Legal Studies ("JELS") published a lengthy article by labor economist Doug Williams, who examined in depth the available data and research on law school mismatch.[22] Using a host of different tests, Williams found compelling evidence that law school mismatch effects experienced by many African-American and Hispanic students were large and harmful. JELS is a peer-reviewed journal and perhaps the most

[21] Similarly, a state could largely eliminate the adverse effect of learning mismatch upon bar exam results by eliminating bar exams for students who successfully graduate from certain in-state schools – such as is done by the State of Wisconsin.

[22] See Williams, *supra* note 18.

highly-regarded publication in its field. As of this writing, none of the critics who argue that mismatch does not exist have successfully published such criticisms in a peer-reviewed journal (much less one with the stature of JELS).

2. Two years ago, the Journal of Economic Literature ("JEL"), which is published by the American Economics Association, commissioned an article investigating the state of research on mismatch issues. To insure a balanced assessment, they commissioned two economists to coauthor the article, one sympathetic to the mismatch argument (Peter Arcidiacono of Duke) and one skeptic (Michael Lovenheim of Cornell). Their draft article was then evaluated by seven peer reviewers – an unusually large number, prompted by the "controversial" nature of mismatch research. All seven of the reviewers recommended publication, and the article is due out in the next issue of the Journal. Arcidiacono and Lovenheim reach a crucial empirical conclusion: the mismatch problem is real. ("The evidence suggests that racial preferences are so aggressive that reshuffling some African American students to less-selective schools would improve some outcomes due to match effects dominating quality effects.[23] The existing evidence suggests that such match effects may be particularly relevant for

[23] See Carrell et al, *supra* note 20.

first-time bar passage and among undergraduates majoring in STEM fields.") But the policy implications they draw are mixed: it is difficult to say, without better data (i.e., more institutional transparency) and experimentation, exactly at what point preferences become too large and whether interventions by universities could offset mismatch effects. What is clear is that universities need to recognize the mismatch issue and collaborate with scholars to mitigate its harmful effects.

3. Also in 2013, the journal *Econometrica* (perhaps the single most prestigious journal in the social sciences) published the results of a rigorous experimental study undertaken at the Air Force Academy in Colorado. The study was notable for its experimental design and for the fact that its designers had found evidence in prior research that academically marginal students could benefit from small-group interactions with stronger peers; in other words, they hypothesized that if college interactions occurred in small groups outside of class, one might observe reverse-mismatch effects. They deliberately created "squadrons" composed of students with relatively weak academic preparation mixed with students with very strong academic preparation; other squadrons were comprised of randomly assigned students. Unfortunately, academically weak students in the treatment squadrons had worse outcomes than those in the

control groups. To phrase the authors' results in mismatch terms, there were strong "social mismatch" effects that overwhelmed any academic benefits from the experimental squadrons; the academically weak students disproportionately engaged with one another, and thus became isolated.

4. The general upshot from this literature is that harmful "first-order" mismatch effects show up in higher education virtually every time two conditions are met: (a) a university uses very large preferences (racial or otherwise) and (b) good data exists on student performance or interaction. It follows that responsible universities should be more cautious in their use of preferences: they should develop better information on student outcomes, and make sure they are not harming students when extending large preferences. Unfortunately, this has not been the general response in higher education. We see, rather, a general denial that mismatch could exist,[24] and (as

---

[24] For example, in Derek Bok's recent book, *Higher Education in America*, he writes that "many critics have insisted preferences hurt the very people they are meant to help because minority students admitted by affirmative action would be unable to keep up with their classmates and would either flunk out or suffer from being stigmatized as intellectually inferior. In fact, it turns out that minorities admitted to highly selective colleges are much more likely to graduate than minorities with similar high school grades and test scores who attend less selective institutions…" Bok thus completely dismisses mismatch, but his only citation in this discussion is to his own

documented in Part III, above) a decrease in university transparency.

5. A striking example of the dysfunction of higher education institutions in dealing with the mismatch issue can be found in legal education, where the evidence of mismatch is particularly strong. It has now been ten years since I published, in the Stanford Law Review, the first detailed examination of the law school mismatch problem.[25] My estimates that large racial preferences accounted for roughly half of the huge black-white gap in first-time bar passage rates have now been confirmed by a series of studies, as noted above; the existence of a serious mismatch problem tied to the use of preferences by law schools is now a rigorously established matter. The actions, and inactions, of law schools and the leading institutions of legal education (such as the American Bar Foundation ("ABF"), the Law School Admissions Council ("LSAC"), and the Society of American Law Teachers ("SALT")) during this time are revealing.

   i. No law school or legal education organization has undertaken to create any kind of commission or investigative body to assess the evidence for, and

---

1998 work on affirmative action. He not only ignores the vast literature that has emerged since that time, but also ignores the difference between first- and second-order mismatch effects discussed above. Bok, Derek. *Higher Education in America*, Princeton (2013).

[25] See Sander, *supra* note 10.

implications of, the mismatch problem. The United States Civil Rights Commission (USCCR) did undertake such an investigation, found strong evidence in support of mismatch, and urged the legal education community to recognize the problem as a serious one and to promote transparency efforts to better define its scope and evaluate solutions.[26] The USCCR report was completely ignored by the legal education community.

ii. The pro-active efforts within the legal education establishment have focused on suppressing and preventing investigation into the mismatch phenomenon. The ABF purged from a major project – a longitudinal study of lawyer careers – scholars associated with mismatch research.[27] When a group of scholars identified the California Bar's database on bar applicants and bar takers as the best available data source for the study of mismatch, SALT, and a group of deans from California law schools, strongly objected to efforts to study the data.[28] The LSAC stopped sending LSAT scores to the California Bar, to assure that any effort to study bar-takers after 2008

---

[26] U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools* (2008).

[27] See Sander, Richard and Stuart Taylor, *Mismatch:How Affirmative Action Hurts Students Its Intended to Help, and Why Universities Won't Admit It*, (2012), chapter 5.

[28] See, for example, http://www.seaphe.org/pdf/bar-proposal/letter_from_SALT.pdf

would be crippled by incomplete information. In subsequent litigation, it came to light that a group within LSAC itself, during the design stage of a national study of legal education and bar passage undertaken in the 1990s, had initially proposed to study the mismatch phenomenon, but this proposal had been killed, and the data collection process altered so that LSAC's data would be a much weaker source for studying mismatch. When one law school (George Mason University) attempted to scale back its use of racial preferences, partly out of concern about mismatch effects, the American Bar Association threatened to eliminate the school's accreditation unless it did something about minority enrollment – i.e., restored large racial preferences.[29] George Mason did so.

iii. Meanwhile, a coterie of influential law school-based empiricists, including Ian Ayres of Yale Law School, Daniel Ho of Stanford Law School, and Richard Lempert of the University of Michigan Law School, published or coauthored critiques of the mismatch effect in legal journals. None of this work was published in established peer-reviewed journals; all of it suggested that concern about the mismatch issue was overblown. In 2012, all of these scholars, along with several other eminent social science

[29] Sander and Taylor, *supra* note 27 at Chapter 14.

colleagues, submitted to this court an amicus brief in *Fisher I*, arguing on behalf of the University of Texas.[30] The entire point of the brief was to summarize the case against the law-school-mismatch argument; the brief became known as the "Empirical Scholars Brief" ("ESB") and, among legal educators, probably the best known of all critiques against the mismatch hypothesis. Inspection will reveal, however, that the main argument of the ESB revolves around three methodological critiques of the law school mismatch literature. All three of these critiques are not just misguided; they are demonstrably false.[31] For example, the ESB contends that the law school mismatch research is invalid because it does not make "intra-racial comparisons" – for example, comparing black outcomes at institutions with different levels of racial selectivity -- which is, arguably, important because "interracial" comparisons (e.g., comparing blacks and whites) may fail to control for important interracial differences that affect empirical results. However, the Williams paper, cited above, and cited by the ESB as a prime example of law school

---

[30] *Fisher v. University of Texas at Austin*, Docket 11-345, Brief of Empirical Scholars as Amici Curiae in Support of Respondents (2012), available at http://gking.harvard.edu/files/gking/files/*Fisher*_amicus_final_8-13-12_0.pdf

[31] Sander, Richard "Mismatch and the Empirical Scholars Brief," 48 Val. U. L. Rev., 555 (2014).

mismatch work, uses ***only*** intraracial comparisons throughout its entire analysis.[32] The ESB authors either did not read the work they were critiquing, or deliberately misrepresented it. In any case, the ESB is laughably inept throughout.

iv. The closer one examines these stories, the more evident it becomes that the legal education establishment – a very real entity – is incapable of acting as a responsible fiduciary for its students, when it comes to regulating and evaluating the use of racial preferences by law schools.

V. *Fisher I* demonstrated the Court's intention to apply strict scrutiny to the use of racial preferences by universities, but the tests laid out in *Fisher I* and *Grutter* need a clearer, more coherent grounding in empiricism and transparency if they are to actually influence university behavior.

A. The disagreement in the Fifth Circuit opinion below occurred because of two distinct and contrasting interpretations of the Supreme Court's guidance in *Grutter* and *Fisher I*. Judge Higginbotham's opinion essentially argues as follows: *Fisher I* did not overrule

---

[32] The ESB scholars were apparently unaware that Williams' work was on the verge of being accepted by the prestigious Journal of Empirical Legal Studies when they attacked his work, even though one of the prime movers of the ESB, Richard Lempert, was an associate editor of the journal. See Williams, *supra* note 18.

> *Grutter*. In *Grutter*, the Court upheld the use of preferences at the University of Michigan Law School ("UMLS"). The University of Texas's practices (such as its formulation of reasons for using race-conscious admissions, and the holistic nature of its application review) are, if anything, closer to the spirit of *Grutter* than were the practices of UMLS. Therefore, the University of Texas has met its burden of narrow tailoring. Judge Garza's dissent essentially argues as follows: The message of *Fisher I* is that we (the lower courts) should listen to the Court's words in *Grutter* and *Fisher I*, and not to the practices actually upheld by the Court in *Grutter*. And if we try to apply the words of these opinions, we must conclude that the University of Texas falls short.

These are both comprehensible readings of the Court's two key opinions in this area. The conflict between them can be resolved by taking into account Justice Kennedy's dissent in *Grutter*, as a gloss on the actual meaning of *Fisher I*. Even Judge Garza's opinion, however, cannot be said to provide clear guidance to the University of Texas, or higher education more generally. The best way to make *Fisher I* and *Grutter* have the meaning and effect that the Court intends is to articulate more precisely how the key requirements of strict scrutiny can be satisfied.

As the discussion in Part I of this brief shows, universities have very strong tendencies to minimize, or even ignore, any restrictions placed on their ability to use racial preferences. They will always favor the "Higginbotham" interpretation of this

Court's precedents in the absence of highly specific guidance and rules.

Here are three specific examples of how the Court could make its meaning more concrete by specifying transparent, empirically-grounded doctrinal tests:

B. "Critical mass." Universities are permitted to seek a critical mass of underrepresented minorities in pursuing the educational benefits of a diverse campus. But the University of Texas has been unwilling to specify just what this critical mass might be, because (justifiably), it is concerned that any number it specifies will be condemned as an illegal quota. Court doctrine thus creates a difficult bind for schools, one which it can resolve by articulating a methodology for universities to determine a permissible "critical mass" range. Schools seeking to use racial preferences should be required to explicitly define the educational benefits they seek from diversity, and then demonstrate empirically, preferably through controlled experiments, how varying levels of racial diversity produce the benefits they seek. For example, if the goal is for students to achieve a certain level of proficiency in understanding cross-cultural perspectives, the school would devise some instrument for measuring this outcome among students, and study how performance on this outcome varies when racial diversity varies. Crucially, however, such experimentation should not be based on "hypothetical" racial mixes; student environments and classroom dynamics need to reflect the results of actual admissions

strategies for, as the mismatch research has documented, larger racial preferences – and consequently, larger academic gaps on campus across racial lines – can directly undermine the attainment of underlying diversity goals. Under this approach, "critical mass" is a range of racial compositions. The lower bound of the range would be the point at which the benefits from greater racial diversity become substantial; the upper bound would be the point where the marginal benefits from greater racial diversity become flat enough to lose statistical significance.

C. "Good faith consideration of race-neutral alternatives." By provide specific examples of how to make "critical mass" concrete, other aspects of strict scrutiny come into focus as well. In particular, it seems obvious that two types of "race-neutral alternatives" should almost always be considered as part of a university's demonstration of narrow tailoring:

1. A university seeking to use racial preferences should demonstrate that it has carefully considered socioeconomic ("SES") diversity alternatives, such as effective targeted recruiting of SES-diverse students, or SES-based preferences. This follows for two reasons. First, almost all selective colleges and graduate programs (the ones that use racial preferences to begin with) have even less socioeconomic diversity than racial diversity. Any number of studies have demonstrated that, on average, students from the bottom SES quartile constitute about 3% of the

students at selective colleges or graduate programs; students from the bottom two quartiles constitute about 10-12% of the students.[33] Whereas African-Americans, when one controls for academic credentials, are about 30% more likely than whites to enter a four-year college, low-SES students are about 80% less likely than high-SES students with similar academic credentials to enter a four-year college.[34] Thus, consideration of the pursuit of SES diversity as an alternative to racial preferences makes sense in part because schools are missing SES diversity more severely than they are missing racial diversity, and can achieve SES diversity with much simpler interventions. The second reason why SES is always an important race-neutral alternative for universities to consider is that low-SES recruitment generates large racial dividends, because low-SES, and membership in an underrepresented minority, have a substantial correlation. The fact that the correlation is imperfect is actually an advantage for SES preferences, because having an imperfect correlation between preferences and minority status reduces the likelihood that students will make racial generalizations about the

---

[33] Carnevale, Anthony and Stephen Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," chapter 3 of Richard Kahlenberg, ed., *America's Untapped Resource: Low-Income Students in Higher Education* Century (2004).

[34] Sander, *supra* note 5.

academic strength of fellow students.

2. A university seeking to use racial preferences should also demonstrate that it has carefully considered, and experimented with, instructional alternatives. Once a school articulates specific benefits that it seeks to confer upon students through racial diversity, such as an understanding of the complexity and diversity of political views within the African-American community, it should be obvious that there are instructional strategies that may accomplish the same goals as well or better than (the much more indirect method of) hoping that a certain mix of students will spontaneously generate appropriate discussion. This includes having a diverse faculty, having guest speakers and lively debates on campus, and a host of other strategies aimed at encouraging substantive engagement with the issues that universities consider important to the civic education of students.[35]

3. The "consideration of the diversity contribution of each student" is crucial to the Court's jurisprudence on the strict scrutiny of racial preferences, but the direction given in *Grutter* that schools use

[35] The process of identifying and evaluating SES criteria in admissions, and blending those with a more moderate use of racial preferences, is discussed and illustrated extensively in Sander, Richard and Aaron Danielson, "Thinking Hard About 'Race-Neutral Admissions,' 47 *Univ. of Michigan J. of Law Reform* 967 (2014).

a "holistic" admissions process makes it less, not more likely that universities will actually avoid the type of mechanical treatment of race that the Court eschews. "Holistic admissions" conveys an impenetrable, highly subjective process that cannot be objectively evaluated by any outside party: it is the incarnation of the extreme deference to university judgments that Justice O'Connor embraced, but which the Court under Justice Kennedy has rejected. For the large institutions that are generally the subject of racial preference litigation, many thousands (or, in the case of the University of Texas, many tens of thousands) of applications are evaluated each year; these schools must either have a fairly mechanical process embedded within the "holistic" screen, or they are giving a great many admissions staff enormous individual discretion. Schools that wish to use racial preferences should, instead of shrouding their process under a "holistic" banner, be expected to articulate their admissions process with enough detail and transparency so that the role of race can be inferred from the institution's admissions data.

4. Implicit in Fisher is the idea that universities must engage in a deliberative process *before* introducing racial preferences. As Parts I-III of this brief illustrate, the only time universities actually seem to engage in the tangible steps that indicate a serious consideration

of the impact of diversity and the alternatives to race-consciousness, is when they are legally barred from using racial preferences. The Court should consider whether this strong pattern suggests a salutary strategy for permissible race-consciousness: that institutions should actually stop using racial preferences for some period as part of their process of evaluating and justifying its use.

5. Whether a university is using racial preferences in legitimate ways should also be evaluated based on the general transparency with which it proceeds. There is no reason why schools should not make available to applicants and the general public, in suitably anonymized form, the research they undertake to determine the basis for diversity measures and the instruments chosen to pursue it, as well as the ingredients of the admissions process itself. Institutions often avoid transparency for obvious reasons: their admissions procedures are often legally questionable, they generally do not have well-articulated justifications for using racial preferences, and they are fear publicity about low achievement (and mismatch) outcomes for students who receive preferences. As noted in Part III, opacity among universities has notably increased in recent years. If the Court emphasizes the important of transparency in assessing the good faith of universities, it could powerfully change this dynamic,

and universities themselves would greatly benefit from a more honest, transparent, and collaborative inquiry into both the legitimate uses of race for educational goals, and the important purpose of weaning the system of its use of race in the discernible future.

6. Finally, and relatedly, whether a university is engaged in a constitutional use of racial preferences should be judged in part on the degree to which it deals honestly and transparently with the potential for mismatch effects resulting from racial preferences.[36]

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit decision and provide a more sharply delineated path for universities that wish to make use of racial preferences in admissions.

Respectfully submitted,

STUART TAYLOR, JR.*
stuarttaylorjr@gmail.com
3911 JOCELYN ST. NW
WASHINGTON, DC 20015
(202) 966-0677

**Counsel of Record*

[36] See Part IV, *supra.*