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RACE REVIEW IN A NATION SEEKING EQUALITY

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I. INTRODUCTION

In modern America, race relations continue to play a significant role in national news and the enforcement of the laws. Equality is oftentimes a game of multifaceted tug of war in which there is constantly a struggle for the rights of differing races, ethnicities, and genders. The foundation of knowledge and success in America is its educational system. At the forefront of the educational system are the admissions policies for each academic institution, which include the basis for the types of students desired by each institution. Several factors are weighed in admission processes, including academic achievement, extracurricular involvement, and racial and socioeconomic backgrounds. In *Fisher v. University of Texas*, the United States Supreme Court determined that the University of Texas ("the University"), which reviewed each applicant's race in consideration of granting admission, was not violating the Equal Protection Clause of the Fourteenth Amendment by doing so.[1] In a country that promotes equality and fairness, should race even be a part of a college application? Should the Supreme Court have ruled in this manner?

In *Fisher*, the Court held that the University had identified sufficient compelling interests in its goals for a diverse student body, that those interests had not yet been met, that the interests were narrowly tailored to achieve its goals, and that there were no better race-neutral alternatives to the methods it had been employing.[2] After ruling on those four issues, the Court concluded that the University was not violating the Equal Protection Clause of the Fourteenth Amendment in reviewing race in its admissions process.[3] In their dissent, Justice Alito and Justice Thomas detailed how the Court in *Fisher* mistakenly catered to the University in its application of strict scrutiny review by allowing the school to tiptoe around the difficulty of the standard.[4]

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1. Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).
2. *Id.*
3. *Id.*
4. *Id.* at 2215.

In this Note, I argue: (1) that the review of race in an admissions process results in a violation of the Equal Protection Clause, (2) that Fisher should have been ruled differently, and (3) for a new outlook on how an admissions system should be in its focus on the "educational benefits of diversity." Part II will cover the background facts and procedural history on the instant case, as well as a descriptive history of the progression of the relevant laws and an explanation of the Court's decision in *Fisher*.[5] Part III will discuss how the Court should have ruled, and it will bring forth suggestions for how the University should mold its admissions program in a manner that rewards not only academic success, but extracurricular activities and achievements as well. In doing this, the University should keep the Equal Protection Clause as its foundation, remembering its plain meaning, and avoiding the weighing of racial backgrounds in the process.

II. BACKGROUND

A. Facts and Procedural History

The University of Texas at Austin ("University") utilizes an admissions system that is comprised of two components.[6] The first component, Texas's Top Ten Percent Law (implemented by the University in 1998), requires the admission of any student who graduates from a Texas high school in the top 10% of his or her class.[7] The second component, which fills the remaining spots in the freshman class, involves the combination of each applicant's "Academic Index" and "Personal Achievement Index."[8] The "Academic Index" is made up of the student's SAT score and high school academic performance, while the "Personal Achievement Index" is a comprehensive review of numerous factors, including the student's race.[9]

Abigail Fisher, a Caucasian applicant, was not in the top 10% of her high school class.[10] Her application was reviewed under the "Academic Index" and "Personal Achievement Index" lens, and she was denied admission to the University's 2008 freshman class.[11] Fisher filed suit, arguing that by considering race as a part of the holistic-review process, the University disadvantaged her and other Caucasian applicants,

5. *Fisher*, 136 S. Ct. 2198.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

in violation of the Equal Protection Clause of the Fourteenth Amendment.[12]

The United States District Court for the Western District of Texas granted summary judgment in favor of the University, and the Court of Appeals for the Fifth Circuit affirmed.[13] Because the Court of Appeals applied an "overly deferential" good-faith standard in assessing the constitutionality of the University's admissions program, the Supreme Court of the United States granted certiorari and vacated the judgment of the Court of Appeals.[14] The case was remanded to assess the claims under a more appropriate standard, and the Court of Appeals once again affirmed summary judgment in the University's favor.[15] The Supreme Court of the United States again granted certiorari, and finally affirmed the judgment of the Court of Appeals.[16]

B. Background and History of the Law

Texas's Top Ten Percent Law and the rulings from the *Grutter* and *Gratz* cases eventually influenced the University's admissions program to consist of what was in place at the time of *Fisher*, but the program went through an evolution on its way to the instant case. In *Grutter v. Bollinger*, the Court held that the Equal Protection Clause did not prohibit the University of Michigan's law school from the narrowly tailored use of race in its admissions process in furthering the compelling interest of diversity.[17] In *Gratz v. Bollinger*, it was held that the University of Michigan's admissions process was not narrowly tailored because it resulted in the admission of nearly every "underrepresented" minority.[18] A series of past cases led to three controlling principles set by the District Court's hearing of *Fisher*, which were evaluated and decided upon in the case at hand. This section discusses the evolution of the admissions program as well as the case law leading up to the instant case.

1. History of the Admissions System

Up until 1996, the admissions decisions made by the University were based solely on an "Academic Index," which combines an applicant's SAT score with his or her high school academic

12. *Id.*
13. *Id.*
14. *Id.* at 2207.
15. *Id.*
16. *Id.*
17. Grutter v. Bollinger, 539 U.S. 306, 307 (2003).
18. Gratz v. Bollinger, 539 S. Ct. 244, 246 (2003).

performance.[19] Racial minorities were given preference amidst this process.[20] In the *Hopwood v. Texas* case of 1996, the Court of Appeals for the Fifth Circuit held that the consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment.[21] In response, the University began combining each applicant's Academic Index with his or her "Personal Achievement Index," which is a numerical score based on a holistic review of an applicant's essays, experience, activities, community service, and other "special characteristics."[22] The Texas Legislature had its own response to *Hopwood*—it enacted the Top Ten Percent Law, which guarantees admission to any public university in the state to any student who graduates from a Texas high school in the top ten percent of his or her class.[23] In 1998, the University implemented the Top Ten Percent Law and, after filling every spot with qualifying students, filled the remaining spots using its system involving the Academic and Personal Achievement Indexes.[24] The University used this admissions system until 2003 and the arrival of the *Grutter* and *Gratz* cases, which altered its strategy.[25]

2. *Grutter* and *Gratz*—Evolution of the Admissions System

In *Gratz v. Bollinger*, the Court reprimanded the University of Michigan's admissions system for its predetermination of points toward racial minority applicants.[26] *Grutter v. Bollinger*, on the other hand, dealt with the University of Michigan Law School's admissions program.[27] In *Grutter*, the Court held that its holistic review system, which only used race as a broad component of an application, was appropriate.[28] In doing so, the Court overruled the holding in *Hopwood* that any consideration of race in admissions violated the Equal Protection Clause.[29] Following *Grutter*, the University was faced with the issue of whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body . . . to all of the University's undergraduate students."[30]

19. *Fisher*, 136 S. Ct. at 2205.
20. *Id.*
21. Hopwood v. Texas, 78 F.3d 932, 935 (5th Cir. 1996).
22. *Fisher*, 136 S. Ct. at 2205.
23. *Id.*
24. *Id.*
25. *Id.*
26. Gratz v. Bollinger, 539 S. Ct. 244, 246 (2003).
27. Grutter v. Bollinger, 539 U.S. 306, 309 (2003).
28. *Id.*
29. *Fisher*, 136 S. Ct. at 2205.
30. *Id.* at 2205-06.

After determining that it was not providing those benefits, the University submitted a request to the Board of Regents to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University."[31] Stemming from this is the admissions policy that the University still uses to this day.[32]

The new policy implemented by the University was the result of *Grutter*, but it was not developed using the exact framework specified by the case.[33] Today, the University fills up to 75 percent of its incoming freshman class using the Top Ten Percent Plan.[34] While it did not adopt an identical policy to that of *Grutter* for filling the majority of its classes, the University *did* adopt a similar policy to fill the remaining 25 percent of its incoming freshman class by evaluating the previously mentioned Academic and Personal Achievement Indexes.[35] However, the Personal Achievement Index began using race as a "subfactor" by analyzing the potential contributions made by an applicant based on his or her experiences, activities, and other "special circumstances."[36] These "special circumstances" include socioeconomic situations of the applicants and many other factors, including race.[37] The decision makers over these applications undergo extensive training to make sure to maintain consistency in their evaluations.[38]

3. *Fisher I*'s Controlling Principles

The admissions system at the University in 2008 resulted in the lawsuit by Abigail Fisher, in which she alleged that the University's consideration of race in its application process violated the Equal Protection Clause.[39] After the District Court granted summary judgment in favor of the University, the Court of Appeals affirmed the decision of *Fisher I*.[40] The decision was then vacated, remanded, affirmed, and

31. *Id.* at 2206.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Fisher*, 136 S. Ct. 2198.
40. *Id.*

certiorari was granted before the instant case, but not before some key controlling principles were laid out by *Fisher I*.[41]

Relevant to the issue in the instant case are three controlling principles from *Fisher I*.[42] First, "because racial characteristics so seldom provide a relevant basis for disparate treatment, [r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny."[43] "Strict scrutiny" requires the University to clearly show that its purpose is both "constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose."[44] Second, "the decision to pursue 'the educational benefits that flow from student body diversity'" is an "academic judgment to which some, but not complete, judicial deference is proper."[45] A quota cannot be established for a particular race or group of people, but once a university gives a reasoned explanation for its decision, "deference must be given to the University's conclusion."[46] Third, "no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals."[47] A university must prove that "race-neutral alternatives" that are both "available" and "workable" "do not suffice" to promote its purpose.[48] After much deliberation, the Court of Appeals determined that the University's admissions program "conformed with the strict scrutiny mandated by *Fisher I*."[49]

C. The Instant Case

In an attempt to have the judgment of the Court of Appeals reversed, Fisher made four arguments: (1) that the University has not expressed its interest with clarity, (2) that the University has no need to consider race, (3) that considering race was not necessary because it merely has a "minimal impact" in advancing the University's interest, and (4) that there are various other ways of achieving the University's interest.[50]

41. *Id.*
42. *Id.* at 2207-08.
43. *Id.* at 2208.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2210-12.

1. Majority Holding

In her first argument, Fisher claimed that the University did not specifically express its compelling interest with enough care.[51] She emphasized that, without clarifying its end goal, the University could not possibly have its admissions program reviewed by a court to determine whether its program was "narrowly tailored" to that goal.[52] The Court prefaced its holding on this matter by determining that a university may implement a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity," rather than for the purpose of obtaining a specific enrollment of minority students.[53] According to the Court, those benefits could be achieved by increasing minority enrollment, but the increase in minority enrollment cannot be something put into a number-oriented goal, as Fisher seemed to suggest.[54] However, the Court noted, a university's educational goals cannot be so broad and vague that they cannot be measured.[55] Referring to the record, the Court declared that the University "articulated concrete and precise goals" when it implemented its policy at the time.[56] Citing specific language in the University's admissions policy, the Court noted that the University identified educational values it wished to realize through its admissions process: "promotion of cross-racial understanding" and preparation of students "for an increasingly diverse workforce and society."[57] These objectives, the Court reiterated, directly resembled a "compelling interest" as approved in past cases.[58] Citing the record as its main basis for rebuttal of Fisher's first contention, the Court denied her argument that the University's compelling interests were not specified enough.[59]

Fisher's second argument was that the University had no need to consider race in its admissions because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and the race-inclusive review of applicants.[60] She also argued that the University bore the burden of proving it had not acquired the educational benefits of diversity

51. *Id.* at 2210.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 2211.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

before turning to a race-inclusive plan.[61] Although this is true, the Court noted, the University did prove that it had not yet obtained the benefits by conducting months of studies and data review and ultimately concluded that using race-neutral policies and programs did not help achieve racial diversity at the school.[62] Citing once again to the record, the Court referenced both statistical and anecdotal data that showed a lack of growth in minority enrollment.[63] In denying Fisher's second argument, the Court noted that although a college has the duty to constantly reconsider a race-inclusive review of its applicants, the University in this case had done its due diligence and still determined that its goals of diversity had not yet been met.[64]

In her third argument, Fisher claimed that considering race was unnecessary because it had only a "minimal impact" in furthering the compelling interest of the University.[65] The Court determined that this contention was unsupported.[66] By referencing the massive increase in Hispanic and African-American enrollees between 2003 and 2007, the Court held that the consideration of race had had a limited, but significant, effect on the diversity of the University's freshman class.[67] Although race consciousness had a limited effect on the admissions process, the Court noted it should be viewed as the University's effort to narrowly tailor its compelling interests, rather than acting unconstitutionally.[68]

The final argument made by Fisher was that the University's compelling interest could have been achieved through a multitude of other race-neutral methods.[69] However, the Court determined that, at the time of her application, none of her suggested alternatives were "workable means for the University to attain the benefits of diversity it sought."[70] One suggestion by Fisher was that the University increase its efforts in outreach to African-American and Hispanic applicants.[71] But, the University had already done so by creating new scholarship programs and opening new admission centers.[72] In addition, the University previously spent seven years trying to achieve its compelling interest by means of a

61. *Id.*
62. *Id.*
63. *Id.* at 2212.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 2213.
72. *Id.*

race-neutral review and was unsuccessful.[73] Another suggestion given by Fisher was that the University should alter the weight given to academic and socioeconomic factors in its admissions.[74] However, the Court noted she ignored the fact that an "enhanced" consideration of socioeconomic (and other) factors had already been attempted by the school.[75] Fisher's last suggestion was that the University should uncap the Top Ten Percent Plan and admit more students through a percentage plan.[76] The Court reiterated that the plan's purpose was to encourage minority enrollment.[77] In the past, percentage plans had been "adopted with racially segregated neighborhoods and schools front and center," giving the Court reason to uphold that "it is race consciousness, not blindness to race, that drives such plans."[78] To strengthen its response, the Court discussed that even if class rank was the primary standard in admission, admitting students based on rank alone excludes those students who spent much of their high school careers doing extracurricular activities, such as playing sports or music.[79] "Class rank is a single metric and, like any single metric, it will capture certain types of people and miss others."[80]

The Court concluded its denial of Fisher's final argument by stating that none of the suggested alternatives to meeting the University's educational goals were "available" or "workable," and that the University had met its burden of showing that its admissions policy was "narrowly tailored" at the time of Fisher's application.[81] This was the key to the University justifying its use of race in the admissions process. The Supreme Court of the United States affirmed the prior judgment of the Court of Appeals but made sure to provide that it is the University's "ongoing obligation" to make sure its admissions policies are current and appropriate.[82]

2. Dissent

In quite a lengthy dissent, Justice Alito and Justice Thomas laid out the specific ways in which the Court could have ruled differently regarding its avoidance of traditional strict scrutiny review. Justice Alito

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 2214.
82. *Id.* at 2215.

recalled the initial decision in the *Fisher I* case in which the Court held that strict scrutiny required the University to show that reviewing race and ethnicity in its admissions process served compelling interests, and that its admissions plan was narrowly tailored to achieve those interests.[83] On remand, the University never met those requirements.[84] To this day, according to Justice Alito, the University has yet to identify with any specificity the interests that are supposed to be served through the review of race and ethnicity in its admissions process.[85] By building on these points, Justice Alito and Justice Thomas explained in-depth how the Court in *Fisher*: (1) should not have ruled that the University passed strict scrutiny and (2) how the Court tiptoed around the normal standard of strict scrutiny review in order to cater to the University.[86]

Justice Alito first contended that the University's race-conscious admissions program could not satisfy strict scrutiny because it failed to define its interest in furthering the educational benefits of diversity.[87] He also said that the University failed to narrowly tailor its program to achieve its interest, which is required under strict scrutiny.[88] He began these claims by referring to the Equal Protection Clause and by citing the *Miller* opinion, which profoundly stated that "[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class."[89] He quoted another case which said, "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[90] Justice Alito reiterated his stance that individuals should be treated as humans, not as byproducts of different groups of people.

When the University adopted its policy, according to Justice Alito, it "characterized its compelling interest as obtaining a 'critical mass' of underrepresented minorities."[91] Yet, the University failed to define what it meant by "critical mass"—it only determined that it is not an absolute number.[92] This caused Justice Alito to infer that the University wanted to keep it on a "we'll let you know when we see it" basis, in which there was

83. *Id.*
84. *Id.*
85. *Id.* (Alito, J., dissenting).
86. *Id.*
87. *Id.* at 2220.
88. *Id.*
89. *Id* at 2221 (quoting Miller v. Johnson, 115 S. Ct. 2475 (1995)).
90. *Id.* (quoting Rice v. Cayetano, 120 S. Ct. 1044 (2000)).
91. *Id.*
92. *Id.*

no real way of measuring whether its goals had been achieved.[93] For this reason, the University's goals could not be determined, in Justice Alito's opinion, to be "concrete."[94] Although the University gave nothing but a vague interest determination in defining its goals, it identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation.[95] It was never determined by the majority or the University whether even these specific goals could survive strict scrutiny.[96]

Regarding the first goal, Justice Alito said, "[I]f a demographic discrepancy can serve as a gauge that justifies the use of racial discrimination, then racial discrimination can be justified on that basis until demographic parity is reached."[97] Thus, he says, this goal cannot be used to satisfy strict scrutiny.[98] The second goal, classroom diversity, could not have been used to satisfy strict scrutiny either because, once again, the University failed to identify a level of classroom diversity that it sought to be sufficient.[99] The third goal, intraracial diversity, also failed because it relies on the assumption that there is something wrong with the African-Americans and Hispanics being admitted through the race-neutral Top Ten Percent Plan.[100] The assumption is that the minorities being granted admission through the plan are coming from "lower-performing, radically identifiable schools."[101] Lastly, the University claimed an interest in avoiding feelings of isolation in minorities.[102] Because of the vagueness of this goal, it could not possibly satisfy strict scrutiny, as it cannot be measured.[103]

Justice Alito's second major point addressed the Court's three reasons for avoiding the application of the normal strict scrutiny standard in *Fisher*.[104] First, he quoted the Court's statement that while the "evidentiary gap perhaps could be filled by a remand to the district court for further factfinding" in "an ordinary case," that will not work here because "when petitioner's application was rejected, . . . the University's combined percentage plan/holistic review approach to admission had been

93. *Id.*
94. *Id.* at 2223.
95. *Id.* at 2224.
96. *Id.*
97. *Id.* at 2225-26.
98. *Id.* at 2226.
99. *Id.*
100. *Id.* at 2230.
101. *Id.* at 2232.
102. *Id.* at 2235.
103. *Id.*
104. *Id.* at 2239.

in effect for just three years."[105] Justice Alito went on to refute this statement by the Court saying that the "Equal Protection Clause does not provide a 3-year grace period for racial discrimination."[106] The Court erred, in his opinion, by being lenient with the interpretation of the Equal Protection Clause in light of the case at hand. The second reason the Court went around the normal standard of review was because the University (in an attempt to excuse itself from having sufficient evidence) "had no reason to keep extensive data."[107] "This is not—as the Court claims—a 'good-faith effort to comply with the law.'"[108] The third reason given by Justice Alito was that the majority noted the fact that, in the time this issue had been litigated, the petitioner had already graduated from another school, and that this case may not offer much outlook for future cases of this matter.[109]

Justice Alito concluded his dissent by stating that what was "at stake" in *Fisher* was whether university authorities could justify using racial discrimination to serve the interest of promoting educational diversity without explaining why they must do so.[110] Although the University never fully explained its reasoning for using discrimination on the basis of race and, even though its position relied on "a series of unsupported assumptions," the majority concluded that it had met its burden. According to Justice Alito, that conclusion was "remarkably wrong."[111]

III. ANALYSIS

In *Fisher*, the United States Supreme Court affirmed the judgment of the Court of Appeals, which granted summary judgment in favor of the University and held that its admissions system did not violate the Equal Protection Clause of the Fourteenth Amendment.[112] A three-step analysis will be brought to light detailing the Equal Protection Clause, how the Court should have ruled in *Fisher*, and suggestions for the admissions system of the University in achieving its goals of invoking the "educational benefits of diversity."

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 2240.
109. *Id.* at 2242.
110. *Id.*
111. *Id.* at 2243.
112. *Id.* at 2207.

A. Was the Equal Protection Clause Violated?

The Fourteenth Amendment of the United States Constitution addresses citizenship and the rights of citizens.[113] Section One of the Fourteenth Amendment contains the Equal Protection Clause, which is itself at the heart of *Fisher*:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[114]

The phrase "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws" highlights the key concerns of the Fourteenth Amendment, demanding that the states must treat all individuals the same as others in similar circumstances. The Equal Protection Clause is vital to the enforcement of civil rights of individuals. In Fisher's case, she was not treated the same as all other applicants of the University, and she should have been granted relief under the Equal Protection Clause.

In a nation where over half of the students in college are Caucasian, reviewing race as part of the admissions process would never help a Caucasian student gain admission, but it would almost always produce a negative effect. The University of Texas, in promoting a "compelling interest" that resulted in increased levels of diversity, allowed the characteristic of race to be included in its admissions process. Although diversity, which cannot be measured, was cited as its primary goal, the University strategically ousted the efforts of an already heavily represented sector. In essence, it justified its behavior, not by admitting the most academically and well-rounded students, but by punishing a group of students for the sole fact that they were born into the majority of the race which already made up over half of the college population.

The Equal Protection Clause clearly states no state shall "deny to any person within its jurisdiction the equal protection of the laws."[115] In reading this plainly, anyone could determine that if someone is treated

113. U.S. Const. amend. XIV, § 1.
114. *Id.*
115. *Id.*

differently than another in similar circumstances, his or her rights under the Equal Protection Clause would be violated. While there are ways to get around the strictness of the clause, it must first be determined whether the rights of Fisher and other Caucasian applicants were infringed upon. In the review of students' applications that were not granted admission through the Top Ten Percent Plan, a factor of the application was the race of the applicant.[116] The promotion of diversity can absolutely be understood and justified, but this does not bring forth the authority of a school to pick and choose its admitted students while considering their racial or ethnical background. In order for the Equal Protection Clause to be honored to its fullest extent, race should not be considered in the admissions process of a university, as that would unfairly prejudice anyone who is a member of a race in which there is considered to be "too many of." Because race was a factor in the admissions process at the University, it can be stated with confidence that the school disadvantaged certain races and ethnic groups under the Equal Protection Clause—in fact, there was no equal protection at all.

B. Analogy to Hopwood

Fisher, while circumstantially different than that of the *Hopwood* case, should have been decided in the same manner, and *Hopwood* should still be good law today. In *Hopwood*, a Caucasian female was denied admission to the University of Texas School of Law, despite being more academically qualified than most applicants in her year.[117] It was ultimately ruled that the inclusion of race in the admissions process at the school violated the Equal Protection Clause, and that the inclusion of race should not be used as a way to "fix" bad minority community relations.[118] In *Fisher*, Ms. Fisher claimed she was disadvantaged because of the application process, which considered race as a subfactor in granting admission.[119] The cases differ in the underlying situations surrounding the applicants who brought actions against their respective schools, but because of the possibilities presented by *Hopwood*, it should remain intact as a law in blanketed form.

Hopwood presented the potential result of a university denying an academically strong student admission because of the inclusion of race in the admissions program.[120] The plaintiff's academic success was

116. *Fisher*, 136 S. Ct. at 2202.
117. *Hopwood*, 78 F.3d at 938.
118. *Id.*
119. *Id.*
120. *Id.*

ultimately undermined by her race, and that is not and should not be the intention of any institution. *Hopwood* turns the focus on a student's credentials and skillset, rather than factors concerning his or her race, which cannot be controlled. For that reason, *Fisher* should have been ruled in the same manner as *Hopwood*. Although the plaintiff in *Fisher* was not considered to be an academic superior, the ruling in that case set an unjust precedent that strayed from the court in *Hopwood*. Had Ms. Fisher been strong academically, but not in the top ten percent of her class, she may still have not been granted admission because the school was using the representation of her race against her. It is interesting to consider all of the possibilities in which Ms. Fisher could have been discriminated against in situations that were immeasurable and out of her control.

This gray-area standard the University was using in its application review is a key reason why *Hopwood* should apply as a simple, blanketed law today. It held, quite plainly, that the review of race in the admissions process violated the Equal Protection Clause. Although this ruling may cause anger and uproar to some, it provides a clear basis for the standard at which an admissions program should be held—and in full transparency. When a university can tailor its program to meet immeasurable goals, it can potentially do anything with the program that its employees intend.

C. Improvements to the Admissions Program

When a university sets out to declare its main objective or set of objectives for its student body, the most important issue to decide upon is whether it will focus more on academic strength alone or a combination of academic strength and personal achievements. Once this mission can be established, it can be easier to decide which kind of students will be granted admission to the institution. In the case of the University, a combination of the two seems to be what is desired most.

The University's current admissions system fills up to 75 percent of its incoming freshman class using the Top Ten Percent Plan.[121] By doing this, it portrays that its focus with incoming classes is on academic success. Where it could improve is in filling the remaining spots using the "Academic Index" and "Personal Achievement Index." The "Personal Achievement Index," in order to align with the Equal Protection Clause, should completely exclude race from its list of components. The best way to have equality in this country is to eliminate the racial lens which things are viewed through. People shall be seen as people, as humans. When one thinks of personal achievements, he or she thinks about experiences,

121. *Fisher*, 136 S. Ct. at 2206.

hobbies, talents, obstacles that have been overcome, and other things that have required initiative to complete. The "Personal Achievement Index" should weigh all of these types of factors in students to find the ones who will bring the most diversity to the collegiate table because of their experiences in the extracurricular world. It seems unfair to weigh the race of someone as a deciding factor in his or her admission, when he or she could just be viewed as a person with certain talents or capabilities. As long as this country uses race as a reason to promote or demote a person, it will never be the land of the free. We do not choose to be born into a certain race—it is given to us. And for that reason, it should not limit anyone of any race from being what he or she wants to be, if his or her experiences can contribute to our society. The University should mold its admissions program in a way that rewards academic success thus far, but also rewards experiences from extracurricular activities. The Equal Protection Clause should forever remain a stronghold in this field.

IV. CONCLUSION

The Court in *Fisher* faced four arguments: (1) that the University had not sufficiently identified its compelling interests regarding its goals, (2) that the University had already "achieved critical mass" under its race-holistic review, (3) that consideration of race was unnecessary because of its minor impact on the student body, and (4) that there were plenty of other race-neutral alternatives to achieve the University's goals.[122] Affirming the judgment of the Court of Appeals, the Court held: (1) that the University had sufficiently specified its compelling interests, (2) that the University had determined its goals had not quite been met, (3) that the University should continue reviewing race in order to continue narrowly tailor its interests, and (4) that none of the race-neutral alternatives suggested by Fisher were a workable means for the program.[123]

In this Note, I argued that by reviewing race in its admissions process, the University violated the Equal Protection Clause. I urged a plain reading of the phrase, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws," because it provides that every individual, no matter the circumstances, be granted the equal protection of this country's laws.[124] Fisher's race was reviewed as a part of the admissions process and, because she was treated differently, she should have been granted relied under the Constitution. The

122. *Fisher*, 136 S. Ct. 2198.
123. *Id.* at 2198-99.
124. U.S. Const. amend. XIV, § 1.

University disadvantaged a handful of races and ethnic groups because it did not uphold the purpose of the Equal Protection Clause. I argued that the Court should have ruled in a different manner—one more consistent with that of the *Hopwood* case, which I think should still be the precedent today. Lastly, I suggested that in order to comply with the Equal Protection Clause, the University should completely exclude race from its review process. Rather than looking at an applicant's race, I asked that the University focus more on achievements that students can control, such as his or her academics and personal achievements outside of the classroom. Diversity is a wonderful thing—however, a belief more in the diversity of a person's dedication, academic success, hobbies, and unique abilities should be the factors that are weighed. In doing this, diversity will be accomplished.

While we are all different in many ways, the race into which someone is born into is not a choice. Therefore, someone should not be held on a pedestal or given a special advantage for being born into a certain category. Every person should be viewed as a human—and what each human accomplishes in his or her life should determine his or her potential. For this reason, perhaps we should turn a blind eye to "check the box indicating your race."