

Chapter 11 Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in *Fisher v. Texas**

Kimberly West-Faulcon**

The *Fisher v. University of Texas*¹ case exposes the reality that test score-focused meritocracy claims of “reverse discrimination” plaintiffs are often a subterfuge. The facts in *Fisher* reveal clearly that Abigail Fisher had a constitutionally fair opportunity to compete for admission to University of Texas at Austin (“UT” and “UT Austin”). Because of her class rank and SAT scores, Fisher was an applicant who had no reasonable expectation of admission to UT, irrespective of any consideration of race. Yet, Fisher’s lawsuit advanced to the U.S. Supreme Court on the contention that Fisher, a rejected white applicant who presented no evidence that her admissions credentials were superior to admitted African-Americans and Latinos, could assert a constitutional injury. Fisher asserted this injury even though whites were selected to UT Austin at a higher rate than any other racial group. Her injury then apparently resided in the fact that the university policy considered race at all. Here, I assert that the *Fisher* case sidelines the issue of equal racial opportunity to put forth the novel contention that the Equal Protection Clause affords a “race-blindness entitlement.”

To demonstrate how Abigail Fisher’s claim ultimately rests on a white racial entitlement to a “race-blind” pro-

* Copyright © 2013 Thomson Reuters.

** James P. Bradley Chair in Constitutional Law and Professor of Law, Loyola Law School; B.A., Duke University; J.D., Yale Law School. Thanks to Tomiko Brown-Nagin, Cheryl Harris, Eric Miller and Steven Saltzman for their helpful and insightful comments. I also wish to thank Joshua Phillips of the Loyola Law School Law Library and Weiss Hamid for their research assistance.

cess, I consider the hypothetical—Would Abigail Fisher—the rejected white plaintiff in the *Fisher v. University of Texas* case—have been admitted to the university if she had been Black or Latino? The empirical realities of the 2008 UT admissions process strongly suggest not. In fact, *Fisher* is a significant departure from cases that rely heavily on the relatively higher standardized test score of the rejected white plaintiff and differences in racial group average standardized test scores as evidence of “racial preferences” and “reverse discrimination.” Because of UT’s reliance on a test score-driven regression equation to assess applicants (who were not automatically admitted because they were not ranked in the top 10% of their high school graduating class) and because Abigail Fisher’s SAT score was lower than the UT freshman average SAT score, it was a virtual mathematical certainty that the race-conscious aspect of the UT admissions policy did not cause Fisher’s application to be rejected. Nevertheless, because those who conceived the *Fisher* lawsuit oppose any and all race-consciousness irrespective of whether it harmed the admissions chances of any particular white applicant, Abigail Fisher’s inability to satisfy UT’s test score-dominated admissions criteria did not deter them from selecting Fisher as a plaintiff.

Given Abigail Fisher’s less than stellar academic credentials, she exemplifies a different type of “reverse discrimination” plaintiff—rejected whites who file cases in which “merit” in selection is a secondary issue. In this new era of “reverse discrimination” litigation, I posit that the “civil right” that plaintiffs like Abigail Fisher seek to vindicate is not racial inclusion, but instead, a freedom *from* racially inclusive policies. Using this frame, the selection of Abigail Fisher as a plaintiff is strategically beneficial to those pushing the Supreme Court to interpret the Equal Protection Clause as requiring “race-blindness.”

Moreover, as my analysis in this Article reveals for the first time, the 2008 UT admissions process challenged by Abigail Fisher *admitted white applicants at higher rates* than African-American, Latino and Asian-Americans applicants. Likely because Fisher was a white plaintiff *without* a particularly high test score, the red herring argument that whites deserve to be admitted at higher rates due simply to the fact that whites, as a racial group,

have a higher average SAT score was strikingly absent from the *Fisher* litigation. Without the typical focus on SAT score differences as a distraction, the *Fisher* case made the ultimate goal of its backers easy to identify. Irrespective of whether their target is UT's modest race-consciousness in admissions or federal civil rights statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the individuals and organizations behind the *Fisher* case seek to use the Equal Protection Clause to invalidate any effort to disrupt the historical status quo of racial inequality—in short, they seek to entrench white entitlement to a disproportionate share of society's most prized resources.

Background of Fisher's Discrimination Claim

Although Fisher filed suit to challenge UT's decision in 2003 to include race as an admissions factor subcomponent,² the UT admissions processes in place before and after the addition of race-consciousness relied so extensively on either high standardized test scores or high class rank to predict applicants' future college performance that Fisher would likely have been rejected on the basis of that prediction even if UT had never included race as a potential admissions criterion.³ For decades and up until 1996, the university's conception of admissions-related "merit"—which applicants deserved to attend UT Austin—was based, by UT's own description, on whether an applicant had "high standardized test scores and high class rank."⁴ In 1997, after a rejected white applicant won her legal challenge to the race-conscious component of UT's law school admissions process,⁵ the Texas Legislature passed a law that defined admissions-related merit exclusively as having a high class rank (but not necessarily a high standardized test score). This was essentially a state legislative determination that students with the highest grade point average in an individual Texas high school were the most deserving of admission to UT Austin.

Under this law, HB 588 (the "Texas Ten Percent Law"),⁶ the highest ten percent (10%)—the "top 10%"—of students in a particular high school graduating class were required to be admitted *automatically* to UT based solely on their high class rank.⁷ For the relatively small number of UT

admissions slots remaining after all top 10% applicants were admitted—the “non-top 10%” applicants, UT continued to define merit primarily based on high test scores. UT used a multiple regression equation to calculate each non-top 10% applicant’s “predicted freshman year grade point average (GPA)” as the primary “academic” admissions factor but the university also had admissions officers read the complete admissions file of eligible non-top 10% applicants in order to consider several non-numerical, “personal achievement” factors for which applicants were assigned an overall “personal achievement index” score.⁸

Specifically, each applicant’s SAT-driven⁹ predicted freshman year GPA, referred to by UT as an applicant’s “academic index” score,¹⁰ was used to either automatically admit the applicant or to plot the applicant’s position by index score into a “cell” on UT’s two-axis “admission decision grid” for subsequent cell-by-cell selection.¹¹ The plotting of an applicant’s scores was determined along the horizontal axis of the decision grid based on the applicant’s academic index score. As part of UT’s expansion of admissions criteria beyond SAT scores and class rank, the cell position along the vertical axis of the grid was determined by the applicant’s personal achievement index score¹²—a number computed using a formula comprised of three sub-scores—two distinct written essay scores¹³ and a “personal achievement score”¹⁴ that admissions readers assigned by considering six equally weighted, personal achievement sub-factors—(1) leadership experience, (2) extracurricular activities, (3) awards and honors, (4) work experience, (5) community service and (6) “special circumstances,” the last of which permitted admissions officers to consider seven subcomponents, six of which were socio-economic-focused and one that was race-conscious.¹⁵ According to the UT admissions office, the inclusion of the personal achievement factors and subcomponents as admissions factors in addition to an applicant’s test scores and class rank served to broaden the concept of merit in UT admissions.¹⁶

The central issue in the *Fisher* case was the constitutionality of the race-conscious subcomponent of the “special circumstances” personal achievement sub-factor. In *Fisher*, Abigail Fisher, who was evaluated under the non-top 10%

admissions policy (because her class rank was lower than top 10%), alleged that the Equal Protection Clause prohibited UT admissions officers from considering race, even in the limited and individualized manner¹⁷ set forth in UT's policy. The anti-affirmative action organization behind the *Fisher* litigation filed the case because it sought to establish the legal precedent that *any* race-consciousness by UT violated Abigail Fisher's equal protection rights¹⁸—the advance of a new constitutional theory that race cannot be considered at all by a public entity. While opponents of race-based affirmative action and backers of the *Fisher* case undoubtedly hoped the facts in the lawsuit would demonstrate that the university's race-consciousness was, in some way, the cause of Abigail Fisher's rejection, the reality seems to be that UT's heavy reliance on SAT scores was to blame for Fisher's rejection. The fact that Abigail Fisher's SAT was not high enough to claim she was a high-scoring white plaintiff rejected in lieu of lower-scoring African-American and Latino plaintiffs potentially explains why Fisher essentially focused on an entitlement to what I term "race-blindness" as the basis for her equal protection claim.

While many opponents of race-based affirmative action have asserted greater racial desert for whites based on differences in racial group average scores on standardized tests,¹⁹ comparison of Black/Latino versus White/Asian SAT average test scores was noticeably absent from the case presented on behalf of Abigail Fisher. In other words, Fisher did not adopt the enticing but fallacious argument—known as the "mean test score fallacy"—that whites, as a group, were entitled to a larger share of the 2008 UT admissions slots because whites had, on average, higher SAT scores than African-Americans and Latinos.²⁰ The likely explanation as to why the *Fisher* case omitted arguments relying on the fallacy—a typical feature of "reverse discrimination" claims—is the fact that Abigail Fisher's own SAT score was lower than the average SAT score of UT Austin enrolled students (and thereby *even lower than the average SAT score of 2008 UT applicants*).²¹ Strikingly, without reliance on the mean test score fallacy, Abigail Fisher offered no explanation—absent an implicit presumption of white racial entitlement—as to why an

admissions system that admits whites at a *higher* rate than African-Americans, Latinos, and Asian Americans should be construed as either a racial “preference” for nonwhites or as racial discrimination against whites.

In the next section, I show how Fisher’s claim that she lost out on attending UT because of her race was contradicted by other details about the 2008 UT Austin admissions process included in the *Fisher* record. To accomplish this, I take seriously Fisher’s contention that she would have been admitted to UT if she had been Black or Latino by considering the potential impact a change of Fisher’s race from white to either Black or Latino would have had under the terms of UT’s 2008 freshman admissions process. This analysis exposes the lack of empirical support for Fisher’s claim that African-American and Latino applicants received preferential treatment. The following examination of the basic arithmetic of the mathematical equations that governed non-top 10% admissions as well as evidence of UT’s admission of many lower-scoring white 2008 freshman applicants and rejection of lower-scoring Black and Latino 2008 freshman applicants combine to strongly support the conclusion that Abigail Fisher would most likely have been rejected by UT if she had been an African-American or Latina who received positive consideration for her race.²²

If Abigail Fisher Had Been Black or Latino

In this section, I consider explicitly, by examining the basic mathematical details of the entire UT admissions process, whether Abigail Fisher’s admissions file would have been treated differently and, ultimately, whether she would have been admitted to UT if she had been Black or Latino. I consider this hypothetical because “reverse discrimination” plaintiffs have often contended that the race-conscious policy they have challenged discriminates against whites because it results in the virtual certain acceptance of lower-scoring Blacks and Latinos yet virtual certain rejection of lower-scoring whites.²³ Here, I explain that there is strong reason to conclude that a Black or Latino applicant with the same SAT scores and grades as Abigail Fisher would have met the same admissions fate as Fisher—rejection.

FORSAKING CLAIMS OF MERIT

Foremost, the actual 2008 UT Austin admissions outcomes belie the contention that lower-scoring Blacks and Latinos were admitted to the detriment of higher-scoring white applicants.²⁴ Though SAT scores played a critical and likely determinative role in the admission of those applicants who did not qualify for class rank-based top 10% admission, UT did not apply lower standards to African-American and Latino applicants. Instead, the university both admitted and rejected higher- as well as lower-scoring applicants of all races.

First, being Black or Latino did not make admission to UT Austin a certainty. Moreover, many lower-scoring whites were admitted. No African-American or Latino applicant with lower admissions scores than Abigail Fisher was admitted to UT Austin for the 2008 regular fall admissions cycle and only five such applicants were admitted for summer admission. Secondly, being white did not translate into certain rejection. A significant number of different white applicants with scores the same as Fisher were accepted to UT. Specifically, forty-two (42) white applicants with scores “identical to or lower than” Fisher were admitted.²⁵ Thirdly and notably, *Black and Latino applicants with higher admissions scores than Abigail Fisher were denied admission* at the same time that these lower-scoring whites were admitted. According to the undisputed facts in the *Fisher* case record, there were 168 African-American and Latino students with credentials “identical to or *higher* than” Abigail Fisher who were denied admission.²⁶

Like the actual facts presented in the case, analysis of the mathematical details of the various components of the 2008 UT Austin admissions process are also useful in considering the hypothetical question of whether Abigail Fisher would have been selected by UT if she had been African-American or Latino. First and most obviously, under the Texas Ten Percent Law at the time Fisher applied, irrespective of race, a Texas high school senior whose class rank placed them in the top 10% of their high school graduating class was automatically admitted to UT Austin based solely on their class rank.²⁷ Since Abigail Fisher ranked 81 (only top 12%)²⁸ out of 680 students at Stephen F. Austin High School, she would have been, by

law, still ineligible for top 10% automatic admission to UT Austin if she had been an African-American or Latina applicant.

It bears noting that Abigail Fisher's admissions chances were likely negatively impacted by another component of the UT policy that received relatively little attention in the *Fisher* case. An undisclosed number of UT admission slots were awarded to applicants based solely on their predicted first year GPA,²⁹ which UT calculated by inputting each applicant's SAT score and a fraction comparing their class rank and class size into a multiple regression equation.³⁰ As is common practice in higher education admissions, this regression formula was derived based upon correlations between high school grades and SAT scores and grade point averages of UT Austin freshman admitted in previous admission cycles.³¹ As I have explained elsewhere, this by-the-numbers, formula-driven "prediction" of a high school applicant's future grades in college is useful but imperfect and has been the subject of judicial criticism for its limitations.³²

Though some 2008 applicants were admitted automatically based on their academic index score—UT's regression formula-based numerical prediction of their freshman college GPA, Abigail Fisher was not. Fisher's SAT score—1180 (out of 1600)³³—was not high enough to qualify her for this automatic "high academic score" admission.³⁴ Fisher's 3.1 academic index score was a full 1 point below the highest possible academic score of 4.1 points.³⁵ If Abigail Fisher had been African-American or Latino, she would not have been admitted based solely on her academic index score.

Thus, Abigail Fisher was ineligible under either of UT's facially race-neutral automatic admissions routes—(1) admission based solely on class rank or (2) admission based solely on a SAT score-driven numerical prediction of freshman GPA (academic index score). Fisher's ineligibility for admission under these processes had nothing to do with her race. Instead, it had everything to do with her grades and SAT scores. Because neither Fisher's class rank nor her SAT test scores were particularly competitive,³⁶ her only chance of admission to UT would have been through the non-automatic, non-top 10% process—the pro-

FORSAKING CLAIMS OF MERIT

cess that considered numerous factors other than class rank and SAT scores, only one of which included a race-conscious subcomponent.

As mentioned in the prior section,³⁷ the non-top 10% component of the UT admissions process was the aspect of the process that UT conceived as including a “holistic” aspect because it was based on a broader conception of “merit” than sole reliance on grades and test scores.³⁸ Had Abigail Fisher been Black or Latino, the computation of her academic index score,³⁹ the assessment of her two written essays,⁴⁰ and her level of personal achievement based upon five of the six total personal achievement factors⁴¹ would have been identical because none of those admissions criteria were race-conscious. So, the only question left to consider in assessing whether Abigail Fisher’s admission decision would have been different if she had been African-American or Latino is the last of the six personal achievement sub-factors—the special circumstances sub-factor.

As an initial matter, all but one of the seven special circumstances sub-factors permitted consideration of an applicant’s socio-economic status. Thus, the significance of race was likely to have been outweighed by an admissions reader’s assessment of how Abigail Fisher’s socio-economic status may or may not have been relevant to assessing her “personal achievement.”⁴² In addition, irrespective of her race—whether Abigail Fisher had been Black, Latino, Asian-American or white, admissions readers could have opted to consider her race positively or not to consider it at all because UT’s policy did not *require* that any particular applicant’s race be considered.⁴³ Thus, if Abigail Fisher had been an African-American or Latina applicant, it is possible but not necessarily the case that the admissions reader evaluating her application could have added a maximum of 1 point to her personal achievement sub-score based on the consideration of race, which, as explained below, would not have impacted her chances of admission.⁴⁴

Despite the open, individualized, and racially inclusive character of this race-consciousness, the fact that race was included at all as a possible factor UT admission officers could consider was the basis for Fisher’s legal claim that

UT Austin discriminated against her because of her race—as I describe it, an implicit claim that the Equal Protection Clause entitled Fisher to “race-blindness.” However, as a matter of basic arithmetic, even if Fisher had been African-American or Latino and received the highest possible special circumstances sub-factor score, it could have only increased her personal achievement score by one (1) of six (6) possible points and, accordingly, her overall personal academic index score could have only increased by a fraction of a fraction.⁴⁵ Most likely because of her unexceptional academic index score,⁴⁶ it was an undisputed fact in the case record that receiving the maximum possible positive consideration for race would not have changed Abigail Fisher’s admissions decision from a rejection into an acceptance.⁴⁷

In fact, it was asserted by Fisher’s attorneys and not contradicted by UT that a difference of 1 point in overall personal achievement index score was needed to make a difference in whether an applicant was admitted to UT but it took *only a one-tenth* (0.1) of a point difference in academic index score to make the difference in whether some applicants were admitted.⁴⁸ In mathematical terms, this meant that relatively small differences in an applicant’s academic index score had significantly greater impact on an individual applicant’s admissions decision than even large differences in an applicant’s overall personal achievement index score. Accordingly, due to how Fisher’s SAT score compared to other UT applicants, no facts exist to suggest Fisher would have been admitted had she been Black or Latino even if her personal achievement score had included the maximum possible positive consideration of her race.

Lastly, other facts in the *Fisher* case record support the conclusion that being Black or Latino would not have changed Abigail Fisher’s UT rejection letter into an acceptance letter. In particular, how the UT 2008 admissions process impacted high school applicants in the “second decile of their high school class”—applicants who, like Abigail Fisher, ranked above the top 20% but below the top 10% of their high school graduating class—showed a marked disadvantage for African-Americans and Latinos. Specific focus on this group reveals a racially differential

impact of the UT Austin admissions process—but it is one that disfavors nonwhites, not whites. As explained by UT in its brief to the Supreme Court, “[t]he odds of admission for a qualified African-American or Latino applicant from the second decile of their high school class declined after the top 10% law took effect, whereas the odds for a similarly situated Caucasian applicant increased.”⁴⁹ So, before UT added race to the list of special circumstances sub-factors, white students in the second decile—those between 10% and 20% in high school class rank—were admitted at higher rates than African-American and Latino students with the same high school class rank.⁵⁰

UT noted this differential racial impact on second decile-ranking African-American and Latino applicants during the course of the *Fisher* litigation and contended that the university’s consideration of race in the non-top 10% component of the admissions process was crucial to remedying the differential racial effect of the automatic top 10% process on UT’s effort to achieve racial diversity in a holistic manner.⁵¹ In other words, one of the rationales for UT’s race-consciousness was its need to have “diversity within its diversity” by admitting a diverse group of African-American and Latino applicants, including nonwhite students with highly competitive academic credentials who attended racially diverse schools but ranked below the top 10%—students not admitted by the top 10% plan.⁵² That said, since the race-consciousness admissions sub-factor ameliorated some but not all of the negative racial impact of UT’s regression formula-generated academic index score, there is no evidence to suggest that it would have improved Abigail Fisher’s chance of admission if she had been a second decile African-American or Latino student instead of a second decile white applicant.

Hence, unlike other “reverse discrimination” cases in which a rejected white applicant successfully identified African-American and Latino applicants with *lower* test scores and grades who were admitted, Fisher did no such thing. In fact, it seems Fisher discovered no evidence during the course of the litigation to prove any concrete harm that UT’s race-consciousness caused her. So, it defies reason, based on the details of the 2008 admissions process

highlighted here and based on the actual admissions outcomes detailed in this section of this Article, to conclude that a change in Abigail Fisher's race would have put Abigail Fisher at a competitive advantage in vying for admission to UT Austin.⁵³

Since Abigail Fisher presented no evidence that race-consciousness negatively impacted her individual admissions chances, the next issue to consider is whether the facts in the *Fisher* case support the conclusion that whites, *as a group*, had their admissions chances diminished by UT's inclusion of a potentially race-conscious admissions factor subcomponent. In the following section, I compile and analyze the overall numerical admissions outcomes and admission rates for "top 10%" and "non-top 10%" 2008 UT applicants by racial group—data that was not compiled nor presented by the parties in the *Fisher* case and, thus, not considered by the courts that ruled on the merits of the *Fisher* lawsuit. Significantly, the data below shows that whites, as a racial group, were admitted in both higher numbers and at higher rates under the non-top 10% admissions process—the aspect of the UT admissions policy that Abigail Fisher challenged as discriminating against her on the basis of her race.

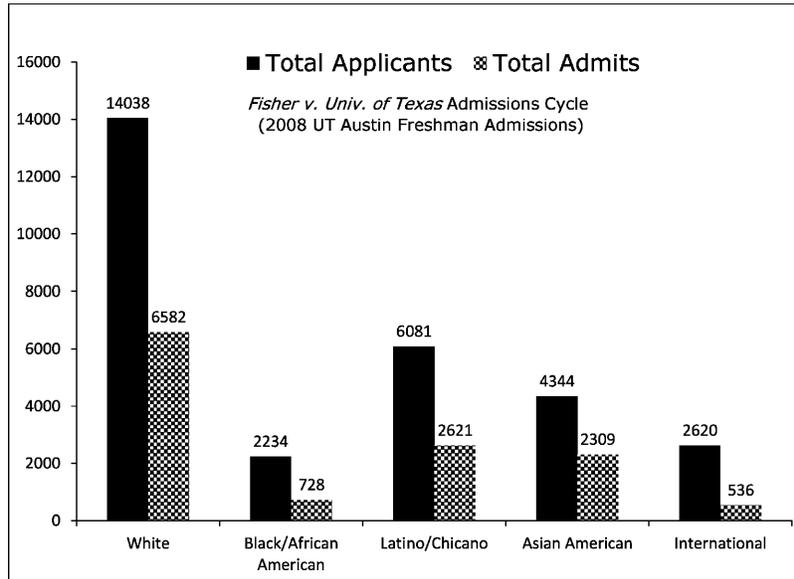
The Missing Admissions Data Analysis in Fisher

As noted above,⁵⁴ the complaint in the *Fisher* case invoked the familiar "reverse discrimination" rhetoric that UT Austin's use of race as a potential admissions criterion was a "racial preference" that had "a pervasive negative effect on non-minority applicants."⁵⁵ However, unless it is presumed that whites, as a group, possess greater admissions-related merit than all other groups, Abigail Fisher failed to present evidence of racially preferential treatment in favor of African-American and Latino applicants. To the contrary, my analysis reveals clearly that non-top 10% white applicants were *more*, not less, likely than non-top 10% African-American, Latino, or Asian-American applicants to be admitted to UT.

Figure 1 shows the total number of 2008 freshman applicants and admits to UT Austin by race and of international students.⁵⁶

FORSAKING CLAIMS OF MERIT

Figure 1.⁵⁷

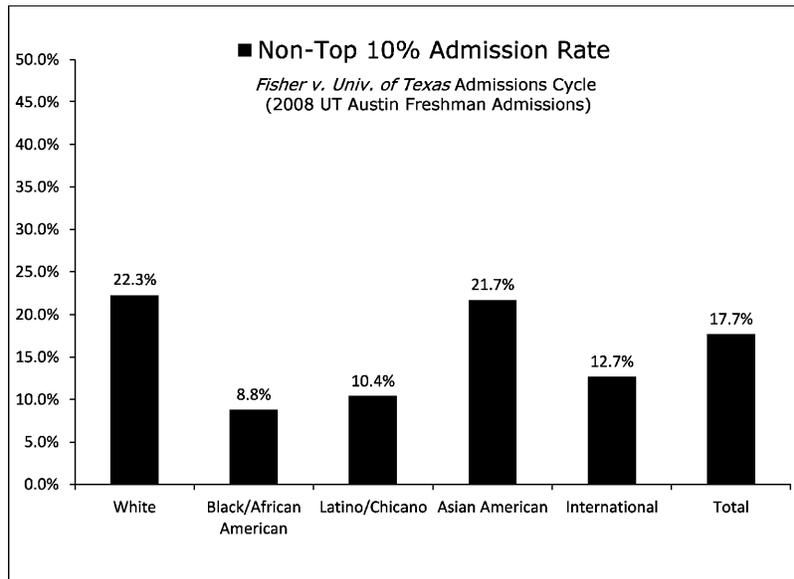


The total number of white applicants for 2008 freshman admission to UT Austin was 14,038. Of those white applicants, 6,582 were admitted. Of the 2,234 African-American applicants, 728 were admitted. For Latinos, the number of applicants was 6,081 and, of those, 2,621 Latino students were admitted as 2008 freshman. Of the 4,344 Asian-Americans who applied to UT Austin for 2008 freshman admission, 2,309 Asian-Americans were admitted.⁵⁸ Yet, because of the significant differences between the top 10% admissions process and the non-top 10% admissions process, examination of total applicants and admits by race does not provide the full picture of 2008 UT admissions.

Figure 2 compares the numerical results of the automatic top 10% admissions process dictated by the Texas Ten Percent Law⁵⁹ to the non-top 10% admissions process. In accordance with the legal requirement that top 10% admission be based *solely on class rank*, the admissions outcomes for top 10% applicants to UT were very straightforward numerically and equivalent to the applicant numbers—all top 10% applicants of all racial groups were admitted. In contrast, also as shown in Figure 2, very large numbers of non-top 10% applicants were rejected. Still, whites fared better than any other racial group in the non-top 10% process, both as a matter of overall numbers of whites admitted and the percentage of total white admits who were non-top 10%. The number of whites admitted under the non-top 10% process—2,142—was far greater than the number of non-top 10% admits from any other racial group.

FORSAKING CLAIMS OF MERIT

Figure 2.⁶⁰



To elaborate, excluding international applicants,⁶¹ each of the 4,440 white applicants ranked in the top 10% of their high school class who applied for 2008 freshman admission to UT Austin was automatically admitted as were all of the 582 top 10% African-American applicants who applied. Likewise, each of the 2,218 Latino applicants ranked in the top 10% of their class was admitted. The same was true of the 1,744 Asian-American top 10% applicants.⁶²

However, of the 9,598 *non-top 10%* white applicants—the white applicants ranking below the top 10% in their high school graduating class, 2,142 were admitted to UT Austin. Only 146 of the 1,652 *non-top 10%* African-American applicants were admitted. Of the 3,863 *non-top 10%* Latino high school students who applied to UT, just 403 of those Latino applicants were accepted. The pattern was similar for Asian Americans who did not rank in the top 10%. Of the 2,600 Asian-American applicants ranked below the top 10%, 565 were admitted.⁶³ The total number of white *non-top 10%* admits—2,142—not only far outnumbered the total number of African-American (146), Latino (403) and Asian-American (565) *non-top 10%* admits, the 2,142 total number of white *non-top 10%* admits far exceeded the combined total *number* of African-American, Latino and Asian-American *non-top 10%* admits—1,114—by almost double.⁶⁴

While these admissions numbers reveal how many admissions *slots* were offered to members of each racial group, *rates* of admission are more useful in evaluating variations in admissions between different policies and how those policies differed in their selection by race. As intended by the Texas Ten Percent Law, the admission rates for the automatic top 10% applicants was one hundred percent (100%) of those who ranked above the 10% class rank cut-off point and thus far exceeded the admission rates for *non-top 10%* applicants. Because admission was literally automatic for those ranked in the top 10% of their high school class, the admission rate is 100% *for all racial groups* under the class rank-based automatic admissions process⁶⁵—perfect racial parity.⁶⁶ As a basic mathematical proposition, there was no disparity in admission *rates* in favor of and no disparity to the

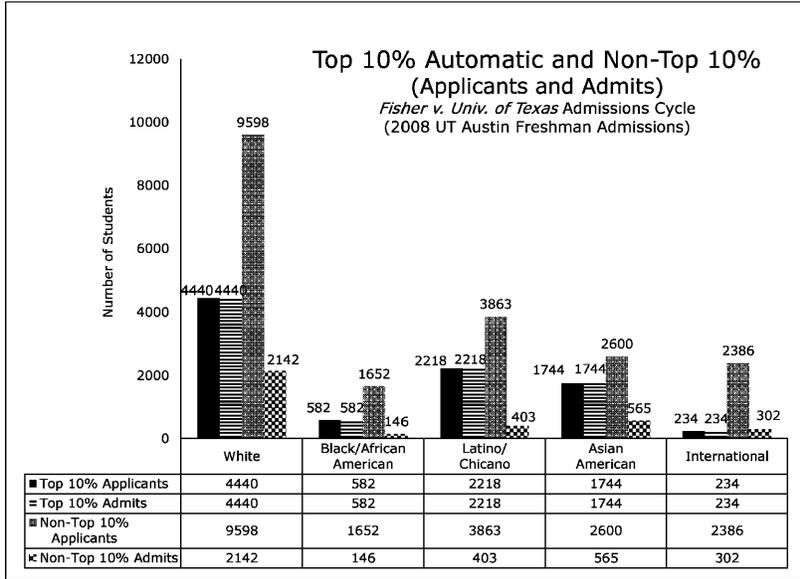
FORSAKING CLAIMS OF MERIT

detriment of any racial group for the top 10% component of 2008 UT admissions.

Given that the vast majority of 2008 UT admissions slots were offered to top 10% applicants, it makes sense that the non-automatic component of UT's admission process—the non-top 10% process—resulted in significantly lower admission rates for all racial groups. Students with a grade point average that placed their class rank lower than the top 10% had to compete based on multiple admissions criteria, including SAT scores, for the far smaller number of admissions slots left over after all top 10% applicants were admitted. In contrast to the 100% admission rate for top 10% applicants, the overall admission rate for all non-top 10% applicants was just 17.7%. This difference simply provides numerical support for what is well-known and clearly intended by the Texas state legislature. The Texas Ten Percent Law makes it much more difficult for students ranked below the top 10% of their high school class to be admitted to the top-ranked school in the University of Texas system—UT Austin.

Since Abigail Fisher ranked below the top 10% of her class, she applied to UT under the hypercompetitive non-automatic, non-top 10% admissions process. Again, because the non-top 10% component of UT's admissions was the only part of the process in which an applicant's race could potentially be considered, this was the aspect of UT Austin admissions process that was challenged by the opponents of affirmative action who conceived the *Fisher* case. It turns out that indeed there were substantial racial disparities in *rates* of admission under the non-automatic, non-top 10% portion of UT admissions. But, contrary to the very general assertion in the *Fisher* complaint that UT's race-consciousness negatively impacted whites as a group, my analysis of the admissions outcomes shown below in Figure 3 shows whites were admitted at the *highest* rate of any racial group.

Figure 3. ⁶⁷

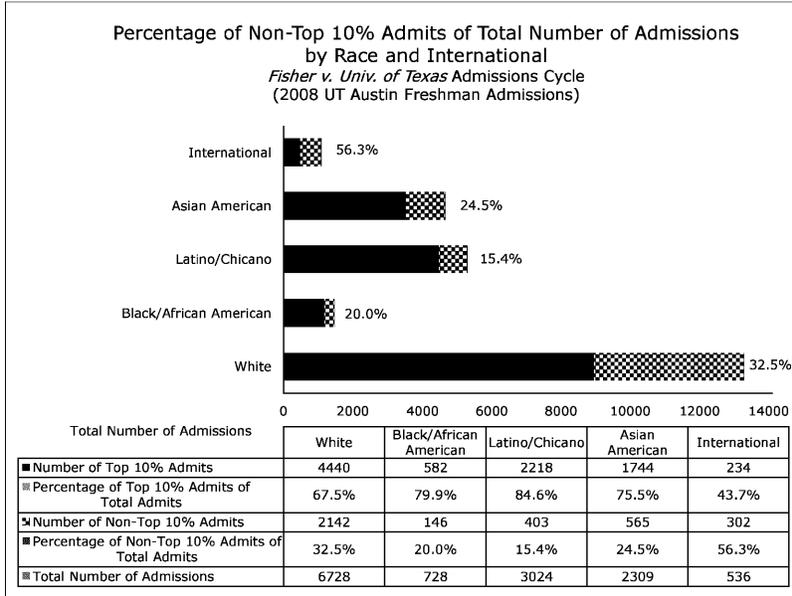


FORSAKING CLAIMS OF MERIT

Figure 3 shows that Abigail Fisher claims to have been discriminated against on the basis of her race by an admissions process that disproportionately selected whites *more often* than African Americans, Latinos, and Asian Americans. For 2008 UT admissions, excluding international applicants,⁶⁸ the admission rate for white non-top 10% applicants was 22.3%. That was somewhat higher than the admission rate of 21.7% for non-top 10% Asian-American applicants and also higher than the overall 17.7% admission rate for all groups.⁶⁹ The 10.4% admission rate for Latino non-top 10% 2008 UT Austin freshman applicants was less than half of the white admission rate. Finally and most starkly, the 8.8% admission rate of African-American applicants under the non-top 10% process was the lowest rate of all racial groups.⁷⁰ So, interestingly, Abigail Fisher's chances of admission as a white non-top 10% applicant were well over twice as good as they would have been if she had been African-American or Latino.

Again excluding international applicants,⁷¹ Figure 4 shows that non-white non-top 10% applicants had access to fewer admissions slots than white non-top 10% applicants. It also shows disparities among racial groups in the proportion of slots filled by non-top 10% students. Non-top 10% whites were selected for admission in both greater numbers and in a greater proportion than non-10% applicants of other races.

Figure 4.⁷²



FORSAKING CLAIMS OF MERIT

Over a third of the whites admitted to UT Austin the year Abigail Fisher applied were non-top 10% applicants like Fisher. While it was certainly more difficult for an applicant of any race ranking lower than the top 10% of his or her high school class to gain admission to UT Austin, a greater percentage of the non-top 10% admissions slots were awarded to white applicants than any other racial group. As shown in Figure 4 above, excluding international applicant admissions,⁷³ 32.5% (2,142 of the 6,582 white admissions) of the overall total number of white UT Austin admits were non-top 10%. For all Asian-American admits, 24.5% were non-top 10% admits (565 of the 2,309 Asian-American admissions).⁷⁴ Only 20% of all admission slots for African-Americans (146 of the 728 African-American admissions) were awarded to non-top 10% African-American applicants. Of all groups, Latinos had the smallest percentage of admission slots awarded under the non-top 10% admissions process (403 of the 2,621 Latino admissions)—15.4%.

Thus, as a white Texan, Fisher's white racial group membership gave her the best chance of admission under the non-top 10% UT admissions process of any other racial group. As shown in Figure 4, the higher admission rate for non-top 10% whites ultimately meant UT Austin awarded a greater *number* and greater *percentage* of non-top 10% admission slots to whites than any of racial group. Thus, of all the racial groups, whites benefited most from UT's non-automatic, non-top 10% admissions process. Barring an assumption that white UT applicants,⁷⁵ as a group, far outstrip all other races in admissions-related merit, the analysis of admission rate data that I have provided here greatly undermines Abigail Fisher's claim of "reverse discrimination." Given that the facts surrounding Abigail Fisher's application to UT Austin fall so far short of proving that race-consciousness harmed Fisher's chances of admission, I next consider what may have motivated the decision to select Abigail Fisher as a "reverse discrimination" plaintiff.

So, Why Choose Fisher to Sue UT Austin?

Edward Blum, a conservative non-lawyer on a mission to put an end to "race-based laws and policies," was the

architect of the *Fisher v. Univ. of Texas* lawsuit.⁷⁶ Soon after the Supreme Court's 2003 decision in *Grutter v. Bollinger*,⁷⁷ Blum identified UT Austin—Texas' flagship public university—as one of the numerous targets in his litigation campaign against race consciousness. As explained above, after the *Grutter* decision,⁷⁸ UT Austin introduced race as one of the seven possible subcomponents of the special circumstances sub-factor for assessing a non-top 10% applicant's personal achievement based on the university's assessment that many meritorious African-American and Latino students were not being admitted under its race-blind process.⁷⁹ It was this modest degree of race-consciousness⁸⁰ that made the university's admissions policy "race-based" in Blum's eyes. Still, why would Blum select Abigail Fisher as the plaintiff for his "reverse discrimination" lawsuit if she would have been equally or, as I have explained above, potentially *more* likely to be rejected if she had been an African-American or Latina 2008 freshman applicant to UT? I theorize that the answer is two-fold. First, Abigail Fisher may have been selected as the plaintiff Blum backed to sue UT Austin because Blum had few other options.⁸¹ Second, in my view, Blum's selection of Abigail Fisher as a plaintiff exposes how the articulated legal objective of "reverse discrimination" lawsuits has begun to shift from merit-driven claims to what I term "race-blindness entitlement" claims.

It is quite possible that the reason that Blum had a difficult time finding white applicants with high SAT scores and grades who were denied 2008 freshman admission to UT Austin is because the UT admissions policy was so class rank-driven and SAT-score driven that most high-ranking and high-scoring white students who applied were in fact admitted. Despite UT's repeated characterization of the non-top 10% aspect of its admissions process as "holistic," the vast majority (92%) of all 2008 Texas residents accepted to UT were selected based solely on the single admissions criteria identified by the Texas Ten Percent Law—class rank.⁸² Another undisclosed percentage of the remaining 8% of Texas residents admitted in 2008 were selected based on the academic index regression formula based in large part on SAT test scores as

FORSAKING CLAIMS OF MERIT

“high academic score” automatic admits.⁸³ Finally, even though UT Austin considered non-numerical academic information like written essays, leadership experiences, extracurricular activities, and special circumstances such as family economic status, parental education and race for some applicants, the equation and grid cut-score process the university used for this supposedly “holistic” part of the process was still heavily SAT score and class rank driven.⁸⁴

Hence, although the inclusion of race as an admission sub-factor made it possible to consider the race of a given individual African-American and Latino applicant (or the race of an Asian-American or white applicant) when race warranted consideration, the admissions policy that UT Austin touted as based on a broader concept of “merit”⁸⁵ was, as a numerical matter, far more influenced by the facially race-neutral academic index criteria than the modestly race-conscious personal achievement criteria. Ultimately, when both the top 10% and non-top 10% processes are considered, the upshot is that UT Austin relied exclusively on one admissions criterion to select the vast majority of the freshman class—class rank—and a SAT-test-score-driven regression equation was the primary determinate of which applicants got one of the few remaining and coveted non-top 10% spots.

My key point is to note that SAT scores and class rank were, for the most part, highly influential in determining which applicants were admitted to UT. Under the equations and grid-determined cut-scores used by UT Austin, the supposedly holistic non-top 10% admission process gave substantially more weight to the class rank and SAT test-score-based formula than was given to applicants’ non-numerical, non-academic accomplishments and personal background. Since SAT scores and class rank were the primary drivers of UT admissions, UT accepted many whites with high class rank and high SAT scores for 2008 freshman admission. This, at least partially, explains Blum’s difficulty identifying rejected white applicants with stellar SAT scores and class rank to serve as plaintiffs willing to charge UT with race discrimination against whites.

My alternative theory as to why Abigail Fisher may

have been chosen is that she satisfied Blum's objectives for suing UT Austin better than it seems at first blush. It is quite possible that the fact that Fisher lacked outstanding admissions credentials made her a more than satisfactory plaintiff to disentangle the affirmative-action-hurts-more-deserving-whites argument from the race-based-policies-are-inherently-harmful-to-whites argument that Blum wished the *Fisher* case to advance.

To the extent that the legal objective of *Fisher* has been seen as trying to end race-based affirmative action, I think those analyzing the objection of the opponents of race-based affirmative action may have mistaken the "short game" for the ultimate goal of those backing the *Fisher* lawsuit. The "give away" is the irrelevance of merit in Abigail Fisher's narrative as to why she was harmed by the UT admissions process. The fact that the *Fisher* case failed to demonstrate that race-based affirmative action harmed Abigail Fisher's chances of admission is of little consequence if those backing her lawsuit were focused on the "long game"—seeking a far broader change in the Court's equal protection jurisprudence.

Abigail Fisher did not present any evidence supporting her claim that less qualified African-Americans and Latinos essentially took what should have been "her spot" at UT. Yet, to the extent that Blum and his ideological counterparts have identified ending "race-based" policies as their ultimate legal goal, Abigail Fisher was a fine plaintiff. As Blum has explained, he searched unsuccessfully for several years before he eventually found Abigail Fisher.⁸⁶ Fisher was likely seen as a viable plaintiff in his eyes because she was white and she was not selected through either the top 10% or non-top 10% paths to UT admission.⁸⁷ Far more importantly, even though her class rank, grades, test scores, personal achievements and background fell short of stellar, she was willing to unabashedly assert that being denied admission harmed her for intangible reasons.⁸⁸

In lieu of purporting to vindicate the right of rejected white students to compete under a race-blind admissions process because such a process would be more "meritocratic," the substantive legal objective in filing the *Fisher* case seems to have been to argue that UT Austin's admis-

FORSAKING CLAIMS OF MERIT

sions process should be “wholly race-blind” because that is somehow what the Equal Protection Clause requires. Instead of arguing that fair treatment is central to equal protection, the *Fisher* case thus advanced the argument that “race-blindness” is central to the Constitution’s guarantee of equal protection. Unlike previous cases that have challenged race-conscious admissions policies as unfair to white applicants on the theory that the rejected white plaintiff was more qualified based on grades and test scores, Blum’s objection to UT’s policy was the fact that UT’s policy had any race-conscious component whatsoever.

In fact, even Blum’s media statements about the case and the arguments made by Fisher’s attorneys offer little basis for concluding that the primary concern of Blum and the other strategists behind the *Fisher* case was that the 2008 UT Austin admissions process unfairly diminished the admissions chances of qualified white applicants at the expense of less qualified non-whites. Abigail Fisher said in her public statements that she had a long-standing desire to attend UT Austin, in part, because her father and sister had attended the university, but her legal case did not contend that her accomplishments were stellar as compared to other UT applicants.⁸⁹ Neither media statements nor case filings on behalf of Fisher argued that Fisher’s academic accomplishments were of the caliber that she “deserved” to be admitted to UT Austin. This is what leads me to posit that it seems more likely that the ultimate goal of the *Fisher* case was to move the Supreme Court one step closer to holding that the Equal Protection Clause guarantees some sort of race-blindness requirement.

In the past, anti-affirmative “reverse discrimination” cases have typically contended that using race as a means to increase racial diversity had the side effect of unfairly harming more qualified whites. Essentially, the long-standing argument has been that, even if a university demonstrates a compelling interest in diversity sufficient to justify the consideration of race, the use of race is anti-meritocratic because it unfairly harms more deserving whites. The essence of that critique was that whites (and Asians) are harmed by affirmative action in higher educa-

tion because “if you are a B or a C student, and if you are white or Asian, you would be wasting your time and your money” applying to an elite university.⁹⁰ “But if you have the same record and are black or Hispanic, your chances for admission to one of these schools are vastly better.”⁹¹ Finally, the critique continues, “whatever your academic record may be, if you are black or Hispanic, you have a very significant advantage in the competition for prized admission slots.”⁹²

As a doctrinal matter, rejected white applicants have often contended that a university’s use of race was not “narrowly tailored” on the grounds that it resulted in rejection of white applicants with a particular combination of test scores and grades but resulted in almost certain selection of virtually any underrepresented minority applicant who applied with the same test scores and grades.⁹³ Under the Supreme Court’s affirmative action jurisprudence, opponents of race-based affirmative action have utilized this argument to contend that a particular race-based admissions policy fails to satisfy the “narrow tailoring” prong of the “strict scrutiny” equal protection standard of review. However, until *Fisher*, “reverse discrimination” plaintiffs have not typically advanced the theory that the Equal Protection Clause entitled them to a thoroughly race-blind admissions process.

In the pre-*Fisher* “reverse discrimination” cases, a key legal strategy of the opponents of affirmative action was to frame their opposition to race-consciousness as driven by a deep commitment to academic meritocracy. Accordingly, it was argued that Allan Bakke, Cheryl Hopwood, Barbara Grutter and Jennifer Gratz, all plaintiffs in prior challenges to affirmative action in higher education, were more deserving of admission than nonwhites admitted under race-conscious affirmative action policies.⁹⁴ These “reverse discrimination” plaintiffs usually attempted to substantiate their equal protection claims by identifying racial differences in admissions outcomes for African-American and Latino applicants with similar numerical tests scores and grades.⁹⁵

As an example, the rejected white plaintiff in *Gratz v. Bollinger*, Jennifer Gratz, contended that based on her particular grades and test scores, she would have been a

FORSAKING CLAIMS OF MERIT

virtual shoo-in for admission to the University of Michigan had she been African-American or Latino because one hundred percent of the “underrepresented minority” applicants with grades and test scores comparable to her were selected for admission.⁹⁶ Similarly, Barbara Grutter, the rejected white plaintiff in *Grutter v. Bollinger*, contended that whites were subjected to tougher admissions standards at the Michigan Law School because the law school routinely placed less emphasis on the law school admission test (LSAT) scores of underrepresented minority students.⁹⁷ Likewise, in *Bakke v. Univ. of California Board of Regents*, Allan Bakke’s case challenging the University of California Davis Medical School’s admissions policy hinged on Bakke’s contention that the average underrepresented minority student admitted under the school’s special admissions program had grades and test scores “inferior to those of Bakke and of the average student admitted under the regular procedure.”⁹⁸

Claiming that race-consciousness so unfairly tipped the scales that the white plaintiff would almost certainly have been accepted if he or she had been African-American or Latino has been historically one of the most compelling arguments offered by whites challenging race-based affirmative action in higher education admissions. In fact, the “reverse discrimination” case that gave the opponents of race-based affirmative action their first major victory after the *Bakke* case was a challenge to Cheryl Hopwood’s rejection by a University of Texas graduate school—the University of Texas School of Law. Not only was Hopwood’s personal story quite compelling,⁹⁹ she claimed that 90–100% of African-American and Latino applicants to the law school were admitted with test and grade index scores that would have resulted in almost certain rejection had those applicants been white like Cheryl Hopwood. Like Bakke, Grutter, and Gratz, Cheryl Hopwood was a rejected white applicant who claimed that the affirmative action policy she challenged violated the Equal Protection Clause because it resulted in the selection of less-deserving nonwhites and denied her an opportunity to compete on equal terms because of her race.¹⁰⁰

The facts and data analysis presented here show that Abigail Fisher differed from these prior “reverse discrimi-

nation” plaintiffs. Due to the stiff competition for the small number of non-top 10% admission slots, Fisher’s less than stellar standardized test scores and high school grades, not her race, made her admission to UT Austin an uphill battle from the beginning. If Abigail Fisher had been Black or Latino, her chances of admission would, in all likelihood, have been diminished. Far from conferring a racial “preference” on African-Americans and Latinos, UT Austin adopted a very constrained factoring of race. The 42 *different* white applicants, 1 Black, and 4 Latino applicants (with admissions scores either identical to or lower than those of Abigail Fisher) who were admitted demonstrated that non-racial admissions criteria played a significant role in why Fisher was rejected. Instead of suggesting that racial preferences in favor of nonwhites caused Fisher’s rejection, it seems more likely that the cause of her rejection was that she failed to satisfy UT’s high test score standards yet lacked sufficiently impressive non-test score achievements to stand out for selection amongst the numerous other lower-scoring non-top 10% applicants.¹⁰¹

Conclusion

Although Fisher’s complaint in *Fisher v. Univ. of Texas* made the perfunctory I-would-have-been-admitted-if-I-had-been-a-minority type allegation, I have set forth in this Article how the evidentiary record in the *Fisher* case did not fit this narrative.¹⁰² So, in this significant sense, the *Fisher* case broke the traditional “reverse discrimination” case mold. It lays bare an aspect of the opposition to race-based affirmative action that was only implicit in prior “reverse discrimination” cases: that the opposition to the use of race does not seem sincerely or even primarily rooted in concern that Abigail Fisher’s personal admission chances were individually harmed by it or rooted in concern that less qualified nonwhites got an admissions spot Fisher had earned. Blum essentially conceded there is no proof of such.¹⁰³

Instead, the primary concern of Blum and his ideological counterparts seems to be that whites, as a racial group, are harmed in a different way by government efforts to be racially inclusive. While the exact nature of this harm has not been fully articulated, it appears to be some type of

psychological (as opposed to a material harm) that rejected white applicants can suffer *irrespective of their admissions qualifications*. Under this novel and, in my view, erroneous, theory of equal protection, an applicant could be harmed by the mere fact that UT Austin failed to be “race-blind” in its admissions process. Thus, more than any other prior anti-affirmative action case, *Fisher* reveals the ultimate goal of the staunchest proponents of a “colorblindness” ideology—they seek an interpretation of the Equal Protection Clause requiring “race-blindness” by the government in order to challenge the legality of any and all government policies intended to increase racial inclusion, whether those policies be affirmative action policies or civil rights laws.¹⁰⁴

As a matter of strategy, in this battle against “race-based policies,”¹⁰⁵ it seems of little consequence that the facts in *Fisher* failed to show that UT’s race-consciousness disrupted meritocracy or resulted in unfair outcomes. This failure actually seems to have made *Fisher* a good plaintiff to claim that whites are harmed by race-based policies even if the race-consciousness has no concrete impact on them. If the goal of those who conceived the *Fisher* case was to advocate for a constitutional right to a “race-blind” admissions process, this objective was well served by Abigail Fisher—a rejected white plaintiff with a weak meritocratic claim. Earlier “reverse discrimination” cases explicitly embraced race-blindness as a means to an end to race discrimination (against whites).¹⁰⁶ In contrast, the core of the *Fisher* case was not the allegation that Abigail Fisher was the victim of racial “preferences” in favor of nonwhites. Actually and disingenuously, the *Fisher* case sidelines the issue of race discrimination altogether. Race-blindness is an end, in and of itself—irrespective of and, perhaps, *because of* how much race discrimination it leaves unseen.

NOTES:

¹133 S. Ct. 2411 (2013).

²UT’s inclusion of a race-conscious personal achievement subcomponent was prompted in 2003 by the Supreme Court’s reaffirmation of the constitutionality of the narrowly-tailored consideration of race as one of

CIVIL RIGHTS LITIGATION HANDBOOK

many factors in a higher education admissions policy. *See* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³Before it began relying heavily on standardized tests as an admissions criterion, the University of Texas facially discriminated against nonwhites in admissions on the basis of race under *de jure* segregation for nearly 100 years after its establishment in the late 1800s. Brief for Respondents at 3, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Respondents] (noting “[d]uring the first 70 plus years of its existence, UT was racially segregated by law.”). Texas state law explicitly prohibited nonwhites from attending the University of Texas. *See* Tex. Const., Art. VII, §§ 7, 14; Tex. Rev. Civ. Stat. (Vernon, 1925), Arts. 2643b (Supp. 1949), 2719, 2900. *See also* *Sweatt v. Painter*, 339 U.S. 629, 631 n.1 (1950). “Until 1969, the Texas Constitution required “separate schools . . . for the white and colored children.” Brief for Respondents, *supra* at 4 n.1 (citing Tex. Const. art. VII, § 7 (repealed 1969)).

⁴*See* Univ. of Tex. at Austin Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall 2008, Report 11*, 2 (2008), at <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf> [hereinafter *UT Freshmen Fall 2008 Report*].

In an overview of freshman admissions at UT, the admissions office states:

“In 1996, UT Austin carefully reviewed its admissions process. At the time, merit, when applied at an admission decision, consisted of high standardized test scores and high class rank. In 1997, the Texas State Legislature exerted its own definition of merit through the “Texas Top 10% Automatic Admissions Law.” . . . The UT Austin admissions routine for students *not* automatically admitted is elaborate and entails a broader concept of merit. Beginning with the entering class of 1997, for those not automatically admitted, the idea of merit was expanded from class rank and test scores exclusively to the inclusion of [a combination of Academic Index (AI) and Personal Achievement Index (PAI)] factors[.]”

Id.

⁵Prior to 1996, UT’s law school considered race as an admissions criteria for the purpose of increasing the admission rate of African-American and Latino applicants. *See* *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In 1992, Cheryl Hopwood, a white applicant denied admission to the University of Texas School of Law, sued the law school contending its consideration of race to benefit nonwhite applicants violated her rights under the Equal Protection Clause. *Id.* UT completely eliminated race as an admissions criterion after the Fifth Circuit Court of Appeals ruled that the law school’s consideration of race in admissions constituted a “racial preference” in violation of the Equal Protection Clause, *see id.* at 962.

⁶*See* HB 588 (Tex. 1997).

⁷*Id.*

FORSAKING CLAIMS OF MERIT

⁸*UT Freshmen Fall 2008 Report*, *supra* note 4 at 2.

⁹UT relied on either the SAT Reasoning Test or the ACT Assessment to predict applicants' first year grades at the university. *See id.* at 5, n. 5.

¹⁰The academic index score could range from 0 to 4.1 and included a potential score increase by 0.1 based upon the high school curriculum an applicant completed. *See UT Freshmen Fall 2008 Report*, *supra* note 4 at 3.

¹¹*Id.* at 3 (academic index scores and personal achievement index scores “are then plotted on an admissions grid” and “[a]dmissions liaisons, and/or representatives of Deans' office or faculty, then make decision as to which cells [of the admissions decision grid] to select as admitted students”).

¹²The personal achievement index score could range from 1 to 6. *See UT Freshmen Fall 2008 Report*, *supra* note 4 at 3.

¹³The two essay scores could each range from 1 to 6. *See UT Freshmen Fall 2008 Report*, *supra* note 4 at 3.

¹⁴The personal achievement score—a sub-score used in conjunction with the two essay scores to calculate the overall personal achievement index score—could range from 1 to 6. *See UT Freshmen Fall 2008 Report*, *supra* note 4 at 3.

¹⁵*Id.* (explaining that “[t]he Personal Achievement Index (PAI) is UT Austin's *holistic* approach to admissions” and that an applicant's overall personal achievement index score is calculated based on an equation that “gives slightly more weight to the personal achievement score than the [two] essays”—“ $PAI = [(personal\ achievement\ score * 4) + (mean\ essay * 3)] / 7$ ”) (emphasis added).

¹⁶“Thus, [for UT Austin] merit includes the ambition to tackle rigorous high school coursework, the production of quality prose, and the desire to make a difference in one's school, home, or community. Evidence of employability (work), and some sense of having excelled in any number of areas are also considered. Moreover, admissions officials placed these attributes in the context of the circumstances under which the student lived.” *Id.*

¹⁷UT Austin argued that its use of race was effective in increasing racial diversity yet confined to only a small portion of its admission process:

Moreover, although petitioner claims that the consideration of race in holistic admissions has had an “infinitesimal” (at 10) impact on diversity at UT, the record shows otherwise. Of the 728 African-Americans offered admission to the 2008 class, 146—or 20%—were admitted through full file review. That figure was 15% for Hispanic students admitted. *Id.*; see *infra* at 36–38. Petitioner notes (at 9) that race is listed on the front page of the application. But to be clear, the only place where race is considered in the admissions process is in the calculation of the PAS [personal achievement] score as described above. Race plays no role in the calculation of AI. And petitioner has conceded that race has “no influence” in scoring essays, or in deciding whether to admit or deny a cell.

Brief for Respondents, *supra* note 3, at 13–15.

¹⁸*See, e.g.*, Nikole Hannah-Jones, *A Colorblind Constitution: What Abigail Fisher's Affirmative Action Case is Really About*, PROPUBLICA, (Mar. 18, 2013, 12:25 PM), <http://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r> at 3 (quoting Edward Blum, founder of the Project on Fair Representation as follows: “An argument can be made that it is simply impossible to tease out down to the last student who would have been admitted, and who would have not been admitted, had they been a different skin color,” Blum said. “What we know is skin color is weighed and ethnicity is weighed by the University of Texas in their admissions process, that alone is enough to strike down the plan.”).

¹⁹*See, e.g.*, Brief Amicus Curiae in Support of Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3–4, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345) (contrasting the racial group average SAT scores of whites and Asians with the racial group average scores of African-Americans and Latinos to support unproven inference that African-American and Latino applicants to UT Austin enjoyed “very large preferences” in admissions); Lino A. Graglia, 54 J. OF URBAN & CONTEMP. L. 31, 35–38 (1998) (describing differences in racial group average scores to support contention that “the size of [racial] preferences [in higher education admissions] is so large that their use cannot operate to increase racial equality or respect”). Notably, Graglia makes explicit what typically goes unsaid in claims of white racial entitlement. He observes, “blacks are not in fact ‘under-represented,’ but rather ‘overrepresented’—that is, their numbers are disproportionately high—in institutions of higher education once IQ scores are taken into account.” *Id.* (citing RICHARD J. HERNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 319–20 (1994). *See also* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 386–422 (1997). *But see* Brief of Kimberly West-Faulcon as Amicus Curiae in Support of Respondent at 6, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411(2013) (No. 11-345) (explaining the debunking of the “mean test score fallacy” and noting that “[f]or decades, differences in the average test scores of racial groups, particularly the differences in black and white average group scores, have been misconceived as strong evidence of widespread race discrimination against whites—‘reverse discrimination’ in selective higher education admissions”).

²⁰Again, as the term “mean test score fallacy” indicates, this would have been a fallacious argument if Fisher had invoked it. A numerical difference in racial group average scores of admitted freshman is not proof that race factored in the admissions process. *See id.* “It is a fallacy that the existence of black-white difference in mean test scores of admitted students proves reverse discrimination against whites because social science research has shown definitively that *averages* of black-white racial group scores also differ when admissions are completely race-blind.” *Id.* “Since UT [did] not require all applicants have the same SAT score, irrespective of UT’s policy on considering race in admissions, mathematics would dictate that the black racial group SAT score average at selective universities will differ from the white racial

FORSAKING CLAIMS OF MERIT

group average until the differences in black-white racial group averages in the general population are narrowed by use of more theoretically-sound mental tests.” *Id.* at 13.

There is an additional mathematical reason that differences in the average SAT score of admitted black and the white admits average SAT score are not evidence of the existence of racial preferences in favor of nonwhites nor it is evidence of the magnitude of weight placed on race in a selective admissions process. Simply put, even when a university maintains extremely high academic selection standards, those African-Americans who meet or exceed those standards are more likely to do so based upon their non-test-score qualifications. Among the black test-takers who score high enough to be qualified for admission to selective universities, their SAT scores, on average, will be lower than as compared to qualified white applicants because black applicants are less likely to qualify *because of* their SAT.

Id. at 14.

²¹Abigail Fisher’s SAT score was 1180 whereas the average SAT score of *enrolled* non-top 10% applicants who applied in 2008 was 1285. UT has not made public the average SAT score of 2008 UT *applicants*. See *UT Freshmen Fall 2008 Report*, *supra* note 4, at 9. However, as I have observed elsewhere, due to the measurement limitations of standardized tests, the single fact that an applicant’s SAT is lower than the average SAT score of either admitted or enrolled students does not, it itself, prove that applicant is less deserving of admission. See, Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, (2011) (observing that “the SAT college admissions test, considered alone, explains approximately 13% of the variation in a test-taker’s college grades” and leaves 87% of the difference in freshman grades “unaccounted for and unexplained by consideration of applicants’ SAT score by itself”). Despite the reality of the limitations of the SAT’s predictive power, Abigail Fisher’s lawyers mentioned Fisher’s SAT score only in passing and offered no challenge to the fairness of UT’s heavy reliance on SAT scores to assess Fisher’s application. Cf. Second Amended Complaint at 22 *Fisher v. Univ. of Tex.* at Austin, 645 F. Supp.2d 587 (W.D. Tex. 2009) (No. 08-00263-SS) [hereinafter Second Amended Complaint] (asserting that Fisher’s SAT scores “are competitive”).

²²Again, it is worth noting that nothing in the 2008 UT admissions policy prohibited admissions officers from according Abigail Fisher positive consideration for her actual race—if, as a white applicant, Fisher’s race had been relevant to assessing Fisher’s “personal achievement,” an admissions reader could have awarded her such consideration. See Brief of Respondents, *supra* note 3, at 26 (“any applicant—of any race—can benefit from UT’s contextualized consideration of race”).

²³Atypical for “reverse discrimination” plaintiffs, Fisher’s Supreme Court brief touted the fact that “many” of the accepted African-American and Latino who enrolled at UT Austin would have been admitted “without regard to their race.” Brief of Petitioner at 9, *Fisher v. Univ. of Tex.* at Austin, 133 S.Ct. 2411(2013) (No. 11-345) [hereinafter Brief of Petitioner]. Fisher’s brief also noted that “some [minority

CIVIL RIGHTS LITIGATION HANDBOOK

enrollees] were admitted based solely on high AI [academic index] scores” and that “many more” would have been admitted under the non-automatic admissions process without their race being considered at all. *Id.*

²⁴Also, as I have explained elsewhere, evidence that the average SAT score of admitted African-American and Latino students was lower than the average SAT scores of white students would not prove that UT Austin had held white applicants to a higher SAT score standard or that race had played a role in their selection. See Brief of Kimberly West-Faulcon as Amicus Curiae in Support of Respondent, *supra* note 19 at 7 (explaining that “the reason for differences in the average SAT scores of black and white admits is not race discrimination against whites in the form of racial preferences for nonwhites”) (emphasis added). It would only have proven that SAT scores were not the admissions criterion that was the primary basis for the institution’s decision to select those particular African-American and Latino applicants over other applicants. *Id.* at 15 (noting that “even when a university maintains extremely high academic standards, those African-Americans who meet or exceed those standards are more likely to do so based upon their non-test-score qualifications”).

²⁵Brief for Respondents, *supra* note 3, at 16 n.6 (UT Austin responding to petitioner Fisher’s assertion that her “academic credential exceeded those of many admitted minority applicants” and correcting the district court’s incorrect statement that 64 minority applicants with lower AI scores than petitioner were *admitted* to the Liberal Arts major).

²⁶Brief for Respondents, *supra* note 3, at 16 n.6. Only one African-American and four Latino students with lower scores than Fisher were offered admission. *Id.*

²⁷See *id.* at 8. This meant the vast majority of all admission slots were awarded based on class rank alone. See *supra* Table 4. “In 2008, 81% of all freshmen, and 92% of all Texas residents admitted as freshmen, were Top Ten Percent applicants, leaving only 841 slots to be filled by Non-Top Ten Percent applicants.” Brief of the United States at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411(2013) (No. 11-345). “The portion of the class admitted pursuant to the top 10% law has ranged from roughly 60 to 80%.” Brief for Respondents, *supra* note 3, at 8.

²⁸Fisher’s complaint alleges she ranked 82 out of 674 students who attended her high school. Second Amended Complaint, *supra* note 21, at 3. UT’s answer states she was 81 out of 680 students in her class. Answer of Defendants to Plaintiffs’ Amended Complaint, *supra* note 55, at 3, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411(2013) (No. 11-345).

²⁹See Memorandum in Support of Defendant’s Cross-Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Partial Summary Judgment at 8, *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 (W.D. Tex. 2009) (No. 08-00263-SS) [hereinafter Defendant’s Cross-Motion for Partial Summary Judgment]; See also

FORSAKING CLAIMS OF MERIT

Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment at 19, *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 (W.D. Tex. 2009) (No. 08-00263-SS) [hereinafter Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment] ("Some number of non-Top Ten Percent Law applicants may be automatically admitted to a particular academic program based solely on their high AI [academic index] score UT Austin does not appear to maintain admission figures for the number of applicants admitted based on high AI [academic index] scores.").

³⁰*UT Freshmen Fall 2008 Report*, *supra* note 4, at 2.

³¹*See, e.g.,* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1109–11 (2009).

³²I have explained the rationale behind and various critiques of universities' reliance on such formulas. *See, e.g., id.* Members of the Supreme Court have recognized the folly of viewing test scores as perfectly precise measures of test-takers' admissions-related "merit." Justice Douglas is among the justices who have most explicitly questioned the typical "folk" assumption that reliance on non-test-score-driven criteria is, by its very nature, a deviation from a "true" academic merit-based standard. In reference to tests designed to predict performance in law school, Justice Douglas observed:

Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. And no one knows how many of those who were not admitted because of their test scores would in fact have done well were they given the chance.

DeFunis v. Odegaard, 416 U.S. 312, 329 (1974) (Douglas, J., dissenting) (internal citation omitted).

³³Fisher's score on the verbal/reading section of the SAT was 500 and her score on the math section was 680. Second Amended Complaint, *supra* note 21, at 22. Only 33.3% of the students admitted for non-top 10% fall admission the year before Fisher applied had SAT scores as low as or lower than Fisher's 1180. THE UNIVERSITY OF TEXAS AT AUSTIN OFFICE OF ADMISSIONS, *THE PERFORMANCE OF STUDENTS ATTENDING THE UNIVERSITY OF TEXAS AT AUSTIN AS A RESULT OF THE COORDINATE ADMISSION PROGRAM (CAP) STUDENTS APPLYING AS FRESHMAN 2007*, Report 7 (Feb. 8, 2010) at Table 5 at 4 [hereinafter *APPLYING AS FRESHMAN 2007*]. The percentage was even lower for 2007 Summer Freshman admissions—only 29.3% had SAT scores of 1190 or lower. *Id.*

³⁴*See* Plaintiff's Statement of Facts in Support of Motion for Partial Summary Judgment, *supra* note 29, at 19.

³⁵*See* Brief for Respondents, *supra* note 3, at 15 ("The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had

received “a ‘perfect’ PAI score of 6 [the score that includes race as a possible factor].”).

³⁶*Cf.* Second Amended Complaint, *supra* note 21, at 22 (asserting that Fisher’s SAT scores “are competitive with the historical SAT scores of student who enroll at UT Austin’s undergraduate program” by noting only that Fisher’s score of 1180 was between the 25th and 75th percentiles for students who enrolled at UT in 2006). The average SAT score of enrolled students is most certainly lower than the average SAT score of applicants *accepted* for admission to UT.

³⁷*See supra* text accompanying notes 12–16.

³⁸*UT Freshmen Fall 2008 Report, supra* note 4, at 2.

³⁹*Id.*

⁴⁰*Id.*

⁴¹The six equally-weighted personal achievement factors were: (1) leadership experience, (2) extracurricular activities, (3) awards and honors, (4) work experience, (5) community service and (6) a “special circumstances” factor, which was itself based on seven possible personal background circumstances. *Id.* The seven special circumstances sub-factors were:

- 1) the socio-economic status of the student’s family, 2) whether the student lived in a single-parent home, 3) the language spoke at the student’s home, 4) the student’s family responsibilities, 5) the socio-economic status of the student’s high school, 6) how the student’s SAT or ACT score compared to the average score for the student’s high school, or 7) the student’s race.

Id.

⁴²Six of the seven special circumstances personal achievement score sub-factors could be said to correlate to socioeconomic status—three explicitly, and the rest implicitly. *See UT Freshmen Fall 2008 Report, supra* note 4, at 2. As an aside, since more of the special circumstances sub-factors were related to socioeconomic status than were related to race, it could reasonably be argued that Abigail Fisher’s personal achievement score would have been likely to increase more if her family had been relatively less wealthy than if she had been Black or Latino.

⁴³In its brief to the Supreme Court, UT Austin explained the race-consciousness of the special circumstances sub-factor as follows:

The “special circumstances” factor is broken down into seven attributes, including socioeconomic considerations, and—as of 2005—an applicant’s race. Race is one of seven components of a single factor in the PAS [personal achievement] score, which comprises one third of the PAI [personal achievement index score], which is one of two numerical values (PAI and AI [personal achievement index score and achievement index score]) that places a student on the admissions grid, from which students are admitted race-blind in groups. In other words, race is “a factor of a factor of a factor of a factor” in UT’s holistic review. No automatic advantage or value is assigned to race or any other PAS [personal achievement score] factor. Each applicant is considered as a whole person, and race is considered “in conjunc-

FORSAKING CLAIMS OF MERIT

tion with an applicant's demonstrated sense of cultural awareness," not in isolation. "Race is contextual, just like every other part of the applicant's file," and "[t]he consideration of race helps [UT] examine the student in 'their totality.'" Adding race to the mix in whole-file review "increases the chance" that underrepresented minorities will be admitted. But because of the contextualized way in which race is considered, it is undisputed that consideration of race may benefit any applicant (even non-minorities)—just as race ultimately "may have no impact whatsoever" for any given applicant (even an underrepresented minority). Consistent with the holistic and modest way in which race is considered, it is impossible to tell whether an applicant's race was a tipping factor for any given admit. But it is undisputed that "race is a meaningful factor and can make the difference in the evaluation of a student's application."

Brief for Respondents, *supra* note 3, at 13–15.

⁴⁴See Brief for Respondents, *supra* note 3, at 15.

⁴⁵The personal achievement score, itself a sub-score used in the UT equation that calculates an applicant's personal achievement index (PAI) score, is a score assigned at the admission reader's discretion on a scale of 1 to 6 based on consideration of six personal achievement sub-factors. The overall personal achievement index (PAI) score is calculated based on the following equation: $PAI = [(personal\ achievement\ score * 4) + (mean\ essay * 3)] / 7$. *UT Freshmen Fall 2008 Report*, *supra* note 4, at 3.

⁴⁶The UT Austin Office of Admissions acknowledges that test scores play "a large role" in the non-top 10% admissions process. See, e.g., *APPLYING AS FRESHMAN 2007*, *supra* note 33, at 4 ("[i]t is not surprising that the groups with the highest mean scores are the Non-Top 10% and the Summer Freshman group. These students competed for slots and test scores played a large role in their admission.").

⁴⁷According to UT, Fisher's 3.1 academic index score was so low as compared to the other non-top 10% applicants being considered under the non-automatic admissions process that Fisher would not have been admitted even if she had been assigned a perfect—6 (of 6 possible points)—personal achievement index score. UT's Supreme Court brief states: "The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had received "a 'perfect' PAI score of 6 [the score that includes race as a possible factor]." Brief for Respondents, *supra* note 3, at 15.

⁴⁸See Statement of Facts in Support of Motion for Partial Summary Judgment, *supra* note 29, at 20. That it takes ten times a difference in overall personal achievement score—1.0—to make a difference in an applicant's ultimate admissions decision demonstrates how much greater an applicant's academic score impacts admissions than their personal achievement score. *Id.* ("One-tenth of an AI [academic index score] point or one PAI [personal achievement index score] point can be determinative as to whether an applicant is admitted or not admitted.").

⁴⁹Brief for Respondents, *supra* note 3, at 9.

⁵⁰*Id.* My instinct is to think that this was because SAT scores had a large impact on admissions for non-top 10% applicants.

⁵¹*Id.*

⁵²*See, e.g.,* Elise Boddie, *Commentary on Fisher: The Importance of Diversity Within Diversity*, SCOTUS BLOG (Oct. 11, 2012, 10:50 AM), <http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity/>.

⁵³Though Fisher alleged “on information and belief” in the Second Amended Complaint that “but for” being white she would have been admitted to UT Austin, *see* Second Amended Complaint, *supra* note 21, at 25. Apparently, the evidence produced in discovery did not support this contention. Fisher’s lawyers made no such allegations in their briefs to the U.S. Supreme Court and Fifth Circuit Court of Appeals, adding to the litany of reasons the *Fisher* case should have been dismissed. For others, *see* Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 *YALE L.J. ONLINE* 85 (2012), <http://yalelawjournal.org/2012/10/01/chandler.html>.

⁵⁴*See supra* note 53 and accompanying text.

⁵⁵Second Amended Complaint, *supra* note 21, at 22.

⁵⁶UT Austin’s report on the 2008 UT admissions does not include data on the racial composition of the international student applicants and admits. *See generally* *UT Freshmen Fall 2008 Report*, *supra* note 4.

⁵⁷The data presented in Figure 1 is based upon my analysis of publicly available UT Austin admissions data. *See UT Freshmen Fall 2008 Report*, *supra* note 4, at 6, 8.

⁵⁸Of the 2,620 international students who applied, 536 international students were admitted. *See infra* Figure 1.

⁵⁹*See supra* note 6 and accompanying text. Admission to UT Austin—the flagship campus in the University of Texas system—is guaranteed to Texas residents graduating with a class rank in the top 10% or better from a Texas high school and for Texas students ranking in the top 10% who attended a school outside the United States operated by the U.S. Department of Defense. *Id.* In this important sense—the fact that the Texas Ten Percent Law guarantees top ranked high school students admission to the state’s most selective university, the Texas law differs from other state university admissions “percentage plans.” Significantly, the admissions percentage plans of states like California and Florida do not guarantee admission to those states’ university systems’ most selective and prestigious undergraduate universities. Instead, students ranking at the top of their high school classes in those states are guaranteed admission to *one of* the campuses in the university *system* but not guaranteed admission to their state’s flagship campuses. *See, e.g.,* CATHERINE L. HORN & STELLA M. FLORES, *PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES* (2003) at 20 (describing difference between Texas percentage plan and California and Florida percentage plans

FORSAKING CLAIMS OF MERIT

that guarantee only admission to the University of California *system*, not admission to its most selective campuses, to the top 4 percent of each California's high school's graduates and only admission to the Florida State University *system*, again not to its most selective campuses, to the top 20 percent of each Florida high school class). Again, in contrast, Texas top 10% students are guaranteed admission to UT Austin—the most selective university in the Texas system.

⁶⁰The data presented in Figure 2 is based upon my analysis of publicly available UT Austin admissions data. *See UT Freshmen Fall 2008 Report, supra* note 4, at 6, 8.

⁶¹*See infra* note 56. Of the 2,386 non-top 10% international applicants, 302 were accepted as 2008 freshmen. *See supra* Figure 2.

⁶²All 234 of the top 10% international student applicants were also accepted for admission. *See id.*

⁶³Of the 2,386 non-top 10% international applicants, 302 were accepted as 2008 freshmen. *Id.*

⁶⁴The sum of the 146 African-American non-top 10% admits, 403 Latino non-top 10% admits, and 565 Asian-American non-top 10% admits is 1,114, which is a little over half of the 2,142 total number of white non-top 10% admits.

⁶⁵All top 10% applicants of all races were accepted. So, the top 10% admission rate for all races was 100%. *See Report 11 at 8. %.* *See UT Freshmen Fall 2008 Report, supra* note 4, at 8.

⁶⁶Texas' racially segregated high schools create a unique demographic scenario such that the numbers of non-whites with class rank above the top 10% class rank cut-off is large enough to create a pool of applicants of each racial group that numerically resembles that number of applicants of each race sufficient to produce applicant numbers similar to what UT Austin has had over the past several decades. *See, e.g.,* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729 (2001) (explaining that percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated).

⁶⁷The data presented in Figure 3 is based upon my analysis of publicly available UT Austin admissions data. *See UT Freshmen Fall 2008 Report, supra* note 4, at 6, 8.

⁶⁸*See infra* note 56.

⁶⁹The white non-top 10% admissions rate was also almost 10 percentage points higher than the admissions rate for international non-top 10% applicants. *Id.*

⁷⁰The 12.7% admission rate for non-top 10% international students was higher than the 8.8% African-American admission rate and the 10.4% Latino admission rate. *Id.*

⁷¹*See infra* note 56.

⁷²The data presented in Figure 4 is based upon my analysis of

publicly available UT Austin admissions data. *See UT Freshmen Fall 2008 Report*, *supra* note 4, at 6, 8.

⁷³*See infra* note 56.

⁷⁴As would be expected, most, 56.3% of international admission slots were awarded to non-top 10% students. *See supra* Figure 4.

⁷⁵My point here is that the *Fisher* case does not make an explicit claim of merit-based superiority of whites as a racial group. This is atypical for reverse discrimination plaintiffs and it is a key feature of many critiques of race-based affirmative action. *See supra* note 19.

⁷⁶Edward Blum procured both the financial funding and the named plaintiff for the *Fisher* case. *See* Joan Biskupic, *Special Report: Behind U.S. Race Cases, A Little-Known Recruiter*, REUTERS, Dec. 4, 2012, at 2–3 available at <http://www.reuters.com/article/2012/12/04/us-usa-court-casemaker-idUSBRE8B30V220121204>. Blum, a 1973 graduate of the University of Texas at Austin (UT Austin) with a long history of work for conservative groups, is the founder of the Project on Fair Representation, a non-profit legal organization he formed in 2005 and a current fellow with the American Enterprise Institution in Washington, D.C. *Id.* From 2000 to 2006, he spent several years as a senior fellow with the Washington-based conservative Center for Equal Opportunity. *Id.* The Project on Fair Representation describes its focus as challenging racial and ethnic “distinctions” and “preferences” in voting, education, contracting and employment. *See* Project on Fair Representation, home page available at <http://www.projectonfairrepresentation.org/>.

⁷⁷In *Grutter*, the Court held that a university’s use of race as a factor in a “holistic” admissions process is constitutional. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁷⁸*See supra* text accompanying note 2.

⁷⁹As UT has explained:

The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African-American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. The race-neutral efforts have failed to improve racial diversity within the classroom. In fact . . . , for Fall 2002, there were *more* classes with no or only one African-American or Hispanic students than there had been in Fall 1996. With so few under-represented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

See Defendant’s Cross-Motion for Partial Summary Judgment, *supra* note 29, at 24–25.

⁸⁰Fisher’s attorneys said the impact of race was “infinitesimal.” Brief of Petitioner, *supra* note 23, at 9.

⁸¹Blum’s task was made all the more difficult by the fact that the route to admission that considered applicants’ “personal achievement”

FORSAKING CLAIMS OF MERIT

admitted white applicants with lower test scores and grades based on a broad range of criteria that permitted consideration of their academic and non-academic accomplishments based on the students family background and socio-economic status. Thus, stellar white students who overcame personal obstacles or excelled in non-academic ways were also admitted to UT Austin and hence unavailable to serve as Blum's plaintiff.

⁸²See Brief for the United States as Amicus Curiae Supporting Appellees at 8, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).

⁸³See *supra* text accompanying note 29.

⁸⁴See *supra* text accompanying notes 12–16.

⁸⁵As described by UT Austin, the institution defines “merit” to include “the ambition to tackle rigorous high school coursework, the production of quality prose, and the desire to make a difference in one’s school, home, or community.” To evaluate an applicant’s personal achievement, “[e]vidence of employability (work), and some sense of having excelled in any number of areas are also considered.” “Moreover, according to UT Austin, “admissions officials place these attributes in the context of the circumstances under which the student lived.” See *UT Freshmen Fall 2008 Report*, *supra* note 4 at 2.

⁸⁶A 2012 Reuters profile described the process as follows:

[Edward Blum] set up a Web address, utnofair.org, which asked spurned University of Texas students to contact Blum and relate their experiences. He gave speeches to the Young Conservatives of Texas and similar groups, and hounded everyone he knew in the state.

“I could bump into people in restaurants and bars that I knew from high school in Houston that had kids graduating from high school,” he recalled. “And I was such a noodge: ‘If she doesn’t get in, I want to represent her.’”

He says he heard from many students, but after two and a half years, none still seemed right. Someone might have had strong grades, he said, but didn’t seem like a person he could work with for a long period or “expose to the press.” Then, in March 2008, Blum got a call from his old friend Richard Fisher. Blum had met Fisher, an accountant, through business even before Fisher’s daughter Abigail, then 18, was born. The Blums and Fishers had socialized together over the years and Blum attended the wedding of Abigail’s older sister. Fisher, also a Republican with what he says are strong conservative views, knew of his friend’s search.

Fisher told Blum that Abigail had just received a rejection notice from the University of Texas and was heartbroken. He described her scores, and the men agreed that she might make a strong candidate to challenge the Texas admissions system . . . Blum retained the Wiley Rein firm again [as he had as a plaintiff in the *Bush v. Vera* case], and within a couple of weeks, the lawsuit now known as *Fisher v. University of Texas at Austin* was filed at the U.S. District Court in Austin. The lower court sided with the university in 2009, upholding the affirmative action plan. A panel of the Fifth Circuit Court of Appeals later agreed. Abigail, meanwhile, had enrolled at her second-choice school, Louisiana State University.

See Joan Biskupic, *supra* note 76, at 3.

⁸⁷Since the personal achievement index score was the only portion of UT Austin's admission policy that permitted the consideration of race, Edward Blum needed to find a rejected white student ranked too low to qualify her for automatic admission under the Top Ten Percent Law and whose SAT score was too low to qualify her for automatic admission based on the UT test-score-based regression formula. Abigail Fisher fit the bill. Having graduated in the 81st class rank place in her class of 680 students at Stephen F. Austin High School with a cumulative average of 3.59, Fisher was not a top 10% applicant. Additionally, Fisher's combined SAT score of 1180 out of 1600 did not qualify her for automatic admission based on her calculated academic credentials score.

⁸⁸This, in fact, has subjected Fisher to some harsh criticism by some. See, e.g., Evette Dionne, *An Open Letter to Abigail Fisher*, CLUTCH MAGAZINE, Oct. 11, 2012, at 3 available at <http://www.clutchmagonline.com/2012/10/an-open-letter-to-abigail-fisher/>.

⁸⁹See, e.g., Michael Persson, *A Profile of Ex-Student Who's Challenging University's Affirmative Action Policy*, CNN, Jun. 24, 2013 available at <http://www.cnn.com/2012/10/10/us/affirmative-action-profile/>.

⁹⁰Carl Cohen, *Race, Lies and Hopwood*, COMMENTARY, Jun. 1996, at 42.

⁹¹*Id.*

⁹²*Id.*

⁹³That said, such claims by rejected whites have often been erroneous. See West-Faulcon, *More Intelligent Design*, *supra* note 21, at 1292–93.

⁹⁴For a persuasive refutation of Bakke's contention that the race-consciousness component of the admissions policy adopted by the University of California at Davis Medical School was the cause of his rejection, see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

⁹⁵See, e.g., West-Faulcon, *More Intelligent Design*, *supra* note 21, at 1283.

⁹⁶Petition for Writ of Certiorari at 7–8, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

⁹⁷Petition for Writ of Certiorari at 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

⁹⁸Brief for Respondent at 12, *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76–811).

⁹⁹The following is one account of why Cheryl Hopwood was an ideal (and sympathetic) plaintiff to challenge race-based affirmative action:

She was admitted to Princeton University as an undergraduate but couldn't afford to attend because she had to pay for her own education. Instead, she

FORSAKING CLAIMS OF MERIT

spent four years at a community college in Pennsylvania, working part time, and then moved to California, where she attended community college and California State University at Sacramento. She graduated with a 3.8 grade point average while working twenty to thirty hours a week and still found time to be active in the Big Brothers/Big Sisters program. She became a certified public accountant and took care of a severely handicapped baby daughter who was born with a rare muscular disease. (The daughter died last November.) Her test scores were high enough to put her in the top tier of candidates for admission to UT, but a university official discounted her grades because she had not attended an academically competitive school. When an Austin lawyer named Steven W. Smith sent out letters to 31 white students who had been rejected by UT, suggesting that they might be able to win a lawsuit, Hopwood was one of nine who responded.

Paul Burka, *She Fought Affirmative Action at the University of Texas — and Won*, TEXAS MONTHLY, Nov. 30, 1999, at 113.

¹⁰⁰Such claims made it possible for those targeting affirmative action by elite universities and the litigation campaign against race-based policies to be self-depicted as a “fairness and merit-focused” endeavor—simply attempting to guarantee a fair and meritocratic playing field for the best and the brightest applicants of all races.

¹⁰¹See, West-Faulcon, *More Intelligent Design*, *supra* note 21, at 1281 (pointing out that “[a]ssessing applicants based on scores on tests premised on an incomplete or flawed definition of intelligence denies them a fair opportunity to compete”); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. Rev. 73 (2010) (describing the potential claims of “different whites” who could have “questioned the [standardized firefighter] exams’ fairness as a measurement of job-related merit”).

¹⁰²Second Amended Complaint, *supra* note 21, at 22, 25.

¹⁰³See Nikole Hannah-Jones, *supra* note 18, at 2 (“There are some Anglo [white] students who had lower grades than Abby who were admitted also,” Blum told ProPublica, “Litigation like this is not a black and white paradigm.”)

¹⁰⁴Quite notably, Blum has already succeeded with respect to Section 4 of the Voting Rights Act in the *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), lawsuit he designed. See Joan Biskupic, *supra* note 76, at 3. Blum also helped finance *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009)—the case that laid the groundwork for the *Shelby County* decision. *Id.* at 3.

¹⁰⁵See Joan Biskupic, *supra* note 76, at 2–3.

¹⁰⁶Chief Justice Robert’s statement that “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race” is a prime example of this logic. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007) (Roberts, J., concurring). *But see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion) (“[i]n order to get beyond racism, we must first take account of race”).