SCRUTINIZING STRICT SCRUTINY

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Standards of review dominate personal liberties practice, and we must take them seriously if we heed calls to take (constitutional) lawyering seriously. Standards are poorly articulated and undertheorized. They must be properly fashioned by exploring and reconciling the logic and purpose of each of their components. We do this with strict scrutiny both to energize an important standard of review and model a proper approach. Our analysis is primarily within the context of higher education affirmative action cases because they typify the ambiguity of strict scrutiny; one such case—Fisher v. University of Texas at Austin—*was set to be argued on December 9, 2015.*

We derive a preferred articulation of strict scrutiny with six achievable but rights-protective requirements. Strict scrutiny is especially energized by separating its ends question *about compellingness from its* means question *about interest advancement. Then state interests are compelling only if of a special nature. This is analogous to requiring fundamental rights to have special attributes irrespective of any intrusion.*

The preferred version of strict scrutiny is applied to Fisher*, which involves a university program that considers race as one diversity factor combined with a top ten percent law. Our contrarian conclusion is that the law is unconstitutional, but that the Court should save the University program by severing it from the law. It is contrarian because most authorities—whether invoking an anti-subjugation, anti-classification, or anti-balkanization perspective—accept supposedly racially neutral top ten percent laws. We invoke a nuanced conception of anti-balkanization applicable in* Fisher*'s unique circumstances. Our conclusion is also based on a rich conception of academic freedom with two complementary aspects that place it at the foundation of freedom of speech. These aspects combine to protect universities from external impositions such as the Texas law,*

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allowing them to accommodate diversity and demonstrated academic capacity.

INTRODUCTION

Explicit standards of review—what some might call doctrinal structures/tests or constitutional decision rules—pervade constitutional oral arguments, briefs, and opinions, and dominate practice at least in personal liberties cases.[1] Insofar as they represent and implement a "constitutional hierarchy of values," they are imbedded in court decisions whether or not they are explicit.[2] Yet Justices of the United States Supreme Court, like other judges, often articulate or employ standards in vague, inconsistent, and contradictory ways—sometimes within single opinions.[3] This implies that standards of review are not taken seriously and, if they are not taken seriously, they can shroud, impede, or distort decision making. Some scholars, moreover, actually decry the use of standards of review as interfering with proper constitutional interpretation and enforcement of the Constitution's best meaning.[4] It is not surprising then, that despite some foundational work, they are undertheorized and sometimes inadequately described by even the most prominent of scholars.[5]

At the same time, professors have been urged to make law school—presumably including constitutional law—more in tune with the real world.[6] If standards of review pervade, if not dominate, the actual practice of constitutional law, we must take them seriously if we are going to take

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1. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1280, 1299, 1303, 1317 (2006) (discussing judicially manageable standards (as referenced within the political question doctrine), doctrinal design, standards versus rules, and their relationship to constitutional meaning); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (separating doctrine into categories of operative propositions and constitutional decision rules). We do not dwell on the definition of "standard of review," but essentially rely, instead, on the term's "street meaning" or common use in opinions and secondary authorities.

2. Michael H. Shapiro, *Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies*, 11 HEALTH MATRIX 351, 354 (2001).

3. *See infra* the discussion in the text at notes 91–180.

4. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996) (favoring a "moral reading" of the Constitution in the considerable domain where it is said to be appropriate); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–46 (1990) (arguing that the Court's job is to enforce the framers' intended meaning).

5. *See infra* the discussion in the text at notes 78–90 as well as the citations in those notes; *see also supra* notes 1–2 for cites to additional foundational work.

6. *See, e.g.*, *Report and Recommendations American Bar Association Task Force on the Future of Legal Education*, 2014 A.B.A. SEC. LEG. ED. 3, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf; Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES (Feb. 11, 2013), http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html?_r=0.

the practice of law seriously. Standards of review are not going to go away in the foreseeable future. They therefore must be defined, designed, and implemented to make them work as best they can. This entails the laborious task of separating them into each of their components and exploring the logic and purpose of each standard of review and its components. When extraordinary circumstances arise in which a standard of review needs to be altered or not employed even though the standard is presumptively applicable, this should be done explicitly and with reasons given.

Strict scrutiny exemplifies the problem. A prominent standard of review in equal protection, substantive due process, and First Amendment adjudication,[7] it has been variously described as, for example, "the strictest scrutiny," "most rigid scrutiny," "most exacting judicial examination," or the scrutiny specified by the compelling state interest test.[8] Whatever the label, strict scrutiny has been described in a number of ways without precise analysis of its distinct articulations, its constituent parts, what those elements might logically mean, and the purposes that would be served by competing interpretations of those constituent parts.[9] (We will dispense with one ambiguity by stipulating that *strict scrutiny* will be used here—as in most commentary—as coterminous with the compelling state interest test; the former moniker will be used for ease of style.)

More broadly, insufficient attention has been paid to two important areas. First, the relationships among prima facie claims, rules that determine which standard of review will be used, and the standards of review themselves deserve more attention. Second, the purposes or meta-criteria by which standards of review generally—and competing interpretations of them specifically—should be judged merit further exploration. We will briefly address the former issue, and will discuss more fully the purposes or meta-criteria by which standards of review should be judged.

We will scrutinize strict scrutiny both to derive its best articulation as a prominent standard of review and to contribute to an ongoing discussion

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7. When applied at the state level, First Amendment analysis is a form of substantive due process, the First Amendment being incorporated and made applicable to the states through the due process clause of the Fourteenth Amendment. Our reference to substantive due process in the text refers to substantive analysis under the due process clause of either the Fifth or Fourteenth Amendment.

8. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 300 (1978) (describing strict scrutiny as the "most rigid scrutiny" (quoting Korematsu v. United States, 320 U.S. 81, 216 (1944)), "most exacting judicial examination", and "most exacting scrutiny"). An example of a case using "compelling-state-interest test" is Dunn v. Blumstein, 405 U.S. 330, 339 (1972) (striking durational residency requirement for voting).

9. *See infra* Part II.

about standards of review generally. This best articulation is not a new version of strict scrutiny but a product of taking, from inconsistent expressions of it, the best articulations of each of its components as determined by the purposes the Court has expressed for it. We will not address the important question about interrelationships among and between strict scrutiny and other standards of review—e.g., in the Court's three-tiered equal protection decision making[10]—because there is more than can be said in one article just focusing on strict scrutiny. Nevertheless, we will show strict scrutiny to be, when best interpreted, effective as a distinct and vigorous standard at the top (short of so-called per se invalidity)[11] of any hierarchy of standards as judged by rigor. Strict scrutiny can both be better distinguished from, and suggest other tests in the form of, one or more but not all strands of scrutiny contained within it when it is unpacked into several distinct but interrelated forms of invigorated scrutiny.

We will consider criteria the Court and others have suggested for judging standards of review generally, and will apply those criteria to competing interpretations of strict scrutiny and its constituent parts. Our preferred articulation of strict scrutiny will emerge from this examination.

We will undertake our analysis of strict scrutiny primarily within the context of equal protection and higher education affirmative action cases. The arguments, briefs, and opinions in those cases typify the ambiguity of this standard of review and the problems this causes in constitutional adjudication. It is likely, moreover, that we have not heard the last of affirmative action in higher education from the Court. In fact, one of the education cases—*Fisher v. University of Texas at Austin*[12]—is likely to return to the Court in its next term. Affirmative action in higher education is also a paradigm that represents an extraordinary circumstance in which

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10. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 6.5, at 551–55 (Vicki Been et al. eds., 4th ed. 2011). *See* Roy G. Spece, Jr., *A Fundamental Constitutional Right of the Monied to "Buy Out Of" Universal Health Care Program Restrictions Versus the Moral Claim of Everyone Else to Decent Health Care: An Unremitting Paradox of Health Care Reform?*, 3 J. HEALTH & BIOMEDICAL L. 1, 29–34 (2007) (discussing strict scrutiny and various intermediate tests used in equal protection and substantive due process in addition to those in the more common three-tier hierarchy).

11. Whether there is a useful concept of per se invalidity we leave aside, with the comment that it is easy to manipulate *justifications* for regulation into the *threshold description of the constitutional interest affected* so that per se invalidity can be ascribed.

12. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2422 (2013) (remanded to the Fifth Circuit with instructions to apply "strict scrutiny" rather than a weak version of it.). On remand, the Fifth Circuit paid lip service to following the Court's instructions but essentially relied on its original reasoning. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637–60 (5th Cir. 2014), *reh. en banc den*., 771 F.3d 274 (5th Cir. 2014), *cert. granted*, 135 S.Ct. 2888 (2015).

strict scrutiny perhaps should be applied with some form of deference to the government on certain issues.[13]

Our preferred version of strict scrutiny will be applied to *Fisher*, which involves an admissions program that considers race as one diversity factor among many designed to achieve educational benefits combined with a legislatively mandated top ten percent law (guaranteeing that all high school students in the top ten percent of their graduating class will be admitted). The Court has called programs that consider race as only one, nondispositive factor "holistic programs."[14] Our contrarian conclusion is that the top ten percent law, either independently or in tandem with the holistic program, is unconstitutional. This is because the legislature cannot invoke the First Amendment right to academic freedom that supports the University's holistic program, and because the law has a racial impact, was explicitly passed for a racial purpose, and fails to meet the all the requirements of strict scrutiny as properly conceived. We also argue that the Court should sever the holistic part of Texas's admissions program from the top ten percent law and indicate that it would be constitutional if implemented alone.[15] Our position is based on the best version of strict scrutiny drawn from the Court's body of cases. It does not mark a sharp departure from the Court's analyses generally or in the higher education affirmative action cases specifically. Rather, it rationally reconstructs the Court's sometimes inconsistent articulation of strict scrutiny. It is contrarian only in that scholars and certain Justices—whether invoking an anti-subjugation (of minorities), anti-classification (color-blind), or anti-balkanization (racial divisiveness) perspective—seem to prefer supposedly race-neutral top ten percent laws over holistic programs.[16] We argue the opposite based on applying a nuanced conception of anti-balkanization—looking beyond ostensible facial neutrality—to the unique facts in *Fisher*.[17]

It should be kept in mind that, even if passed in circumstances and framed in terms distinguishable from the law in *Fisher* and therefore constitutional, top ten percent plans are not feasible for nationally elite universities and graduate programs. Some opponents of affirmative action might favor them for strategic reasons.

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13. *See infra* text at notes 110–111, 126–132, 197, 205–206.

14. Grutter v. Bollinger, 539 U.S. 306, 309, 337 (2003), *superseded by constitutional amendment,* MICH. CONST. art. I § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1629 (2014).

15. *See infra* text at notes 196–207.

16. *See generally* Reva B. Siegel, *From Color Blindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

17. *See infra* text at notes 199–200.

Part I will explain what we mean by standards of review. It will delineate their purposes, the meta-criteria by which they should be judged generally, and examine the most common Court articulations of strict scrutiny. Next, it will unpack distinct elements and ambiguities contained in these articulations, and describe a preferred interpretation of strict scrutiny. Finally, it will compare this preferred interpretation to formulations of strict scrutiny ventured by representative scholars who have addressed this standard of review. Part II will show that the education cases typify the problems presented when strict scrutiny—or any standard—is not carefully articulated or consistently applied. If anything, strict scrutiny has regressed in coherence, over thirty-five years of education cases, from *Bakke*[18] in 1978, to *Grutter*[19] and *Gratz*[20] in 2003, to *Fisher*[21] in 2013 (and possibly beyond). Part III will apply the preferred articulation of strict scrutiny to *Fisher*.

I. STANDARDS OF REVIEW AND STRICT SCRUTINY

A. Standards of Review (Partially) Defined and Distinguished

We rely on a "street" definition of standards, i.e., the one commonly used in cases and textbooks; therefore, we will not engage in a theoretical discussion about standards and their relationship to such concepts as operative propositions, doctrinal design, and judicially manageable standards.[22] Standards of review are defined here as particular and focused forms of rule that are meant to specifically direct courts on the presumptive stances to take with respect to, and ultimately how to resolve, differently characterized constitutional claims by individuals, groups, and government entities.[23] They are, of course, not capable of mechanical application, but are meant to allow the Court to provide guidance and further the rule of law by providing a bridge from individual cases to more general constitutional provisions and values.

Standards of review obviously are not algorithms in the sense of digital applications. They must be the product of, and informed by, interrelated processes of constitutional interpretation. (Under one well-crafted

18. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
19. *Grutter*, 539 U.S. at 306.
20. Gratz v. Bollinger, 539 U.S. 244 (2003).
21. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).
22. *See* Berman, *supra* note 1, at 51 (discussing the street meaning of standards of review).
23. Shapiro, *supra* note 2, at 354, 366, 368 (discussing the meaning and functions of "standards of review").

taxonomy these processes include text, framer's intent, constitutional theory, precedent, and value.[24]) Standards of review usually have several components and each of a standard's components, and the standard itself, fulfill and accommodate various purposes. These purposes are the meta-standards by which standards should be judged. A meta-standard of review explains the nature and origin of standards of review by reference to what they are supposed to do. Standards of review must fulfill and accommodate the various purposes specified or implicit within the meta-standard. Some purposes are closely associated with certain standards of review or their components. For example, one purpose is limiting Court striking of government actions and enactments. This purpose is strongly associated with the rational basis test[25] and least associated with strict scrutiny.

In equal protection, substantive due process, First Amendment, and other areas of constitutional adjudication, standards of review are applied only after a party both makes out a prima facie claim of a constitutional violation and succeeds or fails in establishing a justification for use of a standard more demanding than the baseline rational basis test.[26] We call the latter requirements *standard of review choice criteria*. The choice criteria for application of strict scrutiny in equal protection, for example, are that there is either a substantial intrusion on a fundamental right or an intentionally drawn suspect classification.[27] One could define standards of review to include the criteria for establishing prima facie cases or choice criteria. The purposes and concerns of these criteria complement and overlap those of standards of review. This is particularly true for standard of review choice criteria. The latter should be determined and judged by the same purposes or meta-standards applicable to standards of review.

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24. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1208 (1987) [hereinafter Fallon, *Constructivist Coherence Theory*] (carefully setting forth a theory for the use, reconciliation, and prioritization of these methods of interpretation); *See* Fallon, *supra* note 1, at 1299–1300, 1302–03 (addressing under- and over-enforcement of constitutional values and various considerations in choosing among judicially manageable standards).

25. This standard, in its "traditional" form, provides that government action will be upheld if it can be conceived to advance an imaginable legitimate goal. CHEMERINSKY, *supra* note 10, § 6.5, at 552–53; Spece, *supra* note 10, at 29–34 (discussing the rational basis test, the compelling state interest test, and various intermediate tests used in equal protection and substantive due process).

26. Argument structures and standards of review take a different but consistent form in other constitutional areas—e.g., the Fourth and Fifth Amendments. Some scholars argue that these areas of fundamental rights do not draw strict scrutiny. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006) (explaining that strict scrutiny is not used for eight of the ten constitutional amendments).

27. CHEMERINSKY, *supra* note 10, § 6.5, at 554, § 9.1, at 687, 690.

As utilized in practice, however, prima facie case determination, applying standard of review choice criteria, and applying a standard of review have been treated as distinct phases of a three-step analysis: (1) determine whether there is a prima facie case; (2) if so, apply choice criteria to choose a standard of review; and (3) apply the chosen standard of review. This is useful because the various phases call into play distinct, albeit overlapping, considerations and purposes. First, for example, the criteria for prima facie claims speak to issues such as whether a claim should be dismissed for failure to state a claim, a party should be sanctioned for filing a frivolous suit, or discovery should be allowed. Second, standard of review choice criteria focus on when and generally to what extent courts should engage in the counter-majoritarian endeavor of meaningfully questioning actions of other branches or levels of government. The same choice criteria—e.g., substantial intrusion on a fundamental right—can trigger strict scrutiny in more than one area such as in substantive due process, equal protection, and First Amendment analyses. They can also be area-specific as with suspect classifications and equal protection. Third, standards of review speak to how claims ultimately should be presumptively treated and finally resolved.[28]

B. Standards of Review: Purposes and Meta-Standards

Our complex and dynamic society poses ever new problems, and yet the Court can only determine a limited number of cases each year. It therefore tries to restrict itself to cases of national import or involving disputes among lower courts.[29] Given these conditions, it is not likely that the Court can provide sufficient guidance to citizens, government actors, parties to litigation, and judges as to what the Constitution proscribes and prescribes simply with a scattering of diverse bottom-line rules of decision developed through long strings of opinions on discrete topics. Standards of review help us to sort and understand and, in the case of strict scrutiny, connect substantive due process, equal protection, and First Amendment adjudication. They provide guidance and serve rule of law values.

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28. The precise nature of this three-step process raises interesting issues that need not be resolved here.

29. David O. Stewart, *The Uncertainty of Cert: Predicting Court's Choice of Cases Can Be Anyone's Guess*, 82 A.B.A. J. 50, 50 (1996). In 1996, the Court heard "only about 75 arguments, barely more than 1 percent" which is down from 160 cases in the mid-1980s; "[t]he accepted wisdom is that a petition, to have any chance . . . should present a conflict among the lower courts, involve a matter of public importance, or be filed by the federal government." *Id.*

As one of us has written elsewhere, the interrelated meta-standards, or purposes of standards of review, include giving "notice of constitutionally proscribed or prescribed conduct to" those benefitted or bridled by the Constitution throughout their daily activities; bridling the Court's discretion; limiting the Court's intervention into the political process; improving the political process by encouraging accountability through exposure of actual purposes of government action and by fostering good policy through encouraging focus on actual goals; establishing a rough preferential ordering of values under which certain rights and government interests will be given special protection; protecting the Court from political limitation of its authority; fostering efficiency; and fostering recognition that the Court can only handle a limited number of cases.[30] These purposes speak for themselves, many relating to efficiency and preservation of judicial resources, but we will refer to them further insofar as they inform analysis of strict scrutiny.

C. Strict Scrutiny

1. A Smidgen of History

Justices and scholars have offered (sometimes detailed) conflicting accounts of strict scrutiny's history.[31] There is a consensus, however, that it

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30. Roy G. Spece, Jr., *A Purposive Analysis of Constitutional Standards of Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1289 (1978); *See infra* text at notes 51–61 regarding special state interests.

31. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1315 (2006) (setting forth his analysis and views of different Justices); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (2006) (arguing that strict scrutiny first developed in First Amendment litigation in the 1950s and 1960s); Toru Mori, *Justice Frankfurter as the Pioneer of the Strict Scrutiny Test – Filling In the Blank in the Development of Free Speech Jurisprudence*, 7 NAT'L TAIWAN U. L. REV. 91, 103, 108 (2012) (claiming the Justice prepared the way for Justice Brennan's development of strict scrutiny by introducing the terms "deter," "chill," and "compelling" to the vocabulary of First Amendment protections in the McCarthy era); Jennifer Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 423 (2009) (introducing a "history of doctrines leading up to modern judicial scrutiny"); David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 861–63 (2012) (mentioning the traditional view of Lochnerism that associates it with an across-the-board anti-regulatory agenda; a revisionist perspective that associates it with assuring legislation was within the police power; and the Author's view reflected in the title and supported by "several later instances in which the Supreme Court invalidated legislation under the Due Process Clause even though the Court acknowledged that the state had asserted legitimate police-power justifications for the laws in question"); Matthew Bunker, et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 349 (2011) (exploring "the beginnings of the strict scrutiny test and the

emerged from different strands of scrutiny—i.e., important rights merit special protection; these rights are best protected by requiring weighty government interests; and gratuitous harm is best avoided by requiring attention to possible overbreadth or alternatives—reflected in equal protection, substantive due process, and First Amendment case law going back to the 1940s.[32]

If one focuses on the logical components of strict scrutiny rather than use of identical or similar terms, however, this standard of review goes back to at least *Lochner* and the line of cases *Lochner* represents.[33]

2. Common Articulations and Their Components, Ambiguities, Purposes, and Best Interpretation

A prerequisite to properly formulating standards of review is to match specific values and purposes to clear words that describe a standard. To facilitate such investigation, we will break the Court's common articulations of strict scrutiny, the analyses it inconsistently engages in when invoking that standard of review, and the goals of these analyses into overlapping steps and related values and purposes. We will offer consistent labels, tasks, and underlying purposes for these inquiries. This is to produce consistency, comprehensibility, and orderly use and growth of strict scrutiny. The confusion about strict scrutiny can be attributed to lumping, and thus confusing, distinct analyses, often caused by ignoring purposes of and giving inconsistent names to the lumped examinations.

The Court's most common articulations of strict scrutiny are that the state must show its action is necessary to further a compelling state interest or that its action is narrowly tailored to further a compelling state interest.[34] Both formulations make explicit two component inquiries, with the government bearing the burden of proof on each. These components are c*ompelling state interest* and either *necessity* or *narrow tailoring*. Necessity

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underpinnings of its subsequent dilution," proliferation of compelling state interests, avoidance of strict scrutiny in the first instance, and imprecise narrow tailoring analysis).

32. *See, e.g.*, Fallon, *supra* note 31, at 1274; Siegel, *supra* note 31, at 356.

33. Recall that *Lochner* struck down a statute limiting bakers' work hours. Lochner v. New York, 198 U.S. 45, 59 (1905). The Court closely scrutinized the law, with the burden of proof on the government, because the preferred right of liberty to contract was substantially invaded. *Id*. at 53, 57. It said health was a legitimate goal but was outweighed by the intrusion on liberty. *Id*. at 59. The Court also reasoned that the "shadowy" means-ends connection between hours worked and health of employees or the public (safe food) evidenced that health was not the State's actual purpose, which was "simply to regulate the hours of labor between the master and his employees" without regard to health or morals. *Id.* at 62, 64.

34. *See infra* Part II.

and narrow tailoring are not coterminous; the latter might include but not exhaust the former, but not vice versa. Thus, the two formulations are disparate and confusing. Although the government generally has the burden of proof on these requirements, the Court is inconsistent regarding these burdens.

The two most common articulations of strict scrutiny, moreover, ignore or lump together at least six distinct achievable but rights-protective components or inquiries, most subject to, and having been given, different interpretations in full discussions of strict scrutiny. The distinct components, both logically and as a matter of precedent (considering the *body* of applicable cases), are: (1) limiting the government to its actual purposes; (2) requiring that its purposes be legitimate; (3) requiring that its purposes be compelling; (4) when classifications are drawn in equal protection and First Amendment adjudication, requiring that they not be over- or under-inclusive (regarding the latter: a classification will be struck if it is not sufficiently precise and therefore does not substantially advance the government's purpose(s)); (5) requiring a sufficient advancement of the government's purpose without regard to preciseness of any classifications (as obviously at issue in substantive due process where there are no classifications, but applicable nevertheless in equal protection and First Amendment analysis); and (6) requiring that the government's action be necessary.[35] The government action must be necessary in these respects: it addresses an actual problem, a problem that has not already been adequately dealt with, and a problem that cannot be addressed through the use of a less or least restrictive alternative. All but the first of these strands of scrutiny can be interpreted to require explicit weighing and balancing of individual and government interests, but the Court inconsistently articulates whether these strands of scrutiny involve or do not involve explicit balancing.[36] Although we seek to energize strict scrutiny by isolating its six rights-protective components, we do not believe that strict scrutiny is or should be dispositive against the government.

Strict scrutiny is obscured when courts invoke it by name, but actually use and analyze only one or a limited set of the component inquiries lumped within compelling interest or necessity/narrow tailoring.[37] This

35. *See infra* Part I.C.2.a–c.

36. *See* cases cited *infra* notes 63–73.

37. For example, in *Bernal*, the Court applied strict scrutiny and struck Texas's requirement that notaries be citizens. Bernal v. Fainter, 467 U.S. 216, 218, 228 (1984). The Court rejected the State's proffered interests in assuring the availability of notaries as witnesses and in assuring their knowledge of Texas law and institutions, solely *invoking* the absence of a compelling state interest: "[w]ithout a

probably reflects, at least in part, that strict scrutiny represents the coalescence of distinct strands of scrutiny—primarily burden shifting, requiring particularly weighty government interests, actual advancement of government interests, and avoidance of unnecessary harm—first explicitly utilized in certain relatively early substantive due process, equal protection, and First Amendment cases.[38] It is also attributable to one or another component of strict scrutiny alone being dispositive, or being treated as dispositive, in certain cases.[39] Further confusion is caused by the Court's common, but not invariable, practice of mentioning specific components of strict scrutiny without speaking to their underlying purposes such as preventing gratuitous sacrifice of individual or group rights or interests, improving government decision making, or enhancing government accountability.[40]

We will facilitate analysis by separating the components of strict scrutiny into the well-known categories of ends (government goals) and means (the action or classification designed to achieve the goals) scrutiny.[41] Although an important Court function, ends scrutiny is considered particularly intrusive to other branches of government because it involves either expressing that the Court does not believe the government's statement of its purpose (making it more difficult to achieve that purpose in the future and potentially creating great animosity between the Court and other governmental actors) or completely denying the government's goal at issue into the future.[42] Means analysis is more likely to leave government goals in play. Its focus is to require governmental actors to more carefully frame their regulations or actions to achieve their goals, which in turn can send a message that the individual rights are important and sacrificed only

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factual underpinning, the State's asserted interest lacks the weight we have required of interests properly denominated as compelling." *Id.* at 227–28. This case actually primarily involved the failure to show there was any real problem associated with notaries not being citizens, i.e., what we would call necessity scrutiny. *Id.* at 227.

38. Fallon, *supra* note 31, at 1270–71, 1277–80; Siegel, *supra* note 31, at 356–57, 360–61.

39. *See* cases cited *infra* notes 63–73.

40. For example, *Grutter* discusses "smok[ing] out" bad intent as the purpose of strict scrutiny generally when "smok[ing] out" is only one of the purposes of the actual purpose prong, as well as other strands, of strict scrutiny. Grutter v. Bollinger, 539 U.S. 306, 326 (2003), *superseded by constitutional amendment,* MICH. CONST. art. I, § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1629 (2014).

41. Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–22 (1972).

42. *Id.* at 26–27.

because of actual gains. In these senses, it is less intrusive to other branches and levels of government.[43]

a. Ends Scrutiny

i. Limiting Government to Its Actual Interests

Strict scrutiny, properly conceived, only allows actual interests to be considered as possible justifications for government action.[44] In *Fisher*, for example, petitioner argued that the University of Texas's purpose is an illegitimate one: simply to admit more minority students. The University, however, argued that its purpose is attaining the educational benefits of diversity, a compelling interest.[45] This essential actual purpose requirement is unfortunately most often left unstated in common articulations of strict scrutiny.[46] This requirement should not be ignored because it encourages government accountability by identifying actual goals, protects important individual interests from the great assault occasioned by the government's embrace of patently illegitimate interests, and maximizes the probability that individual interests are sacrificed only when the government embraced a coherent goal that channels its action toward achieving important ends.

The absence of discussion of the actual purpose requirement might be caused by a failure to separate two senses in which purpose or intent of the government actor is used in cases, such as the higher education affirmative action cases. There, institutions admit their intent to consider race, but defend that intent as justified, because race is used in a nondispositive way as only one of many diversity factors necessary to accomplish educational benefits. That intent, although not illegitimate, is sufficient as a choice of standard of review criterion to justify use of strict scrutiny.

When strict scrutiny is applied, there is a second sense in which intent is relevant. This is to determine whether the intent was an actual purpose to simply obtain greater numbers of students of certain races, a purpose that

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43. *Id.* at 27.

44. CHEMERINSKY, *supra* note 10, § 6.5, at 551–55; *see also* Spece, *supra* note 10, at 29–34 (discussing strict scrutiny and various intermediate tests used in equal protection and substantive due process). For discussion of this requirement in the education cases, see *infra* the text at notes 96–102, 110–11, 163.

45. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 603–04 (W.D. Tex. 2009), *aff'd*, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *rev'd*, 133 S. Ct. 2411 (2013).

46. *See supra* the two common articulations of the test in the text at note 34.

the Court has held unconstitutional.[47] These two different intents—one that triggers strict scrutiny but can be justified by showing its proper relationship to a compelling state interest and one illegitimate—can cause confusion when considering ends scrutiny. This is further complicated because the Court sometimes looks to means scrutiny to determine whether there is a fatal bad intent: if the means-ends fit is loose or the means used are not necessary, this can prove an illegitimate intent.[48]

ii. Government Interests Must Be Legitimate and Compelling

The second and third steps of strict scrutiny involve determining the minimum acceptability and required nature or weight of government interests. Only legitimate, compelling state interests are sufficient.[49] Interests are illegitimate if they are patently prohibited by the Constitution, as with a mere desire to deter the exercise of a fundamental right.[50] The purpose of this requirement is to prevent the grave assault to individual rights that occurs when government action trammels those rights to achieve goals directly inconsistent with the Constitution. This requirement applies even in rational basis scrutiny.[51]

As to the compellingness requirement, there are two important ambiguities. First, does compellingness depend on the nature or weight of the government's goal alone or on that *and* the amount of it actually advanced by the government's action? Second, whatever the answer to the first question, does compellingness depend on a case-by-case or as-applied

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47. These senses of intent are manifest in the *Bakke*, *Grutter*, and *Fisher* cases as discussed in Part II.B *infra*. Even if there is such an "unconstitutional intent," the government theoretically can still prevail if it meets the burden of proving that it would have taken the same action in the absence of the tainted intent. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

48. For example, the Court has used evidence of poor means-ends connections to determine the government had improper gender-based motives. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728–30 (1982). This is after intermediate scrutiny is triggered by the mere supposedly benign consideration of gender. Even a possibly "benign" racial purpose can be hidden rather than patent, and the search for both benign and malign purposes can take the Court into examination of other steps of strict scrutiny; there is no sharp dichotomy between finding racial intent that mandates a finding of unconstitutionality and full-blown strict scrutiny.

49. Spece, *supra* note 10, at 54–55; CHEMERINSKY, *supra* note 10, § 6.5, at 554.

50. *See* Shapiro v. Thompson, 394 U.S. 618, 627–33 (1969) (discussing illegitimate interests). Another mark of illegitimacy is if the government's regulation goes beyond its powers to act irrespective of clashing individual rights, but this element of illegitimacy is of little interest to the current discussion. *See also* Exxon Corp. v. Governor of Md., 437 U.S. 117, 141 (1978) (state interest in protecting local businesses from more efficient out-of-state businesses is illegitimate).

51. *See* Romer v. Evans, 517 U.S. 620, 633–34 (1996) (holding that certain interests are illegitimate, regardless of the level of scrutiny).

analysis in which the government's interest is explicitly balanced against the competing individual right?

If compellingness is determined by considering the amount of the government's interest that is involved, then this analysis merges ends and means scrutiny. Problems with this interpretation are that it too easily allows an interest to be found compelling if it is of great importance (e.g., survival of the nation) but very little at risk, and vice versa. Means analysis is obscured by lumping the ends (nature or weight of the government's interest without regard to the amount of it advanced) and means (how much of the interest is actually advanced) inquiries. Similarly, if there is a very strong means-ends connection and the government interest is advanced to a high degree, interests can be found compelling even if their nature or attributes do not place them high among possible government interests. In this scenario, the ends analysis is obscured or made meaningless.

Compellingness should be determined without considering how much of the government interest is advanced and without weighing it against the individual right at stake. These latter requirements should be addressed, but as a separate, though related, matter of means scrutiny. Our approach highlights both ends and means scrutiny and makes them robust requirements that must be met to justify government action that substantially intrudes upon a fundamental right or intentionally draws a suspect classification.

The lumping of ends and means analyses creates two additional and related problems. First, combining analyses tends to deny the government a greater array of goals insofar as the Court finds an interest to be compelling in one case and feels obliged to be consistent case-to-case in which goals it characterizes as compelling. If the Court does not feel so obliged, the second, related, and opposite problem is that if the same interest is considered compelling in one case but not another (because less of the interest is advanced there) parties will feel demoralized and confused. They lose to the government because it has a compelling interest, but their counterpart wins against the government when the same interest, albeit less of it, is found not compelling.

We favor the interpretation that segregates ends and means analyses and determines compellingness based on the nature or attributes of the government interest. This does not suggest that ends and means analyses are disconnected. They are both part of an integrated strict scrutiny standard of review. This standard of review, however, will require the government to prove both the compellingness of its interest (ends scrutiny) and, in a separate but related means analysis, that this compelling interest is in fact substantially advanced. Once an interest is found compelling under this

approach, the same interest will be found compelling in all cases in which it is at issue. The government might win some of those cases, or lose some, depending upon separate means scrutiny and its revelation of how much of the government's compelling interest is actually at stake.

The compellingness determination's second ambiguity is whether it involves explicit balancing of the government's interest and the amount of that interest actually at stake against the competing individual right and the amount of *that* interest actually at stake. Sometimes the Court indicates there should be balancing and sometimes it does not.[52] Of course, our position is that compellingness should be determined in the abstract. Here the only balancing is metaphorical, requiring that the government interest and competing individual right are similarly situated in any ordering of values described by their nature or attributes. We will examine this issue in the next subsection.

We also argue that the means scrutiny determination of whether the government's interest is substantially advanced should involve explicit balancing. This focuses the Court on the actual facts about the competing interests that must be reconciled. It also sends the rights-protective message that government actions that substantially intrude on fundamental rights or intentionally draw suspect classifications will not be tolerated unless their benefits outweigh their costs in terms of individual rights.

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52. Although most cases suggest a balancing, one can read certain cases either way. The following cases suggest that interests are not compelling unless they outweigh the competing individual interests: NAACP v. Alabama, 357 U.S. 449, 463 (1958) (compelling state interest must be "subordinating" to justify the harm to individual rights involved); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978) (also describing a "subordinating interest"); Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion) ("The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. . . . The gain[s] to the subordinating interest . . . must outweigh the incurred loss of protected rights . . . ."). Conversely, *Blumstein* can be interpreted as finding an interest in protecting the integrity of the voting process through a bona fide residence requirement compelling solely because of the special attribute of being "necessary to preserve the basic conception of a political community. . . ." Dunn v. Blumstein, 405 U.S. 330, 343–44 (1972). Similarly, *Roe* can be read as finding the state's interest in maternal health to be compelling without regard to the competing right because the Court stated that this interest was sufficient at approximately the end of the first trimester when "mortality in abortion may be less than mortality in normal childbirth." Roe v. Wade, 410 U.S. 113, 163 (1973). The Court's reference to the interest in potential life being compelling at viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb" also suggests that the nature of the interest rather than its comparison to the competing right is determinative as to compellingness. *Id.* On the other hand, given that the Court said its opinion was "consistent with the relative weights of the respective interests involved" and that it admitted an interest in potential life existed before viability and yet found that interest compelling only at viability, *Roe* can be read as determining compellingness by balancing the particular individual and government interests. *Id.* at 150, 165.

Korematsu v. United States illustrates the merits of our position.[53] Although *Korematsu* did not use the term compelling interest, the concept was functionally present, as one West editor's headnote indicates.[54] The Court upheld orders that all Japanese be excluded from the West Coast of the United States during World War II because we were at war with Japan and feared an invasion, reasoning:

> Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [exclusion].
>
> . . .
>
> But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . .
>
> . . .
>
> There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.[55]

The Court is correct to classify "danger to the public safety" and preventing invasion as interests of the highest order, i.e., compelling in the abstract. This is an easy call, but the Court did nothing to clarify the nature or attributes of these interests that mark them as compelling so as to provide guidance in future cases. These relatively specific purposes can be morphed into, for example, the talisman of national security. National security has been invoked in situations in which the government interest is actually nothing more than "we need to hide facts about what actually is happening in our war [Vietnam] because our government's blunders might undercut otherwise unwitting citizens' support for the war and embolden our

53. Korematsu v. United States, 323 U.S. 215 (1944).

54. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect and must be rigidly scrutinized, though not all of them are necessarily unconstitutional." *Id.* at 215 (West Headnote 1).

55. *Id.* at 218, 220, 223–24.

enemies."[56] Once again, we will say more about the nature or attributes of government interests in the next subsection.

Although the *Korematsu* Court was correct to rank preventing invasion at the top of a hierarchy of values (as all of our rights depend upon the nation or segments of it being free of direct foreign control), its above-quoted words ring hollow insofar as the actual threat involved. It was known by the very authorities claiming otherwise (the military) that there was actually minimal danger, and this became even more glaringly apparent over the years.[57] The Court's reference to "gravest imminent danger" required a showing of a compelling interest. *Korematsu* demonstrates that—if compellingness is defined to subsume examination of the actual amount of the state interest involved—an interest with an enormous magnitude can be characterized as compelling even if there is a miniscule probability that the interest needs to be, or will be, protected by the government's action, no matter how massive the invasion on personal liberties. This is much less likely to happen if compellingness and substantial connection are severed and made independent requirements.

Substantial connection should include, moreover, a balance of the individual rights and the government interests at stake. The failure of *Korematsu* was in not implementing a substantial advancement requirement, including balancing. Such a requirement would have forced consideration of the actual probabilities of various security risks. The substantial advancement requirement also balances the product of the magnitude and probability of risks, on the one hand, and the magnitude and

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56. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (refusing to enjoin publication of documents critical of the "Viet Nam policy" despite the government's invoking a "national security" argument).

57. Korematsu's conviction was reversed on coram nobis. Korematsu v. United States, 584 F. Supp. 1406, 1420–23 (N.D. Cal. 1984) (reversing Korematsu's conviction because the government admitted its fraud and egregious attempts to cover up the true facts about the government's untenable position in a memorandum). There is a considerable literature on this case and the entire imbroglio and much of it is cited in Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 U.C.L.A. ASIAN PAC. L.J. 72 (1996) (noting among a wealth of facts the catastrophic losses suffered by the victims and that the United States finally paid reparations); *see generally* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1–18 (1982) (providing a summary of events and initial justification for Japanese relocation and exclusion during WWII). The cases dealing with persons of Japanese ancestry were critically important for developing strict scrutiny protection for vulnerable groups and important rights. *See* Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, LAW & CONTEMP. PROBS., Spring 2005, at 29, 30 (arguing that litigation over rights of Japanese Americans during and after World War II "[laid] the foundation" of strict scrutiny for subsequent civil rights cases, such as *Brown v. Board of Education*).

probability of massive limitations on the freedom of movement of an entire class of people because of their race, on the other.

iii. Attributes of Compellingness and the Analogy to Fundamental Rights

Our approach limiting compelling government interests to those that rank high in an ordering of values based on their nature or attributes would also make the compellingness determination parallel to the requirement that parties demanding strict scrutiny establish a substantial intrusion on a fundamental right. The Court has made clear that an individual right or interest must have a special nature or special attributes to be deemed fundamental. There are different approaches to this determination, the strictest of which is the *Glucksberg* test, which requires that a fundamental right or interest must be carefully described, "deeply rooted" in our "history and tradition," and a necessary part of "liberty" and "justice."[58] Even if a plaintiff shows a fundamental right under *Glucksberg* or another of the Court's approaches to fundamental rights determination, he will only be protected by strict scrutiny if he shows a *substantial intrusion* on the fundamental right.[59] If the plaintiff makes such a showing, it doesn't make sense to allow a government interest to trump his right unless the government shows a similarly robust interest that is *substantially advanced*.

Of course, compellingness and fundamentality differ; fundamental rights at least initially focus on individuals, and compelling interests generally speak to the good of society.[60] Nevertheless, both have communitarian aspects. The task with both is explaining why they are entitled to special force in our constitutional jurisprudence. Professor Gottlieb is correct, moreover, when he points out:

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58. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). We do not agree with the conceivable interpretation that the opinion makes "history and tradition" and essential to "liberty" and "justice" both independently sufficient conditions if paired with a "careful description."

59. *Id.* at 767 n.8 (Souter, J., concurring).

60. Consider a possible similar analogy between values associated with the suspect classification doctrine and determination of compelling interests: Although gender discrimination is only considered quasi-suspect and thus only merits intermediate scrutiny, the Court has held that there is a compelling state interest in stamping out gender discrimination. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623, 625 (1984) (holding that the Minnesota Human Rights Act can impinge on the Jaycees' First Amendment rights because it furthers the compelling interest to eliminate gender discrimination in places of public accommodation); *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (reaffirming the *Roberts* decision that equal access for women is a compelling interest because it furthers societal goals to eliminate discrimination against women). Why then has the Court rejected rooting out the effects of societal racial discrimination as a compelling state interest? *See infra* text at notes 96–100 for a discussion of this alleged interest.

> [T]he source and basis for fundamental rights and compelling interests are essentially the same. Recognition of the shared origins and equivalent indeterminacies of rights and interests should serve to blunt deference to compelling interests and to mitigate some of the criticism leveled at the recognition of fundamental rights, or both. The strongest support for recognizing non-explicit, fundamental rights comes from textual inferences, described as "penumbras," or from the purposes underlying various constitutional clauses. . . . Similarly, however, compelling interests lack a strong textual foundation in the Constitution; at no point does the Constitution mandate or define compelling interests, or establish their weight or supremacy. . . . The shared origins of rights and interests suggests that they should be treated alike.[61]

We agree, and argue that the Court and others should elaborate on the nature, attributes, or criteria that mark compelling state interests. As a start, we draw on the following factors pertinent to making a right fundamental (though most are neither necessary nor sufficient to establish a fundamental right) as suggested criteria for making an interest compelling. First, clearly, a state interest in protecting individuals' fundamental rights should qualify as compelling. The higher education affirmative action cases demonstrate this by finding a compelling state interest that is derived from or entwined with universities' fundamental First Amendment rights to academic freedom.[62]

Further, drawing on the *Glucksberg* criteria for determining fundamental rights, an interest might be determined compelling if carefully described, deeply rooted in our history and traditions, or essential to liberty and justice. We would not make each of the *Glucksberg* criteria necessary conditions to finding either a fundamental right or a compelling state interest. Although *Glucksberg* seems to do so as to fundamental rights, so read it creates an almost impossible barrier to special protection of individual rights. *Glucksberg*, moreover, does not purport to overrule other Court precedents that allow finding fundamental interests in less impossibly demanding ways.[63]

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61. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919–20 (1988).

62. *See infra* text at notes 101–04, 106–110.

63. *See, e.g.*, Shapiro v. Thompson, 394 U.S, 618, 630–31 (1969) (characterizing the right to travel interstate as fundamental because of its frequent recognition and its nexus to our federal form of government), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

In addition to the *Glucksberg* criteria, we draw other criteria from fundamental rights analyses and offer them for consideration as possibly useful—either as relevant, necessary, or sufficient conditions—in characterizing government interests as compelling. These include: (1) linked to the survival or functioning of a liberal democracy or an important institution within our federal system (this is analogous to the criterion used to establish a fundamental right to vote, essential to democracy, or to travel interstate, essential to federalism); (2) non-economic; (3) not paternalism applied to competent adults; (4) early- or often-recognized; (5) related to other interests found to be compelling; (6) not adequately protected through nongovernmental actions; and (7) designed to remedy failures in the democratic process.[64]

b. Means Scrutiny

i. Inclusiveness and Substantial Advancement Scrutiny

The terms within strict scrutiny that connote means scrutiny are *necessary* and *narrowly tailored*. Cognate terms are *substantial advancement*, *substantial means-ends connection*, *least/less restrictive alternative*, *overbreadth*, and *over-* or *under-inclusive classifications*. These terms should be unpacked into three categories of means scrutiny: (1) searching for substantial advancement or sufficient means-ends connections in the sense of intolerable under- or over-inclusive classifications (inclusiveness scrutiny); (2) determining substantial advancement of the government's goal without regard to classifications (substantial advancement scrutiny); and (3) inquiring whether the government action is unnecessary either because it seeks to solve a non-existent problem, the problem has been adequately addressed by another action, or the government can obtain its goals in an alternative way that treads less on individual rights (necessity scrutiny). An example of inclusiveness scrutiny is comparing the extent to which a goal—such as identifying carriers of a genetic trait so that they could receive counseling that might dissuade them from procreating—would be advanced by genetic screening of only one racial group of possible procreators with a high incidence of the target anomaly, on the one hand, to the amount that the same goal would be advanced by screening another group with a similar, but not identical, incidence of carrying the target genetic trait, on the other.

64. For discussion of these criteria, see Spece, *supra* note 10, at 35–36, exploring determining factors for finding a fundamental right.

An example of substantial advancement scrutiny is examining the extent to which the same goal would be advanced by screening *everybody* who might procreate, assuming that everybody has a non-negligible chance of carrying the trait.

The Court and commentators should adopt our inclusiveness scrutiny, substantial advancement scrutiny, and necessity scrutiny nomenclature to assure that they both attend to the distinctions that the distinct forms of scrutiny specify and clarify which form or strand of scrutiny they are talking about. Inclusiveness and substantial advancement scrutiny are intertwined. They are both means scrutiny because they do not necessarily deny any goal to the government. They just require that the government be more precise or efficient when pursuing its goals. Inclusiveness scrutiny is characteristic of equal protection and First Amendment adjudication. It examines whether the government's classification does not include applicable persons or entities (under-inclusiveness) or includes inapplicable persons or entities (over-inclusiveness).[65] Perfect classifications are a virtual impossibility, but if the government's classification is precise enough to be considered neither too under-inclusive nor too over-inclusive, it will be found to substantially advance the government's goal. We call this inclusiveness scrutiny.

Relatedly, if the government's classification is sufficiently precise, its action still might be found unconstitutional because it does not advance enough of the government's interest to outweigh the individual rights at stake. This is most closely associated with substantive due process where classifications are not at issue, but it can also apply in equal protection and First Amendment adjudication as a requirement separate from, and additional to, the inclusiveness mandate. We call this substantial advancement scrutiny. Inclusiveness and substantial advancement scrutiny are logically related. Over- or under-inclusive classifications are more likely to fail the substantial advancement requirement even if found to be precise enough because, however weak or strong the means-ends connection, it is operating on either irrelevant or too few persons or entities respectively. Nevertheless, the Court should specify when using the term substantial advancement whether it is referring to inclusiveness scrutiny or to sufficient means-ends connections without regard to any classification.[66]

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65. *See* CHEMERINSKY, *supra* note 10, § 9.1.2, at 689–90.

66. Some have argued that equal protection, as distinguished from substantive due process, is or should be limited to inclusiveness scrutiny rather than also including substantial advancement scrutiny independent from any focus on classifications. *See* Gary Simson, *A Method For Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 709–10 (1977).

Before moving to necessity scrutiny, we emphasize that inclusiveness and substantial advancement scrutiny share an ambiguity with the meaning of compelling state interest. Specifically, is substantiality, if stated as a separate requirement, either in the sense of inclusiveness scrutiny or independent substantial advancement scrutiny, to be determined in the abstract? For example, implementing a program that achieves a 10% improvement in scores on tests for cultural sensitivity is substantial advancement of a goal of educational benefits regardless of the intrusiveness of the program. Or is substantiality to be determined through comparison to the nature and amount of the fundamental right or interest at stake? The latter is preferable because it anchors the analysis to the facts that should be determined as part of the investigation rather than allowing the Court to arbitrarily stipulate some level of means-ends relationship as substantial. It also assures and sends a message that individual rights will only be sacrificed when the benefits measured in terms of compelling state interests and the advancement thereof are more weighty. Court opinions contain language supporting both the existence and inexistence of a balancing element within means-ends analyses, assuming they are unpacked from the compellingness determination.[67]

Regardless of its approach to inclusiveness or substantial advancement scrutiny, the Court should clarify what it requires, the words to be consistently used to describe each such requirement, and the underlying purpose of each requirement.

> It makes no sense . . . to use the equal protection clause to differentiate among types of harm experienced. If there is any weighing of interests to be done, the due process clause provides the sole authority for the task, and it directs an inquiry into the lawfulness of governmental actions that gauges the magnitude of the injury suffered by the plaintiffs without regard to the state's better or worse treatment of persons not before the court.

Id.

67. For example, *Grutter* is one precedent referring to balancing:

> Narrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." . . . To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups."

Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (citation omitted) (first quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978)), *superseded by constitutional amendment,* MICH. CONST. art. I, § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014); then quoting Merto Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)). *Fisher*, on the other hand, omits any reference to balancing. *See infra* text at notes 150–79 (discussing *Fisher*).

ii. Necessity Scrutiny

Necessity scrutiny looks to whether the government's action is unnecessary because it addresses a nonexistent problem, a problem that is already adequately addressed otherwise, or a problem that can be dealt with in an alternative way that treads less on individual rights. It ensures that the government will not gratuitously trammel rights and it sends a message to this effect. Ambiguities in this inquiry are whether the government must use the *least* restrictive, as opposed to just a *somewhat less* restrictive, alternative; whether it will be required to use less restrictive alternatives only if they are equally effective; whether it will be required to use an alternative if it is more costly; and whether determination of these questions turns on a balancing of government interests and individual rights akin to the balancing that should occur within the inclusiveness and substantial advancement inquiries.

The Court sometimes invokes the requirement of using less or least restrictive alternatives without discussion of whether this means that the *least* restrictive alternative be used, that the alternative be equally effective, that the alternative be no more costly, or that these determinations involve balancing.[68] As to whether the government must use the *least* restrictive alternative, a few points must be made. First, the Court could use *least restrictive alternative* to refer to classifications that are imprecise and thus not the least restrictive alternative classification. We treat that inquiry as the inclusiveness scrutiny discussed above. When discussing strands of strict scrutiny, we have explained that perfect classifications are not possible. Thus, it is not practical to enforce a requirement that classifications be the *least* restrictive alternative classification.

Looking to least or less restrictive alternatives having nothing to do with precise classifications, it also seems impractical to require that the government prove that it has considered and carefully studied all possible alternatives and chosen the *least* restrictive of these. Mandating proof of the *least* restrictive alternative, as we commented regarding inclusiveness scrutiny above, similarly seems to require the impossible—perfection. The best resolution of this ambiguity is to require that the government has in fact considered alternatives and that it prove the impracticability of apparently reasonable alternatives proffered by the government's opponent or the Court.[69]

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68. For example, Justice Powell did not discuss any of these issues in *Bakke*.

69. This is what the Court has done in the education cases. *See infra* text accompanying notes 124–26, 178–79.

As to whether the government must use alternatives that are not equally effective or that are more costly, in the education cases after *Bakke* the Court has said that the government must use alternatives even if they are only "about as effective" or entail reasonable expense.[70] Conceiving of these requirements as means scrutiny favors a reading that would only require use of equally effective alternatives; less effective alternatives sacrifice at least a small amount of the government's ends or goals.[71] Even requiring that alternatives be used though they require greater costs can be conceived of as ends scrutiny in the sense of questioning the government's determinations of how much its actions are worth. Nevertheless, we favor the positions taken in *Grutter* and *Fisher*.

The articulations in *Grutter* and *Fisher* are superior to requiring the use of only equally effective and no more costly alternatives. This view serves the purpose of prioritizing individual rights over government interests. It also allows balancing, adding a proportionality dimension to the Court's analysis. By *proportionality* we mean judging the constitutionality of government action by considering its benefits in relationship to its costs. The opposite articulation gives greater weight to controlling judicial activism and values associated with such control. We prefer the former articulation because it robustly protects individual rights, calls attention to the competing rights and interests, and recognizes that the Court cannot precisely calibrate the effectiveness and costs of alternatives. It places the risk of error and the burden of not being able to make precise calculations on the government, not individuals. Although it entails some ends scrutiny, it is indirect and circumscribed.

c. Burden of Proof

A cross-cutting element of strict scrutiny is the burden of proof as to each stage of analysis. Strict scrutiny would usually require the government to bear the burden of proving it met each of the elements of that standard: actual purpose, legitimate interest, compelling interest, proper inclusiveness/sufficiently precise classifications, substantial advancement, and necessity.[72] The Court sometimes, however, alters the placement or

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70. *See id. infra* for the relevant discussion of *Grutter* and *Fisher*.

71. *See* Roy G. Spece, Jr., *The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection*, 33 VILL. L. REV. 111, 146, 148 (1988) (pointing out that theoretically the government should also be required to use more effective alternatives, i.e., get the biggest bang for its buck).

72. CHEMERINSKY, *supra* note 10, § 6.5, at 554.

nature of burdens of proof as to one or more components of strict scrutiny because of special considerations, such as the subject matter being one in which the Court has a (relative) dearth of expertise or one in which there is textual, historical, or other support for deference to the particular governmental actor.[73] This adds flexibility to strict scrutiny. This exception to the usual placement of burdens of proof on the government on each element of strict scrutiny, however, should be strictly limited and explicitly discussed and justified whenever implemented. We will discuss below how and why this has been done in the higher education affirmative action cases.[74]

In addition to the question as to when the Court might alter burdens of proof, the Court should strive to ameliorate further ambiguities concerning the burden of proof. How strong is the burden—is it preponderance of the evidence, clear and convincing proof, or something else? Does it require statistically validated proof as to factual propositions? How does it apply to normative or moral issues? Professor Faigman has written carefully and at length about how the Court inconsistently—if not capriciously—approaches questions relating to proof of empirical, adjudicative, and legislative facts.[75] We cannot resolve these questions here. The bottom line is that here too the Court needs to adopt explicit, consistent, and rights-protective approaches so that strict scrutiny's burden of proof will be as robust as its other components once they are clarified. Although we cannot survey all the issues here, we will nevertheless say a bit more about the burden of proof below when discussing how *Fisher* should be resolved.[76]

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73. *Compare* Gonzales v. Carhart, 550 U.S. 124, 164 (2007) ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."), *and* Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010) (mentioning although compelling state interest test applied, the Court owed deference because of "weighty interests of national security and foreign affairs."),*with* Stenberg v. Carhart, 530 U.S. 914, 936–37 (2000) (medical uncertainty required striking of limitation on partial birth abortion). A related point is that the Court sometimes applies a deferential standard of review even when it appears that there is a fundamental right involved because of such special considerations. Spece, *supra* note 10, at 82–85 (discussing the Court's deference to two state programs requiring mandatory immunization of children and permitting forcible civil detainment in separate cases).

74. *See infra* text at notes 108–11, 122–31.

75. DAVID L. FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW 362–64 (2004); DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 1–21 (2008).

76. *See infra* text at notes 201, 205–06.

3. Summing Up

Our best and preferred interpretation of strict scrutiny is that the government will prevail only if it meets the burden of proving six elements. The government must prove that (1) its actual interest; (2) is legitimate; (3) is compelling (i.e., it is high in a hierarchy of values because of its nature or attributes, as determined in a process similar to the one engaged in when divining fundamental rights); (4) any classifications it has drawn are sufficiently precise to allow the conclusion that they substantially advance its interest (inclusiveness scrutiny); (5) its action substantially advances its interests without regard to classifications drawn (substantial advancement scrutiny); and (6) its action is necessary because it is aimed at an actual problem, that has not been dealt with already, and that cannot be addressed in ways less burdensome on individual rights (necessity scrutiny). Steps (3), (4), and (5) should involve balancing the individual rights and government interests at stake.

Our formulation of strict scrutiny should be explicitly adopted by the Court, practitioners, and academics. Each distinct component of strict scrutiny should be mentioned, and the Court should specify which one(s) it will apply in each case. Listing each element serves as a quality assurance check that the author is aware of these elements and, if applicable, has made a choice to use less than all of them. This would bring clarity and stifle unnecessary analyses claiming that the Court announced a separate standard of review when in fact it was intentionally only using one component of strict scrutiny without any intention of abandoning that test or framing an alternative one.

The Court might want to use less than all of the strands of strict scrutiny because one or less than all of those strands might be clearly dispositive. It is generally reasonable, if not preferable, that the Court preserves judicial resources by deciding cases on reasonably narrow grounds.[77] When it does so, however, it should explain why it has chosen those grounds and that by doing so it does not intend to change strict scrutiny or create a new test.

When the Court, a Justice, a judge, or a commentator deviates from the articulation of strict scrutiny we have proffered, they should explain why. Deviations and justifications from them should be the subject of careful consideration by each Justice and the Court's critics. Only in this way will a

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77. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 30 (1996) ("Anglo-American judges usually speak as if minimalism is the appropriate presumption . . . .").

continually improving articulation of strict scrutiny allow it to best fulfill and accommodate the functions associated with standards of review.

II. THE SUPREME COURT'S AND SCHOLARS' VARIED, INCONSISTENT, OR INCOMPLETE EXPOSITIONS OF STRICT SCRUTINY

In this Part we discuss the Court's and scholars' varied and incomplete expositions of strict scrutiny. We only survey the best or most representative of the plethora of literature concerning strict scrutiny. Similarly, among the considerable number of precedents where the Court invokes strict scrutiny, we only discuss the higher education affirmative action cases.

A. Scholars' Accounts

Professor Fallon has most deeply considered standards of review, including strict scrutiny.[78] He argues that the Court applies three forms of strict scrutiny:

> According to one interpretation, strict scrutiny embodies a nearly categorical prohibition against infringements of fundamental rights, regardless of the government's motivation, but subject to rare exceptions when the government can demonstrate that infringements are necessary to avoid highly serious, even catastrophic harms. . . . According to another interpretation, [it] is, in essence, a weighted balancing test . . . in which a court must ask whether a particular intrusion on protected liberties, which may be greater or lesser, can be justified in light of its benefits. . . . [A]ccording to a third interpretation, [it] . . . does not determine when the infringement of a right can be justified by competing governmental interests . . . . Instead, it defines constitutional rights as rights not to be harmed by governmental acts taken for forbidden purposes, such as promoting white

78. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 60, 62 (1997) (distinguishing between specifying the "meanings of constitutional norms" and fashioning "doctrinal tests," a distinction we would not make); *see also* RICHARD H. FALLON, Jr., IMPLEMENTING THE CONSTITUTION (2001) (containing a chapter entitled "Doctrinal Tests and the Constitution"); *see also* Fallon, *Constructivist Coherence Theory*, *supra* note 24, at 1274–76 (discussing a theory that reconciles various modes of interpretation with use of standards and indicating how this theory would apply to *Bakke*); *see generally* Fallon, *supra* note 1 (discussing standards of review as a form of judicially manageable standard); *see generally* Fallon, *Strict Judicial Scrutiny*, *supra* note 31.

> privilege at the expense of racial minorities or suppressing speech based on disagreement with its message. On this interpretation, a finding of forbidden purposes requires immediate condemnation.[79]

Professor Fallon argues that the best conception of strict scrutiny is not any one of the three just described, but a fourth articulation: "the strict scrutiny test is best understood as mandating a proportionality inquiry" asking "whether the benefits [of government action that cannot extirpate targeted harms] justify the costs in light of regulatory alternatives that would trench less deeply on constitutional rights but also be less effective in promoting their goals."[80]

Although he has done as much or more than anybody to advance thinking about standards of review, we do not agree with Professor Fallon that there are necessarily three interpretations of strict scrutiny, nor do we agree with his "best conception" of it. As to Professor Fallon's posited three distinct interpretations, the Court has inconsistently offered a single test and interpreted components of that test. It also sometimes invokes one component of strict scrutiny with or without mentioning strict scrutiny and never explaining why it is using a single component of it. When doing this, however, the Court has not purported to announce different versions of strict scrutiny. If there are three tests, they can only be reconstructed from the chaos; even then there would be no choice of standard of review criteria to specify when each should be used. We believe the best conception is one that reconstructs the Court's articulations of strict scrutiny by unpacking the various strands of scrutiny and purposes associated with them. The preferred articulation is the one that best captures, reasonably explains, and accommodates the various analytical constructs and their underlying purposes in one standard of review.

This reconstruction yields a robust strict scrutiny that strongly protects individual rights by creating several necessary conditions the government must establish to prevail. It also seriously contemplates that the government might in fact prevail when invoking values as important as protected individual rights.

Professor Fallon's favored conception of strict scrutiny—"best understood as mandating a proportionality inquiry" asking "whether the benefits [of government action that cannot extirpate targeted harms] justify the costs in light of regulatory alternatives that would trench less deeply on

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79. Fallon, *Strict Judicial Scrutiny*, *supra* note 31, at 1302–03.

80. *Id.* at 1267.

constitutional rights but also be less effective in promoting their goals"—focuses on the important element of proportionality.[81] Nevertheless, it contains some flaws. First, it does not even mention the significant step of examining the government's intent (actual interest) when it draws suspect classifications or treads on individual rights. Second, it is not apparent why the proportionality analysis should only take place if there is government action that cannot extirpate harms. Even if government action does extirpate a harm, it should be struck down if it is unnecessary. Third, this conception does not even purport to limit the sacrifice of fundamental rights to only situations in which the government has a compelling interest, of which both the nature and weight measure up against the competing fundamental right or rights (or equivalent value embedded in the suspect classification doctrine). Fourth, it is not apparent why this conception only speaks to situations in which the proffered alternatives are "less effective in promoting their goals."[82] Fifth, it either melds inclusiveness and substantial advancement scrutiny with necessity scrutiny or only requires the latter. Sixth, it does not discuss the purposes underlying whatever distinct components it intends to include.

Professor Siegel, another noteworthy chronicler of strict scrutiny, says it consists of switching the burden of proof, requiring a compelling state interest, and demanding narrow tailoring.[83] He too ignores the actual interest requirement. He also does not explain what "narrow tailoring" is meant to include. It no doubt refers to means scrutiny but, as we have explained, there are at least three distinct means scrutiny components that need to be either rejected for good reasons or well-articulated and applied in light of explicit underlying purposes. The Court has sometimes interpreted "narrow tailoring" as distinct from necessity scrutiny, though both are part of strict scrutiny.[84] It is possible, therefore, that by mentioning only narrow tailoring Professor Siegel suggests, or could be interpreted to suggest, that necessity scrutiny is not even part of strict scrutiny.

Another prominent commentator, Professor Volokh, has described strict scrutiny as follows while focusing on the First Amendment:

> Content-based speech restrictions . . . are constitutional if they are "narrowly tailored to serve a compelling state interest" . . . . The Court makes a normative judgment about the

81. *Id.*
82. *Id.*
83. Siegel, *supra* note 31, at 359–60.
84. An example is the *Grutter* opinion, as discussed *infra* in the text at notes 118–20.

> ends: Is the interest important enough to justify a speech restriction? And the Court makes a primarily empirical judgment about the means: If the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through a better-drafted law.
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> . . .
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> Most cases striking down speech restrictions . . . rely primarily on the narrow tailoring prong, which . . . contains four components: 1. . . . [T]he government must prove . . . that the law actually advances the interest . . . [;] 2. *No Over-inclusiveness* . . . [;] 3. *Least Restrictive Alternative*: A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction. . . . The government need not, however, choose an alternative that "fall[s] short of serving [the] compelling interests." . . . 4. *No Under-inclusiveness*. . . .[85]

Professor Volokh argues that strict scrutiny does not include balancing at the stages of determining substantial advancement (presumably as separate inquiries within inclusiveness and substantial advancement scrutiny or subsumed within compellingness) and necessity scrutiny as contained in our articulation. He recognizes that one solution to his supposed problem is to amend strict scrutiny so it reads as we interpret it. But he much prefers a different approach:

> The second alternative, which I prefer, is for the Court to shift away from means-ends scrutiny, and toward an approach that operates through categorical rules—such as a per se ban on content-based speech restrictions imposed by the government as sovereign—coupled with categorical exceptions, such as the exceptions for fighting words, obscenity and copyright. I think this framework would better direct the Court's analysis, and would avoid the erroneous results that strict scrutiny seems to command.[86]

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85. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–19, 2421–23 (1996) (footnotes omitted) (alterations in original).

86. *Id.* at 2418.

We disagree. First, contrary to what Professor Volokh suggests, there is no traditional understanding of strict scrutiny, which is not surprising given that it spans equal protection, substantive due process, and the First Amendment. One point is clear: strict scrutiny is opaque and must be unpacked from its traditional articulation—which Volokh does to some extent. Second, there is no need to amend strict scrutiny. Some Court precedent supports our interpretation. *Grutter* and *Fisher*—which turn on the state's protection of a First Amendment right—require the use of alternatives that are not equally effective and that might entail more cost, thus indicating a balancing of individual rights and state interests.[87] Volokh too confidently states that the Court does not engage in such balancing. Third, we should bolster, not jettison, a standard that has evolved over decades; spans the major areas of substantive due process, equal protection, and the First Amendment; and is deeply embedded in our law.

This is especially true if the alternative is to move toward a categorical First Amendment jurisprudence. To be sure, Volokh first argues for a categorical ban on "content-based speech restrictions imposed by government as sovereign," and then "categorical exceptions." But the Court seems to associate a categorical approach with restrictions on speech that it seeks to avoid. Thus, the Court has made clear that even content discrimination as to communication that is supposedly categorically excluded from First Amendment protection will be strictly scrutinized, and it has repeatedly refused to add to the list of categorically excluded communication.[88] These are moves that expand or refuse to restrict First

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87. Grutter v. Bollinger, 539 U.S. 306, 339 (2003), *superseded by constitutional amendment,* MICH. CONST. art. I, § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013). The Court has explicitly pointed out, moreover, that alternatives would be required in the context of the fundamental interest in voting even though they entail additional expense. *See* Bullock v. Carter, 405 U.S. 134, 147–49 (1972) (striking filing system for candidates requiring fees—as high as $8,900—because the state could achieve its goal of limiting the size of the primary ballot by only qualifying candidates who received a certain percentage of votes in a previous election). And David L. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1146–49 (1972), plausibly argues that early pure speech cases appear to require use of obviously less effective alternatives.

88. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (striking content discrimination involving hate speech); *see also* United States v. Stevens, 559 U.S. 460, 481–82 (2010), *superseded by statute*, 18 U.S.C. § 48 (2012) (declining to decide whether depictions of animal cruelty may be constitutionally proscribed); *see also* Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2734–35 (2011) (refusing to exclude violent video games from protected speech); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (refusing to exclude category of false speech from protected speech); *see also* Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499,

Amendment protection. Volokh states that the goal of his approach is to ensure robust First Amendment protections.[89] But he underestimates the speech-restrictive dangers *any* categorical approach poses. Once unleashed, a categorical approach, even a modified one such as Volokh's, can lead to focus on creating new categories of non-protection rather than on what is "demanded by the 'theory of the Constitution.'"[90]

B. The Higher Education Affirmative Action Cases as Exemplifying Inadequate Articulation of Strict Scrutiny

1. *Bakke*

In a lone opinion that usually has been treated as at least the virtual equivalent of a binding precedent and equated with *Bakke*, Justice Powell reasoned that strict scrutiny was controlling.[91] Seemingly recognizing that it had not been adequately theorized, other justices called it an "inexact term."[92] Justice Powell first summarized strict scrutiny as follows: "When [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[93] In another part of his opinion he articulated strict scrutiny differently: "[A] State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or safeguarding its interest."[94]

The first articulation requires that the government's interest be *compelling*, while the second requires it to be permissible and *substantial*. The highlighted terms cannot reasonably be read to refer to an identical requirement. Similarly, the first articulation requires precise tailoring, while the second requires that the state's interest be necessary. *Precise tailoring* is

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509–10 (2013) (discussing *Alvarez* and the Supreme Court's reluctance to expand categorically excluded areas of communication from First Amendment protection).

89. Volokh, *supra* note 85, at 2460–61.

90. *Id.* at 2459; Smolla, *supra* note 88, at 525 ("staking the future of a robust free speech principle on the strict scrutiny test may be the better bet.").

91. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978) (5–4 decision) (Powell, J., plurality opinion). Hereafter we will equate Bakke with Justice Powell's opinion unless otherwise stated. Justice O'Connor recognized Justice Powell's reasoning in *Grutter*, but declined to determine whether it should be considered a binding precedent. *Grutter*, 539 U.S. at 322–25.

92. *Bakke*, 438 U.S. at 357 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)

93. *Id.* at 299 (Powell, J., plurality opinion).

94. *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721–22 (1973)).

vague enough to possibly refer to sufficient inclusiveness, substantial advancement, and necessity scrutiny. *Necessary*, however, can only reasonably be read to speak to whether the government's interest is not necessary because it addresses a problem that doesn't exist, has been dealt with already, or for which there is a less intrusive solution. Thus Justice Powell gave two inconsistent descriptions of strict scrutiny, perpetuating it as an even more inexact term.

Although he was less than precise when formulating strict scrutiny, Justice Powell was somewhat better when applying most of the elements we have identified within it. He indicated by the words "a state must show" that the government has the burden of proof, but as will be seen below he was not true to this approach. He did not explicitly refer to an actual purpose requirement, but he in fact struck the U.C. Davis Medical School's program because of an illegitimate purpose—a purpose it denied—which was simply to obtain what in essence was a quota of minority students.[95]

He rejected two other government goals by invoking different elements of strict scrutiny. First, he mentioned that remedying "identified discrimination" was compelling, but spoke derisively about Davis's apparent goal of remedying "societal discrimination."[96] He explained "identified discrimination" as requiring "judicial, legislative, or administrative findings of constitutional or statutory violations."[97] Such findings would cabin the extent of the remedy and justify the burden to those harmed. He argued it was not within Davis's academic mission or power to make the required findings.[98] It is not clear whether he considered any attempt by Davis to remedy societal discrimination to be illegitimate. He only explicitly stated that it was not compelling.[99] In any event, it is important to note that the identified discrimination he referred to as being properly addressed by an appropriate governmental entity includes past *private discrimination* by, for example, an entire industry.[100]

Turning to the second additional interest rejected by Justice Powell, an interest in improving minority access to health care was held insufficient because there was no showing that the admission program would, or was

95. *Id.* at 318–19.
96. *Id*. at 307.
97. *Id*.
98. *Id*. at 308–09.
99. *Id.* at 307–10.
100. *See id.* at 301 (contrasting the petitioner's case with the employment discrimination case *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)).

necessary to, ameliorate the problem.[101] This was use of substantial advancement and necessity scrutiny.

Although he struck Davis's program and rejected various proffered state interests, Justice Powell dissolved an injunction against all use of race in the program. He reasoned that the school could implement a program similar to Harvard's process that treated race as a plus factor, one diversity consideration among many designed to produce educational benefits.[102] Such benefits would be compelling because of their entwinement with universities' fundamental First Amendment right to academic freedom. Here is what he said about academic freedom:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." . . . "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" . . . "[E]xperiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. . . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.[103]

These passages make clear that academic freedom includes the right to determine who can teach, what may be taught, how it shall be taught, and

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101. *Id*. at 310–11.

102. *Id.* at 316–17.

103. *Id.* at 312–13 (first quoting Sweezy v. New Hampshire, 345 U.S. 234, 263 (1957) (Frankfurter, J., concurring); then quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

whom to admit. These freedoms are intended to create an atmosphere of experimentation and creation. Maximum diversity is said to be essential to this atmosphere. This atmosphere is explained to be crucial to our nation's future because, for example, it is a prerequisite to producing superior leaders.

Justice Powell elaborated by anticipating and rejecting the argument that what might be necessary for an undergraduate program at Harvard would not apply to a medical school. He emphasized that such technical programs do not just train technicians, but well-rounded leaders, and he cited authority for the proposition that students learn much about being superior human beings from each other in *and outside of* the classroom.[104]

Justice Powell's articulation of academic freedom is drawn from Court precedents. More recently, Dean Robert Post, drawing in part on the work of prominent philosopher Alan Buchanan, has elaborated another necessary facet of academic freedom.[105] Although it is designed to create speculation and experimentation, academic freedom is also necessary to allow universities to fulfill the need for production of professional expertise and standards. Epistemic experts and standards are necessary to the functioning of a liberal democracy. They balance the no-holds-barred and sometimes faulty dialogue among all comers in the market place of ideas.[106] Thus, academic freedom lies at the foundation of freedom of speech and is intertwined with both diversity and demonstrated excellence in academic capacity.

Justice Powell's discussion of academic freedom took place in the context of an explanation why the educational benefits of holistic diversity are compelling. It is also somewhat hypothetical because he was projecting a possible implementation of a Harvard-like program at U.C. Davis.

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104. *Id.* at 313–14 (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

105. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 9 (1st ed. 2012) (explaining that democratic competence depends upon disciplinary practices that create expert knowledge, which in turn are (and should be more clearly) constitutionally fostered by academic freedom). As Post put it, "[t]he 'unrestrained epistemic egalitarianism' imposed by the First Amendment on public discourse" must be balanced by (epistemic) experts as reliable sources of belief, and these experts must be fostered by "'key liberal institutions' capable of authorizing 'a comparatively large role for merit in the social identification of reliable sources of belief.'" *Id.* at 31–32 (quoting Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHIL. & PUB. AFF. 95, 99, 118 (2004)).

106. *Id.* at 31–32, 61–93; Buchanan, *supra* note 105, at 99, 103, 118. We leave to another article whether realization of the nature and centrality of academic freedom protects state universities from laws prohibiting their consideration of race. Michigan's law on point was upheld in *Schuette v. Coalition to Defend Affirmative Action*, which turned on a Fourteenth Amendment political process rationale. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1653 (2014).

Nevertheless, it seems clear that part of the academic freedom he described is the power to define what sort of students should be admitted and what should be taught to them, including tolerance and openness. It thus makes sense to conclude that he reasoned that properly implementing academic freedom requires that universities be allowed to determine that the educational benefits of diversity are essential to their mission, to define what those educational benefits are, and to balance racial diversity with other forms of diversity and demonstrated capacity for academic excellence.

He did not have occasion to make clear whether academic freedom raises a presumption in favor of universities on this point or whether, instead, they can meet their burden of proof by showing how their fundamental right to academic freedom is intertwined with the ability to determine that the educational benefits of diversity are essential to their mission, to define what are in fact educational benefits, and to balance racial diversity with other forms of diversity and demonstrated capacity for academic excellence. We prefer the view that universities meet their burden of proof by establishing their academic freedom and its entailments. Conceiving of the issue as raising a presumption favorable to the university implies that strict scrutiny does not include a burden of proof on the governmental actor, and this enervates strict scrutiny.

Justice Powell also failed to explore how academic freedom might bear on the other aspects of strict scrutiny: actual purpose, sufficiently precise classification, substantial advancement, and necessity scrutiny. The only one of these he discussed was actual purpose (albeit without that label), as to which he indicated there would be a presumption in favor of universities that implement holistic programs and claim that these programs are intended to produce educational benefits, rather than simply to increase the number of students from specified races.[107]

The entire discussion of a holistic program was perforce hypothetical and thus dictum not tethered to any facts. That might have justified not addressing any prong of strict scrutiny other than compellingness. But he only discussed actual purpose. It seems unreasonable to discuss this without touching the other prongs of strict scrutiny. As he stated that there is a presumption in favor of the university as to actual purpose, similar presumptions may be suggested as to all the other elements and, as a result, entirely gut strict scrutiny.

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107. *Bakke*, 438 U.S. at 316.

Justice Powell's discussion of actual purpose is weak because he purported to support his position by citing cases—including *Washington v. Davis*[108]—in which the Court assumed that governmental personnel acted in good faith in the absence of a showing of racial intent.[109] Those cases apply the rational basis test if there is no showing of intent necessary to the application of strict scrutiny. Here, the admitted use of race as a consideration already triggered strict scrutiny. Justice Powell ignored a glaring difference between the case before him and the cases he cited, including *Washington v. Davis*.

He *might* have been silently relying on the notion of academic freedom that he explicitly invoked when he characterized receiving the educational benefits of diversity as a compelling state interest. But academic freedom is not relevant to the question whether a university was in fact trying to exercise it to obtain educational benefits. Justice Powell should have realized this, just as he realized that it was beyond Davis's academic role or power to remedy societal discrimination. The University should be presumed to have the power to admit students whom it wants to, and believes it can, teach. The University should be presumed to be willing to stamp out societal discrimination. That speaks to whom to admit and what to teach. Remedying societal discrimination directly, however, does not have a close nexus to academic freedom. Moreover, extending a presumption in favor of the University as to its actual purpose ignores that one of the central purposes of strict scrutiny is to smoke out improper intent. That purpose should not be undercut by any deference, let alone a presumption.[110]

We will discuss below whether academic freedom or other considerations support some form of deference as to other aspects of strict scrutiny.[111]

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108. Washington v. Davis, 426 U.S. 229 (1976).

109. *Id.* at 245–46.

110. As indicated in the text *supra* at note 79, Professor Fallon even finds this purpose as equivalent to one of three forms of the compelling state interest test. Fallon, *supra* note 79, at 1271.

111. *See infra* text at notes 115–20.

2. *Grutter*[112] & *Gratz*[113]

In 2003 the Court decided the companion cases, *Grutter* and *Gratz*, dealing with admission to the University of Michigan law and undergraduate schools, respectively. Michigan's law school had implemented a holistic program, contending that it had to admit a "critical mass" of minority students to achieve educational benefits.[114] The parties agreed that strict scrutiny governed, and the two issues the Court framed in *Grutter* were: (1) whether diversity in higher education constituted a compelling interest; and (2) whether the Law School admissions policy was narrowly tailored.[115] This is typical of the Court's misleading lumping of strict scrutiny into two parts: compellingness and narrow tailoring. As explained above, this articulation is flawed for three reasons. First, it ignores the actual purpose requirement as one distinct from the benign racial intent that justifies use of strict scrutiny in the first instance. Second, it lumps or disguises distinct strands of scrutiny. Finally, it obscures whether these forms of scrutiny are ends or means scrutiny. Therefore, this articulation impedes careful application of all components of strict scrutiny, including an expression and reconciliation of the purposes underlying each component.

In any event, Justice O'Connor, writing for a 5-4 majority,[116] answered yes to both questions—compellingness and narrow tailoring—and she identified these as the overriding issues. She initially articulated strict scrutiny as follows:

> This means that . . . [racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. . . . We apply strict scrutiny to . . . "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[117]

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112. Grutter v. Bollinger, 539 U.S. 306 (2003), *superseded by constitutional amendment,* MICH. CONST. art. I, § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

113. Gratz v. Bollinger, 539 U.S. 244 (2003).

114. *Grutter,* 539 U.S. at 333.

115. *Id.* at 326–27.

116. *Id.* at 310.

117. *Id.* at 326 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

This articulation—"'smok[ing] out' illegitimate uses of race"—confuses actual purpose as a separate requirement within strict scrutiny and as one of its underlying purposes. Once again, benign racial intent is a purpose that justifies use of strict scrutiny. Once strict scrutiny is applied, however, there is a separate search to see whether an actual purpose is simply to increase the number of students from minority racial groups, which the Court has held unconstitutional. Further, in this articulation Justice O'Connor explicitly refers to a compellingness requirement and a narrow tailoring requirement. This ambiguously lumps distinct means inquiries—inclusiveness, substantial advancement, and necessity—within narrow tailoring.

Justice O'Connor did a better job in a subsequent articulation of strict scrutiny by unpacking necessity scrutiny from narrow tailoring. However, it is axiomatic that continued inconsistent articulations of strict scrutiny as just explained in *Grutter* do not maximize proper functioning of standards of review. Justice O'Connor's better formulation of strict scrutiny, decoupling necessity and other possible parts of narrow tailoring, is: "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."[118]

Justice O'Connor reasoned that the holistic program was necessary because there was no alternative way to advance the university's goal. Concerning narrow tailoring as separate from necessity scrutiny, Justice O'Connor seems to look for proper inclusiveness and substantial advancement. This reading would support our position that substantial advancement analyses should be distinct steps within strict scrutiny, and separate from compellingness. The problem is that the opinion, in its first articulation of strict scrutiny as set forth above, can also be read to collapse inclusiveness and substantial advancement scrutiny into the compellingness determination, leaving only necessity scrutiny as part of narrow tailoring or means scrutiny.

Justice O'Connor found the educational benefits of diversity to be compelling for the same reasons set forth in *Bakke*: public "universities occupy a special niche in our constitutional tradition," due to "the expansive freedoms of speech and thought associated with the university environment."[119] We agree. Earlier we elaborated upon the complementary

118. *Id.* at 327.
119. *Id.* at 329.

aspects of academic freedom, its foundational importance to freedom of speech, and its implications for holistic programs.[120] It was axiomatic that the Michigan program was intertwined with academic freedom.

We criticize the opinion, however, for containing an articulation of strict scrutiny that could meld inclusiveness and substantial advancement scrutiny into the compellingness determination. This could lead to pursuit or approval of some less well-crafted, or implemented, ineffective programs just because they are similar to Michigan's in *Grutter*. The reasoning would be that "the Court already held in *Grutter* that there is a compelling interest in the educational benefits of diversity programs." The risk of such faulty reasoning is enhanced if a court obscures the means questions of inclusiveness and substantial advancement by lumping them within the ends question of compellingness. Conversely, if a court rejects the compellingness finding in *Grutter* in the subsequent case just hypothesized because of proper attention to the means questions lumped within compellingness, the particular university involved might be demoralized and confused as to why Michigan's interest in the educational benefits of diversity was compelling but its same interest is not.

Thus far the analysis can be read as basically consistent with *Bakke* given that *Bakke* is open to different interpretations. *Bakke* also states there is a presumption that a university does not have an improper purpose.[121] *Grutter* repeats *Bakke*'s mistake by adopting the presumption in favor of the university as to its asserted purpose.[122] Moreover, *Grutter* arguably extends such inappropriate burden shifting to necessity scrutiny:

> Narrow tailoring . . . require[s] serious, *good faith* consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. . . . We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." . . . But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.[123]

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120. *See supra* text at notes 103–06.

121. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978).

122. *Grutter*, 539 U.S. at 329 (citing *Bakke,* 438 U.S. at 318–19).

123. *Id.* at 339–40 (emphasis added) (quoting Petition for Writ of Certiorari at 251a, *Grutter*, 539 U.S. 306 (2003) (No. 02–241)).

We agree that using a lottery or decreasing emphasis on GPA and LSAT scores "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." They would be anathema to the University's academic freedom. Requiring "only good faith consideration" of alternatives, however, can be reasonably read to switch the burden of proof as to what we call necessity scrutiny. This is not consistent with strict scrutiny, and it explains in part why Justice Kennedy dissented, arguing that the majority had given improper deference concerning matters other than compellingness.[124]

It is puzzling why Justice O'Connor would only require "good faith consideration" when, conversely, she stated that the University would have to adopt alternatives even if they were not equally effective or involved some additional costs.[125] This connotes a demanding necessity scrutiny. This doesn't fit with the notion of either switching the burden of proof as to necessity scrutiny or of only requiring the University to merely *consider* alternatives.

Grutter also specifically refers to deference, although not as a presumption, as to requiring universities to show that holistic diversity substantially advances the goal of educational benefits, stating:

> The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[126]

This passage is ambiguous. In light of the more specific reference to good faith as to other components of strict scrutiny (good faith connoting a presumption), the absence of that term in the quoted passage is best read as stating that there should be deference, but not a presumption, in favor of the University as to the substantial advancement component of strict scrutiny. Once again, however, this should be made explicit and justified. The quoted language is ambiguous, moreover, by linking a statement about deference to a conclusion that the University had substantiated its position. It is not

124. *Id*. at 387–88 (Kennedy, J., dissenting).
125. *Id.* at 339 (majority opinion).
126. *Id.* at 328.

obvious why deference would be needed if there were substantiation without it. The passage exacerbated the confusion by a reference to "taking into account complex educational judgments in an area that lies primarily within the expertise of the university" along with a statement that this "taking into account" does not mean there is not to be "strict scrutiny."[127] There is, moreover, a possibility that the opinion intends an actual presumption in favor of the University on the substantial advancement issue, because it cited, in addition to *Bakke*, *Ewing*,[128] and *Horowitz*,[129] cases where the Court applied rational basis scrutiny while basically rubber-stamping educational judgments concerning whether students should be dismissed from educational programs.

We rejected the notions of giving any deference regarding actual purpose or deference in the form of burden shifting as to compellingness when discussing *Bakke*,[130] and we will explain below why we would not switch the burden of proof concerning any facet of the strict scrutiny analysis.[131] We would give deference to strands of strict scrutiny other than actual purpose by having the Court give extra weight to universities' testimony and evidence because of their expertise. This is a reasonable way to interpret Justice O'Connor's statement that, when judging the university's determination that its diversity program did in fact produce educational benefits, the Court exercised "scrutiny of the interest asserted by the Law School [that] is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university."[132]

An issue that is just as important as the placement and nature of the burden of proof concerning substantial advancement is what constitutes the educational benefits that are held to be compelling. This is an area in which the university should be given latitude but not a presumption. It must link its fundamental right to academic freedom with the educational benefits that the university contends to exist, thereby meeting its burden of proof. This is not difficult. If academic freedom means or bears a nexus to anything, it must include the determination of what to teach and to what ends, i.e., how to define educational benefits.

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127. *Id.*

128. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 214–25 (1985).

129. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 84–85 (1978) (holding that, in dismissing a student for disciplinary reasons, procedural due process requires only full information and a careful and deliberate decision).

130. *See supra* text at notes 100–02.

131. *See infra* Parts III.B–III.D.

132. *Grutter*, 539 U.S. at 328.

Justice O'Connor elaborated on the utility of holistic diversity by articulating essentially six constitutionally relevant benefits: (1) increased perspectives in the classroom; (2) enhanced civic engagement; (3) improved professional training; (4) national security; (5) "[e]ffective participation by members of racial and ethnic groups in the civic life of our Nation [as] essential if the dream of one Nation, indivisible, is to be realized;" and (6) "to cultivate a set of leaders with legitimacy in the eyes of the citizenry . . . of every race and ethnicity."[133] These benefits flow from and are intertwined with the Court's conception of academic freedom.

The first benefit was clearly expounded in *Grutter*: "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."[134] Language from *Bakke* also supported the second and third benefits of enhanced civic engagement and professionalism—in particular, arguments applying the diversity rationale to professional education in a medical school and a statement that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[135]

National security, the next articulated benefit, is asserted for the first time and emerges from the Court taking notice of—or perhaps being overwhelmed by the copious number of—*amicus curiae* briefs filed on behalf of the Law School.[136] For example, Justice O'Connor cited the American Educational Research Association's conclusion that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals," and alluded to similar briefs from major corporations such as 3M and General Motors.[137] This laid the groundwork for a similar argument regarding national security: "high-ranking retired officers and civilian leaders in the United States military" asserted that, "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is

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133. *Id.* at 332.

134. *Id.* at 330 (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001)).

135. *Bakke*, 438 U.S. at 313 (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

136. The University of Michigan has sixty-seven amicus briefs posted on its website. *Briefs Filed in Support of the University of Michigan*, U. MICH., http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/summary.html (last updated Apr. 4, 2003).

137. *Grutter*, 539 U.S. at 330 (quoting Brief for Am. Ed. Research Ass'n et al. as *Amici Curiae* at 3, *Grutter*, 539 U.S. 306 (No. 02–241)).

essential to the military's ability to fulfill its principle mission to provide national security."[138]

Finally, the benefits of moving us to our dream of one nation indivisible and assuring the legitimacy of our political leaders are expansive, no doubt. But they follow from the discussions of academic freedom in *Bakke* and *Grutter* that link this freedom to universities' choices concerning how to foster superior leaders.

In *Gratz v. Bollinger,* the companion case to *Grutter*, the Court struck down Michigan's undergraduate admissions program, which admitted students based on a numerical score out of 150.[139] It automatically granted 20 points to each eligible minority applicant, and this number guaranteed admission of every minimally qualified minority.[140] Michigan argued it would have been too expensive to holistically review files, but the Court rejected the program as "not narrowly tailored."[141]

The Law School's reliance in *Grutter* on the amorphous concept of a *critical mass* skirted this flaw. Experts for the Law School refused to define critical mass in terms of any number or percentage, repeatedly insisting on equally vague definitions, such as "meaningful numbers" or "meaningful representation."[142] In a sense, the University probably felt pushed into using a concept like critical mass, because stating a specific figure could run afoul of the prohibition on quotas and stifle the ability to make trade-offs within various types of diversity as well as between diversity benefits and competing educational goals (such as benefits that flow from having students with high GPAs, test scores, and similar accomplishments).

Justice O'Connor had no problem with this concept, and, as partially indicated above, she rejected race-neutral alternatives (such as a lottery or admitting a cohort at the top of each high school class as done in Texas) as unduly interfering with the University's right to seek holistic diversity and an elite student body.[143] She said that critical mass must be "defined by reference to the educational benefits that diversity is designed to produce."[144] This can be reasonably read as explaining that different members of minority students might be necessary to achieve each of the several essential educational benefits she referred to. This is an admittedly

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138. *Id.* at 331 (quoting Brief for Julius W. Becton Jr., et al. as *Amici Curiae* at 5, *Grutter*, 539 U.S. 306 (No. 02–241)).

139. Gratz v. Bollinger, 539 U.S. 244, 255 (2003).

140. *Id.*

141. *Id.* at 275.

142. *Grutter*, 539 U.S. at 318.

143. *Id.* at 340.

144. *Id.* at 330.

vague statement, but it is beside the point to ask for precise thresholds concerning at least many of the educational benefits of diversity, such as producing leaders and maintaining the legitimacy of our political system. Academic freedom is premised on the principle that an idea can defeat an army. One person can produce that idea, given the proper environment. Moreover, the notion of having too many candidates for producing these ideas is absurd. Thus, in a sense, it is beside the point to examine exactly how many minority students are needed to produce robust classroom debate and when a threshold is reached where a university is admitting too many minority students in a holistic program. The only excess worth talking about is when there is proof that diversity in a holistic sense is not being used. If there were admission of wildly disproportionate numbers of minority students admitted with far inferior grades and test scores, it would show nonuse of holistic diversity.

Another aspect of narrow tailoring that Justice O'Connor held must be examined is explained in the following passage:

> Narrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." . . . To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups."[145]

Justice O'Connor reasoned that the program in *Grutter* met this requirement, observing that, "[b]ecause the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."[146] This connotes a balancing step in the analysis—a step we argue should be part of strict scrutiny.

Still another aspect of narrow tailoring (plans "may be employed no more broadly than the interest demands"), as Justice O'Connor explained, was that it must include a temporal limitation, presumably 25 years in this context. This would have to be supplemented with sunset provisions and

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145. *Id.* at 341 (first quoting *Bakke*, 438 U.S. at 308; then quoting Metro Broadcasting, Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

146. *Id.* at 341 (quoting *Bakke*, 438 U.S. at 317).

periodic monitoring.[147] This partially procedural, partially substantive limitation is hard to comprehend. Monitoring and sunsets seem reasonably related to the notion of a program not being *necessary* if monitoring shows that to be the case, but the 25-year limitation does not seem to fit within the requirements of strict scrutiny. In 25 years, strict scrutiny might yield a conclusion that including race in a holistic program is even more needed or effective and thus permissible.

Once again, Justice Kennedy dissented. He scolded the Court for "confus[ing] deference to a university's definition of its educational objective with deference to the implementation of this goal" and complained that invoking "critical mass" evinced an improper concern with racial politics and numbers of minority students rather than an interest in holistic diversity.[148] He did not, however, explain whether there should be deference concerning the University's actual purpose, nor which components of strict scrutiny fall within implementation of the government's compelling interest, where there should be no deference.

Other dissents argued that the educational benefits of diversity are not compelling; that the University's program did not produce educational benefits but actually harmed minority students; that there were invidious distinctions among minorities; and that a striking correlation between the applicants and admittees in each of the eligible minority groups, which Justice Kennedy also mentioned, demonstrated that there was an illegitimate purpose simply to admit more minority students rather than an attempt to reach a critical mass of minority students.[149]

3. *Fisher*

The Court's latest higher education affirmative action case is *Fisher v. University of Texas at Austin*.[150] The Court overturned the Fifth Circuit's upholding of the University of Texas's undergraduate affirmative action

147. *Id.* at 341–42.

148. *Id.* at 388 (Kennedy, J., dissenting).

149. Justice Scalia concurred in part, dissented in part, and filed an opinion which Justice Thomas joined. *Id.* at 346–49 (Scalia, J., concurring in part and dissenting in part). Justice Thomas concurred in part, dissented in part, and filed an opinion in which Justice Scalia joined in part. *Id.* at 349–78. (Thomas, J., concurring in part and dissenting in part). Chief Justice Rehnquist dissented and filed an opinion in which Justice Scalia, Justice Kennedy, and Justice Thomas joined. *Id.* at 378–87 (Rehnquist, J., dissenting).

150. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013). The *Fisher* decision pre-remand affirmed a decision of the District Court for the Western District of Texas. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), *aff'd*, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217, 247 (5th Cir. 2011), *rev'd*, 133 S. Ct. 2411 (2013).

program. This decision resulted from a surprising 7-to-1 vote for remand. Justice Kennedy, joined by Justices Breyer, Sotomayor, Alito, Roberts, Scalia, and Thomas, reversed the lower court's decision, while Justice Ginsburg dissented.[151] Justices Scalia and Thomas filed concurring opinions, noting that they would prefer to overrule *Grutter* but instead acquiesced in the Court's judgment, given that petitioner was not pushing the Court to overrule *Grutter*.[152] Justice Ginsburg dissented, arguing, among other points, that the Court's apparent endorsement of top ten percent laws is based on the completely unrealistic assumption that they are race-neutral.[153] Justice Kagan did not participate because of her involvement in the case at earlier stages.[154]

It has been reported that the Court was originally split 5-to-3 for Fisher, but, with "Sotomayor as agitator, Breyer as broker, and Kennedy as compromiser," the 7-to-1 minimalist position was reached.[155] Thus, there was a compromise, the liberals being able to ostensibly leave *Grutter* as good law and the conservatives undercutting it insofar as deference to universities is concerned. If so, the compromise reflects an unfortunate, albeit common, willingness to sacrifice doctrinal development for a chance to perpetuate Justices' ideological perspectives.[156] Such a compromise, or just carelessness, yielded a particularly opaque opinion.

The Fifth Circuit did what the *Fisher* Court said it did, but in so doing it was following what *Grutter* reasonably seemed to require. Although *Fisher* purported to leave *Grutter* as good law, the *Fisher* Court claims that the Fifth Circuit misread it.[157] *Grutter* ostensibly was only meant to allow deference with respect to the proposition that the educational benefits of diversity are compelling, and not with respect to the issue (and sub-

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151. *Fisher*, 133 S. Ct. at 2414.

152. *Id.* at 2422 (Scalia, J., concurring); *id.* (Thomas, J., concurring).

153. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

154. *Fisher*, 133 S. Ct. at 2414 (majority opinion).

155. Linda Greenhouse, *Groundhog Day at the Supreme Court: Will the Court Hear Affirmative Action Again?*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/19/opinion/will-the-supreme-court-consider-affirmative-action-again.html.

156. As one professor argues:

> [T]here is more than one way to be a swing justice. It is fairly clear that Justice Kennedy called the tune here, and that at least some of the liberal and conservative justices reluctantly sang along. They joined his opinion because it provided adequate security for their own views, and because joining, with the hope of limiting the scope of Kennedy's wanderings, was preferable to the risk of wrenching defeat from victory.

Paul Horwitz, Fisher*, Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 517–18 (2013).

157. *Fisher*, 133 S. Ct. at 2417, 2421.

inquiries) of whether the University's program was narrowly tailored.[158] But Justice Kennedy had dissented in *Grutter,* accusing the majority of extending deference across-the-board—i.e., of doing what he now, as the author of *Fisher*, criticized the Fifth Circuit for interpreting *Grutter* to have done.[159] The case was remanded with instructions for the Fifth Circuit to apply the Court's "clarification" of what *Grutter* says strict scrutiny demands.[160]

On remand, the Fifth Circuit asked for the parties' guidance as to what *Fisher* commanded, and, not surprisingly given the Court's opaque approach to strict scrutiny, the parties responded with diametrically opposed answers.[161] Appellant Fisher argued that the Court's direction was to limit deference to the sole proposition that the educational benefits of diversity are compelling without regard to whether the University's program substantially advances educational benefits, whether its program is necessary to that goal, or whether the University actually embraced that goal as opposed to simply seeking a quota of minority students. Appellant argued that the latter inquiries are embedded in *Fisher*'s reference to narrow tailoring.[162] Appellees claimed that deference was owed regarding all the issues identified by appellant and that the only task for the Fifth Circuit was to confirm that the University's program met the formal requirements of using race as only one diversity factor among many, with temporal limits (subject to periodic review for necessity). Appellees basically argued that only these latter, formal inquiries fit within the Court's reference to "narrow tailoring," the other inquiries—including whether diversity is both necessary and actually substantially advances the goal of educational benefits—falling within the rubric of compellingness as to which deference is owed.[163]

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158. *Grutter*, 539 U.S. at 326.

159. *See id.* at 388 (Kennedy, J., dissenting) (arguing that the majority confused deference to the law school's "educational objective with deference to the implementation" of that objective); *Fisher*, 133 S. Ct. at 2421.

160. *Fisher*, 133 S. Ct. at 2421–22.

161. The court's questions to counsel were set forth in a September 12, 2013, letter from Clerk Lyle W. Cayce. Letter from Lyle W. Cayce, Clerk, 5th Cir., Fisher v. Texas, No. 09–50822, USDC No. 1:09-CV-263 (Sept. 12, 2013) (on file with author). Appellant's Supplemental Brief was filed on October 4, 2013, and her Supplemental Reply Brief was filed on November 8, 2013. Plaintiff-Appellant's Supplemental Brief, *Fisher*, 758 F.3d 633 (No. 09-50822); Plaintiff-Appellant's Supplemental Reply, *Fisher*, 758 F.3d 633 (No. 09-50822). Appellees' Supplemental Brief was filed on October 25, 2013. Supplemental Brief for Appellees, *Fisher*, 758 F.3d 633 (No. 09-50822).

162. Plaintiff-Appellant's Supplemental Brief at 18–21, *Fisher*, 758 F.3d 633 (No. 09-50822).

163. Supplemental Brief for Appellees, *supra* note 161, at 2, 21–25, 43.

After remand, rebriefing, and reargument, the Fifth Circuit once again ruled in favor of the appellees. It essentially gave formal recognition to *Fisher*'s demand to limit deference and then reached the same decision and wrote basically the same opinion it wrote in *Fisher* pre-remand.[164] An application for rehearing en banc was rejected,[165] and Fisher filed a petition for a writ of certiorari in February 2015, which was granted in June 2015.[166] The case was set to be argued December 9, 2015.[167]

Neither the Fifth Circuit pre-remand nor the parties can be criticized for their disparate readings of *Grutter* or *Fisher*. The fault lies in the Court's capricious approach to standards of review. It is not clear where those different components of strict scrutiny, once unpacked, fit within the concepts of compelling state interest, to which deference is owed under *Fisher*, and narrow tailoring, to which deference is not owed. The Fifth Circuit post-remand, however, can be criticized. The court said it read *Fisher* to allow deference only on the question whether the educational benefits of diversity are compelling. The University had the burden of proof on the issues of actual purpose, substantial advancement, and necessity.[168] It upheld the holistic program, however, under essentially the same reasoning it used before remand. The chief difference was that prior to remand, the Court launched an attack against the top ten percent law on several grounds, while after remand, it complained about it but then characterized it as a "first step" toward narrow tailoring.[169] The Fifth Circuit broadly interpreted narrow tailoring, to which *Fisher* clarified that deference was *inappropriate*, and then, contradictorily, used essentially the same reasoning it used pre-remand—reasoning the Court had said reflected excessive deference by the Fifth Circuit pre-remand.

As a prerequisite to further analysis of *Fisher*, we must mention the Fifth Circuit's *Hopwood v. Texas*[170] because it was a precursor to *Fisher*.

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164. *Compare* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 247 (5th Cir. 2011), *with* Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 660 (5th Cir. 2014).

165. Fisher v. Univ. of Tex. at Austin, 771 F.3d 274, 275 (5th Cir. 2014) (order denying petition for rehearing en banc).

166. Petition for a Writ of Certiorari, Fisher v. Univ. of Tex. at Austin 758 F.3d 633 (5th Cir. 2014) (No. 14–981), 2015 WL 603513; Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015) (granting certiorari).

167. *Monthly Argument Calendar for the Session Beginning November 30, 2015*, SUP. CT. U.S. (Oct. 9, 2015), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDecember2015.pdf.

168. *Fisher*, 758 F.3d at 644.

169. *Id.* at 654–55.

170. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

Hopwood struck the University of Texas Law School's then-existing race-conscious program, reasoning that *Bakke* was not controlling and that "the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."[171] This ruling obviously applied to undergraduate as well as graduate education. The Texas legislature promptly responded by passing a top ten percent law that guaranteed admission to any Texas student graduating in the top ten percent of her high school class. It was explicitly stated and is obvious that this law's purpose was to increase admission of minority students.[172]

Shortly after *Grutter*, the University of Texas researched the need for, developed, and implemented a holistic admissions program, containing all the checks in the program at issue in *Grutter* and more (a training program for selectors and no distinctions among Hispanic groups), to assure that race was only one, non-dispositive diversity factor.[173] This program, however, was implemented on top of the top ten percent law.

Fisher, a white female, sued. She was not admitted when she applied in 2008, although she arguably had qualifications that exceeded those of some minority students admitted within the holistic program. She argued the program was unnecessary because the top ten percent law had already allowed the University to admit a critical mass of students needed to achieve the educational benefits of diversity, assuming *arguendo* that such benefits exist. She also argued that the holistic program did not sufficiently advance the goal of educational benefits because it led to the admission of so few minority students in light of the high percentage of slots filled under the top ten percent law.[174]

Given the content and history of the Texas admissions policy, neither the District Court nor the Fifth Circuit had any difficulty concluding that, in isolation, the holistic program clearly adhered to the standards upheld in *Grutter*.[175] The problem, however, was that the admissions policy was *not* implemented in isolation but on top of the top ten percent law.

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171. *Hopwood*, 78 F.3d at 948. Judge Wiener concurred, finding the program was not "narrowly tailored." *Id*. at 962 (Wiener, J., concurring).

172. TEX. EDUC. CODE ANN. § 51.803 (West 2013). *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 320–30 (2001) (explaining that several legislators whose votes were necessary to passage of the law explicitly stated they supported the bill to increase the number of minority admittees).

173. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2416 (2013).

174. *Fisher*, 758 F.3d at 644–45.

175. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 603–04 (W.D. Tex. 2009), *aff'd*, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *rev'd*, 133 S. Ct. 2411 (2013).

The holistic program and top ten percent law are intertwined. Holistic review is only conducted on those applicants who are not admitted as top ten percent graduates.[176] This substantially reduces the scope of persons impacted by the holistic program. In 2008, for example, the top ten percent law accounted for 8,984 of the 10,200 Texas admittees—and thus only 1,216 were even potentially selected in a process that directly considered race (but as one among many diversity factors).[177] It also means that a second force—top ten percent—is at work in recruiting minorities, one that theoretically could achieve the elusive "critical mass" without ever needing to implement an explicitly race-conscious admissions policy (if the top ten percent law were, in fact, not race-conscious).[178]

The following passages from *Fisher* convey its core ruling:

> On this point [narrow tailoring], the University receives no deference. *Grutter* made clear that . . . "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." . . . True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But . . . it remains . . . the University's obligation to demonstrate . . . that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." . . . Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. . . . Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." . . . If "a nonracial approach . . . could promote the substantial interest about as well and at tolerable

176. *Fisher*, 631 F.3d at 239 ("By now it is clear that [the top ten percent law] is inescapably tied to UT's *Grutter* plan, as *Grutter* does its work with the applicants who remain after the cut of the [law].").

177. *Id.* at 227 n.74. This is not to suggest that 1,216 is an insignificant number, but only that it is clearly less than if the top ten percent law did not exist.

178. *See infra* notes 183–201 regarding the law being race-conscious. There were modifications to the law after 2008 (the year Fisher applied)—including a 75% cap on 10% enrollees—that will not be discussed in this Article. These are discussed in Cara Davis, *A Wolf in Sheep's Clothing: How Texas's Top Ten Percent Law Is the Unconstitutional Use of Race and a Racial Quota in Disguise*, 40 S.U. L. REV. 367, 381–82 (2013).

> administrative expense," . . . then the university may not consider race.[179]

These passages seem to include the following requirements and characterize them as part of narrow tailoring as to which no deference is owed: proof that the actual goal is educational benefits, not racial balancing; proof that the goal is substantially advanced ("specifically and narrowly framed" to achieve the government's goals); proof that there are no less restrictive ("necessary to use race") alternatives that could achieve about the same amount of educational benefits with reasonable extra expense; and proof that the University treats race as only one, non-dispositive diversity element. The Court's apparent placement of determination of actual purpose—ensuring that "race or ethnicity [is not] the defining feature" of admissions decisions—within the rubric of narrow tailoring is especially confusing. Actual purpose is, once again, best conceived as a part of ends scrutiny, albeit distinct from the compellingness determination. Moreover, *Grutter* lacks references to temporal limitations and forbidding an undue burden on those disfavored by the program. Nevertheless, it is ironic that the Court cited *Grutter* with approval on the very point of cabining deference.[180]

If the Court thought that *Grutter* had extended deference beyond what was contemplated by *Bakke* or what was appropriate, it should have explicitly overruled *Grutter* on this point. This is especially true regarding *Grutter*'s adoption of deference as to the university's actual purpose. It is contradictory that *Grutter* emphasizes that perhaps the primary purpose of strict scrutiny is to "smoke out" improper government purpose and, at the same time, relies on the University's good faith assertions that its goal was educational benefits.[181]

Recall the passage quoted above from *Grutter*, which hasn't been formally overruled, that describes "smoking out" improper purpose as the very reason for strict scrutiny. *Fisher* does not make sufficiently clear that there are purposes other than smoking out improper purpose underlying strict scrutiny; it, in fact, does not explicitly mention any other underlying

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179. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013) (first quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003), *superseded by constitutional amendment,* MICH. CONST. art. I, § 3, *as recognized in* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1629 (2014); then quoting *Grutter*, 539 U.S. at 337; then quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978); then quoting *Grutter*, 539 U.S. at 339–40; and then quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986)).

180. *Fisher*, 133 S. Ct. at 2420.

181. *Grutter*, 539 U.S. at 326, 329.

purposes of strict scrutiny. The smoking out of improper intent is the core of the actual purpose requirement. It assures and conveys the message that individual rights will not be sacrificed to achieve illegitimate goals.

Forcing proof of actual purpose, however, also encourages political accountability by revealing government's specific legitimate goals and improves government policy by incentivizing the government to focus its actions on achieving identified ends, thereby improving overall welfare. As explained above, moreover, the other components of strict scrutiny—requiring a compelling state interest, substantial advancement, sufficiently precise classifications (inclusiveness scrutiny), and use of less restrictive alternatives (necessity)—each advance various goals.

III. PROPER RESOLUTION OF *FISHER*

Here we will analyze how *Fisher* should be resolved, organizing our discussion around each element of strict scrutiny.

A. What is the Program Subject to Scrutiny?

A preliminary but vital issue concerns what precisely is under constitutional scrutiny. The liberals on the Court seem content to welcome the conservatives' acceptance of the top ten percent law and want to approve it and the holistic program in tandem. The conservatives seem so intent on ultimately limiting holistic programs that they actually advance the top ten percent law, regardless of its historical context or legislative history, as a less restrictive alternative.[182] This is ironic because the top ten percent law applicable in *Fisher* was bad policy, relying on highly-segregated schools of widely different quality, undercutting holistic diversity, encouraging non-minority parents to transfer their children to inferior schools, inviting minority parents not to transfer their children to superior but more competitive schools, and arguably incentivizing parents in minority neighborhoods to perpetuate inferior (or at least non-competitive in the sense of student quality) schools to enhance the chances of their children being admitted under the top ten percent law.[183] The

182. *See, e.g.*, *Fisher*, 133 S. Ct. at 2432 (Thomas, J., concurring) (alluding favorably to the top ten percent law).

183. For example, the University argues that the top ten percent law undermines diversity. Brief for Respondents at 8, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (arguing that the top ten percent law "hurts academic selectivity" and "undermin[es] UT's efforts to achieve diversity in the broad sense"). Concerning strategic behavior by white students, see Julie Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan*, 97 J. PUB.

particular top ten percent law at issue in *Fisher*, moreover, is racially motivated,[184] has a racial impact,[185] and cannot withstand strict scrutiny.[186] The adoption of the holistic program on top of the top ten percent law occurred because the University was not satisfied with the types of diversity that it was obtaining from the top ten percent law, including racial diversity.[187] In fact, the University complained in the litigation that the top ten percent law was interfering with holistic diversity.[188] This undercuts any contention that the top ten percent law is, as the Fifth Circuit said after remand, a first step toward narrow tailoring.[189] It is, in fact, more intrusive than necessary because, in the circumstances, the holistic program alone would be a less restrictive alternative. Therefore, the holistic program must either be severed from the top ten percent law or found unconstitutional along with it.

As to the top ten percent law itself, we indicated above that certain scholars and Justices—whether invoking an anti-subjugation, anti-classification, or anti-balkanization perspective—seem to prefer top ten percent laws over holistic programs because the former are facially race-

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ECON. 32 (2013). Professor David Orentlicher, however, we think too optimistically argues that the law could encourage improvement of schools and property values in minority neighborhoods by causing "immigration" of white students. David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 188–93 (1998); *See generally* Kalena E. Cortes & Andrew I. Friedson, *Ranking up by Moving out: The Effect of the Texas Top 10 Percent Plan on Property Values*, 67 NAT'L TAX J. 51 (2014) (claiming that strategic transfers to lower-performing schools increased property values). Ironically, transfers could undercut the racial diversity goal of the law. *See* Sunny X. Niu & Marta Tienda, *Minority Student Academic Performance Under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 EDUC. EVALUATION POL'Y ANALYSIS 44, 65 (2010) ("[I]ncreased saturation of UT-Austin Freshman classes with students using a single merit criterion . . . suggests that college performance of students admitted automatically may decline in the future. This does not bode well for the future of the uniform admission law, however laudable its intended equity goals."). This last paper has complex assumptions, novel comparisons, and perhaps too confident conclusions; for example, the paper assumes that top ten percent minority students admitted performed as well or better than third decile white students in years studied and that grades are a better predictor of success than standardized tests. *Id.*

184. *See supra* text at note 172.

185. Disparate impact can be shown by comparing the percentage of minority and white students in the groups of students admitted under the top ten percent law and otherwise. The percentage of minority students admitted under the top ten percent law exceeds the percentage of white students so admitted. Fitzpatrick, *supra* note 172, at 320–30 (using figures from 2000 and similar proportionate numbers in other years).

186. The most glaring failure of the top ten percent law under strict scrutiny is that it does not minimize the use of race in pursuit of diversity's educational benefits; a well-crafted and monitored holistic program is superior.

187. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 226, 228 (5th Cir. 2011), *rev'd,* 133 S. Ct. 2411 (2013).

188. *Id.* at 240–41.

189. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 654 (5th Cir. 2014).

neutral.[190] Reva Siegel, the scholar who divined the notion of anti-balkanization to describe the approach of certain moderate Justices, is among those who seem to acquiesce to top ten percent laws.[191] She explains anti-balkanization as concerned with whether government action will create racial divisiveness by causing defined groups of persons to feel that they have been disadvantaged on the basis of race.[192]

We argue that the anti-balkanization concern can be triggered by government action, like Texas's top ten percent law, that is facially race-neutral but saliently racially motivated, has a racial impact, is modified because it is not fulfilling its purpose, and undercuts a less race-intrusive program such as the university's holistic program. These attributes of Texas's top ten percent law—being a substitute for a racially conscious program struck down by the state's Supreme Court, being described by a set of legislators whose votes were necessary to passage as intended to increase minority student admissions, and being supplemented by a holistic program because it was not supplying the diversity desired by the university exercising its academic freedom—are similar to those present in a facially race-neutral situation Professor Siegel describes as sufficient to raise anti-balkanization concerns. Specifically, she cites *Ricci v. DeStefano*, in which a municipality decided to re-administer a test for firefighters because a disproportionate number of minority firefighters had failed the first test that was administered.[193] Although re-administration of the test was facially neutral, the municipality explicitly stated that it re-administered the test because of a racial concern, i.e., that failure to do so would subject it to Title VII liability to minority firefighters.[194] Given that re-administration would have a deleterious impact on white firefighters and that there was a racial purpose, there was a reasonable expectation of balkanization. This, Professor Siegel argued, might explain why the Court found the municipality's actions to violate Title VII, which operates much like equal protection jurisprudence.[195]

Texas's passage of the top ten percent law is similar to, but exceeds the racially divisive aspects of, the municipality's action in *Ricci*. The top ten percent law has a negative impact on whites.[196] It was, moreover, passed

190. *See supra* text at note 16.
191. Siegel, *supra* note 16, at 1345.
192. *Id*. at 1293, 1307–09.
193. Ricci v. DeStefano, 557 U.S. 557, 566–72 (2009).
194. *Id.* at 569–74.
195. Siegel, *supra* note 16, at 1315–16.
196. *See supra* text at notes 182–83.

because a prior race-conscious program was found unconstitutional. Furthermore, the legislative history combines with these circumstances to show that there was an explicit racial purpose behind passage of the law.[197] The Court should, however, sever the top ten percent law and the holistic program. There is at least some deference owed to the University and its holistic program because of the University's academic freedom. This deference does not apply to the state legislature and the top ten percent law because the legislature does not possess academic freedom. To the contrary, one aspect of academic freedom is protection of universities from external majoritarian institutions such as state legislatures.[198] This protection is supposed to encourage and protect the expression of new ideas and criticism of orthodoxy and majoritarian or establishment institutions. At the very least, academic freedom is possessed by universities so they can resist powerful external actors.[199] A strong view of academic freedom's force in the affirmative action context is embraced by *Bakke* and *Grutter*, and *Fisher* does not criticize this view.[200]

The holistic program also differs from the top ten percent law because the former can withstand strict scrutiny if it is severed from the latter. The latter is unconstitutional because it does not take race into account in a limited way along with other diversity factors meant to enhance and preserve academic excellence. This is not the form of diversity the Court has approved. It is not necessary, it is not calculated to produce educational benefits, and it is over-inclusive. It is, therefore, not compelling and these

197. Fitzpatrick, *supra* note 172, at 320–30.

198. *See* David Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1414 (1988) (noting the view that the university itself holds academic freedom and can limit faculty abuses with internal policies; also delineating a careful, balanced view of academic freedom that answers "yes" to the question in the title); *see also* Frederick Schauer, *Is There a Right to Academic Freedom*, 77 U. COLO. L. REV. 907, 908 (2006) (arguing that the strongest case for a First Amendment academic freedom belongs to universities themselves); Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1306–07, 1323–32, 1382–1405 (1999) (defending affirmative action if implemented according to six principles consistent with the traditional roles of universities and the reasons they have been afforded discretion and academic freedom; also surveying some of the social science studies defending and attacking affirmative action); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2113–15 (2004) (arguing that the compelling state interest at stake is held by society, not just universities); Michael Poreda, *Perspective on* Fisher v. University of Texas *and the Strict Scrutiny Standard in the University Admissions Context*, 2013 B.Y.U. EDUC. & L.J. 319, 322, 334–38 (2013) (attempting to base a compelling interest "in a transparent student selection process" on academic freedom).

199. *See supra* notes 105–06 and accompanying text.

200. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312–14 (1978); Grutter v. Bollinger, 539 U.S. 306, 324, 328–29 (2003); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) ("academic judgment").

all combine with the top ten percent law's racial impact and purpose to make it ripe for creating racial division. All these facts combine, moreover, to show that one but-for cause of the top ten percent law was an actual purpose simply to increase the number of minority students, which the Court has condemned as illegitimate.

A holistic program of a very crude nature that would not meet the demands of *Grutter*, or especially *Fisher*, existed alone at the University before *Hopwood*, while the top ten percent law functioned alone from *Hopwood* to *Grutter*.[201] We assume that, because the top ten percent law replaced the earlier program and was explicitly adopted to increase minority student admissions, the government could not show that the top ten percent law would have been passed regardless of its at least partial racial purpose. On the other hand, it is clear the University would have implemented a holistic policy alone in the absence of the top ten percent law because a holistic program of sorts was its preference pre-*Hopwood*, and it has rightly complained that the top ten percent law interferes with its pursuit of holistic diversity. The Court could strike down the top ten percent law, similar to the way it struck down the quota in *Bakke*, and yet indicate that the holistic program severed from the top ten percent law would be constitutional, as the *Bakke* Court indicated that the University could implement a holistic plan on the model of Harvard's program.

As to the remainder of our analysis, we will assume that the top ten percent law will be severed and struck down. We will, nevertheless, apply the other elements of strict scrutiny to the holistic program, making the assumption that the University's goal of educational benefits from a broad notion of diversity that takes race into account would be made easier to achieve, because without the top ten percent law, there would be an increased pool of minority applicants who could be vetted for overall diversity along with non-minority students.

B. Burden of Proof

We will discuss burden of proof in the context of each of the other components of strict scrutiny. Although the burden of proof is on the government at each stage of strict scrutiny, the nature of the burden might differ from one element to another. In some instances, but not here, burden shifting might even be appropriate. The Court has altered the burdens of proof somewhat in *Bakke* and *Grutter*, each ambiguously extending

201. *See supra* text at notes 170–73.

deference as to different components of strict scrutiny.[202] They both seem, oddly, to switch the burden of proof on the important question concerning the government's actual purpose.

C. Actual Purpose

The University argued on remand that the *Fisher* Court had held that educational benefits of diversity are the school's actual purpose.[203] This is incorrect because one passage in *Fisher* indicates that there is not even any deference concerning the *legitimacy* of the government's purpose.[204] Actual purpose (a factual question) and legitimacy (a legal issue for the Court) are distinct, but in this context they are inextricably related. The only way the University's purpose would be illegitimate is if it were to simply increase the number of minority students rather than to obtain the educational benefits of diversity. Oddly, *Fisher* also discussed actual purpose in the part of its opinion addressing narrow tailoring, to which the Court said the Fifth Circuit had erroneously extended deference. Once again, *Grutter* does presume good faith as to actual purpose, but in so doing it is inconsistent with its position that "smoking out" improper purpose is the primary reason for strict scrutiny.

We explained above why we would not extend any deference on this issue.[205] Regardless, the University has done everything possible to comport with the guidelines the Court has established to frame its holistic program in a way that maximizes the probability that the program is intended to obtain the educational benefits of diversity, rather than to establish a quota or to remedy past societal discrimination. In isolation from the top ten percent law, the holistic program's actual purpose clearly is to obtain the educational benefits of diversity.

D. Legitimate and Compelling State Interest

Given our discussion of the actual purpose issue, it is clear that the University has a legitimate interest in obtaining the educational benefits of diversity. Obtaining the educational benefits of a holistic program is not patently in violation of any constitutional prohibition.

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202. *Grutter*, 538 U.S. at 328 (citing *Bakke,* 438 U.S. at 319 n.53).
203. Supplemental Brief for Appellees, *supra* note 161, at 2, 21–25, 43.
204. *Fisher*, 133 S. Ct. at 2419.
205. *See supra* Part II.B.2.

Once again, our position is that the compellingness determination does not include findings as to how much the government's interest is advanced or how that balances against the individual interests at stake. We would make compellingness turn on the unique importance of the government's interest as indicated by its nature or special characteristics, including the rarely sufficient attribute of protecting fundamental rights. *Bakke* and *Grutter* characterize the educational benefits of diversity as compelling because of entwinement with universities' First Amendment academic freedom, and *Fisher* defers to this because the petitioner did not question it. We agree with this result, but not necessarily the reasoning used to get there. *Bakke* and *Grutter* can be read as switching the burden of proof on the compellingness issue because of universities' academic freedom and expertise.

We argue that the burden of proof should not be switched because this would fundamentally change the nature of strict scrutiny. The better view is that universities meet their burden of proving a compelling state interest if they implement a holistic plan like the ones in *Grutter* and, especially, *Fisher*. They meet this burden of proof because the educational benefits they seek are intertwined with their fundamental First Amendment right to academic freedom. Moreover, although there should not be any burden switching, their claims and evidence concerning these educational benefits should be given the extra weight commonly extended to experts. This small amount of deference does not alter the essence of strict scrutiny.

E. Substantial Advancement (Independent from and Related to Inclusiveness Scrutiny)

Our position is that the ultimate conclusion that there has been a sufficiently precise classification or substantial advancement will depend on a *comparison*, *weighing*, or limited *balancing* between the amount of educational benefits produced by the government's classification or action and the presumed assault on equality values and burden on non-minority applicants and society. This weighing element is easily assimilated into *Grutter*'s insistence that affirmative action programs appear fair, benefit all students and society, and not place an undue burden on non-minority applicants.[206]

206. *Grutter*, 539 U.S. at 341 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

The central questions here are what constitutes educational benefits and whether the University can meet its burden of proof as to inclusiveness and substantial advancement scrutiny regarding each of these benefits. Concerning compellingness, we have argued above that the University should be given deference in the form of considering its claims and evidence concerning educational benefits in light of its special expertise.[207] We take the same position concerning all the strands of strict scrutiny: inclusiveness, substantial advancement, and necessity scrutiny.

Recall that we are pursuing our analysis on the assumption that what is at issue is an enhanced holistic program severed from the top ten percent law. The University would have no problem meeting its burden of showing that its holistic program draws classifications precisely because it extends to all disadvantaged minorities and, even as to these groups, treats race as only a plus factor.[208] As to whether the program so drawn would produce sufficient educational benefits, the University can advance its study, which was done even before the program was adopted, and the massive amount of evidence in the scores of amicus briefs filed in support of its positions.[209]

Fisher's argument against the foregoing reduces to a concession. She stipulates that the racial diversity from the top ten percent law is sufficient to produce the requisite educational benefits.[210] Therefore, she must concede that, in the absence of the top ten percent law, a holistic program geared to admission of approximately the same number of minority students—albeit varying somewhat year-to-year—as under the law would be at least as effective. In fact, it would be both more effective and more proper because it would not depend on a mass (top decile), instead of individual-by-individual, search for diversity and excellence.

Given all the above points, we submit that the University could meet its burden of proving sufficient educational benefits. At the very least, the Court should allow the University to implement an enhanced holistic program and gather data as to its success over a reasonable period of time.

F. Necessity Scrutiny

The one means-focused inquiry that remains to be unpacked and applied is necessity scrutiny. We reserve the term *necessity scrutiny* for the

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207. *See supra* text at Part III.D., para. 3.

208. *See supra* text at note 173.

209. *Fisher*, 133 S. Ct. at 2419.

210. Reply Brief for Petitioner at 1, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2012) (No. 11-345).

requirement that the government show that its questioned action addresses a real problem, which has not already been adequately dealt with and for which there is no alternative way to achieve its goals and yet tread less on individual rights. We distinguish necessity scrutiny from substantial advancement scrutiny and inclusiveness scrutiny. Substantial advancement scrutiny asks whether the program does, in fact, achieve significant educational benefits. Inclusiveness scrutiny asks whether the program could draw more precise classifications, for example, by excluding certain minority groups that are included or including certain minority groups that are excluded. This unpacking of necessity scrutiny, inclusiveness scrutiny, and substantial advancement scrutiny calls attention to the reality that there are three distinct forms of inquiry, each of which needs careful consideration and possible refinement case-by-case.

The three processes overlap and are interrelated. If there is no problem, for example, further government action is not necessary. There also cannot be any substantial advancement because there is no problem. In this sense, what we call necessity scrutiny overlaps with substantial advancement scrutiny. Similarly, one cannot determine whether the government's action is not necessary because there is an effective alternative unless there is a determination of the amount of the government's interest that is actually advanced by its preferred action. Effectiveness can only be determined by a comparison between the amount of the government's interest advanced by its preferred action and by the proffered alternative.

Grutter and *Fisher* hold that a university must use any alternatives that are almost as effective and can be implemented even if there is some extra cost.[211] We treat this requirement as necessity scrutiny, and its chief purpose is to prevent gratuitous harm to individual rights (here equality and the opportunity to compete on an equal basis) and to send a message to that effect.

When speaking about alternatives in the higher education affirmative action cases, the Court seems to be focusing on necessity scrutiny because it mentions alternatives such as top ten percent laws and deemphasizing standardized test scores.[212] On their faces, these alternatives are not proffered as offering more precise classifications. The Court's requirement that universities use alternatives even if they are not equally effective or if they are more costly is a stringent form of necessity scrutiny. On the other hand, *Grutter* was lax in only requiring the University to give *good faith*

211. *Grutter*, 539 U.S. at 339 (citing Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280 n.6 (1986)); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013) (same).

212. *Grutter*, 539 U.S. at 340.

consideration to alternatives.[213] The Court should have but did not explain why it would be stringent on certain aspects of necessity scrutiny but lax on another.

Our position is that a university should have the burden of proof across the board. *Fisher* seems to agree, except perhaps that it gives great deference concerning the compellingness determination in the narrow sense in which we have articulated compellingness. The type of deference that *Fisher* anticipates is captured in the following words:

> True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter,* it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[214]

We embrace an interpretation that requires use of alternatives—even if the alternatives are somewhat less effective or more expensive—because it incorporates the balancing that should take place to give appropriate weight and respect to the individual rights at stake. (We also embrace the notion of giving limited, but not burden shifting, deference through consideration of a university's expertise.) The Court's formulation requiring use of about as effective and somewhat more costly alternatives also recognizes that it cannot determine precise equivalences in cost and effectiveness of the government's action as compared to alternatives.

We reject, however, the interpretation that only requires good faith consideration of alternatives. Our position is that the government should be required to use any less restrictive alternative that its opponent or the Court can proffer and support on common sense grounds. At this point, the government should have to prove that any such alternative is sufficiently less effective or more expensive, when balanced against the individual right involved, that the government should not be required to use the alternative. This is consistent with the burden on the government to use alternatives even if somewhat less effective or more expensive.

Petitioner Fisher argues that the top ten percent law is sufficient to achieve the University's racial diversity goals and that the holistic program

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213. *Id.* at 339.

214. *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337).

is therefore not necessary.[215] The University argues, on the other hand, that the top ten percent law actually stifles holistic diversity because it leads to the admission of most minority students through a non-holistic, mechanical determination.[216] Our position is, of course, that the Texas top ten percent law is void because it has a detrimental impact on white applicants and is based on an illegitimate racial goal. In this light, the top ten percent law and holistic program together are not necessary. However, the holistic program enhanced by inflows of minority applicants from a defunct top ten percent law, *is* a less restrictive alternative. At the same time, there is no alternative mechanism through which it can achieve even a portion of the holistic program's balance among race, other diversity factors, and educational talent judged through the predictive power of grades and tests scores considered *together*.

CONCLUSION

We recognize that some scholars argue that holistic programs do not differ from quotas. We also recognize that resting affirmative action on supposed educational benefits of diversity, rather than on an allegedly more transparent and expansive rationale (such as remedying past racial discrimination or achieving integration), is ultimately unsatisfactory and perhaps harmful to minority persons—through stereotyping and backlash—in the long run.[217] There are also arguments that top ten percent laws are

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215. Reply Brief for Petitioner at 6, 16, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

216. Brief for Respondents, *supra* note 183, at 8 (arguing that the law "hurts academic selectivity" and "undermines UT's efforts to achieve diversity in the broad sense").

217. *See* Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the FCC, and the Courts*, 88 YALE L.J., 717, 731 (1979) (arguing that "the fact that an absolute scale or absolute weights probably are used at Harvard, but are hidden from view, supports the 'Brennan opinion' view that Harvard's program approximates the Davis quota system" and that "[t]he 'Brennan opinion' captured most of the results that can be achieved by an application of public choice theory to admissions processes."); *see also* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1195, 1231 (2002) (arguing pre-*Grutter* that "there is no constitutional or moral basis for prohibiting state uses of racial means to remedy private-sector discrimination"; articulating four versions of strict scrutiny: skepticism, balancing, color-blind, and allowing harm when benefits are overwhelming); Wendy B. Scott, *"CSI" After* Grutter v. Bollinger*: Searching for Evidence to Construct the Accumulation of Wealth and Economic Diversity as Compelling State Interests*, 13 TEMP. POL. & C.R.L. REV. 927 (2004).

> First, I reformulate the state's interests as correcting the injuries to entrepreneurial freedoms that have resulted from the race-conscious exclusion of Black citizens from full participation in the accumulation of wealth. Second, I argue that both diversity-based and remedial affirmative action are more like economic regulation. Therefore, legislation intended by Congress to address

superior because they are race neutral. We will not consider these arguments because the purpose of this paper has been to address the situation in *Fisher*, and we have explained that the top ten percent law in *Fisher* was passed with, and would not have been passed without, a racial intent of the nature that triggers strict scrutiny (or even a stronger intent that leads to invalidity under solely the actual-purpose prong of strict scrutiny). Perhaps top ten percent laws can be implemented without reference to racial goals—even if they have racial impacts—and, if so implemented, might not threaten racial equality values. Nevertheless, as explained above, they do not represent good educational policy, and they are not workable at elite universities or in graduate schools.[218]

Furthermore, although holistic programs are capable of being administered to become the de facto equivalent of quotas, the Court has required careful construction and constant monitoring to prevent this from happening.[219] Holistic programs are perceived, moreover, to be fairer than quota programs. Quota programs are facially race-based and invite racial divisiveness or balkanization. Holistic programs evince, however, a desire to minimize the impact of race. The importance of perceptions about racial intent is illustrated by the fact that strict scrutiny provides that a law will be struck down if an improper racial intent (for example, simply to increase the number of students of particular races) is shown, even if the program resulting from that intent substantially advances a compelling state interest in the least restrictive way.[220] (Of course, in such a case the government can succeed if it shows that it would have pursued the same program, even if it had not embraced the improper racial intent.[221])

It is ironic that petitioner Fisher's position rests squarely on the weak foundation of the Texas top ten percent law. This position is disingenuous. It argues for a program that gives ham-fisted weight to race to avoid a limited consideration of race in the holistic program. In any event, *Fisher* argues for bad policy that, as implemented in Texas, can harm all races in order to attack programs that achieve educational benefits vital to all. It is sad that the University of Texas is caught in the middle between the state legislature and petitioner, and has to defend its holistic program while not

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> race-based inequities in the distribution of production, income and wealth should be subject to a deferential standard of review similar to the standard used in Grutter [and other cases.]

Id. at 931.

218. *See supra* text at notes 182–200.

219. *Grutter*, 539 U.S. at 342.

220. Village of Arlington Heights v. Metro. Hous. Dev. Auth., 429 U.S. 252, 270 n.21 (1977).

221. *Id.*

being too critical of the top ten percent law. As we have explained, the University's academic freedom should allow it to resist outside forces, such as the Texas legislature, and fulfill its mission. This mission is to foster new ideas while producing epistemic experts who establish and maintain professional standards. It can only do this if it is allowed to balance diversity and demonstrated academic capacity.

A proper constitutional analysis channeled by the best formulation of strict scrutiny leads to a conclusion that the top ten percent law is unconstitutional because of an illegitimate actual purpose and racial impact (accompanied by a failure to meet the other prongs of strict scrutiny). Conversely, the holistic program that could be implemented alone has the actual, legitimate, compelling goal of achieving educational benefits. This goal is substantially advanced (in both an inclusiveness sense and independently), and, at least in the *Fisher* circumstances, is necessary because there is no alternative method that is nearly as effective in achieving a broad and balanced diversity.