

## CATCH TWENTY-WU? THE ORAL ARGUMENT IN *FISHER V. UNIVERSITY OF TEXAS* AND THE OBFUSCATION OF CRITICAL MASS

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### INTRODUCTION

On October 10, 2012, the Supreme Court of the United States heard oral argument in *Fisher v. University of Texas at Austin*<sup>1</sup>—the latest challenge to race-conscious affirmative action university admissions programs.<sup>2</sup> Court watchers highlighted that during the hearing, the Justices spent considerable time attempting to understand the meaning of a “critical mass” of minority students enrolled in universities and registered for individual courses.<sup>3</sup> Critical mass emerged from the Justices’ questions in oral argument in a sort of catch-22. On one hand, it faced critiques that it lacked a quantifiable threshold that judges could review. Any attempts,

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<sup>1</sup> No. 11-345 (U.S. argued Oct. 10, 2012).

<sup>2</sup> I use the terms *race-conscious* and *affirmative action* synonymously when describing programs that seek to diversify or ameliorate current and past racial discrimination or both. I agree with the sentiments that Ted Shaw expressed when he wrote that

[t]he attack on affirmative action is insidious. Our opponents are trying to turn affirmative action into a pejorative. I do not want to get hung up on what we call “affirmative action.” If we abandoned the phrase and started calling it “fairness,” I guarantee you that within a year “fairness” would be a pejorative term. They would be saying, “Fairness isn’t fair.” So let’s not get all hung up on what we call it.

Theodore M. Shaw, *Comments of Theodore M. Shaw*, 30 COLUM. HUM. RTS. L. REV. 489, 491 (1999). I agree with Shaw that instead of focusing on what we label affirmative action, it is more important to attack the pejorative meanings that opponents have attached to it. This Essay works to disassociate similar pejorative meanings from the term *critical mass*.

<sup>3</sup> See, e.g., Victor Goode, *Affirmative Action’s Fate May Turn on Defining ‘Critical Mass’ of Diversity*, COLORLINES (Oct. 11, 2012, 10:37 AM), [http://colorlines.com/archives/2012/10/affirmative\\_actions\\_fate\\_may\\_turn\\_on\\_defining\\_critical\\_mass\\_of\\_diversity.html](http://colorlines.com/archives/2012/10/affirmative_actions_fate_may_turn_on_defining_critical_mass_of_diversity.html) (link); Peter Schmidt, *Supreme Court Hearing in Texas Admissions Case Exposes Gaps in Affirmative-Action Law*, CHRON. OF HIGHER EDUC., Oct. 10, 2012, <http://chronicle.com/article/Supreme-Court-Hearing-Exposes/134976> (link).

however, to quantify critical mass would place the concept into the unconstitutional realm of impermissible quotas.

This Essay argues that the nature of the questions that lead to the critical mass catch-22 is a *wu*—a concept in Zen philosophy that can be used to describe questions that are flawed because their underlying conditions and assumptions do not match reality.<sup>4</sup> The Essay examines the U.S. Supreme Court oral argument in *Fisher*, and illustrates that—regardless of conservative or liberal judicial philosophy—most of the Justices’ understanding of the definition of critical mass relies on a misreading of Justice O’Connor’s articulation of the concept in *Grutter v. Bollinger*.<sup>5</sup> This misreading is rooted partially in an attempt to gain the support of the perceived swing vote of Justice Anthony Kennedy. The formation of this misunderstanding, or what I call a “Catch Twenty-Wu”—a paradoxical problem that an individual cannot avoid because of fundamentally flawed constraints that are not grounded in reality—is the latest engine fueling a thirty-five-year conservative campaign that began with *Regents of the University of California v. Bakke*<sup>6</sup> and has slowly, incrementally gutted affirmative action structures in the United States.

## I. THE CRITICAL MASS CATCH-22

In the realm of race-conscious remedies and equal protection doctrine, critical mass is a relatively new concept. Counting *Grutter*, the *Fisher* oral argument marks the second time the Court has contemplated the meaning of critical mass in the context of university admissions. A brief background on the origin of the concept and its contested nature in oral argument follows.

### A. *Grutter: The Source of the Critical Mass Concept*

The concept of critical mass first appears in *Grutter*, in which the Supreme Court held that using race to pursue a critical mass of student body diversity to enrich the educational experience was a compelling government interest. The Court endorsed a number of reasons for the University of Michigan Law School to pursue critical mass. First, achieving critical mass avoids minority tokenism, and therefore disadvantaged minority students are not made to feel isolated or like racial spokespersons.<sup>7</sup> Second, nonminority students can avoid racial stereotypes of the “minority viewpoint” as they learn that there are a variety of viewpoints among minority students.<sup>8</sup> Writing a separate dissent in *Grutter*, however, Justice

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<sup>4</sup> *Wu* is a Chinese word that is used as a means of negation. It translates into English as “no,” “not,” “nothing,” or “without.” HELEN J. BARONI, THE ILLUSTRATED ENCYCLOPEDIA OF ZEN BUDDHISM 229 (2002). For a more detailed discussion of the concept, see *infra* notes 22–23 and accompanying text.

<sup>5</sup> 539 U.S. 306 (2003) (link).

<sup>6</sup> 438 U.S. 265 (1978) (plurality opinion) (link).

<sup>7</sup> *Grutter*, 539 U.S. at 319.

<sup>8</sup> *Id.* at 320 (internal quotation marks omitted).

Kennedy disfavored the use of the critical mass concept, characterizing it as an “attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”<sup>9</sup>

*B. The Fisher Oral Argument*

Critical mass first appeared in the *Fisher* oral argument in response to Justice Ginsburg’s suggestion that the Texas affirmative action program was more modest and less aggressive than the University of Michigan Law School’s affirmative action program approved in *Grutter*.<sup>10</sup> Bert Rein, the attorney for Abigail Fisher, responded:

In order to satisfy *Grutter*, you first have to say that you are not just using race gratuitously, but it is in the interest of producing a critical mass of otherwise underrepresented students. And so to—to be within [the] *Grutter* framework, the first question is, absent the use of race, would we be generating a critical mass?<sup>11</sup>

Rein argued that determining whether a university’s student body lacks a critical mass of diversity is a necessary prerequisite to determine whether a state institution can use race as a factor in its admissions. In an exchange with Justice Breyer, Rein pointed out that the University of Texas never satisfied this prerequisite, and that it was indeed impossible for the university to answer this question because it never defined critical mass in quantifiably testable terms. He stated:

[T]here was no effort in this case to establish a—even a working target for critical mass. They simply ignored it. They just used words, and they said, we’ve got to do more. So they never answered the predicate question, which *Grutter* asks: Absent the use of race, can we generate a critical mass?<sup>12</sup>

Conservative Justices echoed Rein’s critique of the vagueness of critical mass. Their questions revealed a frustration that employed an amorphous articulation of critical mass, and that a failure to quantify critical mass made it impossible for the Court to perform a strict scrutiny analysis

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<sup>9</sup> *Id.* at 389 (Kennedy, J., dissenting).

<sup>10</sup> See Transcript of Oral Argument at 10, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-345.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf) [hereinafter *Fisher Oral Argument*] (link).

<sup>11</sup> *Id.* (italics added).

<sup>12</sup> *Id.* at 13 (italics added).

to assess whether the use of race was narrowly tailored to the compelling government interest of achieving educational diversity.

A question from Justice Alito encapsulated the vagueness discussion. He asked, “Mr. Rein, do you understand what the University of Texas thinks is the definition of a critical mass? Because I don’t.”<sup>13</sup> Justice Alito’s question and subsequent remark supported Rein’s claim that the University of Texas’s articulation of critical mass was unclear. A finding that critical mass is vague could lead to the legal conclusion that the University of Texas’s affirmative action plan is not narrowly tailored. Similarly, Chief Justice Roberts posed this scenario to Gregory Garre, the attorney for the University of Texas, in the following exchange:

CHIEF JUSTICE ROBERTS: What is that number? What is the critical mass of African Americans and Hispanics at the university that you are working toward?

MR. GARRE: Your Honor, we don’t have one. And—and this Court in *Grutter*—

CHIEF JUSTICE ROBERTS: So how are we supposed to tell whether this plan is narrowly tailored to that goal?

MR. GARRE: To look to the same criteria of this Court in *Grutter*. This Court in *Grutter* specifically rejected the notion that you could come up with a fixed percentage.<sup>14</sup>

Chief Justice Roberts resumed this line of question in a later exchange with Garre:

CHIEF JUSTICE ROBERTS: I understand my job, under our precedents, to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won’t tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?

MR. GARRE: Your Honor, what—what this Court’s precedents say is a critical mass is an environment in which students of underrepresented—

CHIEF JUSTICE ROBERTS: I know what you say, but when will we know that you’ve reached a critical mass?

MR. GARRE: Well—

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<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 39–40 (italics added).

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CHIEF JUSTICE ROBERTS: *Grutter* said there has to be a logical end point to your use of race. What is the logical end point? When will I know that you've reached a critical mass?<sup>15</sup>

Garre responded to Chief Justice Roberts with a qualitative standard, that critical mass is achieved when a minority student no longer feels racial isolation or feels like a spokesperson for her race.<sup>16</sup> When the Chief Justice asked for additional factors used to determine critical mass, Garre introduced a numerical consideration, yet refused to take it to its quantitative conclusion:

MR. GARRE: Another is that we did look to enrollment data, which showed, for example, among African Americans, that African American enrollment at the University of Texas dropped to 3 percent in 2002 under the percentage plan.

CHIEF JUSTICE ROBERTS: At what level will it satisfy the critical mass?

MR. GARRE: Well, I think we all agree that 3 percent is not a critical mass. It's . . . well beyond that.<sup>17</sup>

Garre's response seemed to imply that numbers can tell us when we do not have critical mass, yet he was unwilling to use quantitative measures to describe when a university does reach critical mass. Like Justice Potter Stewart's threshold test for obscenity, the university appeared only to employ a minimum numerical standard for minority enrollment and critical mass: they know it when they do *not* see it.<sup>18</sup>

While Garre stated that three percent was not enough, the Chief Justice continued to press the question of what percentage constituted a critical mass:

CHIEF JUSTICE ROBERTS: Yes, but at what level will it satisfy the requirement of critical mass?

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<sup>15</sup> *Id.* at 46–47 (italics added).

<sup>16</sup> *See id.* at 47.

<sup>17</sup> *Id.* at 48.

<sup>18</sup> *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”) (link).

MR. GARRE: When we have an environment in which African Americans do not—

CHIEF JUSTICE ROBERTS: When—how am I supposed to decide whether you have an environment within particular minorities who don't feel isolated?

MR. GARRE: Your Honor, part of this is a—is a judgment that the admin—the educators are going to make, but you would look to the same criteria—

CHIEF JUSTICE ROBERTS: So, I say—when you tell me, that's good enough.<sup>19</sup>

The oral argument made it clear that vagueness was not the only problem plaguing critical mass. One solution to the vagueness problem was to provide a quantifiable measure of critical mass. Justice Sotomayor, however, categorized any quantification of critical mass as a quota. In one exchange, Justice Sotomayor pressed Fisher's attorney to articulate the standard for determining critical mass, and to state how the University of Texas's use of race did not fit the narrow tailoring required by strict scrutiny as articulated in *Grutter*:

MR. REIN: First of all, if you think about narrow tailoring, you can't tailor to the unknown. If you have no range of evaluation, if you have no understanding of what critical mass means, you can't tailor to it.

JUSTICE SOTOMAYOR: So you have to set a quota for critical mass?

MR. REIN: No. There's—there's a huge difference, and it's an important one that is not well put out by the University of Texas. Having a range, a view as to what would be an appropriate level of comfort, critical mass, as defined in *Grutter*, allows you to evaluate where you are—

JUSTICE SOTOMAYOR: So we won't call it a quota, we'll call it a goal, something *Grutter* said you shouldn't have.

MR. REIN: Well, Justice Sotomayor, I think it's very important to distinguish between the operative use of that range. In other words, that's where we are, and we're going to use race until we get there, every year, in consideration of each application, which was a problem—

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<sup>19</sup> Fisher Oral Argument, *supra* note 10, at 48.

JUSTICE SOTOMAYOR: Boy, it sounds awfully like a quota to me, that *Grutter* said you should not be doing, that you shouldn't be setting goals, that you shouldn't be setting quotas. You should be setting an individualized assessment of the applicants.

Tell me how this system doesn't do that.<sup>20</sup>

Justice Sotomayor appears to contend that the Fisher attorney's solution to the problem of vagueness—to quantify critical mass—is akin to a quota, and that quotas—or even mere numerical goals—are tools that *Grutter* forbids.

Competing claims that critical mass was too vague or an impermissible quota placed the concept in a dangerous catch-22. Regardless of how one defined critical mass, the definition could lead to a finding of unconstitutionality. Following oral argument, Cornell Law Professor Michael Dorf characterized the Court's dilemma as a "critical mass catch-22" where "[f]ailure to quantify critical mass would leave the university open to the charge that it did not discharge its burden of proof. But if the university did quantify critical mass, then it would instead be accused of using a quota—which the Court's affirmative action cases also forbid."<sup>21</sup>

## II. CATCH TWENTY-WU?

The catch-22 in the *Fisher* oral argument is a result of poor readings of the Court's affirmative action precedents and attempts to appease Justice Kennedy. The questioning and assumptions about critical mass discussed during the oral argument were not grounded in the *Bakke* and *Grutter* opinions' articulation of the narrow tailoring requirement. A close reading of those precedents reveals that there is no catch-22. Rather, when presented with contradictory questions of whether the qualitative nature of critical mass leads to a failure in narrow tailoring or whether the quantification of critical mass triggers an illegal quota, proponents for affirmative action must realize that these questions are not necessarily mutually exclusive, and that both questions can be best answered with the Zen Buddhist response: *wu*.

The Chinese word *wu* can be interpreted as the declaration that a question is problematic in its foundations and that, based on the terms provided, no answer can exist. In his Pulitzer Prize-winning book, *Gödel, Escher, Bach: An Eternal Golden Braid*, Douglas Hofstadter used the *wu* concept to describe the need to "un-ask" a question because the question's

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<sup>20</sup> *Id.* at 19–20 (italics added).

<sup>21</sup> Michael C. Dorf, *The Recent Supreme Court Affirmative Action Oral Argument Zeroes in on the Concept of "Critical Mass,"* JUSTIA.COM VERDICT (Oct. 17, 2012), <http://verdict.justia.com/2012/10/17/the-recent-supreme-court-affirmative-action-oral-argument-zeroes-in-on-the-concept-of-critical-mass> (link).

underlying conditions do not match reality, or to indicate that a question is fundamentally flawed.<sup>22</sup> Hofstadter drew his understanding of this concept from the Mu Kōan, a parable from Zen practice in which a student asks his master whether a dog has a Buddha nature. The Zen master replies, “Mu”—the Japanese translation of *wu*.<sup>23</sup> The Zen master’s reply indicates that the premise of the student’s question—that a Buddha nature is found in some things but not in others—is flawed. The question ignores that a Buddha nature constitutes the essential nature of all beings, even the universe itself.<sup>24</sup>

“Un-asking” the critical mass questions at oral argument puts the Justices’ questions in perspective, rejects their false premises, and permits a more accurate restatement of the meaning of critical mass and quotas as they were initially articulated in precedent. Acknowledging the flaws in questioning is a better way to address Justice Kennedy’s swing-vote concerns.

#### A. *What Is Critical Mass?*

The *Fisher* case does not present a real catch-22, because a close reading of the Court’s precedents—contrary to both conservative and liberal Justices’ remarks in oral argument—demonstrates that critical mass has both quantitative and qualitative elements. When analyzed properly, these elements are narrowly tailored for the purpose of strict scrutiny and do not lead to the practice or production of illegal quotas. Based on a combined reading of *Bakke* and *Grutter*, critical mass is a complicated concept, but it is not amorphous, vague, or undefinable.

The general concept of critical mass does have origins in numerical representation. In addition to the affirmative action context, critical mass has been used in fields as divergent as business and nuclear physics to describe the minimum amount of something needed in order for a specific result to occur or to be sustained.<sup>25</sup> Critical mass is grounded, at least in part, in a numerical understanding.

But contrary to Justice Sotomayor’s claim that goals and quotas are synonymous,<sup>26</sup> the *Grutter* Court never ruled that (1) universities cannot have goals, or (2) numbers cannot be used with respect to setting goals in a constitutional race-conscious admissions plan. In fact, there is evidence that the Court supports the use of goals. First, the Court in *Grutter* goes to great

<sup>22</sup> See DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 231–45 (1979).

<sup>23</sup> THE GATELESS BARRIER: THE WU-MEN KUAN (MUMONKAN) 7 (Robert Aitken trans., N. Point Press 1991).

<sup>24</sup> See *id.* at 10.

<sup>25</sup> See *Critical Mass Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/definition/american\\_english/critical+mass](http://oxforddictionaries.com/definition/american_english/critical+mass) (last visited Apr. 1, 2013) (link).

<sup>26</sup> See *Fisher Oral Argument*, *supra* note 10, at 19–20.

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lengths to demonstrate that there is a distinction between goals and quotas. According to *Grutter*, quotas reserve opportunities for certain minority groups, and the institution of quotas requires that a rigid percentage or number be attained, or not exceeded.<sup>27</sup> The Court stated that goals are distinguishable and permissible because they require only that there is a good faith effort to come within range of the goal.<sup>28</sup> Unlike quotas, goals allow each candidate to compete with all other applicants.<sup>29</sup>

Second, both *Bakke* and *Grutter* approved the role of numbers when setting admissions goals. Relying on *Bakke*, *Grutter* states that, alone, some attention to numbers “does not transform a flexible admissions system into a rigid quota.”<sup>30</sup> Both the *Bakke* plurality opinion and the *Grutter* majority endorsed the Harvard College Admissions Plan, which “certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind.”<sup>31</sup> There *were* numbers that Harvard admissions officers believed too low to achieve diversity. The Harvard Plan argued that “10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.”<sup>32</sup>

While Justice Sotomayor was correct to be careful in announcing numbers with respect to critical mass, she went too far to state that goals linked to numbers looked just like impermissible quotas. Goals and numbers are acceptable under both *Bakke* and *Grutter*. One must pay special attention, however, to the specific contexts in which the Court approved the use of numbers. In *Bakke*, Justice Powell referred to the Harvard Plan in the appendix to his opinion. The Harvard Plan noted that numbers have a role in diversity admissions programs because “there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.”<sup>33</sup> The Harvard Plan made it clear, however, that attention to numbers did not mean that the university had set a mandatory minimum quota for admissions. The Harvard Plan continued:

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<sup>27</sup> *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (citing Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring in part and dissenting in part)).

<sup>28</sup> The Court wrote, “In contrast, ‘a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself . . . .’” *Id.* (alteration in original) (quoting *Sheet Metal Workers*, 478 U.S. at 495 (O’Connor, J., concurring in part and dissenting in part)).

<sup>29</sup> *Id.* (citing *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 638 (1987)).

<sup>30</sup> *Id.* at 336 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (appendix to plurality opinion)).

<sup>31</sup> *Id.* at 335.

<sup>32</sup> *Bakke*, 438 U.S. at 323 (appendix to plurality opinion).

<sup>33</sup> *Id.*

But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only “admissible” academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.<sup>34</sup>

The *wu* answer allows for a more accurate assessment of the Court’s holdings and a very different response to the conservative Justices’ questions. Contrary to the Justices’ claims that critical mass can be reduced to a numerical representation, neither *Grutter* nor *Bakke* ever ruled that critical mass was solely a fixed number or range. How should one answer the conservative Justices’ questions about the numerical threshold for critical mass? The answer is that while one component of critical mass is a university’s numerical goal, it also requires a relative assessment of the number of qualified students who apply for admission. The Harvard Plan, which Justice Powell approved, tells us so.

Under our current constitutional framework, universities cannot have predetermined, fixed, or inflexible admissions results or requirements. Universities can have a numerical goal that is not a requirement, however. These numerical goals can be used to guide which individuals are chosen from a qualified pool of applicants. Critical mass is achieved when a university chooses the most diverse class based on its pool of available, qualified applicants. If a student is not qualified, then he can never be considered for meeting a university’s diversity goal. If there are too few racial minorities who meet a university’s qualifications, then a university’s goal would go unmet.

Based on the number of students who apply and their qualifications, a university (or, in the instance of constitutional scrutiny, a court) cannot necessarily determine some fixed number that constitutes critical mass—but can determine the critical mass the university can generate from the qualified pool of applicants. A university may have a numerical goal of racial-minority students, but because there is no requirement, and due to the changing demographics and qualifications of applicants from year to year, the actual number of students offered admission will fluctuate. The fluctuation does not reveal that critical mass is vague. To the contrary, it is a testament to its relative and complicated nature.<sup>35</sup> Relying on a closer

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<sup>34</sup> *Id.* at 323–24.

<sup>35</sup> This scenario is analogous to the facts of *Grutter*, where the Court observed (and Justice Kennedy conceded) that between 1993 and 1998 the minority student enrollment at the University of Michigan Law School fluctuated between 13.5% and 20.1%. The Court argued that this variance was inconsistent with a quota. *See Grutter*, 539 U.S. at 336.

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reading of *Bakke* and *Grutter*, it might be helpful (and more accurate) to formulate a clearer statement of the state's interest—that the government's compelling interest is in a student body that has a critical mass of diversity *given its qualified applicants*. This reading more closely matches a justification that links diversity to the pursuit of educational excellence. It is contrary to conservative readings that once some quantified critical mass is reached, schools no longer have a need to consider race<sup>36</sup>—a view and a standard that has no support in either *Bakke* or *Grutter*.<sup>37</sup>

One benefit to this articulation of critical mass is that it acknowledges a fact that often goes unstated in discussions of affirmative action and university admissions—that there is a difference between whether a student is admissible and qualified, and whether a student will be offered admission. It assumes that there are a number of considerations in addition to a student's merit that go into an admissions offer. One factor must be how well a student will fit within, and enrich, a university's student body. Contributing to a school's student-body diversity is one measure of enrichment. The weight and importance of these considerations remain frequently unconsidered and undiscussed in debates on affirmative action.

Another benefit to conceptualizing critical mass as relative, and guided by numbers, is that it directly addresses the Justices' questions intimating vagueness. Judges would be able to review a university's goals in conjunction with the policies and methods that an admissions committee uses to decide between qualified candidates when building a student body. This is in contrast to the University of Texas's response, which flatly asserted that it was barred from using numerical considerations and could only define critical mass with respect to qualitative descriptions of student isolation and the avoidance of minority tokenism. Additionally, by recognizing the role of quantitative considerations in the definition of critical mass, the relative approach to critical mass avoids a potentially fatal flaw in the University of Texas's argument. In one breath the university claimed that critical mass is not numerical, yet argued that we can “all agree that 3 percent is not a critical mass. It's . . . well beyond that.”<sup>38</sup>—a statement that clearly presupposes some numerical consideration.

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<sup>36</sup> Susannah W. Pollvogt argues that concerns that a school might achieve too much diversity assumes that reaching a numerical critical mass of minorities means that universities no longer have a need to construct diverse student bodies. She argues that such concerns do not fit well with the educational excellence justification supported in *Bakke* and *Grutter*. See Susannah W. Pollvogt, *Casting Shadows: Fisher v. University of Texas at Austin and the Misplaced Fear of “Too Much” Diversity*, 72 MD. L. REV. ENDNOTES 1, 11 (2013) (link).

<sup>37</sup> While *Grutter* states that there must be a logical end point to the use of race, the decision never articulated a standard that this end point is somehow tied to, or should be measured to, the attainment of some fixed quantified critical mass. This is a fundamental misreading of *Grutter*. See *Grutter*, 539 U.S. at 342 (“We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”).

<sup>38</sup> Fisher Oral Argument, *supra* note 10, at 48.

*B. Why the Catch Twenty-Wu?*

A misreading of Court precedent partially explains the catch twenty-wu. A more complete explanation, however, includes how advocates have tried to appease Justice Kennedy. Advocates have operated from an understanding that linking critical mass to numbers will likely draw Justice Kennedy's disapproval. In an exchange explaining the definition of critical mass to Chief Justice Roberts, Solicitor General Verrilli betrayed this concern. Verrilli said:

I don't think there is a number, and I don't think it would be prudent for this Court to suggest that there is a number, because it would raise exactly the kind of problem that I—that I think Justice Kennedy identified in the *Grutter* dissent of creating hydraulic pressure towards that number.<sup>39</sup>

Verrilli's statement indicates his belief that Kennedy opposes the use of any numerical considerations in affirmative action.

In his dissent in *Grutter*, Justice Kennedy wrote:

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.<sup>40</sup>

Justice Kennedy's dissent does not necessarily voice apprehension for numerical goals. Instead, it expresses a concern over how universities utilize numbers and whether a university changes its admission criteria in order to meet predetermined numbers, thereby producing a link between goals and results indicative of quotas. There is no apprehension for numbers per se, but an exchange between Justice Kennedy and the attorney representing the University of Texas still reveals a concern about the nexus between goals and results:

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<sup>39</sup> *Id.* at 71 (italics added).

<sup>40</sup> 539 U.S. at 392 (Kennedy, J., dissenting).

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JUSTICE KENNEDY: Suppose we—that you, in your experience identify a numerical category a numerical standard, a numerical designation for critical mass: It's X percent. During the course of the admissions process, can the admissions officers check to see how close they are coming to this numerical—

MR. GARRE: No. No, Your Honor, and we don't. On page 389 of the joint—

JUSTICE KENNEDY: You—you cannot do that?

MR. GARRE: We—we wouldn't be monitoring the class. I think one of the problems—

JUSTICE KENNEDY: But isn't that what happened in *Grutter*; it allowed that.

MR. GARRE: It did, Your Honor. It was one of the things—

JUSTICE KENNEDY: So are you saying that *Grutter* is incorrect?

MR. GARRE: No, Your Honor. It was one of the things that you pointed out in your dissent. What I'm saying is we don't have that problem, because—

JUSTICE KENNEDY: I'm—I'm asking whether or not you could do that. And if—

MR. GARRE: I don't think so, because the *Grutter* majority didn't understand it to be monitoring for the purposes of reaching a specific demographic.<sup>41</sup>

Justice Kennedy is perceived as a swing-vote Justice, arguably occupying a middle ground between conservative and liberal judicial positions on the proper use of racial categories in the context of education.<sup>42</sup> One could argue that proponents of affirmative action have unnecessarily abandoned discussions of numerical considerations in an attempt to appease Justice Kennedy. This approach is unfortunate because, not only does it fail to address Justice Kennedy's fundamental concern over quotas—a mechanistic link between goals and actual admissions—but it abandons the use of strong persuasive precedent that would support affirmative action programs undergoing strict scrutiny analysis.

In his *Grutter* dissent, Justice Kennedy focused on what he determined was the exclusive use of race during the last stages of a university's

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<sup>41</sup> Fisher Oral Argument, *supra* note 10, at 53–54 (italics added).

<sup>42</sup> See Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. COLLOQUY 74 (2012), <http://www.law.northwestern.edu/lawreview/colloquy/2012/11/LRColl2012n11Rostron.pdf> (link).

admissions process. Affirmative action proponents would be wise to remind Justice Kennedy that Justice Powell specifically addressed and approved considerations of race (as well as other factors) in the final stages of admissions as articulated in the Harvard Plan. The Harvard Plan stated:

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.<sup>43</sup>

The *Bakke*-, *Grutter*-, and Justice Kennedy-endorsed Harvard Plan states that the use of race in deciding between two or three candidates in the final stages of admissions is relative and can depend on the distribution of those candidates' individual characteristics among the already admitted student body. This is akin to the "consultation of daily reports" that concerned Justice Kennedy in *Grutter*,<sup>44</sup> but it is not a policy in which a school changes its admissions decisions to reach some predetermined number. The Harvard Plan's articulation of the use of race in the last stages of admissions is important because it neutralizes Justice Kennedy's critique of the *Grutter* majority, demonstrating that *Grutter* was not a departure from Justice Powell's opinion in *Bakke*.

In fact, Justice Kennedy has argued that Justice Powell's opinion was controlling both with respect to the compelling government interest and with respect to the issue here, whether the admissions process was narrowly tailored.<sup>45</sup> If Justice Kennedy truly believes that Justice Powell's decision is

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<sup>43</sup> Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (appendix to plurality opinion).

<sup>44</sup> 539 U.S. at 392 (Kennedy, J., dissenting).

<sup>45</sup> See *id.* at 387 ("The opinion by Justice Powell, in my view, states the correct rule for resolving this case.").

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controlling, then it is important to highlight Justice Powell's support and reliance on the Harvard Plan, which allowed for a review of race and the distribution of admitted students during the final stages of admissions.

A strong answer to Justice Kennedy's question to the University of Texas as to whether an admissions office can consult daily reports with respect to predetermined numerical goals would be to say that numbers can be used just as in the Harvard Plan. There can be no fixed number of racial admits that must be attained. Instead, numbers are used to determine the admissions distribution of applicants who have already been deemed qualified and admissible. Race is never the sole controlling factor for a student's admission because there are other factors, in addition to race, that are considered and taken into account when building a student body that has a critical mass of diversity with respect to the qualified applicants.

### CONCLUSION

A misreading of Supreme Court precedent, coupled with attempts to appease Justice Kennedy, have left the concept of critical mass in a position that, at first glance, seems indefensible. The *Fisher* oral argument demonstrated that by refusing to articulate numbers, the University of Texas fueled a catch-22 and drew the conservative criticism that the university was administering an unquantifiable definition of critical mass that was overly vague and judicially not evaluable. In addition, when affirmative action proponents ignored numbers, they failed to trigger the supportive language and arguments that Justice Powell laid out in *Bakke*—a judgment Justice Kennedy supports fully.

“Un-asking” the questions that lead to the critical mass catch-22 can lead to awareness that our present understandings of precedent are misguided. Answering these questions with *wu* can teach the affirmative action advocate the need to acknowledge and be cautious of her role in a conservative movement that challenges the use of race to achieve equality. This thirty-five-year conservative movement began in *Bakke* and has used a language of colorblindness to shift justifications for affirmative action away from equality and racial remediation to arguments in favor of diversity. Prior to *Bakke*, quotas were legal, yet today the mere mention of numbers in the same breath as critical mass conjures the specter of unconstitutionality.

The catch twenty-*wu* is only possible because opponents of affirmative action have reframed and reconceptualized critical mass outside of its established framework as a relative, not a rigid, criterion. Equality is likewise relative, and not rigid or colorblind. Halting the shift away from equality requires staking progressive claims, and refusing to discard strong, well-accepted arguments, which are grounded in history in a misguided attempt to curry favor with middle-leaning Justices. “Un-asking” flawed questions in order to move beyond conservative discursive frames is a powerful step toward achieving this goal.