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## In Fisher v. University of Texas Derrick Bell's Interest Convergence Theory is on a Collision Course with the Viewpoint Diversity Rationale in Higher Education

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IN FISHER V. UNIVERSITY OF TEXAS DERRICK BELL'S  
INTEREST CONVERGENCE THEORY IS ON A COLLISION COURSE  
WITH THE VIEWPOINT DIVERSITY RATIONALE IN HIGHER  
EDUCATION

*L. Darnell Weeden*<sup>\*</sup>

INTRODUCTION

Professor Derrick Bell is necessarily and properly acknowledged because of his leading community service as a civil rights lawyer, a scholarly intellectual, law professor, and political activist.<sup>1</sup> Professor Derrick Bell helped to set in place the basis for Critical Race Theory.<sup>2</sup> After Professor Bell became a member of the faculty of Harvard Law School in 1969, he shared his experience and reflections regarding the civil rights movement and issues of racial inequality with the academic community in a very profound and prolific manner.<sup>3</sup> “Because of his views about the permanence of racism and the intransigence of inequality generally, Professor Bell and critical race theorists have mistakenly been considered to be pessimists.”<sup>4</sup> While establishing an outstanding legal legacy, “Professor Bell worked to connect law, scholarship, and the struggle for social justice, an endeavor that critical race theorists also adopted and continue to further today.”<sup>5</sup> One commentator has described the late Professor Derrick Bell as the “founder of the Critical Race Theory movement.”<sup>6</sup> Over the course of my career, I have met and talked with Professor Bell more than once, and I will describe him as an intellectual giant committed to both racial equality and social justice. Although I have great respect for Professor Bell as a courageous man of principle, I nevertheless believe Professor Bell’s interest convergence theory in the context of diversity in higher education merits reconsideration by others.

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<sup>\*</sup> Professor, Thurgood Marshall School Of Law, Texas Southern University; B.A., J.D., University of Mississippi. I extend a special word of thanks to my wife and children for their endurance while I completed this article.

<sup>1</sup> See Derrick Bell Official Site, <http://professorderrickbell.com/> (last visited February 9, 2015).

<sup>2</sup> Id.

<sup>3</sup> See Derrick Bell Official Site, <http://professorderrickbell.com/scholarship/> (last visited February 9, 2015).

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Elvia R. Arriola, *It's Not Over: Empowering The Different Voice In Legal Academia*, 29 Berkeley J. Gender L. & Just. 320, 325 (2014).

Under the Equal Protection principle, a public university's admission policy which makes race a significant factor in order to advance racial diversity for an underrepresented racial minority violates the equal protection rights of a nonminority. This is due to the fundamental right to be free of racial discrimination in higher education, and therefore is not limited to insular and discrete minorities.<sup>7</sup> Two major cases that demonstrate this concept are *Gratz v. Bollinger* and *Grutter v. Bollinger*.<sup>8</sup> In *Gratz*, the Supreme Court concluded that a University of Michigan undergraduate admission policy that mechanically awarded twenty percent of the points necessary to virtually assure admission of each underrepresented minority applicant based exclusively on the applicant's race was an unconstitutional violation of the equal protection of the law. Conversely, in *Grutter v. Bollinger*,<sup>9</sup> the Supreme Court held that law school student body diversity at the University of Michigan is a compelling state interest that justifies the use of race as one of many factors in a public university admissions under the equal protection of the law concept.

Professor Derrick Bell contends that the Supreme Court's 5-4 approval of Michigan's Law School's diversity admission program in *Grutter* is a major case in point demonstrating how his interest convergence theory works.<sup>10</sup> The interest convergence theory, promoted by the late Professor Derrick A. Bell without giving any deference to context, unrealistically contends that the interest of African Americans in seeking racial equality is supported only if policy makers determine that the interest of African Americans converges with a greater political and economic interest of whites in America.<sup>11</sup> Simply stated, the white/majority will promote racial advances for a racial minority only when it also promotes perceived white self-interest. Under Professor Bell's narrow treatment of the interest convergence theory racial justice for racial minorities is an incidental by product of white self-interest.

This article is divided into three parts. Part I examines Professor Bell's narrow, non-collaborative, treatment of interest convergence. Part II contends that Professor Bell's interest convergence theory has evolved to a collaborative substantial beneficiary move toward freedom for historically subordinated racial or ethnic groups. Part III presents an analysis of the *Fisher v. University of Texas*<sup>12</sup> with its implications for the collaborative

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<sup>7</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>8</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>9</sup> *Id.*

<sup>10</sup> Derrick Bell, *Diversity's Distraction*, 103 COLUM. L. REV. 1622, 1626 (2003).

<sup>11</sup> Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005).

<sup>12</sup> *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013).

interest convergence theory and viewpoint diversity as constitutionally permissible public policy. In *Fisher*<sup>13</sup> the Supreme Court refused to invalidate the use of race preference in admission at the University of Texas at Austin (UT) but remanded the case in order to decide whether the UT diversity plan was narrowly tailored to meet the goal of viewpoint diversity. *Fisher* is a direct challenge to the interest convergence theory, that historically subordinated racial groups will only receive a substantial viewpoint diversity benefit in the admission process at UT if the policy primarily promotes white self-interest.

I. THE EXAMINATION OF PROFESSOR BELL'S NARROW, NON-COLLABORATIVE TREATMENT OF INTEREST CONVERGENCE.

Professor Bell's interest convergence theory is highly respected in the legal academy and elsewhere.<sup>14</sup> Even if it contains words of wisdom, Professor Bell's interest convergence theory should not escape reasonable critique.<sup>15</sup> Professor Driver, a legal scholar, appropriately asserts that "a critical discussion" of Professor Bell's interest-convergence theory is both necessary, proper, and "is long overdue."<sup>16</sup> A potential adverse impact of Professor Bell's interest convergence theory, if left unchallenged, is that it may unnecessarily "strengthen the racially conspiratorial viewpoint that is disturbingly prevalent in the black community."<sup>17</sup> If Professor Bell's view of interest convergence represents a racial conspiratorial viewpoint, it runs the great risk of alienating the many supporters of diversity in higher education of many races. Professor Bell recognized that many in America including Justice O'Connor, corporate America, and the nation's military officials, argue that viewpoint diversity is needed today in the global market place to help students develop the intellectual skills necessary to engage in an assortment of people, cultures, accepted wisdom, and perspectives.<sup>18</sup> In spite of Professor Bell's interest convergence theory conceivable pragmatic flaws it deserves examination due to its "considerable contribution to legal discourse."<sup>19</sup>

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<sup>13</sup> Id.

<sup>14</sup> Justin Driver, *Rethinking the Interest Convergence Thesis*, 105 NW. U.L. REV. 149, 156 (2011).

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id. at 156-57.

<sup>18</sup> Bell, *Diversity's Distraction*, supra note 10 at 1623 (Grutter v. Bollinger, 123 S.Ct. 2325, 2340 (2003)).

<sup>19</sup> Driver, *Rethinking the Interest Convergence Thesis*, supra note 14 at 157.

II. PROFESSOR BELL'S INTEREST CONVERGENCE THEORY HAS EVOLVED TO A COLLABORATIVE SUBSTANTIAL BENEFICIARY MOVE TOWARD FREEDOM FOR HISTORICALLY SUBORDINATED RACIAL OR ETHNIC GROUPS.

A collaborative application of Professor Bell's interest convergence theory supports the belief of equality, justice, and fair opportunity with everyone sitting down at the table of brotherhood as racial equals. The collaborative beneficiaries approach to viewpoint diversity permits an inference that collaborative interest convergence is a necessary and proper step for America to evolve into a more just and racially equal society. Since the twin goals of social justice and racial equality promote the general welfare of all people living in America, collaborative interest convergence is good public policy. Professor Bell's argument that interest convergence in the context of race and the law in America is always a one sided venture on balance is probably not valid from either a historical perspective or a contemporary perspective because racial justice in America as a general rule involves a collaboration of interests.

The Emancipation Proclamation<sup>20</sup>, well known for advancing freedom for many black slaves, is a historic example of the interest convergence theory necessarily and properly serving a compelling interest of blacks to be free while advancing a substantial interest of whites in abolishing slavery. Now, "the Proclamation is best understood as a legal document, albeit one promulgated under unusual circumstances. Lincoln wrote the Emancipation Proclamation believing, or fearing, that it might be litigated or challenged in the Supreme Court."<sup>21</sup> When the Civil War began in the summer of 1862, thousands of slaves abandoned "southern plantations to Union lines, and the federal government didn't have a clear policy on how to deal with them. Emancipation would undermine the Confederacy while providing the Union with a way to enlist thousands of former slaves."<sup>22</sup> An expansive reading of Bell's interest convergence theory, as a tool of collaboration, supports my conclusion that both the U.S. military and the newly emancipated slaves were substantial beneficiaries of an emancipation proclamation that may have been inspired by military strategy.<sup>23</sup> It would deny social justice and military

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<sup>20</sup>Paul Finkelman, *Lincoln, Emancipation, And The Limits Of Constitutional Change*, 2008 SUP. CT. REV. 349 (2008) (citing Proclamation No 17, 12 STAT 1268 (Jan 1, 1863)).

<sup>21</sup> Id.

<sup>22</sup> Sarah Pruitt, *Five Things You May Not Know About Lincoln, Slavery, and Emancipation*, HISTORY IN THE HEADLINES (Sept. 21, 2012), <http://www.history.com/news/5-things-you-may-not-know-about-lincoln-slavery-and-emancipation>.

<sup>23</sup> Id.

reality to suggest that newly freed black slaves were only incidental beneficiaries of the Emancipation Proclamation even if it was adopted predominately for military reasons.

The historical importance of the Emancipation Proclamation suggests that Professor Bell's interest convergence theory as a general rule should be viewed under a primary effects test. This is seen when Bell applies his interest convergence theory very narrowly to justify his position that *Brown v. Board of Education*<sup>24</sup> only held that racially separate public schools were unconstitutional because the primary beneficiaries were whites.<sup>25</sup> A challenge to racially segregated public school was not a revolutionary idea because people rejected segregation in the public schools since the 1840's<sup>26</sup> without success.<sup>27</sup> It was during the 1840's that the Supreme Court of Massachusetts held that it was permissible under state law for the city of Boston to establish separate but equal public schools for African American schoolchildren. Even if the exclusive motive of the Supreme Court and the federal executive branch in *Brown* in seeking to end public school segregation was to achieve a strategic military or propaganda victory in the Cold War was intended to benefit whites only, Bell's narrow interest convergence theory does not apply here because African Americans were more than mere incidental beneficiary of the end of state sponsored racial segregation. Even when interest convergence is intended to benefit the white majority it is not to be regarded as an inherently negative situation if the primary effect of a focus on the white middle class public policy actually substantially advances the anti-subordination goal of African American in ending legally required racial segregation in public schools and elsewhere. It is conceded in the *Brown* decision that prohibiting racial segregation may have granted to the United States a symbolic victory in the Cold War with communist nations.<sup>28</sup> However, the practical effect of the *Brown* anti-segregation policy served as a collaborative foundation for ending state imposed racial segregation in public places.<sup>29</sup>

Professor Bell's interest convergence theory is not limited to the issue of race and the law. Under Professor Bell's characterization of the role of interest convergence, it could be argued that interest convergence is nominally implicated whenever the primary purpose of any governmental policy is to advance the agenda of the white middle class. Interest

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<sup>24</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>25</sup> Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005).

<sup>26</sup> *Roberts v. City of Boston*, 59 Mass 198 (Mass. 1849).

<sup>27</sup> Bell, *supra* note 26.

<sup>28</sup> *Id.* at 1056.

<sup>29</sup> *Id.*

convergence motivated by a focus on what is good for the white middle class, which has the actual effect of substantially advancing social justice and racial equality historically sought by subordinated groups, and their collaborators should be embraced and not considered as inherently evil. Some scholars believe that the narrow self-interest convergence theory is implicated in series of issues including animal rights and the war on terror.<sup>30</sup> Scholars have utilized the narrow self-interest interest convergence theory to help explain why the separation of church and state concept typically provides only minimal benefits to groups underrepresented in the political process.<sup>31</sup> Often under represented, religious groups benefit only when their interest happened to converge or correspond with the interest of an influential religious group.<sup>32</sup> Under the narrow view of the interest convergence theory, the primary benefit of separation of church and state accrues to Christianity as a recognized leading religion in America.<sup>33</sup>

Furthermore, with respect to workplace diversity, the narrow self-interest convergence view holds that the government will require employers to hire nonwhites only when doing so converges with the institutional interests of the employer.<sup>34</sup> It is alleged that when hiring, racial diversity is pursued when the employer seeks institutional legitimacy while accommodating the preferences of a historically racially homogeneous workplace environment.<sup>35</sup> In some instances an employer may reasonably conclude that a racially homogenous American work force may make it less profitable in the global or local market place. An employer may also allege that work force diversity serves a compelling interest because it has no other effective way to remain competitive in a global marketplace. By analogy supporters of educational diversity in the field of higher education may reasonably contend that academic freedom supports intellectual diversity as a compelling interest. Under the rationale of *Grutter v. Bollinger*,<sup>36</sup> intellectual diversity is narrowly tailored because it is a very effective way to teach students as future leaders in business and government, as well as employees and employers, how to compete in an international market place of ideas while minimizing domestic unrest and international armed conflict.

Professor Bell's narrow scope of the interest convergence theory is extremely controversial in the context of advancing diversity in higher

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<sup>30</sup> Justin Driver, Rethinking the Interest Convergence Thesis, *supra* note 18 at 155.

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

<sup>32</sup> *Id.*

<sup>33</sup> See Stephan M. Feldman, Principle, History, and Power: The Limits of the First Amendment Religion Clauses, 81 IOWA L. REV. 833, 871–72 (1996).

<sup>34</sup> See Devon W. Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 YALE L.J. 1757, 1764 (2003).

<sup>35</sup> *Id.*

<sup>36</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

education because of the nature of the benefit sought. Since the benefit of racial diversity in higher education is recognized constitutionally as a compelling shared goal of blacks, other racial minorities, and whites; Professor Bell's narrow view of interest convergence is so problematic that it invites discussion. When important shared goals of whites and other racial minorities including blacks converge in the fight for the benefits of intellectual diversity in higher education, a more expansive collaborative view of interest convergence is required than the one articulated by Professor Bell.

Under a collaborative view of the interest convergence theory, it is important to discuss whether a convergence of interest between historically subordinate racial minorities and the white power structure actually has the effect of advancing a compelling or important educational diversity goal sought by blacks and other racial minorities. Since blacks and other traditionally underrepresented minorities groups have aggressively sought to protect the alleged benefit of viewpoint diversity in higher education, it would lack congruence to conclude to that the awarding of diversity in higher education is experienced by blacks as only an incidental benefit. A predominantly white university developing or asserting a true interest in intellectual diversity as a tool of academic freedom provides a welcomed opportunity to discuss issues related to law and equality. Intellectual diversity, even if inspired primarily by an academic freedom movement which collaboratively converges with a longstanding black goal of achieving racial diversity in higher education, does not render the black racial diversity goal as an inherently inferior and incidental factor.

The diversity rationale for affirmative action is unnecessarily creatively complex because it allegedly does not compensate beneficiaries for past racial discrimination experienced in society.<sup>37</sup> Nevertheless, William G. Bowen and Derek Bok in *The Shape of the River* conclusion regarding the benefits generated by expanding diversity in American colleges and universities, has a practical individual compensatory effect for a beneficiary of affirmative action where race is a factor in the admission process.<sup>38</sup> Diversity black male graduates careers are greatly enhanced because race conscious inspired affirmative action provided them with an opportunity to graduate from prestigious colleges and universities. This will allow them to generally earn double the amount of money earned by black males with Bachelor of Arts degrees from less prestigious colleges during a similar

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<sup>37</sup> Tung Yin, *Is "Diversity" Diverse Enough?* 21 ASIAN AM. L.J. 89, 93 (2014).

<sup>38</sup> *Id.* At 94 (Citing William G. Bowen & Derek Bok, *The Shape Of The River: Long-Term Consequences Of Considering Race In College And University Admissions* 281-82 (1998)).

twenty year period.<sup>39</sup> Secondly, Bowen and Bok contend the race conscious affirmative action which enhanced the career results for these black male graduates also benefitted society because diversity graduates from prestigious colleges are more likely than their similarly situated white peers to assume leadership roles in civic and community groups.<sup>40</sup> Some supporters of intellectual diversity with a race factor think communities of color will benefit since the ethnic or racial minority diversity affirmative action graduates is more likely than others to serve communities of color as doctors, lawyers, and as professionals in the global market place.<sup>41</sup> Finally, Bowen and Bok conclude that a racial diverse student body at the college level benefits non-minority students, because race matters and white students need at a minimum academic classroom realization of the attitudes, views, and circumstances confronting most racial minorities.<sup>42</sup>

Professor Bell's white self-interest diversity theory is very problematic for Twenty First Century universities seeking to promote either viewpoint or racial diversity. From a historical perspective it has been assumed by one commentator that the "Interest- Convergence principally contemplates what will be, rather than what has been."<sup>43</sup> Professor Bell's racial justice Prophet Dr. W.E.B. Du Bois was too pragmatic to reject diversity because it might have been motivated primarily by white self-interest if the goal of achieving racial equality for blacks was actually advanced.<sup>44</sup> In the field of higher education it is very plausible that Dr. Du Bois would accept a viewpoint diversity plan that created a more diverse collaborative education for all college students.<sup>45</sup>

Since Dr. Du Bois was a pragmatic intellectual he would support a college diversity plan that provided students of color with a wider networking opportunity in their future.<sup>46</sup> One of the benefits of viewpoint diversity for all college students is that it may stimulate mutual respect for all races while serving as a deterrence to future acts of racism. A progressive collaborative view of the interest convergence in the context of higher education and

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<sup>39</sup> Id.

<sup>40</sup> Id. at 94-95 (citing BOWEN & BOK, *supra* note 38, at 258).

<sup>41</sup> Id. at 95 (citing *See, e.g.*, Terrance Sandalow, *Minority Preferences in Law School Admissions*, in *Constitutional Government In America* 277, 282-83 (1980)).

<sup>42</sup> Id. (citing Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 686 (1975)).

<sup>43</sup> Driver, *Rethinking the Interest Convergence Thesis*, *supra* note 14 at 149.

<sup>44</sup> Derrick Bell, *Racism As The Ultimate Deception*, 86 N.C.L.REV. 621, 629 (2007-2008).

<sup>45</sup> See id. (citing W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?* 4 J. NEGRO EDUC. 328, 335 (1935)).

<sup>46</sup> See id.

diversity may recognize the color-line as a continuing major problem<sup>47</sup> but offer viewpoint diversity as a tool to help promote racial and cross cultural understanding to address issues of racial and economic inequality. One of the major functions of viewpoint diversity under the rationale of *Grutter v. Bollinger*<sup>48</sup> is to advance a multicultural understanding in an increasingly diverse workforce and society. Supporter of diversity in higher education may agree with the declaration made by the singer Ray Charles that “understanding is the best thing in the world.”<sup>49</sup>

Since the battle to achieve viewpoint diversity in higher education represents shared goals in the political process promoted by white, blacks, and other racial minorities in achieving racial justice, it is unfair to treat interest convergence as an exclusive tool of white self-interest.<sup>50</sup> Professor Bell plausibly suggests that once interest convergence moves beyond the judicial process, interest convergence has the potential to develop into a valuable collaborative blueprint.<sup>51</sup> Professor Bell suggests that defenders of the University of Michigan’s diversity plan implemented the interest convergence theory to serve the University’s white self-interest perhaps at the request and expense of its black supporters.<sup>52</sup> While connecting the University of Michigan Law School diversity approach to his interest convergence theory Professor Bell said, “Using the interest convergence model in planning and implementing civil rights strategies may mean relying less on courts to advance racial goals. But, as individuals and groups, we have to challenge the assumptions of white dominance and the presumption of black incompetence.”<sup>53</sup> A collaborative approach to interest convergence based on racial equality and respect for the individual inherently rejects the assumption of white superiority.

The irony of Professor Bell’s traditional interest convergence theory in the higher education diversity battle is that it is hard to support the white self-interest theory as the exclusive justification for viewpoint diversity when the diversity program has the potential of denying a white applicant’s admission to either the highly respected university of Michigan Law School or the greatly regarded University of Texas undergraduate school. I believe it is appropriate to contend that UT is dedicated to keeping its diversity goals alive because it reasonably believes that the best interest of all members of

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<sup>47</sup> Id. (citing W.E. BURGHARDT DUBOIS, *The Souls of Black Folk* 23 (1903)).

<sup>48</sup> 539 U.S. 306 (2003).

<sup>49</sup> Bell, *Racism as the Ultimate Deception*, supra note 44 (citing Ray Charles, *Understanding*, on PORTRAIT OF RAY (ABC Records 1968)).

<sup>50</sup> Contra, Derrick A. Bell, Jr., *The Unintended Lessons In Brown v. Board of Education*, N.Y.L. Sch. L. Rev. 1053, 1066, (2004–2005).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

society is best served by the benefits of viewpoint diversity.

### III. THE IMPLICATIONS OF FISHER V. UNIVERSITY OF TEXAS FOR THE COLLABORATIVE INTEREST CONVERGENCE THEORY AND THE VIEWPOINT DIVERSITY DEBATE

UT takes into account race as one of a number of elements in its undergraduate admissions practice.<sup>54</sup> Race is not given a mathematical assessment for every single candidate, nevertheless the University has devoted resources to expanding racial minority registration on campus. UT identifies its objective as achieving a critical mass of minority students. In *Fisher v. University of Texas*, a Caucasian plaintiff, sued the University after her submission was denied. She claims that the University's treatment of race in its admission practice is prohibited by the Equal Protection Clause of the Fourteenth Amendment. The parties requested the Court to decide whether the judgment of the lower courts below properly applied the Supreme Court's decisions construing the Equal Protection Clause of the Fourteenth Amendment under the rationale of *Grutter v. Bollinger*.<sup>55</sup> The Court held that because the Court of Appeals fail to hold the University to the demanding burden of strict scrutiny established in *Grutter*, its ruling affirming the District Court's award of summary judgment to the University was improper. That verdict was vacated, and the case was remanded for additional proceedings.<sup>56</sup>

After the Court's decisions in *Grutter v. Bollinger*, and *Gratz v. Bollinger*, UT implemented, the 2004 program in which the University utilized an explicit consideration of race. The 2004 program was challenged in *Fisher*.<sup>57</sup> In *Grutter*, the Court approved the use of race as one of many "plus factors" in the admissions process that measured the complete individual impact of each candidate.<sup>58</sup> In *Gratz*, by comparison, the Court concluded Michigan's undergraduate registration process was an unconstitutional admissions program, because it mechanically gave points to candidates from specific racial groups.<sup>59</sup> UT's plan to implement race-conscious admissions was announced in a June 2004 document called *Proposal to Consider Race and Ethnicity in Admissions* (Proposal).<sup>60</sup> The

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<sup>54</sup> *Fisher v. University of Texas*, 133 S.Ct. 2411, 2415 (2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2416.

<sup>58</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>59</sup> *Gratz v. Bollinger*, 539 U.S. 204 (2003).

<sup>60</sup> *Fisher v. University of Texas*, 133 S.Ct. 2416 (2013).

Proposal determined that the University did not have a “critical mass” of minority students, and that in order to cure the shortage it was essential to use race as an explicit factor in the undergraduate admissions process. To execute the Proposal UT included a student's race as a factor in the (Personal Achievement Index) PAI score, starting with candidates in the fall of 2004. The University requests students to categorize themselves from among five predefined racial groups on the application.<sup>61</sup> While race is not assigned a direct numerical value it is acknowledged that race is a significant or important factor in the admission process.<sup>62</sup>

A racial classification by a public university must meet a strict scrutiny standard because decisions considering race must be narrowly tailored to accomplish a compelling governmental interest.<sup>63</sup> A compelling interest that might justify a utilization of race is the educational advantages that are naturally generated by a diverse student body.<sup>64</sup> Remediating historical discrimination is not a compelling interest, since it is incompatible with a university's expansive undertaking in the enterprise of education.<sup>65</sup> Unlike a university, the Supreme Court contends, the judicial, legislative, or administrative governmental entities have the necessary expertise and resources to determine whether racial classification is needed to remedy past societal discrimination.<sup>66</sup>

A diverse student body is intended to promote independent viewpoints in spite of a race conscious admission procedure.<sup>67</sup> It is reasonable to foresee that a university's viewpoint diversity goals will promote inclusive classroom dialogue when a critical mass of students with nontraditional backgrounds do not experience unreasonable racial or social isolation.<sup>68</sup> A primary effect of expanding a university's goal in developing diversity is the lessening of social economic status isolation and other status stereotypes.<sup>69</sup> The educational operation of a university is granted an important degree of deference under the First Amendment. Because a university is a creative intellectual enterprise its determination about ‘who may be admitted to study’ should be given a great deal of deference.<sup>70</sup> Justice Powell's characterization of the benefits of university level diversity as a

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<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id. At 2417.

<sup>64</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 307-309 (1978)

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> *Fisher v. University of Texas*, 133 S.Ct. at 2418 (2013).

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id. (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)).

complex permissible goal is very accurate. According to Justice Powell viewpoint diversity is not limited to unsophisticated attempts at racial diversity, in which a quantified percentage of the student body is promised to designated racial groups.<sup>71</sup> A diversity goal which promotes a compelling state interest involves a more extensive grouping of experiences than racial or ethnic origin.<sup>72</sup>

The recent educational diversity opinion in *Fisher v. University of Texas* requires universities to articulate a compelling rationale to justify their viewpoint diversity goals.<sup>73</sup> For example, a university as an academic institution could contend that the benefits of viewpoint diversity are compelling because like free speech intellectual diversity serves the societal value of promoting the search for knowledge and truth in the market place of ideas while promoting individual fulfillment on issues of race and social justice.<sup>74</sup> When free speech and intellectual diversity goals are treated as compelling academic endeavors enhanced by First Amendment free speech and freedom of association considerations a university's diversity procedure is less likely to remind a court of a racial quota.

According to certain commentators, *Fisher* is very noteworthy because of what it did not do rather than for what it actually did.<sup>75</sup> The Court refused to invalidate UT's holistic admissions program, and rejected the temptation to overrule *Grutter* and it did not officially, modify the constitutional benchmarks declared in *Grutter*, did not rule that UT's admissions procedure flunked the narrowly tailoring test, took no steps indicate shortcomings in the UT diversity plan.<sup>76</sup> One popular interpretation of *Fisher* by the supporters of diversity, is that it did not create any new law, but was a simply black letter restatement of *Bakke*, *Grutter*, and *Gratz v. Bollinger*. "Upon a closer reading, *Fisher* is a departure from settled law in a number of critical respects."<sup>77</sup> The Supreme Court's decision in *Fisher* pretends that it is simply instructing the Fifth Circuit that its utilization of the law invented in *Grutter* was wrong.<sup>78</sup> In spite of this assertion, the Court's unforeseen judgment abandons the standard approved in *Grutter* while inventing a different legal standard.<sup>79</sup> Some scholars contend the greatest

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<sup>71</sup> Id.

<sup>72</sup> Id. (citing *Bakke*, 438 U.S. at 315 separate opinion).

<sup>73</sup> Tung Yin, Is "Diversity" Diverse Enough? supra note 37 at 38.

<sup>74</sup> See Emerson, *The System Freedom of Expression* (1970).

<sup>75</sup> John A. Powell, Stephen Menendian, *Fisher V. Texas: The Limits of Exhaustion And The Future Of Race-Conscious University Admissions*, 47 U. MICH. J.L. REFORM 899, 903 (2014).

<sup>76</sup> Id.

<sup>77</sup> Id. at 904.

<sup>78</sup> Id. at 905.

<sup>79</sup> Id.

problem with *Fisher* is that the Court's strong suggestion that a public university must run through all practical race-neutral options in order to justify the educational diversity benefit under the narrowly tailoring strict scrutiny test articulated in *Grutter*.<sup>80</sup> Justice Kennedy's statement in *Fisher* that all practical race-neutral options be given serious deliberation in order to meet the strict scrutiny test invented in *Grutter*, symbolizes a problematic retreat from *Grutter*.<sup>81</sup> *Fisher* looks as if it has substituted *Grutter's* demand of a good faith deliberation of race-neutral opportunities with the additional demand that all practical race neutral options be given serious consideration.<sup>82</sup> It is alleged that the *Fisher* opinion places *Grutter's* educational benefits of diversity rationale at risk because "the Court shifts responsibility for assessing the viability of workable race-neutral alternatives from the university to the courts."<sup>83</sup> In *Grutter*, when the University of Michigan alleged that it was using race as a single factor among many other factors to promote the educational benefits of diversity, the Court allowed the university to survive the narrow tailoring test. The Court presumed the university was acting in "good faith" in evaluating the lack of practical race neutral options to achieve its academic mission.<sup>84</sup>

On remand in *Fisher v. University of Texas*<sup>85</sup> the Fifth Circuit acknowledged that the Supreme Court's decision in *Grutter* mandates the application of strict scrutiny as to UT's diversity admissions procedure because it utilized race as a factor. After discussing Justice Kennedy's dissent in *Grutter*, the Supreme Court disapproved of both the federal district court's and the Fifth Circuit's judicial approval of the race conscious procedure utilized by UT Austin to promote diversity because UT procedures did not meet the narrowly tailored requirements needed to seek a diverse student body. The Fifth Circuit's charge on remand was to give exacting scrutiny to UT's diversity endeavors.<sup>86</sup> On remand the Fifth Circuit took a less deferential approach to UT's diversity goals by applying a form of strict scrutiny that Professor Vinay Harpalani has described as a "unique contribution to diversity" requirement.<sup>87</sup> According to Professor Harpalani, the goal of the unique contribution to diversity requirement allows the court to reasonably "assess the underlying issue raised by Fisher-whether a race conscious policy is necessary to attain the educational benefits of diversity

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<sup>80</sup> Id. at 908.

<sup>81</sup> Powell & Menendian, *Fisher V. Texas: The Limits of Exhaustion and the Future of Race-Conscious University Admissions*, *supra* note 75 at 908–09.

<sup>82</sup> Id. at 909.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> *Fisher v University of Texas*, 758 F.3d 633, 642 (5<sup>th</sup> Cir. 2014).

<sup>86</sup> Id. at 642.

<sup>87</sup> Vinay Harpalani, 15 U. PA. J. CONST. L. 463, 523 (2012-2013).

when a race-neutral policy is in place and has increased diversity.”<sup>88</sup> The choice to chase the educational benefits created by student body diversity that a University considers important to its undertaking is, for all practical purpose an academic judgment to which a degree of academic freedom deference from the judicial branch is appropriate under *Grutter*.<sup>89</sup> Without trying to decide whether a critical mass exists at UT the *unique contribution to diversity analysis* converges on whether UT’s race-conscious admission policy reasonably adds distinctively to the educational benefits of viewpoint diversity expressed in *Grutter*.<sup>90</sup>

The deference to diversity rationale articulated by the Fifth Circuit on remand indicates that Professor Bell interest convergence theory might be a little insensitive to the old fashion art of horse trading.<sup>91</sup> In my view collaborative interest convergence is analogous to horse trading. Collaborative interest convergence in the academic policy making framework is similar to the legislative setting because both politicians and academicians after reasonable opportunity to debate on an issue are comfortable compromising to achieve their policy goals.<sup>92</sup> The Fifth Circuit on remand in *Fisher* may have allowed diversity to live because of its implicit judicial appreciation of collaborative interest convergence as involving the art of conciliation.<sup>93</sup> It appears that the Fifth implicitly rejected Professor Bell’s white self-interest convergence theory because it recognized that the UT diversity plan represented a collaborative cooperation even though it was an immediate burden to the white self-interest of those applicants who unlike *Fisher* who might have been admitted to UT but for the race conscious affirmative action plan.<sup>94</sup> Under the rationale of both *Grutter* and *Fisher* a court is required to confirm that a rationale principled explanation exists for the academic decision to pursue the benefits of diversity.<sup>95</sup> *Fisher* notes that, “Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes.”<sup>96</sup>

In 1997, after the *Hopwood v. Texas*<sup>97</sup> opinion in which the court

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<sup>88</sup> *Id.*

<sup>89</sup> *Fisher v University of Texas*, 758 F.3d at 642 (citing *Fisher*, 133 S.Ct. at 2419 (quoting *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325) (internal quotation marks omitted)).

<sup>90</sup> Harpalani, *supra* note 87.

<sup>91</sup> Cynthia Lee, Cultural Convergence: Interest Convergence Theory Meets The Cultural Defense, 49 ARIZ. L. REV. 911, 925 (2007).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Fisher v University of Texas*, 758 F.3d 633, 642 (5th Cir. 2014).

<sup>96</sup> *Id.* at 643.

<sup>97</sup> *Id.* at 645 (citing 78 F.3d 932 (5th Cir.1996), *abrogated by Grutter*, 539 U.S. at 322, 123 S.Ct. 2325).

determined that race could not be used as a factor in law school admissions, UT confronted a difficult situation: realizing holistic diversity while incorporating racial diversity which it deemed important to its academic undertaking but not facially taking into account race as one of several factors of diversity. Prohibited from utilizing race as a factor after *Hopwood*, UT implemented the Top Ten Percent Plan, which provides Texas inhabitants finishing in the top ten percent of their graduating high school class an option to attend any public university in Texas.<sup>98</sup> The Top Ten Percent process had the ability to cover every freshman seat at UT, however, by itself it was not an acceptable method of promoting the holistic diversity anticipated by *Bakke*.<sup>99</sup> The Top Ten Percent plan was flawed because it did not include superior-performing, multi-talented students, minority or non-minority.<sup>100</sup> Because it focused exclusively on class rank The Top Ten Percent Plan places an undue burden on viewpoint diversity and academic integrity because it excluded huge numbers of extremely qualified minority and non-minority candidates.<sup>101</sup> The problem with the Texas Top Texas Top Percent Plan was addressed by the Court in *Grutter*, when it said “even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”<sup>102</sup>

The Fifth Circuit rejected *Fisher’s* contention that socioeconomic disadvantage is an appropriate race-neutral alternative procedure under a holistic review because race still matters even when it should not be relevant at all.<sup>103</sup> “*Bakke* accepts that skin color matters—it disadvantages and ought not to be relevant but it is. We are ill-equipped to sort out race, class, and socioeconomic structures, and *Bakke* did not undertake to do so.”<sup>104</sup> After refusing to “conclude that skin color is no longer an index of prejudice” the Fifth Circuit upheld the UT diversity plan under the Supreme Court’s *Fisher* strict scrutiny standard of no other practical option<sup>105</sup> rather than *Fisher’s* unacceptable Fifth Circuit’s good faith strict scrutiny light approach.<sup>106</sup>

While meeting the demanding, narrow tailoring requirement under the equal protection principle UT proved that a race-conscious holistic review remained indispensable to the Top Ten Percent plan because it allows UT to

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<sup>98</sup> *Id.* at 645.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Fisher v University of Texas*, 758 F.3d 633, 645 (5th Cir. 2014).

<sup>102</sup> *Id.* (quoting *Grutter*, 539 U.S. at 340).

<sup>103</sup> *Id.* at 656-57.

<sup>104</sup> *Id.* at 657.

<sup>105</sup> *Id.*

<sup>106</sup> Harpalani, *supra* note 87 at 534.

support a facially-neutral process while seeking to enrich viewpoint diversity as an academic undertaking.<sup>107</sup> *Grutter* reiterated the belief that growing up in a specific region, possessing certain professional encounters and the unique experience of being a racial minority in an American society where race still matters will probably impact a person's viewpoint.<sup>108</sup> The Fifth Circuit was convinced on remand that to block UT's requested narrow use of race as a factor as it pursues holistic diversity, would unnecessarily impair the richness of the educational involvement permitted under the basic principles of *Bakke* and *Grutter*.<sup>109</sup>

The diversity skill sets created by admitting candidates from majority-white and majority-minority schools supports the Supreme Court's decision in *Fisher* that evenhanded educational diversity is deeper than skin color.<sup>110</sup> "To conclude otherwise is to narrow its focus to a tally of skin colors produced in defiance of Justice Kennedy's opinion for the Court which eschewed the narrow metric of numbers and turned the focus upon individuals. This powerful charge does not deny the relevance of race."<sup>111</sup> The Fifth Circuit decided that because race still matters it may be utilized as a single narrowly tailored compelling element to assist UT in its task of admitting "students with a range of skills, experiences, and performances" that promote viewpoint diversity on campus.<sup>112</sup>

Although many believe diversity produces significant benefits for students, colleges as well as society, the viewpoint diversity rationale has been subjected to major criticism.<sup>113</sup> It has been accused of not actually developing racial justice for students of color, but rather benefiting white colleges by legitimizing admissions policies that support white privilege while creating an atmosphere that cause in fighting among minority groups.<sup>114</sup> Because the Supreme Court in *Grutter* and *Gratz* approved diversity as a compelling state interest but nevertheless refused to recognize the remediation of societal discrimination as also compelling Professor Derrick Bell said an exclusive concentration on diversity permits courts as well as policymakers to evade truths regarding past and continuing racial discrimination.<sup>115</sup> According to Professor Bell, rather than receive these self-evident truths as validation for a truly remedial interest in affirmative action

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<sup>107</sup> *Fisher v University of Texas*, 758 F.3d at 654.

<sup>108</sup> *Id.* at 659.

<sup>109</sup> *Id.* at 659–60.

<sup>110</sup> *Id.* at 660.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Osamudia R. James, *White Like Me: The Negative Impact of the Diversity*

*Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 450 (2014).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

that would assist racial minorities, policymakers advertise, and some courts support, the viewpoint that diversity is a compelling interest primarily because of diversity's advantage for Whites.<sup>116</sup>

Professor Bell's interest convergence attack on the diversity rationale is potentially self-destructive because it undermines the collaborative interest convergence efforts among blacks and other minority groups since it unreasonably presumes that whites are generally not capable of championing social and racial justice without being preoccupied with white self-interest. An interest convergence theory that places undue emphasis on the need to protect white self interest in the viewpoint diversity debate is pragmatically unacceptable to groups like African Americans, Mexican Americans, and diversity friendly whites. Whites like members of other races may endorse diversity, because they simply want to end the lack of viewpoint diversity at institutions of higher education. Professor Bell's interest convergence theory promotes an outcome that "is antithetical to genuine social justice movements, which should encourage"<sup>117</sup> all groups to support one another in order to create a better society even if means sacrificing their self-interest. I believe that championing a race neutral diversity percentage plan has the potential to be accepted under a collaborative interest convergence theory because it will inspire larger and more operational viewpoint diversity than a diversity plan that is explicitly race conscious.

When the United States Supreme Court in the *Fisher v. University of Texas* opinion explained the Texas's Top Ten Percent Law as a race-neutral process for realizing the viewpoint diversity, it engaged in collaborative interest convergence in order to save the diversity goals articulated in its *Grutter* decision.<sup>118</sup> Collaborative interest convergence allowed the Supreme Court in *Fisher* to judicially label the Texas Top Ten Percent as presumptively valid race-neutral social legislation under the Equal Protection Clause rational basis standard. This is due to the Texas plan's conceivable rational relationship with UT's articulated academic enhancement viewpoint diversity goal.<sup>119</sup> Unlike a race-conscious percentage plan promoting viewpoint diversity a race neutral plan does not have to meet the strict scrutiny Equal Protection Clause diversity standard articulated in *Grutter*.<sup>120</sup>

The Supreme Court's characterization of the Top Ten Percent Plan in *Fisher* as race neutral in spite of Justice Ginsburg's solo dissenting position

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<sup>116</sup> Id. (citing Derrick Bell, Diversity's Distractions, 103 COLUM. L. REV. 1622, 1625 (2003)).

<sup>117</sup> See id. at 453.

<sup>118</sup> Leslie Yalof Garfield's, *The Paradox of Race-Conscious Labels*, 79 BROOK. L. REV. 1523, (2014).

<sup>119</sup> Id.

<sup>120</sup> Id.

that the plan is race conscious signals an implied judicially collaborative interest convergence that represents a type of judicial consensus that may not be available under a race-conscious percentage plan.<sup>121</sup> A majority of the Court now appears ready to support a race-neutral Texas percentage plan under the rational basis standard which signals a collaborative interest convergence and a continuing judicial acknowledgement that viewpoint diversity among college students will probably increase the understanding our society needs in order to bring a quicker end to racial and social isolation that often leads to discrimination.<sup>122</sup> Viewpoint diversity shows great potential for social healing because in a civil society change “comes from a confluence of personal, cultural, and legal transformation,”<sup>123</sup>

On June 29, 2015, the United States Supreme Court granted a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to rehear the Fisher case.<sup>124</sup> The family of Heman Marion Sweatt who was not admitted to the University Of Texas Law School because he was “a negro” has filed an up-to-date brief endorsing UT Austin's existing admission's policies.<sup>125</sup> Sweatt's family backs UT in its extended legal encounter with Abigail Fisher, who maintains her 2008 denial of admission by the state's flagship university was race based discrimination.<sup>126</sup> The Fisher case will be argued before the Supreme Court for the second time in December of 2015 and has far-reaching implications regarding how universities in America may treat race in the admissions process.<sup>127</sup> “The Sweatt family's brief, which is one of many to have been filed ahead of December's oral arguments, says that UT considers race the right way: as only one factor.”<sup>128</sup> However, according to the brief filed with the Supreme Court by Fisher's lawyers’, “By holding that UT discriminated against Ms. Fisher and reversing the judgment below, the Court will not only vindicate her equal-protection rights, it will remind universities that the use of race in admissions must be a last resort -- not the rule”<sup>129</sup>

## CONCLUSION

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<sup>121</sup> Id. at 1524.

<sup>122</sup> Id.

<sup>123</sup> Dagmar Rita Myslinska, *Racist Racism: Complicating Whiteness through the Privilege and Discrimination of Westerners in Japan*, 83 UMKC L. REV. 1, 12 (2014).

<sup>124</sup> Fisher v. University of Texas, 135 S.Ct. 2888 (2015)

<sup>125</sup> Benjamin Wermund, *A Brief Rooted In History Filed In UT Admissions Case*, HOUS. CHRON., Oct. 27, 2015, available at 2015 WLNR 31907692

<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

This article has reasoned that Professor Bell's interest convergence theory in the context of viewpoint diversity in higher education is probably too restrictive because it implies that judicial transformation in rejecting racial discrimination is only inspired by white self-interest.<sup>130</sup> If the interest conversion theory represents the concept that blacks will only achieve an educational diversity viewpoint benefit when it serves exclusively white self-interest, it is not likely to receive any deference or recognition by the Court in *Fisher*. However, *Fisher* suggests a race neutral percentage plan designed to advance the viewpoint of diversity in Texas colleges, represents a legal and cultural transformation that is consistent with the Confucianism concept of respect for individual dignity.<sup>131</sup> A college viewpoint diversity plan that does not discriminate on the basis of race, is a feature of Confucianism has won general acceptance in Texas. A race neutral viewpoint of the diversity percentage plan, motivated by a collaborative interest convergence for the twin purposes of immediate academic enhancement and long term community progress, is a characteristic of Confucianism<sup>132</sup> which was implicitly recognized by the Supreme Court in *Fisher*.<sup>133</sup>

Professor Bell's interest convergence attack on the diversity rationale is potentially self-destructive because it undermines the collaborative interest convergence efforts among blacks and minority groups since it unreasonably presumes that whites are generally not capable of championing social and racial justice without being preoccupied with white self-interest. An interest convergence theory that places undue emphasis on the need to protect white self interest in the viewpoint diversity debate is pragmatically unacceptable to groups such as African Americans, Mexican Americans, and diversity friendly whites. Whites like members of other races may endorse diversity, because they simply want to end the lack of viewpoint diversity at institutions of higher education. Although Professor Bell's interest convergence theory may have intellectual appeal, it may unfairly discredit the goals of those who truly believe that a society benefits from intellectual diversity.

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<sup>130</sup> Myslinska, *supra* note 123 at 112

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Fisher v. University of Texas*, 133 S.Ct. 2415–16 (2013).