**“Petitioner’s final argument is that ‘there are numerous other available race-neutral means of achieving’ the University’s compelling interest. . . . [P]etitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. . . . Percentage plans are ‘adopted with racially segregated neighborhoods and schools front and center stage.’ *Fisher I* (Ginsburg, J., dissenting). ‘It is race consciousness, not blindness to race, that drives such plans.’ *Ibid.*”⸺Justice KENNEDY**

**“It is important to understand what is and what is not at stake in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. . . . *What is at stake* is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve “the educational benefits of diversity,” without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives.”⸺Justice ALITO, dissenting**

**Fisher v. University of Texas at Austin**

579 U.S. \_\_\_, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016)

■Justice **Kennedy** delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

**I**

The University . . . relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called “Academic Index” (or AI), which it calculated by combining an applicant’s SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See Hopwood v. Texas (5th Cir. 1996)*.*

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant’s AI and his or her “Personal Achievement Index” (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant’s essays, leadership and work experience, extracurricular activities, community service, and other “special characteristics” that might give the admissions committee insight into a student’s background. Consistent with *Hopwood,* race was not a consideration in calculating an applicant’s AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H.B. 588, commonly known as the Top Ten Percent Law. [It] guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant’s AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of Grutter v. Bollinger and Gratz v. Bollinger*.* In *Gratz,* this Court struck down the University of Michigan’s undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. In *Grutter,* however, the Court upheld the University of Michigan Law School’s system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate’s application. In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*’s categorical prohibition.

In the wake of *Grutter,* the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide “the educational benefits of a diverse student body . . . to all of the University’s undergraduate students.” The University concluded that its admissions policy was not providing these benefits.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of “the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University.” After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University’s new admissions policy was a direct result of *Grutter,* it is not identical to the policy this Court approved in that case. Instead, consistent with the State’s legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. . . .

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. . . . Therefore, although admissions officers can consider race as a positive feature of a minority student’s application, there is no dispute that race is but a “factor of a factor of a factor” in the holistic-review calculus. . . .

Petitioner Abigail Fisher applied for admission to the University’s 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner’s application was rejected.

Petitioner then filed suit alleging that the University’s consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University’s favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, Fisher v. University of Tex. at Austin(2013) (*Fisher I*), because it had applied an overly deferential “good-faith” standard in assessing the constitutionality of the University’s program. The Court remanded the case for the Court of Appeals to assess the parties’ claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University’s favor. This Court granted certiorari for a second time, and now affirms.

**II. . . .**

**III. . . .**

**IV**

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a “critical mass.” Without a clearer sense of what the University’s ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University’s admissions program is narrowly tailored to that goal.

As this Court’s cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity.” *Fisher I*; see also *Grutter.* As this Court has said, enrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”

Increasing minority enrollment may be instrumental to these educational benefits, but it is not . . . a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 “Proposal to Consider Race and Ethnicity in Admissions,” the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “ ‘promot[ion of] cross-racial understanding,’ ” the preparation of a student body “ ‘for an increasingly diverse workforce and society,’ ” and the “ ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’ ” Later in the proposal, the University explains that it strives to provide an “academic environment” that offers a “robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” All of these objectives, as a general matter, mirror the “compelling interest” this Court has approved in its prior cases.

The University has provided in addition a “reasoned, principled explanation” for its decision to pursue these goals. *Fisher I.* The University’s 39–page proposal was written following a year-long study, which concluded that “[t]he use of race-neutral policies and programs ha[d] not been successful” in “provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society.” . . .

Second, petitioner argues that the University has no need to consider race because it had already “achieved critical mass” by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner’s application, the University could not be faulted on this score. Before changing its policy the University conducted “months of study and deliberation, including retreats, interviews, [and] review of data,” and concluded that “[t]he use of race-neutral policies and programs ha[d] not been successful in achieving” sufficient racial diversity at the University. . . .

[T]he demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African–American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African–American students enrolled in them, and 27 percent had only one African–American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. . . .

Third, petitioner argues that considering race was not necessary because such consideration has had only a “ ‘minimal impact’ in advancing the [University’s] compelling interest.” Again, the record does not support this assertion. [I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner’s final argument is that “there are numerous other available race-neutral means of achieving” the University’s compelling interest. A review of the record reveals, however, that, at the time of petitioner’s application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African–American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Perhaps more significantly, in the wake of *Hopwood,* the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University’s admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court’s precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*.

Petitioner’s final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University’s students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. . . . Percentage plans are “adopted with racially segregated neighborhoods and schools front and center stage.” *Fisher I* (Ginsburg, J., dissenting). “It is race consciousness, not blindness to race, that drives such plans.” *Ibid.* Consequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. . . .

[C]lass rank is a single metric, and . . . it will capture certain types of people and miss others. [P]rivileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it. . . .

In short, none of petitioner’s suggested alternatives . . . have been shown to be “available” and “workable” means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I*. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.

\* \* \*

A university is in large part defined by those intangible “qualities which are incapable of objective measurement but which make for greatness.” Sweatt v. Painter(1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as “laboratories for experimentation.” United States v. Lopez (1995) (Kennedy, J., concurring); see also New State Ice Co. v. Liebmann (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

■Justice **Kagan** took no part in the consideration or decision of this case.

■Justice **Thomas**, dissenting.

I join Justice Alito’s dissent. . . . I write separately to reaffirm that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” *Fisher I* (Thomas, J., concurring). “The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.” The Court was wrong to hold otherwise in *Grutter*. I would overrule *Grutter* and reverse the Fifth Circuit’s judgment.

■Justice **Alito**, with whom **The Chief Justice [Roberts]** and Justice **Thomas** join, dissenting. . . .

**I. . . .**

**II**

UT’s race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT’s rationales as sufficient to meet its burden, the majority licenses UT’s perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out. . . .

**C**

Although UT’s primary argument is that it need not point to any interest more specific than “the educational benefits of diversity,” it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT’s arguments to the contrary depend on a series of invidious assumptions.

**1**

First, both UT and the majority cite demographic data as evidence that African–American and Hispanic students are “underrepresented” at UT and that racial preferences are necessary to compensate for this underrepresentation. But neither UT nor the majority is clear about the relationship between Texas demographics and UT’s interest in obtaining a critical mass. . . .

To the extent that UT is pursuing parity with Texas demographics, that is nothing more than “outright racial balancing,” which this Court has time and again held “patently unconstitutional.” *Fisher I*; see *Grutter*. . . . And as we held in *Fisher I,* “ ‘[r]acial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.” ’ ” (quoting Parents Involved in Community Schools v. Seattle School Dist. No. 1 (2007)). . . .

**2**

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity. [I]f UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT’s own study . . . demonstrated that classroom diversity was more lacking for students classified as Asian–American than for those classified as Hispanic. But the UT plan discriminates *against* Asian–American students. . . .

While both the majority and the Fifth Circuit rely on UT’s classroom study, they completely ignore its finding that Hispanics are better represented than Asian–Americans in UT classrooms. In fact, they act almost as if Asian–American students do not exist. Only the District Court acknowledged the impact of UT’s policy on Asian–American students. But it brushed aside this impact, concluding—astoundingly—that UT can pick and choose which racial and ethnic groups it would like to favor. According to the District Court, “nothing in *Grutter* requires a university to give equal preference to every minority group,” and UT is allowed “to exercise its discretion in determining which minority groups should benefit from the consideration of race.”

This reasoning, which the majority implicitly accepts by blessing UT’s reliance on the classroom study, places the Court on the “tortuous” path of “decid[ing] which races to favor.” Metro Broadcasting, Inc. v. FCC (1990) (Kennedy, J., dissenting). And the Court’s willingness to allow this “discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.” Gong Lum v. Rice (1927) (holding that a 9–year–old Chinese–American girl could be denied entry to a “white” school because she was “a member of the Mongolian or yellow race”). In sum, “[w]hile the Court repeatedly refers to the preferences as favoring ‘minorities,’ . . . it must be emphasized that the discriminatory policies upheld today operate to exclude” Asian–American students, who “have not made [UT’s] list” of favored groups. *Metro Broadcasting* (Kennedy, J., dissenting).

Perhaps the majority finds discrimination against Asian–American students benign, since Asian–Americans are “*overrepresented* ” at UT. But “[h]istory should teach greater humility.” *Metro Broadcasting* (O’Connor, J., dissenting)….

In addition to demonstrating that UT discriminates against Asian–American students, the classroom study also exhibits UT’s use of a few crude, overly simplistic racial and ethnic categories…. For example, students labeled “Asian American,” seemingly include “individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population.” It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against Asian–American students because they are “overrepresented” in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, “Filipino Americans” or “Cambodian Americans.” As long as there are a sufficient number of “Asian Americans,” UT is apparently satisfied….

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

**3**

UT’s purported interest in intraracial diversity, or “diversity within diversity,” also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African–American and Hispanic students admitted through the Top Ten Percent Plan…. UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools. These students, UT argued, tend to come from poor, disadvantaged families, and the University would prefer a system that gives it substantial leeway to seek broad diversity *within* groups of underrepresented minorities. In particular, UT asserted a need for more African–American and Hispanic students from privileged backgrounds. Thus, the Top Ten Percent Law is faulted for admitting *the wrong kind of African–American and Hispanic students*….

Ultimately, UT’s intraracial diversity rationale relies on the baseless assumption that there is something wrong with African–American and Hispanic students admitted through the Top Ten Percent Plan, because they are “from the lower-performing, racially identifiable schools.”… UT’s assumptions appear to be based on the pernicious stereotype that the African–Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian–Americans. These are “the very stereotypical assumptions [that] the Equal Protection Clause forbids.” *Miller*….

In addition to relying on stereotypes, UT’s argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. See, *e.g.,* University of California v. Bakke (opinion of Powell, J.). Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild….

[I]t is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees. . . . Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African–American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. The same is true for Hispanic students. These conclusions correspond to the results of nationwide studies showing that high school grades are a better predictor of success in college than SAT scores….

**4**

UT also alleges—and the majority embraces—an interest in avoiding “feelings of loneliness and isolation” among minority students. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel “isolated.” This vague interest cannot possibly satisfy strict scrutiny….

**IV**

It is important to understand what is and what is not at stake in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had “effectively compensated for the loss of affirmative action,” and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

*What is at stake* is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve “the educational benefits of diversity,” without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT’s position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

***Editors’ Notes***

 (1) In previous affirmative action cases, the justices have battled over the proper level of scrutiny to apply. Officially, the Supreme Court applies “strict scrutiny.” On the one hand, the Court has said that strict scrutiny does not entail that affirmative action is automatically unconstitutional (not necessarily “fatal in fact”). On the other hand, in Fisher v. University of Texas (2013; reprinted above, \_\_\_\_) (*Fisher I*), the Court insisted that “the opposite is also true:” strict scrutiny must not be “feeble in fact.” Where do things stand after *Fisher II*?

 (2) The dissenters argue that the UT affirmative action plan cannot withstand strict scrutiny, and they argue that the Court is improperly deferring to the judgment of UT officials. Are their arguments persuasive? In considering this question, we might distinguish two forms of deference: (1) presuming that the action being challenged is constitutional versus (2) crediting the good faith efforts of the UT officials to comply with the Court’s requirements in previous cases. Which form of deference is the majority opinion applying? Assuming that the dissenters’ objections would be well taken if the Court were applying the former form of deference, would they be apt if it instead were applying the latter form?

 (3) A common definition of a “Catch-22” is “a paradoxical situation from which an individual cannot escape because of contradictory rules.” *Wikipedia* (noting that the term was coined by Joseph Heller in his 1961 novel, *Catch-22*). In this case, petitioner argues that “the University must set forth more precisely the level of minority enrollment that would constitute a ‘critical mass,’” yet if the University did set forth a precise level of minority enrollment that would constitute a “critical mass,” petitioner would argue that the University was engaging in “outright racial balancing,” which is “patently unconstitutional.” Does the majority opinion succeed in avoiding this “Catch-22" predicament?

 (4) In concluding his dissent, Justice Alito contends that “*What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups.” He continues: “UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.” What types of admissions plans, on his view, would be permissible? He evidently would permit Top Ten Percent Plans like that which the Texas legislature adopted. But does a Top Ten Percent Plan really not take race or ethnic background into account? The majority opinion emphasizes “the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment.” Would acknowledgment of that fact and basic purpose lead the dissenters to condemn such plans?

 (5) Alito objects to UT’s focus on affirmative action for African-Americans and Hispanics and condemns the district court’s statement that “nothing in Grutter [v. Bollinger (2003; reprinted above, \_\_\_\_)] requires a university to give equal preference to every minority group.” Suppose that the University of Texas has an egregious history of identified discrimination against African-Americans and Hispanics, but not against other minority groups, and, on that basis (to quote Alito quoting the district court), “determin[ed] which minority groups should benefit from the consideration of race.” Is Alito arguing that UT is obligated to ignore that history of identified discrimination? Previous affirmative action cases have credited remedying identified racial discrimination as a compelling governmental interest.