

ADAM D. CHANDLER

## How (Not) To Bring an Affirmative-Action Challenge

A little-known fact about the biggest Supreme Court case of the Term is that it is botched beyond repair. This Essay describes a series of grave defects in *Fisher v. University of Texas at Austin*,<sup>1</sup> the potentially momentous affirmative-action case, that should prevent the Supreme Court from reaching the merits.<sup>2</sup>

In 2008, the University of Texas at Austin (UT) denied Abigail Fisher admission to its undergraduate class of 2012. She promptly brought suit, alleging that the university's use of race as a factor in undergraduate admissions violates the Equal Protection Clause, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964. She asked the district court to command the university to admit her. She also sought an injunction preventing the university from using race in future admissions decisions and a declaration that doing so would violate federal law. Finally, she requested a refund of her application fees, as well as attorney's fees and costs. The district court granted summary judgment to the university. The Fifth Circuit affirmed, but not before noting that Fisher's requests for forward-looking injunctive and declaratory relief were, by then, nonjusticiable. Fisher had enrolled elsewhere and had no intention of reapplying to the university. As a result, the Fifth Circuit said, she lacked standing to make prospective requests.

This Essay takes that conclusion and runs with it. The argument boils down to this: The only relief still available to Fisher is a refund of her application fees (Part I). Texas could therefore moot the case for a tiny sum (Part II). Regardless, the Eleventh Amendment and Title VI jurisprudence bar recovery of the fees (Part III). In addition, there are three defects in Fisher's

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1. 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345), *granting cert. to* 631 F.3d 213 (5th Cir. 2011).

2. This Essay treats Supreme Court precedent as settled and binding. The Essay's aim is not to defend or to criticize established doctrine, but rather to apply it fairly. The Court, of course, is free to revisit its precedents, but see *infra* Part V for the pitfalls of the doctrinal innovations to which the Court might be inclined to resort.

standing to claim the fees (Part IV). The potential recourses for resuscitating the case are fraught and unconvincing (Part V). And if, despite all that, the Court reaches the merits, the Justices will find the case a much narrower dispute than they might have expected (Part VI).

Whether dismissed as improvidently granted (this Essay's recommendation) or decided on its merits, *Fisher* should not herald the end of affirmative action for America's colleges and universities. If that was the aim of the Justices who voted to grant certiorari, they could not have selected a faultier vehicle for obtaining that result.

### I. FISHER'S ORIGINAL SIN

Many of *Fisher*'s deficiencies stem from one surprising fact: all that is at stake, aside from the future of affirmative action, is \$100. That is the sum of Abigail Fisher's application fee (\$50) and nonrefundable housing deposit (\$50)—the only monetary damages she claims and the only forms of relief remaining in the case.<sup>3</sup>

Fisher's challenge started out more ambitiously, of course. In the district court, Fisher was joined by coplaintiff Rachel Michalewicz, and they primarily sought declaratory and injunctive relief—a declaration that the race-conscious admissions practices at UT are unconstitutional and an order that those practices cease.<sup>4</sup> The monetary damages were such an afterthought that Fisher's lawyers did not even include them in the first two versions of the complaint filed in the district court.<sup>5</sup>

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3. The complaint also asks for attorney's fees and costs, but such a claim cannot establish an Article III case or controversy where one does not otherwise exist. See *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). It is worth noting, too, that, having lost in both lower courts, Fisher's attorneys have never been entitled to fees under the fee provision Fisher cites in her complaint, 42 U.S.C. § 1988(b) (2006), which gives courts discretion to award attorney's fees to the "prevailing party" in civil rights cases. Fisher's catchall request for "[a]ll other relief [deemed] appropriate and just" is discussed *infra* Section V.D. Second Amended Complaint for Declaratory, Injunctive, and Other Relief ¶ 165(i), *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. A-08-CA-263-SS) [hereinafter Second Amended Complaint].

4. Second Amended Complaint, *supra* note 3, ¶ 165(c)-(f).

5. Compare *id.* ¶ 165, with Amended Complaint for Declaratory, Injunctive, and Other Relief ¶ 165, *Fisher*, 645 F. Supp. 2d 587 (No. A-08-CA-263-SS), and Complaint for Declaratory, Injunctive, and Other Relief ¶ 143, *Fisher*, 645 F. Supp. 2d 587 (No. A-08-CA-263-SS).

The critical blunder was that, unlike *Grutter*<sup>6</sup> and *Gratz*,<sup>7</sup> the Court's last rendezvous with affirmative action, *Fisher* was not brought as a class action on behalf of future nonminority applicants.<sup>8</sup> *Fisher* and Michalewicz enrolled at other colleges with no intention of reapplying or transferring to UT.<sup>9</sup> As a result, when their case reached the Fifth Circuit, the court held that they "lack[ed] standing to seek injunctive or forward-looking declaratory relief."<sup>10</sup> That court nevertheless decided the case on the premise that the plaintiffs could still obtain retrospective relief.<sup>11</sup> Perhaps unaware that the only form of retrospective relief requested was \$100 in application fees, the circuit did not evaluate whether such relief could sustain the action.<sup>12</sup>

*Fisher* has not challenged the circuit's holding barring prospective relief, and she appears to accept that only her retrospective money-damages claim is sustaining her case.<sup>13</sup> (Reinforcing the Fifth Circuit's conclusion, both of the original plaintiffs have now graduated from other colleges,<sup>14</sup> and Michalewicz has dropped out of the litigation altogether.<sup>15</sup>) With that narrow basis for the suit essentially stipulated, this Essay proceeds to examine whether the \$100 claim is sufficient to keep the case alive, starting with a nagging hypothetical.<sup>16</sup>

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6. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).
  7. *Gratz v. Bollinger*, 539 U.S. 244, 252-53 (2003).
  8. *Fisher* also does not present a *Bakke* or *Hopwood* scenario in which a plaintiff (or a small set of plaintiffs) challenges his rejection from a professional school and is holding off enrolling in an alternate program until litigation is concluded. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978) (recounting the Court's stay of the lower court's order directing the medical school to admit Allan Bakke), and *Hopwood v. Texas*, 999 F. Supp. 872, 901 & n.63 (W.D. Tex. 1998) (noting that one plaintiff proceeded to another law school while several others continued to seek a court order directing that UT's law school admit them), *aff'd in part, rev'd and remanded in part*, 236 F.3d 256 (5th Cir. 2000), with *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) ("[B]oth students deny intention to reapply to UT.").
  9. *Fisher*, 631 F.3d at 217.
  10. *Id.*
  11. *Id.*
  12. Cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 109 (1983) (evaluating the plaintiff's standing for each requested form of relief).
  13. See Reply Brief at 1-8, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Dec. 20, 2011).
  14. See Brief in Opposition at 8-10, *Fisher*, No. 11-345 (U.S. Dec. 7, 2011).
  15. See Brief for Petitioner at ii, *Fisher*, No. 11-345 (U.S. May 21, 2012).
  16. For discussion of another "original sin"—that *Fisher* explicitly does not challenge diversity as a compelling interest—see *infra* Part VI.

## II. MOOTNESS CAN BE YOURS, TEXAS, FOR ONE LOW PRICE OF \$100

The Fifth Circuit was correct that forward-looking relief is off the table, leaving only \$100 up for grabs. That raises an intriguing question, even if only a hypothetical one at the moment: could Texas moot the entire case by tendering \$100 to Fisher?<sup>17</sup> It is hard to see why not.<sup>18</sup> In its brief in opposition to certiorari, Texas telegraphed that it could moot the case “beyond any doubt” by handing over the money.<sup>19</sup> Since then, Texas has not publicly indicated that it will—just the opposite, in fact, forking over \$1 million for a top-flight Supreme Court litigation team.<sup>20</sup> It is possible that Texas is waiting to see how oral argument goes before making any decisions, but it must know that the longer it waits, the more likely it is to irritate the Court.<sup>21</sup>

17. To be safe, Texas should make it \$101 to cover nominal damages (\$1), even though Fisher did not plead nominal damages in her complaint, *see infra* Section V.D, and perhaps add some measure of interest. *See also* Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1273 (10th Cir. 2004) (Henry, J., concurring) (“A defendant could . . . simply pay the nominal damages, thereby mooting the case.”).
18. Because declaratory and injunctive relief is no longer available to Fisher, Texas would not need to admit any wrongdoing. The money is sufficient. *Cf.* Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 763 n.6 (4th Cir. 2011) (discussing FED. R. CIV. P. 68, which governs offers of judgment in district courts); Chathas v. Local 134 IBEW, 233 F.3d 508, 511-12 (7th Cir. 2000) (same). *But see* Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* Fisher v. University of Texas Gives the Court (Yet) Another Chance To Say Yes, 65 VAND. L. REV. EN BANC 77, 84 (2012) (raising “the possibility” that “[t]he tender of a nominal amount of money that is not accompanied by an admission of wrongdoing does not . . . really redress the claims alleged”).
19. Brief in Opposition, *supra* note 14, at 2.
20. *See* Matthew Huisman, *Latham & Watkins Team Tapped To Represent Texas University in Racial Preference Case*, NAT’L L.J. (Apr. 25, 2012), <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1335129039390>.
21. Texas might have already made a move. In a recent contribution to an online symposium, a prominent UT law professor wrote that “it is reliably reported that the University has offered to refund the application fees the plaintiff might have paid four years ago.” Sanford Levinson, *Online Alexander Bickel Symposium: Alexander Bickel Has Left the Building*, SCOTUSBLOG (Aug. 20, 2012, 11:17 AM), <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-alexander-bickel-has-left-the-building>. In a follow-up e-mail, Professor Levinson reported that he did not recall where he learned of Texas’s offer. E-mail from Sanford Levinson, W. St. John Garwood & W. St. John Garwood, Jr., Centennial Chair, Univ. of Tex. Sch. of Law, to author (Aug. 20, 2012, 7:43 PM) (on file with author). If Professor Levinson is right, the case is almost certainly moot, but neither party has advised the Court of the offer.

There are good reasons that Texas may be hesitant: mooting the case now would mean forfeiting its hard-won Fifth Circuit precedent,<sup>22</sup> and Texas might expect an immediate follow-on lawsuit patching up the procedural potholes in this one. If Texas assumes that the eventual Supreme Court ruling in that follow-on case will be the same as in *Fisher*'s, it might be inclined to forge ahead and spare its taxpayers the expense of defending a second lawsuit.

On the other hand, several considerations weigh in favor of waiting for a second case to develop. For one thing, mooting *Fisher* would give UT several more years to use, and perhaps tweak, its current affirmative-action practices. For another, Justice Kagan will not be recused from the future case, and that could change the cert. calculus. In *Fisher*, the four more conservative Justices (Roberts, Scalia, Thomas, and Alito) probably saw no downside to granting cert.: at worst, Justice Kennedy would join the three more liberal Justices, resulting in a nonprecedential four-to-four split. With Justice Kagan participating, though, there is a possibility, albeit a small one, that a majority of the Court would uphold Texas's program. That might dissuade the more conservative Justices from voting to grant cert. in the next case. Unlikely, but possible.

It is more likely that the Court's personnel will be different when the next case comes up for consideration. If Texas moots *Fisher*, another five years<sup>23</sup> or more could elapse before the Court ultimately rules in a hypothetical follow-on case. A lot can happen in five years. That is two presidential elections from now. The Court's membership will almost certainly be different, and it might favor Texas's position more than today's composition does. That is no guarantee of a different outcome, but waiting for the Court to change is perhaps Texas's best, if not only, hope of sustaining its affirmative-action program.<sup>24</sup>

If Texas is considering this \$100 mooting gambit, it must consider how *Fisher*'s almost-certain refusal of the payment will affect the mootness determination. There is no Supreme Court case that answers that question directly,<sup>25</sup> but, frankly, it does not seem like a hard call, and several circuits

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22. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (requiring vacatur of a respondent's lower-court victory when she elects to moot the case in the Supreme Court).

23. *Fisher* filed her complaint in April 2008, and the Supreme Court probably will not rule until spring 2013, a span of five years.

24. See *Amar, supra* note 18, at 78 (“[T]he Fifth Circuit opinion upholding [UT’s] race-based admissions plan was doomed once the Court granted cert.”).

25. See *generally* *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332-33 (1980) (noting that a case would not be moot, even where the plaintiffs refuse to accept tender, “so long as they retain[] an economic interest in class certification”); *California v. San Pablo & Tulare R.R.*

agree.<sup>26</sup> If the courts cannot give her anything more than what Texas offers, Fisher's challenge is no longer a justiciable case or controversy under Article III.

### III. STATE SOVEREIGN IMMUNITY AND TITLE VI

Other weaknesses in the case are not at all hypothetical, beginning with state sovereign immunity under the Eleventh Amendment.

The Eleventh Amendment generally bars suits against states, including state officers in their official capacities, for retrospective monetary relief.<sup>27</sup> Federal courts commonly regard the Eleventh Amendment bar as a limitation on their subject-matter jurisdiction.<sup>28</sup> A state can waive Eleventh Amendment protection, however, if it consents to be sued, and certain federal statutes adopted under Section 5 of the Fourteenth Amendment can abrogate states' protection.

The Eleventh Amendment implications for *Fisher* are not hard to spot. Retrospective monetary relief is all that is at stake. The defendants are the university and a host of its officials, all sued explicitly in their official capacities. Although the Supreme Court has not said so, there is broad consensus among the lower courts that state universities are "arms of the state" for Eleventh

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Co., 149 U.S. 308, 313-14 (1893) (relying on a California statute for the proposition that depositing money in a bank and directing it to the other party has the "same effect as actual payment and receipt of the money," thereby mooted the case). The Court had an opportunity to address this question last Term, but all that can be gleaned from its mootness ruling in *Knox v. SEIU*, 132 S. Ct. 2277, 2287-88 (2012), is that the offer of judgment must be unconditional and easily accepted. See Adam Chandler, *The Case That Didn't Spell Fisher's Fate*, JUST ENRICHMENT (June 21, 2012, 1:22 PM), <http://justenrichment.com/2012/06/21/the-case-that-didn-t-spell-fisher-s-fate>.

26. See, e.g., *Russell v. United States*, 661 F.3d 1371, 1375 (Fed. Cir. 2011); *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994); *United States v. Greenwood Mun. Separate Sch. Dist.*, 454 F.2d 282, 283 (5th Cir. 1972) (en banc) (per curiam). Where an exception to mootness is implicated, this principle may not hold. See *Church of Scientology of Haw. v. United States*, 485 F.2d 313, 317-18 (9th Cir. 1973) (recognizing the "voluntary cessation" exception); see also *infra* Section V.B (discussing the "capable of repetition, yet evading review" exception with regard to Fisher's case).
27. See *Edelman v. Jordan*, 415 U.S. 651, 666-69 (1974); *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459, 464 (1945).
28. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) ("[T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.>").

Amendment purposes.<sup>29</sup> That conclusion seems especially obvious for UT, which is funded by the state treasury and whose governing board is appointed by the Governor and confirmed by the Texas State Senate. In sum, the defendants are of the type that the Eleventh Amendment generally protects against claims for money damages.

*Fisher* does not evaporate quite so easily, though. For one thing, Texas has not doggedly pressed its Eleventh Amendment argument, which in most other contexts would render the argument waived. For another, one cause of action survives regardless, a point to which this Essay will return shortly.

Texas invoked the Eleventh Amendment as an affirmative defense in its answer to the complaint in the district court, but it has not mentioned it since.<sup>30</sup> To some extent, that silence is understandable. Until the Fifth Circuit ruled, injunctive relief was the focus of the case, and sovereign immunity was no succor for Texas on that score. Texas may have been holding on to the immunity argument for the damages phase of the case, which has yet to take place. (The case is still in the liability phase of the bifurcated proceedings.) Also, even when the case is narrowed to money damages, the Eleventh Amendment does not block all causes of action in the case, as we shall see. Nonetheless, it is surprising that Texas's Supreme Court merits brief, as well as its brief in opposition to cert., failed even to cite the Eleventh Amendment.<sup>31</sup>

If sovereign immunity were a typical defense, courts would not hesitate to declare that Texas had waived it by not urging it at each stage of the litigation. But because sovereign immunity sounds in subject-matter jurisdiction, the analysis is not so simple. For instance, the Supreme Court has held that, because of the jurisdictional nature of sovereign immunity, a state can raise it for the first time on appeal, a move that courts generally disallow.<sup>32</sup> More relevant to *Fisher*, the Court has indicated that federal courts must conduct a

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29. See, e.g., *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996) (“Texas Tech, as a state institution, clearly enjoys Eleventh Amendment immunity.”). See generally *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431-32 (1997) (declining to address Ninth Circuit precedents holding that a state university is an arm of the state).

30. Answer of Defendants to Plaintiffs’ Second Amended Complaint at 16, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. A-08-CA-263-SS) [hereinafter Answer].

31. Brief for Respondents at vi, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Aug. 6, 2012); Brief in Opposition, *supra* note 14, at vi-vii.

32. See *Edelman*, 415 U.S. at 677-78.

sovereign immunity analysis *sua sponte* when necessary<sup>33</sup> (even though it had previously declined to do exactly that<sup>34</sup>). Obligatory *sua sponte* review makes sense, for as long as the Court speaks of sovereign immunity in jurisdictional terms, it would be inconsistent to ignore it just because the parties do.<sup>35</sup>

What the Court will find is that sovereign immunity bars nearly all of Fisher's claims. Her constitutional claim, brought under the Fourteenth Amendment and 42 U.S.C. § 1983,<sup>36</sup> as well as her 42 U.S.C. § 1981 claim,<sup>37</sup> cannot proceed.<sup>38</sup> But there is an exception. Fisher wisely included a claim under Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs.<sup>39</sup>

Actions under Title VI constitute a categorical exception to sovereign immunity doctrine.<sup>40</sup> That is no small exception, because the Supreme Court has held that Title VI and the Equal Protection Clause are essentially coterminous.<sup>41</sup> That is, if Texas's policy is unconstitutional under the Equal

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33. See *Pennhurst*, 465 U.S. at 121 (“A federal court *must* examine each claim in a case to see if the court’s jurisdiction over that claim is barred by the Eleventh Amendment.” (emphasis added)).

34. *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982) (declining to raise the Eleventh Amendment issue on its own when the state requested a ruling on the merits and the immunity issue could be resolved on remand).

35. One might ask whether Texas’s failure to invoke its sovereign immunity amounts to an implicit waiver of that immunity for the purposes of this case. Under the Court’s narrow conception of “constructive waiver,” Texas’s (involuntary) defense of Fisher’s lawsuit in federal court is almost certainly insufficient to constitute “consent” to the suit. See *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-87 (1999). *But see Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999) (holding that active litigation on the merits can constitute waiver).

36. Section 1983 is the primary means of vindicating constitutional rights against officials acting under color of state law.

37. Section 1981 prohibits discrimination in making and enforcing contracts.

38. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989) (addressing § 1983 claims); *Quern v. Jordan*, 440 U.S. 332 (1979) (same); *Singletary v. Mo. Dep’t of Corrections*, 423 F.3d 886, 890 (8th Cir. 2005) (noting that “other circuits have uniformly held that a state is immunized from § 1981 liability under the Eleventh Amendment” and collecting supportive cases).

39. 42 U.S.C. § 2000d (2006); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979) (finding an implied private right of action under Title VI).

40. See 42 U.S.C. § 2000d-7(a)(1); *Sossamon v. Texas*, 131 S. Ct. 1651, 1662 (2011).

41. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 328 (opinion of Brennan, White, Marshall & Blackmun, JJ.); see also *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (“Our cases make clear . . . that the reach of Title VI’s protection extends no further than the Fourteenth Amendment.”).

Protection Clause, then it violates Title VI, and vice versa. Even so, the Eleventh Amendment places real limits on the Court's ultimate ruling in *Fisher*. First and foremost, it cannot be a constitutional ruling. A future case will be needed to solidify its constitutional implications, even if the writing is already on the wall. It will also be subject to reversal by Congress until that future case comes along.<sup>42</sup> And any intended consequences for public elementary and secondary schools will be muddled, as such schools are much less dependent on federal funding.

On top of those shortcomings, monetary damages are not available under Title VI absent a finding that the defendant discriminated intentionally.<sup>43</sup> The Court has said that “a recipient [of federal funding] may be held liable . . . for intentional conduct that violates the clear terms of [Title VI], but not for its failure to comply with the vague language describing the objective of the statute.”<sup>44</sup> The rationale for distinguishing intentional from unintentional conduct is that, for unintentional violations, “the receiving entity of federal funds lacks notice that it will be liable for a monetary award.”<sup>45</sup>

How those principles apply in the affirmative-action context has not been squarely resolved. The question is whether the racial classifications employed in an affirmative-action program are sufficiently “intentional” to afford a plaintiff money damages under Title VI. The “discrimination” is surely no accident,<sup>46</sup> but a university's good-faith reliance on the Supreme Court's precedents approving limited use of race in admissions is not the same as

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42. Federal lawmakers' support is lopsided in Texas's favor, at least when judged by the amicus briefs. Seventeen senators and sixty-six members of Congress signed amicus briefs supporting Texas (not to mention the Solicitor General), compared with a single member of Congress who supported *Fisher* as an amicus.

43. See *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 602-03 (1983) (opinion of White, J.); see also *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70 (1992) (“Though the multiple opinions in *Guardians* suggest the difficulty of inferring the common ground among the Justices in that case, a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation . . .”).

44. *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (citation omitted).

45. *Franklin*, 503 U.S. at 74.

46. It is not obvious that colleges would describe their use of race in admissions as “discrimination” at all. There are more than four hundred schools now using the Common Application, which declares that none of its “member institution admission offices . . . discriminate on the basis of race,” even though many of them use affirmative action. See THE COMMON APPLICATION FOR UNDERGRADUATE COLLEGE ADMISSIONS, at AP-5 (2011-12 ed.). See generally Exec. Order No. 13,160, 65 Fed. Reg. 39,775, 39,775-76 (June 23, 2000) (extending Title VI, among other provisions, to “[f]ederally conducted education and training programs and activities” and specifically exempting “any otherwise lawful affirmative action plan or program”).

intending to engage in conduct that would violate Title VI.<sup>47</sup> In other words, the university knows that it is discriminating, but not that its discrimination violates the law. Unhelpfully, the Court has variously attached the requisite intentionality to two words, “discrimination”<sup>48</sup> and “violation,”<sup>49</sup> of which only the former conceivably describes everyday affirmative-action practices.<sup>50</sup> The opinion that gave rise to the intentional/unintentional distinction in the Title VI context helps to resolve the ambiguity. That opinion used the term “discriminatory animus” to define the kind of “intentional discrimination” that would give rise to Title VI damages.<sup>51</sup> The term “discriminatory animus” indicates that the Court was describing conduct beyond the ken of affirmative action, a set of university admissions practices that no one contends stems from racial animus. According to the general principles of notice and clarity recounted in the prior paragraph, the best reading of the cases is that a university would not be liable for money damages under Title VI for attempting, in good faith, to use race in admissions in accordance with prevailing law.<sup>52</sup> That is especially so in light of federal regulations implementing Title VI that *require* affirmative action in some instances and permit it in even more.<sup>53</sup>

This issue matters because, while Fisher alleges a violation of Title VI, she does not allege an intentional or knowing one that would give rise to money damages. Combined with the sovereign immunity bar, Fisher’s failure to state a claim for monetary damages under Title VI is a serious, if nonjurisdictional,

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47. See Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 673 n.11 (1998) (noting this “interesting and as yet unexplored tension”).

48. E.g., *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630-31 (1984).

49. E.g., *Franklin*, 503 U.S. at 70; *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 607 (1983) (opinion of White, J.).

50. See *Guardians*, 463 U.S. at 590 (noting that affirmative action is “intentional discrimination” that is nevertheless “permitted by the Constitution” and therefore by Title VI).

51. *Guardians*, 463 U.S. at 584, 607 n.27.

52. See Michael Holley, *More Repercussions from Hopwood: The Availability of Money Damages Under Title VI*, 27 T. MARSHALL L. REV. 119, 129-39 (2002) (agreeing with this reading).

53. See 34 C.F.R. § 100.3(b)(6)(i)-(ii) (2012) (requiring educational programs receiving federal funding to “take affirmative action to overcome the effects of prior [racial] discrimination” and permitting such action “in the absence of such prior discrimination”); see also U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011), <http://www.justice.gov/crt/about/edu/documents/guidancepost.pdf> (giving colleges broader leeway to consider race in efforts to achieve diversity).

reason her case cannot go forward.<sup>54</sup> Texas should have let the Court know about both.<sup>55</sup> It still could do so in a motion to dismiss,<sup>56</sup> although that prospect seems increasingly unlikely as the case moves closer to oral argument.

Even if Texas squanders this argument, the Court could consider it on its own after requesting supplemental briefing, or it could remand for an initial determination in the lower courts. It should do one or both. Suppose the Court uses Fisher's case to make a grand pronouncement of constitutional law in her favor. It will be an embarrassment when, in the damages phase on remand, the district court reveals that most of the Court's ruling was barred by sovereign immunity and that what remained must be dismissed for failure to state a claim. The case will be exposed as the empty vehicle for ideological struggle that it now is.

The one-two punch of the Eleventh Amendment and Title VI offers the Court a principled way to duck this case and avoid an entirely unnecessary ruling on a white-hot social issue. Perhaps that would have been an attractive offer to an earlier Court more attuned to its "passive virtues,"<sup>57</sup> but today's bench might be more likely to greet it with an eye roll than a sigh of relief.<sup>58</sup>

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54. The Ninth Circuit is alone in not requiring plaintiffs to plead facts supporting intentional discrimination in order to bring a Title VI cause of action. See *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994) ("Although the plaintiff must prove intent at trial, it need not be pled in the complaint."), *overruled on other grounds*, *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (en banc).
  55. Texas actually cited this Essay in its merits brief, Brief for Respondents, *supra* note 31, at 17 n.6, but it is hard to imagine the Court crediting Texas with an argument made solely through citation.
  56. SUP. CT. R. 21.2(b).
  57. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).
  58. See Levinson, *supra* note 21 ("[W]hat one finds among all of the Justices . . . is a remarkable insouciance regarding the Bickelian 'passive virtues.' Each and every one of them is more than happy to intervene quite extensively in the state or national political process."); Steve Vladeck, *Online Alexander Bickel Symposium: The Passive Virtues as Means, Not Ends*, SCOTUSBLOG (Aug. 21, 2012, 12:32 PM), <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-the-passive-virtues-as-means-not-ends> ("At least with regard to hot-button social issues, the Court in the near term appears generally uninterested in relying on justiciability doctrines or other avenues for judicial restraint . . . to avoid reaching the merits of high-profile constitutional questions."); see also *infra* Section IV.C (describing another opportunity to rely on constitutional avoidance and judicial restraint to end this case); *infra* Part VI (predicting that the Court will not be swayed by invocations of avoidance and restraint in this case).

#### IV. ARTICLE III STANDING

*Fisher's* defects do not end there. *Fisher* also faces the daunting task of establishing that she has standing to pursue the \$100 in fees that she claims as damages. Because standing is jurisdictional, the Court can and must raise the issue on its own.

*Lujan v. Defenders of Wildlife*<sup>59</sup> provides the familiar three-prong test for Article III standing. The plaintiff must have suffered (1) a concrete, particularized, actual “injury in fact” (2) that bears a causal connection to the alleged misconduct and (3) that is likely to be redressed by a favorable decision of the court.<sup>60</sup> There are three separate arguments against *Fisher's* standing to pursue the fees, keyed to each of these prongs. Each argument characterizes her alleged injury slightly differently. This Essay presents the arguments in the reverse order of *Lujan's* test, to get the simpler ones out of the way first.

##### A. Redressability

The easiest argument against *Fisher's* standing is that her requested relief cannot redress her rejection from UT. *Fisher* has said so herself.

*Fisher's* complaint alleges that her application to UT was not evaluated fairly and that, as a result, she was “deprived of the opportunity to attend the UT Austin, an injury that cannot be redressed by money damages.”<sup>61</sup> Such a concession is understandable when one remembers that the early focus of the case was injunctive relief. No matter. It is the kind of unwise stipulation that unwittingly dooms cases in the federal courts every day.<sup>62</sup> *Fisher's* should be no exception.

*Fisher's* only response might be that the allegedly unfair consideration of her application and her subsequent rejection constitute two distinct injuries, and that her concession only speaks to the latter. Perhaps, but that explanation is belied by her complaint, which fails to distinguish those two actions—actions that she alleges are directly, causally related—as separate injuries. That explanation also raises the imponderable question why one would be redressable with money damages if the other is not.

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59. 504 U.S. 555 (1992).

60. *Id.* at 560-61.

61. Second Amended Complaint, *supra* note 3, ¶ 124.

62. See, e.g., Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2982-84 (2010) (refusing to entertain an argument undermined by a prior stipulation).

*B. Causation*

To the extent that Fisher's alleged injury is a monetary one (that is, the lost \$100), it bears no causal connection to the complained-of university conduct. The refund she wants is orthogonal to the university's consideration of race in admissions. Beyond their generic, and separate, relationships to the UT admissions process, the admissions policies and admissions fees are uncorrelated.

At the heart of the causation inquiry is this question: did UT's consideration of race in admissions in some way make Fisher more likely to apply to UT and thus to pay the fees? Only a creative contrarian could make that argument, considering that UT's admissions policy made Fisher less likely to be admitted. Moreover, if Fisher had been admitted, as she wished, UT would not have refunded her the fees.<sup>63</sup> All applicants, whether admitted or not, pay those administrative fees, a fact that underscores the deficient causal link between the fees and UT's admissions decisionmaking.

Other categories of monetary damages would have sufficed for this purpose. For example, Fisher could have sought reimbursement of any tuition differential or her future earnings lost because she attended a different school.<sup>64</sup> Those damages would have been plainly linked to the conduct and outcome that Fisher alleges was unfair: the denial of her application.<sup>65</sup> The application fees are not similarly connected.

*C. Injury*

Upon hearing the causation argument, Fisher would counter that her injury is not the monetary loss itself, but rather that her UT application was unconstitutionally disfavored because of her race.<sup>66</sup> In other words, she did not

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63. In fact, she would have had to pay an additional \$200 enrollment deposit.

64. See *Samuel v. Univ. of Pittsburgh*, 538 F.2d 991, 994-95 (3d Cir. 1976) (upholding an award of excess tuition fees that plaintiffs paid because of unconstitutional residency rules); *Jackson v. Kump*, No. 93 Civ. 3519 (LMM), 1994 WL 9691, at \*5 (S.D.N.Y. Jan. 13, 1994) (entertaining a claim for lost future income resulting from an allegedly wrongful rejection from a school, and citing New York courts that did the same); see also *Hopwood v. Texas*, 999 F. Supp. 872, 908-11 (W.D. Tex. 1998) (calculating such damages), *aff'd in part, rev'd and remanded in part*, 236 F.3d 256 (5th Cir. 2000).

65. See *infra* Section V.C for an explanation why the Court cannot now consider the prospect of Fisher adding those claims to her suit on remand.

66. Truth be told, this was not her actual response. In her reply brief at the cert. stage, Fisher only addressed Texas's arguments on redressability (which are somewhat distinct from this Essay's) by saying that her claim for a fee refund is "restitutionary" and therefore "capable

get to compete on an equal footing because of her race. There is no question that, if prospective relief were still in play, that alleged injury would suffice for standing purposes.<sup>67</sup> But there is a question, created by an inscrutable Supreme Court precedent, whether unequal treatment in admissions, without more, is enough to establish standing in a purely retrospective suit.

The precedent in question is an obscure and short per curiam opinion, *Texas v. Lesage*.<sup>68</sup> *Lesage* was an affirmative-action challenge under all the same provisions of federal law invoked in *Fisher*. (It would seem that the University of Texas is something of a magnet for these suits.<sup>69</sup>) The district court had granted summary judgment for the university on the basis that François Daniel Lesage would have been rejected even under a colorblind admissions policy. The Supreme Court essentially affirmed that ruling, relying on *Mt. Healthy City School District Board of Education v. Doyle*<sup>70</sup> for the proposition that the government defendant can defeat liability by “demonstrating that it would have made the same decision” regardless of the challenged criterion.<sup>71</sup>

Where the *Lesage* opinion gets muddy is in describing what counts as an “injury” for forward-looking versus retrospective relief, and whether that “injury” is the same as the familiar “injury in fact” in standing doctrine. The Court said that, for forward-looking relief, “[t]he relevant injury . . . is ‘the inability to compete on an equal footing,’” as opposed to rejection because of one’s race.<sup>72</sup> In support of that proposition, the Court cites two cases discussing “injury” for Article III standing purposes.<sup>73</sup> The Court then goes on to say that when forward-looking relief is not at issue, “there is no cognizable injury warranting relief under § 1983” if the government can show that it would have made the same decision absent the alleged discrimination.<sup>74</sup>

The mystery is whether that reference to “cognizable injury” means that a plaintiff in such a case (1) has suffered no “injury” for Article III standing

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of redressing [her] constitutional injury.” Reply Brief, *supra* note 13, at 3. Being restitutionary is not responsive to this Essay’s objections.

67. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

68. 528 U.S. 18 (1999) (per curiam). *Lesage* was a summary reversal, decided without full briefing and argument, which may have contributed to the present confusion.

69. In addition to *Hopwood*, *Sweatt v. Painter*, 339 U.S. 629 (1950), is yet another example.

70. 429 U.S. 274 (1977).

71. *Lesage*, 528 U.S. at 20.

72. *Id.* at 21 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)).

73. *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995); *Associated Gen. Contractors*, 508 U.S. at 666).

74. *Id.*

purposes or (2) has standing but not a successful claim on the merits.<sup>75</sup> Each approach has weaknesses. The former interpretation would imply that standing requirements differ based on the kind of relief sought. The latter interpretation would imply that a constitutional injury sufficient for standing purposes is nevertheless not a “cognizable injury” for damages purposes.<sup>76</sup> Commentators line up on both sides.<sup>77</sup> As it turns out, Fisher runs into trouble under either.

Every circuit to stake a position on this issue takes the former view, that *Lesage* is a case about Article III standing.<sup>78</sup> They rely on *Lesage* in standing contexts, as if *Lesage* had announced a new rule for standing in race-discrimination cases. If those courts are correct, then the Supreme Court cannot decide *Fisher*. No court has yet answered the (counter)factual question whether Fisher would have been admitted but for UT’s consideration of race. That inquiry is far from a slam-dunk for Fisher, and the Supreme Court is not the forum for undertaking such a fact-intensive analysis in the first instance.

But that is not the best interpretation of *Lesage*. Although the Court confusedly relied on standing cases in its discussion, *Texas v. Lesage* is inescapably a decision about the merits of Lesage’s claim on summary judgment and the potential liability of the university. If Lesage had lost because he lacked standing, the Court would have made that clear. Instead, the word “standing” does not appear once in the (albeit brief) opinion. Besides, the

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75. See Ashutosh Bhagwat, Essay, *Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445, 446 (2001) (“There is . . . something odd and frankly perplexing about the Court’s holding in *Lesage* . . .”). Underlying this mystery is the subtle influence of remedies on justiciability doctrine generally. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).
76. See Bhagwat, *supra* note 75, at 452 (“*Lesage* may have had a right but he had no remedy, proving John Marshall wrong again.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803))).
77. See *id.* (adopting the nonjurisdictional interpretation); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 313 (2008) (adopting the jurisdictional interpretation); Vikram David Amar, *An Update on the Fisher v. University of Texas Affirmative Action Case, and the Procedural Issue That Might, but That Need Not, Complicate Things for the Supreme Court*, VERDICT (Oct. 28, 2011), <http://verdict.justia.com/2011/10/28/an-update-on-the-fisher-v-university-of-texas-affirmative-action-case> (adopting the nonjurisdictional interpretation).
78. See, e.g., *Braunstein v. Ariz. Dep’t of Transp.*, 683 F.3d 1177, 1186-87 (9th Cir. 2012) (Fletcher, J.); *Donahue v. City of Boston*, 304 F.3d 110, 117-18 (1st Cir. 2002); *Aiken v. Hackett*, 281 F.3d 516, 519 (6th Cir. 2002); *Wooden v. Bd. of Regents*, 247 F.3d 1262, 1274-78 (11th Cir. 2001). The Supreme Court has never cited *Lesage*.

Court's handling of the case in summary fashion indicates that it did not think it was making new law.<sup>79</sup>

Even under the nonjurisdictional interpretation of *Lesage*, though, Fisher's case is vulnerable. In its pleadings, Texas denied that it was "likely" that Fisher would have been admitted but for UT's use of race in admissions,<sup>80</sup> and it has raised this point in both of its Supreme Court briefs.<sup>81</sup> Although Texas does not put it in these terms, constitutional avoidance beckons. There is no need for a constitutional ruling if Fisher is ineligible for damages because her race was not the reason for her rejection. The Court can simply remand the case for that determination, consistent with longstanding principles of judicial restraint and constitutional avoidance.<sup>82</sup>

#### V. PATHS TO REVIVING THE CASE, AND THE DEAD ENDS TO WHICH THEY LEAD

There are several moves available to the Court that look like end-runs around the various potholes presented above. But none of these moves is endorsed by current Supreme Court case law, and each is suspect.

##### A. *Rewriting the Declaratory Request*

A potential answer to all of the foregoing objections is to claim that Fisher's declaratory request is actually retrospective rather than prospective, and thus still available as a remedy in the case. Maybe all Fisher wants is a declaration that UT violated her constitutional rights when it evaluated her application rather than a declaration that UT's admissions policies are unconstitutional for all applicants now and in the future.

Before turning to the implausibility of that claim in this case, there is a question whether declaratory relief can ever be deemed retrospective. The Supreme Court has repeatedly referred to declaratory judgments generically as "prospective" or "forward-looking."<sup>83</sup> One might assume that a declaratory

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79. For a more developed argument for the nonjurisdictional reading, see Amar, *supra* note 77.

80. Answer, *supra* note 30, ¶ 120.

81. Brief for Respondents, *supra* note 31, at 16 n.6; Brief in Opposition, *supra* note 14, at 13 n.6.

82. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

83. E.g., *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 449 (2010) (contrasting "monetary damages" with "prospective relief, such as an injunction or a declaratory judgment"); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971,

judgment is inherently forward-looking, serving as the basis for relief when the declaration is transgressed in the future.<sup>84</sup> Some circuits, however, distinguish between prospective and retrospective declaratory judgment actions, finding the latter when the request for declaratory relief is intertwined with claims for damages for past violations.<sup>85</sup> Crucially, though, those courts require the retrospective declaration to “affect the parties’ current rights or future behavior,”<sup>86</sup> and the Supreme Court would likely agree.<sup>87</sup> That the declaratory judgment would deliver emotional satisfaction is not enough, according to those courts, for, “were the rule otherwise, few cases could ever become moot.”<sup>88</sup> Fisher, now a college graduate with no intent of reapplying to UT, would struggle to explain how a declaration that UT wronged her would offer her anything beyond emotional solace today.<sup>89</sup>

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2982 n.6 (2010) (“[The plaintiff’s] suit, after all, seeks only declaratory and injunctive—that is, prospective—relief.”).

84. See *Nat’l Audobon Soc’y, Inc. v. Davis*, 474 U.S. 64, 69 (1985) (describing a declaratory judgment as a permanent injunction against continuing violations of law, and noting that the declaratory judgment only “implied that the defendants had violated [the] law in the past” (emphasis added)); see also Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 14 (2009), <http://yalelawjournal.org/content/view/764/1> (“The declaratory judgment . . . does not penalize any past act. It simply declares the law.”).
85. See *Nat’l Audobon Soc’y, Inc. v. Davis*, 307 F.3d 835, 847-48 & n.5 (9th Cir. 2002); *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) (citing *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995)); *F.E.R.*, 58 F.3d at 1533 (“The [plaintiffs’] claim for a declaratory judgment is similar to their claim for damages. In each, [they] ask the court to determine whether a past constitutional violation occurred.”).
86. *Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006); accord *Jordan v. Sosa*, 654 F.3d 1012, 1025-26 (10th Cir. 2011); see also *Arar v. Ashcroft*, 532 F.3d 157, 191-92 (2d Cir. 2008) (holding that the plaintiff lacked standing to request a declaration that the United States violated his rights when that declaration would offer him no future benefit), *aff’d en banc*, 585 F.3d 559, 563 (2d Cir. 2009). *But cf.* Fiss, *supra* note 84, at 15 (arguing that a declaration of prior illegality confers a concrete benefit on a plaintiff sufficient for Article III standing).
87. See *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (holding that a claim for declaratory relief was moot where the party’s “primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son’s death [at the hands of the police] was wrongful”). Notably, too, the Supreme Court has found a declaratory judgment unavailable when it would “have much the same effect as a full-fledged award of damages or restitution” otherwise barred by the Eleventh Amendment, a scenario that fits Fisher’s case snugly. *Green*, 474 U.S. at 73.
88. *Mattis*, 431 U.S. at 173.
89. Interestingly, courts recognizing retrospective declaratory relief have held that it is subject to the Eleventh Amendment bar, just like retrospective money damages. See *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1233 (10th Cir. 2004) (McConnell, J.); *Strunk v. N.Y. State Ins. Fund*, 47 F. App’x 611, 612 (2d Cir. 2002) (unpublished opinion) (before, *inter alios*,

In any event, casting Fisher's declaratory prayer as retrospective requires some creative license. Fisher requested a declaratory judgment that the university's admissions policies and procedures "violate" (present tense) the Fourteenth Amendment and federal civil rights statutes, and that request makes no reference to Fisher herself or to the year that she applied for admission.<sup>90</sup> What she sought, of course, was a broad declaration of ongoing illegality, which is consonant with her related request for an injunction halting all future illegality. Furthermore, this is not an argument Fisher has ever made. In fact, what is most damning to this approach is that Fisher has tacitly accepted in her Supreme Court filings that declaratory relief is no longer in play.

*B. Capable of Repetition, yet Evading Review*

The Supreme Court could attempt to resuscitate Fisher's request for injunctive relief by ensconcing college admissions suits in the exception to mootness known as "capable of repetition, yet evading review."<sup>91</sup> That exception obtains, most famously in the abortion context,<sup>92</sup> when a claim becomes moot quickly, before litigation can resolve it, and when the challenged conduct could recur with respect to the plaintiff.<sup>93</sup> At first blush, one might think that university admissions decisions would fit easily into this category, given that the timeframe for reapplying or transferring to a school is narrow. The Court, however, rejected that position in a 1974 per curiam decision.<sup>94</sup> Even if the Court were to reconsider or distinguish that holding, it would need to explain why lawsuits like Fisher's "evade review" when other plaintiffs can challenge admissions policies by bringing class actions or by alleging more viable damage claims. The claim is also not "capable of repetition" with respect

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Sotomayor, J.). If the Supreme Court agrees, then this potential "solution" to *Fisher's* procedural quagmire is nothing of the sort.

90. *Cf.* Carr v. United States, 130 S. Ct. 2229, 2237 (2010) ("[A] statute's 'undeviating use of the present tense' [i]s a 'striking indic[ator]' of its 'prospective orientation.'" (third alteration in original) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987))); *Winsness v. Yocom*, 433 F.3d 727, 735 (10th Cir. 2006) (holding that a requested declaration that a statute "interferes with free expression . . . would operate prospectively," but not retrospectively, to "prevent future enforcement of the statute" (internal quotation marks omitted)).

91. *See S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

92. *See Roe v. Wade*, 410 U.S. 113, 125 (1973).

93. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007).

94. *DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974) (per curiam).

to Fisher because she will not be reapplying or attempting to transfer to UT. In sum, this maneuver goes nowhere.

*C. Amending the Complaint*

Fisher’s attorney has floated a response in the press, that “other damages could be claimed if the case goes forward—including the tuition differential at [Louisiana State University] and possible lost wages because Fisher did not get into UT.”<sup>95</sup> A recent Supreme Court case, *Alvarez v. Smith*,<sup>96</sup> offers a rejoinder. In *Alvarez*, the Court held that, because the district court had not yet ruled on a pending motion to add damages to the complaint, the Court would have to evaluate the case solely by reference to the (by-then moot) injunctive and declaratory claims.<sup>97</sup> As a result, the Court ruled that the case was moot. *Alvarez*’s principle is that the Court is constrained to focus only on the claims and forms of relief before it rather than speculating on what could be added in the future on remand.<sup>98</sup> That principle applies even more strongly to Fisher’s case because she has no pending motion to add damages. (Not to mention that the amendment deadline was in July 2008.) In any event, this theory is not responsive to the concerns this Essay raises about sovereign immunity and the Title VI claim (Part III) or about the deficiency of Fisher’s alleged “injury” (Section IV.C).

*D. Nominal Damages*

Finally, Fisher believes the Court can award nominal damages (\$1) if nothing else, even though she did not request them in her complaint. She contends that praying for nominal damages is unnecessary.<sup>99</sup> She also says that the Court can read her catchall boilerplate demand for “[a]ll other relief this Court finds appropriate and just” to include nominal or even other compensatory damages.<sup>100</sup> There are cases on her side,<sup>101</sup> but Texas offers

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95. Tony Mauro, *Court Wades Back into Affirmative Action*, NAT’L L.J. (Feb. 21, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202543034383>.

96. 130 S. Ct. 576 (2009).

97. *Id.* at 580.

98. *Id.*

99. Reply Brief, *supra* note 13, at 3 (citing *Mitchell v. Horn*, 318 F.3d 523, 533 n.8 (3d Cir. 2003)).

100. *Id.*

101. *Mitchell*, 318 F.3d at 533 n.8; *Yniguez v. State*, 975 F.2d 646, 647 n.1 (9th Cir. 1992) (per curiam).

contrary holdings from other lower courts, particularly from mootness contexts.<sup>102</sup> For its part, the Supreme Court has rejected one litigant's late attempt to stave off mootness by reading a nominal damages claim into a catchall prayer for relief.<sup>103</sup> That ruling lends some heft to Texas's position, which is already more in line with the principle of *Alvarez*. Moreover, under Fisher's argument, virtually no case would ever naturally become moot.<sup>104</sup>

*Lesage* adds a wrinkle here, too. In a 1978 decision, the Court held that plaintiffs whose procedural due process rights were violated but who did not suffer a calculable monetary injury are still entitled to nominal damages to vindicate their rights.<sup>105</sup> Perhaps it would not be much of a stretch for the Court to extend that principle to the Equal Protection context. But as commentators have noted, *Lesage* says that affirmative-action plaintiffs who cannot prove that they would have been admitted under colorblind criteria have not suffered an injury sufficient for any money damages under § 1983, which must include nominal damages.<sup>106</sup> In conjunction with the unavailability of money damages under Title VI, as discussed in Part III, *Lesage* may stop this last-ditch nominal-damages theory in its tracks.

It must be said, too, that nominal damages are no answer to this Essay's arguments in Part II (mootness),<sup>107</sup> Part III (Eleventh Amendment and Title VI), Section IV.A (redressability), and Section IV.C (injury). It is a rather desperate argument attempting to compensate for drafting errors in the complaint. The Court would be wise to recognize it as such.

## VI. FISHER, NARROWLY TAILORED

As if all that were not enough, a significant limitation on the scope of Fisher's lawsuit is buried in her complaint and has gone almost entirely unnoticed: "To the extent that UT Austin articulates an interest in promoting

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<sup>102</sup> *Fox v. Bd. of Trustees*, 42 F.3d 135, 141-42 (2d Cir. 1994); Brief in Opposition, *supra* note 14, at 17-18 & n.7 (citing *Fox* and eight other supportive cases).

<sup>103</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (citing *Fox*, 42 F.3d at 141-42).

<sup>104</sup> See Vikram Amar, *Fisher v. Texas: An Important Affirmative Action Case Pending in the Supreme Court in Which the Challengers May Have Blown It*, DEAN'S BLOG (Dec. 16, 2011), <http://www.law.ucdavis.edu/blogs/deans/posts/associate-dean-amar-on-fisher-v.-texas.html>.

<sup>105</sup> *Carey v. Piphus*, 435 U.S. 247, 248 (1978).

<sup>106</sup> See Bhagwat, *supra* note 75, at 454; Christina Whitman, *An Essay on Texas v. Lesage*, 51 MERCER L. REV. 621, 632-35 (2000).

<sup>107</sup> In particular, see *supra* note 17.

‘student body diversity,’ Plaintiffs do not challenge this interest.”<sup>108</sup> In other words, *Fisher* is not a challenge to diversity’s vaunted status as a compelling interest. *Fisher*’s grievance, by her own admission, is entirely about narrow tailoring in Texas’s unusual setting.<sup>109</sup> That limited scope binds the Court and should prevent it from using *Fisher* to overrule *Grutter* and end affirmative action once and for all. Consequently, the stakes are not nearly as high as commentators (and nearly every amicus) imagine.<sup>110</sup>

Even without *Fisher*’s concession, the Court, as it is currently constituted, is unlikely to demote diversity from its compelling-interest perch. There are not five votes to do it. Justice Kennedy’s singular and now controlling views in racial-preference cases are premised on diversity retaining its pride of place in the jurisprudence.<sup>111</sup> If diversity were no longer a compelling interest, Justice Kennedy’s preferred race-neutral alternatives (such as Texas’s Top Ten Percent Law<sup>112</sup>) would swiftly come in for constitutional challenge under *Washington v. Davis*<sup>113</sup> and its progeny.<sup>114</sup> Thus, regardless of the narrowness of *Fisher*’s

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108. Second Amended Complaint, *supra* note 3, ¶ 145, *quoted in* Brief for Respondents, *supra* note 31, at 52. This statement appears within *Fisher*’s Fourteenth Amendment claim and immediately follows the observation that “racial classifications must be narrowly tailored to further compelling government interests,” *id.* ¶ 144, removing any doubt that it refers to racial diversity. The claim focuses exclusively on narrow tailoring.

109. Her recent reply brief rearticulated this scope. Reply Brief for Petitioner at 1, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Sept. 5, 2012) (“Petitioner has not contested the holding of *Grutter v. Bollinger* that pursuing racial diversity for educational purposes is constitutional when necessary to secure ‘critical mass’ and narrowly tailored to that end.” (citation omitted)).

110. See, e.g., Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 15, 2011, <http://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html>; Jeffrey Toobin, *The Other Big Supreme Court Case*, NEW YORKER: DAILY COMMENT (May 1, 2012), <http://www.newyorker.com/online/blogs/comment/2012/05/the-other-big-supreme-court-case.html>; see also, e.g., Brief for the United States as Amicus Curiae Supporting Respondents at 8-25, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Aug. 13, 2012) (focusing on diversity as a compelling interest); Brief of Brown University et al. in Support of Respondents at 6-13, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012) (same).

111. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”).

112. TEX. EDUC. CODE ANN. § 51.803 (West 2009).

113. 426 U.S. 229, 239-41 (1976) (holding that a successful Equal Protection claim must demonstrate discriminatory purpose as well as a racially disparate impact).

114. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (explaining that “[a] racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification,” including “a classification that is ostensibly neutral but is an obvious pretext for racial discrimination”); *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 242 n.156 (5th Cir.

challenge, the *Fisher* ruling is likely to be limited to the narrow-tailoring inquiry, with reasoning confined to Texas's unique circumstance.

That assumes, of course, that the Justices reach the merits. This Essay has argued ardently that *Fisher* is wrecked and should be dismissed as improvidently granted, but it remains hard to imagine the Court casting aside a case of such surpassing visibility so brusquely.<sup>115</sup> Doing so would amount to an admission that the Justices were wrong to grant cert. (they were) and that they stirred the country's passions on a delicate issue for nothing. In all likelihood, the Court was aware of at least some of the deficiencies this Essay raises, and the fact that it granted cert. anyway (absent a circuit split, to boot) suggests that the Court was desperate to review this case.<sup>116</sup>

So it is on to the merits. How will they get there?<sup>117</sup> There is really no telling, other than to advert to Justice Brennan's old line that with five votes, you "can do anything around here."<sup>118</sup> It may be as simple as looking the other way.

If the Court does give an answer, *Fisher* could be a fresh example of a pivotal constitutional issue leaving dubious procedural law in its wake. *National Federation of Independent Business v. Sebelius*<sup>119</sup> and *Knox v. SEIU*<sup>120</sup> are two other examples just from the last Term. In the former, over no noted dissents, Chief Justice Roberts ruled that the Tax Anti-Injunction Act (TAIA) did not preclude an immediate decision on the Affordable Care Act's

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2011) (discussing potential constitutional challenges to Texas's Ten Percent Law); *see also id.* at 242 ("The Top Ten Percent Law was adopted to increase minority enrollment."); Richard Pérez-Peña, *To Enroll More Minority Students, Colleges Work Around the Courts*, N.Y. TIMES, Apr. 1, 2012, <http://www.nytimes.com/2012/04/02/us/college-affirmative-action-policies-change-with-laws.html> ("Officials acknowledge that the aim [of percentage plans] is race-conscious but that the mechanism is race-neutral.").

115. *See* Amar, *supra* note 18, at 78 (agreeing that a merits ruling is more likely than a procedural ruling).

116. *See* Dan Slater, *Will the Supreme Court End Affirmative Action?*, DAILY BEAST (Feb. 26, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/02/26/will-supreme-court-end-affirmative-action-not-so-fast.html> ("The justices seem to be so impatient to roll back affirmative action that they don't care what the case looks like.").

117. *Cf.* Alan Morrison, *Agreeing on One Thing: The Anti-Injunction Act Does Not Apply*, SCOTUSBLOG (June 28, 2012, 2:49 PM), <http://www.scotusblog.com/2012/06/agreeing-on-one-thing-the-anti-injunction-act-does-not-apply> ("It was quite clear from oral argument [in the health care cases] that no one on the Court was interested in the [threshold Tax Anti-Injunction Act] argument; the only question was how it would get there.").

118. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008).

119. 132 S. Ct. 2566 (2012).

120. 132 S. Ct. 2277 (2012).

constitutionality.<sup>121</sup> To do so, he established two distinct tests for what constitutes a tax, one for constitutional purposes and another for TAlA purposes.<sup>122</sup> Although most commentary on that case has focused on other aspects, the TAlA result has met with its share of skepticism.<sup>123</sup> In *Knox*, again over no noted dissents, the Court relied on the thinnest possible reed of “controversy” to dodge a mootness problem and hand down a major First Amendment ruling.<sup>124</sup> The respondent had offered the petitioners all they stood to gain from the case, but because the respondent “refused to accept refund requests by fax or e-mail and . . . made refunds conditional upon the provision of an original signature and a Social Security number,” the Court held that the case was not moot.<sup>125</sup> The plaintiffs wanted to e-mail rather than snail-mail, and that was enough. Such is the procedural law made en route to major constitutional pronouncements. Never let it be said that reaching for issues that lurk behind thickets of jurisdictional and procedural thorns leaves no scars.

The Roberts Court is fast developing a reputation for reaching out to decide things it does not need to decide.<sup>126</sup> Dubious justiciability rulings are playing a part in that trend, but because they are dwarfed by the high-wattage conclusions announced alongside them, they tend to draw less criticism than more obvious overreaches. Regardless, being at the center of so many hot-button controversies might become intolerably draining for the Court—not just physically,<sup>127</sup> but also in terms of public approval.<sup>128</sup> The Chief Justice is known to be hyper-attuned to the institutional legitimacy and legacy of his

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121. 132 S. Ct. at 2582-84.

122. *Id.* at 2594.

123. See, e.g., Levinson, *supra* note 21; Morrison, *supra* note 117.

124. 132 S. Ct. at 2287-88.

125. *Id.*

126. See Pamela S. Karlan, *When the Umpire Throws the Pitches*, BOS. REV., May/June 2012, [http://www.bostonreview.net/BR37.3/pamela\\_s\\_karlan\\_supreme\\_court\\_john\\_roberts\\_umpire\\_analogy.php](http://www.bostonreview.net/BR37.3/pamela_s_karlan_supreme_court_john_roberts_umpire_analogy.php); sources cited *supra* note 58.

127. See Adam Liptak, *In Supreme Court Term, Striking Unity on Major Cases*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html> (quoting Justice Ginsburg describing October Term 2011 as “more than usually taxing”).

128. See Adam Liptak & Allison Kopicki, *Public’s Opinion of Supreme Court Drops After Health Care Law Decision*, N.Y. TIMES, July 18, 2012, <http://www.nytimes.com/2012/07/19/us/politics/publics-opinion-of-court-drops-after-health-care-law-decision.html> (“The American public’s satisfaction with the Supreme Court, which had already been low by historical standards in recent polls, dropped further in the wake of the court’s 5-to-4 ruling last month upholding President Obama’s health care overhaul law.”).

Court. With high-profile voting rights and gay marriage cases stacking up in the cert. pool as this Essay goes to press, he and other Justices could be looking for a way to turn down the temperature after last Term's scorcher. If so, this Essay presents a number of ways that the Court could exercise its passive virtues and retreat from the biggest case on its docket with its head held high. If not, another confounding standing ruling is probably in the offing.

It is worth noting, in conclusion, that the Justices who are most likely to want to reach the merits of *Fisher* are the same Justices who are typically the least generous with federal jurisdiction generally and standing in particular.<sup>129</sup> In large part, they and their forebears are the ones who laid these traps. They know best where the traps lie, and also how to get around them.

*Adam D. Chandler recently served as a law clerk to the Hon. Patrick E. Higginbotham, the author of the Fifth Circuit panel opinion in Fisher. The Fifth Circuit decided Fisher prior to the author's tenure on the court, and he was privy to no internal discussion about the case. The views expressed here are his own.*

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<sup>129</sup>. See Morrison, *supra* note 117 ("Given the anti-standing rampage of the Court, and in particular the Chief Justice, in recent years, it is odd that no one even raised the issue.").