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## A Diverse Student Body Without Student Bodies?: Online Classrooms and Affirmative Action

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# A Diverse Student Body Without Student Bodies?: Online Classrooms and Affirmative Action

Ryan H. Nelson\*

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## I. INTRODUCTION

*Ready Player One* is a 2011 tour de force science fiction novel by Ernest Cline,<sup>1</sup> the feature film version of which is set to be directed by Steven Spielberg and released in 2018.<sup>2</sup> At the heart of *Ready Player One* lies its protagonist, Wade Watts, a teenager living in Oklahoma City in 2044 who

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1. ERNEST CLINE, *READY PLAYER ONE* (2011); *see also* Janet Maslinaug, *A Future Wrapped in 1980s Culture*, N.Y. TIMES (Aug. 14, 2011), <http://www.nytimes.com/2011/08/15/books/ready-player-one-by-ernest-cline-review.html>.

2. *Ready Player One*, IMDB, <http://www.imdb.com/title/tt1677720/> (last updated Sept. 20, 2016).

attends school inside the OASIS (a clever backronym for the Ontologically Anthropocentric Sensory Immersive Simulation),<sup>3</sup> a massively-multiplayer, online role-playing game<sup>4</sup> that has taken the world by storm. Each day, Wade and his classmates from across the globe don virtual reality headsets, immerse themselves in the OASIS, and their avatars<sup>5</sup> attend school virtually. Part of the allure of the OASIS is that students like Wade do not need to look or sound like themselves; rather, their adopted avatars can be any sex, race, or age they want, and the OASIS's voice modulation software can make the avatars sound however the user wishes.<sup>6</sup> Therefore, when Wade sits in an online classroom comprised entirely of avatars inside the OASIS, he has no way of knowing who he is sitting next to. Wade is anonymous.

The online classrooms of the OASIS may seem like pure science fiction but, in reality, America's public universities engage students in myriad classroom environments that range from traditional, entirely-in-person classroom environments to entirely-online, virtual classrooms, with every shade of grey in between.<sup>7</sup> These varied classroom environments pose a fascinating question with respect to the ways such universities use affirmative action in admissions. In *Grutter v. Bollinger*,<sup>8</sup> the United States Supreme Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>9</sup> Indeed, student body diversity remains one of the few "compelling interests" that the Court has held satisfies the constitutional imperative that the "government may treat people differently because of their race only for the most compelling reasons."<sup>10</sup> Yet, can student body diversity exist when there are no student bodies, as in an online classroom? Is the ability of public university students to know the races of their classmates a necessary element

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3. CLINE, *supra* note 1, at 56; Maslinaug, *supra* note 1.

4. A massively-multiplayer, online role-playing game is "any story-driven online video game in which a player, taking on the persona of a character in a virtual or fantasy world, interacts with a large number of other players." *MMORPG*, DICTIONARY.COM, <http://www.dictionary.com/browse/mmorpg> (last visited Feb. 14, 2017).

5. An avatar is "a graphical image that represents a person, as on the Internet." *Avatar*, DICTIONARY.COM, <http://www.dictionary.com/browse/avatar> (last visited Feb. 14, 2017).

6. CLINE, *supra* note 1, at 57.

7. I. ELAINE ALLEN & JEFF SEAMAN, CHANGING COURSE: TEN YEARS OF TRACKING ONLINE EDUCATION IN THE UNITED STATES 7 (2013), <http://files.eric.ed.gov/fulltext/ED541571.pdf> [hereinafter CHANGING COURSE].

8. 539 U.S. 306, 325 (2003).

9. *Grutter*, 539 U.S. at 325.

10. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

of what makes student body diversity sufficiently compelling to justify race-based admission considerations? What remains of *Grutter* if students stop seeing the color of their classmates' skin, and instead see only their computer screens?

This Article tackles those questions. Part II briefly recounts affirmative action jurisprudence with respect to public higher education admissions, concentrating predominantly on the *Grutter* holding and its progeny—namely, both iterations of *Fisher v. University of Texas at Austin*.<sup>11</sup> Part III explores the popularity, growth, and variety of online classrooms used in public universities in recent years. Finally, Part IV contends that the compelling nature of a higher education institution's interest in student body diversity becomes uncertain—and potentially diluted—by the institution's use of online classrooms. Thus, this Article argues that the Supreme Court should require public universities seeking to use race-based considerations in their admission decisions to prove that student body diversity remains sufficiently compelling despite the incidence of online classrooms at their institutions. In other words, the Court should cease recognizing student body diversity as per se compelling, and instead should deem it a potentially compelling interest, the nature of which must be proved.

## II. AFFIRMATIVE ACTION IN HIGHER EDUCATION

The U.S. Supreme Court has held that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny,” meaning “such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”<sup>12</sup> Working within this framework, the *Grutter* Court confronted an issue of first impression: is student body diversity a compelling government interest that justifies the consideration of race in university admissions? By a vote of 5–4, the Court answered yes.<sup>13</sup>

However, instead of relying on any single reason, the *Grutter* Court chose instead to cite no fewer than five effects of student body diversity in

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11. See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2418 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210–11 (2016).

12. *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc.*, 515 U.S. at 227) (internal quotations omitted).

13. *Id.* at 325 (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest.”).

support of its conclusion:

1. It promotes a “robust exchange of ideas”<sup>14</sup> and “exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>15</sup>
2. It “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.”<sup>16</sup>
3. It “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>17</sup>
4. It promotes “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.”<sup>18</sup>
5. It cultivates “a set of leaders with legitimacy in the eyes of the citizenry, [as] it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>19</sup>

A decade later, the Court revisited *Grutter*'s core holding in *Fisher I*, where it reemphasized the first two points above by noting that student body diversity was sufficiently compelling because it “enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”<sup>20</sup> Yet, beyond that citation, the *Fisher I* Court failed to reinforce or expound upon *Grutter*'s conclusion. Most recently, in early 2016, in *Fisher II*, the Court underscored all of the rationales above save the fourth, but failed to provide any additional justifications for the proposition that student body diversity is a compelling state interest.<sup>21</sup>

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14. *Id.* at 324, 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

15. *Id.* at 330 (internal citation omitted).

16. *Id.* (internal quotations omitted).

17. *Id.* (internal quotations omitted).

18. *Id.* at 332 (internal citations omitted).

19. *Id.*

20. *Fisher I*, 133 S. Ct. at 2418.

21. *Fisher II*, 136 S. Ct. at 2210–11.

## III. THE RISE OF ONLINE CLASSROOMS IN PUBLIC UNIVERSITIES

The popularity of online classrooms in higher education is at an all-time high and growing every year, as demonstrated by the data below:

1. Even in 2002, before *Grutter* was decided, “[v]irtually all public institutions had online offerings.”<sup>22</sup> Ten years later, that statistic remained roughly constant—over 90% of all public institutions continued to offer some form of online classrooms.<sup>23</sup>
2. From 2002 to 2012, the proportion of public universities whose online offerings included completely online classrooms (i.e., programs where students do not or rarely interact in person) rose dramatically. It soared from less than 50%, in 2002, to over 70%, in 2012.<sup>24</sup>
3. Not only is the prevalence of online courses and completely online classrooms high and growing, but many public institutions now offer students the option of completing an entire degree in online classrooms. Indeed, eight out of the top ten public universities, as ranked by *U.S. News and World Report*,<sup>25</sup> offer at least one degree that can be earned entirely online.<sup>26</sup>

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22. CHANGING COURSE, *supra* note 7, at 21, 37.

23. *Id.* at 21.

24. *Id.* at 37.

25. See generally *Top Public Schools*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public> (last visited Feb. 14, 2017).

26. See *Dental Hygiene, Master of Science Online*, M DENTISTRY, <http://www.dent.umich.edu/about-school/department/pom/dental-hygiene/dental-hygiene-masters-degree-online> (last visited Feb. 14, 2017) (University of Michigan); *Fully Online Degree Programs*, UNC ONLINE, <http://programs.northcarolina.edu/> (last visited Feb. 14, 2017) (University of North Carolina); *MBA Online from William & Mary*, RAYMOND A. MASON SCH. OF BUS., <http://mason.wm.edu/programs/online-mba/> (last visited Feb. 14, 2017) (College of William & Mary); *Online Course Information*, UCLA ENGINEERING, MASTER OF SCI. IN ENGINEERING ONLINE, <http://www.msol.ucla.edu/> (last visited Feb. 14, 2017) (University of California, Los Angeles); *Online Learning*, U. OF VA., SCHOOL OF CONTINUING AND PROFESSIONAL STUD., <http://www.seps.virginia.edu/online-learning> (last visited Feb. 14, 2017) (University of Virginia); *Online Master's Degrees*, GA. PROFESSIONAL TECH EDUC., <https://pe.gatech.edu/online-masters-degrees> (last visited Feb. 14, 2017) (Georgia Institute of Technology); *The Master of Information and Data Science Delivered Online from UC Berkeley*, DATASCIENCE@BERKELEY, <http://datascience.berkeley.edu/> (last visited Feb. 14, 2017) (University of California, Berkeley); *Types of Graduate Programs*, UCI GRADUATE

4. From 2012 to 2013, the number of students at public universities enrolled in at least one online course grew by over 160,000 students to a total of 3.75 million, an increase of 4.6%.<sup>27</sup>
5. Likewise, from 2012 to 2014, the number of students at public universities not enrolled in any online courses decreased 5.3%.<sup>28</sup> During that same timeframe, the number of public university students enrolled in some online courses increased 6.4%, and the number enrolled only in online courses increased 8.6%.<sup>29</sup>

In sum, online classrooms are widely available at public universities, completely online classrooms and degrees are gaining popularity, and students are enrolling in more of such courses and taking a larger proportion of their classes online than ever before.

#### IV. WHY THE COMPELLING NATURE OF STUDENT BODY DIVERSITY AT PUBLIC UNIVERSITIES SHOULD BE A CASE-SPECIFIC INQUIRY

Collectively, *Grutter*, *Fisher I*, and *Fisher II* stand for the proposition that student body diversity is a compelling governmental interest because it exposes students to diverse ideas; decreases stereotypes; prepares students for a diverse workforce; promotes diversity in the civic life of our nation; and ensures that the path to leadership is open to all races, thereby cultivating legitimate leaders. However, the Court has never clarified whether these effects of student body diversity would remain just as compelling if students were unaware of their classmates' races or ethnic backgrounds.

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DIVISION, <http://www.grad.uci.edu/academics/program-development/types-of-programs.html> (last visited Feb. 14, 2017) (University of California, Irvine). The University of California's Santa Barbara and San Diego campuses do not currently appear to offer any degrees that can be earned entirely online.

27. I. ELAINE ALLEN & JEFF SEAMAN, GRADE LEVEL: TRACKING ONLINE EDUCATION IN THE UNITED STATES 13, 47 (2015), <http://www.onlinelearningsurvey.com/reports/gradelevel.pdf>; see also Daphne Koller, *The Future of College: It's Online*, WALL STREET J. (April 26, 2015), <http://www.wsj.com/articles/the-future-of-college-its-online-1430105057>.

28. See I. ELAINE ALLEN & JEFF SEAMAN, ONLINE REPORT CARD: TRACKING ONLINE EDUCATION IN THE UNITED STATES 44 (2016), <http://onlinelearningsurvey.com/reports/online-reportcard.pdf>.

29. *Id.*

Assuming the Court's assessment of the effects of student body diversity is accurate, some of those effects are unaffected by online learning. Specifically, the absence of an in-person classroom does not affect the diversity of the ideas shared in class because diverse ideas can be shared with equal fervor in an online classroom. Moreover, the civic life of our nation would maintain the same level of diversity regardless of whether students attended traditional or online courses. Additionally, student body diversity ensures that the path to leadership via public institutions is visibly open to all races, regardless of students' awareness of their classmates' races.

However, the strength of the remaining effects of student body diversity may be influenced by online learning. Diversity in a traditional classroom decreases stereotypes because students see their classmates' race as they share their particular viewpoints. Yet, in a completely online course, a student may or may not know the race of the person sharing an idea. One anecdote by Professor Sheila Seifert from the University of Colorado illustrates the potential range of exposure of students in online classrooms to their classmates:

Seifert sometimes arranged for students to work together from a distance, requiring them to collaborate with classmates whom they never saw. One time, however, members of the class chose to meet in person after completing an online assignment. "They were amazed at how they looked to each other compared to the personalities that had come across [online]," Seifert said.<sup>30</sup>

Similarly, students in online courses may not be as prepared for a diverse workplace as they would have been had they enrolled in traditional courses. Indeed, the limited exposure to diversity that a completely online classroom offers suggests insufficient preparation for a diverse workplace.

In contrast, the prevalence of online classrooms may, in some ways, strengthen the compelling nature of student body diversity. To that end, the University of Virginia advertises its online course offerings by extolling the diverse nature of students from around the world who are able to learn together solely via an online classroom:

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30. GENE I. MAEROFF, *A CLASSROOM OF ONE: HOW ONLINE LEARNING IS CHANGING OUR SCHOOLS AND COLLEGES* 42 (2004).



When you enroll in an online course, you'll experience a collaborative environment where you'll interact with your instructor and other students who live not only in Virginia, but also in other parts of the country or around the globe. This student diversity adds to the richness of online learning, as participants share their differing opinions and experiences.<sup>31</sup>

In conclusion, the prevalence of online classrooms may weaken the effect that student body diversity at public universities has on decreasing stereotypes and preparing students for a diverse workforce. However, it concomitantly may strengthen the diversity in the classroom, ostensibly encouraging more diverse ideas, promoting more diversity in our nation's civic life, and further ensuring that the path to leadership is open to all races. Accordingly, the prevalence of online classes at public universities may render two of the five effects of student body diversity cited by the *Grutter* Court moot.

Furthermore, while the Court has declined to weight the effects of student body diversity, students' exposure to diverse ideas and the reduction of stereotypes stand out as arguably the most important reasons justifying the use of race-based considerations in admissions.<sup>32</sup> Yet, in completely online degree programs, student body diversity might have no effect on stereotypes because stereotypes would not trigger. Indeed, in the case of a completely online degree program where students have no knowledge of their classmates' race, student body diversity no longer looks like a compelling reason to use race-based admission considerations at all.

To be clear—this Article is neither a criticism nor an affirmation of *Grutter's* holding that, when Barbara Grutter filed her lawsuit in 1997 against various agents of the University of Michigan Law School,<sup>33</sup> student body diversity was a compelling reason justifying all race-based considerations in admission decisions. Rather, this Article argues only that the increased prevalence of online classrooms in public universities in the two decades since then dilutes *Grutter's* conclusion and calls for a

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31. *Online Learning*, SCPS.VIRGINIA.EDU, <http://www.scps.virginia.edu/online-learning> (last visited Feb. 15, 2017) (University of Virginia, School of Continuing and Professional Studies).

32. See, e.g., Jessica Bulman-Pozen, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L. J. 1408, 1411 (2006) (reducing arguments for racial diversity to two basic forms—racial diversity as a proxy for viewpoint diversity and racial diversity as a tool for breaking down barriers to equal opportunity directly, for example by challenging stereotypes).

33. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

reexamination of its holding that student body diversity is *always* such a compelling reason. For these reasons, the Court should revisit *Grutter*'s holding and require public universities to justify the use of race-based admission considerations on a case-by-case basis. Public universities should be required to prove that, taking into account the prevalence of online classrooms in the plaintiff's education, student body diversity remains a compelling reason to "treat people differently because of their race."<sup>34</sup>

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34. *Id.* at 326 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).