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Emphasis Added

Fisher v. University of Texas and Its Practical Implications for Institutions of Higher Education

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The year 2013 was a year of galvanizing focus on higher education diversity, with all eyes again on the U.S. Supreme Court, this time with the highly anticipated decision in *Fisher v. University of Texas*.¹ For those who anticipated that the Court would materially reverse course from its landmark decisions in 2003 (and its unanimous affirmation of a core principle underpinning those decisions in 2007), the Court's decision failed to meet the mark. While not the blockbuster typical of past Court pronouncements in higher education admissions (*Bakke*, 1978; *Grutter/Gratz*, 2003), Justice Anthony Kennedy's opinion on behalf of seven members of the Court² was indisputably consequential. While

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preserving the core principles and legal framework relevant to race- and ethnicity-conscious student admission practices (which apply to other enrollment practices),³ Justice Kennedy also amplified the Court's prior pronouncements on key points associated with race-conscious means of achieving diversity goals, with particular emphasis on the consideration of race-neutral alternatives to race-conscious practices. At the same time, when compared to Justice Sandra Day O'Connor's 2003 *Grutter* opinion, Justice Kennedy's opinion reflects a more subtle but no less pronounced shift in tone throughout all facets of his decision—suggesting at the margins, at least, a heightened evidentiary rigor applicable to the Court's review of race-conscious means pursued to achieve diversity goals.

Without question, the Court's 2013 ruling should be a point of focus for all institutions of higher education (IHEs) that include race-conscious policies in their portfolio of enrollment policies and practices designed to achieve diversity goals. As IHEs undertake their review of this important decision in light of their policies and practices, it is essential that they read *Fisher* as addressing a key element of a larger legal regime of relevance, and, correspondingly, neither over nor under react to the Court's edict. (Indeed, higher education leaders must avoid the pitfalls that often plague the press and public in the wake of Court decisions on highly polarizing issues, such as those raised in this case, where headlines rushed to judgment in declaring victory for Abigail Fisher, a win for the University of Texas [UT], and for everyone in between.) As Justice O'Connor reminded us in *Grutter*, "context matters"—and *Fisher* can only be fully understood within the larger legal story that started nearly forty years ago.

In 1978, in an opinion that no other justice joined but that was viewed as a melding of the more stark views of the other eight justices expressed in differing opinions, Justice Lewis F. Powell articulated the view in *Regents of California v. Bakke* that the educational benefits of diversity could justify race-conscious admissions policies in appropriate cases.⁴ Twenty-five years later, a majority of the Court in *Grutter v. Bollinger* and *Gratz v. Bollinger* built on this core principle with the articulation of a clear, operational framework to guide IHEs when developing and pursuing race-conscious enrollment practices, with a particular focus on the kinds of diversity-focused admissions policies that could withstand strict scrutiny.⁵ A decade after that, in 2013, *Fisher* preserved the *Grutter* framework, with two major points of emphasis and refinement: (1) amplification on key principles and questions associated with the need for race-conscious policies and practices in light of race-neutral

alternatives; and (2) the corresponding need to evaluate the actual effects of policy implementation—policies *and practices*—with care.

We titled this essay “Emphasis Added” not only to call attention to the Court’s amplification of key elements from prior cases, as well as its shift in tone, but also to ensure that the *Fisher* decision (one that some have perceived to be a “dud”⁶) is understood as a decision of consequence. Said differently, the fact that the decision was not the expected blockbuster does not mean that it was not a case with important implications for the higher education community. To provide useful guidance regarding those implications, this essay includes a discussion of key policy and legal contextual points, the *Fisher* decision itself, and practical implications of that decision.

The Policy Context Associated with Institutional Diversity Goals: The True Starting Point

Although key legal issues associated with race-conscious enrollment policies and practices are integral in their development and implementation, the importance of the relevant legal inquiries does *not* mean that the law should be the exclusive point of focus with respect to those policies, or, for that matter, that the Supreme Court’s legal framework should be the starting point for an analysis of institutions’ diversity policies. To the contrary, the most central questions to be addressed (and on which, to be sure, answers to legal inquiries depend) are the educational policy and practice questions that are at the core of enrollment decisions made by IHE leaders. Said differently, educationally sound—and, correspondingly, legally sustainable—policies should, in the first instance, be developed with a focus on the institution’s mission and accompanying diversity goals. It is only in that context—with clarity around core educational aims and benchmarks of success in achieving those aims—that essential legal considerations associated with risk/return judgments and assessments of likely compliance should (robustly) enter the process. Thus, even though *Fisher* can serve as a forcing event for many institutions, it is important to keep in mind that the exercise associated with policy and practice development, implementation, evaluation, and change over time should not be solely focused on legal compliance, as vital as that inquiry is.⁷

Grutter, in fact, continues to remind us that institutional mission is the key driving force that underlies legal compliance judgments associated with student diversity. Indeed, the requirements of the *Grutter*

framework that remain as guideposts in the wake of *Fisher*—well-defined, mission-aligned goals accompanied by strategies that are effective, flexible, and regularly reviewed—map with the primary elements of good policy development.

Additionally, as recognized by the *Grutter* majority, the achievement of diversity goals does not end with the admissions office. Faculty members, among others, have a vital hand in ensuring that the benefits of diversity are embraced as mission central and, correspondingly, that they actually accrue to students. In this vein, the role of researchers is indispensably central, as well—particularly as issues of program design and impact surface and as questions are posed about what programs and policies are working to assure and enhance the quality of education, and why.

The Legal Context Associated with Race- and Ethnicity-Conscious Practices: Key Rules and Inquiries

Under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, classifications based on race or ethnicity are inherently suspect, disfavored by courts, and, therefore, subject to “strict scrutiny”—the most rigorous standard of judicial review.⁸ Strict scrutiny requires that public institutions of higher education and private institutions receiving federal funding only use race as a factor in conferring benefits or opportunities to individual students in instances where they can establish that such race-conscious policies or practices serve a “compelling interest” and are “narrowly tailored” to serve that interest.

A compelling interest is the end that must be established as a foundation for maintaining lawful consideration of race and ethnicity when conferring benefits and opportunities. Federal courts have expressly recognized two distinct interests as compelling: a remedial interest (correcting for the present effects of past discrimination) and university’s mission-based interest in promoting the educational benefits of diversity among its students—the focus of this essay.⁹ Importantly, the Court’s recognition of these interests, as a matter of law, does not categorically confer a badge of compliance on any institution pursuing diversity goals through race-conscious means. Instead, that recognition merely sets the stage for an IHE to “make the case” regarding its *particular* compelling interest associated with diversity. Reflecting this point, the University of Michigan in *Grutter* established that diversity (including racial and ethnic diversity) was essential to its success in achieving its institutional mission; the evidence presented persuaded

the Court that, in the words of Justice O'Connor, the benefits of diversity were, for the University of Michigan, "substantial" and "real."

Narrow tailoring reflects the requirement that any race- or ethnicity-conscious means used to achieve the compelling interest must "fit" that interest precisely, with race or ethnicity considered only in the most limited manner possible to achieve those goals (though this limited consideration of race or ethnicity should also produce a material benefit to the institution). Federal courts examine several interrelated criteria in determining whether a given program is narrowly tailored, including:

1. **Necessity:** the necessity of using race or ethnicity to achieve goals in the first place (a prerequisite, of sorts, for all other components of the narrow tailoring analysis, meaning that an institution must be able to show that the use of race-conscious policies is needed to meet its diversity goals; this is where questions about race-neutral alternatives most often surface);
2. **Flexibility and Burden:** the flexibility of the policy with respect to its consideration of race and the corresponding burden imposed on non-beneficiaries (illustrated in the University of Michigan cases where the "individualized holistic review" of each law school applicant passed legal muster and the "mechanical" and "rigid" undergraduate point system pursuant to which each underrepresented minority applicant was awarded 20 points out of a possible total of 150 merely because of his or her minority status did not); and
3. **Review and Evaluation:** whether the race-conscious policy is subject to periodic review and refinement, as appropriate, with an end point in mind.

In addition, although not clearly established as precedent in a higher education setting, the positive material impact of a race-conscious policy in the achievement of compelling interests is likely germane—and may well be integral in the future—to any narrow tailoring inquiry. Complementary of the necessity analysis, the demonstrated material impact was a decisive element in a decision by the Court in 2007 related to race-conscious elementary and secondary student assignment policies.¹⁰ In that case, the Court rejected the challenged student assignment policies at issue, in part because they only affected a very small number or proportion of students and, therefore, did not yield (in the Court's view) material diversity benefits. Notably, in reaching that judgment, the Court contrasted its *Grutter* precedent, where the University of Michigan law school policy had led

to a significant increase in underrepresented minority students at the law school—from 4.5 percent of the total student body to 14 percent.¹¹

The *Fisher* Decision . . . and a Postscript

With a 7–1 vote tally and short (at least by Supreme Court standards) seven-page opinion, the *Fisher* decision surprised most Court watchers. Justice Kennedy’s majority opinion preserved the *Grutter* strict scrutiny framework (described above) and declined to rule on the merits of the UT admissions policy, remanding the case to the Fifth Circuit for further action.

So, what do we know?

After *Fisher*, a number of federal nondiscrimination principles and standards remain the same. First, *Grutter* remains good law and its overarching strict scrutiny framework has been preserved. Second, and as importantly, the educational benefits of diversity after *Fisher* remain a compelling interest that can justify appropriately developed and implemented race-conscious practices. And, third, given academic freedom interests long recognized in higher education contexts by the U.S. Supreme Court, IHEs continue to merit limited deference from federal courts regarding their mission-focused diversity goals that are associated with their race- and ethnicity-conscious policies and practices.

At the same time, Justice Kennedy’s decision in *Fisher* placed new emphasis on a number of legal principles and inquiries. Within the narrow tailoring analysis, the *Fisher* Court refined or amplified elements of legal principles in three key areas:

1. The Court made it clear that, though a court may give some deference to an institution’s judgment related to its mission-driven diversity *goals*, an institution will not receive any deference in the design and implementation of the *means* to achieve those goals. (Justice O’Connor’s majority opinion in *Grutter* on that point was ambiguous, but Justice Kennedy’s dissent in *Grutter* drew the precise distinction that he has now clearly reflected in Court’s opinion in *Fisher*.¹²)
2. With its strong emphasis on the question of necessity of considering race, the Court reverted to older, non-admissions precedent to articulate more rigorously the thresholds that must be met in a court’s review. Context still matters in a strict scrutiny analysis, but

an institution's good faith judgment regarding the necessity of its race-conscious policies and practices is not, standing alone, enough to meet the strict scrutiny standard. Specifically, the Court placed a new emphasis on race-neutral strategies in an institution's process of policy development, with Justice Kennedy instructing that "[c]onsideration by the university is of course necessary, but is not sufficient to satisfy strict scrutiny" and that the university has the "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."¹³ Relevant factors in this analysis include whether a race-neutral approach "could promote the substantial interest about as well [as the race-conscious approach] and at tolerable administrative expense"—notably considered in the context of the institution's "experience and expertise in adopting or rejecting certain admissions processes."¹⁴

3. Under *Fisher*, a reviewing court must examine the institution's "assertion that its admissions process uses race in a permissive way"—and give "close analysis to the evidence of how the process works in practice."¹⁵ This inquiry will likely encompass the degree to which a race-conscious policy has been implemented faithfully to its intended purpose and design as well as the actual impact or effects the policy has on the institution's achievement of its mission-based diversity goals.

Correspondingly, the tone of the *Fisher* decision is manifestly different than in *Grutter*. A number of reasons may account for the difference. One is that the principal critique from the Court related to a lower court's failure to rigorously apply strict scrutiny principles (not present in *Grutter*) and that the Court was, at core, focused on and admonishing lower courts.¹⁶ Another reason involves the makeup of the group of Justices who joined the majority opinion: the seven justices in the *Fisher* majority included conservative, moderate, and liberal members of the Court—a marked contrast to the five in *Grutter*, made up of the swing vote Justice O'Connor and the four more liberal justices at the time.¹⁷

That said, the points of substantive emphasis and amplification noted above (all in a more "conservative" direction) make it difficult to conclude that that is the only basis for the shift in tone, especially in light of the stark divide in the *Grutter* and *Fisher* majority opinions' discussion of the narrow tailoring inquiry. Making this point most glaringly, Justice

O'Connor wrote that institutions must undertake "serious, good faith consideration of workable race-neutral alternatives"—but this "does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."¹⁸ Justice Kennedy selectively quoted and added emphasis to this language: "Although '[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative' [emphasis added], strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'"¹⁹ This indicates that an institution does not have to try every neutral strategy imaginable, but should review every strategy that could have some possible utility—arguably, a more demanding threshold than in *Grutter*.²⁰

A postscript to the Supreme Court's decision: shortly after the *Fisher* decision was issued, the U.S. Departments of Education and Justice released a new guidance document related to *Fisher*.²¹ The document does not provide new substantive guidance, nor does it offer detailed commentary on the case beyond an affirmation that the *Grutter* framework continues to rule the day. It does, however, reflect the departments' support for institutions' diversity efforts and explicitly confirms the continuing viability of the departments' 2011 postsecondary, as well as elementary and secondary guidance, regarding the federal government's enforcement of Title VI of the Civil Rights Act of 1964. That document also reaffirms the viability of the Department of Education's 1994 Federal Register guidance (also under Title VI) on financial aid and scholarships.²²

Practical Implications of the Fisher Decision

A Gift of Time . . . to Reexamine Processes and Foundations for Race-Conscious Policies

Institutions should consider the *Fisher* decision to have conferred a gift of time. Rather than materially disrupting the current legal landscape, the Court fundamentally affirmed, with respect to core principles, a "business as usual" message—albeit one with express requirements and implicit suggestions of more rigor in analysis and justification of race-conscious policies related to the commonly accepted framework of "strict scrutiny" analysis.

Moreover, even though the case itself was not the blockbuster expected, interest and energy generated by *Fisher* provides an opportunity to engage with leadership and stakeholders across the institution to re-examine mission-based diversity goals and the policies and practices to attain them in light of the current context and future development.

A Strong Reminder of the Need to Assess Viable Race-Neutral Strategies Fully

As a matter of principle, *Fisher* reminds institutions seeking to achieve the educational benefits of diversity that they should focus as deliberately on race-neutral practices as they do on race-conscious practices. Most institutions that pursue race-conscious strategies already include a broad array of race-neutral approaches in their enrollment efforts. *Fisher's* significance perhaps is greatest in its stark reminder about the need to evaluate and understand fully the relationships among the full panoply of viable race-neutral and race-conscious policies and practices and how they can, in the right combination, optimally support mission-driven diversity goals.

Operationally, as well, race-neutral strategies are the focus of what is perhaps the most important passage in *Fisher*: “[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”²³ And, if a race-neutral approach “could promote the substantial interest about as well [as the race-conscious approach] and at tolerable administrative expense,” the institution may not use the race-conscious policy.²⁴ Unfortunately, the Court did not provide any greater definition of these key terms and phrases. Given that previous precedent provides little meaningful guidance, IHEs are left to assess the practical meaning of this language, and chart their own course.

Simply put, this quandary presents both a challenge and an opportunity for institutions to define these terms for themselves within their own unique context—a seemingly appropriate exercise given the centrality of institutional mission in the legal framework *and* the Court’s explicit recognition of the value of “a university’s experience and expertise . . . in adopting or rejecting certain admissions processes,” which courts can consider.²⁵ Practical perspectives that may help inform those institutional efforts include the following:

- “*Demonstrate.*” An institution does not necessarily have to try out a neutral strategy or conduct a full-fledged study to make a proper

showing for purposes of strict scrutiny, but it must have a sound basis for a decision not to pursue a particular neutral strategy that is anchored in evidence and informed by the institution's experience and expertise.²⁶ That foundation should be documented as part of the "periodic review and evaluation" effort associated with the Court's narrow tailoring rules. Notably, general social science research and studies of programs at other institutions may well factor into an institution's analysis, but the institution's decision to adopt or not to adopt a neutral strategy should be anchored in its own context.²⁷

- "*Available and workable.*" Not all strategies are appropriate for use at every institution, and any neutral strategy will need to be designed and implemented in light of an institution's unique mission and context. If the adoption of a neutral strategy would diminish the mission, conception of diversity, understanding or determination of merit, or other central component of its institutional identity—or if a strategy is simply out of reach (for example, a percent plan for a small private liberal arts school)—a college or university has no legal obligation to pursue it.²⁸
- "*About as well.*" Guided by its mission and related diversity goals, an institution should be able to articulate why its goals are or are not being met by its current policies and practices (both race-conscious and race-neutral). Within this context, the institution should be able to articulate the kinds of trade-offs associated with the replacement of a race-conscious strategy with one that is neutral and whether those trade-offs are acceptable to the institution so that it can continue to fulfill its mission and meet its diversity goals. Courts are not principally in the business of weighing the benefits and costs of such institution-specific judgments—or substituting an institution's well-founded judgment with their own—but they will look closely at the institution's justification and sources of information (including the processes pursued to arrive at its judgment) in the context of the legal admonitions described above. Institutions thus remain free to make these judgments for themselves, but should be prepared, in educational terms, to "show their work" in the event of a legal challenge.
- "*At tolerable administrative expense.*" Race-neutral strategies can require significant investments of time and resources to be designed and implemented effectively, and institutions appear not to be

required to absorb an undue added cost to adopt a neutral strategy. At the same time, an institution should not assume that cost savings alone can justify the ongoing use of a race-conscious policy. In sum, cost should be considered along with a wide range of other factors in an institution's analysis of whether a neutral strategy should be adopted.²⁹ Again, the institution should be prepared to show the reasoning behind its decision as it continues its periodic review of race-conscious policies and practices.

Silence on Critical Mass . . . With More to Come

Despite being a major issue in the case that was extensively briefed by the parties and amici, the concept of critical mass was completely bypassed by the Supreme Court's *Fisher* opinion, leaving Justice O'Connor's very brief discussion (and acceptance) of the concept in *Grutter* as the only Court pronouncement on this topic in a student enrollment context. Thus, critical mass remains a viable contextual benchmark of success under federal law—even as more robust, practice-oriented research and program evaluation should be pursued.³⁰

In that vein, the Fifth Circuit judges hearing the *Fisher* case on remand from the Supreme Court included important questions about critical mass in framing the issues for the next stage of litigation, including: (1) Is UT due any deference in its decision that critical mass has not been achieved? (2) Has the University achieved critical mass? If so, when? And, if not, when is it likely to be achieved?

In response, the parties articulated significantly different conceptions of the term.

Abigail Fisher's counsel conveyed a limited focus squarely on the quantitative nature of critical mass. For example:

UT's use of race is unconstitutional because UT will have failed to demonstrate "with clarity" that it is short of critical mass. Given the substantial number of minority students admitted through UT's pre-2004 race neutral admissions system, UT effectively achieved critical mass no later than 2003, the last year it employed its race neutral admissions plan, and certainly would have achieved critical mass without the use of racial preferences by 2007, the year before Ms. Fisher applied for admission.³¹

UT responded by emphasizing both the qualitative and quantitative nature of critical mass. Building on "several data points," UT asserted,

“As *Bakke*, *Grutter*, and *Fisher* recognize, the constitutional diversity objective is a more nuanced concept—and one that is inherently bound up with educational judgments as well. That interest simply does not lend itself to the kind of numerical precision or bright-line targets that Fisher has in mind.”³²

To be sure, while critical mass implicates important numbers-focused inquiries in any particular institutional context, a position that critical mass begins and ends with a head count is simply wrong. Again, return to *Grutter*. In that case, the critical mass that Justice O’Connor accepted, was (as a matter of court record) the law school’s objective of achieving a range of somewhere between 11 percent and 17 percent of underrepresented minority students (African-American, Hispanic, Native American at the Law School).³³ That range, without a hard and fast floor or ceiling, was inextricably linked to an evidence-based view about the educational benefits of diversity that would emanate from a critical mass of underrepresented minorities.³⁴ In short, critical mass, as approved in *Grutter*, reflected a contextualized blend—recognizing the inextricable link between the “substantial” and “real” educational goals associated with student diversity and the need for a sufficient presence of underrepresented minorities in a particular setting.³⁵

The Fifth Circuit’s treatment of the thorny question of what, precisely, critical mass can or should look like in light of *Grutter*’s holding (and with an eye on four dissenters including Justice Kennedy who voiced emphatic objections regarding the University of Michigan’s application of the theory) will likely have implications beyond the *Fisher* case itself related to key foundations of IHEs’ diversity policies (What is success? How do you know?) as well as a new generation of issues associated with changing demographics (including an increasingly diverse population of students).

The Work Ahead . . . on Diversity and More

Though not the game changer that many expected, *Fisher* nonetheless presents an important opportunity (and challenge) as colleges and universities reexamine their diversity policies and practices in light of efforts to gather supporting information and evidence, identify questions that need to be answered by practitioners and researchers, refine policies as appropriate, and build the processes and relationships necessary to maintain a continuous improvement cycle. Perfection is not the legal standard,

but institutions should be prepared to invest time and resources in the development of well-articulated and crafted policies—particularly race-conscious policies that, after all, must serve “compelling” goals. Stated differently, maintaining the status quo of the past decade (even for institutions with effective diversity policies) may not be enough to meet the economic, demographic, political, and legal demands in years to come.

The good news? While challenging, to be sure, the achievement of these goals—educationally and legally—is an attainable goal. (The University of Michigan prevailed in *Grutter*, after all.) As with other vital educational interests and objectives, the effort requires conviction, commitment, engagement, and resources, as well as a fair amount of “roll up your sleeves” effort. Thus, in the bigger picture, the pursuit of diversity goals is fundamentally no different than those that are correspondingly important in achieving other (often related) mission-driven goals. Moreover, using limited institutional resources effectively—including not taking significant legal risks for ineffective strategies—simply makes good sense.

Notably, the achievement of institution-specific diversity goals—essential not only for the fulfillment of institutional mission but also for the future economic, social, and civic future of our country—cannot be accomplished solely in a courtroom or by institutions acting alone. The higher education community at large must rally around key shared values and beliefs, and work to build broad-based public understanding and support of those efforts.

(Michigan illustrates that the court of public opinion, after all, is as important as a court of law. Its victory in *Grutter* proved pyrrhic, after a successful voter initiative in Michigan two years later led to a state law that forbade the consideration of race and ethnicity when conferring benefits at public institutions in the state.)

Moving forward, as institutions work to better articulate the mission-related goals, objectives against which success is gauged, and the logic and rationale of supporting enrollment strategies, there is yet more to do. Institutions should ensure that the complementary (but distinct) set of issues related to *access* in higher education are fully incorporated into a broader dialogue with all key stakeholders, and that they find their way into policies and programs that are strategically targeted toward this set of goals.

To achieve core access goals, institutions will need to measure success differently than they do for diversity goals. Not every student that an institution touches with an access policy will be admitted or choose to

enroll in that institution—but, as the pool of admissible students grows, it will lift up the higher education community (not to mention the country as a whole). This means that institutions should act collaboratively, particularly to build pathways in and through degree programs; to share best practices; and to strengthen relationships among themselves, as well as with K–12 systems, college counselors, and community-based organizations, among others.³⁶

Finally, we should not lose sight of fact that the ongoing dialogue surrounding twenty-first-century knowledge and skills is occurring at a pivotal moment in time, when colleges and universities focused on diversity goals are uniquely positioned to lead. Their efforts to admit a broadly diverse group of students and encourage interactions among them have been studied and repeatedly documented as leading to better critical thinking, enhanced understanding and acceptance of difference, breaking down stereotypes, effective leadership development, and other critical educational benefits.³⁷ Notably, these benefits are the underpinnings of much that surrounds the twenty-first-century knowledge and skills agenda, which can be effectively leveraged and aligned with diversity-related efforts as all key stakeholders work to achieve world class educational excellence associated with a robustly diverse higher education environment. The result? Engaged citizens, community leaders, and productive workers to carry out the promise of the twenty-first century.³⁸