

# ACCEPTING UNCERTAINTY: FISHER V. UNIVERSITY OF TEXAS AND RACE-CONSCIOUS COLLEGE ADMISSIONS

VERNON L. FRANCIS\*

## **Abstract**

*In Fisher v. University of Texas a 4-3 majority of the United States Supreme Court upheld the University's race-conscious admission program against a challenge from an applicant who claimed that the program violated the Equal Protection Clause of the 14th Amendment. The hope was that this decision would finally bring an end to divisions among the Justices on the issue of affirmative action that have created uncertainty about whether public universities can maintain race-conscious admissions policies without violating the constitution, and what the principles governing such programs would be. This article explores whether a workable consensus on these issues has been reached, or whether divisions that still exist among members of the Court continue to contribute to an atmosphere of uncertainty that has followed the Court's affirmative action jurisprudence from the outset. The paper concludes that the Court appears to have reached consensus on the idea that equal protection "strict scrutiny" should be the standard of review for such programs, and that diversity is the kind of compelling governmental interest that can be furthered by the judicious use of race-conscious admissions criteria. But divisions among the Justices remain on how this standard should be applied in a given case. Two approaches appear to be in competition for the Justices' attention—the more pragmatic but still rigorous approach to strict scrutiny applied by the Fisher majority in upholding the Texas program, and a much less forgiving form of scrutiny proposed by Fisher's dissenters, which seems closer in spirit if not in application to the "strict in theory, fatal in fact" form of review traditionally applied to legislative measures used to institutionalize racial segregation and promote white supremacy. It should be noted, however, that the application of either standard would require a college or university whose plan was subject to challenge to produce the kind of evidentiary record that would support their continuing use of race-conscious criteria, and that would demonstrate that the use of racially neutral criteria would fail to achieve the level of diversity in its student body needed to meet its legitimate educational goals. Public institutions of higher learning must be prepared to live with the uncertainty created by this ongoing doctrinal conflict, and for the challenges the conflict over affirmative action will continue to present.*

## **Introduction**

In an article published at the end of the United States Supreme Court's 2015 term, the *New York Times* reported that Justice Ruth Bader Ginsburg characterized the Court's decision in *Fisher v. University of Texas*,<sup>1</sup> its most recent affirmative action

---

\* Partner, Dechert LLP. I would like to thank Georgette Chapman Phillips for her comments on an early draft of this paper

case, as “built to last.”<sup>2</sup> It took two trips to the Supreme Court for the Justices to reach their final decision in *Fisher*, which focused on a rejected applicant’s challenge to the University of Texas at Austin’s race-conscious admissions plan. At the conclusion of the case’s second round before the Court, seven of the Court’s Justices voted 4 to 3 to rebuff the petitioner’s challenge to the University’s plan, holding it a constitutional exercise of government authority under the Equal Protection Clause of the Fourteenth Amendment. After this result, Justice Ginsburg reportedly observed, “I don’t expect that we’re going to see another affirmative action case ... at least in education.”<sup>3</sup>

If Justice Ginsburg’s prediction proves to be accurate, then *Fisher* would be an important milestone in the Court’s over forty-year struggle to determine whether, and when, the use of race-conscious college admissions policies are constitutionally valid. Over the years, the Court’s body of decisions on these programs has been characterized by doctrinal instability and uncertainty—byproducts of continuing disagreements among the Justices over the constitutionality of race-conscious admissions programs under the Equal Protection Clause. From the beginning, basic issues regarding whether, and for what purposes, government entities may use race-conscious policies, and about what standards courts should use to review them, have been debated. The Justices’ disagreements on these issues have been so pronounced, and their divisions so pointed and persistent that even cases decided by Court majorities seemed vulnerable to reconsideration and reversal.

Justice Ginsburg’s remarks can be read to suggest that the Court’s opinions in the *Fisher* case may have altered this pattern. In the second of its *Fisher* opinions (*Fisher II*), a majority of the Court reaffirmed holdings in earlier cases that have allowed institutions of higher education to employ race-conscious admissions policies as long those policies can survive strict scrutiny under the Equal Protection clause. To that extent, the Court in *Fisher II* also can be viewed as having rejected, once again, a theory of strict scrutiny that is “strict in theory, but fatal in fact,” at least when applied to appropriately tailored race-conscious admissions programs. But did *Fisher* really exorcise the shade of uncertainty that has haunted the Court’s affirmative action jurisprudence, at least as it relates to college admissions?

This summary will discuss why a level of doctrinal uncertainty about the future of race-conscious admissions programs is likely to persist despite the *Fisher* result. Two reasons in particular will be suggested. First, although the Court has agreed for quite some time that “strict scrutiny” is the appropriate standard of review for race-conscious admissions plans, significant differences among the Justices remain on *how* the courts should apply this standard. The Court’s differences on the strict scrutiny standard’s application are the result of disparate opinions among the Justices on the level of skepticism with which any race-conscious policy adopted by government should be approached. They are doctrinally significant because their

---

1 136 S. Ct. 2198 (2016). *Fisher*’s case came before the Supreme Court twice. For simplicity, the Court’s 2013 opinion, *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), will be referred to as *Fisher I*, and the 2016 opinion, 136 S. Ct. 2198, as *Fisher II*. The litigation collectively will be referred to as *Fisher*.

2 Adam Liptak, *Ginsburg Has a Few Words About Trump*, N.Y. Times, July 11, 2016, at A1.

3 *Id.*

resolution can affect not only the kind and quantity of proof a college or university will be expected to produce in the event of a court challenge, but also the type and intensity of the administrative effort necessary to create an evidentiary record that can persuade a reviewing court of the institution's good faith.

The second source of continued doctrinal uncertainty is the *Fisher* Court's emphasis of a principle long associated with the use of race-conscious remedies, but in a way that seemed almost new. Specifically, as part of its holding, *Fisher II*'s majority directed state-run institutions of higher education that use race-conscious measures to conduct "periodic reviews" of their admissions policies, in order "to reassess [their] constitutionality and efficacy." In other words, if it was not clear before, the Court made clear in *Fisher II* that institutions employing race-conscious admissions strategies are expected and required to be proactive about ensuring that, over time, their programs operate within constitutional boundaries. These institutions also are required to make sure that any such plan will operate only for as long as it is actually needed, and have been encouraged to view themselves as "laboratories" for the development of racially-neutral strategies for maintaining diverse student populations, in anticipation of a time when such measures presumably would be no longer needed. Figuring out how to incorporate the Court's new emphasis on plan oversight into their admissions strategies may well be the next important challenge state-run institutions must face in this area.

The paper begins with a review of the Court's journey from its first affirmative action case to its rulings in *Fisher*, with an emphasis on the Court's decisions on college admissions programs, to provide background on the issues that have united and divided the Justices. The discussion then turns to the *Fisher* decisions themselves, and to how the results in these decisions incorporate and depart from the Court's precedents on the constitutionality of race-conscious admissions in an effort to explain where the Court's doctrinal fissures remain. The paper concludes with thoughts on where the Court's latest rulings on affirmative action may or may not take future litigation on these issues, and on what changes, if any, to their recruiting programs the Court's directives will require of colleges and universities that still rely on race-conscious recruiting efforts.

## I. Race-Conscious Admissions and Living with Doctrinal Uncertainty

Uncertainty has been a defining characteristic of the Supreme Court's affirmative action jurisprudence from the very beginning. The confusion started with the Court's very first affirmative action case, *DeFunis v. Odegaard*,<sup>4</sup> where the Court declined to reach the merits of a law student's Fourteenth Amendment claim because of mootness. The plaintiff in *DeFunis* was a white law school applicant who challenged the University of Washington's law school admissions policy, claiming that the school's procedures for admitting minority applicants violated his right to Equal Protection.<sup>5</sup> In a *per curiam* decision, the Court dismissed *DeFunis*'s claim as moot because the trial court had ordered the petitioner immediately admitted to the law school, and he was in the last quarter of his final year as a law student

---

4 416 U.S. 312 (1974).

5 *Id.* at 314.

when the Supreme Court heard his case.<sup>6</sup> Even then, a forceful dissent by Justice Douglas, who argued that as a general matter the Equal Protection Clause barred the use of racial preferences by government, suggested the depths of the internal divisions the Court would face in attempting to decide these issues.<sup>7</sup>

It was in *Regents of the University of California v. Bakke*<sup>8</sup> that the Supreme Court first addressed the doctrinal challenges raised by race-conscious admissions policies. In *Bakke*, the Court was asked to determine whether the minority admissions plan for the University of California at Davis Medical School, which apportioned a predetermined number of places in each entering class for applicants of color, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution or Title VI of the Civil Rights Act.<sup>9</sup> An opinion by Justice Lewis Powell led a fractured Court to a compromise holding: that race-conscious measures in college admissions were not necessarily prohibited by the Equal Protection Clause in every instance, but that Davis's particular use of racial criteria was unconstitutional.<sup>10</sup> In later decisions, while appearing to accept the core of Justice Powell's approach to reviewing race-conscious government actions, the Court has continued to disagree on what his approach actually requires with regard to judicial review of race-conscious college admissions policies.

#### ***A. Justice Powell Lays a Foundation in Bakke***

The divide Justice Powell sought to bridge with his opinion in *Bakke* arose in part from a split among the Justices on what standard of review under the Equal Protection Clause to apply in cases involving "benign" uses of race-conscious measures. In cases before *Bakke* involving regulations that restricted or granted access to governmental rights or benefits on the basis of racial criteria, the Court had held that the government entity employing the rule was required to meet the demands of strict scrutiny—that is, to demonstrate that the racial classification at issue served a compelling government interest, and that the use of such a measure was necessary to the achievement of that interest.<sup>11</sup> In *Bakke*, the Court was faced with deciding whether strict scrutiny as it had been applied in other cases should be used to evaluate Davis's program, whether a lower level of scrutiny that would have allowed the states more leeway to develop voluntary remedial measures

---

6 *Id.* at 319-20.

7 *See id.* at 320-48 (Douglas, J., dissenting). Justice Brennan also filed a dissent in *DeFunis*, which was joined by Justices Douglas, White, and Marshall. Justice Brennan also argued that the case was not moot, and that the majority's decision was an attempt to sidestep resolution of a difficult case. *Id.* at 348-50 (Brennan, J., dissenting).

8 438 U.S. 265 (1978).

9 *Id.* at 277-78. The Equal Protection clause provides that "[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

10 *See Bakke*, 438 U.S. at 316-20.

11 *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

should be applied, or whether Court review of any constitutional issue was required given the circumstances of the case.

The argument that strict scrutiny should be used to review voluntary affirmative action policies posed a doctrinal problem for those who believed in the validity of voluntary affirmative action efforts. Before *Bakke*, observers considered the strict scrutiny applied in Equal Protection cases to be “strict in theory, but fatal in fact.”<sup>12</sup> What this meant was that in most cases, once the Court decided to apply strict scrutiny to a race-conscious measure, it was almost a certainty that the measure in question would be found unconstitutional.<sup>13</sup> This was because, in reviewing the constitutionality of racial restrictions now acknowledged to have been unlawfully repressive to non-whites, the Court found that, “[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”<sup>14</sup>

Four Justices (Brennan, Marshall, Blackmun and White) concluded in *Bakke* that it made no sense for courts to use the same Equal Protection standard used to break down the system of racial apartheid that had developed in the United States after the Civil War to assess the constitutionality of actions taken by governments to improve the condition of people who were the victims of this oppression.<sup>15</sup> More pragmatically, these Justices also must have been concerned that a rule requiring the application of the “strict in theory, fatal in fact” model of strict scrutiny to race-conscious regulations would either drastically curtail or bring an end to voluntary government efforts to address racial inequality, a fate they found inconsistent with the remedial purposes that motivated passage of the post-Civil War Amendments.<sup>16</sup> The proper response to these concerns, these Justices argued, was the use of a form of intermediate scrutiny (similar to the standard used to review gender-based restrictions) in cases involving benign uses of racial criteria.<sup>17</sup>

---

12 *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citation omitted).

13 *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the Warren Court’s model for Equal Protection review).

14 *Palmore*, 466 U.S. at 432; *accord* *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J. dissenting) (“Our jurisprudence ranks race a ‘suspect’ category, not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.” (emendation in original)).

15 *Bakke*, 438 U.S. at 356-66, 368 (Brennan, J., concurring).

16 “*See id.* at 362-69 (explaining why voluntary efforts by state governments to bring their institutions’ practices into compliance with the Fourteenth Amendment’s protections are constitutional). More recently, Justice Ginsburg has argued that in reviewing race-conscious regulation, courts should be allowed to distinguish between measures intended to remedy lingering inequalities and restrictions meant to perpetuate them, and that the standards of review utilized in equal protection cases should reflect these differences. *Gratz*, 539 U.S. at 301-302 (Ginsburg, J., dissenting).

17 *See Bakke*, 438 U.S. at 359 (Brennan, J., concurring). For a time, a majority of the Court agreed that the intermediate standard championed in Justice Brennan’s *Bakke* opinion should be used to review affirmative action programs enacted by the United States Congress, as opposed to those established by state governments. *E.g.*, *Metro Broadcasting v. FCC*, 497 U.S. 547, 565-66 (1990). The Court abandoned this distinction, however, in *Adarand Constructors v. Peña*, 515 U.S. 200, 226-27 (1995), where it held that all race-conscious governmental action should be subject to strict scrutiny no matter where it originates.

Four other Justices took the position in *Bakke* that the only issue legitimately before the Court was whether Davis's admissions policy violated Title VI. Writing for himself, Chief Justice Burger, and Justices Stewart and Rehnquist, Justice Stevens wrote that it was "perfectly clear that the question whether race can ever be used as a factor in an admission decision is not an issue in this case, and that discussion of that issue is inappropriate."<sup>18</sup> Instead, these Justices concluded that Davis's program violated Title VI's prohibitions on discrimination, and that given the availability of a statutory ground for the Court's decision, the analysis should have ended there.<sup>19</sup>

Justice Powell's opinion in *Bakke* was essentially an attempt to bridge this divide. First, although he agreed that the Fourteenth Amendment did not always preclude uses of racial criteria for remedial purposes *per se*, Justice Powell also concluded that strict scrutiny should apply to all uses of racial criteria by government, whether characterized as benign or not.<sup>20</sup> He believed that the Fourteenth Amendment required the courts to maintain a degree of skepticism about the use of racial preferences for any purpose, and that consistency in constitutional interpretation required the use of the same standard in all cases.<sup>21</sup> Second, and importantly, Justice Powell also concluded that the alleviation of what he called "societal discrimination" was not the kind of compelling state interest that could survive strict scrutiny because it was "an amorphous concept of injury that may be ageless in its reach into the past."<sup>22</sup> After examining all of the justifications offered by Davis for its admissions policy, he determined that the only interest important enough to meet the demands of strict scrutiny was that of attracting and maintaining a diverse student body. The Justice concluded that Davis's interest in enrolling diverse classes of medical students was not only constitutionally protected, but also consistent with the educational missions of institutions of higher education and within their institutional competencies.<sup>23</sup>

Reaching the "means" prong of the strict scrutiny inquiry, Justice Powell concluded that Davis's decision to reserve a specific number of class seats only for students of color was not a "narrowly tailored" means of achieving this constitutionally permissible goal.<sup>24</sup> It was this conclusion that led to what has become one of the few rules of general application to come from the Court's affirmative action cases—namely, that schools are prohibited from using racial "quotas" as a tool for achieving diversity.<sup>25</sup> Citing the undergraduate admissions policy in place at Harvard University as an example, Justice Powell endorsed

---

18 *Bakke*, 438 U.S. at 411 (Stevens, J., concurring in part).

19 *See id.* at 411-12, 421.

20 *Id.* at 294-99 (judgment of the court).

21 *Id.* at 294, 296-97, 99.

22 *Id.* at 306-09. Justice Powell expressed a similar sentiment in *Wygant v. Jackson Board of Education* when he called such a goal "too amorphous a basis for imposing a racially classified remedy." 476 U.S. 267, 276 (1986).

23 *Bakke*, 438 U.S. at 311-14.

24 *Id.* at 315, 318-19.

25 *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (*citing Bakke*, 438 U.S. at 315).

plans that instead required each application to be considered individually and that treated an applicant's race as but one of several factors potentially relevant to the admissions process.<sup>26</sup> In his view, this individualized consideration of applications would limit the potential damage to the interests of non-minority candidates, while allowing educational institutions to pursue constitutionally legitimate efforts to ensure a diversity of perspectives on campus.<sup>27</sup>

### **B. Grutter Adopts Justice Powell's Reasoning and Sets a Deadline**

Twenty-five years later, the issue of race-conscious university admissions returned to the Supreme Court<sup>28</sup> in the form of two actions brought against separate schools of the University of Michigan: *Grutter v. Bollinger*,<sup>29</sup> an action challenging the constitutionality of the law school's admissions policy under the Equal Protection clause,<sup>30</sup> and *Gratz v. Bollinger*,<sup>31</sup> which raised a similar challenge to the university's undergraduate admissions policy.<sup>32</sup> The Court found the undergraduate school's use of race as a factor to be overly rigid and, therefore, unconstitutional.<sup>33</sup> However, the Court approved the law school's admissions policy, which was modeled on the "Harvard" plan recommended by Justice Powell in *Bakke*.<sup>34</sup>

The Court's decision in *Grutter* followed a period of uncertainty about affirmative action's continuing viability, fueled in part by decisions about government use of race-conscious measures in settings other than college admissions that raised questions about the Court's willingness over the long term to continue to allow states to implement race-conscious remedies.<sup>35</sup> Contributing to these anxieties was the Fifth Circuit's 1996 decision in *Hopwood v. Texas*,<sup>36</sup> which rejected the idea that ensuring classroom diversity could ever be a sufficiently compelling justification

---

26 *Bakke*, 438 U.S. at 315-19.

27 *Id.*

28 Another case involving a student challenge to a university's affirmative action plan did reach the Court during the period between its decisions in *Bakke* and *Grutter*, but the Court found the student's claim invalid because he was unable to allege the kind of injury necessary to support a Section 1983 action. *See Texas v. Lesage*, 528 U.S. 18, 20-22 (1999).

29 539 U.S. 306.

30 *Id.*

31 539 U.S. 244 (2003).

32 *Id.*

33 *Id.* at 270-72.

34 *Grutter*, 539 U.S. at 343-44.

35 *See id.* at 344-45 (Ginsburg, J., concurring) (noting that for "at least part of [the] time" that elapsed between *Bakke* and *Grutter*, "the law could not fairly be described as 'settled'"); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling Supreme Court precedent to hold that strict scrutiny applies in all cases involving judicial review of race-conscious measures, whether the regulations at issue are state or federal); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that local government minority set-aside program violated Equal Protection clause).

36 78 F.3d 932 (5th Cir. 1996).

for the use of race-conscious measures.<sup>37</sup> The *Grutter* majority appeared determined to put these anxieties to rest, at least in the context of college and university admissions. Justice O'Connor's opinion for the Court endorsed Justice Powell's recognition of student diversity as a constitutionally permissible objective.<sup>38</sup> The Court also reaffirmed the constitutionality of individualized review of applicants using race as one factor among many others, as Justice Powell had prescribed.<sup>39</sup>

Justice O'Connor's opinion in *Grutter* was consistent with the approach to Equal Protection strict scrutiny she had articulated in earlier cases involving government use of race-conscious measures. In *Wygant v. Jackson Board of Education*,<sup>40</sup> for example, the Court invalidated a public school plan that would have provided minority teachers a measure of protection in the event of a layoff.<sup>41</sup> In her concurring opinion in *Wygant*, Justice O'Connor expressly "subscribe[d] to Justice Powell's formulation" of strict scrutiny because it "mirror[ed] the standard ... consistently applied" by the Court "in examining racial classifications in other contexts."<sup>42</sup> The Justice also suggested that the differences between strict scrutiny as she would apply it in affirmative action cases and the intermediate standard of scrutiny Justice Brennan advocated in *Bakke* did "not preclude a fair measure of consensus." Rather, she concluded, "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant to remedial use of a carefully constructed affirmative action program."<sup>43</sup>

A few years later, in *Adarand Constructors v. Pena*,<sup>44</sup> a case involving a federal program meant to encourage the use of minority contractors, Justice O'Connor again made it clear that, in her view, strict scrutiny should not be viewed as necessarily "fatal in fact" when applied to affirmative action plans:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it ... . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.<sup>45</sup>

---

37 *See id.* at 944-48.

38 *See Grutter*, 539 U.S. at 328.

39 *Id.* at 340-41.

40 476 U.S. 267 (1986)

41 *Id.* at 270-71, 283-84.

42 *Id.* at 285 (O'Connor, J., concurring in part).

43 *Id.* at 286; *see also id.* at 287 (stating that the Court was "in accord" that a public employer "consistent with the Constitution," may undertake appropriate affirmative action remedies).

44 515 U.S. 200 (1995).

45 *Id.* at 237 (O'Connor, J., concurring) (citations omitted).

In her *Grutter* opinion, Justice O'Connor applied this understanding of strict scrutiny's purpose and of its proper application to the University of Michigan Law School's race-conscious admissions plan. Speaking for the Court, she wrote: "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"<sup>46</sup> and explained:

Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.<sup>47</sup>

The *Grutter* majority was convinced that the law school's admissions plan should survive this review. In contrast, the majority in *Gratz* just as soundly rejected more rigid applications of criteria that in its view gave undue weight to race-conscious factors.<sup>48</sup> Unlike the law school's admissions plan, the undergraduate school's plan automatically awarded twenty points from a 100 point scale to every candidate for admission from an "underrepresented racial or ethnic minority group."<sup>49</sup> In the Court's view, this plan's automatic award of a substantial number of the points needed for admission to every minority candidate did not provide the kind of individualized consideration of applicants envisioned by Justice Powell in *Bakke*, which meant that the plan could not be considered "narrowly tailored" within the meaning of strict scrutiny.<sup>50</sup> Read together, the results in *Gratz* and *Grutter* cemented the idea that admissions policies employing racial criteria in a manner that, whether intentionally or by operation, guaranteed admission to a defined number of minority students, rather than plans that called for holistic reviews of each individual applicant, would face serious obstacles on review.<sup>51</sup>

Although it voted to allow appropriately tailored uses of race-conscious criteria in the context of college admissions, the *Grutter* majority also appeared to be concerned that without appropriate guidance from the courts, there was a danger that educational institutions would treat racial preferences not as temporary remedial measures, but as permanent entitlements. To address this concern, the Court grafted a requirement onto race-conscious admissions plans that introduced a new source of uncertainty about the future of such programs: the idea that all affirmative action policies should have a "sunset." The Court noted in *Grutter* that

---

46 *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

47 *Id.*

48 *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (discussing the Harvard-style admissions plan described by Justice Powell in *Bakke* and noting that, "[t]he admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application" (citations omitted)); *see also Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

49 *Gratz*, 539 U.S. at 255.

50 *Id.* at 269-75.

51 *See id.* (discussing differences between the University of Michigan undergraduate plan and the Powell plan).

race-conscious admissions programs were never intended to exist in perpetuity, that any such programs “must be limited in time,” and that there was “no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”<sup>52</sup> In fact, the Court went as far as to suggest what the “logical end point” for race-conscious admissions programs might be, writing: “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>53</sup>

Incorporated as part of *Grutter’s* “sunset” provision was the admonition that colleges and universities should periodically review their race-conscious admissions programs to determine whether racial preferences remained necessary at any particular point in time before the end of the 25-year “sunset” period.<sup>54</sup> The Court observed that educational institutions in several states already were experimenting with race-neutral alternatives for achieving diversity.<sup>55</sup> Universities in states other than those identified in *Grutter*, the Court cautioned, “can and should draw on the most promising aspects of those race-neutral alternatives as they develop.”<sup>56</sup>

## II. The *Fisher* Decisions

A decade after *Grutter*, the *Fisher* case again raised questions about the viability of race-conscious programs in general, and about how long the use of such measures by colleges and universities should be allowed to continue. The Court’s response followed several years of litigation between Abigail Fisher and the University of Texas at Austin (“UT” or “University”), which had adopted race-conscious admissions procedures to select about a quarter of its incoming classes. After two trips to the Supreme Court, a majority of the Justices held that UT’s admissions policy was constitutional under the Fourteenth Amendment.<sup>57</sup> In so holding, the Court reaffirmed that a degree of race-consciousness was allowable in college admissions, provided that institutions are able to demonstrate that a compelling government interest is being served by the program, and that the program is tailored “narrowly” to achieve the interest. The Court also emphasized a “review” requirement that is sure to pose challenges for race-conscious programs in the future.

### A. *The University’s Admissions Policy and Fisher’s Challenge*

At the time the *Fisher* litigation was commenced, undergraduate admissions at UT involved a two-step process. The first 75 percent of each entering class was admitted under the so-called “Top Ten Percent” rule, a statutorily-imposed

---

52 539 U.S. at 341-43.

53 *Id.* at 343.

54 *See id.* at 342.

55 *Id.*

56 *Id.*

57 Only seven Justices decided *Fisher II*. Justice Kagan, who had been responsible for handling the case during her tenure as Solicitor General, did not take part in the decision. Justice Scalia heard oral argument but died in February of 2016, before the Court published its decision in June.

obligation that guaranteed college admission to a state college or university in Texas to all students who graduated in the top 10% of their high school classes.<sup>58</sup> The Texas legislature enacted this provision in 1997 in response to the Fifth Circuit's 1996 decision in *Hopwood*, which had declared any use of race in the college admissions process a violation of the Equal Protection guarantee.<sup>59</sup> A second phase of the admissions process, which UT adopted after the Supreme Court's 2003 opinion in *Grutter*, used a combination of factors to create a score used to rank candidates for the remaining positions in the class. A candidate's race was one of the factors used to calculate a component of this score, along with other factors like the candidate's academic record, the socioeconomic status of the applicant's high school, the applicant's family responsibilities, and the language spoken in the applicant's home.<sup>60</sup>

Petitioner Fisher applied for admission to UT's 2008 freshman class. Because she was not ranked in the top ten percent of her high school class, she had to compete for the relatively limited number of positions available through the post-*Grutter* component of UT's admissions process. Fisher was denied admission and sued, claiming that UT's use of race as a factor in the admissions process violated her right to Equal Protection.<sup>61</sup> Initially, her claim was rejected by the trial and circuit courts,<sup>62</sup> but the Supreme Court reversed, holding that the standard for Equal Protection strict scrutiny had been incorrectly applied by the lower courts.<sup>63</sup> In essence, the Court held that the lower courts had deferred too much to the University's assertions of good faith in determining whether the University's use of racial classifications were in fact necessary.<sup>64</sup>

The Court remanded the case to the Fifth Circuit Court of Appeals and ordered it to reconsider and assess the University's plan "under a correct analysis."<sup>65</sup> Finding that a remand to the district court was unnecessary under the circumstances, the Fifth Circuit re-examined the record considering *Fisher I*'s holding and decided that UT's plan should still be approved.<sup>66</sup>

---

58 *See Fisher II*, 136 S. Ct. 2198, 2205 (2016); *Fisher I*, 570 U.S. 297, 305 (2013).

59 *Fisher I*, 570 U.S. at 304-05. A year after *Hopwood* was decided, the University switched to a holistic review process for applications that did not include any consideration of race. The Texas legislature adopted the Top Ten Percent Law, which the University implemented in 1998. Thus, from 1998 to 2003, when *Grutter* was decided, the University first admitted any student who qualified under the Top Ten Percent law, and then filled the rest of the class using a holistic review process that did not include consideration of any applicant's race. *See Fisher II*, 136 S. Ct. at 2205.

60 *See Fisher II*, 136 S. Ct. at 2205-06.

61 *Fisher I*, 570 U.S. at 306.

62 *Id.* at 306-07.

63 *Id.* at 315.

64 *Id.* at 313-15.

65 *Id.* at 314-15.

66 *See Fisher v. Univ. of Texas*, 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016)

## ***B. Rejecting the Per Se Approach to Reviewing Race-Conscious Programs (Again)***

Fisher's petition for review of the Fifth Circuit's decision on remand was granted and, in an opinion authored by Justice Kennedy, a majority of the seven Justices who heard Fisher's case voted to approve UT's plan. They held that strict scrutiny had been properly applied by the circuit court on remand, and discussed and rejected arguments to the contrary.<sup>67</sup> Three of the conclusions reached by the majority in *Fisher II* merit more detailed exposition.

### *1. Rejecting the Per Se Approach to Reviewing Race-Conscious Programs*

First, although it occurred without much discussion, the *Fisher II* majority used its opinion to make clear that the Court's decision in *Grutter* had "overruled" categorical objections to race-conscious admissions plans. In 1996, as noted in the *Fisher* opinions, the Fifth Circuit essentially barred all race-conscious recruiting in *Hopwood*. In that case, considering the validity of what was then the University of Texas's law school admission scheme, the Fifth Circuit held that, "any consideration of race or ethnicity ... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment,"<sup>68</sup> expressly rejecting Justice Powell's reasoning in *Bakke*. The *Hopwood* court had concluded that Justice Powell's opinion in *Bakke* was not binding precedent because the section of his opinion that discussed the diversity issue was joined by none of the other Justices.<sup>69</sup> Because the Supreme Court declined to hear Texas's appeal in *Hopwood*, the circuit court's decision remained the law of the Fifth Circuit until *Grutter*.<sup>70</sup>

Viewed with this background in mind, Justice Kennedy's statement in *Fisher II* that *Grutter* overruled *Hopwood* should be viewed as something more than a parenthetical aside. The question of whether the Fourteenth Amendment operated as a *per se* prohibition on remedial uses of race by government was not a new issue for the Court. Beginning with the *Bakke* case, Justices in decisions issued before the *Fisher* case had rejected the argument that the Equal Protection Clause categorically barred the use of racial criteria in governmental decision-making.<sup>71</sup> However, during this same period other Justices continued to hold firm to their view that anything other than a color-blind interpretation of the Fourteenth Amendment violated the Equal Protection guarantee.<sup>72</sup> That this division remained intact was

---

67 *Fisher II*, 136 S. Ct. 2198 (2016).

68 *Hopwood v. Texas*, 78 F.3d 932, 944 (1996).

69 *Id.* at 944-45.

70 *See Texas v. Hopwood*, 518 U.S. 1033 (1996).

71 In addition to Justice Powell's opinion and that of the four other Justices in *Bakke*, see also Justice O'Connor's opinion for the Court in *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (disputing the idea that strict scrutiny should always be "fatal in fact").

72 Justice Stewart argued in favor of a color-blind approach to Equal Protection in his dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 522-32. Justices Thomas and Scalia never wavered from their opinion that the Equal Protection clause ordinarily requires governments to refrain from anything but color-blind actions. *E.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1 (Parents Involved)*, 551 U.S. 701, 751-52, 757-58, 772-82 (2007) (Thomas, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 350-54 (2003) (Thomas, J., dissenting); *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring in part); *id.* at 24041 (Thomas, J., concurring in part).

apparent from the dissents in *Grutter*, where Justices Scalia and Thomas continued to maintain that the Equal Protection Clause barred the use of race-conscious measures *per se*.<sup>73</sup> These Justices took the same position in their *Fisher I* opinions.<sup>74</sup>

The Court's opinion in *Fisher I* also contributed to the uncertainty about where it was headed with the "strict scrutiny" inquiry. Having dissented in *Grutter* because he thought the majority's application of strict scrutiny in that case had been overly lenient,<sup>75</sup> Justice Kennedy took the position in his opinion for the Court in *Fisher I* that the lower courts in that case also had given too much deference to UT's professions of good faith and had not conducted a sufficiently searching review of the record.<sup>76</sup> Although Justice Kennedy agreed that strict scrutiny should not necessarily be "fatal in fact" in all cases, he also wrote that the courts' review "of race-conscious admissions plans must not be strict in theory but feeble in fact."<sup>77</sup> This said, however, the Court's opinion was not particularly clear about how much more "stringency" was required. Too lenient a review would not be sufficiently "strict." But, too stringent a review would be tantamount to the "fatal in fact" approach to judicial review the Court had supposedly rejected in *Grutter* and other cases.

The majority's opinion in *Fisher II* answered these concerns by once again rejecting calls for a *per se* prohibition on race-conscious policies in admissions,<sup>78</sup> and applying a strict scrutiny standard that was something more like the approach taken in *Grutter*. In noting expressly that *Grutter* had overruled *Hopwood* and cases like it, *Fisher II*'s majority took a doctrinal dispute that had continued to inject a

---

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice Kennedy also expressed a preference for a *per se* rule against racial preferences, although he joined the majority's application of strict scrutiny because he believed that, properly applied, strict scrutiny would achieve substantially the same result as a *per se* rule. *See id.* at 518-19 (Kennedy, J., concurring in part). *See also* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 631-38 (1990) (Kennedy, J., dissenting) (characterizing the Court's ruling in favor of the FCC's affirmative action plan as reminiscent of the Court's embrace of the "separate but equal" doctrine in *Plessy v. Ferguson*, and expressing his "regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign'").

Chief Justice Roberts took a similar view of the Clause's protections in his opinion for the Court in *Parents Involved*, 551 U.S. at 48 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For a discussion of how the Court has been divided on the issue of how Equal Protection strict scrutiny should be applied in the context of affirmative action, see Richard Fallon, *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1312-15 (2007).

73 *See Grutter*, 539 U.S. at 349, 353-54 (Thomas, J., concurring in part and dissenting in part).

74 Justices Thomas and Scalia continued to insist on a *per se* prohibition on any use of race by governments in their concurring opinions in *Fisher I*. Justice Scalia stated that he was joining *Fisher I*'s opinion for the Court only because the petitioner had not sought *Grutter*'s reversal. 570 U.S. 297, 315 (2013) (Scalia, J., concurring). Justice Thomas described *Grutter* as "a radical departure from our strict-scrutiny precedents," and recommended that the decision be overruled. *Id.* at 315-18 (Thomas, J., concurring).

75 *See Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting).

76 *Fisher I*, 570 U.S. 297, 313-15.

77 *Id.* at 314.

78 *See Fisher II*, 136 S. Ct. 2198, 2205 (2016) (stating that *Grutter* "implicitly overruled *Hopwood*'s categorical prohibition").

degree of uncertainty to the Court's prior affirmative action decisions and signaled it should be put to rest. Indeed, only Justice Thomas wrote separately to argue in his *Fisher II* dissent that virtually any and every use of racially-conscious criteria in university admissions should be considered *per se* unconstitutional.<sup>79</sup>

*Fisher II*'s analysis can be read, therefore, as having accepted and reinforced the view of strict scrutiny that had been articulated and applied in *Bakke* by Justice Powell, and by Justice O'Connor in *Grutter* and other cases. The *Fisher II* majority agreed that although "strict scrutiny" is supposed to be searching and rigorous ("not feeble in fact"), it should not be so inflexible that it cannot be used to distinguish constitutional from oppressive uses of racial criteria by government. With this question addressed, the Court focused its attentions on the main question raised by *Fisher II*, which was whether UT's admissions program could survive strict scrutiny on the basis of the evidentiary record before the Court—a record that was, as a result of the Fifth Circuit's decision on remand, the same record it had reviewed in *Fisher I*.

## 2. What Kind of Showing Does Strict Scrutiny Require?

As stated by the Court in *Fisher II*, UT was required under the strict scrutiny standard to demonstrate "with clarity" that its purpose or interest in using racially-conscious admission criteria was "both constitutionally permissible and substantial," and that its use of such criteria was "necessary ... to the accomplishment of its purpose."<sup>80</sup> In her arguments, Fisher challenged whether UT had stated the interest it claimed in student body diversity with the kind of clarity a court would need to conduct a meaningful review of the constitutionality of its admissions program. She also advanced several reasons why the Court should find that UT had not met its burden of showing that the race-conscious measures it had adopted after the *Grutter* decision were necessary. Because the Court's responses to these arguments will serve as guides for decisions in future cases, they are discussed in more detail below.

### (a.) How Precise Does an Institution's Description of its Goals Have to Be?

Fisher and the dissenting Justices' major complaint about the University's admissions plan was with what they viewed as the lack of specificity in UT's description of the institutional interests it sought to further by the use of race-conscious measures. As part of its post-*Grutter* review of its admissions policies, the University identified four reasons for wanting to increase the diversity of its student body: (1) the destruction of stereotypes; (2) the promotion of cross-racial understanding; (3) preparing its students for an increasingly diverse workforce and society; and (4) cultivating a set of leaders with legitimacy in the eyes of the citizenry.<sup>81</sup> In discussing these goals, the University explained that it wanted an academic environment that would offer students a "robust exchange of ideas,

---

79 *See id.* at 2215 (Thomas, J., dissenting). Justice Thomas also joined Justice Alito's dissent with the Chief Justice.

80 *Id.* at 2208 (opinion of the Court) (ellipsis in original) (internal quotation marks omitted).

81 *Id.* at 2211 (citation omitted) (internal quotation marks omitted).

exposure to differing cultures, preparation for the challenges of a diverse workforce, and acquisition of competencies required of future leaders.”<sup>82</sup>

Fisher contended that the University’s articulation of its diversity objectives was legally insufficient. She argued that to demonstrate the kind of “compelling” government interest that would survive strict scrutiny, UT was required to set forth the level of minority enrollment that would constitute a “critical mass” of minority students with greater precision.<sup>83</sup> Without a more specific estimate of what UT’s “ultimate” recruiting goal was, she argued, a reviewing court would not be able to assess whether the University’s program was narrowly tailored to that goal.<sup>84</sup>

In his dissent, Justice Alito agreed with Fisher’s assessment of UT’s justifications, and complained that the University had “not identified with any degree of specificity” the interests that its race-conscious program was supposed to serve.<sup>85</sup> He characterized UT’s “primary argument” as contending that “merely invoking ‘the educational benefits of diversity’ is sufficient and that [the University] need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.”<sup>86</sup> Justice Alito also complained that whenever the University seemed to have attempted to move beyond this broad statement of its goals, its presentation was “shifting, unpersuasive, and, at times, less than candid.”<sup>87</sup> Indeed, much of Justice Alito’s dissent is devoted to demonstrating why, in his view, the University’s proffered justifications for its race-conscious policy were either too vague to allow for meaningful review or too lacking in credibility or logic to be persuasive.<sup>88</sup>

*Fisher II*’s majority did not accept Justice Alito’s position. It refused to adopt a standard that would require colleges to express the goal of creating a critical mass of minority students in numerical terms: “the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students.”<sup>89</sup> It was enough, in the Court’s view, that UT had articulated a set of “concrete and precise goals” that would be served by greater student body diversity.<sup>90</sup> The Court concluded, moreover, that the goals UT had articulated sufficiently “mirror[ed]” the compelling interest in diversity that had been identified and endorsed by the Court in its previous cases on race-conscious admissions, and that the University had provided a “reasoned, principled explanation” for its decision to pursue the goals it had articulated.<sup>91</sup>

---

82 *Id.* (citation omitted) (internal quotation marks omitted).

83 *Id.* at 2210.

84 *Id.*

85 *Id.* at 2215 (Alito, J., dissenting).

86 *Id.*

87 *Id.* at 2215-16.

88 *Id.* at 2222-36.

89 *Id.* at 2210 (opinion of the Court).

90 *Id.* at 2211.

91 *Id.*

(b.) *Had UT Given Adequate Consideration to “Race-Neutral” Alternatives?*

Fisher’s other objections to UT’s plan focused on whether the University had given sufficient consideration to racially-neutral strategies for achieving a diverse student body. The differences between the Justices’ approaches to answering this question provide the clearest indications of how the majority’s application of strict scrutiny would differ from the dissenters’ approach in future cases. Briefly characterized, the majority’s approach, at least as applied in *Fisher II*, would be more pragmatic, focused on the record as a whole. The dissenters’ approach was far more skeptical of the university’s motivations, requiring specific proof of the institution’s intent and reasoning at the time its race-conscious plan was adopted.

At bottom, the issue was whether the University had carried its burden of proving that adopting a race-conscious policy was necessary, given the availability and operation of what Fisher argued were equally effective race-neutral measures. Indeed, Fisher argued that by the time she applied to the University in 2008, UT had no need to utilize race-conscious criteria because it had achieved a desirable level of diversity (that is, a “critical mass” of minority students) by 2003 using its pre-*Grutter* admissions process comprising a combination of the Top Ten Percent plan and a form of race-neutral holistic review.<sup>92</sup>

Judge Alito’s dissent concurred with this argument, accusing the University of having rushed headlong into adopting race-conscious measures after *Grutter* was decided without seriously considering whether there was a case for change.<sup>93</sup> He also accused UT of employing racial criteria “in the most aggressive manner permitted under controlling precedent,” and cited evidence suggesting that the University had reflexively added a race-conscious component to its admissions process despite the fact that, during the period before *Grutter* was decided, it had represented in public statements that the University had managed to attract a student body that was as diverse as it had ever been without the use of race-conscious measures.<sup>94</sup>

As the *Fisher II* majority described UT’s burden on this issue, the University was required to demonstrate that a “nonracial approach” would not have promoted its interests in the educational benefits of diversity “about as well” as a race-sensitive strategy.<sup>95</sup> In other words, if UT had implemented an admissions strategy that did not utilize any racial criteria, and that strategy was doing “about as good” a job of enrolling a diverse class as a race-conscious strategy would have done, then the Constitution would not have allowed UT to employ race-conscious measures. In addition, the Court noted that, “although ‘[n]arrow tailoring does not require

---

92 *Id.*

93 *Id.* at 2236-37 (Alito, J., dissenting). Justice Alito’s dissent characterizes UT’s administration as having “leapt at the opportunity to reinsert race” into its admissions process once the results in *Grutter* were announced, noting that “on the same day” the decision came down UT’s President announced that the undergraduate school would adopt a new procedure that combined the Top Ten Percent program with affirmative action programs. *See id.* at 2218.

94 *See id.* at 2217-19.

95 *Id.* at 2208 (opinion of the Court).

exhaustion of every conceivable race-neutral alternative’ or ‘require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to all racial groups,’” UT still had the “ultimate burden” of proving that available and workable race-neutral alternatives would not have served its purposes.<sup>96</sup>

Applying these principles, the Court rejected Fisher’s argument that the changes UT made to its admission policy after *Grutter* were unnecessary. It accepted the University’s judgment that continuing to rely solely on race-neutral efforts would not have produced sufficient racial diversity at the University.<sup>97</sup> The Court noted that this judgment was based on months of study and deliberation by the University, and a self-assessment process that included retreats, interviews and reviews of available data.<sup>98</sup> The Court also relied on what it characterized as “significant evidence, both statistical and anecdotal, in support of the University’s position,” which suggested that before UT implemented a race-conscious component to its program after 2003, its efforts to enroll a critical mass of diverse students had stalled.<sup>99</sup> In the end, the Court determined that the University’s assessment of its needs “appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.”<sup>100</sup>

Fisher also argued that the University had failed to try “numerous” other available race-neutral means of achieving a critical mass.<sup>101</sup> The Court rejected this argument as well, finding that the University had intensified its race-neutral efforts to attract minority students during the period that *Hopwood* had barred colleges and universities subject to the Fifth Circuit’s jurisdiction from relying on race-conscious policies, and that these efforts had proven unsuccessful.<sup>102</sup> In particular, the Court rejected Fisher’s argument that UT should “uncap” the number of students it took from the Top Ten Percent Plan, concluding that the strategy would not produce the level of diversity necessary to meet UT’s educational goals, and expressing doubts about whether an admissions system based solely on class rank ever could produce a sufficiently diverse student population.<sup>103</sup>

Both the majority and the dissenters agreed that their review of the evidence was hampered somewhat by the University’s failure to keep records about the diversity of the students who were admitted under the Top Ten Percent plan in the years before *Grutter* was decided.<sup>104</sup> Absent this evidence, the majority admitted, the Court could not determine “how students admitted solely based on their class

---

96 *Id.* (emendations in original).

97 *Id.* at 2211-12.

98 *Id.*

99 *Id.*

100 *Id.* at 2212.

101 *Id.* at 2212-13.

102 *Id.* at 2213.

103 *See id.* at 2213-14.

104 *Id.* at 2209; *id.* at 2238 (Alito, J., dissenting).

rank differ[ed] in their contribution to diversity from students admitted through holistic review.”<sup>105</sup> The majority and dissenters disagreed, however, on what effect this lack of evidence should have on the Court’s disposition of the case.

The dissenters believed that to survive strict scrutiny, the University was required to demonstrate how the classes it admitted under the racially-neutral criteria it applied before *Grutter* differed in their contributions to UT’s diversity from the classes UT admitted under its post-*Grutter* race-conscious plan. In the dissenters’ view, the University’s failure to produce evidence needed to perform this comparison should have been fatal to UT’s defense of its plan: “[w]ithout identifying what was missing from the African-American and Hispanic students it was already admitting through its race-neutral process, and without showing how the use of race-based admissions could rectify the deficiency, UT cannot demonstrate that its procedure is narrowly tailored.”<sup>106</sup> Even if the Court decided not to grant Fisher’s relief on the record before it, they argued, the Court should have at least remanded the case to the trial court for additional development of the evidentiary record.<sup>107</sup>

In contrast, the Justices in *Fisher II*’s majority were not deterred by the lack of evidence on the contributions to student body diversity specifically made by the Top Ten Percent students, and held that a remand was unnecessary. They concluded that evidence of the Top Ten Percent procedure’s contributions to the UT’s diversity in the years before 2008 (when Fisher applied for admission) would have “little bearing” on the resolution of the petitioner’s claim.<sup>108</sup> The Court also pointed to other factors that in its view could have explained why it was reasonable for the University not to have kept extensive records on the students admitted through the Top Ten Percent procedure, including what the Court saw as the unique circumstances of the case and the fact that the University would not have had the benefit during this period of *Fisher I*’s guidance on the kind of evidentiary showing necessary to survive strict scrutiny review.<sup>109</sup> The Court also questioned the value that would be added by further development of the record given the passage of time, noting, for example, that the case had already gone on for eight years, and that the petitioner herself had already graduated from college.<sup>110</sup>

The Court did suggest, however, that it might look less favorably on evidentiary deficiencies like these in future cases. It reminded the University that its ruling in *Fisher II* would not relieve the University of its “continuing obligation to satisfy the burden of strict scrutiny in changing circumstances,” or the expectation that the University would continue to collect and examine its enrollment data on a regular basis.<sup>111</sup> “Through regular evaluation of data and consideration of

---

105 *Id.* at 2209 (opinion of the Court).

106 *Id.* at 2238 (Alito, J., dissenting).

107 *See id.* at 2238-39.

108 *Id.* at 2209 (opinion of the Court).

109 *Id.* at 2209.

110 *Id.*

111 *Id.* at 2209-10.

student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.”<sup>112</sup> Thus, as the University goes forward, the Court warned, it will be expected to have gathered and reviewed the data necessary to support its policy choices: “[t]he type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”<sup>113</sup>

Reviewed as a whole, the majority’s approach to means analysis in *Fisher II* was pragmatic about the record-keeping at educational institutions and the benefits that could accrue from giving educators some leeway in their area of expertise, but with the suggestion that the Court would expect more of these institutions in the future. Adopting the dissenters’ approach, on the other hand, would have required greater skepticism from courts about how institutions explained their decisions to adopt race-conscious measures, focusing on why and how college administrators came to adopt their admissions policies, and on the nature of the evidence offered to support their determinations. Both approaches suggest that in future cases, whether colleges or universities with race-conscious admissions policies can produce records that will explain and, ultimately, justify their decisions to adopt and to continue to utilize such strategies will be important areas of concern for reviewing courts.

(c.) *Can a Race-Conscious Policy Be Too Ineffectual to be Constitutional?*

Fisher also argued that considering the race of applicants was unnecessary because UT’s use of race-conscious criteria to choose a quarter of its entering class had, at best, only a “minimal” impact on UT’s diversity.<sup>114</sup> The relevance of this point was explained by Justice Alito in his dissent: “[w]here, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result.”<sup>115</sup>

As support for this conclusion, the *Fisher II* dissenters cited the Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>116</sup> where the Court considered the constitutionality of race-conscious public school student assignment plans in Seattle, Washington, and Louisville, Kentucky. Under the Seattle plan, in situations where students were competing for spaces in over-subscribed high schools, the school system used factors like the race of prospective enrollees and the racial composition of the high schools they wanted to attend in determining where each student would be assigned.<sup>117</sup> Louisville’s school authorities used racial criteria in determining what “clusters” of schools students

---

112 *Id.* at 2210.

113 *Id.*

114 *Id.* at 2212.

115 *Id.* at 2237-38 (Alito, J., dissenting) (citing *Parents Involved*, 551 U.S. 701, 733-34 (2007)).

116 551 U.S. 701 (2007).

117 *Id.* at 711-12.

would be allowed to attend; applications to transfer to other school clusters could be affected by racial considerations as well.<sup>118</sup> Parents in each jurisdiction claimed the assignment schemes violated their children’s rights to Equal Protection, and the Supreme Court agreed, holding both plans unconstitutional. In reaching this decision, the Court relied in part on findings that, in both districts, the race-conscious components of their assignment systems accounted for only a small number of the placements actually made under the plans. In the Court’s view, the small number of students actually affected by the plans’ operations suggested that something was amiss: “[w]hile we do not suggest that *greater* use of race would be preferable,” the Court opined, “the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”<sup>119</sup>

*Fisher II*’s majority was not persuaded by this argument. It first rejected the contention as wrong on the facts, finding that UT’s evidence showed that its use of race-conscious measures post-*Grutter* had increased minority matriculation to the point where the program was making a “meaningful, if still limited” impact on campus diversity.<sup>120</sup> But the Court also rejected the argument’s premise:

In any event, it is not a failure of narrow tailoring for the impact of a racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.<sup>121</sup>

Where one stands on the persuasiveness of this kind of evidence will depend most likely on where one sits with regard to UT’s justifications for adopting a race-conscious policy. The dissenters in *Fisher II* believed that the relatively small number of students admitted under the race-conscious component of the University’s admissions policy provided yet more proof that such a policy was unnecessary, because race-neutral policies appeared to be giving UT “about all” the diversity it needed. For *Fisher II*’s majority, in contrast, the fact that the number of diverse students enrolled through UT’s race-conscious “holistic” process was relatively small but still “significant” proved that UT’s measures were as effective as they should have been if, as required, each application was being reviewed individually, and there were no *Gratz*-like advantages being given automatically to every minority applicant.

(d.) *Did the University’s Plan Treat Everyone’s Interests Appropriately?*

If Justice Alito’s dissent in *Fisher II* can be taken as a guide, two of the objections the courts might see in future cases involving race-conscious admissions are: (1) the argument that some race-conscious admissions policies favor certain racial minority groups over other minority groups; or (2) the contention that such plans

---

118 *Id.* at 715-17.

119 *Id.* at 734-35 (emphasis in original).

120 *Fisher II*, 136 S. Ct. at 2212.

121 *Id.*

favor certain members of a particular minority group over other members of the same group. Although these contentions did not take up much space in the majority’s opinion, they were a significant point of focus for the dissenting Justices.

For example, Justice Alito asserted in his *Fisher II* dissent that UT’s race-conscious admissions policy discriminates against Asian-American applicants.<sup>122</sup> In general, the *Fisher II* dissenters questioned whether UT’s admissions plan was related logically to one of its professed diversity-related objectives, namely that of reaching a “critical mass” of diverse students “at the classroom level.”<sup>123</sup> But a more pointed criticism of the plan was the contention that, although UT’s own data “demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic,” the University’s plan actually “discriminates *against* Asian-American students.”<sup>124</sup> The dissenters accused UT of not sufficiently valuing the potential contributions of Asian students to the University’s student body diversity, an attitude they found “troubling, in light of the long history of discrimination against Asian Americans, especially in education.”<sup>125</sup> They also accused their colleagues in the majority of “endorsing” UT’s alleged disregard for Asian-American applicants’ rights.<sup>126</sup>

The dissenters also accused the University of preferring more affluent African-American and Hispanic candidates for admission to candidates from these groups who were admitted through the Top Ten Percent program. The dissent accused UT of having adopted the race-conscious part of its plan because it wanted Black and Hispanic candidates from affluent school districts more than it wanted the students from these groups who had been admitted under the Top Ten Percent plan. The dissenting Justices believed that these students were disfavored because many of them had attended schools in economically disadvantaged areas. Justice Alito argued that UT’s alleged preference for the more affluent minority students—which UT denied—was the result of “pernicious” stereotyping of the economically disadvantaged students, and “affirmative action gone wild.”<sup>127</sup>

These arguments were essentially dismissed in *Fisher II*’s majority opinion. The Court concluded that nothing in UT’s plan could be viewed as the kind of “mechanical plus factor” that subordinated the interests of one group of students to facilitate the admission of students from other groups.<sup>128</sup> As support for this conclusion, the Court cited, among other things, the District Court’s finding that *Fisher* had

---

122 *Id.* at 2227 (Alito, J., dissenting)

123 *See id.* at 2226-27.

124 *Id.* at 2227 (emphasis in original).

125 *Id.* at 2228.

126 *See id.* at 2227-2228.

127 *Id.* at 2230-35.

128 *See id.* at 2207 (opinion of the Court).

produced no evidence to suggest that members of any racial group, including Asian-Americans, were being excluded from the class by operation of the University's admissions process.<sup>129</sup> But the dissenters' contention that discrimination among minority groups or claims that intra-group discrimination is being facilitated by race-conscious programs are objections the courts are likely to see in future cases, if only because they provide affirmative action opponents with additional support for the more general argument that affirmative action programs are harmful not only to non-minorities, but also to members of the minority groups they are supposed to be helping.<sup>130</sup> To ensure fairness—and presumably to counter these kinds of accusations—reviews of race-conscious admissions plans should be concerned with ensuring that no group potentially affected by the plan's operation suffers unwarranted deprivations.

### *C. Requiring Periodic Review of Race-Conscious Measures*

While *Fisher II* appears to have resolved long-standing questions about the Fourteenth Amendment's scope, the decision introduced a different kind of uncertainty with regard to maintaining race-conscious programs over the longer term by emphasizing the requirement that institutions employing such measures periodically reassess "the constitutionality, and efficacy, of [their] admissions program[s]."<sup>131</sup> *Fisher II* did not introduce the concept of the need for periodic review. Justice Powell's opinion in *Bakke* and the Court's opinion in *Grutter* both stated that race-conscious admissions plans should be "'subject to continuing oversight to assure that [they] will work the least harm possible to other innocent persons'" competing for the benefit at issue.<sup>132</sup> But in *Fisher II*, the Court took the additional step of *emphasizing* both that such reviews were required and that this requirement included the obligation to explore race-neutral alternatives.<sup>133</sup>

The Court's primary motivation in adopting this requirement clearly was its desire to ensure that in administering race-conscious plans, colleges and universities would employ strategies that served legitimate governmental interests while

---

129     *See id.*

130     *See, e.g., id.* at 2229 (Alito, J., dissenting) ("By accepting the classroom study as proof that UT satisfied strict scrutiny, the majority 'move[s] us from "separate but equal" to "unequal but benign." (emendation in original) (citation omitted)). Indeed, by the time *Fisher II* was decided, Harvard University was being sued under Title VI for using race-conscious admissions criteria that allegedly discriminated against Asian applicants. *See generally*, Complaint, *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 1:14-cv-14176-DJC (D. Mass), 2014 WL 6241935. The Trump Administration's Justice Department is reportedly investigating the allegations as well. *See* Susan Svrulga & Nick Anderson, *Justice Department investigating Harvard's affirmative-action Policies*, *Washington Post* (Nov. 21, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm\\_term=.8bfa8874297a](https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm_term=.8bfa8874297a).

131     *See Fisher II*, 136 S. Ct. at 2210.

132     *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978)).

133     *See Fisher II*, 136 S. Ct. at 2214-15.

inflicting the least possible damage on the rights of non-minority applicants.<sup>134</sup> Such reviews, in the view of the Court, could be expected to protect the rights of non-minority applicants in at least two ways.

First, the *Fisher II* Court appeared to believe that requiring colleges and universities to conduct periodic reviews could help prevent otherwise valid admissions programs from slipping into practices that would amount to no more than “racial balancing.” The Court described the ultimate goal of race-conscious programs as reconciling “the pursuit of diversity with the constitutional promise of equal treatment and dignity.”<sup>135</sup> Justice Kennedy, *Fisher II*’s author, clearly believed that vigorous review of these plans was a key to maintaining the balance between these two objectives. He had made a similar point in his *Grutter* dissent, arguing that mandating strict scrutiny of affirmative action plans was important in part because it would make the state officials responsible for such plans take their duty to monitor them more seriously: “[c]onstant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution.”<sup>136</sup> *Fisher II*’s majority appears to have concluded that requiring ongoing, rigorous, and good faith *internal* reviews of race-conscious programming also should encourage educational institutions to bring the appropriate measure of diligence to maintaining the “sensitive balance” of interests between minority and non-minority applicants a properly functioning race-conscious admissions program is expected to preserve.<sup>137</sup>

Second, *Fisher II*’s monitoring requirement also appears to be meant to nudge educational institutions into more actively preparing for a time when race-conscious admissions programs will no longer be needed to create and maintain diverse learning environments. Viewed from that perspective, the review requirement serves a purpose similar to that which motivated Justice O’Connor to suggest the twenty-five-year “sunset” provision for race-conscious programs in *Grutter*. Colleges and universities, the majority suggests, can and should become “laboratories” for experimenting with race-neutral alternatives to race-conscious admissions schemes. In support of this observation, the Court noted the “special opportunity to learn and teach” the University of Texas had acquired through its experiences with administering race-conscious admissions programs:

[UT] now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-

---

134 See *id.* at 2209-10.

135 *Id.* at 2214.

136 *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). See also *Adarand Constructors v. Peña*, where Justice Ginsburg suggests that “[c]lose review ... is in order” because in some cases, “some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.” 515 U.S. 200, 276 (1995) (Ginsburg, J., dissenting).

137 See *Fisher II*, 136 S. Ct. at 2214-15.

conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.<sup>138</sup>

The differences between *Fisher II*'s majority and its dissenters on the adequacy of UT's evidentiary support for its claim that race-conscious measures were necessary suggests that this more conscious emphasis on internal review could well be an important battleground for future conflicts over race-conscious admissions policies. In highlighting the requirement that affirmative action plans be periodically reviewed, the Court can be seen as announcing an intention to scrutinize seriously and, if necessary, invalidate plans that, because of changed circumstances, appear to have over-stayed their welcome.<sup>139</sup> Justice Alito's dissent can be viewed as a preview of the kind of granular, plan-specific objections institutions with race-conscious admissions programs may see in future challenges to their plans' continuing validity.

### III. Conclusion

The *Fisher* results reaffirmed important points from prior cases about the constitutionality of race-conscious admissions plans. As was held in *Bakke* and *Grutter*, the Court ruled that the Equal Protection Clause does not categorically bar the use of racial criteria for remedial or other benign purposes. It reaffirmed strict scrutiny as the standard of judicial review that should be applied to all such programs and, in the case of institutions of higher education, that the goal of creating and maintaining a diverse student body qualifies as the kind of "compelling" interest capable of surviving strict scrutiny. Thus, if the *Fisher* result holds, a rough consensus on the basic framework for reviewing these cases may finally have been reached.

Disagreements among the Justices clearly remain, however, about how courts should apply the strict scrutiny standard in a given case. It is this disagreement (coupled with the fact that *Fisher II* was decided by only seven members of the Court, a single vote separating its four-person majority from the three dissenting Justices) that pulls a degree of uncertainty back into the Court's application of its precedents in cases involving race-conscious admissions or, indeed, any kind of racially-conscious government program. In the view of *Fisher II*'s dissenters, the majority adopted a plan that allowed UT to adopt a racially discriminatory admissions process, "simply by asserting that such discrimination is necessary to achieve 'the educational benefits of diversity,' without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives."<sup>140</sup> They seek a standard that would in essence authorize, and encourage, challenges to what they would view as constitutionally deficient plans today and not at some future date. Moreover, their standard would

---

138 *Id.*

139 *See id.* 2210 (reminding University of review requirement and warning that "[t]he type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come").

140 *Id.* at 2242 (Alito, J., dissenting).

require highly specific proof about the data available to a college at the time it adopted its race-conscious program, and evidence developed contemporaneously by the educational institution that justified its decision. A standard of review that would require a high (and perhaps insurmountable) level of judicial skepticism about the value of race-conscious admissions plans and their operation would appear to be the mechanism these Justices would employ to prevent racial preferences from becoming ingrained in state educational systems, and society in general.

For its part, the majority in *Fisher II* appears to have intended to lay a legal foundation for allowing colleges and universities to continue to utilize race-conscious strategies for as long as they remain necessary, but *only* for as long as they are needed. Their answer to concerns about affirmative action becoming an entitlement is to emphasize the need for institutional self-policing that can keep legitimate affirmative action plans from degenerating into unconstitutional “race-balancing,” and to suggest that plans not subject to rigorous internal reviews could be vulnerable to judicial revocation in the future. The standard of judicial review they would employ in these kinds of cases would be stringent, but more pragmatic than the approach favored by the dissenting Justices in assessing whether colleges and universities have met their Fourteenth Amendment obligations.

That these disagreements are likely to continue should come as no surprise. Given where we are as a nation, some degree of tension in the adjudication of cases involving race-conscious measures is inevitable. As has always been the case with debates over government uses of affirmative action, disputes among American citizens over the constitutionality of race-conscious actions by government are based on deeply-held beliefs about fairness that are not likely to resolve themselves anytime soon. The federal courts’ divisions on these issues have to some extent mirrored society’s differences, and the Supreme Court itself has not been immune to them. The application of strict scrutiny to these kinds of governmental actions heightens the level of uncertainty, as skepticism about the wisdom of any race-conscious measure is built into the standard of review.<sup>141</sup> Thus, absent some major change in either the Court’s composition or the doctrine to be applied in these cases, an undercurrent of disagreement is bound to persist.

Given the result in *Fisher*, it will be the lower courts’ task, at least initially, to figure out how to walk the line between applying a standard of review that would be “fatal in fact” in nearly all cases (which is, from a fair reading of Justice Alito’s dissent, what the dissenting Justices in *Fisher II* seem to want), and the application of strict scrutiny adopted by the majority in *Fisher II*. The majority’s standard is meant to be stringent, but also discerning enough to distinguish between plans that serve legitimate state purposes and other uses of racial criteria that governments may label “benign” but that are in the view of the courts invidious or overreaching. In all probability, the debate among the Justices in *Fisher II* will be reflected in these lower court decisions.

Care should be exercised in attempting to apply reasoning from the *Fisher* case to contexts other than college and university admissions. One of the analytical

---

141 See *Adarand Constructors*, 515 U.S. at 223-24.

cornerstones of Justice Powell's analysis in *Bakke* was his conclusion that maintaining a diverse student body was the kind of "compelling" government interest capable of surviving strict scrutiny. As Justice Powell noted, that particular interest is rooted in the First Amendment's protection of academic freedom, which the Court had recognized as a substantial interest in its own right.<sup>142</sup> How the *Bakke/Grutter/Fisher* approach to strict scrutiny might be applied to other uses of affirmative action in future cases remains to be seen. Indeed, other decisions by the Court have suggested that the "diversity" rationale held to justify race-conscious measures in *Bakke* might not necessarily be accepted as a sufficiently compelling justification for the use of race-conscious government action in other contexts.<sup>143</sup>

Moreover, even in the specific context of college admissions, the direction the Court has taken in the *Fisher* cases should not be taken as an excuse for complacency in the use of race-conscious measures. Considering these cases as a whole, it is fair to conclude that the Court has determined three things: *first*, that while thoughtfully planned and sensitively administered race-conscious admissions policies may be legal today, if and when demographic or other relevant circumstances change, these same plans may not necessarily be viewed as constitutional at some undetermined point in the future; *second*, that educational institutions must shoulder the burden of proving when and if challenged, that such measures are still required; and, *third*, that one of the ways educational institutions should be preparing to meet this burden is by being able to demonstrate that they have conducted the kind of oversight necessary to ensure that whatever race-conscious measures they employ have remained necessary and are sufficiently narrowly tailored in light of current circumstances.

Through its discussion of the evidence offered by UT to justify its admissions plan, the *Fisher II* Court provided guidance about how colleges and universities might provide the kind of proof necessary to survive strict scrutiny, but only in a general sense. Its warning that "more" in the way of supporting evidence of the need for race-conscious measures than UT offered in *Fisher* may be required in future cases adds an additional complication that also must be addressed. The Court appears to be leaving the development of review strategies, at least initially, to colleges and universities in their role as "laboratories" for change. Higher education cannot afford to ignore *Fisher's* challenge, as the Court has been clear about the "constant deliberation and continued reflection" it expects educational institutions to be giving these issues. The Court's opinion put the University of Texas on notice that its favorable decision in *Fisher II* did not necessarily mean that the University could rely indefinitely on the same policy "without refinement" in the event of future challenges. This admonition is meant to influence the admissions practices of other public colleges and universities as well.<sup>144</sup>

---

142 See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 311-314 (1978).

143 See, e.g., *Parents Involved*, 551 U.S. 701, 722-25 (2007) (holding that *Grutter's* diversity rationale did not apply to public school policies that took racial factors into consideration when ranking students for assignment to high schools, noting that the Court's decision in *Grutter* "relied upon considerations unique to institutions of higher education").

144 See *Fisher II*, 136 S. Ct. at 2215.

This warning is, perhaps, the most important message from the *Fisher* case: a reminder that, in the view of the Court, if state-run colleges and universities are feeling unsettled about how long they may continue to use race-conscious measures to maintain diverse learning environments, it is because the utilization of race-conscious measures, even for constitutionally acceptable reasons, is *supposed* to make them uncomfortable. The results in *Fisher* all but instruct institutions of higher education now utilizing race-conscious strategies to monitor their programs, and to experiment with race-neutral strategies in an effort to replace, at an appropriate point in time, the programs they are using today. This will be a challenge. The Court is imposing this requirement at a time when many of the same inequities in educational opportunities that gave rise to race-conscious strategies in the first place continue to plague the nation's public school systems. In the end, although the Court may have given higher education a "win" today in *Fisher*, it also has given them a whole new set of challenges to consider and address in the future.