

*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 a 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.*