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ENSURING THE CONSTITUTION REMAINS COLOR BLIND VS. TURNING A BLIND EYE TO JUSTICE: EQUAL PROTECTION AND AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

*Attashin Safari**

I. INTRODUCTION

On university campuses across the country, students come together to take part in a global exchange of ideas and experiences. The fusion of diverse perspectives enriches the campus community and contributes to the learning experience of each student. As students compete to gain acceptance into universities, many schools experience an influx in applications.¹ The increase in admission applications has led to lower acceptance rates at many schools.² Across the nation, prospective applicants hope that all students start off on a level playing field in the eyes of the admissions committee—leaving it up to their achievements and accomplishments to determine their fate. However, more and more universities are looking beyond grades and scholastic achievements when aiming to select a diverse student body.³

Yet the notion that an immutable characteristic such as race may affect university admissions might be perceived as being counterintuitive to the notion of fairness between all applicants. This is the sentiment that drove Abigail Fisher (“Fisher”), an applicant

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1. Lindsey Cook, *Is the College Admissions Bubble About to Burst?*, U.S. NEWS & WORLD REP. (Sept. 22, 2014, 9:48 AM), <http://www.usnews.com/news/blogs/data-mine/2014/09/22/is-the-college-admissions-bubble-about-to-burst> (“Met with an influx in applications, selective colleges have refined the way they look at students.”).

2. *Id.* (“The increase in students and applications continue to push acceptance rates lower and lower.”).

3. See Juju Chang, *Good Grades, Extracurriculars, May Not Be All Colleges Look For Anymore*, ABC NEWS (Jan. 22, 2016, 11:30 AM), <http://abcnews.go.com/US/good-grades-extracurriculars-colleges-anymore/story?id=36429888>.

denied admission to the University of Texas at Austin (“University”), to sue the University, alleging that the University’s consideration of race in its admissions policy violated the Equal Protection Clause of the Constitution.⁴

Fisher’s legal team sought to make her a living symbol of the alleged unfair racial victimization faced by Caucasians in present day society.⁵ Fisher’s narrative depicted a young woman who seemingly did everything right—worked hard in school, attained high grades, and participated in extracurricular activities,⁶ but nevertheless was rejected from a university that denied her admittance due to the color of her skin.⁷ However, the Supreme Court upheld the University’s race-conscious admissions policy as constitutional because it was narrowly tailored to serve a compelling state interest and thus survived strict scrutiny.⁸

This Comment will argue that the holding in *Fisher II* is narrower than initially perceived, leaving the door open to future challenges. Part II of this Comment delineates Fisher’s journey up to the Supreme Court and discusses the reasoning of the Court in holding that the race-conscious admission policy employed by the University is constitutional. Part III of this Comment examines the ramifications of *Fisher II* with regard to affirmative action as applied in university admissions and the possibility of future challenges to race-conscious admissions policies.

II. STATEMENT OF THE CASE

A. *The University of Texas at Austin’s Admission Policy*

The University’s admission policy has shifted over the course of two decades.⁹ Prior to 1997, the University considered two factors, “a

4. See Nikole-Hannah Jones, *What Abigail Fisher’s Affirmative Action Case Was Really About*, PROPUBLICA (June 23, 2016, 12:28 PM), <https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r>. (“There were people in my class with lower grades who weren’t in all the activities I was in, who were being accepted into UT, and the only other difference between us was the color of our skin . . . I was taught from the time I was a little girl that any kind of discrimination was wrong. And for an institution of higher learning to act this way makes no sense to me. What kind of example does it set for others?”).

5. *See id.*

6. *Id.*

7. *Id.* (“But she was cheated, they say, her dream snatched away by a university that closed its doors to her because she had been born the wrong color: White.”).

8. Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2214–15 (2016).

9. Fisher v. Univ. of Tex. (*Fisher I*), 133 S. Ct. 2411, 2415 (2013).

numerical score reflecting an applicant's test scores and academic performance in high school" and the race of the applicant.¹⁰ During this time, the consideration of the race of the applicant was a separate and distinct factor in the University's admissions policy. However, in 1996 the United States Court of Appeals for the Fifth Circuit ruled in *Hopwood v. Texas*¹¹ that the consideration of race employed by the University violated the Equal Protection Clause.¹² The Court of Appeals held that the University's race-conscious admissions policy did not serve to further a compelling government interest.¹³ Following *Hopwood*, the University changed its admissions policy and adopted a new program to comply with the decision.¹⁴

The University continued to take into consideration a numerical score (hereinafter "Academic Index") that reflected the applicant's academic performance in high school as well as the applicant's various test scores.¹⁵ However, rather than considering race in its admissions policy, the University instead created a second factor referred to as the "Personal Achievement Index."¹⁶ The Personal Achievement Index is a holistic metric of a candidate's potential contribution to the University.¹⁷ The University uses this metric in conjunction with the applicant's Academic Index.¹⁸ The Personal Achievement Index "measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background."¹⁹

In 1997, the Texas State Legislature enacted a statute that grants "automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards"(hereinafter "Top Ten Percent Law").²⁰ The enactment of the Top Ten Percent Law affected the University substantially, as approximately 75% of the incoming

10. *Id.*

11. 78 F.3d 932 (5th Cir. 1996).

12. *Id.* at 962.

13. *Id.* at 955.

14. *Fisher I*, 133 S. Ct. at 2415.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 2415–16. Such circumstances include "growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family." *Id.* at 2416.

20. *Id.* at 2416; *see* TEX. EDUC. CODE ANN. § 51.803 (2009).

class is comprised of students granted admission through this means as opposed to the traditional application process.²¹ Approximately 25% of the incoming freshman class is still subject to the University's admissions policy.²²

In 2004, the University created a "Proposal to Consider Race and Ethnicity in Admissions" ("Proposal").²³ "The Proposal concluded that the University lacked a 'critical mass' of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program."²⁴ Beginning with applicants in the fall of 2004, the University updated its admission policy to include an applicant's race as a component of the student's Personal Achievement Index score.²⁵ Although the University's application process is explicitly race-conscious, race is not "assigned an explicit numerical value," though it is "undisputed that race is a meaningful factor."²⁶

After applicants are assigned scores for their Academic Index and their Personal Achievement Index, applicants are placed on a grid in which the Personal Achievement Index is the y-axis and the Academic Index constitutes the x-axis.²⁷ Students with individual scores that fall above a certain line are admitted.²⁸

B. Procedural History

1. Fisher's First Journey to the Supreme Court

Fisher's first journey to the Supreme Court was in 2013, in *Fisher I*.²⁹ In 2008, plaintiff Fisher, who is Caucasian, sought admission to the University's entering class.³⁰ After being rejected admission to the University, she sued the University and various University officials, alleging that the University's consideration of race in its admissions

21. *Fisher II*, 136 S. Ct. 2198, 2206 (2016).

22. *Id.*

23. *Fisher I*, 133 S. Ct. 2411, 2416 (2013).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 2415.

30. *Id.* at 2417.

policy was unconstitutional because it violated the Equal Protection Clause.³¹

The District Court granted summary judgment to the University, and upheld the University's admissions plan.³² The Fifth Circuit affirmed, however, the court did not perform a searching examination of the admissions policy, but rather held that Fisher could challenge only whether the University's use of race as a factor in the admissions process was made in good faith.³³ In addition, the Fifth Circuit gave substantial deference to the University, both in terms of the "compelling interest in diversity" and in its conclusion regarding whether the University's "specific plan was narrowly tailored to achieve its stated goal."³⁴

However, when the case reached the Supreme Court, the reasoning of the lower courts was not adopted.³⁵ The Court held that in order for race to be considered in a university's admissions process, the admissions policies must survive strict scrutiny.³⁶ The Court noted that narrow tailoring "requires a reviewing court to verify that it is 'necessary' for the university to use race to achieve the educational benefits of diversity."³⁷ The Court further concluded that "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."³⁸

In *Fisher I*, the Supreme Court disagreed with the rationale employed by the Appellate Court regarding deference to the University, and overturned the prior decision because the lower courts did not apply the correct standard of strict scrutiny.³⁹ The Supreme Court held that the strict scrutiny inquiry employed by the lower courts was too narrow in its deference to the University's supposed "good

31. *Id.*

32. *Id.*

33. *Id.* at 2420. The court presumed the University had "acted in good faith" and placed the burden of rebutting that presumption on Fisher. By doing so, the court considered the narrow-tailoring requirement of strict scrutiny with a degree of deference to the University. *Id.*

34. *Id.* at 2417.

35. *Id.* at 2415.

36. *Id.*

37. *Id.* at 2414; *see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (holding that, "in order to justify the use of a suspect classification, [the government] must show that . . . its use of the classification is necessary" to achieving a compelling government purpose or safeguarding a compelling government interest).

38. *Fisher I*, 133 S. Ct. at 2414.

39. *Id.* at 2421.

faith” in its use of racial classifications.⁴⁰ The Supreme Court held that it was the duty of the courts to actually verify that the means the University chose to attain diversity were necessary to achieve the benefits of diversity and find that there was no race-neutral alternative available that would provide the same benefits.⁴¹ The Court ruled that the lower courts did not conduct an examination that was sufficient under strict scrutiny.⁴² It remanded and ordered the lower court to perform a searching examination of the University’s admissions process to “assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”⁴³

In addition, the Supreme Court concluded that strict scrutiny did not permit a court to simply accept at face value a University’s claim that its admissions policy used race in a permissible way.⁴⁴ The Court held that any reviewing court must give “close analysis to the evidence” provided by the university of how the use of race in its admissions policy “works in practice.”⁴⁵ The Court held that once a university has “established that its goal of diversity is consistent with strict scrutiny” there must still be “a further judicial determination that the admissions process meets strict scrutiny in its *implementation*.”⁴⁶ The Court further explained that “[T]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal” and specified that, “[o]n this point, the University receives no deference.”⁴⁷

Prior to *Fisher I*, the Supreme Court upheld the use of race as one of many factors in a higher education admission program that holistically examined the overall contribution of individual applicants.⁴⁸ However, the Supreme Court had also held that an

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2421.

45. *Id.*

46. *Id.* at 2419–20 (emphasis added).

47. *Id.* at 2420.

48. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that a law school admissions program that considered race and ethnicity as a factor affecting diversity did not violate the Equal Protection Clause because such an admissions policy satisfied strict scrutiny. Reasoning that the admissions policy constituted a narrowly tailored use of race in admissions decisions to further the law school’s compelling interest in obtaining the educational benefits that stem from diversity).

admissions policy that awarded points to applicants from certain racial minorities was unconstitutional.⁴⁹

2. Fisher's Second Journey to the Supreme Court

In *Fisher II*, the Supreme Court held that the University's race-conscious admissions policy was narrowly tailored to serve a compelling state interest and thus survived strict scrutiny.⁵⁰ The Court looked to precedent that had established educational diversity as a compelling interest so long as there was a concrete goal that was neither a "fixed quota" nor a "specified percentage" of a particular racial group.⁵¹ In reaching its conclusion, the Court acknowledged that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"⁵²

However, the Court noted that "asserting an interest in the educational benefits of diversity writ large is insufficient."⁵³ The Court noted that, "[a] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."⁵⁴ In applying this rule to the University, the Court reasoned that the University had not merely cited the general goal of diversity but rather had "articulated concrete and precise goals" such as "the destruction of stereotypes, the 'promo[tion of] cross-racial understanding,' the preparation of a student body for 'an increasingly diverse workforce and society,' and the 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'"⁵⁵ The court reasoned that such concrete goals "mirror the compelling interest this Court has approved in prior cases" and concluded that the compelling government interest prong of strict scrutiny was met.⁵⁶

The Court further concluded that the University met the narrow tailoring requirement of strict scrutiny because the University pointed to empirical data showing that there were no other workable

49. See *Gratz v. Bollinger*, 539 U.S. 244, 273–76 (2003) (holding that a university's policy of automatically giving twenty points to applicants who were members of an underrepresented minority solely due to the applicant's race was not narrowly tailored to achieve diversity).

50. *Fisher II*, 136 S. Ct. 2198, 2214 (2016).

51. *Id.* at 2208.

52. *Id.* at 2210.

53. *Id.* at 2211.

54. *Id.*

55. *Id.*

56. *Id.*

alternatives for attaining its diversity goals.⁵⁷ In concluding that the University met the narrow tailoring prong of strict scrutiny, the Court reasoned that empirical data, including a year-long study conducted by the University, “revealed that its race-neutral policies and programs did not meet its goals.”⁵⁸

The Court reasoned that the University’s conclusion that race-neutral admissions policies were ineffective in achieving the University’s diversity goals was supported by significant statistical and anecdotal evidence.⁵⁹ For example, the Court noted that a University study revealed that, “in 2002, 52% of undergraduate classes with at least five students had no African-American students enrolled in them, and 27% had only one African-American student.”⁶⁰ The Court reasoned that although a university “must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.”⁶¹ The Court ultimately concluded that due to the empirical evidence indicating lack of diversity, the University had a “reasoned, principled explanation” for adopting an admissions policy that considers an applicant’s race as one factor of the applicant’s Personal Achievement Index score.⁶²

Justice Alito’s dissenting opinion, which was joined by Chief Justice Roberts and Justice Thomas, heavily criticizes the majority’s conclusion.⁶³ In addition to joining Justice Alito’s dissenting opinion, Justice Thomas wrote separately to reaffirm that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause” and that “[t]he Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”⁶⁴

The dissent written by Justice Alito reasons that the University had not “identified with any degree of specificity the interests that its

57. *Id.* at 2212.

58. *Id.* at 2211.

59. *Id.* at 2212.

60. *Id.*

61. *Id.*

62. *Id.* at 2211.

63. *Id.* at 2215–17 (Alito, J., dissenting).

64. *Id.* at 2215 (Thomas, J., dissenting).

use of race and ethnicity is supposed to serve,” and thus did not meet the demanding standard of strict scrutiny.⁶⁵ The dissent notes that the University’s primary argument was that “the educational benefits of diversity” is a specific interest 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.”⁶⁶ The dissent analogizes the majority’s acceptance of the University’s generic purpose of attaining the “educational benefits of diversity” to the court giving *deference* to the University (a practice that was rejected by the Supreme Court’s holding in *Fisher I*).⁶⁷

Justice Alito reasoned that although the University argued it adopted a race-conscious admissions policy in order to promote classroom diversity, the University had not shown that its admissions policy did in fact increase classroom diversity.⁶⁸ In addition, the dissent criticized the University for arguing that it lacked a “critical mass” of minority students without ever defining the term “critical mass.”⁶⁹ Justice Alito notes that “[a]ccording to [the University], a critical mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State.”⁷⁰ The dissenting Justices reason that accepting this type of generic and undefined goal is akin to giving deference to the University.⁷¹ The dissent further notes that to the extent that the University is aiming to diversify their incoming class to achieve harmony with Texas demographics of minority populations, such an act constitutes an “outright racial balancing” that has unequivocally been held as unconstitutional.⁷²

The dissent further reasons that the University’s admission policy does not meet the narrow tailoring requirement of strict scrutiny.⁷³ Justice Alito argues that even if the University is “truly seeking to expose its students to a diversity of ideas and perspectives,” the race-

65. *Id.* (Alito, J., dissenting).

66. *Id.*

67. *Id.*; *Fisher I*, 133 S. Ct. at 2421. (holding that the strict scrutiny inquiry employed by the Appellate Court was too narrow in its deference to the university’s supposed “good faith” in its use of racial classifications).

68. *Fisher II*, 136 S. Ct. at 2216 (Alito, J., dissenting).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2225.

73. *Id.* at 2227.

conscious admissions process is poorly tailored to serve that interest.⁷⁴ To make that point,⁷⁵ Justice Alito points to the University's own study of Asian-American students, "which the majority touts as the best 'nuanced quantitative data' supporting UT's position" and notes that it demonstrated that "classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic."⁷⁶ Justice Alito argued that the University's plan actually discriminates against Asian-American students.⁷⁷ Justice Alito justified his argument by reasoning that the University's race-conscious admissions policy is "clearly designed to increase the number of African-American and Hispanic students by giving them an admissions boost vis-à-vis other applicants."⁷⁸ Justice Alito further argued that, "[g]iven [the] 'limited number of spaces,' providing a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission."⁷⁹

Justice Alito also criticized the majority for "completely ignor[ing] [the University's] finding that Hispanics are better represented than Asian-Americans in classrooms" and reasons that the majority's holding demonstrates the notion that the University "can pick and choose which racial and ethnic groups it would like to favor."⁸⁰ The dissenting justices brought their argument full circle in reasoning that, "unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian-Americans), it seemingly views the classroom contributions of Asian-American students as less valuable than those of Hispanic students."⁸¹ The dissent ultimately concludes that the University did not meet either prong of the heavy burden of strict scrutiny and heavily criticizes the majority's conclusion, stating that the holding was "remarkably wrong."⁸²

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 2227 n.4.

79. *Id.* (citation omitted).

80. *Id.* at 2227–28.

81. *Id.* at 2227 (citation omitted).

82. *Id.* at 2243.

III. ANALYSIS

While Justice Alito's dissent constitutes a passionate plea for those that believe the majority granted too much deference to the University in its holding, legal precedent supports the conclusion of the majority that the University's race-conscious admissions policy survives strict scrutiny. The dissent points out that the University failed to define the term "critical mass" with clarity and reasons that without knowing specifically how a "critical mass" of minority students can be measured, a reviewing court would not be able to examine whether the use of race would be necessary to meet that goal.⁸³ However, this reasoning is flawed. Well-established case law prohibits the use of numbers or quotas for minority student admission in universities.⁸⁴ In addition, Justice Alito's argument that the University's race-conscious admissions policy provides a "boost to African-Americans and Hispanics"⁸⁵ that harms other students by "decreasing their odds of admission"⁸⁶ finds no support in legal precedent regarding the burden of strict scrutiny. Accepting this kind of reasoning would merely serve to blur the line between arguments emerging from established legal precedent and passionate rhetoric aiming to persuade the masses.

However, a careful examination of the holding in *Fisher II* lends support to the notion that the Court's decision leaves the door open for future challenges. Ultimately, the holding in *Fisher II* is a far cry from the unequivocal upholding of "affirmative action" in college admissions that many national headlines jumped to proclaim.⁸⁷ Justice Kennedy examined the University's race-conscious admissions policy with a strict application of the narrow tailoring prong and his reasoning

83. *Id.* at 2222.

84. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

85. *Fisher II*, 136 S. Ct. at 2222 n.4.

86. *Id.*

87. *See* Nina Totenberg, *Supreme Court Upholds Affirmative Action in College Admissions*, NPR (June 23, 2016, 4:31 PM), <http://www.npr.org/2016/06/23/483275212/supreme-court-upholds-affirmative-action-in-college-admissions>; Richard Wolf, *Supreme Court Upholds Affirmative Action in University Admissions*, USA TODAY (June 23, 2016, 5:36 PM), <http://www.usatoday.com/story/news/politics/2016/06/23/supreme-court-university-texas-affirmative-action-race/83239790>; Jess Bravin & Brent Kendall, *Supreme Court Upholds Affirmative Action in University Admissions*, WALL ST. J. (June 23, 2016), <http://www.wsj.com/articles/supreme-court-upholds-affirmative-action-in-university-admissions-1466691615>.

was firmly based on records and data.⁸⁸ A strong argument against the use of a race-conscious admissions policy as a means of achieving the various benefits of diversity is that such an outcome can be achieved by other means. Justice Kennedy reasoned that the narrow tailoring requirement of strict scrutiny was met because the University used extensive evidence to show that there were no race-neutral alternatives available.⁸⁹ The Court specifically reasoned that a review of the record revealed that none of Fisher's "suggested alternatives—nor other proposals considered or discussed in the course" of litigation constituted a "'available' and 'workable'" alternative by which the University could attain its "educational goals."⁹⁰

Fisher II ceases to be a one size fits all interpretation of the equal protection clause as it pertains to the use of race in university admissions. The Court made it clear that the holding was based on the specific set of circumstances present in the case, and even noted that the constitutionality of the University's admission policy must be reassessed in the future "in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan."⁹¹ The Court noted that the University has a "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances."⁹² With respect to the narrow tailoring prong of strict scrutiny, the Court pointed to the extensive evidence the University presented regarding race neutral alternatives.⁹³ The Court's imperative use of the type of critical records and data that would range widely from university to university delineates how fact specific the narrow tailoring consideration is. Such a fact specific consideration inherently leaves the door open for future challenges.

This is exemplified by Justice Kennedy's consideration of Fisher's suggestion that one alternative mean by which the University could attain its diversity goals may be to "intensify its outreach efforts to African-American and Hispanic applicants."⁹⁴ Justice Kennedy pointed to the fact that the University submitted "extensive evidence

88. *Fisher II*, 136 S. Ct. at 2211–14; *See, e.g.*, 2212 ("The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position.").

89. *Id.* at 2214.

90. *Id.*

91. *Id.* at 2209–10.

92. *Id.*

93. *Id.* at 2212–13.

94. *Id.*

of the many ways in which it already had intensified its outreach efforts to those students.”⁹⁵ Specifically, the University had submitted evidence that it had created several new scholarship programs, “opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events.”⁹⁶ Justice Kennedy specifically pointed to the fact that the University “spent seven years attempting to achieve its compelling interest using race-neutral holistic review” but “none of these efforts succeeded.”⁹⁷ Such university-specific facts and considerations cannot be stretched to fit across the board to various universities across our nation. When such specific considerations are employed, even a slight variation in facts and circumstances at another university may tip the balance in favor of a ruling that strict scrutiny was not met.⁹⁸

The Court emphasized that the University’s admissions process was both unique and complex, and that the set of circumstances creating the backdrop of *Fisher II* may limit the case’s value for “prospective guidance.”⁹⁹ Fundamentally, Texas’s unique Top Ten Percent Law played an important role in the diversity of the University. Approximately 75% of admitted students are comprised of students granted admission through the Top Ten Percent Law as opposed to the traditional application process.¹⁰⁰ As a result of this unique circumstance, the Court reasoned that even if the Top Ten Percent Law increased minority enrollment as a matter of raw numbers, such an “approach would sacrifice all other *aspects* of diversity” as it would “exclude the star athlete or musician whose grades suffered because of daily practices and training” or the “talented young biologist who struggled to maintain above-average grades in humanities classes.”¹⁰¹ Justice Kennedy reasoned that “class rank is a single metric, and like any single metric, it will capture certain types of people and miss others.”¹⁰² The Top Ten Percent Law is fundamentally at odds with the goal of educational diversity as

95. *Id.* at 2213.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2209 (“The fact that this case has been litigated on a somewhat artificial basis, furthermore, may limit its value for prospective guidance.”).

100. *Id.* at 2202.

101. *Id.* at 2213 (emphasis added).

102. *Id.*

defined by past precedent.¹⁰³ The Top Ten Percent Law created a situation in which a majority of the University's entering class was essentially admitted based on a single metric (class rank) and thus compromised the very diversity the University sought. This led to an increased need for the University to be able to utilize its holistic admissions policy to attain the diversity it sought in the remaining 25% of the class.

The narrow nature of the Court's decision is further highlighted by Justice Kennedy's statement that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement."¹⁰⁴ In holding that "[i]t is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies,"¹⁰⁵ the Court indicates that the ruling regarding the constitutionality of the University's current admission policy itself may turn out differently in the future should enrollment data and statistics shift. This consideration denotes the volatility of the Court's own decision, highlighting the notion that even the same policy may become unconstitutional as circumstances and data regarding students change.

Moreover, under the University's admissions policy race is merely a "factor of a factor of a factor," as it is one of many considerations examined when assessing an applicant's Personal Achievement Index.¹⁰⁶ Under the University's admissions policy, the consideration of race does not "operate as a mechanical plus factor for underrepresented minorities."¹⁰⁷ Thus any university that considered race as more than merely a factor of a factor in its admissions process would likely face an uphill battle in meeting the narrow tailoring prong of strict scrutiny.

Going forward, if a university wishes to use race as a factor in its admissions process, it cannot rely on the general goal of merely

103. See *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003) (noting that admissions policies that include percentage plans might preclude universities from "conducting the individualized assessments necessary" to attain a truly diverse student body).

104. *Fisher II*, 136 S. Ct. at 2215.

105. *Id.*

106. *Id.* at 2207 ("[A]lthough admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities." (citation omitted)).

107. *Id.*

increasing diversity, but rather, would likely need to prove a deficiency in diversity and point to specific goals that courts have the ability to measure.¹⁰⁸

IV. CONCLUSION

Considering Justice Kennedy's past stance on affirmative action cases, it may be surprising to some that he decided in favor of upholding a race-conscious admissions policy, and went on to author the Court's opinion. Prior to *Fisher II*, Justice Kennedy had never voted to support an affirmative action policy.¹⁰⁹ In fact, in *Grutter*, Justice Kennedy wrote a scathing dissent that went so far as to state that the majority's acceptance of the University of Michigan Law School's admissions policies was "nothing short of perfunctory" and that "the concept of critical mass" was a "delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."¹¹⁰

However, Justice Kennedy's change in stance is an example of the notion that as society evolves and circumstances change, so too can the opinions of Supreme Court Justices. Should future challenges to race-conscious university admissions policies arise, there may easily be a new Justice on the Supreme Court whose outlook diverges from that of the majority in *Fisher II*.

While the holding in *Fisher II* was groundbreaking in its own right, the holding of the court is inextricable from the specific circumstances and factors that played a role in the Court's reasoning. For this reason, the holding in *Fisher II* falls short of an unequivocal upholding of the constitutionality of race-conscious university admissions policies across the board. *Fisher II* leaves the door open to new challenges, and possibly different outcomes, to race-conscious university admissions policies moving forward.

108. *Id.* at 2211–12.

109. Daniel Fisher, *Justice Kennedy Evolves from Affirmative Action Skeptic to Supporter with Texas Case*, FORBES (June 23, 2016), <http://www.forbes.com/sites/danielfisher/2016/06/23/justice-kennedy-evolves-from-affirmative-action-skeptic-to-supporter-with-texas-case/#45afa8af53ef> ("Kennedy's opinion is all the more surprising since he had never before voted in favor of race-based preferences . . .").

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

