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Past as Prologue in the Affirmative Action Jurisprudence of the Supreme Court: Reflections on Fisher v. University of Texas at Austin and Schuette v. Coalition to Defend Affirmative Action

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PAST AS PROLOGUE IN THE AFFIRMATIVE ACTION JURISPRUDENCE OF THE SUPREME COURT: REFLECTIONS ON *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* AND *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

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INTRODUCTION

Fisher v. University of Texas at Austin[1] ("*Fisher II*") is the quintessential proof that past is prologue. Forty years ago, the affirmative action jurisprudence of the United States Supreme Court was born out of a close interweaving of public sector higher education with private sector employment in, respectively, *Regents of the University of California v. Bakke*[2] and *United Steelworkers of America v. Weber*.[3] The *Bakke* and *Weber* dynamic has controlled the evolution of affirmative action in the courts ever since.

As Supreme Court Justice Felix Frankfurter often counseled, the history of the law is in large measure the history of procedure. In *DeFunis v. Odegaard*,[4] the Supreme Court invoked

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[1] 133 S. Ct. 2411 (2013).
[2] 438 U.S. 265 (1978).
[3] 443 U.S. 193 (1979).
[4] 416 U.S. 312 (1974).

nonjusticiability and remanded the substantially, but perhaps not entirely, moot *DeFunis* case to the majoritarian political process.[5] A half decade later, the Court promulgated the *Bakke* and *Weber* architecture that governs to this day.

Fisher II, for all practical purposes, may be the functional equivalent of the *DeFunis* case forty years ago. Likewise, *Schuette v. Coalition to Defend Affirmative Action*[6] may be the broad analog to *Bakke* and *Weber*.

This Article critically analyzes the dimensions and likely ramifications of *Fisher* and *Schuette*. The principle of pragmatic political proportionality eschews the wholly ideological extremist views that would either utterly vitiate affirmative action or deeply embed it as a substantially obsolete elitist residue of endless recalibrating. Instead, this Article subscribes to Lincolnian practical wisdom supplemented with a healthy dose of plain common sense.[7] Enlightened political leadership should seek achievable pragmatic proportionality as the guiding principle controlling access to public institutions of higher education and, consequently, entry into the professions.

Although affirmative action in higher education and in employment under Title VII has evolved differently, the salient Court decisions have been closely interwoven. With these most recent Court decisions opening the door, there are likely to be future challenges to affirmative action. The Court suggests that there is a compelling need for proponents to justify their affirmative action policies. This resurrects the classic confluence of the standards for affirmative action in higher education and under Title VII. The future of affirmative action is again up for debate. The problem that affirmative action is designed to remedy—educational disparity among different groups—could be addressed by measures to enhance the educational system at the primary level. More closely calibrating resources to primary school education would seem to be money better spent.

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[5] *Id.* at 316, 320.

[6] 134 S. Ct. 1623 (2014).

[7] The scholar whose position comes closest to the position of this Article is probably Professor Randall Kennedy, a prominent African-American professor at Harvard Law School. *See* Randall Kennedy, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW (Pantheon Books ed., 2013); Stuart Taylor Jr., *Book Review:* 'For Discrimination' *by Randall Kennedy*, WALL ST. J., http://www.wsj.com/articles/SB10001424127887324165204579026632266964524 (last updated Aug. 30, 2013, 4:22 PM).

To withstand the judicial strict scrutiny applied to affirmative action, a university must show that its race conscious policy is narrowly tailored to support a compelling state interest.[8] As the Court reiterated in *Fisher II*, the means to implement this compelling interest must be narrowly tailored. "[T]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."[9]

The requirement that the university must narrowly tailor its goals to show that affirmative action measures are necessary presents an especially difficult problem: "Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."[10] How does one prove that it is necessary to use race? It is easier said than done, especially in light of *Fisher II*.

In *Fisher II*, the Court held the following:

> In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[11]

When this holding is read alone, it seems that Texas had done what was required. The 2004 proposal and the creation of the many iterations of affirmative action show that the university has tried to narrowly tailor their plan.[12] Race is only considered as one factor of the Personal Achievement Index ("PAI") score, which is only considered if the applicant has not been accepted under the Top Ten Percent Plan.[13] What the Court presented has left a wall that is too high to realistically overcome. The Court punted in the outcome of *Fisher*, and the remand to the United States Court of Appeals for the Fifth Circuit left *Fisher* essentially in the same place as before it was decided. The most recent affirmative action case, *Schuette v.*

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[8] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
[9] Fisher v. Univ. of Tex. at Austin (*Fisher II*), 133 S. Ct. 2411, 2420 (2013).
[10] *Id.* (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).
[11] *Id.* at 2421 (alteration in original) (quoting *Bakke*, 438 U.S. at 315).
[12] *Id.* at 2416.
[13] *Id.* at 2415.

Coalition to End Affirmative Action,[14] will not settle this uncertainty with race-conscious policies and may bring more constitutional challenges.

The Court's decision in *Fisher II* has spurred greater uncertainty in the law. Ensuring a court could be satisfied that "no workable race-neutral alternatives would produce the educational benefits of diversity"[15] is very difficult. Perhaps the money spent on litigating affirmative action suits[16] could be better spent on targeted recruitment strategies and financial aid incentives tailored to low-income students. In *Schuette*, the State of Michigan has effectively eliminated its laboratory for experimenting with affirmative action by enacting Proposal 2 ("Prop 2"), now § 26, of the Michigan State Constitution.[17] By upholding this amendment, the Court has given other states a way around affirmative action, but this could be to the detriment of the states. Whether the effects of diversity as a compelling state interest are still a part of the discussion will remain to be seen and has already led to the return of *Fisher II* to the Court.

I. THE FOUNDATION OF AFFIRMATIVE ACTION IN PUBLIC UNIVERSITY PROFESSIONAL SCHOOL EDUCATION AND IN EMPLOYMENT

A. DeFunis v. Odegaard

In 1971, Marco DeFunis, a white male, applied, and was denied admission to the University of Washington Law School.[18] The admissions committee used different procedures and criteria to evaluate minorities versus nonminorities.[19] DeFunis, contending that the admissions committee's criteria and procedures insidiously discriminated against him based on race

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[14] 134 S. Ct. 1623 (2014).

[15] *Fisher II*, 133 S. Ct. at 2420.

[16] *See generally* Jonathan H. Adler, *Texas Taps Mahoney*, THE VOLOKH CONSPIRACY (Apr. 28, 2012, 9:33 AM), http://www.volokh.com/2012/04/28/texas-taps-mahoney; Justin Marion, *How Costly is Affirmative Action? Government Contracting and California's Proposition 209*, 91 REV. ECON. & STAT. 503 (2009), http://people.ucsc.edu/~marion/Papers/Prop209_oct2007_revision.pdf.

[17] *Schuette*, 134 S. Ct. at 1629.

[18] DeFunis v. Odegaard, 416 U.S. 312, 314 (1974).

[19] *Id.*

in violation of the Equal Protection Clause, brought suit in a Washington trial court.[20] The Court granted certiorari while DeFunis was in his final year of law school.[21]

In a five-to-four per curiam decision, the Court held that the case was moot because DeFunis would complete his studies at the law school by the end of the academic term independent of any decision the Court would reach. In his dissent, Justice Douglas[22] asserted that, instead of being selected by cultural background, minorities "should be chosen on talent and character alone."[23] Additionally, Justice Brennan stated that by dismissing the case as moot, the Court "disserve[d] the public interest."[24] The Court should not "transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases."[25]

DeFunis is a landmark affirmative action case, primarily because it was the first occasion in which the Court considered a claim regarding race in the context of public university admissions policies. This decision indirectly became foundational for future "reverse discrimination" challenges of racial preference programs. By failing to reach the merits on the basis of mootness, the Court implicitly signaled the sensitivity and the difficulties of the issues. Similarly, *Fisher II* sidestepped a resolution on the merits.[26] The issue of possible mootness recurred in *Fisher II* during oral arguments. Justices Sotomayor and Ginsburg probed Fisher's counsel to demonstrate that there was an injury.[27] The underlying difference may be the way the plaintiff's injunctions were treated in the lower courts. The state

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[20] *Id.*

[21] *Id.* at 315.

[22] Justice Douglas was a Washington State native. He had also survived the 1970 impeachment proceedings brought against him for his liberal positions on controversial issues which he detailed in his two-volume memoirs. *See generally* WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS (Random House ed., 1st ed. 1974); WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, (Random House ed., 1st ed. 1980).

[23] *DeFunis*, 416 U.S. at 334 (Douglas, J., dissenting).

[24] *Id.* at 350 (Brennan, J., dissenting). There were twenty-six amicus briefs filed in *DeFunis*. One hundred twenty-three amicus briefs were filed in *Fisher II*.

[25] *Id.*

[26] *Fisher II*, 133 S. Ct. 2411, 2415 (2013) (holding that the appellate court applied the wrong level of scrutiny in upholding the trial court's grant of summary judgment).

[27] Transcript of Oral Argument at 3–6, *Fisher II*, 133 S. Ct. 2411 (No. 11-345).

trial court granted DeFunis an injunction, and by the time the dispute reached the Court, DeFunis was about to graduate.[28] The *DeFunis* Court perceived this as a no harm, no foul instance. In contrast, when Fisher sought an injunction compelling her admission to University of Texas, it was denied.[29] Thus, she was never enrolled and went instead to Louisiana State University. Therefore, Fisher's only injury was the application fee and the theoretical difference in job opportunities available to her as a nongraduate of the University of Texas. Finally, there is the issue of the fractured decision that resulted when ruling on the basis of Article III grounds. In a five-to-four split, the *DeFunis* majority signed their decision per curiam.[30] The anonymity may indicate an underlying fear of becoming the next Justice Taney in legal history.

B. Regents of University of California v. Bakke

Allan Bakke,[31] a white male, was denied admission to the University of California Davis School of Medicine.[32] The medical school distinguished between underrepresented minority applicants and nonminority applicants and relied on a quota by reserving sixteen of one hundred seats in the incoming class for

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[28] *DeFunis*, 416 U.S. at 314–15.

[29] *Fisher II*, 133 S. Ct. at 2417 (noting that the trial court granted summary judgment for the university).

[30] The Court does not generally omit the name of the Justice penning the decision. In most instances, per curiam decisions are very brief, unanimous, and on uncontroversial topics. In *DeFunis*, the opinion was none of those things.

[31] Bakke was a thirty-seven-year-old mechanical engineer with stellar qualifications. Not only did he have n ROTC background, but he also showed drive and determination to attend medical school by taking night science classes to qualify. He had a 3.46 grade point average ("GPA"), with ninety-six percent verbal and ninety-four percent quantitative scores on the MCAT. Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1051 (2002).

[32] Bakke had applied twice before and was rejected on both occasions before he brought an action against the medical school. He was never waitlisted. When his first application was rejected, there were four special admissions seats unfilled at the time, but Bakke was not considered. After this first rejection, Bakke protested the special admissions program by writing a letter to the chairman of the admissions committee, alleging the program operated as both a racial and ethnic quota. In both years in which Bakke was rejected, other applicants were admitted to the medical school under the special admissions program with GPAs, MCAT scores, and benchmark scores significantly lower than Bakke's. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272–78 (1978); Liu, *supra* note 31.

minorities.[33] Bakke alleged that the special admissions program distinguishing between minority and nonminority students discriminated on the basis of race in violation of Title VII of the Civil Rights Act, the California State Constitution, and the Equal Protection Clause of the Fourteenth Amendment.[34]

Justice Powell's plurality opinion was the most influential opinion issued from the fractured Court. Relying upon the "Harvard Plan," a diversity enhancing admissions plan Harvard College has used for decades, he opined that using quotas was illegal, but schools may consider race as one admissions factor.[35] Bakke therefore was entitled admission to the medical school because the medical school could not show that he would not have been admitted in the absence of the special admissions program.[36] There were six separately authored opinions with no more than four Justices concurring in their reasoning on any point. Five agreed that Bakke should be admitted, yet a different group of five agreed that a public school might constitutionally consider race in admissions under certain circumstances.[37] This was the first time the Court addressed the constitutional issue of race when admitting students to a public university. The Court set the groundwork for *Fisher II*, which reaffirmed *Bakke*, holding that under the Equal Protection Clause of the Fourteenth Amendment racial preferences must be examined with the "most exacting" strict scrutiny, that diversity was a compelling state interest, and that educators are in the best position to determine the policies to effectuate this goal.[38]

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[33] The two admissions programs used by the medical school were the regular admissions program and the special admissions program. *Bakke*, 438 U.S. at 273.

[34] *Id.* at 277–78.

[35] *Id.* at 316–20.

[36] *Id.* at 320.

[37] *Id.* at 271–72. *See generally* Laurence H. Tribe, *Perspectives on* Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979) (exploring possible theoretical ramifications of the *Bakke* decision and examining the *Bakke* decision for broader themes in constitutional law including equal protection, procedural fairness, and structural justice); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 131–48 (1978) (describing the holding and discussing the majority, concurring, and dissenting opinions); John C. Jeffries, Jr., Bakke *Revisited*, 55 SUP. CT. REV. 1 (2003) (critiquing the Court's decision in *Bakke*).

[38] *Fisher II*, 133 S. Ct. 2411, 2417–19, 21 (2013); *id.* at 2422 (Thomas, J., concurring).

The greatest difference between these cases is the division of the Court itself. *Bakke* is notorious for its fractured decision and it is virtually impossible to derive overarching rules of law from the many opinions; the most heavily relied upon is the plurality opinion of Justice Powell. *Bakke* left lower courts with little to work with, because Justice Powell's opinion did not specify the circumstances under which race may be considered and only provided broad language to be interpreted. The *Fisher II* Court reinforced *Bakke* in a seven-to-one decision and reaffirmed the application of strict scrutiny.

C. United Steelworkers of America v. Weber

Brian Weber, a white male, and several white coworkers, applied for and were denied places in a company training program, which trained employees for skilled craft positions.[39] Pursuant to a master collective bargaining agreement between the United Steelworkers of America ("USWA") and Kaiser Aluminum & Chemical Corp ("Kaiser"), Kaiser implemented a training program for current employees for craft positions.[40] Trainees were selected on the basis of seniority; half of the available positions were reserved for blacks.[41] The Court described the selection process for the plan as follows:

> During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected.[42]

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[39] United Steelworkers of Am. v. Weber, 443 U.S. 193, 199 (1979).

[40] *Id.*

[41] Kaiser's purpose for this program was "to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft-work forces." *Id.* at 198. Kaiser and USWA voluntarily adopted the program. The program was temporary and sought to increase the number of black workers to meet the level of the local labor force. According to the employer, when this goal was met, the program would be eliminated. Specifically, at the plant where the litigation arose, prior to 1974, only 1.83% of the skilled craft workers were black, even though the local workforce was approximately 39% black. *Id.* at 198–99, 208–09.

[42] *Id.* at 199.

Weber instituted a class action lawsuit in federal district court on behalf of white production workers with greater seniority than those black workers admitted to the program. He contended that the program discriminated on the basis of race in violation of Title VII.[43]

The Court held that the Title VII prohibition of racial discrimination does not prohibit the use of affirmative action in all private and voluntary programs.[44] Instead, the Court found that Kaiser's affirmative action plan under the collective bargaining agreement that reserved fifty percent of the training program openings for black employees until the percentage of black craft workers was comparable with the percentage of blacks in the labor force did not violate Title VII.[45] The Court reasoned that the program was permissible because the plan reflected the purpose of Title VII, it did not "unnecessarily trammel the interests of the white employees,"[46] was only "a temporary measure,"[47] and intended simply "to eliminate a manifest racial imbalance."[48]

Chief Justice Burger dissented, arguing that the Court usurped the role of the legislature, and that its decision was contrary to the explicit language of Title VII.[49] Justice Rehnquist's dissent quoted *1984*[50] to emphasize the dramatic leap the Court took to reach its decision when interpreting the language of the statute and the application of Title VII to employer-sponsored training programs.[51] Education and employment are interwoven. Without being trained to perform a

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[43] *Id.* at 199–200.
[44] *Id.* at 208.
[45] *Id.* at 209.
[46] *Id.* at 208.
[47] *Id.* at 209.
[48] *Id.* at 208–09.
[49] *Id.* at 216 (Burger, J., dissenting).
[50] GEORGE ORWELL, 1984, (Signet Classic 1950).
[51] *Weber*, 443 U.S. at 219–20 (Rehnquist, J., dissenting); *see* George Schatzki, United Steelworkers of America v. Weber*: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 51, 53, 73 (1980) (discussing the factors to consider when designing an affirmative action program in the workplace); *see also* Philip P. Frickey, *Wisdom on* Weber, 74 TUL. L. REV. 1169 (2000) (examining the *Weber* decision retrospectively and its impact on the development of affirmative action policies); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 253 (1979) (arguing that although the Court attempted to find a practical solution to compliance problems in Title VII, the Court went too far in approving voluntary affirmative action programs in the workplace).

job, an employee cannot ascend the employment ladder. Deficient job skills resulted in lower pay, as pointed out by the plaintiffs in both *Weber* and *Fisher II* in their challenges to their respective programs.[52]

Unlike *Fisher II*, *Weber* did not rely on *Bakke*. Comparing *Weber* and *Bakke* may elucidate this difference. First, because *Bakke* involved a state university and raised the question of whether race-conscious programs violated the Fourteenth Amendment, much of the Court's decision was grounded in constitutional analysis. Second, *Weber* challenged a private employer's voluntary and temporary use of a program considering race in admissions to a craft program and thus was based on Title VII.

II. THE EXPANSION OF AFFIRMATIVE ACTION IN THE REAGAN ERA

A. Wygant v. Jackson Board of Education

In *Wygant*, a collective bargaining agreement between a school district and the teachers' union provided that, in the event of layoffs, teachers with the most seniority would be retained, but there would not be "a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[53] When the district failed to follow the agreement, minority nontenured teachers, laid off rather than senior tenured nonminority teachers, along with the union, sued in federal court.[54]

The Court held that strict scrutiny applied, but neither societal discrimination nor the role-model theory constituted compelling state interests.[55] Justices Powell, Burger, and

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[52] Weber argued that by not entering into the craft-training program, he would not be able to hold a craft position in the plant and thus would not receive higher wages. *Weber*, 443 U.S. at 199–200. Fisher argued that if she had obtained a University of Texas degree, she would have enjoyed more job opportunities. *Fisher II*, 133 S. Ct. 2411, 2413 (2013).

[53] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270 (1986).

[54] *Id*. at 271.

[55] *Id*. at 276.

Rehnquist further held that the agreement was not narrowly tailored to effectuate the parties' goals because less intrusive methods, like hiring goals, were available.[56]

Justices White and O'Connor concurred, opining that it was impermissible to achieve racial diversity in hiring by firing whites in lieu of blacks until a permissible number of blacks were reached.[57] The agreement was not sufficiently tailored because it was tied to the number of minority students, which had no correlation to employment discrimination.

Justices Marshall, Brennan, and Blackmun dissented, arguing that the majority had erred because it had confused unfairness with constitutional injury.[58] The Court had not yet adopted strict scrutiny as the standard. Even if that was the standard adopted, the agreement did not violate the Constitution because remedying past discrimination is a compelling state interest. In addition, the agreement was a narrowly tailored means to achieve the compelling state interest because it equally apportioned the burden between the racial groups, and because it was reached through the bargaining process.

Wygant is one of the first cases in which strict scrutiny appears in the form it exists in today: Race conscious policies are appropriate only when there is a compelling state interest and the means used to effectuate that interest are narrowly tailored. Strict scrutiny still did not command a steadfast majority. Indeed, Justice Marshall disagreed that strict scrutiny was the proper test.[59] Justice Marshall endorsed a much less rigorous standard.[60] Minimally, four Justices agreed in *Wygant* that strict scrutiny is the correct standard. The dissenters acknowledged the precedential value of strict scrutiny.[61] *Fisher II* is an affirmation of Powell's vision: Strict scrutiny is the way to validate race-conscious policies and in *Fisher*, the Court achieved unanimity in equal protection jurisprudence.

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[56] *Id.* at 283–84.
[57] *Id.* at 294 (O'Connor, J., concurring); *id.* at 295 (White, J., concurring).
[58] *Id.* at 296 (Marshall, J., dissenting).
[59] *Id.* at 301–02.
[60] *Id.*
[61] *Id.* at 302–03.

B. Piscataway

The situation involving the Piscataway Board of Education may be the most memorable equal protection case that never was.[62] The distinction between *Wygant* and the Piscataway settlement is that the former was a layoff case while Piscataway was a hiring case.[63] Is the denial of benefits based on race or the extension of benefits based on race more egregious to the Constitution? There is no clear answer. *Fisher* involved university admissions, which could be either an extension or denial of benefits based on race, which raises philosophical questions about higher education in America. One common refrain in American society is that college is the path to success. The federal government ostensibly endorses this view.[64] At the same time, universities have a finite number of seats and there is no inherent right to higher education. In addition, many people now criticize the higher education complex for failing heavily indebted students.[65] If the higher education system is so badly broken, then denial of admission does not seem so injurious. However, if everyone should receive a college education, then denial of college admission is potentially a constitutional injury of great magnitude.

C. Johnson v. Transportation Agency

The Transportation Agency of Santa Clara County instituted a plan that "provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant."[66] Paul Johnson, a male employee, sued.

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[62] *See* Elizabeth Hull, *Out on a Lonely Limb: The Piscataway Board of Education's Fight for Educational Diversity*, 2000 L. REV. MICH. ST. U. DET. C.L. 407, 422–23 (2000) (discussing the Piscataway settlement in light of *Wygant*).

[63] *Id.*

[64] Matt Taibbi, *Ripping Off Young America: The College-Loan Scandal*, ROLLING STONE (Aug. 15, 2013), http://www.rollingstone.com/politics/news/ripping-off-young-america-the-college-loan-scandal-20130815.

[65] President Barack Obama, State of the Union Address (Jan. 27, 2010), *available at* https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

[66] Johnson v. Transp. Agency, 480 U.S. 616, 620–21 (1987).

Justices Brennan, Marshall, Powell, Stevens, and Blackmun held the promotion plan was constitutional.[67] Employers adopting race conscious hiring policies need not show actual past discrimination but merely traditional underrepresentation.[68] The plan did not consider sex dispositive, as it was taken into account with other factors. The Court's decision did not foreclose other voluntary programs that employers can create to benefit disadvantaged groups. Justice O'Connor concurred in the judgment but wrote separately "because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers."[69] Justice Scalia authored the dissent, excoriating the Court for ensuring that sex would be the basis for employment decisions.[70]

Johnson is quite distinct from *Fisher II*; the application of sex rather than of race means that strict scrutiny analysis was not implicated in *Johnson*. The majority in *Johnson* noted that traditional underrepresentation can be the basis for policies that seek to expand minority presence—here, females—in a given field.[71] However, this is somewhat irrelevant to strict scrutiny analysis, especially after *Fisher II*, since strict scrutiny has been further refined.

D. City of Richmond v. J.A. Croson Co.

The Richmond City Council mandated that general contractors who were awarded construction contracts were required to reserve thirty percent of the contract's value for subcontractors who were also minority business entities ("MBE").[72] This set-aside program was designed to promote minorities' business ventures in public construction projects. In implementing this plan, Richmond relied on a study which showed that Richmond's population was 50% black, yet only 0.67% of the city's contracts had been awarded to MBE's between

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[67] *Id.* at 641–42.

[68] *Id.* at 630.

[69] *Id.* at 648 (O'Connor, J., concurring).

[70] *Id.* at 658 (Scalia, J., dissenting).

[71] *Id.* at 630 (majority opinion).

[72] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477–78 (1989). To qualify as an MBE, the business must have been at least fifty-one percent owned and controlled by citizens who were "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 478.

1978 and 1983.[73] Also, the city contractor associations had a limited number of minority businesses as members.[74] The city relied on *Fullilove v. Klutznick* to adopt the ordinance.[75]

The district court upheld Richmond's set-aside plan, and was affirmed by the United States Court of Appeals for the Fourth Circuit, also relying on *Fullilove v. Klutznick*.[76] The Court granted certiorari but remanded the case for further consideration after *Wygant*, whereupon the Fourth Circuit held that the plan violated the Equal Protection Clause of the Fourteenth Amendment.[77] The Fourth Circuit held that broad findings of past discrimination did not justify this set-aside, and that thirty percent was not narrowly tailored.[78] Richmond appealed; with an opinion written by Justice O'Connor, the Court affirmed.[79]

Justice O'Connor wrote that strict scrutiny must be applied to all race-conscious measures, even benign ones; without using strict scrutiny, it was impossible to ascertain whether racial classifications were benign or produced by insidious racial discrimination.[80] Richmond relied on generalized past discrimination, and the Court held that "an amorphous claim that there has been discrimination in a particular industry cannot justify the use of an unyielding racial quota."[81] A city may only dismantle local discriminatory practices if it is shown that they have become a passive participant in a systematic exclusion of minorities. Here, Richmond "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[82]

Both *Fisher II* and *Croson* were brought under of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. In both, the Court used strict scrutiny to evaluate the race-based policies. In *Croson*, there were no

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[73] *Id.* at 479–80.
[74] *Id.*
[75] *Id.* at 505 (quoting Fullilove v. Klutznick, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting)).
[76] *Id.* at 483–84.
[77] *Id.* at 485.
[78] *Id.* at 485–86.
[79] *Id.* at 486.
[80] *Id*. at 493.
[81] *Id.* at 499.
[82] *Id.* at 505.

race-neutral measures attempted to increase minority contracts awarded by the city, even though it was shown that bond requirements hindered minority subcontractors.[83]

The Court's holding in *Fisher II* that "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity"[84] is a natural extension of the race-neutral alternatives first articulated in *Croson*. The lack of deference to the generalized legislative intent in *Croson* is similar to the dynamic in *Fisher II* where the case was remanded to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[85] In *Fisher II*, the Court stated, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[86] Whether there was enough evidence in the record to be more than a "mere recitation" was remanded to the Fifth Circuit.[87] Interestingly, *Croson*, which was seen as only applying to state or local actions in light of *Metro Broadcasting, Inc. v. FCC*, has suddenly become relevant again in light of *Fisher*.[88]

E. Metro Broadcasting, Inc. v. FCC

Metro Broadcasting was a consolidation of two federal cases that challenged the policies of the Federal Communications Commission ("FCC") under the Equal Protection Clause of the Fifth Amendment.[89] The FCC was granted authority by Congress in the Communications Act of 1934 to implement policies to increase diversity in broadcasting, and, thus, increase the dissemination of information from a variety of sources.[90] To increase the minority ownership in broadcasting, the FCC gave

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[83] *Id.* at 482.

[84] *Fisher II*, 133 S. Ct. 2411, 2420 (2013).

[85] *Id.* at 2421.

[86] *Id.* (quoting *Richmond*, 488 U.S. at 500) (internal quotation marks omitted).

[87] *Id.* at 2421–22.

[88] *See generally* Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995); John Galotto, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508 (1993); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990).

[89] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 552 (1990).

[90] *Id.* at 553.

an enhancement wider credit for ownership and participation by members of minority groups, both in applications for new broadcast licenses and in "distress sales" of licenses.[91] Whether this violated the equal protection rights under the Fifth Amendment was considered in light of the congressional support for the objectives of the FCC.

The Court held that the FCC policies were constitutional, since they had "the imprimatur of longstanding congressional support" and were "substantially related to the achievement of the important governmental objective of broadcast diversity."[92] Benign minority preference programs of the FCC were constitutional when sustained through intermediate scrutiny under the equal protection right of the Fifth Amendment.[93] The Court held that *Fullilove* did not impose strict scrutiny on the program, and distinguished *Fullilove* from *Croson*, noting that *Croson* only applied to state and local government actions.[94] The Court adopted intermediate scrutiny as the appropriate standard for assessing federal "benign" racial classifications.[95] The majority—Justices Brennan, White, Marshall, Blackmun, and Stevens—held that an interest in enhancing diversity in the broadcast industry was an important government objective and the FCC achieved that objective through substantially related means.[96] These programs promoted increased minority participation rather than simply remedying past discrimination, which was an unprecedented expansion. The Court gave deference to congressional objectives of enhancing diversity in broadcasting, accepting that it was an important government objective and the FCC's polices were substantially related to the achievement of diversity.[97]

Justice O'Connor argued for strict scrutiny in all racial classifications and that the compelling interest should be remedying past racial discrimination, something which was not

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[91] *Id.* at 554.
[92] *Id.* at 600.
[93] *Id.* at 564–65.
[94] *Id.* at 565.
[95] *Id.*
[96] *Id.* at 566.
[97] *Id.* at 567–69.

shown by the FCC.[98] This case was later overruled by *Adarand Constructors, Inc. v. Pena*,[99] which held that strict scrutiny must be applied to federal laws with benign racial classifications.[100]

The Court's deference to the FCC's stated purposes in *Metro Broadcasting* is similar to the Court's deference to the university's collective judgment in *Fisher II*. Nevertheless, it is difficult to fully reconcile *Metro Broadc*asting with *Fisher II*, as *Metro Broadcasting* was overturned in favor of using strict scrutiny on all instances of racial classifications.[101]

III. AMBIVALENCE

A. Hopwood v. Texas

Cheryl Hopwood, Douglas Carvell, Kenneth Elliot, and David Rogers were white applicants denied admission to the 1992 entering class at the University of Texas School of Law.[102] The plaintiffs challenged the law school's affirmative action admissions program under the Equal Protection Clause of the Fourteenth Amendment and claimed that they were subjected to unconstitutional discrimination in the application process.[103] The school admitted applicants based on a number of qualifications, including their Texas Index ("TI") score, LSAT score, and undergraduate grade point average ("GPA").[104]

The plaintiffs brought suit in the Western District of Texas, where the court held that the school violated the Equal Protection Clause because the admissions program was not sufficiently tailored to achieve the compelling interests of having a diverse student body and remedying past discriminatory effects on minorities.[105] The Fifth Circuit reversed and remanded for further proceedings, noting that the usage of discrimination based on race was highly suspect.[106] On remand, the district court held that the applicants were not entitled to damages, but

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[98] *Id.* at 611–12 (O'Connor, J., dissenting).
[99] 515 U.S. 200 (1995).
[100] *Id.* at 227.
[101] *Id.*
[102] Hopwood v. Texas (*Hopwood IV*), 236 F.3d 256, 260–61 (5th Cir. 2000).
[103] *Id.* at 263.
[104] *Id.* at 265.
[105] Hopwood v. Texas (*Hopwood I*), 861 F.Supp. 551, 578–79 (W.D. Tex. 1994).
[106] Hopwood v. Texas (*Hopwood II*), 78 F.3d 932, 962 (5th Cir. 1996).

entered a permanent injunction proscribing consideration of race in the school's admission process and awarded attorney fees to the applicants.[107] Once again on appeal, the Fifth Circuit struck down the program and held that the government had not shown any compelling interests sufficient to justify the racially discriminatory admissions program.[108]

The Supreme Court denied certiorari, leaving the Fifth Circuit's holding as binding precedent until *Grutter v. Bollinger* trumped *Hopwood IV*.[109]

The Fifth Circuit held that diversity was not a compelling state interest for using racial classifications in admissions, rejecting Justice Powell's arguments in *Bakke*, and ruled that any remedial justification for affirmative action had to be based on discriminatory actions by the law school.[110] Considering race for the purpose of achieving a diverse student body was not a justifiable use of race; the law school's methods did not withstand strict scrutiny.[111] By holding one race as more befitting admission over another nonpreferred group, the school undermined the Equal Protection Clause,[112] which halted racial preferences in the Fifth Circuit until *Grutter*.

Hopwood IV was the impetus for the Top Ten Percent Plan.[113] After *Grutter*, the University of Texas ("UT") system supplemented the Top Ten Percent Plan with the Personal Achievement Index ("PAI") at issue in *Fisher II*.[114] Unlike the Texas Index score used in *Hopwood IV*, the PAI in *Fisher II* allowed the admissions officer to consider each applicant as an individual, with race being just a portion of the application.[115] The Texas Index singled out minorities for special review to the exclusion of whites.[116] After the implementation of the holistic PAI, minority enrollment in the UT system dropped and the university was forced to expand outreach programs and other

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[107] Hopwood v. Texas (*Hopwood III*), 999 F. Supp. 872, 923–24 (W.D. Tex. 1998).
[108] *Hopwood IV*, 236 F.3d at 273–75.
[109] Grutter v. Bollinger, 539 U.S. 306, 322, 343–44 (2003).
[110] *Hopwood II*, 78 F.3d at 944, 952.
[111] *Id.* at 944–46, 949, 952, 955.
[112] *Id.* at 947–48.
[113] *Fisher II*, 133 S. Ct. 2411, 2416 (2013).
[114] *Id.* at 2415–16.
[115] *Id.*
[116] *Id.*

means to reach minority students.[117] However, when the university considered factors such as growing up in a non-English speaking home, coupled with the operation of the Top Ten Percent Plan, it resulted in a more racially diverse environment at the university, even more so than before *Hopwood IV*.[118]

IV. THE UNIVERSITY OF MICHIGAN CASES

The United States Supreme Court issued two opinions on June 23, 2003 that altered the landscape of affirmative action in university admissions. In *Grutter v. Bollinger*, Justice O'Connor held for the Court that the University of Michigan Law School could use race as a nonnumeric "plus factor[]" in admissions decisions.[119] In *Gratz v. Bollinger*, the Court held that the University of Michigan could not reduce race to a numeric value to be used in admissions decisions.[120] In *Grutter*, Justice O'Connor famously wrote that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[121]

A. Grutter v. Bollinger

The elite University of Michigan Law School sought a diverse mix of students.[122] The admissions policy specifically sought a "critical mass" of students from underrepresented racial minority groups.[123] This policy was challenged, and the Court held that strict scrutiny applied.[124] The admissions policy was constitutional only if the government had a compelling state interest that it sought to satisfy through narrowly tailored means.[125] "[T]he Law School ha[d] a compelling interest in

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[117] *Id.*
[118] *Id.*
[119] *Id.* at 2416.
[120] Gratz v. Bollinger, 539 U.S. 244, 255, 275–76 (2003).
[121] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
[122] *Id.* at 314.
[123] *Id.* at 316.
[124] *Id.* at 326–27.
[125] *Id.* at 326.

attaining a diverse student body."[126] Namely, classroom diversity is important because the country should "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[127]

The narrow tailoring prong was also satisfied.[128] Quotas were impermissible, but a plan that used race as a plus factor was permissible.[129] Justice O'Connor compared the University of Michigan Law School plan with the Harvard Law School admissions policy that Justice Powell approved in *Bakke*.[130] Michigan's plan was not "racial balancing" because there was no numeric goal but rather a philosophical "critical mass."[131] Although there may be other means to achieve a critical mass, narrow tailoring does not require the exhaustion of all race-neutral options.[132] The Court expected that in twenty-five years, race would not have to be used in university admissions policies.[133] Race-based admissions policies should be periodically reviewed and eliminated as necessary.[134]

Justice Thomas's dissent quoted Frederick Douglass: "[C]olored people" should be given "not benevolence, not pity, not sympathy, but simply *justice*."[135] He agreed with the majority's holding that racial discrimination will be illegal in twenty-five years because it was illegal at that time.[136] Thomas concurred on two points. First, racial discrimination between groups within the "critical mass" remains unlawful.[137] Second, "in 25 years the practices of the Law School will be illegal" for the same reasons that they were illegal.[138]

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[126] *Id.* at 328.
[127] *Id.* at 332.
[128] *Id.* at 339–40.
[129] *Id.* at 334–35.
[130] *Id.* at 335.
[131] *Id.* at 336.
[132] "Narrow tailoring" is required, but the most narrowly tailored method is not required. *Id.* at 339.
[133] *Id.* at 343.
[134] *Id.* at 342–43.
[135] *Id.* at 349 (Thomas, J., concurring in part and dissenting in part).
[136] *See id.* at 351.
[137] *Id.* at 374–75.
[138] *Id.* at 375.

Twenty-five years earlier,[139] Justice Powell wrote the plurality opinion in *Bakke.* Justice O'Connor borrowed heavily from that opinion, and her forward-looking twenty-five year language did not end up in the majority opinion by accident. Scholars have speculated on possible reasons for the twenty-five year language, including a desire to legitimize the Court.[140] Some have interpreted this as a call to finally end racial injustice;[141] others criticize this as an arbitrary time limit.[142]

The academic achievement gap between racial groups is not likely to disappear in twenty-five years,[143] and affirmative action disincentivizes minorities from improving their LSAT scores.[144] If the twenty-five year window is intended to mitigate the majority's damage to strict scrutiny, future applicants will not find solace in knowing that Justice Powell's basic protection is suspended for a full quarter century.[145]

B. Gratz v. Bollinger

The University of Michigan's undergraduate admission policy awarded applicants twenty points out of one hundred possible points for belonging to an underrepresented minority group.[146] Applicants belonging to nonminority groups who were denied admission sought injunctive relief for violations of the Fourteenth Amendment, Title VII of the 1964 Civil Rights Act, and 42 U.S.C. § 1981.[147]

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[139] Note that no direct discussion of Justice O'Connor's twenty-five year language appears in the *Gratz* opinion. *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003).

[140] Vijay S. Sekhon, *Maintaining the Legitimacy of the High Court: Understanding the "25 Years" in* Grutter v. Bollinger, 3 CONN. PUB. INT. L.J. 359, 360 (2004).

[141] Wendy B. Scott, *Panel Commentary Twenty-Five Years: The Future of Affirmative Action*, 78 TUL. L. REV. 2053, 2060 (2004).

[142] Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 183–84 (2004).

[143] *Grutter*, 539 U.S. at 376 (Thomas, J., concurring in part and dissenting in part).

[144] *Id.* at 377.

[145] *Id.* at 394 (Kennedy, J., dissenting).

[146] Gratz v. Bollinger, 539 U.S. 244, 256 (2003).

[147] *Id.* at 250–51.

Here, the Court found the university's admissions policy was unconstitutional.[148] *Grutter* established binding precedent that the university's interest in classroom diversity satisfied the "compelling state interest" prong of the strict scrutiny test.[149] However, this admissions policy did not satisfy the "narrowly tailored" prong of the strict scrutiny test.[150] The admissions policy lacked the individualized consideration first articulated in *Bakke*.[151] The ability for an admissions officer to flag an application for review did not make the policy narrowly tailored because the award of twenty points was dispositive in many cases.[152] The Michigan undergraduate admissions policy failed because it lacked nonracial distinctions between minority applicants.[153]

The dissent in *Gratz* noted that "we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."[154] Though indirect, this is perhaps the closest that the *Gratz* decision comes to referencing O'Connor's twenty-five year language from *Grutter*.[155]

V. *FISHER V. UNIVERSITY OF TEXAS*

A. Lower Court Decisions

Fisher v. University of Texas at Austin ("*Fisher I*") was brought in the Western District of Texas, which granted summary judgment to the university, finding that the University of Texas ("UT") had correctly applied the constitutional standard established in *Grutter v. Bollinger* and UT's consideration of race as one admissions factor was narrowly tailored to support a compelling interest.[156] On appeal, the Fifth Circuit affirmed.[157]

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[148] *Id.* at 268–76.
[149] *Id.* at 268–70.
[150] *Id.* at 270.
[151] *Id.* at 271.
[152] *Id.* at 273.
[153] *See id.* at 273–74.
[154] *Id.* at 298 (Ginsburg, J., dissenting).
[155] *Id.*
[156] Fisher v. Univ. of Tex. at Austin (*Fisher I*), 631 F.3d 213, 216–17 (5th Cir. 2011).
[157] *Id.* at 247. The court held that, rather than seeking outright racial balancing for its own sake, the university's policy was supported by the compelling interest of

The Fifth Circuit applied strict scrutiny while giving deference to the judgment of the university administrators and declined to evaluate Fisher's Title VII claims.[158] The court affirmed the lower court's grant of summary judgment to the university.[159] The Fifth Circuit synthesized three objectives for a critical mass of diversity[160]: enhanced perspectives,[161] professionalism, and civic engagement.[162] To increase minorities in leadership positions, higher education must be open and inclusive of all qualified individuals of any race.[163] The Fifth Circuit identified these as worthy objectives, as long as they were narrowly tailored, that is, a holistic evaluation of each applicant.[164]

After *Hopwood IV*, UT had incorporated the personal achievement index ("PAI") to be used in conjunction with the academic index.[165] The PAI was meant to "identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores."[166] Though facially neutral, it was designed to increase minority enrollment as many of the factors used in the PAI disproportionately affect minority applicants.[167] Despite the implementation of the PAI, minority applications immediately decreased, and there was a corresponding decrease in minority enrollment. After *Hopwood*, African-American enrollment dropped forty percent and Hispanic enrollment decreased by five percent. In the same period, Caucasian enrollment increased by fourteen percent and Asian-American enrollment increased by twenty percent.[168]

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achieving critical mass. *Id.* at 234–38. The court also found that the Texas Top Ten Percent Plan was not a constitutionally mandated replacement for the university's policies and that the critical mass the university sought with its policies had not yet been achieved. *Id.* at 245.

[158] *Id.* at 231–32.

[159] *Id.* at 217.

[160] *Id.* at 219.

[161] *Id.*

[162] *Id.* at 219–20.

[163] *Id.* at 220.

[164] *Id.* at 220–21.

[165] *Id.* at 223.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 224.

Also after *Hopwood IV*, the Texas legislature enacted the Top Ten Percent Plan, which automatically admitted Texas residents in the top ten percent of their high school class to state universities.[169] This increased minority percentages at UT because of the demographics of the State of Texas.[170] *Hopwood IV*'s prohibition on using race ended after the 2004 admissions cycle with the Court's decision in *Grutter*.[171]

"UT commissioned two studies to explore whether the university was enrolling a critical mass of underrepresented minorities," such that a *Grutter*-like system was unnecessary.[172] The university incorporated these findings into the 2004 *Proposal To Consider Race and Ethnicity in Admissions*.[173] The plan proposed that a "comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, [and] preparation[s] for . . . an increasingly diverse workforce."[174] The proposal observed that these objectives were important to UT Austin as the flagship University of Texas.[175] The results of the studies and of the objectives of the proposal caused UT to adopt race as one of the many factors used in admission.[176] In addition to adding race as a factor, the university instituted informal reviews of the admissions procedure each year.[177] The current *Grutter*-like policy has produced noticeable results; the UT system is ranked "sixth in the nation in producing undergraduate degrees for minority groups."[178] The current program is a tiered system where the Top Ten Percent Plan is used first, and the AI and the PAI winnow out the remaining applicants; race is one of the factors used in the PAI.[179]

Given that UT's admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny, and to withstand it, one must show that its policy is narrowly tailored

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[169] *Id.*
[170] *Id.*
[171] *Id.* at 224–25.
[172] *Id.* at 225.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 225–26.
[176] *Id.* at 226.
[177] *Id.*
[178] *Id.* (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 594 (W.D. Tex. 2000)) (internal quotation marks omitted).
[179] *Id.* at 227–28.

to effectuate a compelling state interest.[180] However, the Court has counseled deference to a university's educational judgment when evaluating race-based government action.[181] The Fifth Circuit determined that strict scrutiny with "a degree of deference to the University's . . . academic judgment" was appropriate, and the university's decision-making process must be scrutinized under the good faith consideration of *Grutter*.[182] *Grutter* recognized that courts must afford a measure of deference to a university's educational judgment, and the court must make this good faith determination that certain race-conscious measures are necessary to achieve the benefits of diversity including attaining critical mass.[183]

In deciding so, the Fifth Circuit determined that Fisher's Title VII challenge did not apply to university admissions.[184] However, because university admissions treat race as part of a holistic consideration, this does not apply in the same way.[185] In both *Wygant v. Jackson Board of Education*[186] and *City of Richmond v. J.A. Croson Co.*[187] quotas were used, and in *Ricci v. DeStefano*[188] a de facto quota was created.[189] Conversely, no quota was present in UT's admissions decisions.[190]

Given that "diversity is a permissible goal for educational institutions, but 'outright racial balancing' is not[,] [a]ttempting to ensure that the student body contains some specified percentage of a particular racial group is 'patently unconstitutional.' "[191] It was clear that administrators know a quota system would not survive judicial review.[192] The UT administration carefully fashioned its plan with guidance from *Grutter* and ensured that each individuals were evaluated on the entirety of their application.[193] There was no indication that the

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[180] *Id.* at 231.
[181] *Id.* at 232.
[182] *Id.* at 231–32.
[183] *Id.* at 233.
[184] *Id.* at 232–33.
[185] *Id.* at 233.
[186] 476 U.S. 267 (1986).
[187] 488 U.S. 469 (1989).
[188] 557 U.S. 557 (2009).
[189] *Id.*
[190] *Id.* at 235.
[191] *Id.* at 234 (quoting Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003)).
[192] *Id.* at 235.
[193] *Id.*

plan was a quota by another name.[194] The university did not even keep "an ongoing tally of racial composition of the entering class" during the admission period.[195] The percentage of minorities admitted did not support the appellant's charge of racial balancing.[196] Although race could enhance an applicant's PAI score, every applicant could submit supplemental information to highlight his or her potential diversity contribution.[197] Any consideration of minority group demographics happened only when the university studied whether a race-conscious admission program was needed to attain critical mass.[198]

The Fifth Circuit held that UT policies demonstrated attention to the community it serves as the flagship state university.[199] Both in *Grutter* and *Fisher II*, the relationship between numbers and diversity was recognized, however the court held that UT appropriately concentrated on the educational benefits.[200] The need for a state's leading educational institution to foster engagement and maintain openly visible paths to leadership for minorities required a degree of attention to the community, including demographics.[201]

The Fifth Circuit evaluated the Top Ten Percent Plan because it also impacts minority enrollment.[202] The appellants attempted to portray the Top Ten Percent Plan as a racially neutral alternative that would provide critical mass without resorting to race-conscious admissions.[203]

Texas applicants outside the top ten percent of their class are faced with extreme competition to enroll at UT.[204] This system negatively impacts minority students who have lower standardized test scores and are in the second decile of their classes at competitive high schools.[205] *Grutter*'s—and UT's—all-encompassing look at an application may soften the exclusion of

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194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.* at 236.
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.* at 237.
202 *Id.* at 238–42.
203 *Id.* at 239.
204 *Id.* at 241.
205 *Id.*

minorities based on their standardized test scores.[206] Though the Top Ten Percent Plan was adopted to increase minority enrollment, its blunt sweep of admissions is the opposite of an individualized, holistic focus.[207] Appellants correctly noted that enacting this plan was not constitutionally required, however the Fifth Circuit held that this did not make the *Grutter*-like plan unconstitutional.[208]

The Fifth Circuit did not appraise whether combining the Top Ten Percent Plan and the *Grutter*-style plan was the best possible choice. Though racially neutral, the Top Ten Percent Plan uses demographics to create a proxy for race.[209] Appellants contended that critical mass had already been reached and that benchmarks should be established, which the Fifth Circuit rejected.[210] The Court in *Grutter* "pointedly refused to tie the concept of 'critical mass' to any fixed number."[211] Appellants did not show that UT did not act in good faith and it was also apparent from the 2004 proposal that UT had considered whether aggregate minority enrollment translated to diversity in the classroom.[212] The Fifth Circuit determined that *Grutter*'s precedent supported UT's plans and that it was not their role to move away from *Grutter*'s firm holding that diversity is a compelling state interest.[213]

B. The Supreme Court Decision

In *Fisher v. University of Texas at Austin* ("*Fisher II*"), Justice Kennedy wrote for the Court, with Justices Alito, Roberts, Sotomayor, and Breyer; Justices Scalia and Thomas concurred, but wrote separately; and Justice Ginsburg dissented.[214] Justice Kennedy's majority opinion has three parts.

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[206] *Id.*
[207] *Id.* at 242.
[208] *Id.* at 243.
[209] *Id.* at 240.
[210] *Id.* at 242–45.
[211] *Id.* at 244.
[212] *Id.* at 245–46.
[213] *Id.* at 247.
[214] *Fisher II*, 133 S. Ct. 2411, 2414 (2013). It is interesting to note that Justices Roberts and Alito did not protest the essence of the majority opinion the way that Justices Scalia and Thomas protested. As conservative Justices appointed post-*Grutter*, their acquiescence to the majority opinion suggests that they do not fundamentally challenge *Grutter*'s central holding, unlike Justices Scalia and

First, the prefatory language introduces the procedural posture and frames the issue.[215] Second, part I states facts and introduces law.[216] Part I, section A details UT's various affirmative action plans over the last twenty years,[217] while part I, section B speaks about Equal Protection Clause jurisprudence, specifically in the race and affirmative action context.[218] Finally, part II applies the facts to the law and concludes that the Fifth Circuit erred because it did not properly apply the narrow tailoring prong of strict scrutiny analysis.[219]

Kennedy introduced the procedural posture of the case; generally, the petitioners complained that UT's use of race in admissions decisions violated the Equal Protection Clause.[220] Further, Kennedy framed the exact issue: whether the judgment below was consistent with *Grutter* and *Bakke*.[221]

Part I, section B of Justice Kennedy's opinion discusses applicable Equal Protection Clause jurisprudence.[222] Three cornerstone decisions involving racial classifications in education are *Bakke*, *Grutter*, and *Gratz*.[223] Justice Powell's plurality opinion in *Bakke* held that all governmental decisions based on race are reviewable under Fourteenth Amendment strict scrutiny.[224] Race-conscious admissions policies do not qualify as a "[r]edressing past discrimination" compelling state interest because a school's academic mission is incompatible with the making of executive, legislative, or judicial findings of constitutional violations, which require remediation.[225] Justice Powell cautioned, however, that the attainment of a diverse student body is complex, and diversity can certainly not be reduced to a simple numerical value.[226]

Thomas who vociferously dissented in *Grutter*. *Fisher II* can be seen as a resounding announcement that classroom diversity is a compelling state interest.

[215] *Id.* at 2415.
[216] *Id.* at 2415–19.
[217] *Id.* at 2415–17.
[218] *Id.* at 2417–19.
[219] *Id.* at 2419–22.
[220] *Id.* at 2415.
[221] *Id.*
[222] *Id.* at 2417–19.
[223] *Id.* at 2417.
[224] *Id.* at 2418.
[225] *Id.* at 2417.
[226] *Id.* at 2418.

Grutter and *Gratz* are affirmations of Justice Powell's opinion in *Bakke*, but none of those cases gave university officials complete freedom to consider race: Admissions policies must always withstand strict scrutiny with regard to narrow tailoring and compelling state interest.[227] Courts must always begin with the presumption that racial classifications are inherently suspect and the government must prove its interests in a "[racial] classification [are] clearly identified and unquestionably legitimate."[228]

Part II of the opinion applies these facts to the law.[229] Strict scrutiny must be used to review any admissions program in which race is used as a factor.[230] Speaking to the compelling state interest prong, Justice Kennedy wrote that although educators have deference when making admission decisions, courts must ensure there is a principled, reasoned explanation for the decision.[231] Justice Kennedy also noted that no party asked the Court to review the validity of *Grutter*.[232] Thus, *Grutter*'s central holding remained intact.[233]

Regarding the narrow tailoring prong, Justice Kennedy further opined that racial balancing—seeking a specific number or percentage of a minority group—is unconstitutional.[234] When applying the narrow tailoring prong, courts must engage in "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."[235] A court must be satisfied that "no workable race-neutral alternatives would produce the educational benefits of diversity," which the government bears the burden of demonstrating.[236]

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[227] *Id.* at 2421.

[228] *Id.* at 2419 (alterations in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989)) (internal quotation mark omitted). "[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.' " *Id.* at 2419 (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)).

[229] *Id.* at 2419–22.

[230] *Id.* at 2419.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.* at 2420.

[236] *Id.*

Justice Kennedy attacked the deference the Fifth Circuit gave UT to prove its admissions plan was narrowly tailored enough to survive strict scrutiny.[237] Courts may not accept a school's assertion that its admissions process used race in a permissible way without closely analyzing the evidence of how the plan works in practice.[238] The narrow tailoring prong of strict scrutiny never changes, no matter how compelling the state interest may be.[239] For this reason, the Court vacated the judgment and sent the case back to the Fifth Circuit for review under the correct standard.[240]

Justice Thomas concurred that the Fifth Circuit incorrectly applied strict scrutiny; however, he wrote separately to explain why he would overrule *Grutter*.[241] Justice Thomas explained that his rationale stemmed from *Brown v. Board of Education*.[242] He discredited the arguments made in favor of affirmative action by comparing them to arguments made by segregationists.[243] Justice Thomas denounceed "benign" racism and explained how affirmative action hurts the minorities that it purportedly helps.[244]

Justice Thomas explored the history of strict scrutiny jurisprudence, starting with the Fourteenth Amendment.[245] The central purpose of the Fourteenth Amendment is to require the government treat all citizens equally.[246] Justice Thomas argued the use of race by the government demeans all people and is contrary to the Fourteenth Amendment.[247]

Justice Thomas traced the origin of strict scrutiny to *Korematsu v. United States*.[248] He noted two instances—besides *Grutter*—where the Court recognized "pressing public

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[237] *Id.* at 2420–21.

[238] *Id.* at 2421.

[239] *Id.* at 2421 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).

[240] *Id.* at 2422.

[241] *Id.* (Thomas, J., concurring).

[242] *Id.* at 2422–29.

[243] *Id.* at 2429–31.

[244] *Id.* at 2430–32.

[245] *Id.* at 2422.

[246] *Id.* (citing Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995)).

[247] *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 353 (2006) (Thomas, J., concurring in part and dissenting in part)).

[248] *Id.* at 2422–23.

necessity"[249] that can constitute a compelling state interest: protecting national security[250] and remedying past discrimination.[251] Justice Thomas also noted cases where the Court rejected purported compelling state interests.[252] First, the Court held that the government could not use race when determining the best interests of the child because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[253] Second, providing role models for children did not constitute compelling state interest.[254] Finally, the notion that "black students are better off with black teachers" was rejected in *Brown*.[255]

Justice Thomas also noted that *Grutter* was a radical departure from strict scrutiny precedents because it did not concern protecting a national security or remedying specific past racial discrimination.[256] Rather, the Court deferred to the University of Michigan Law School's bald statement that considering race was necessary in order to obtain the educational benefits that flow from a diverse student body.[257] But there is nothing "pressing" or "necessary" about obtaining educational benefits from a diverse student body.[258]

Justice Thomas refuted UT's arguments in favor of its race-conscious admissions policy. UT claimed its discrimination furthered two distinct interests: diversity for its own sake and the educational benefits that flow from attaining diversity.[259] But diversity for its own sake is a nonstarter because it amounts to "impermissible 'racial balancing.' "[260] Furthermore, the educational benefits that flow from attaining diversity are just as insufficient to support racial discrimination as the purported

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[249] Justice Thomas refered to compelling state interests as "pressing public necessit[ies]." *Id.* at 2423 n.1.

[250] *Id.* (citing Korematsu v. United States, 323 U.S. 214, 217–18 (1944)).

[251] *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 504 (1989)).

[252] *Id.*

[253] *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[254] *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270–71 (1986)).

[255] *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[256] *Id.* at 2424.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003)).

educational benefits that flowed from segregation.[261] Justice Thomas set up this part of the opinion by citing *Brown* and compared the illegality of segregation to the illegality of affirmative action.[262]

The desegregation cases rejected the proposition that racial discrimination was necessary even if discrimination was necessary to the schools' survival.[263] The school board in *Brown*'s companion case, *Davis v. School Board of Prince Edward County*,[264] had unsuccessfully argued that integration would have destroyed the quality of education that blacks received and forced schools to close, and that blacks would be the real victims of desegregation.[265] Justice Thomas observed other cases where this argument failed.[266] Indeed, the school closures *Davis* warned about eventually became reality, but the Court never retreated from its antidiscrimination principle.[267]

Justice Thomas found that there was no rational difference between the form of racial discrimination advanced by the segregationists and the racial discrimination advanced by UT.[268] "Educational benefits are a far cry" from the compelling state interest necessary to justify the governmental use of race.[269]

Justice Thomas cited slaveholder arguments that slavery helped to "civilize" blacks and elevated them as a race.[270] In addition, segregationists argued the Jim Crow laws protected blacks from racist whites and "separate schools were in the 'best interests' of both races."[271] UT wanted the Court to accept the arguments of the slaveholder and the segregationist, but we know that "[r]acial discrimination is never benign."[272] The Court

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[261] *Id.*

[262] *Id.* at 2424–25.

[263] *Id.* at 2425 (citing Davis v. Sch. Bd. of Prince Edward Cnty., 347 U.S. 483 (1954)).

[264] 347 U.S. 483.

[265] *Fisher II*, 133 S. Ct. at 2425.

[266] *Id.* at 2426–27 (citing Brief for Respondents at 96, Sweatt v. Painter, 339 U.S. 629 (1950) (No. 44), 1950 WL 78682, at *96; Brief for Appellees at 32, Briggs v. Elliott, 347 U.S. 483 (1954) (No. 1), 1952 U.S. S. Ct. Briefs LEXIS 11, at *50).

[267] *Id.* at 2426.

[268] *Id.* at 2428.

[269] *Id.*

[270] *Id.* at 2429–30.

[271] *Id.* at 2430.

[272] *Id.*

has held that all racial discrimination must be analyzed under strict scrutiny, even when the government has benevolent motives.[273]

Justice Thomas explained that while UT's plan harms both white and Asian students by denying them equal admissions standards, great harm is also done to those people admitted to UT under its plan.[274] Blacks and Hispanics admitted to UT outside of the Top Ten Percent Plan are far less prepared than other applicants and have lower average GPAs and SAT scores.[275] Stunningly, UT and its amici never disproved the fact that minorities academically perform poorer than their peers and pursue less rigorous paths of study.[276]

Finally, the plan stamped minorities with a lingering "badge of inferiority."[277] Their accomplishments were tainted by the notion that they were only admitted because of their race.[278] Furthermore, because there is no way to distinguish applicants admitted under the Top Ten Percent Plan and the PAI plan, all minority applicants suffer this fate.[279] Justice Thomas concluded by repeating that he would overrule *Grutter*.[280] However, because the Fifth Circuit did not correctly apply strict scrutiny, Justice Thomas concurred in the majority opinion.[281]

Justice Ginsburg started her dissent by noting that UT modeled its admissions plan after the Harvard Plan that Justice Powell praised in *Bakke*.[282] Furthermore, UT avoided quotas as required by *Bakke* and *Gratz*.[283] Finally, Justice Ginsburg explained that UT and many other schools were sticking closely to what *Grutter* required.[284]

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[273] *Id*. (citing Johnson v. California, 543 U.S. 499, 505 (2005)).

[274] *Id.* at 2431.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 2432.

[278] *Id.*

[279] *Id.* ("In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission.").

[280] *Id.*

[281] *Id.*

[282] *Id.* at 2432–33 (Ginsburg, J., dissenting).

[283] *Id.*

[284] *Id.* at 2433.

Justice Ginsburg quoted her own dissenting opinions from the *Gratz* and *Adarand* decisions for the proposition that governmental actors—including universities—"need not be blind to the lingering effects of 'an overtly discriminatory past.' "[285] It is better that the government candidly discloses its use of race, rather than obfuscate its use.[286] She noted that race is considered only as a factor, that the school went on a yearlong good-faith review period before instituting the policy, and that the school periodically reviews the necessity of the policy.[287] Nothing else was required by the Court's precedents to satisfy the narrow-tailoring prong.[288]

Justice Ginsburg concluded that the majority did one thing right: It retained the central holding of *Grutter*.[289] However, Justice Ginsburg affirmed because she found it unnecessary to send the case for further review.[290]

C. Remand to the Fifth Circuit

After the close of *Fisher II* at the Supreme Court, the judgment was vacated and remanded to the Fifth Circuit for more exacting scrutiny of the university's diversity efforts.[291] The Fifth Circuit reheard oral arguments, received additional briefing on the situation, reexamined with additional scrutiny as per the Court's orders, and a divided panel—two-to-one—reaffirmed the district court's grant of summary judgment.[292]

Though the Court ordered the Fifth Circuit not to defer to the university's explanations or rationales, and the Fifth Circuit had closely examined both the admissions policies of the university and the facts of Fisher's case, it nevertheless failed to "ensure that there is a reasoned, principled explanation for the academic decision" as per *Grutter*.[293] In the Fifth Circuit's

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[285] *Id.* (quoting Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting)).

[286] *Id.*

[287] *Id.* at 2434.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.* at 2421 (majority opinion) ("[T]he Court of Appeals must assess whether the University has offered sufficient evidence . . . that its admissions program is narrowly tailored to obtain the educational benefits of diversity.").

[292] Fisher v. Univ. of Tex. at Austin (*Fisher III*), 758 F.3d 633, 660 (5th Cir. 2014).

[293] *Fisher II*, 133 S. Ct. at 2419.

defense, while *Grutter* and *Bakke* are still good law, this directive is unworkable and requires the court to take on the roles of social scientist, statistician, and God to make a determination whether UT Austin's—or any university's—plan would be acceptable. In the majority opinion, the court took a close look at the evolution of the admissions program at UT Austin and examined Fisher's claims in depth; the court strictly scrutinized the changes in demographics effectuated by each admissions program.[294]

The opinion is divided up between review of the university's admissions policies, whether the case should be remanded back to the district court, an analysis of the standard from *Grutter* and an application of the *Fisher II* facts to the *Grutter* standard, as well as an in depth explanation of the difficulties of applying the "critical mass" with any certainty.[295] The increased scrutiny that the Court ordered was shown in the Fifth Circuit review of the Top Ten Percent Plan, the academic index, the personal achievement index ("AI" and "PAI") scores, and the holistic review of the application. The Fifth Circuit concluded that Fisher would not have been admitted to the university under any of her scores.[296] The Fifth Circuit addressed the "factual developments since summary judgment" and questioned whether Fisher had standing to pursue this case any longer.[297] The Fifth Circuit found that Fisher did have standing to review and denied the university's motion for remand to the district court.[298] The Fifth Circuit set out its task from the Court: "In remanding, the Supreme Court held that its decision in *Grutter* requires that 'strict scrutiny must be applied to any admissions program using racial categories or classifications'; that 'racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.' "[299] The Fifth Circuit then examined the different admissions programs in the light of Justice Powell's conclusion, "attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education,"[300] which was stated in *Bakke* but endorsed by

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[294] *Fisher III*, 758 F.3d at 637–39.
[295] *Fisher II*, 133 S. Ct. at 2415.
[296] *Fisher III*, 758 F.3d at 638–39.
[297] *Id.* at 639.
[298] *Id.* at 640–42.
[299] *Id.* at 642.
[300] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978).

both *Grutter* and *Fisher II*.[301] The court discussed the difficulty of attaining diversity without the usage of quotas and while maintaining the richness of experiences and other characteristics that can impact diversity without being deemed "outright racial balancing."[302] A university will receive no deference on whether the "means chosen to accomplish the [university's] asserted purpose . . . be specifically and narrowly framed to accomplish that purpose."[303] This narrow tailoring requirement mandates that a university demonstrate that it attempted to implement race-neutral policies to effectuate the same goals before using race.[304]

In order to assess whether the narrow tailoring was present, the circuit court began with *Hopwood IV* and traced the evolution of the Top Ten Percent Plan and the impacts that it had, namely admitting more white students than minorities.[305] The court found that the demographics of the State of Texas, the Top Ten Percent Plan, and the holistic review operated to lower the number of minorities after their implementation.[306] These realities highlight the difficulty of an approach that seeks to couch the concept of "critical mass" within numerical terms. The court rehashed the process of how the university's admission policy had come to be and commended the university's efforts and constant restructuring of the program to maintain diversity, though diversity is difficult to define.[307] The majority held that "[t]o reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing."[308] This quote sets the stage for this case to return to a higher court, and with the return of this unsatisfyingly derivative ruling, perhaps the Court will be forced to clarify the framework promulgated by *Grutter v. Bollinger*.

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[301] *Id.*
[302] *Fisher III*, 758 F.3d at 643.
[303] *Id.* at 644 (alterations in original).
[304] *Id.*
[305] *Id.* at 645.
[306] *Id.* at 646.
[307] *Id.* at 647–49.
[308] *Id.* at 660.

UT has implemented a *Grutter*-like plan, using race as only one factor in its holistic review, but "this record of its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race, faithful to the content given to it by the Supreme Court."[309]

The dissent blasted both the majority and UT for having the undefined "critical mass" as the goal of the university's diversity efforts.[310] Circuit Judge Garza dissented again in this case, his major qualm with the majority being that they have yet again failed to strictly scrutinize the admissions policy, as it is impossible to do so without a clear understanding of the university's "compelling interest" in diversity.[311] Because the Court clarified the strict scrutiny standard as applicable to racial classifications in higher education, but reviewing courts cannot defer to a state actor's argument that its consideration of race is narrowly tailored to achieve its diversity goals, the court is in a difficult quandary of how to balance the school's goals with the lack of deference. Judge Garza noted that a public university could define its end goal adequately, but UT had not done so.[312]

Given the extensive research and trial and error undertaken by UT since 1997, it is difficult to imagine a more arduous process to gain such a nebulous result. After this decision, it seems the only possibilities are to appeal to the Fifth Circuit to review en banc or to go back to the Supreme Court. The difficulty expressed in Judge Garza's dissent is perhaps the crux of the issue—it is difficult for lower courts to apply the ends and means analysis. Additionally, because courts cannot truly assess whether the use of racial classifications are necessary and narrowly tailored to a university's goals, cases like *Fisher* are destined to hang in limbo until the Court decrees definitive guidelines that can be applied by lower courts.

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[309] *Id.*
[310] *Id.* at 661 (Garza, J., dissenting).
[311] *Id.* at 665.
[312] *Id.* at 666.

VI. *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

A. Lower Court History

The question certified for review in *Schuette* is "whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions."[313] Although *Schuette* belongs to the family of affirmative action Supreme Court cases, the case has presented some unique issues.

Over the years, Michigan has become a laboratory for affirmative action litigation. The controversies surrounding *Gratz* and *Grutter* both originated in the Wolverine State, Michigan. Following those decisions, the *Gratz* lead plaintiff, Jennifer Gratz, spearheaded a ballot challenge to affirmative action programs in Michigan.[314] Gratz and her associates placed Proposition 2 ("Prop 2") on the ballot, which "bar[red] programs for state school admission, public employment, and public contracting [from] grant[ing] preferential treatment on the basis of race or gender."[315] Although proponents faced initial difficulties, Prop 2 passed and went into effect on December 23, 2006.[316]

Litigation ensued: Interest groups brought suit in the United States District Court for the Eastern District of Michigan.[317] The district court made several findings and ultimately found Prop 2 constitutionally permissible.[318] First, the opponents of Prop 2 did not have standing to challenge the law on First Amendment grounds.[319] Second, Prop 2 did not violate the Equal Protection Clause because it did not have a

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[313] Mary Pat Dwyer, *Petition of the Day*, SCOTUSBLOG (Mar. 21, 2013, 10:36 PM), http://www.scotusblog.com/2013/03/petition-of-the-day-422/.

[314] James Taranto, *The Woman Who Fought Racial Preference*, WALL ST. J., http://www.wsj.com/news/articles/SB10001424127887323419604578570041957165544 (last updated Jun. 28, 2013, 7:06 PM).

[315] Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich., 539 F. Supp. 2d 924, 931 (E.D. Mich. 2008), *aff'd*, 701 F.3d 466 (6th Cir. 2012), *rev'd*, 134 S. Ct. 1623 (2014).

[316] *Id.* at 932; *see* MICH. CONST. art. I, § 26.

[317] *Coal. To Defend Affirmative Action*, 539 F. Supp. 2d at 929.

[318] *Id.* at 960.

[319] *Id.* at 944.

discriminatory purpose,[320] nor did Prop 2 violate the equal protection rights of minority applicants under the "political process" theory.[321] Finally, the district court held that neither Title VII nor Title IX preempted Prop 2, because neither law requires preferential treatment for minority groups for the state to receive federal funding.[322]

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed.[323] Upon rehearing en banc, the Sixth Circuit held that Prop 2 violated the Equal Protection Clause because it made the processes of government decision making turn on the racial nature of the issue being considered.[324]

In addressing the issues, the Sixth Circuit did not evaluate "the constitutional status or relative merits of race-conscious admissions policies as such."[325] This court did not evaluate Prop 2 under a traditional equal protection analysis because it found that the political-process doctrine had been violated which was to find Prop 2 unconstitutional.[326] The Court used the tests found in the cases of *Hunter* and *Seattle* that emphasized that the Equal Protection Clause is a guarantee that minorities may participate meaningfully in the political process and ensures that the political process is fair for all players.[327] The Court explained:

> [A law] deprives minority groups of the equal protection of the laws when it: (1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority';

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[320] *Id.* at 953.

[321] *Id.* at 957–58; *see* Hunter v. Erickson, 393 U.S. 385, 387 (1968) (holding that a referendum to require the approval of an electoral majority before any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry" was unconstitutional); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982) (holding that the initiative that prohibited mandatory busing which "inure[d] primarily to the benefit of the minority" was unconstitutional because it reallocated political power unfairly).

[322] *Coal. To Defend Affirmative Action*, 539 F. Supp. 2d at 959.

[323] Coal. To Defend Affirmative Action v. Regents of Univ. of Mich., 652 F.3d 607, 610 (6th Cir. 2011), *superseded on reh'g en banc*, 701 F.3d 607 (6th Cir. 2012), *rev'd*, 134 S. Ct. 1623 (2014).

[324] Coal. To Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012), *rev'd*, 134 S. Ct. 1623 (2014).

[325] *Id.* at 473.

[326] *Id.* at 485.

[327] *Id.* at 474.

> and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority [group].[328]

The Court further found that the program had a racial focus because the admissions policies, which Prop 2 banned, "inure[d] primarily to the benefit of the [racial] minority."[329] The Court also found that Prop 2 reordered the political process through the elected board of directors, which shaped the admissions policies for the state universities named in the suit.[330] In addition, the only way to change the law was to amend the Michigan State Constitution, a significant hurdle.[331] The Sixth Circuit denied the State's contention that *Hunter* and *Seattle* were inapplicable to Prop 2 because those cases governed "enactments that burden racial minorities' ability to obtain protection from discrimination" instead of minorities' ability "to obtain preferential treatment."[332]

B. The Supreme Court Decision

Although the Court explicitly stated that this case was not an indication of the merits of race-conscious admissions policies in higher education,[333] the implications of this case will have far reaching effects on race-conscious policies, educational or otherwise. The importance of this issue is highlighted by the plurality opinion, with most Justices putting their opinions on the record. Justice Kennedy, writing for the plurality, held that no constitutional authority would allow the judiciary to set aside an amendment to the Michigan Constitution prohibiting affirmative action in public education, employment, and contracting.[334] Chief Justice Roberts concurred, Justices Scalia and Thomas concurred in judgment separately, Justice Breyer concurred in judgment separately, and Justice Sotomayor dissented with Justice Ginsburg joining her. Justice Kagan did not take part in the decision.[335]

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[328] *Id.* at 477 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982)).

[329] *Id.* at 479.

[330] *Id.* at 480.

[331] *Id.* at 484.

[332] *Id.* at 485.

[333] Schuette v. Coal. To Defend Affirmative Action, 134 S. Ct. 1623, 1630 (2014).

[334] *Id.* at 1638.

[335] *Id.*

The Court took special care to distinguish this case from *Fisher* before delving into this case. In the Court's short opinion, Justice Kennedy explained why the cases used in the lower court did not apply to Prop 2.[336] The three cases discussed by the plurality were *Washington v. Seattle School District No. 1*,[337] *Hunter v. Erickson*,[338] and *Reitman v. Mulkey*.[339] *Seattle* and *Hunter* led the Sixth Circuit to decide that section 26 was unconstitutional based on the political-process doctrine.[340] In *Hunter*, *Mulkey*, and *Seattle*, insular groups were injured by legislation.[341] The political-process doctrine is triggered when a law reallocates policymaking authority on a racial issue, the first prong of the analysis. At that point, the Court must determine whether the law will put the "effective decisionmaking authority over . . . racial issue[s] at a different level of government," the second prong.[342] Though the political-process doctrine is linked to equal protection, the Sixth Circuit incorrectly applied this standard. The difficulties of applying this standard correctly made the political-process doctrine inappropriate, as stated by the Court:

> Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.[343]

The Sixth Circuit read *Seattle* to hold that a state action with a racial focus that made it difficult for racial minorities to effectuate legislation in their interest is subject to strict scrutiny.[344] The Court held that this was an overly expansive interpretation of *Seattle* that did not have precedential support but had troubling implications at odds with established Equal

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[336] *Id.* at 1634.

[337] 458 U.S. 457 (1982).

[338] 393 U.S. 385 (1969).

[339] 387 U.S. 369 (1967).

[340] Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 488–89 (6th Cir. 2012), *rev'd*, 134 S. Ct. 1623 (2014).

[341] *Schuette*, 134 S. Ct. at 1633.

[342] *Id.* at 1643, 1645 (Scalia, J., concurring) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982)) (internal quotation mark omitted).

[343] *Id.* at 1635 (plurality opinion).

[344] *Coal. To Defend Affirmative Action*, 701 F.3d at 488.

Protection Clause jurisprudence.[345] Section 26 did not demonstrate injury as in *Mulkey*, *Hunter*, and *Seattle*. The Court determined that the issue is merely whether "voters may determine whether a policy of race-based preferences should be continued."[346] The Court explained that if *Seattle* were to control, future courts would be compelled to "determine and declare which political policies serve the 'interest' of a group defined in racial terms," something that a court is not equipped to do and which is at odds with the Constitution.[347] In *Mulkey*, *Hunter*, and *Seattle*, the challenged policies were used, or likely to be used, to injure citizens by reason of race. The plurality analogized *Schuette* to *Coalition for Economic Equity v. Wilson*[348] and held that an equal protection analysis was appropriate.[349] In *Wilson*, the United States Court of Appeals for the Ninth Circuit held that barring racial preferences in public education was constitutional;[350] this ruling would be called into question if the lower court's analysis were correct. At issue is whether voters can determine whether racial preferences may be used, not whether not addressing or preventing an injury on the basis of race, is constitutional. The Court distinguished Prop 2:

> Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental

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345 *Schuette*, 134 S. Ct. at 1634.
346 *Id.* at 1636.
347 *Id.* at 1634.
348 122 F.3d 692 (9th Cir. 1997).
349 *See Schuette*, 134 S. Ct. at 1636.
350 *Wilson*, 122 F.3d at 702.

> right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.[351]

The takeaway of this opinion was that the Michigan voters should not be disempowered to decide on a matter of public importance; *Schuette* is not a case about how racial preferences should be resolved, but rather who may resolve them. *Schuette*'s plurality opinion is deceptively short, but the differing opinions of each Justice shed more light on what the Justices believe should control this case. The Justices are entrenched in their viewpoints with an unsatisfying resolution overall.

Chief Justice Roberts, concurring, wrote separately to scold the dissent for having a lengthy opinion and to declare that "[p]eople can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate."[352] Justice Breyer's concurrence stated that he continues "to believe that the Constitution permits, though it does not require," affirmative action, and though the problems intended to be fixed by affirmative action endure, the political-process doctrine does not fit the facts at hand.[353] Further, Justice Breyer would allow the workings of democracy to take their course instead of overturning them by judicial decree.[354]

Justice Scalia concurred in judgment with this holding, joined by Justice Thomas, writing an opinion full of fire and brimstone in support of the holding but disagreeing with the rationale of the case; he thought it was ludicrous that the Court considered the question presented.[355] Justice Scalia agreed with the plurality that the political-process doctrine, established by *Hunter* and *Seattle*, was not the appropriate standard, but he would have gone further and overturned those cases as contrary to equal protection jurisprudence.[356] The plurality reinterpreted those decisions to support their conclusion, whereas Justice Scalia would have simply reaffirmed that equal protection

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[351] *Schuette*, 134 S. Ct. at 1637.
[352] *Id.* at 1638–39 (Roberts, J., concurring).
[353] *Id.* at 1649–51 (Breyer, J., concurring).
[354] *Id.* at 1649–50.
[355] *Id.* at 1639 (Scalia, J., concurring).
[356] *Id.* at 1640.

violations require a showing of discriminatory intent.[357] The issue Justice Scalia found with regard to the political-process doctrine was that it gives courts too much leeway in finding a "racial issue."[358] Additionally, Justice Scalia opined that the plurality misinterpreted the Equal Protection Clause as applying to groups instead of all persons.[359] The second prong of the political-process doctrine conflicts with the idea of state sovereignty and would create a reverse preemption effect by preventing states from delegating decision-making authority to any subordinate entity. Justice Scalia's concurrence criticized the dissent's notion that the existing political process has been changed, because the voters in Michigan had used the established political process.[360] Justice Scalia would have explicitly reaffirmed that discriminatory purposes must be shown for an equal protection claim under the Fourteenth Amendment; and he would have held that a facially neutral law such as section 26 does not violate the Equal Protection Clause of the Fourteenth Amendment without a showing of discriminatory intent.[361]

The dissent equated eliminating racial preferences in higher education with the historical oppression minority groups have faced in this country. In increasingly hyperbolic tones, Justice Sotomayor's lengthy dissent, about how the plurality incorrectly applied precedent and fundamentally misunderstands the problem with Prop 2, now section 26, maintained that the judiciary should have intervened in this case in order to advance equality.[362] Justice Sotomayor took a historical journey through constitutional law, from the passing of the Fifteenth Amendment and the history of reconstruction-era legislation to the hurdles faced by minorities in the political process.[363] In this historical framework, Justice Sotomayor defended the political-process doctrine that the plurality was eager to disregard.[364] The dissent contended that *Schuette* is like *Hunter* and *Seattle*, and similarly, a majority of voters may not "suppress the minority's right to

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[357] *Id.*
[358] *Id.* at 1643.
[359] *Id.* at 1644.
[360] *Id.* at 1646–47.
[361] *Id.* at 1648.
[362] *Id.* at 1653–54 (Sotomayor, J., dissenting).
[363] *Id.* at 1654–57.
[364] *Id.* at 1656–59.

participate on equal terms in the political process."[365] The dissent equated section 26 with the racially-motivated legislation in *Hunter* and *Seattle* and would overturn section 26.[366] Justice Sotomayor contended that the enactment of section 26 has "changed the basic rules of the political process . . . in a manner that uniquely disadvantaged racial minorities."[367] Though she noted that after *Grutter* voters were free to pursue the end of affirmative action in a number of ways, she took issue with their amendment of the state constitution. Her dissent seems to decry section 26 because of personal feelings and not on legal precedent. Her argument for how the amendment unfairly burdened racial minorities is premised on the fact that alumni of the University of Michigan can lobby to change admissions policies in ways that would benefit other groups, such as legacy applicants, while racial minorities hoping to change admissions policies must now change the state constitution. While there is a disparity between the difficulties of lobbying a school to change its policies and lobbying for a change to the state constitution, it remains that the voters of Michigan enacted this policy. The democratic system provides for a majority rule and perhaps the tyranny of the majority should be avoided in some cases, but is an amendment explicitly outlawing racial preferences that case? Justice Sotomayor addressed this issue: "The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities."[368]

Justice Sotomayor looked at the impact of affirmative-action policies and how minority enrollment drops when only race-neutral selection policies are implemented, and she suggested a parade of horribles of what would happen if race-neutral policies were used exclusively.[369] Her extensive look into the policies was criticized by the plurality, and her dissent seems to be an attempt to see what sticks, especially because she ended with "[t]o be clear, I do not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court today regarding the

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[365] *Id.* at 1657, 1659.
[366] *Id.* at 1659–60.
[367] *Id.* at 1652.
[368] *Id.* at 1683.
[369] *Id.*

constitutionality of § 26."[370] This admission makes it seem that Justice Sotomayor supports the legal analysis of the plurality and that her issue was with the precedent this case will set. Justice Sotomayor continued:

> The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason.[371]

Justice Sotomayor has gone on the record that she would uphold affirmative action as a public policy matter, however this was not the case to make that holding.[372]

Schuette is a fairly straightforward case if the political-process doctrine can be shunted aside and resolved as an equal protection issue. By involving the political-process doctrine and the history of discrimination in the United States, what could be simply resolved devolves into an examination of every wrong and instance of invidious discrimination in the history of the United States, all for a case that explicitly deigns not to consider the constitutionality of affirmative action based on racial preferences. This case has established a Supreme Court sanctioned way for those against affirmative action to dispose of it neatly and constitutionally. The interplay between deciding this case as a straightforward equal protection claim, versus the convoluted and subjective test of the political-process doctrine, makes this case interesting, but what will be more interesting is the outcome of affirmative action. As the *Fisher* case returns from the Fifth Circuit, the time seems ripe for another challenge and a call for the Supreme Court to clarify the guidelines of affirmative action, and for a definitive decision to be reached. On November 12, 2014, the Fifth Circuit announced that it would not rehear this case en banc, which means it is headed back to the Supreme Court.[373]

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[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] Fisher v. Univ. of Tex. at Austin, 771 F.3d 274, 274 (5th Cir. 2014).

CONCLUSION

Fisher II and *Schuette* have tacitly endorsed the operation of affirmative action in higher education and employment, although its perch is precarious. After forty years of contentious litigation in more than a dozen highly charged cases, the Roberts Court undoubtedly understands the operational parameters of affirmative action. Affirmative action is not a perfect methodology; rather, it is a flawed theory. But, given the reality of deeply embedded racism and the hyperutility of higher education as the gatekeeper to professional employment, affirmative action is an indispensable mechanism to provide the rough justice of pragmatic political proportionality.

Essentially, the kaleidoscopic panorama of racial groups in the understandably fair share of tangible benefits accompanied by professional employment is predicated on successful higher education. Ergo, the role and the reality of affirmative action will be a redistributionist tool for the foreseeable future. Rather than dictate its demise, *Fisher II* and *Schuette* may have solidified affirmative action for well more than the next twenty-five years. Affirmative action is perhaps the most effective instrument for periodically recalibrating pragmatic, political proportionality. Because affirmative action is utilized at many levels, and no other policy instrument has a proven track record, thus far, there has been no effective equivalent.

Although *Fisher II* and *Schuette* left unanswered some important questions about the status of affirmative action, the most recent decisions still made important contributions. The *Fisher II* decision is significant in several different ways. First, *Fisher II* may disincentivize universities from using race-conscious admissions policies. Next, *Fisher II* is similar to *Adarand* because it involves the tightening of a key part of equal protection analysis. In addition, the *Fisher II* decision was an implicit, albeit indirect, prediction of *Schuette v. Coalition to Defend Affirmative Action*. *Fisher II* and *Schuette* are important milestones on the twenty-five year journey towards the end of affirmative action.

Though *Fisher II* may provide an exemplar for universities looking to enact a constitutionally permissible affirmative action program, *Fisher II* will decrease other universities' willingness to risk liability for race-conscious admissions policies. By continually holding universities' feet to the fire over

race-conscious admissions policies, the Court has raised public universities' operating costs. Schools risk the threat of high stakes litigation. As the University of California in *Bakke*, the University of Michigan in *Grutter* and *Gratz*, and the University of Texas in *Fisher* all experienced firsthand, litigation over admissions policies is a costly and time-consuming endeavor. Even with pro bono legal assistance from powerful amici, affirmative action lawsuits can eat away at precious administrative resources. Further, schools risk negative press and public backlash from these controversial policies. One compelling argument may become whether the cost of affirmative action policies outweigh the purported benefits of such programs. Finally, the court's ruling mandates that schools acquiesce in an even more taxing review process before instituting race-conscious policies. The time, energy, and manpower devoted to reviewing these policies will undoubtedly temper universities' appetite for affirmative action policies. Perhaps *Fisher II* is the conservative pragmatist's way to eradicate affirmative action.

Similarly to how *Metro Broadcasting* was flipped by *Adarand*, *Fisher II* transforms the old idea that narrow tailoring need not mean that every idea be tested into the idea that, in fact, every race-neutral plan must be thoroughly scrutinized and reviewed.[374] The oft-refrain of pro-affirmative action pundits was that narrow tailoring does not mean that every race-neutral alternative must be tried and tested.[375] However, *Fisher II* does mandate that courts absolutely consider all race-neutral possibilities. The *Fisher II* Court tempered *Grutter* by explaining that "[c]onsideration by the university is . . . necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[376] In this way, affirmative action proponents were dealt a major blow in *Fisher II*. Although they claimed victory in the tepid affirmation of *Grutter*,[377] proponents of affirmative action must realize that their days are numbered after *Schuette*. The tightening of the availability of affirmative action plans in *Fisher* augured the

[374] *Fisher II*, 133 S. Ct. 2411, 2417 (2013).

[375] Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

[376] *Fisher II*, 133 S. Ct. at 2420.

[377] The *Fisher II* majority noted that the Court did not review *Grutter*'s validity because no party asked the court to review it. *See id.* at 2419.

Court's ruling in *Schuette* that affirmative action can be constitutionally banned by state law. *Schuette* is a clear indication that states retain the right to decide affirmative action questions. In tandem, *Schuette* and *Fisher II* invite reexamination of *Grutter*.

Though *Fisher II* may receive a cold reception from the legal academic community for being a "dud," it is this uncertainty that makes the case interesting. It certainly was not a game-changing tectonic shift that transformed constitutional jurisprudence but *Fisher II* leaves the central holding of *Grutter* intact, while hinting that a direct challenge to *Grutter* will change its calculus. *Fisher II*'s significance will be felt in more subtle and long-lasting ways; the Fifth Circuit's decision in this case leaves the door open for the Supreme Court to affirm affirmative action or to eviscerate it. The door was left open by the decision in *Schuette* as well, which implies that the Court may allow states to decide on a case-by-case basis.

The long-term outcome and lasting import of these cases cannot be fully realized until another challenge to affirmative action is before the Court, but *Fisher II* is still an important step towards realizing the end of affirmative action, as predicted by Justice O'Connor's famous twenty-five year deadline from *Grutter*.[378] Although *Grutter* is cited multiple times in the *Fisher II* opinion, *Fisher II* does not explicitly comment on Justice O'Connor's prediction that affirmative action would no longer be needed in twenty-five years. Though the official *Grutter* prophecy does not expire until 2028, these cases open the door for change and the next twelve years will certainly bring shifts in the affirmative action landscape. The educational disparity between races and social classes is increasing,[379] and the need for some mechanism to ensure that there is an opportunity for all to reach the highest echelons of education remains. However, the general tightening of the narrow tailoring prong and tepid acceptance of *Grutter* signal that the Court is moving, with exquisite irony, towards an affirmative action jurisprudence intolerant of race-conscious admissions plans. Affirmative action

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[378] *Grutter*, 539 U.S. at 343.

[379] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHNIC AND RACIAL DISPARITIES IN EDUCATION: PSYCHOLOGY'S CONTRIBUTIONS TO UNDERSTANDING AND REDUCING DISPARITIES 14 (2012), *available at* http://www.apa.org/ed/resources/racial-disparities.pdf.

is in a midlife crisis. Taken together, *Fisher II* and *Schuette* suggest that affirmative action has seen its heyday but is not over yet. Without tenable guidelines for universities to follow, the Court leaves open questions in these decisions. The United States is in the middle of the journey towards Justice O'Connor's utopian society, and until then, affirmative action remains the key to creating political proportionality of racial and economic minority groups.