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Diversity in Legal Education and the Legal Profession: A Symposium Honoring Indiana Chief Justice Randall Shepard

READING BETWEEN THE BLURRED LINES OF *FISHER V. UNIVERSITY OF TEXAS*

Eboni S. Nelson*

I. INTRODUCTION

After more than eight months of anticipation and speculation,¹ the Supreme Court finally issued its opinion in *Fisher v. University of Texas at Austin*.² Contrary to fears held by some and hopes held by others,³ the

* Professor of Law, University of South Carolina School of Law. J.D., Harvard Law School; B.A., Wake Forest University. It is truly an honor to be included in a symposium issue honoring Indiana Chief Justice Randall T. Shepard, who has done so much to contribute to the diversity of the legal profession. I would like to thank Associate Dean Jeremy Telman, Matt Brandabur, and the members of the Valparaiso University Law Review for the invitation to participate. I would also like to thank Derek Black and Danielle Holley-Walker for comments, suggestions, and discussions on this Essay. My thanks also to Chelsea Rikard for her invaluable research assistance, and Scott and Ella Nelson for their love and support. This Essay is dedicated to my grandmother, Geraldine Cohen, who always shared and rejoiced in my educational, professional, and personal achievements. May you find eternal rest in the loving arms of the Lord.

¹ See, e.g., Bret D. Asbury, *The Fisher Oral Argument: Why Affirmative Action Might Endure*, 9 STAN. J. C.R. & C.L. 107, 118-19 (2013) (speculating as to how the Court would decide *Fisher*); Ediberto Roman, *I Am No Jimmy the Greek – Round Two . . . Fisher v. Texas*, HUFFPOST MIAMI (April 9, 2013, 5:03 PM), http://www.huffingtonpost.com/ediberto-roman/fisher-v-university-of-texas-at-austin_b_3037969.html (attempting to predict the result in *Fisher*); Abigail Thernstrom, *Will the Court Strike Down Affirmative Action?*, CNN OPINION (Feb. 22, 2012, 4:32 PM), http://articles.cnn.com/2012-02-22/opinion/opinion_thernstrom-race-court_1_racial-double-standards-affirmative-action-minority-students?_s=PM:OPINION (discussing the possibilities for the *Fisher* decision). Oral arguments in *Fisher v. University of Texas at Austin* took place on October 10, 2012. Transcript of Oral Argument at 1, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). The case was decided on June 24, 2013. *Fisher*, 133 S. Ct. at 2411.

² 133 S. Ct. 2411.

³ See Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. 1037, 1040 (2013) (asserting that Justice Kagan's recusal from *Fisher* heightened "[f]ears that *Fisher* [would] bring the end of affirmative action"); Gerald Torres, *Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97, 101-02 (2012), available at <http://www.vanderbiltlaw>

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Court did not use the case as an opportunity to overrule *Grutter v. Bollinger*,⁴ thereby prohibiting the consideration of race in higher education admissions decisions.⁵ Instead, the Court vacated the Fifth Circuit's decision upholding the University of Texas's ("UT's" or "University's") race-based admissions policy and remanded the case "for further proceedings consistent with [the] opinion."⁶

At first glance, the majority opinion authored by Justice Anthony Kennedy appears to be a straight-forward tutorial regarding the parameters of strict scrutiny by which courts are to examine the constitutionality of race-based admissions plans.⁷ After concluding that

review.org/2012/07/fisher-v-university-of-texas-living-in-the-dwindling-shadow-of-lbj%E2%80%99s-america/ (discussing affirmative action proponents' fear that the *Fisher* Court would dismantle the diversity rationale as sanctioned in *Grutter v. Bollinger* and *Regents of University of California v. Bakke*); Adam Liptak, *Justices Step Up Scrutiny of Race in College Entry*, N.Y. TIMES, June 25, 2013, at A1, available at <http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?hp&pagewanted=all&r=0> (discussing the relief felt by civil rights groups following the Court's decision in *Fisher*); Jon Fleischman, *Ward Connerly: The Disappointment of Fisher v. University of Texas*, FLASHREPORT (July 8, 2013, 5:49 AM), <http://www.flashreport.org/blog/2013/07/08/ward-connerly-the-disappointment-of-fisher-vs-university-of-texas/> (characterizing the *Fisher* decision as "a major disappointment" for "anti-preference advocates"); Adam Freedman, *Fisher: The Court Dodges the Big Issue*, NAT'L REV. ONLINE (June 24, 2013, 12:47 PM), <http://www.nationalreview.com/corner/351869/fisher-court-dodges-big-issue-adam-freedman> ("The majority dodged the opportunity to overturn *Grutter* and the regime of state-sponsored discrimination that it spawned."); Richard Sander, *Commentary on Fisher: A Classic Kennedy Compromise*, SCOTUSBLOG (June 24, 2013, 4:18 PM), <http://www.scotusblog.com/2013/06/commentary-on-fisher-a-classic-kennedy-compromise/> (noting that the *Fisher* decision was "not the sweeping repudiation of racial preferences that many conservatives hoped for, and that the higher education establishment greatly feared").

⁴ 539 U.S. 306 (2003).

⁵ See *Fisher*, 133 S. Ct. at 2417 ("We take those cases [including *Grutter*] as given for purposes of deciding this case."). The Court further noted that the *Fisher* petitioner did not ask the Court to reconsider *Grutter's* sanctioning of student body diversity as a constitutional compelling interest. *Id.* at 2419. The Court stated, "the parties do not challenge, and the Court therefore does not consider, the correctness of [Grutter's narrowly tailored] determination." *Id.* at 2421. While adhering to his steadfast view that race-based affirmative action amounts to constitutionally proscribed discrimination, Justice Scalia acknowledged that "[t]he petitioner in this case did not ask us to overrule *Grutter's* holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions." *Id.* at 2422 (Scalia, J., concurring).

⁶ *Id.* (majority opinion).

⁷ See *id.* at 2417-21 (discussing the type of review the Court has exercised to race-based admission plans in prior cases); see also Elise Boddie, *Commentary on Fisher: In with a Bang, Out with a Fizzle*, SCOTUSBLOG (June 24, 2013, 11:05 PM), <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/> ("[Fisher] charts no new doctrinal territory but instead reads more like a hornbook on strict scrutiny."); Melissa Hart, *Fisher Commentary: Everyone Wins, Everyone Loses*, SCOTUSBLOG (June 25, 2013, 9:15 AM), <http://www.scotusblog.com/2013/06/fisher-commentary-everyone-wins-everyone->

the Fifth Circuit failed to analyze the UT plan under the proper constitutional standard, due to the deference shown to the University during its narrow tailoring analysis,⁸ the Court decided that “fairness to the litigants and the courts that heard the case require[d] that it be remanded so that the admissions process [could] be considered and judged under a correct analysis.”⁹ While the University and other affirmative action supporters may view the Court’s decision as an optimistic signpost for the future of race-based admissions policies,¹⁰ this Essay fears that, unfortunately, such optimism may be misplaced. It argues that a closer reading of the opinion reveals troubling language and sentiments that could detrimentally impact both the UT admissions plan, specifically, and the future of racial diversity in higher education, more broadly.

II. JUSTICE KENNEDY’S FALSE HOPE

Perhaps one of the most troubling, although not surprising, aspects of *Fisher* is that Justice Kennedy authored the seven-to-one majority opinion.¹¹ Given the composition of the Court hearing the case,¹² many affirmative action proponents rested their hopes on Justice Kennedy and the possibility that his vote would result in a four-to-four tie, thereby reaffirming the Fifth Circuit’s decision upholding UT’s admissions

loses/ (“[The opinion] simply rearticulates the strict scrutiny standard as applied to education policy . . .”).

⁸ *Fisher*, 133 S. Ct. at 2415, 2420–21.

⁹ *Id.* at 2421.

¹⁰ See Liptak, *supra* note 3 (“The compromise that the majority reached was at least a reprieve for affirmative action in higher education, and civil rights groups that had feared for the future of race-conscious admission programs were relieved.”); John Schwartz & Richard Pérez-Peña, *Lacking Definitive Ruling, Both Sides Claim Victory*, N.Y. TIMES, June 25, 2013, at A12, available at <http://www.nytimes.com/2013/06/25/us/lacking-definitive-ruling-on-affirmative-action-both-sides-claim-victory.html> (“Civil rights groups that favor race-conscious admissions cheered the ruling, arguing that the court had upheld its 2003 decision in *Grutter v Bollinger*.”); Katey Psencik, *Both Sides Claim Victory in Fisher v. UT*, USA TODAY (June 25, 2013, 7:07 PM), <http://www.usatoday.com/story/news/nation/2013/06/25/fisher-ut-supreme-court/2457939/> (“Defenders of affirmative action say that since the court did not reverse current policies, the odds are in their favor.”).

¹¹ *Fisher*, 133 S. Ct. at 2415. Having recused herself because of her previous involvement in the case while serving as Solicitor General, Justice Elena Kagan did not participate in the consideration or decision of *Fisher*. *Id.* at 2422; Liptak, *supra* note 3.

¹² See Cara Davis, *A Wolf in Sheep’s Clothing: How Texas’s Top Ten Percent Law Is the Unconstitutional Use of Race and a Racial Quota in Disguise*, 40 S.U. L. REV. 367, 388–90 (2013) (discussing the changes in the Court’s composition and the effect those changes might have on the *Fisher* decision); *supra* note 11 and accompanying text (explaining that Justice Kagan recused herself).

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policy.¹³ Instead, as others have suggested, Justice Kennedy appears to have wielded his influence to strike a compromise between the four conservative justices who almost certainly would have invalidated the plan and two of the liberal justices who likely would have found the plan constitutional.¹⁴ In so doing, Justice Kennedy impliedly suggested that the University and its supporters should “[k]eep hope alive”¹⁵ regarding the future of the plan’s constitutionality and, by implication, the future of race-based admissions policies in general.¹⁶ However, Justice Kennedy’s jurisprudence in cases involving racial classifications in the educational context suggests otherwise.¹⁷ If and when the current Court considers the constitutionality of future race-based admissions policies,

¹³ See Rostron, *supra* note 3, at 1041 (explaining that the University hoped Justice Kennedy would vote to uphold the affirmative action program, thereby creating a tie and affirming the Fifth Circuit’s ruling); Derek Black, *Fisher v. Texas, Part II: Making Sausage*, EDUC. L. PROF BLOG (June 24, 2013), http://lawprofessors.typepad.com/education_law/2013/06/fisher-v-texas-part-ii-making-sausage.html (opining that the four-to-four tie would have been the author’s best case scenario); Khiara M. Bridges, *The Problem with Affirmative Action After Grutter: Some Reflections on Fisher v. University of Texas*, CONCURRING OPINIONS (Mar. 6, 2012, 11:30 PM), <http://www.concurringopinions.com/archives/2012/03/the-problem-with-affirmative-action-after-grutter-some-reflections-on-fisher-v-university-of-texas.html> (asserting that affirmative action supporters must hope for a four-to-four split).

¹⁴ Black, *supra* note 13; Sander, *supra* note 3.

¹⁵ “Keep hope alive” is a popular quote often attributed to Reverend Jesse L. Jackson, Sr. See Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 69 (2002) (describing “[k]eep hope alive” as Jesse Jackson’s “mantra”).

¹⁶ Noah Feldman, Op-Ed., *Kennedy Remains the Court’s Fulcrum*, STAR-LEDGER, June 25, 2013, at 13, available at 2013 WLNR 15494254; Miranda Leitsinger, *Supreme Court Ruling Encourages Supporters – and Opponents – of Affirmative Action*, NBC NEWS (June 24, 2013, 4:02 PM), http://usnews.nbcnews.com/_news/2013/06/24/19119553-supreme-court-ruling-encourages-supporters-and-opponents-of-affirmative-action?lite.

¹⁷ See Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 85–88 (2012), available at <http://www.vanderbiltlawreview.org/2012/07/is-honesty-the-best-judicial-policy-in-affirmative-action-cases-fisher-v-university-of-texas-gives-the-court-yet-another-chance-to-say-yes/> (discussing some of Justice Kennedy’s prior affirmative action decisions); Rostron, *supra* note 3, at 1041 (explaining that Justice Kennedy “did not like the Michigan Law School’s policy in *Grutter*”); Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 48 (2012), available at <http://www.vanderbiltlawreview.org/2012/07/fisher-v-grutter/> (“Justice Kennedy has always voted with the conservative bloc to invalidate racial affirmative action.”); Andrew LeGrand, Note, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT’L BLACK L.J. 53, 80 (2009) (asserting that Justice Kennedy’s track record indicates that “the future for explicitly race-conscious admissions programs does not look good”); *The Affirmative Action War Goes On*, N.Y. TIMES, Jan. 22, 2012, at SR12, available at <http://www.nytimes.com/2012/01/22/opinion/sunday/the-affirmative-action-war-goes-on.html> (“Justice Anthony Kennedy, while no fan of affirmative action, has in past decisions supported some use of race in certain situations.”).

including that challenged in *Fisher*, it is doubtful that Justice Kennedy will be affirmative action's saving grace as many have hoped.

A. "Yes" as to Ends

Similar to his former colleague, Justice Sandra Day O'Connor, who was commonly viewed as casting the "decisive swing vote" in several important cases,¹⁸ scholars and commentators have described Justice Kennedy as presently filling this role.¹⁹ Based, in part, on his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰ a case that also concerned race and education issues, and his dissent in *Grutter*, many people expected Justice Kennedy to play an integral role in the outcome of *Fisher*.²¹

¹⁸ William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005, 7:11 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>; see Mark Klock, *Cooperation and Division: An Empirical Analysis of Voting Similarities and Differences During the Stable Rehnquist Court Era—1994 to 2005*, 22 CORNELL J.L. & PUB. POL'Y 537, 540 & n.14 (2013) (identifying Justices O'Connor and Kennedy "as the swing votes in close decisions"); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1305 (2005) ("Virtually all contemporary commentary stresses the critical role Justice O'Connor (and, to a lesser extent, Kennedy) plays on the current Court by casting key votes in many consequential cases.").

¹⁹ See Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 292 (2010), available at <http://scholarship.law.wm.edu/wmjowl/vol16/iss2/3> (identifying Justice Kennedy as "the Court's swing vote on abortion issues"); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 802 (2009) (noting that Justice Kennedy "swings between" the Court's conservative and liberal blocs); Rostron, *supra* note 3, at 1037 ("With the rest of the Court split between a bloc of four reliably liberal jurists and a cadre of four conservatives, the spotlight regularly falls on Justice Kennedy, the swing voter that each side in every closely divided and ideologically charged case desperately hopes to attract."); Jeffrey Toobin, *The Court's Gay-Marriage Confusion*, NEW YORKER (Mar. 27, 2013), <http://www.newyorker.com/online/blogs/comment/2013/03/supreme-court-prop-8-toobin-kennedy.html> (opining that the Supreme Court's decision regarding the constitutionality of California's Proposition 8 banning same-sex marriage would likely depend on Justice Kennedy).

²⁰ 551 U.S. 701, 782-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

²¹ See, e.g., Ellen D. Katz, *Grutter's Denouement: Three Templates from the Roberts Court*, 107 NW. U. L. REV. 1045, 1055 (2013) ("As is true with many cases, the outcome in *Fisher* appears to lie with Justice Kennedy's vote."); R. Randall Kelso, *Justice Kennedy's Jurisprudence on the First Amendment Religion Clauses*, 44 MCGEORGE L. REV. 103, 138 (2013) ("With the replacement of Justice O'Connor by Justice Alito in 2006, Justice Kennedy will likely become the critical swing vote on race-based affirmative action cases, including [*Fisher*]."); Rostron, *supra* note 3, at 1041-42 (discussing Justice Kennedy's potential votes and rationales in *Fisher*); Lyle Denniston, *Argument Preview: Is Affirmative Action About to End?*, SCOTUSBLOG (Oct. 9, 2012, 12:02 AM), <http://www.scotusblog.com/2012/10/argument-preview-is-affirmative-action-about-to-end/> (discussing Justice Kennedy's

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In *Parents Involved*, the Court examined the constitutionality of race-based student assignment plans employed by school districts located in Seattle, Washington and Louisville, Kentucky.²² Although neither school district was presently bound by a court ordered desegregation decree,²³ school officials in both districts sought to achieve the benefits of diverse elementary and secondary schools by voluntarily employing racial guidelines and tiebreakers when making student assignment decisions.²⁴ In its plurality opinion authored by Chief Justice John Roberts, the Court found both plans to be unconstitutional because they were not narrowly tailored to achieve a compelling governmental interest.²⁵ The plurality characterized the school districts' goals as unconstitutional racial balancing and refused to acknowledge any other compelling interest asserted by the school districts.²⁶

Although joining in other parts of the Court's opinion and concurring in the judgment, Justice Kennedy wrote separately to sanction two constitutionally permissible goals in the context of

potential vote in *Fisher*); Daniel Fisher, *Odds Are Kennedy Will Decide Affirmative Action Case. But What Will He Decide?*, FORBES (May 29, 2013, 2:43 PM), <http://www.forbes.com/sites/danielfisher/2013/05/29/odds-are-kennedy-will-decide-affirmative-action-case-but-what-will-he-decide/> (predicting that Justice Kennedy will decide and pen the opinion in *Fisher*).

²² *Parents Involved*, 551 U.S. at 711, 715.

²³ The Court noted that, "Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation." *Id.* at 712. Further, "Jefferson County operated under [a desegregation] decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation." *Id.* at 715–16 (quoting *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000)). However, Justice Breyer noted in his dissent that "[n]o one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto*? *De jure*? A mixture? Opinions differed. . . . The plurality does not seem confident as to the answer." *Id.* at 820 (Breyer, J., dissenting). Justice Breyer also discussed the legal challenges the NAACP filed against the Seattle School District alleging unlawful racial segregation of its public schools and Seattle's responses to the challenges. *Id.* at 808–11; see Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 31–32 (2012) (discussing the "elusive" distinction between *de jure* and *de facto* segregation as evidenced in *Parents Involved*).

²⁴ See *Parents Involved*, 551 U.S. at 711–12, 716–17 (describing the racial guidelines the Seattle and Jefferson County school districts employed). "Each school district argue[d] that educational and broader socialization benefits flow[ed] from a racially diverse learning environment . . ." *Id.* at 725.

²⁵ See *id.* at 726 ("[I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.").

²⁶ *Id.* at 725–33. "The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.* at 732.

elementary and secondary education—the avoidance of racial isolation and the achievement of a diverse student body.²⁷ In his concurrence, Justice Kennedy evidenced his commitment to “school districts . . . continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”²⁸ As the Court turned its attention to *Fisher*, supporters of race-based affirmative action were—and continue to be—hopeful that Justice Kennedy would be equally committed to this pursuit in the context of higher education.²⁹

Because the *Fisher* decision did not specifically address the merits of the UT plan,³⁰ it is impossible to know with certainty whether Justice Kennedy would sanction the University’s interest in attaining the educational benefits that stem from a racially diverse learning environment.³¹ However, considering that the educational goals the University seeks to accomplish “mirror those approved by the Supreme Court in *Grutter*,”³² one can look to Justice Kennedy’s dissenting opinion in *Grutter* to gain some insight as to how he would likely view the matter.³³

²⁷ *Id.* at 797–98 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy reasoned that, “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.” *Id.* at 783. He further stated, “[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.” *Id.* at 788.

²⁸ *Id.* at 798.

²⁹ See *supra* notes 13–16 and accompanying text (explaining why affirmative action supporters rely on Justice Kennedy to protect affirmative action programs); see also David Gans, *Fisher v. University of Texas, Justice Kennedy, and the Text and History of the Fourteenth Amendment*, BALKINIZATION (Feb. 28, 2012), <http://balkin.blogspot.com/2012/02/fisher-v-university-of-texas-justice.html> (“*Fisher* gives Justice Kennedy the opportunity to make good on his words [in *Parents Involved*] and to honor the promise of equality at the core of the Constitution’s text and history.”); Marc H. Morial, *To Be Equal # 40: Supreme Court to Hear Major Affirmative Action Case*, NAT’L URB. LEAGUE (Oct. 3, 2012), <http://nuli.iamempowered.com/content/tbe40-supreme-court-hear-major-affirmative-action-case> (“The balance of the Court has shifted right since *Grutter*. But we are hopeful that the High Court will reaffirm the nation’s highest values by continuing its support of diversity in our colleges and universities.”).

³⁰ See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (“The Court vacates th[e] judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under the correct analysis.” (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995))).

³¹ See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225–26, 230 (5th Cir. 2011) (discussing the University’s proposed benefits of a racially diverse learning environment), *vacated*, 133 S. Ct. 2411 (2013); Brief for Respondents at 6–7, 21, *Fisher*, 133 S. Ct. 2411 (No. 11–345) (arguing the educational benefits of a diverse student body).

³² *Fisher*, 631 F.3d at 230.

³³ *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (Kennedy, J., dissenting).

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Justice Kennedy began his dissent in *Grutter* by stating the principle of permissible race-based affirmative action, as set forth in Justice Powell's opinion in *Regents of the University of California v. Bakke*.³⁴ He approvingly asserted that Justice Powell's opinion "states the correct rule for resolving this case."³⁵ While it may be possible that this statement was merely in reference to the correct application of strict scrutiny, which Justice Kennedy found lacking in *Grutter's* majority opinion,³⁶ rather than his approval of the diversity goals sought in *Bakke*, additional language in his dissent suggests that Justice Kennedy does in fact approve of the appropriate consideration of race in higher education admissions decisions.³⁷

According to Justice Kennedy, "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."³⁸ In fact, in *Fisher*, he acknowledged the values and benefits that are served by assembling a diverse student body.³⁹ Although Justice Kennedy's acknowledgements could foreshadow a bright future for affirmative action, his statements regarding the means by which school officials can pursue such benefits cast a bleak shadow over the long-term viability of race-based admissions policies.

B. "No" as to Means

Although Justice Kennedy's opinions in *Parents Involved* and *Grutter* suggest that he supports the goal of creating racially diverse student bodies, they also evidence his unwillingness to sanction racial classifications and preferences as the means by which to achieve this goal.⁴⁰ For instance, in his concurrence in *Parents Involved*, he found the

³⁴ *Id.* at 387 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91, 315-18 (1978)).

³⁵ *Id.*

³⁶ *See id.* ("The Court, however, does not apply strict scrutiny."). Justice Kennedy described the majority's application of strict scrutiny as "nothing short of perfunctory." *Id.* at 388-89. He also accused the majority of suspending and abandoning strict scrutiny in its analysis of the challenged plan. *Id.* at 393-95.

³⁷ *See, e.g., id.* at 392 ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process."). Justice Kennedy also stated that "the Court's important holding allow[ed] racial minorities to have their special circumstances considered in order to improve their educational opportunities." *Id.* at 395. He further "reiterate[d] [his] approval of giving appropriate consideration to race in this one context . . ." *Id.* at 392-93.

³⁸ *Id.* at 392-93.

³⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013).

⁴⁰ *See, e.g.,* Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 943 (2008) ("Justice Kennedy's *Parents Involved* concurrence demonstrates both an openness to racial diversity as an ideal and an abhorrence of '[g]overnmental classifications that command people to march in different directions based on racial typologies.'" (quoting *Parents*

racial classifications employed by the school districts to be unconstitutional.⁴¹ Justice Kennedy began his opinion by expressing his concern that “[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”⁴² In light of this concern, he subjected the plans to a rigorous, detailed review and rejected the school districts’ contention that they had crafted narrowly tailored means to achieve their interests.⁴³

Despite Justice Kennedy’s vote to invalidate the plans, many scholars and civil rights advocates have lauded Justice Kennedy for his endorsement of race-consciousness as it relates to school officials’ efforts to eradicate racial isolation in their schools.⁴⁴ While it is true that Justice Kennedy asserted that school administrators are free to develop race-

Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

⁴¹ *Parents Involved*, 551 U.S. at 782.

⁴² *Id.* Justice Kennedy expressed similar concerns in *Grutter* when he stated, “[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.” *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

⁴³ *Parents Involved*, 551 U.S. at 783–84, 787 (Kennedy, J., concurring in part and concurring in the judgment). With regard to the Louisville plan, Justice Kennedy wrote:

The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student’s race are made in a challenged governmental program. The Jefferson County Board of Education fails to meet this threshold mandate.

Id. at 784. “Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the [Seattle] school district has provided no convincing explanation for its design.” *Id.* at 787.

⁴⁴ See, e.g., Adams, *supra* note 40, at 943 (discussing Justice Kennedy’s openness to racial diversity); Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 416–27 (2008) (analyzing the value of Justice Kennedy’s concurrence on then existing and future race-based policies); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 369–70 (2008) (stating that scholars have contended that Justice Kennedy’s concurrence provides hope that race-conscious plans will remain constitutional); Steven T. Collis, Note, *A Narrow Path to Diversity: The Constitutionality of Rezoning Plans and Strategic Site Selection of Schools After Parents Involved*, 107 MICH. L. REV. 501, 522–23 (2008) (discussing Justice Kennedy’s concurring opinion and characterizing it as a hopeful message); *Supreme Court Rejects Public School Diversity Plans that Take Race into Account*, PITTSBURGH TRIB. REV., June 29, 2007, available at 2007 WLNR 12312875 (reporting the Court’s decision and explaining that Justice Kennedy’s concurrence is crucial for school districts seeking guidance); see also *Statement from the NAACP Legal Defense Fund on the Supreme Court’s Rulings in Seattle and Louisville School Cases*, SUP. CT.—SCH. INTEGRATION (June 28, 2007), <http://scintegration.blogspot.com/2007/06/statement-from-naacp-legal-defense-fund.html> (supporting the majority’s recognition that educational diversity is a compelling interest, which was evinced by Justice Kennedy’s refusal to join the majority’s conclusion that schools do not possess an interest in providing diversity in educational settings).

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conscious measures to help assemble a diverse student body,⁴⁵ he instructed them to do so “without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”⁴⁶ In fact, after suggesting several facially race-neutral means by which school authorities can pursue diversity,⁴⁷ Justice Kennedy warned that “individual racial classifications employed in this manner may be considered legitimate *only if* they are a *last resort* to achieve a compelling interest.”⁴⁸

As evidenced by his opinions in *Grutter* and *Fisher*, whether the consideration of an applicant’s race is in fact a last resort, such that it is necessary to achieve diversity, appears to be of vital concern to Justice Kennedy. In his *Grutter* dissent, Justice Kennedy took the majority to task for its alleged “perfunctory” review of the University of Michigan Law School’s (“Law School”) admissions program.⁴⁹ According to Justice Kennedy, the majority erred in affording deference to the Law School when examining whether its race-based plan was narrowly tailored to achieve its goals.⁵⁰ He contended that the majority’s lax review would discourage universities from earnestly exploring race-neutral measures to achieve their diversity goals.⁵¹ Furthermore, because, according to Justice Kennedy, “[o]ther programs do exist which will be more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought,”⁵²

⁴⁵ *Parents Involved*, 551 U.S. at 787–89 (Kennedy, J., concurring in part and concurring in the judgment).

⁴⁶ *Id.* at 789.

⁴⁷ *See id.* (suggesting options such as “drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race”). Interestingly, Justice Kennedy’s list of race-neutral measures did not include consideration of students’ socioeconomic status. *Id.* While it is impossible to know with certainty why he chose not to include this often discussed and suggested means of integration in his list of constitutionally permissible measures, his omission may be due, in part, to the fact that such class-based plans often require individual classifications similar to those utilized in race-based plans, which Justice Kennedy does not seem to support. For further discussion of this theory and of the future of socioeconomic integration post-*Parents Involved*, see Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841 (2008).

⁴⁸ *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). It is worth noting that Justice Kennedy suggested that the school districts may have been able to achieve their diversity goals through the use of “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component;” however, he did not discuss this option in detail. *Id.*

⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306, 388–89 (Kennedy, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.* at 394–95.

⁵² *Id.*

the Court should “demand” the utilization of such programs, rather than sanctioning and, thereby, encouraging the continued use of affirmative action plans such as that upheld in the case.⁵³

In *Fisher*, UT modeled its race-based admissions policy after the Michigan plan approved in *Grutter*.⁵⁴ However, UT also employs an arguably effective, race-neutral admissions program,⁵⁵ the sort of which Justice Kennedy seems to prefer. The Texas Top Ten Percent Plan (“Percent Plan”)—granting Texas high school students who graduate in the top ten percent of their class automatic admission into the state’s public colleges and universities⁵⁶—has contributed to the diversity of the UT student body.⁵⁷ However, university officials argue that the Percent Plan has failed to enroll a “critical mass” of racially diverse students such that the educational benefits of diversity can be realized.⁵⁸ Considering that Justice Kennedy was not receptive to the Law School’s arguments regarding critical mass in *Grutter*,⁵⁹ the fact that the Percent Plan

⁵³ *Id.* at 395.

⁵⁴ See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2416 (2013) (comparing the race-conscious policies used in Michigan to the University of Texas’s policy). In her dissent, Justice Ginsberg also noted that “the University has taken care to follow the model approved by the Court in *Grutter v. Bollinger*.” *Id.* at 2433 (Ginsberg, J., dissenting); see *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217–18 (5th Cir. 2011) (“We begin with *Grutter v. Bollinger* because UT’s race-conscious admissions procedures were modeled after the program it approved.”), *vacated*, 133 S. Ct. 2411 (2013).

⁵⁵ See Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in Fisher v. Texas*, 47 U. RICH. L. REV. 1133, 1138 & n.23 (2013) (discussing disagreements between the parties in *Fisher* concerning the effectiveness and race-neutrality of UT’s Top Ten Percent Plan); see also *Fisher*, 133 S. Ct. at 2433 (Ginsberg, J., dissenting) (“I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.” (citing *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003))).

⁵⁶ *Fisher*, 133 S. Ct. at 2416.

⁵⁷ *Id.* As detailed in the majority opinion:

Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University’s entering freshman class was 4.1% African-American and 14.5% Hispanic.

Id.; see *Fisher*, 631 F.3d at 224 (noting that the Percent Plan has increased diversity in the student body at UT).

⁵⁸ *Fisher*, 133 S. Ct. at 2416; see *Fisher*, 631 F.3d at 244–45 (addressing UT’s assertion that its plan was necessary because diversity in the classroom had decreased).

⁵⁹ *Grutter v. Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting). Justice Kennedy stated:

The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an

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produces some diversity may lead Justice Kennedy and other justices to conclude that UT's consideration of race is not necessary to achieve its academic goals.

According to *Fisher*, necessity is an important component when examining the constitutionality of affirmative action plans.⁶⁰ Justice Kennedy stated that narrow tailoring "involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."⁶¹ In light of the Court's reasoning, a race-based plan is likely to be struck down if a court finds that practicable race-neutral measures, such as the Percent Plan, will enable universities to sufficiently achieve the benefits of diversity.⁶²

Again, because the Court did not examine the constitutionality of the UT plan, it is impossible to know whether Justice Kennedy would have found the admissions policy to be narrowly tailored. However, his opinion in *Fisher* is laced with language suggesting his disinclination for approving the University's use of race-based means.⁶³ After discussing the three cases—*Regents of the University of California v. Bakke*,⁶⁴ *Gratz v. Bollinger*,⁶⁵ and *Grutter v. Bollinger*⁶⁶—that address the issue of racial considerations in higher education admissions,⁶⁷ Justice Kennedy made a point to quote language included in other cases that emphasize the perceived harms associated with all racial classifications. He wrote:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," and therefore "are contrary to our traditions and hence constitutionally suspect." "[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment," "the Equal Protection Clause

automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.

Id.

⁶⁰ See *Fisher*, 133 S. Ct. at 2420 ("Narrow tailoring . . . requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978))).

⁶¹ *Id.*

⁶² See *id.* (explaining that strict scrutiny places a burden on the University to demonstrate that race-neutral alternatives are insufficient).

⁶³ See *infra* text accompanying note 68 (providing part of Justice Kennedy's opinion in *Fisher*).

⁶⁴ 438 U.S. 265 (1978).

⁶⁵ 539 U.S. 244 (2003).

⁶⁶ 539 U.S. 306 (2003).

⁶⁷ See *Fisher*, 133 S. Ct. at 2417–18 (explaining the three prior decisions concerning classification of individuals by race in the education system).

demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'"⁶⁸

This language, coupled with the fact that Justice Kennedy "has always voted . . . to invalidate racial affirmative action,"⁶⁹ suggests that, notwithstanding his general support for diversity as a compelling interest, he is unlikely to support the University's plan in *Fisher*. This possibility could have a detrimental impact not only on the University, but also on all institutions of higher education that seek to assemble a diverse student body through the use of race-based means.

III. THE TENUOUS FUTURE OF RACE-BASED AFFIRMATIVE ACTION

In reading the Court's opinion in *Fisher*, it appears that the end may be near for affirmative action as we know it. Although the Court did not revisit or overrule *Grutter*, because the petitioners did not request that it do so,⁷⁰ some of the justices obviously would have welcomed the opportunity.⁷¹ While Justice Kennedy does not directly advocate for overruling *Grutter*, parts of his opinion imply as much. Justice Kennedy noted the disagreement that exists between current justices regarding "whether *Grutter* was consistent with the principles of equal protection."⁷² He insinuated that the Court incorrectly held that the Law School's plan was narrowly tailored.⁷³ He concluded his opinion by juxtaposing Justice O'Connor's statement in *Grutter* that "[s]trict scrutiny is not 'strict in theory, but fatal in fact,'"⁷⁴ with his own admonition that

⁶⁸ *Id.* at 2418–19 (citations omitted) (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

⁶⁹ Spann, *supra* note 17, at 48.

⁷⁰ See *supra* note 5 and accompanying text (explaining that the petitioners in *Fisher* did not ask the court to overrule *Grutter*).

⁷¹ For example, Justice Scalia stated: "I adhere to the view I expressed in *Grutter v. Bollinger*: 'The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.'" *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)). Justice Thomas further stated: "I write separately to explain that I would overrule *Grutter v. Bollinger*, and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." *Id.* (Thomas, J., concurring) (citation omitted).

⁷² *Id.* at 2419 (majority opinion).

⁷³ See *id.* at 2421 (explaining that, although the Court in *Grutter* relied, in part, on the university's good faith consideration of race-neutral alternatives, that did not necessarily mean that good faith would compensate for impermissible race classifications for purposes of strict scrutiny review).

⁷⁴ *Grutter*, 539 U.S. at 326 (majority opinion) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

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“[s]trict scrutiny must not be strict in theory but feeble in fact.”⁷⁵ Taken as a whole, this language foreshadows, at worst, the complete reversal of *Grutter* or, at best, the heightening of judicial scrutiny such that it will be nearly impossible for an affirmative action plan to be deemed constitutional.

This constitutional landscape deters rather than encourages institutions of higher education from pursuing the benefits of diversity via race-based means. Rather than exposing themselves to expensive litigation costs in efforts to successfully defend their consideration of race in admissions decisions, many school administrators may decide to terminate their affirmative action plans. It also discourages universities that currently consider race in their admissions decisions from experimenting with beneficial race-neutral alternatives, as *Grutter* instructed,⁷⁶ for fear of jeopardizing their ability to also rely on race-based measures.

While purported race-neutral methods may be available, the experiences UT encountered demonstrate the potential ineffectiveness of solely relying on race-neutral programs to enroll a critical mass of racially diverse students such that the educational and social benefits of diversity can actually be realized.⁷⁷ Despite the levels of racial diversity to which the Percent Plan and other race-neutral measures had contributed,⁷⁸ UT found that most of its undergraduate courses lacked meaningful racial diversity.⁷⁹ In addition, minority students experienced feelings of isolation, and the majority of undergraduate students felt that the lack of classroom diversity impeded their ability to fully experience the benefits of diversity.⁸⁰ The University reintroduced race as an admissions factor in an attempt to remedy the shortcomings of its race-neutral admissions policy.⁸¹

⁷⁵ *Fisher*, 133 S. Ct. at 2421.

⁷⁶ *See Grutter*, 539 U.S. at 339 (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

⁷⁷ *See Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223–25 (5th Cir. 2011) (discussing the issues UT encountered with regard to drawing a diverse student body prior to implementing the plan at issue in the case), *vacated*, 133 S. Ct. 2411 (2013).

⁷⁸ *See supra* note 57 and accompanying text (explaining that after the University altered its admissions and placed the Percent Plan into place, the environment at UT became more diverse).

⁷⁹ *See Fisher*, 133 S. Ct. at 2416 (providing UT’s assertion that a race-conscious admissions process was necessary because the school lacked a critical mass of minority students); *Fisher*, 631 F.3d at 225–26 (noting that a survey of undergraduate classes showed a small percentage of minority students).

⁸⁰ *Fisher*, 631 F.3d at 225; *see Fisher*, 133 S. Ct. at 2416 (explaining that UT relied on reports from students regarding diversity in the classroom).

⁸¹ *Fisher*, 133 S. Ct. at 2416; *Fisher*, 631 F.3d at 226, 230–31, 239.

The Court's unwillingness to consider and uphold the UT plan under the constitutional standards set forth in *Grutter* suggests that a majority of the justices felt that *Grutter* is not the correct constitutional standard by which to adjudicate affirmative action cases, or, based on the evidence available to the Court, the University's plan is not constitutional. Justice Ginsberg wrote a dissenting opinion concluding that "[t]he Court rightly declines to cast off the equal protection framework settled in *Grutter*. Yet it stops short of reaching the conclusion that framework warrants."⁸² However, Justice Ginsburg was the sole voice advocating for both *Grutter* and the constitutionality of the UT plan, which does not bode well for the continual consideration of race and ethnicity in universities' admissions decisions.

IV. CONCLUSION

Although the *Fisher* decision could have been worse, had the Court decided to strike down the challenged plan, this Essay fears that the Court may have simply delayed the eventual, inevitable result in the case. As Justice Kennedy's jurisprudence regarding race and education cases demonstrates, he has historically been opposed to sanctioning the use of racial classifications to assemble diverse student bodies.⁸³ The explicit and implicit language contained in his *Fisher* opinion suggests that he would have continued to adhere to this trend had the Court examined the constitutionality of the UT plan. In light of this possibility and the uncertain future of race-based affirmative action in higher education, all universities, including the University of Texas, should earnestly endeavor to develop and implement strategies and programs that not only effectively admit a critical mass of racially diverse students but also ensure that the educational and social benefits of diversity are realized once they are admitted. With or without affirmative action, engaging in these endeavors is the moral obligation of every institution of higher education.

⁸² *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting) (citation omitted).

⁸³ See *supra* Part II.B (discussing Justice Kennedy's opinions in prior affirmative action cases and explaining how his statements in those opinions signal an opposition to the use of race-based classifications in admissions procedures).