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THE END OF AFFIRMATIVE ACTION: THE SUPREME COURT'S OPPORTUNITY TO OVERRULE GRUTTER

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INTRODUCTION

In *Grutter v. Bollinger*,[1] Justice Sandra Day O'Connor acknowledged, "race-conscious admissions policies must be

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1. Grutter v. Bollinger, 539 U.S. 306 (2003).

limited in time"[2] and the Court "expects that 25 years from now, the use of racial preferences will no longer be necessary to [further an interest in student body diversity]."[3] While only ten years had passed since Justice O'Connor articulated this temporal estimate in *Grutter*, in February 2012 the Supreme Court was presented with the opportunity to prohibit public universities from considering race in selecting its incoming classes.[4] In *Fisher v. University of Texas at Austin*,[5] the Fifth Circuit upheld the University of Texas's admissions policy of using race in selecting its students, agreeing with the district court's assertion that "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."[6] The appellants in *Fisher* were granted a writ of certiorari to the United States Supreme Court, essentially giving the Court the opportunity to respond to the Fifth Circuit's assertion and declare *Grutter* no longer "remains good law."[7] Considering the Court's shift in ideological composition since deciding *Grutter*, such a ruling seemed very conceivable, creating the possibility of far-reaching ramifications; however, in spite of this opportunity for change, the Court's ultimate decision did relatively little to alter *Grutter*'s applicability.

As the Court's decision in *Fisher* could have ended the controversial "affirmative action" policies implemented by universities nationwide, this Comment will examine how the Court articulated and rationalized its decision. In formulating this analysis, this Comment will scrutinize *Fisher* under the lens of the Court's previous precedent, keeping in mind the Court's compositional changes since *Grutter*, most notably Justice Alito's occupation of O'Connor's seat since her retirement in 2005. Additionally, this Comment will analyze the importance of Justice Kennedy's opinion in the outcome of not only the *Fisher* case, but other recent Supreme Court decisions as well. Lastly, this Comment will evaluate the multiple ways *Fisher* is factually

2. *Id.* at 342.
3. *Id.* at 343.
4. Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).
5. *Id.*
6. Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009).
7. *Id.*

distinguishable from *Grutter*, evincing how the Court ignored an opportunity to reverse *Fisher* without overruling its previous precedent.

I. THE SUPREME COURT'S DIVERSITY PRECEDENT AND THE ROAD TO FISHER

Korematsu v. United States[8] represents the first instance where the Supreme Court applied a strict scrutiny standard to the government's implementation of racial classifications.[9] Motivated by racist, anti-Japanese sentiment in the midst of World War II, the government prohibited all people of Japanese descent from West Coast military zones.[10] Since the government's discriminatory practice was ultimately upheld,[11] *Korematsu*'s xenophobic and anachronistic opinion nonetheless remains significant as the first time the Supreme Court applied strict scrutiny to racial classifications.[12] In spite of this position, however, the Court since 1978 has also applied strict scrutiny when governmental entities enact racially preferential programs.[13] In *Regents of the University of California v. Bakke*[14] the Court held a governmental entity must have a compelling interest in racial classifications if not implemented with the intention of remedying purposeful discrimination.[15]

A. Bakke and Diversity's Emergence

In *Bakke*, the University of California at Davis School of Medicine implemented a race-based admissions program that ensured out of the 100 positions available for incoming students, at least sixteen of those positions would be held by minority applicants.[16] Allan Bakke, a white male, was denied admission to the medical school twice and brought suit after

8. Korematsu v. United States, 323 U.S. 214 (1944).

9. *Id.* at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

10. *Id.* at 217–18.

11. *Id.* at 224.

12. *Id.* at 216.

13. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361–62 (1978).

14. *Bakke*, 438 U.S. 265 (1978).

15. *Id.* at 299.

16. *Id.* at 275.

learning minority candidates with significantly lower qualifications had been admitted under Davis's special admissions program.[17] The Supreme Court ultimately determined the university's admissions program was an unconstitutional quota system and amounted to an impermissible "line drawn on the basis of race and ethnic status."[18] Justice Powell, writing for the plurality opinion, stated that the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education;[19] however, "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[20] Justice Powell also emphasized that while it was important to give universities "wide discretion in making the sensitive judgments as to who should be admitted," such discretion must be curtailed by constitutional limitations.[21]

What gives *Bakke* significance in the context of *Fisher* is Justice Powell's determination that "diversity is compelling in the context of a university's admissions program"[22] and "clearly is a constitutionally permissible goal."[23] This statement represents the first time the Supreme Court declared racial diversity as a compelling interest; however, in order for race-based considerations to be constitutional, Justice Powell, quoting *Korematsu*, stated that "'[all] legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.'"[24] Thus, under Justice Powell's opinion in *Bakke*, race-based considerations in a university's admissions policy are constitutionally permissible only if (1) they serve a compelling governmental interest, (2) the admissions policy is narrowly tailored to achieve that interest, and (3) the policy represents the least restrictive means for achieving that interest.[25]

17. *Id.* at 277.
18. *Id.* at 289.
19. *Id.* at 315.
20. *Id.* at 314.
21. *Id.*
22. *Id.*
23. *Id.* at 311–12.
24. *Id.* at 291 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).
25. *Id.* at 299.

While Justice Powell's opinion in *Bakke* suggests that a diverse student body is a compelling interest that universities, subject to strict scrutiny analysis, may achieve through using race-based admissions considerations, the Court's severely fractured plurality opinion left the lower courts unsure as to whether Powell's opinion was binding.[26] For example, in the Fifth Circuit decision *Hopwood v. Texas*,[27] the court claimed "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."[28] More significantly, the Fifth Circuit declared in *Hopwood* that "[i]n *Bakke*, the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion"[29] and that the rest of the four-Justice opinion "implicitly rejected Justice Powell's position."[30] Therefore, the Fifth Circuit refused to consider Powell's diversity opinion as binding precedent and determined that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."[31] Thus, as a result of *Bakke*'s ambiguous plurality opinion, Powell's "diversity as a compelling interest" position was largely cast aside as insignificant, and universities throughout the Fifth Circuit were forbidden from implementing racially preferential admissions policies in order to attain an ethnically diverse student body.[32]

Despite *Bakke*'s questionable influence on the issue of race-based considerations and diversity as a compelling interest, the Supreme Court offered further elucidation on the subject in its *City of Richmond v. J.A. Croson*[33] decision in 1989. In *Croson*, the city of Richmond, Virginia required companies that were awarded city construction contracts to subcontract thirty percent of their business to minority business enterprises,[34] a requirement the Supreme Court declared unconstitutional.[35]

26. *Id.* at 268.
27. Hopwood v. State of Tex., 78 F.3d 932 (5th Cir. 1996).
28. *Id.* at 944.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 945–46.
33. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
34. *Id.* at 477.
35. *Id.* at 486.

The *Croson* majority held that Richmond failed to demonstrate a compelling interest justifying its affirmative action program, ruling that mere generalized assertions of past racial discrimination are insufficient to authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause.[36] Additionally, the *Croson* majority held that Richmond's affirmative action plan was not sufficiently tailored to address the effects of prior discrimination, as individuals of Hispanic, Oriental, Indian, Eskimo, and Aleut descent received benefits under the plan, however, "[t]here [was] *absolutely no evidence* of past discrimination against [such people] in any aspect of the Richmond construction industry."[37] Such a "random inclusion" of racial groups that may never have suffered from discrimination compelled the Court to question the veracity of the Richmond plan's aim of remedying past discrimination.[38]

Ultimately, the Supreme Court's *Croson* decision reiterated and broadened its holding in *Korematsu*, declaring that all races, including whites, constituted a suspect class that deserved judicial strict scrutiny.[39] While the Court quotes *Wygant v. Jackson Board of Education*[40] when stating the "'guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,'"[41] this fundamental notion of applying judicial strict scrutiny to race-based classifications is derived from *Korematsu*, a decision made over forty years before *Wygant*.

B. Grutter v. Bollinger: Diversity is a Compelling Interest

The Supreme Court's 2003 decision in *Grutter* simultaneously adopted Justice Powell's diversity view[42] in *Bakke* and rendered the Fifth Circuit's decision in *Hopwood* as no longer "good law," creating for the first time an uncontroverted understanding that a university's interest in an ethnically diverse student body can be a compelling

36. *Id.* at 500, 505.
37. *Id.* at 506.
38. *Id.*
39. *Id.* at 494.
40. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
41. *Id.*
42. Grutter v. Bollinger, 539 U.S. at 325 (2003).

governmental interest.[43] Unlike Justice Powell's *Bakke* opinion, which came from a fractured plurality opinion, Justice O'Connor's *Grutter* opinion commanded a five-to-four majority,[44] leaving no question as to diversity's status as a compelling interest.[45] At issue in *Grutter* was a race-conscious admissions policy implemented by the University of Michigan Law School.[46] After being denied admission, Plaintiff Barbara Grutter, a white female, brought suit against the university, claiming the defendant's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[47]

Justice O'Connor acknowledged the confusion amongst the lower courts with regard to the fractured *Bakke* opinion, stating such courts have "struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent."[48] After recognizing the ambiguity that encompassed the *Bakke* opinion, however, Justice O'Connor cleared away such uncertainty by declaring "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[49]

In order to achieve this compelling interest, the Court declared that a university's means must be narrowly tailored and may not include racial balancing or use of race as a predominant factor for admissions;[50] however, a university could use race to achieve "critical masses" of underrepresented minority students.[51] Here, given that the University of Michigan Law School's admissions policy considered race "in a flexible, nonmechanical way" and "[did] not operate as a quota,"[52] the Court determined that "the Law School's admissions program [bore] the hallmarks of a

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 314–15.
47. *Id.* at 316–17.
48. *Id.* at 325.
49. *Id.*
50. *Id.* at 334.
51. *Id.* at 329–31.
52. *Id.* at 334–35.

narrowly tailored plan."[53] Specifically, the Court found that the Law School's admissions policy not only viewed a candidate's race as merely a "plus" factor in admissions considerations,[54] but its admissions program was "flexible enough to ensure that each applicant [was] evaluated as an individual and not in a way that [made] an applicant's race or ethnicity the defining feature of his or her application."[55] Additionally, the Court highlighted that the Law School gave "substantial weight to diversity factors besides race,"[56] a position the majority substantiated by pointing to the Law School's acceptance of "nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected."[57]

Justice O'Connor next highlighted the importance of deferring to a university's admissions policies, acknowledging the "tradition of giving a degree of deference to a university's academic decisions."[58] While stating that a university's race-based considerations would be subject to review under strict scrutiny,[59] Justice O'Connor equally emphasized the need to give a university freedom to make its own judgments as to the selection of its student body,[60] and claimed that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[61] Such deference perturbed Justice Thomas in his dissenting opinion,[62] who viewed such "unprecedented deference the Court g[ave] to the Law School [as] an approach inconsistent with the very concept of 'strict scrutiny.'"[63]

Addressing the subject of less onerous, race-neutral alternatives the Law School could have considered, Justice O'Connor articulated that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative . . . [only] serious, good faith consideration of workable race-

53. *Id.* at 334.
54. *Id.* at 336.
55. *Id.* at 337.
56. *Id.* at 338.
57. *Id.*
58. *Id.* at 328.
59. *Id.* at 327.
60. *Id.* at 329.
61. *Id.* (quoting Regents of the Univ. of California v. Bakke, 318–19 (1978)).
62. *Id.* at 387.
63. *Id.* at 350.

neutral alternatives that will achieve the diversity the university seeks."[64] The *Grutter* majority held that the Law School sufficiently considered race-neutral alternatives, such as using a lottery system or decreasing the emphasis on LSAT or GPA scores, and determined that requiring the implementation of such alternatives "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[65]

Justice O'Connor ended her *Grutter* opinion by noting there must exist a time when race-based admissions considerations will finally end, and claimed the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today."[66] Looking ahead ten years to the *Fisher* case, the possibility exists that race-based considerations may cease much earlier than Justice O'Connor anticipated.

II. FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

After the Fifth Circuit decided *Hopwood* in 1996, the University of Texas at Austin (UT) was prohibited from using race in determining student admissions,[67] a policy that was practiced by the university prior to that decision.[68] The Texas legislature attempted to mitigate the effects of *Hopwood* by passing Texas House Bill 588 in 1997,[69] better known as the "Top Ten Percent Law," which guaranteed Texas students who graduate in the top ten percent of their high school automatic admission to any Texas-funded university.[70] The Top Ten Percent Law did not admit students on the basis of race, but under-represented minorities were its announced target demographic.[71] When the Supreme Court handed down its *Grutter* opinion in 2003, *Hopwood* became bad law, prompting UT to reevaluate its admissions process.[72]

64. *Id.* at 339.
65. *Id.* at 340.
66. *Id.* at 343.
67. Fisher v. Univ. of Tex., 631 F.3d 213, 223 (5th Cir. 1996).
68. *Id.* at 222.
69. *Id.* at 224.
70. *Id.*
71. *Id.*
72. *Id.* at 224–25.

During the reevaluation of UT's admissions process, the university conducted two studies to determine whether it had enrolled a critical mass of under-represented minorities.[73] The findings of these two studies revealed ninety percent of small-sized classes (classes with between five and twenty-four total students enrolled) had one or zero African-American students enrolled and forty-three percent of such classes had one or zero Hispanic students.[74] Additionally, UT's findings revealed that minority students "reported feeling isolated,"[75] and that a majority of the student body felt there was "'insufficient minority representation in classrooms for the full benefits of diversity to occur.'"[76]

Citing these diversity studies, UT determined the university "had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity,"[77] and consequentially added the consideration of race as one additional factor within its admissions process.[78] This new admissions policy is the impetus for the current *Fisher* controversy.

Abigail Fisher is a white female who was denied admission into UT's undergraduate program.[79] After discovering the university's policy of considering race in its admissions process,[80] Fisher brought suit claiming the university violated her rights against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment.[81] The district court ruled in favor of UT,[82] stating, "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."[83] On appeal to the Fifth Circuit, a three-panel opinion affirmed the district court's ruling;[84] however, Judge Garza authored a scathing concurrence criticizing *Grutter's* consistency with general

73. *Id.* at 225.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 226.
78. *Id.*
79. *Id.*
80. *Id.* at 217.
81. *Id.*
82. Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009).
83. *Id.*
84. Fisher v. Univ. of Tex., 631 F.3d 213, 215 (5th Cir. 2011).

constitutional jurisprudence.[85]

A. Judge Higginbotham's Opinion

Judge Higginbotham authored the opinion in *Fisher*'s appeal and ultimately concluded that UT's admissions policy was consistent with Supreme Court jurisprudence.[86] Stating that UT's efforts to obtain a critical mass of minority students constituted "a compelling state interest that can justify the use of race in university admissions," [87] Higginbotham declared UT's "decision to reintroduce race-conscious admissions was adequately supported by . . . *Grutter*."[88] The Fifth Circuit declared that UT's admissions policy deserved judicial deference on two independent grounds: first, UT's academic decisions "are a product of 'complex educational judgments in an area that lies primarily within the expertise of the university,' far outside the experience of the courts;"[89] and second, a university's selection of its student body is entitled to First Amendment protection.[90]

Judge Higginbotham's opinion also focused on the Supreme Court's 2007 affirmative action decision in *Parents Involved v. Seattle School District*,[91] stating that *Parents Involved* supports the Court's position in *Grutter* requiring "a measure of deference to [a] university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity . . . so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system."[92] Instead of interpreting the *Parents Involved* decision as requiring school districts to support their affirmative action plans with specific evidence, Judge Higginbotham held the Court struck down the school districts' programs only "because they pursued racial balancing and defined students based on racial group

85. *Id.* at 247.
86. *Id.*
87. *Id.* at 219 (quoting Grutter v. Bollinger, 539 U.S. 306,325 (2003)).
88. *Id.* at 247.
89. *Id.* at 231 (quoting *Grutter*, 539 U.S. at 328).
90. *Id.*
91. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
92. Fisher v. Univ. of Tex., 631 F.3d 213, 233 (5th Cir. 2011).

classifications, not on individual circumstances."[93] Ultimately, Judge Higginbotham held that even after *Parents Involved*, the Court "ha[d] not retreated from *Grutter*'s mode of analysis, one tailored to holistic university admissions programs," and thus determined that a deferential strict scrutiny standard should be applied to race-conscious admissions policies in higher education.[94] To substantiate this position that *Parents Involved* merely proscribed "binary racial categories to classify schoolchildren,"[95] Judge Higginbotham specifically addressed Justice Kennedy's *Parents Involved* concurrence, stating "Justice Kennedy . . . wrote separately to clarify that 'a more nuanced, individual evaluation . . . informed by *Grutter*' would be permissible, even for small gains sought by the school districts."[96]

Despite the requisite strict scrutiny analysis that must be overcome before a governmental entity may utilize race-based discrimination, the Fifth Circuit determined that strict scrutiny's "narrow-tailoring inquiry . . . [must be] undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."[97] Thus, under the Fifth Circuit's interpretation of *Grutter*, strict scrutiny serves as a faux barrier, requiring the court "give a degree of deference" to a university's race-based admissions policy and examine only whether that policy was adopted in good faith,[98] and the courts must "presume the University acted in good faith."[99]

B. Judge Garza's Dissenting Concurrence

In Judge Garza's concurrence, while agreeing that Judge Higginbotham's opinion correctly adhered to the Supreme Court's decision in *Grutter*,[100] Garza vehemently disagreed with the Court's *Grutter* decision, arguing the case "represents a digression in the course of constitutional

93. *Id.* at 234.
94. *Id.*
95. *Id.* at 246.
96. *Id.*
97. *Id.* at 232.
98. *Id.* at 231–32.
99. *Id.* at 231.
100. *Id.* at 247.

law."[101] Judge Garza reasoned that the deference the courts must give to a university's race-based considerations is antithetical to the fundamental notions of strict scrutiny,[102] and claimed *Grutter* inappropriately "redefined the meaning of [strict scrutiny's] narrow tailoring."[103] By requiring courts to "simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity,"[104] Judge Garza argued that a university's admissions policy escapes any "meaningful judicial review under any level of scrutiny."[105]

Unlike Judge Higginbotham's lead opinion, Judge Garza's concurrence only briefly addressed the *Parents Involved* case and its applicability to the present controversy. As opposed to distinguishing *Grutter* from *Parents Involved*, Judge Garza begrudgingly acquiesced that despite the Court's *Parents Involved* opinion, the principles articulated in *Grutter* remain valid, stating: "[t]oday we follow *Grutter's* lead . . . [and] despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep."[106] Judge Garza acknowledged Justice Kennedy's *Parents Involved* concurrence only to substantiate her position that UT's race-based admissions policy should fail strict scrutiny, highlighting Justice Kennedy articulation that "'[i]ndividual racial classifications . . . may be considered legitimate *only if they are a last resort* to achieve a compelling interest.'"[107]

Despite Justice Kennedy's *Parents Involved* position, Judge Garza emphasized the feebleness of narrow tailoring in a post-*Grutter* world, stating:

> [N]arrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer. Post-*Grutter*, universities need not inflict the least harm possible so long as they operate in good faith. And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow

101. *Id.*
102. *Id.* at 248.
103. *Id.* at 249.
104. *Id.*
105. *Id.*
106. *Id.* at 247.
107. *Id.* at 263 (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 790 (2006)) (emphasis in original).

> courts to review their affirmative action programs . . . In the world *post-Grutter*, courts are enjoined to take universities at their word.[108]

Such language echoes Justice Kennedy's dissent in *Grutter*, where he claimed "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions . . . deference is not to be given with respect to the methods by which [racial diversity] is pursued."[109] Given that Justice Kennedy helped decide *Fisher*, Justice Kennedy's and Judge Garza's criticism of the deference due to a university's race-based admissions policy is especially significant.

Judge Garza also challenged the assumed benefits of diversity as speculative and conjectural,[110] and stated that *Grutter's* majority opinion "rests almost entirely on intuitive appeal rather than concrete evidence."[111] Arguing that strict scrutiny is designed to protect against such intuitive appeal, Judge Garza emphasized that *Grutter's* holding is paradoxical.[112] On one hand, the Court held that diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race; however, at the same time, the *Grutter* Court approved a policy that operates on the assumption that racial status correlates with greater diversity of viewpoints.[113] The Equal Protection Clause, Judge Garza wrote, forbids such stereotypical assumptions, which create the inference that "members of minority groups, *because of* their racial status, are likely to have unique experiences and perspectives."[114] Under Judge Garza's perspective, *Grutter* significantly deflated strict scrutiny's applicability to a university's race-based considerations, inappropriately granted deference to such educational policies, and signified a grave misstep in the Court's constitutional jurisprudence.[115]

108. *Id.*
109. Grutter v. Bollinger, 539 U.S. 306, 388 (2003).
110. *Fisher*, 631 F.3d at 255–56.
111. *Id.* at 255.
112. *Id.* at 256.
113. *Id.*
114. *Id.*
115. *Id.* at 266.

C. Oral Arguments Before The United States Supreme Court

On February 21, 2012, the United States Supreme Court granted certiorari to decide on the *Fisher* controversy.[116] Justice Elena Kagan recused herself from hearing the case, having been involved in her previous capacity as U.S. Solicitor General in the Obama Administration's submission of a brief supporting the University of Texas when *Fisher*'s case was before the Fifth Circuit Court of Appeals.[117] On October 10, 2012, the Court heard oral arguments from the parties. During oral arguments, before the attorney for petitioner Abigail Fisher could even articulate the issue presented before the Court, Justices Ginsberg and Sotomayor raised piercing questions regarding standing.[118] Specifically, the Justices questioned Ms. Fisher's ability to satisfy the injury requirement to confer standing, citing contention that Ms. Fisher would have been rejected from the University of Texas at Austin, whether or not her race was considered.[119] Additionally, Justice Sotomayor expressed doubt over the measure of relief sought by Ms. Fisher, pointing out that because Ms. Fisher had already graduated from another college, injunctive relief would be inappropriate.[120]

Seemingly defending Ms. Fisher's ability to satisfy the requirements of standing, Justice Scalia posited that the denial of Ms. Fisher's equal protection rights constituted sufficient injury to confer standing, stating, "[w]e've had cases involving alleged discrimination in state—state contracting. And we haven't required the person who was discriminated against because of race to prove that he would have gotten the contract otherwise . . . it's been enough that there was a denial of equal protection."[121] Additionally, Justice Scalia noted that Ms. Fisher suffered a monetary injury by paying to have her admissions application considered, when the

116. Fisher v. Univ. of Tex., 132 S. Ct. 1536 (2012).

117. Ralph K.M. Haurwitz, *UT's Race-Conscious Admission Policy Facing Supreme Court Test*, AUSTIN AMERICAN STATESMAN (Feb. 21, 2012), http://www.statesman.com/news/news/state-regional-govt-politics/uts-race-conscious-admission-policy-facing-supreme/nRkgH/.

118. Transcript of Oral Argument at 3–6, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11–345).

119. *Id.* at 3–4.

120. *Id.* at 5.

121. *Id.* at 7.

admission measures utilized were unfair.[122] Based on these considerations, Justice Scalia firmly held that the constitutional injuries suffered by Ms. Fisher were sufficient to confer standing.

After the initial standing issue was discussed, Bert Rein, counsel for Ms. Fisher, argued that the University of Texas failed to apply *Grutter's* holding and consider whether a critical mass of minority students could be generated without resorting to race-based considerations.[123] Mr. Rein also called upon the court to restate the "critical mass" principle articulated in *Grutter*, asserting that the vagueness inherent such language "a flaw . . . in *Grutter*."[124] Alluding to strict scrutiny's "narrowly-tailored" requirement, Mr. Reid argued that because the term "critical mass" is an unknown element left to the opinion of any university, a determination of "critical mass" eludes narrow-tailoring, stating, "you can't tailor to the unknown. If you have no range of evaluation, if you have no understanding of what critical mass means, you can't tailor to it."[125]

The subject of critical mass was a heavily scrutinized question when counsel for the University of Texas, Gregory Garre, approached the Court.[126] Chief Justice Roberts pressed Mr. Garre on the University of Texas' critical mass goals, asking, if the university is unable to articulate what constitutes a critical mass, "how are we supposed to tell whether [the university's] plan is narrowly tailored to that goal?"[127] The justices focused heavily on the subjectivity and opaqueness surrounding the determination of "critical mass," urging Mr. Garre to express the appropriate standard to apply when determining whether such a critical mass had been attained.[128] Solicitor General Donald Verrilli, who appeared in defense of the university's program, attempted to minimize the actual significance of critical mass, stating that critical mass cannot be reduced to a number,[129] and that "the

122. *Id.* at 7–8.
123. *Id.* at 13.
124. *Id.*
125. *Id.* at 19.
126. *Id.* at 33–35.
127. *Id.* at 39.
128. *Id.* at 49.
129. *Id.* at 69.

idea of critical mass has taken on a life of its own in a way that's not helpful because it doesn't focus the inquiry where it should be."[130]

D. The Supreme Court's Ruling in Fisher

When the Court decided *Fisher* on June 24, 2013, an unexpected six of the eight deciding Justices joined in the majority opinion. Justices Thomas, who filed a concurrence, and Ginsburg, who dissented from the majority, were the only Justices who did not join. Perhaps expectantly, while Justices from both the Court's conservative and liberal blocs all managed to agree on *Fisher*'s ruling, the ultimate decision left *Grutter*'s precedent largely unchanged.

Delivering the majority opinion, Justice Kennedy admonished the Fifth Circuit's ruling, holding the "Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications."[131] According to Justice Kennedy, such a "good faith" deferential standard departed from the standard articulated in *Grutter*, stating, "*Grutter* did not hold that good faith would forgive an impermissible consideration of race . . . Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."[132] Noting the unique context of higher education, the majority opinion stated that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts."[133] Given this fact, the Fifth's Circuit's interpretation of *Grutter* as showing deference to a University's diversity objectives, was in error, as such racially based decisions must be subjected to the full force and effect of strict scrutiny.

One especially significant notion Justice Kennedy articulated was describing the circumstances under which a university's "diversity objectives" were to be approached deferentially: "*Grutter* calls for deference to the University's

130. *Id.* at 72.
131. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2421 (2013).
132. *Id.*
133. *Id.*

conclusion [that] based on its experience and expertise, a diverse student body would serve its educational goals."[134] While a university's decision that increased diversity would strengthen its campus constitutes "an academic judgment to which some, but not complete, judicial deference is proper," the implementation of that academic judgment must be tested by the full extent of strict scrutiny.[135] Stated differently, once a university implements an admissions process to achieve its goal of diversity, "[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."[136]

Summarily stating the Court's holding, and recounting the strict scrutiny argument articulated in his *Grutter* dissent, Justice Kennedy cautioned that while strict scrutiny must not be strict in theory, but fatal in fact:

> "[so must] strict scrutiny not be strict in theory but feeble in fact. 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."[137]

Ultimately, *Fisher* did not weaken *Grutter* or change the foundation of affirmative action; instead, *Fisher* further clarified *Grutter*, underscoring when deference should be given, and elucidating the idea that higher education is not exempt from the full force of strict scrutiny.

III. SEPARATING FISHER FROM GRUTTER

While Judge Garza and multiple Supreme Court justices would have liked to see *Grutter* overruled, the facts separating *Fisher* from *Grutter* were dissimilar enough to allow the Court to rule on *Fisher* without overruling its previous precedent. Despite the fact that several of the justices expressed resentment over the holding in *Grutter*, the

134. *Id.* at 2419 (quotations omitted).
135. *Id.*
136. *Id.* at 2419–20.
137. *Id.* at 2421 (quoting *Bakke*, 438 U.S. at 315).

Court has previously emphasized that "a decision to overrule [a previous Supreme Court decision] should rest on some special reason over and above the belief that a prior case was wrongly decided."[138] Thus, in order to avoid concocting a "special reason" as to why *Grutter* should be overruled, the Court could have simply concentrated on one of a number of meaningful differences that distinguished *Fisher* from *Grutter*.

A. Contextual Distinction

When Justice O'Connor wrote the majority opinion in *Grutter*, she repeatedly emphasized that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[139] Justice O'Connor stressed that "[n]ot every decision influenced by race is equally objectionable," [140] and that while strict scrutiny must strenuously examine the reasons advanced for race-based preferences, such scrutiny must also consider the particular context under which such preferences exist.[141] Given the importance of "context" to *Grutter's* ultimate decision, the Court in *Fisher* could have accentuated the differences between the two cases in order to place *Fisher* in a wholly different framework (undergraduate university vs. prestigious law school), allowing the Court to rule on *Fisher* without deciding whether to overrule *Grutter*.

The dissimilarities between *Grutter* and *Fisher* are significant, and the Court could have logically regarded *Grutter* as nonbinding on the *Fisher* case. First, in *Grutter*, race-based preferences were implemented at a top tier law school,[142] whereas in *Fisher* the circumstances encompassed admission into an undergraduate program. [143] Justice O'Connor emphasized in *Grutter* that law schools "represent the training ground for a large number of [the] Nation's leaders,"[144] and further claimed that this was particularly

138. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).
139. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).
140. *Id.*
141. *Id.*
142. *Id.* at 312.
143. Fisher v. Univ. of Tex., 631 F.3d 213, 216 (5th Cir. 2011).
144. *Id.* at 332.

true for "highly selective law schools."[145] Further accentuating the uniqueness of the law school environment, Justice O'Connor maintained that in a heterogeneous society, "[a]ccess to legal education . . . must be inclusive of talented and qualified individuals of every race and ethnicity."[146]

Given the attention the Court showed to the idiosyncratic context of the top tier law school, the *Fisher* Court could have simply stated that *Grutter's* ruling is extremely narrow and applied only in the context of prestigious and highly selective academic programs. Regardless of the fact that the University of Texas's undergraduate program is highly regarded, the Court could have highlighted the vastly different context of the law school environment and effectively made *Grutter* inapplicable to the *Fisher* controversy.

The Court could have emphasized the significance of this contextual difference in *Fisher* by pointing to its decision in *Parents Involved*, where the majority conceded in Part III(A) that diversity could be a compelling state interest "'in the context of *higher education*' . . . [so long as it is] not focused on race alone but encompasse[s] 'all factors that may contribute to student body diversity.'"[147] The *Parents Involved* Court additionally emphasized that *Grutter* "repeatedly noted that it was addressing the use of race 'in the context of higher education,'" and that *Grutter's* ultimate ruling "relied upon considerations *unique to institutions of higher education*, noting that in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'"[148] The majority in Part III(A) even explicitly distinguished *Grutter* from the *Parents Involved* controversy, stating "[t]he present cases are not governed by *Grutter*,"[149] a position that earned Justice Kennedy's decisive fifth vote.[150] Using this language from *Parents Involved*, the

145. *Id.*

146. *Id.*

147. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 551 U.S. 701, 722 (2007) (quoting Grutter v. Bollinger, 539 U.S. 306, 328, 337 (2003)) (emphasis added).

148. *Id.* at 724–25 (quoting *Grutter*, 539 U.S. at 327–29, 334) (emphasis added).

149. *Id.* at 725.

150. *Id.* at 782.

Court in *Fisher* could have further narrowed the "higher education" exception, holding that *Grutter's* authorization of race-based considerations was restricted to graduate school programs, or perhaps even to top tier graduate programs equivalent in reputation to the University of Michigan.

A second dissimilarity between *Fisher* and *Grutter* that the Court could have seized upon is the subtle differences in their contested application processes. With this information, the Court could have analogized how UT's race-conscious admissions process was akin to the unconstitutional measures enacted in *Parents Involved*. Unlike *Grutter's* program, which "focused on each applicant as an individual, and not simply as a member of a particular racial group"[151] the *Parents Involved* majority determined the Seattle diversity program considered race as "not simply one factor weighed with others in reaching a decision, as in *Grutter*; [but] *the* factor."[152] The Court in *Fisher* could have ultimately held that, similar to *Parents United*, UT's race-based admissions objective of "un-clustering minority students from certain programs"[153] simply placed too much weight on an applicant's race during the admissions process, exceeding the bounds of that which is tolerable under *Grutter*.

B. Excessive Deference and Improper Measures

When the Fifth Circuit decided *Fisher*, Judge Higginbotham wrote that strict scrutiny's narrow-tailoring inquiry must be made "with a degree of deference to the University's . . . presumably expert opinion,"[154] requiring a court to examine only whether a race-based admissions policy was adopted in good faith.[155] Comparing the facts of UT's admissions policy with those approved of in *Grutter*, Judge Higginbotham emphasized that, post-*Grutter*, a university's use of race-conscious admissions criteria to promote diversity is permissible "if it contemplates that a broad range of qualities and experiences beyond race will be important contributions to diversity and as such are appropriately

144. *Id.* at 722.
152. *Id.* at 723.
153. Fisher v. Univ. of Tex., 631 F.3d 213, 240 (5th Cir. 2011).
154. *Id.* at 232.
155. *Id.* at 231.

considered in admissions decisions."[156]

Similar to the criteria used by the Law School in *Grutter*, Judge Higginbotham observed that

> [n]one of the elements of [UT's admissions policy]—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.[157]

Holding that UT's admissions program was directly identical with the policy approved of in *Grutter*, Judge Higginbotham agreed with the lower court's determination that "[i]f the Plaintiffs are right, *Grutter* is wrong."[158]

Additionally, Judge Higginbotham emphasized that *Grutter* required the courts to presume a university acted with good faith when enacting such policies.[159] Given this tremendous allocation of deference, the Court could have criticized the Fifth Circuit's interpretation of *Grutter* as an overextension of the deference afforded to a university's implementation of race-based considerations. Whereas *Grutter* specifically afforded deference to a university's academic decisions, the Court could have tightly constricted the applicability of such deference, claiming that *Grutter* only stated deference be granted to a university's *determination* that diversity is essential to its educational goals.[160] Thus, while such a determination deserves deference, the means by which to attain that end may not merit similar deference.

To further substantiate this notion, while the *Grutter* majority held that deference is owed to the "*educational judgment* that . . . diversity is essential to [a school's] educational mission,"[161] the Court specifically stated that the methods implemented to attain that asserted interest would be bound by "constitutionally prescribed limit[ations]."[162] The Court could have stated that the Fifth Circuit misapplied the

156. *Id.* at 221.
157. *Id.* at 228.
158. *Id.* at 218 n.9 (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 612–13 (W.D. Tex 2009).
159. *Id.*
160. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).
161. *Id.* (emphasis added).
162. *Id.*

deference afforded a university's race based considerations as stated in *Grutter*, and ultimately hold that the policy did in fact exceed the "constitutionally prescribed limitations" that decision permitted.

The Court could have also criticized the measures UT used to determine whether it had attained a "critical mass" of underrepresented minority students on its campus.[163] While UT's "critical mass" study revealed that ninety percent of its smaller sized classes had one or fewer African-American students enrolled,[164] the Court had the opportunity to assert that, under *Grutter*, the proper basis for measuring "critical mass" is the diversity of the student body as a whole, [165] and thus does not require that every classroom have a minimum number of minority students. [166] Given that Justice O'Connor's majority opinion in *Grutter* specifically stated that "the Law School sought to . . . achieve student body diversity [as a whole],"[167] the Court could have distinguished UT's classroom-by-classroom "critical mass" analysis as an overextension of *Grutter*.

Additionally, Judge Higginbotham's decision compared UT's "critical mass" measures with *Grutter's* permitted measures numerous times, stating

> [l]ike the law school in *Grutter*, UT "has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." UT has made an " educational judgment that such diversity is essential to its educational mission," just as Michigan's Law School did in *Grutter*.[168]

The Supreme Court in *Fisher* had the opportunity to determine that the Fifth Circuit misapplied *Grutter's*

163. *Fisher*, 631 F.3d at 225.

164. *Id.*

165. *Grutter*, 539 U.S. at 329 ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.'").

166. *Id.* at 325 ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

167. *Id.*

168. *Fisher*, 631 F.3d at 230–31 (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009).

justification for seeking a critical mass of underrepresented minority students and hold that *Grutter's* "critical masses" tolerance is only applicable if the university "adequately consider[s] race-neutral alternatives currently capable of producing a critical mass without forcing the [university] to abandon . . . academic selectivity."[169] Additionally, the Court could have held that Texas's Top Ten Percent program constituted such a race-neutral alternative capable of producing a critical mass of underrepresented minority students, and thus conclude that the Fifth Circuit misinterpreted *Grutter* as tolerating UT's efforts to attain "critical masses" of minority students despite the availability of a reasonable race-neutral alternative.

The Court could have also looked to their *Parents Involved* decision to determine that the means UT's admissions policy utilized to attain its critical mass of underrepresented minority students did not survive strict scrutiny. In *Parents Involved*, the majority opinion stated, "[o]ur established strict scrutiny test for racial classifications . . . insists on 'detailed examination, both as to ends *and* as to means,'"[170] and ultimately held that "using means that treat students solely as members of a racial group is fundamentally [unconstitutional]." [171] Additionally, Justice Kennedy's *Parents Involved* concurrence emphasized that "individual racial classification employed [to avoid racial isolation] may be considered legitimate only if they are a last resort to achieve a compelling interest."[172] In light of these opinions, given that UT's "critical mass" studies cited racial isolation as a substantiating factor for their admissions program, [173] and considering the alleged effectiveness of Texas's race-neutral Top Ten Percent Law,[174] the Court could have labeled UT's race-based considerations as superfluous, and could have ultimately held that the policy fails to satisfy strict scrutiny's narrow-tailoring requirement.

169. *Grutter*, 539 U.S. at 340.

170. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) (quoting Adarand Constructors, Inc. v. Pena 515 U.S. 200, 236 (1995)).

171. *Id.* at 733.

172. *Id.* at 790.

173. *Fisher*, 631 F. 3d at 225.

174. Fisher v. Univ. of Tex., 644 F.3d 301, 306 (5th Cir. 2011).

C. Race-Neutral Alternatives and Diverging Outcomes

Before a governmental entity may enact "legal restrictions which curtail the civil rights of a single racial group,"[175] strict scrutiny requires such restrictions be justified by a compelling governmental interest, [176] and those restrictions must be narrowly tailored to achieve that compelling interest.[177] However, even if both of these criteria are satisfied, if there exists a racially-neutral alternative to achieving that same compelling interest, such a discriminatory curtailment will not satisfy the strict scrutiny standard.[178] In *Fisher*, the Court had the opportunity look to Texas's racially neutral Top Ten Percent Law, which has allowed "unprecedentedly high numbers . . . of preferred minorities" to gain admission to UT,[179] and conclude that the University's race-conscious admissions policy was unnecessarily superfluous to attaining the necessary "critical mass" of underrepresented minority students.

While the Court has held that "[n]arrow tailoring does not require the exhaustion of every conceivable race-neutral alternative," [180] it does require "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity [a] university seeks."[181] The Court in *Fisher* could have maintained that Texas's Top Ten Percent Law is such a workable race-neutral alternative to UT's current race-based admissions program, and further decide that the admissions policy was unconstitutional not because *Grutter* was wrongly decided, but because the University unnecessarily implemented a racially conscious measure beyond an effective race-neutral alternative.[182]

Texas's race-neutral Top Ten Percent Law requires that "each [public university] admit an applicant for admission to the institution as an undergraduate student if the applicant graduated [from a public Texas high school] with a grade

175. Korematsu v. United States, 323 U.S. 214, 216 (1944).
176. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (2007).
177. *Id.* at 720.
178. *Id.* at 735.
179. *Fisher*, 644 F.3d at 306.
180. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
181. *Id.*
182. Tex. Educ. Code § 51.803 (West, Westlaw through 2013).

point average in the top 10 percent of the student's high school graduating class."[183] At the University of Texas at Austin, the site central to the *Fisher* controversy, the admissions policy first separates its applicants into two separate groups, "(1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not."[184] Abigail Fisher falls into the latter group.[185]

While students in the top ten percent of their high school class are guaranteed admission to the University of Texas at Austin, applicants not within the top ten percent of their class compete for admission based on an Academic and Personal Achievement Index (PAI), a "mechanical formula that predicts freshman GPA using standardized test scores and high school class rank."[186] An applicant's PAI is based on two required essays and a "personal achievement score, which represents an evaluation of the applicant's entire file."[187] This personal achievement score is assigned by "assessing an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service . . . [as well as] the socioeconomic status of the applicant and . . . the applicant's race."[188]

"None of the elements of the personal achievement score—including race—are considered individually;" rather, "the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person."[189] The Court could have determined that, given the effectiveness of Texas's race-neutral Top Ten Percent Law, UT's personal achievement score was an unnecessary race-based consideration that needed to exclude the significance of an applicant's ethnicity.

Despite the existence of the alternative race-neutral, Top Ten Percent Law, *Grutter* emphasized that satisfying strict

183. *Id.* § 51.803(a).
184. *Fisher*, 631 F.3d at 227.
185. Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 590, 594–95 (W.D. Tex. 2009).
186. *Id.*
187. *Fisher*, 631 F.3d at 228.
188. *Id.*
189. *Id.*

scrutiny "does not require exhaustion of every conceivable race-neutral alternative . . . [but merely] require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[190] The Fifth Circuit's opinion confirmed this position, holding that the existence of race-neutral alternatives will not cause a race-conscious policy to fail a narrow-tailoring analysis.[191] Nevertheless, the Court could have held that the effectiveness and the prior existence of the race-neutral Top Ten Percent Law renders UT's admissions policy superfluous, and therefore was not sufficiently narrowly-tailored to survive strict scrutiny.

Even assuming that UT could have surpassed the strict scrutiny hurdle, the Court has previously held if a race-conscious program with the goal of promoting diversity has only a "minimal impact" on attaining such diversity, such nominal gains "cast[] doubt on the necessity of using racial classifications."[192] Unlike the race-based admissions policy at issue in *Grutter*, which more than tripled minority representation at the law school,[193] the "additional diversity contribution of [UT]'s race-conscious admissions program is tiny."[194] Despite not being as effective as *Grutter's* policy, the Court could have determined that UT's race-conscious admissions policy is necessary even in light of Texas's race-neutral Top Ten Percent Law, for "[w]hile the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity."[195] But regardless of this argument, the Court could have also simply regarded UT's admissions program as ineffective when compared to the admissions program at issue in *Grutter*.

Additionally, the Court had the opportunity to criticize UT's attempt to remedy "minority students . . . clustered in

190. Grutter v. Bollinger, 539 U.S 306, 339 (2003).

191. *Fisher*, 631 F.3d at 238.

192. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734 (2007).

193. Fisher v. Univ. of Tex., 644 F.3d 301, 304 (5th Cir. 2011).

194. *Id.* at 307.

195. *Fisher*, 631 F.3d at 240.

certain programs"[196] using its decision in *Parents Involved*, for, by seeking diversity through "un-clustering" minority students from certain programs, UT's diversity justifications consider the students' race standing alone. Similar to the Court's criticism of the school district in *Parents Involved*, through UT's attempts to racially diversify its programs and classrooms, "[race] is not simply one factor weighed with others in reaching a decision, as in *Grutter*; [but] is *the* factor."[197]

IV. THE SIGNIFICANCE OF THE SUPREME COURT'S POST-GRUTTER COMPOSITION

When the Supreme Court decided *Grutter* in 2003, the majority opinion passed by a narrow five-to-four margin.[198] But, in the ten years since that decision, the Court's composition has undergone a critical transformation. Of the five justices who voted with the majority in *Grutter*, only two of the five justices remain on the Court today, whereas three of the four dissenters in *Grutter* remain.[199] Nevertheless, despite the addition of four new justices, the majority of those justices are ideologically akin to the justices that they replaced, one notable exception being the conservative Justice Alito's replacement of Justice O'Connor, who authored the majority opinion in *Grutter*. This lack of substantial change to the Court's ideological composition made the task of speculating on how the Court would handle the affirmative action question presented in *Fisher* less opaque; however, the combination of Justice Alito's presence and Justice Kennedy's unique perspective on affirmative action significantly complicated the matter. Based on such complications, to understand Justices Kennedy's and Alito's view in *Fisher*, it is valuable to look back on their prior decisions that encompassed the area of affirmative action.

196. *Id.*

197. *Parents Involved*, 551 U.S. at 723.

198. Grutter v. Bollinger, 539 U.S. 306, 310 (2003).

199. *Id.* (O'Connor, Stevens Souter Ginsburg, and Bryer formed the majority; while Kennedy, Rehnquist, Scalia Thomas formed the minority.).

A. Parents Involved and the Future of Affirmative Action

The controversy in *Parents Involved* concerned a school district's use of a race-based admissions program to promote diversity amongst the district's varying schools.[200] If the racial demographics of any school's student body deviated by more than a predetermined percentage, race was considered to determine whether admission would be granted to incoming students.[201] Under this policy, a particular school could favor either white or non-white students for admission depending on which race would bring the racial balance closer to the predetermined goal.[202]

While the Ninth Circuit Court of Appeals upheld this race-based admissions program as valid under *Grutter*, the Supreme Court reversed, claiming that the Seattle School District's program amounted to unconstitutional racial balancing.[203] The majority noted, with Justice Kennedy providing the critical fifth vote in Part III(A), that the Court's approval of the race-based admissions policy in *Grutter* "relied upon considerations unique to institutions of higher education . . . [and] repeatedly noted that it was addressing the use of race 'in the context of higher education.'"[204] Distinguishing the controversy even further from *Grutter*, in the final sentence of Part III(A), the majority candidly emphasized that the *Parents Involved* case was "not governed by *Grutter*."[205]

As evidenced by the majority's emphatic efforts to distinguish *Parents Involved* from *Grutter* in the last sentence of Part III(A),[206] *Parents Involved* did not overrule *Grutter*; however, it notably narrowed the case's diversity ruling and constituted an unequivocal blow to the future of race-based considerations.[207] In a separate dissenting opinion, Justice Breyer articulated this narrowing of *Grutter*, arguing that the Court's application of equally strict scrutiny to all racial classifications, no matter whether the classifications seek to

200. *Parents Involved*, 551 U.S. at 712.
201. *Id.*
202. *Id.*
203. *Id.* at 729.
204. *Id.* at 724–25 (quoting Grutter v. Bollinger, 539 U.S. 306, 332 (2003)).
205. *Id.* at 725.
206. *Id.*
207. *Id.*

include or exclude,[208] contradicts *Grutter's* position that "'[n]ot every decision influenced by race is equally objectionable.'"[209] Additionally, Justice Breyer argued that such equality of scrutiny ignored the significance of "context" in the *Grutter* decision, for, by evenhandedly applying scrutiny to all race-based classifications, no matter the circumstances, the Court is consequently ignoring contextual nuances.[210]

While affirmative action policies continue to be implemented post-*Parents Involved*, the Court may declare diversity's status as a compelling governmental interest is only applicable to the unique context of higher education.[211] Of the five current Supreme Court justices who voted with the majority in *Parents Involved*, Justices Scalia, Thomas, and Kennedy all dissented in *Grutter*; however, given his position constituted the crucial fifth vote to secure a majority opinion, it is significant that Justice Kennedy only joined Parts I, II, III(A), and III(C) of Chief Justice Roberts' *Parents Involved* decision. The two remaining justices who voted with the *Parents Involved* majority, Chief Justice Roberts and Justice Alito, while appointed after *Grutter*, have nonetheless expressed particular abhorrence for the affirmative action principles expressed and condoned in *Grutter*.[212] Chief Justice Roberts in particular bluntly articulated this oppositional viewpoint in the final sentence of his *Parents Involved* opinion, stating "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[213]

While four of the Court's current justices appear ideologically opposed to affirmative action (Justices Alito, Thomas, Scalia, and Chief Justice Roberts), Justices Ginsburg and Breyer have consistently voted in favor of such race-based considerations. Both justices agreed with the majority in *Grutter*[214] and dissented from the Court's *Parents*

208. *Id.* at 832.
209. *Id.* at 833 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).
210. *Id.* at 834.
211. *Id.* at 725.
212. *Id.* at 748.
213. *Id.*
214. *Grutter*, 539 U.S. at 310.

Involved decision.[215] In fact, Justice Breyer was so opposed to the majority opinion in *Parents Involved* that he pointedly spoke from the bench for more than twenty minutes, decrying that "[i]t is not often in the law that so few have so quickly changed so much."[216] Based on Justice Breyer's and Justice Ginsburg's previous endorsement of race-based considerations to promote diversity, it was anticipated that both justices will be in favor of UT's admissions policy and thus vote to affirm the Fifth Circuit's ruling. Defying such expectations, however, Justice Breyer joined the majority opinion criticizing the Fifth Circuit's application of strict scrutiny; whereas Justice Ginsburg was the sole dissenter, holding that she would have upheld the Fifth Circuit's decision.

Justices Stevens and Souter each agreed with the majority in *Grutter* and dissented from the Court's narrowing of *Grutter* in *Parents Involved*, claiming that "in light of *Grutter*" strict scrutiny of race-conscious admissions policies only requires a judge to inquire into "whether the school boards . . . adopted these plans to serve a 'compelling governmental interest' and, if so, whether the plans are 'narrowly tailored' to achieve that interest."[217] However, both Justices have retired and have since been replaced respectively by Justices Kagan and Sotomayor. Given Justice Sotomayor was a President Obama nominee and had a reputation for siding with the Court's liberal bloc when the justices are divided along ideological lines,[218] many anticipated the Justice would vote to uphold the Fifth Circuit's ruling. Ultimately and unexpectedly, however, Justice Sotomayor joined the majority opinion vacating the Circuit court ruling, agreeing that "in order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve . . . diversity."[219]

215. *Parents Involved*, 551 U.S. at 803.

216. Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y.TIMES (June 29, 2007) http://www.nytimes.com/2007/06/29/washington/29scotus.html.

217. *Parents Involved*, 551 U.S. at 837.

218. David G. Savage, *Sotomayor Votes Reliably With Supreme Court's Liberal Wing*, L.A. TIMES (June 8, 2010), http://articles.latimes.com/2010/jun/08/nation/la-na-court-sotomayor-20100609.

219 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2422 (2012).

B. Justice Kennedy's Court

When the Supreme Court decided *Parents Involved* in 2007, it had the opportunity to overrule *Grutter* and severely alter the affirmative action landscape. Particularly indicative of the likelihood for such a change, when the Court handed down *Parents Involved*, Justice O'Connor, the author of *Grutter's* majority opinion, had retired from the bench and was replaced by conservative Justice Samuel Alito. However, despite this chance to overrule *Grutter*, the Court passed on this opportunity to invalidate affirmative action. Instead, the Court merely curtailed much of *Grutter's* significance in Part III(A) of the majority opinion, first by applying a tougher form of strict scrutiny to the two school districts' student assignment plans,[220] in contrast to *Grutter's* generous allocation of deference, and second by emphasizing the importance of individualized, holistic determinations in the selection process over any discussion of the importance of racial diversity.[221] The Court even acknowledged that student body diversity is a compelling governmental interest[222] and invalidated Seattle's admissions program only because it amounted to racial balancing that "rel[ied] on racial classifications in a 'nonindividualized, mechanical' way."[223]

This begs the question: why merely narrow *Grutter*? Why did the Court relinquish an opportunity to overrule a decision Justice Kennedy described as "antithetical to strict scrutiny" jurisprudence only three years earlier?[224] The answer to these questions lie in Justice Kennedy and the delicate balance the Court in *Parents Involved* had to strike in order to obtain his vote for Parts I, II, III(A), and III(C) of the majority opinion.

While Justice Kennedy dissented in *Grutter*[225] and concurred in Parts I, II, III(A), and III(C) in *Parents Involved*,[226] in each decision Justice Kennedy wrote separate opinions that revealed notable ideological distinctions from

220. *Parents Involved*, 551 U.S. at 720.
221. *Id.* at 722–23.
222. *Id.* at 721.
223. *Id.* at 723.
224. Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).
225. *Id.* at 387.
226. *Parents Involved*, 551 U.S. at 782.

the justices who merely agreed with his conclusion.[227] In *Grutter*, Justice Kennedy agreed with the majority "that a university admissions program may take account of race as one, nonpredominant [admissions] factor,"[228] however Justice Kennedy condemned and ultimately dissented from what he viewed as "the majority's abandonment of strict scrutiny."[229] According to Justice Kennedy, deference should only be given to a university's *decision* that racial diversity will promote the institution's overall education mission, while the *means* the university utilizes to attain that objective should require strict judicial review.[230]

Justice Kennedy further emphasized this position later in his *Grutter* dissent, stating that conferring deference upon a university's means to attain racial diversity "is antithetical to strict scrutiny, not consistent with it."[231] The danger associated with such deference, Justice Kennedy admonished, is that universities will not be forced "to seriously explore race-neutral alternatives . . . [and] [i]f universities are given [such wide] latitude . . . they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review."[232] Without these pressures to explore such neutral alternatives, Justice Kennedy forewarned that the "unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes."[233]

Perhaps what is most compelling about Justice Kennedy's perspective in *Grutter*, and most indicative of his future views on *Fisher*, came at the very end of his dissent. Justice Kennedy condemned the Court for "abdicat[ing] its constitutional duty to give strict scrutiny to the use of race in university admissions," stating that such an omission "negat[ed] [its] authority to approve the use of race in pursuit of student diversity."[234] However, despite his overt

227. *Grutter*, 539 U.S. at 387; *Parents Involved*, 551 U.S. at 782.
228. *Grutter*, 539 U.S. at 387.
229. *Id.* at 394.
230. *Id.* at 388.
231. *Id.* at 394.
232. *Id.*
233. *Id.*
234. *Id.* at 395.

disapproval of the majority's failure to exact strict scrutiny upon the university's race-based admissions policy, the last sentence in Justice Kennedy's dissent articulated his support of affirmative action policies if such strict scrutiny is in place, stating: "I reiterate my approval of giving appropriate consideration to race in this one context."[235]

Justice Kennedy's concurrence in *Parents Involved* even more starkly conveyed his ideological distinctions from the majority opinion.[236] Responding to Chief Justice Roberts and his insistence that "'[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,'"[237] Justice Kennedy emphasized that "[f]ifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution."[238] Additionally, and contrary to the *Parents Involved* majority opinion, Justice Kennedy's concurrence emphasized that "[d]iversity . . . is a compelling education goal a school district may pursue,"[239] and further asserted that the Court's decision "should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds."[240]

Justice Kennedy's concurrence also focused on the school district's use of "crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions" in a school district occupied by several different racially diverse groups.[241] Justice Kennedy asserted that the school district failed to unambiguously articulate how such "a blunt distinction between 'white' and 'non-white' further[ed] [its diversity] goals,"[242] and declared that strict scrutiny "cannot construe [such] ambiguities in favor of the State."[243] Further affirming this position, and echoing his support of strict scrutiny in his *Grutter* dissent, Justice Kennedy expressed that such indefiniteness illustrated that the school district

235. *Id.*
236. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).
237. *Id.* at 788 (quoting plurality opinion).
238. *Id.* (citation omitted).
239. *Id.* at 783.
240. *Id.* at 798.
241. *Id.* at 786.
242. *Id.* at 787.
243. *Id.* at 786.

had "not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny."[244]

Despite Justice Kennedy's criticism of the school district's race-conscious admissions policy, he articulated a similar criticism for the plurality opinion, stating that "[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."[245] Similar to his dissent in *Grutter*, Justice Kennedy approved of school authorities considering "the racial makeup of schools and . . . adopt[ing] general policies to encourage a diverse student body, one aspect of which is its racial composition."[246] Unlike the plurality's unyielding position that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[247] Justice Kennedy held that school administrators concerned with racial diversity issues within their district are "free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[248]

Justice Kennedy even postulated several methods administrators may implement in order to attain such diversity, such as "strategic site selection of new schools; 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."[249] Under Justice Kennedy's view, such mechanisms, although race conscious, would not lead to treatment "based on a classification that tells each student he or she is to be defined by race."[250]

It is also notable that Justice Kennedy did not join Part IV of Chief Justice Roberts' opinion in *Parents Involved*, a section that primarily criticizes Justice Breyer's dissenting

244. *Id.* at 787.
245. *Id.* at 788.
246. *Id.*
247. *Id.* at 748.
248. *Id.* at 788–89.
249. *Id.*
250. *Id.*

opinion.[251] In Justice Kennedy's concurring opinion, he openly stated that his refusal to join Part IV of the Chief Justice's opinion is based on the plurality's refusal to "acknowledge that the school districts h[ad] identified a compelling interest [in increasing diversity]."[252] In contrast to this position taken by the plurality, Justice Kennedy emphasized that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[253] Unlike the plurality's position in Part IV, Justice Kennedy argued that school authorities "are free to devise race-conscious measures to address the [diversity] problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[254]

Justice Kennedy voiced a similar concern about systematic, individual typing by race with the Law School's critical mass justifications in his *Grutter* dissent, claiming that "[w]hether the objective of critical mass 'is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,' and so risks compromising individual assessment."[255] In *Grutter*, daily reports informed admissions personnel whether they were short of assembling a critical mass of minority students, and Justice Kennedy observed that such "consultation of daily reports during the last stages in the admissions process suggest[ed] there was no further attempt at individual review save for race itself."[256] Because of this failure to implement a safeguard throughout the entire admissions process protecting individual review, Justice Kennedy deemed the Law School's policy unconstitutional.[257]

Unlike Justice Sotomayor, whose questions during oral arguments clearly showed her preference for the University of Texas' admissions program,[258] Justice Kennedy's line of questioning during oral arguments did not overly reveal his position, as he stringently challenged both sides with his

251. *Id.* at 735–48.
252. *Id.* at 783.
253. *Id.*
254. *Id.* at 788–89.
255. Grutter v. Bollinger, 539 U.S. 306, 391 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 US 265, 289 (1978)).
256. *Id.* at 392.
257. *Id.*
258. Transcript of Oral Argument, *supra* note 118, at 14.

questions and comments. During oral arguments, Justice Kennedy scrutinized inconsistencies in the petitioner's position, stating:

> You argue that the University's race-conscious admission plan is not necessary to achieve a diverse student body because it admits . . . so few minorities . . . Then—let's assume—that it resulted in the admission of many minorities. Then you'd come back and say, oh, well, this . . . shows that we—we were probably wrongly excluded. I—I see an inconsistency here.[259]

Conversely, Justice Kennedy heavily scrutinized the University of Texas' oral argument, responding to the university's contention that their holistic admissions process only modestly considered race by bluntly stating, "I just don't understand this argument. I thought that the whole point is that sometimes race has to be a tie-breaker and you are saying that it isn't. Well, then, we should just go away. Then—then we should just say you can't use race, don't worry about it."[260]

Justice Kennedy's idiosyncratic perspectives in both *Grutter* and *Parents Involved* illustrate why the Court's conservative bloc was unable to overrule *Grutter* when the opportunity presented itself in 2007. In the 2009-2010 term, Justice Kennedy was in the majority ninety-two percent of the time,[261] and, over the last six years, when the Court is ideologically split five-to-four on a controversial issue, Justice Kennedy has been in the majority more than seventy percent of the time.[262] If the plurality in *Parents Involved* had obstinately insisted on declassifying student body diversity as a compelling governmental interest, it risked alienating Justice Kennedy and pushing him into the Court's opposing ideological camp; and, given that *Parents Involved* was a five-to-four decision,[263] such a result would have changed the

259. *Id.* at 22–23.

260. *Id.* at 63.

261. Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES (June 30, 2009), http://www.nytimes.com/2009/07/01/us/01scotus.html?adxnnl=1&pagewanted=1&adxnnlx=1325847640-K43GimBUMxzPvCjJRjVQkQ.

262. Erwin Chemerinsky, *Chemerinksky: Momentous Term for the "Kennedy Court"?*, ABA JOURNAL (Oct. 3, 2011), http://abajournal.com/news/article/momentous_term_for_the_kennedy_court/.

263. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701,

case's outcome. Such inflexibility would risk losing Justice Kennedy's vote, and consequently prevent the Court from, at the very least, narrowing *Grutter's* applicability.

When the Supreme Court announced its opinion in *Fisher*, it was fitting that Justice Kennedy wrote the majority opinion that ultimately vacated the Fifth Circuit's decision. Furthermore, Justice Kennedy's opinion adhered to the principles and opinions he had articulated regarding affirmative action throughout his tenure on the Court. While Justice Kennedy had advocated in both *Grutter* and *Parents Involved* that student body diversity is a compelling governmental interest, these opinions insisted even more emphatically that such race-based considerations must be implemented in accordance with strict scrutiny.[264] Justice Kennedy had similarly criticized granting incalculable deference to universities executing these purposefully discriminatory policies,[265] arguing that such "deference is antithetical to strict scrutiny, not consistent with it."[266] Given one of UT's main arguments in *Fisher* was that courts must defer to the educational expertise that composed their race-based admissions policy,[267] it was not unforeseeable that such voiced entitlement to judicial deference would repel Justice Kennedy, as he had always adhered to the principle that such deference confounds the fundamental notions of strict scrutiny.[268]

Despite its failure to persuade Justice Kennedy's decision, there was one factor that could have persuaded the Justice to accept UT's race-conscious admissions policy in *Fisher*. In his *Parents Involved* concurrence, Justice Kennedy significantly distinguished *Grutter's* approved diversity plan from the Seattle School District plan, stating that, unlike *Grutter's* plan, which "considered race as only one factor among many,"[269] the Seattle School District's plan applied "a mechanical formula that ha[d] denied hundreds of students

707 (2007).

264. Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).

265. *Id.*

266. *Id.*

267. Fisher v. Univ. of Tex., 631 F.3d 213, 256 (5th Cir. 2011).

268. *Grutter*, 539 U.S. at 394.

269. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 793 (2007).

their preferred school on the basis of three rigid criteria: placement of siblings, distance from schools, and race."[270] If the school district's plan had evaluated its students "for a whole range of their talents and school needs with race as just one consideration," it is likely Justice Kennedy would have considered *Grutter* as guiding precedent.[271] Justice Kennedy could have viewed UT's program as analogous to *Grutter's* approved plan, as it merely considers race as one of several different factors in its admissions process;[272] however, the Justice ultimately chose to ignore the existence of this congruency.

Although efforts to predict an affirmative action program that Justice Kennedy would approve of are purely conjectural, analyzing his *Parents Involved*, *Grutter*, and *Fisher* opinions reveal the fundamental rubric such an accepted program would probably possess. First, given his abhorrence for liberally conferring deference upon the means academic administrators choose to implement race-conscious admissions policies,[273] Justice Kennedy would likely only approve of an affirmative action policy that showed deference to the university's *decision* that a racially diverse student body will contribute to its overall educational goals. Second, the Justice has repeatedly voiced the dangers inherent in assessing race in a non-holistic, non-individualized manner;[274] thus, an approved admissions program considering race would have to follow *Grutter's* framework and view race as merely "one factor among many."[275]

Third, unlike the Seattle School District's program, which failed strict scrutiny after it could not "account for the [racial] classification system it ha[d] chosen,"[276] an affirmative action policy that Justice Kennedy would approve of must show studies and statistics that persuasively support its use of racial distinctions, "show[ing] its plan to be narrowly tailored to achieve its own ends."[277] Finally, Justice

270. *Id.*
271. *Id.*
272. *Fisher*, 631 F.3d at 228.
273. *Grutter*, 539 U.S. at 394.
274. *Grutter*, 539 U.S. at 391; *Parents Involved*, 551 U.S. at 788.
275. *Parents Involved*, 551 U.S. at 793.
276. *Id.* at 787.
277. *Id.*

Kennedy stated in his *Parents Involved* concurrence that affirmative action programs that "are race conscious but do not lead to different treatment based on a [racial] classification" may not even demand strict scrutiny in order to be found permissible.[278] The Justice even gave several examples of tolerable race conscious measures, such as strategically selecting the sites of new schools and drawing attendance zones with a mind towards the neighborhood demographics.[279] Given this perspective, if a school district or university were to implement a race-conscious admissions policy without a dissimilar racial impact, Justice Kennedy would be more likely to approve of the program.

CONCLUSION

The Court's decision in Fisher did not alter Grutter's significance, leaving it to a future Supreme Court decision to elucidate the numerous ambiguities that still encompass the controversial subject of affirmative action. Instead of reshaping the boundaries regarding affirmative action, or creating a scenario where affirmative action was invalidated altogether, the Fisher opinion essentially left the legal landscape undisturbed. While it is clear from Justice Kennedy's majority opinion, as well as his opinion in Parents Involved and Grutter, that he is a proponent of racial diversity as a compelling interest,[280] these opinions also unambiguously illustrate Justice Kennedy's strict adherence to the principles of strict scrutiny.[281] If too much deference is given to a university's implementation of race-based considerations, such a policy, in Justice Kennedy's eyes, will fail to surmount the strict scrutiny hurdle.[282] Unfortunately for UT's admissions policy, the Fifth Circuit conferred unyielding deference to UT's policy when the court upheld the judgment of the lower district court.[283] Consequentially, Justice Kennedy's Fisher opinion articulated the same position he held in Grutter, that such deference "is

278. *Id.* at 788.
279. *Id.*
280. Grutter v. Bollinger, 539 U.S. 306, 387 (2003); *Parents Involved*, 551 U.S. at 783.
281. *Grutter*, 539 U.S. at 394.
282. *Id.*
283. Fisher v. Univ. of Tex., 631 F.3d 213, 232 (5th Cir. 2011).

antithetical to strict scrutiny, not consistent with it."[284]

Nevertheless, even though Justice Kennedy may disapprove of the Fifth Circuit's deferential demeanor towards UT's admissions policy, Grutter's principle holding, that student body diversity is a compelling interest,[285] remains good law post-Fisher. But despite Grutter's continued relevance, several questions regarding the interpretation of that ruling continue to remain. Future Supreme Court decisions must decide the pertinent questions that Fisher raised, but left unanswered, such as the extent to which a university's "expert opinion" should be afforded due deference, or precisely what measures should be used to determine whether "critical masses" of underrepresented minority students have been obtained.

After Fisher, the same opacities that have encompassed affirmative action post-Grutter and Parents Involved continue to exist. But despite such unanswered questions, the Court did make one resounding clarification in determining that the deference bestowed upon universities and the "presumed good faith" afforded their race-based considerations[286] confound the fundamental essence of strict scrutiny, allowing purposeful discrimination without significant judicial scrutiny.[287] The Court capitalized on that opportunity to clarify that facet of Grutter, taking a small but measureable step toward the temporal approximation Justice O'Connor articulated in Grutter. Post-Fisher, the legal landscape as it relates to affirmative action has taken a perceptible step towards the principles articulated in Korematsu: that legal restrictions curtailing the rights of a single racial group must be subjected to the strictest of scrutiny.[288]

284. *Grutter*, 539 U.S. at 394.
285. *Id.* at 325.
286. *Id.* at 329.
287. Fisher v. Univ. of Tex., 631 F.3d 213, 249–50 (5th Cir. 2011) (King, J., specially concurring).
288. Korematsu v. United States, 323 U.S. 214, 216 (1944).