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ARTICLE

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN: AN ANALYSIS OF RACE-CONSCIOUS ADMISSIONS PROGRAMS AND HOW THE SUPREME COURT WILL RULE

By: Kevin McNelis

I. Introduction

More than half a century removed from the Civil Rights movement, diversity remains a hotbed issue in American society, particularly on college campuses. The overarching issue presented in *Fisher v. University of Texas at Austin* is whether a public university can consider an individual's race in its admissions decisions. The answer depends on how the Supreme Court will interpret the Constitution in its upcoming term – notably the Equal Protection Clause of the Fourteenth Amendment, which provides that all United States persons are entitled to the equal protection of the laws.[1]

Diversity has long been asserted as an important factor in a college education. In fact, the Supreme Court approved this belief in the 1978 case *Regents of the University of California v. Bakke,* where it held that achieving a diverse student body is a compelling state interest that can be satisfied by the use of race-conscious

[1] U.S. CONST. amend. XIV, § 1.

admissions programs.[2] What the Supreme Court must decide in *Fisher* is this: how does the University of Texas at Austin's affirmative action plan stand up next to the standards the Court has established in and since *Bakke*? In other words, is the race-conscious admissions program at the University of Texas at Austin ("UT Austin") constitutional?

In this policy note, I will address the history of Supreme Court decisions regarding race-conscious admissions programs at public universities; I will also analyze each justice's tendencies and how their tendencies could affect this decision. In doing so, I will conclude that UT Austin's program is unconstitutional. In its efforts to achieve diversity, it considers race disproportionately among other important factors, thus failing the standard of strict scrutiny.[3]

II. Development of the Law: Supreme Court Decisions and Standards

In order to prohibit racial discrimination in federally-funded programs, Congress enacted the Civil Rights Act of 1964.[4] Title VI of such law specifically provides that no United States citizen shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" based on his or her race.[5] But as the government made its move to prohibit segregation,

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[2] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314–15 (1978). However, race can only be considered if it is done so alongside several other factors. *Id.*

[3] *See generally* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that strict scrutiny standard must be applied whenever racial classifications are imposed by the government).

[4] *Overview of Title VI of the Civil Rights Act of 1964*, THE UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-2000d-et-seq (last updated Jan. 22, 2016).

[5] 42 U.S.C. § 2000(d) (1964).

an entirely different question arose as to whether public universities could achieve integration by implementing race-conscious admissions programs.[6]

In *Bakke*, the Court dealt with the University of California at Davis ("UC Davis") medical school's race-conscious admissions program, which allocated sixteen of one hundred seats of its incoming class to minority students.[7] Because this allocation "absolutely excluded" non-minorities from a certain amount of seats and because it used race as the sole factor in achieving diversity, the program was unconstitutional under a strict scrutiny analysis.[8] The Court found the program operated essentially as a racial quota.[9] Under the strict scrutiny analysis, the program failed the narrow tailoring requirement; as Justice Powell opined, it was not "necessary to promote [the] substantial state interest" of diversity.[10] Although the Court struck down the UC Davis program, it made clear that race-conscious admissions programs, if done properly, could be constitutionally permissible to achieve diversity within the classroom.[11] In fact, Powell expounded upon his belief that

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[6] *See generally A Brief History of Affirmative Action,* UCI: OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY, http://www.oeod.uci.edu/aa.html (last updated June 23, 2015). In 1961, President John F. Kennedy issued Executive Order 10925. *Id.* One provision of such order provided that government contractors "take affirmative action" to ensure that no employee was treated differently due to their "race, creed, color, or national origin." *Id.* Superseding this was Executive Order 11246, issued by President Lyndon B. Johnson in 1965, which prohibited employment discrimination based on "race, color, religion, and national origin" by employers whom received federal funds. *Id.*

[7] CHARLES V. DALE, CONG. RESEARCH SERV., RL30410, AFFIRMATIVE ACTION AND DIVERSITY IN PUBLIC EDUCATION: LEGAL DEVELOPMENTS 4 (2012).

[8] *Id.*

[9] *Bakke*, 438 U.S. at 320; *see* DALE *supra* note 7, at 4.

[10] *Bakke*, 438 U.S. at 320.

[11] *Id.*

a constitutionally sound race-conscious admissions program would actually benefit students.[12]

In the end, the *Bakke* court delivered a total of six opinions,[13] with Powell "split[ting] the difference between two four-justice pluralities."[14] In the 5–4 decision that struck down UC Davis' program, only Powell's opinion included the idea that the state had a compelling interest in achieving a diverse student body.[15] Accordingly, it came as no surprise that race-conscious admissions programs at other public universities remained relatively unaffected by *Bakke* in the decades following its decision.[16] It was not until the Supreme Court heard two Michigan cases – *Grutter v. Bollinger* and *Gratz v. Bollinger* – that the fragile precedent of *Bakke* would be revisited.[17]

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[12] *Id.* at 314 (1978) (Justice Powell remarks that a school with a diverse student body is advantaged by the backgrounds and experiences each student brings. The diversity enhances the learning experience because students are subject to new ideas that may better equip them in their studies and future careers).

[13] *Id.* at 269, 324, 379, 387, 402.

[14] DALE, *supra* note 7, at 6. One of these four-Justice pluralities, led by Justice Stevens, struck down the university's racial quota on statutory civil rights grounds. *Id.* The other plurality, led by Justice Brennan, would have found the racial quota constitutional on the grounds that it would right past wrongs in regards to racial discrimination. *Id.* Powell, in reaching the same result as the Stevens plurality, found the quota unconstitutional. *Id.* Therefore, in a 5–4 decision, the Court struck down the University of California at Davis' racial quota, but under different reasoning. *Id.*

[15] *Id.* at 7.

[16] *See* John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South: What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2148 (2004). I say relatively because outright quota system was declared unconstitutional.

[17] DALE, *supra* note 7, at 8–10; *see* Paula C. Johnson, *Grutter and Gratz Synopsis on Affirmative Action*, COLUMBIA LAW SCHOOL BLOGS 1, 1 (2009), http://blogs.law.columbia.edu/salt/files/2009/08/Grutter-and-Gratz-Synopsis-on-Affirmative-Action.pdf. Similar to *Bakke*, *Grutter* and *Gratz* both dealt with race-conscious admissions programs at the University of Michigan Law School and undergraduate program,

In *Grutter*, the Court subjected University of Michigan ("Michigan") Law School's race-conscious admissions program to the same strict scrutiny analysis that it applied in *Bakke*.[18] That is, the program had to be narrowly tailored in order to further a compelling state interest.[19] Adhering to Justice Powell's observation in *Bakke* – that race can only be "one element in a range of factors" – Michigan's law school used race only as a "plus" factor, allowing a more individualized review of each applicant without his or her race becoming a defining factor.[20] The Court held that a program that considers race only as a plus factor satisfies the narrow tailoring requirement.[21] Accordingly, the Court found the program constitutionally permissible and distinct from that in *Bakke*,

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respectively. Johnson, *Grutter and Gratz Synopsis on Affirmative Action*, COLUMBIA LAW SCHOOL BLOGS at 1. The claimants in each case alleged that they were unlawfully denied admission because race was the predominant factor in the decision. *Id.* Both programs considered race as one of the many factors that went into the admissions decision. *Id.* However, the law school did so in a "holistic manner," whereas the undergraduate program did so within a 150-point system. *Id.* In the latter approach, if one's race was considered in the minority, that applicant received twenty points. *Id.* The Court found that this "placed too much emphasis on race in an inflexible, determinative way." *Id.*

[18] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[19] *Id.* at 333 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.")).

[20] *Id.* at 336–37; *Bakke*, 438 U.S. at 314.

[21] *Grutter*, 539 U.S. at 334 (explaining that when race is considered only as a plus factor, an applicant can be compared holistically to others, whereas a quota system based on race allows certain individuals – like minorities – protection from that comparison); *see Bakke*, 438 U.S. at 317.

despite several dissenting Justices' aversion surrounding the term "critical mass."[22]

In *Gratz*, the Court ruled differently and struck down the undergraduate program's 150-point scale approach, in which one hundred and fifty points were available to applicants, but only a total of one hundred was required to gain admission with twenty points being applied if the applicant was a minority.[23] This decision harkened back to what Justice Powell opined in *Bakke*: that admissions programs should individually assess each applicant; no single characteristic, such as race, should hold a fixed weight in regards to admissions decisions.[24] The *Gratz* Court decided that the system in which minority applicants automatically received a 20-point award was not narrowly tailored to achieve the university's compelling interest of a diverse student body, and thus failed the test of strict scrutiny.[25] *Grutter* and *Gratz* collectively provided the framework, that race can be used only as one of many factors, for race-conscious admissions programs at public universities. [26] However, Justice O'Connor's majority opinion in *Grutter* foretold of a time – then "25 years from

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[22] *Id.* at 343–44. The term "critical mass" refers to the amount of underrepresented minority students Michigan Law School desired to enroll in order to attain the "educational benefits of a diverse student body." *Id.* at 330. However, no "number, percentage, or range of numbers or percentages" can define a critical mass exactly. *Id.* at 318. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas have a problem with this classification. *Id.* at 379, 390. Kennedy, particularly, denounces the concept as a "delusion used . . . to achieve numerical goals indistinguishable from quotas." *Id.* at 389. Rehnquist and Scalia each label it as a "sham." *Id.* at 347, 383.

[23] Johnson, *supra* note 17, at 1; *see* Peer Caldwell, *Defining the New Race-Conscious Frontier in Academic Admissions: Critical Perspectives on Grutter v. Bollinger*, 31 T. MARSHALL L. REV. 197, 200 (2006).

[24] Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

[25] *See id.* at 270–75.

[26] *See generally Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 345.

now" – when the use of racial preferences would "no longer be necessary to further the interest [of diversity]."[27] Today, American society finds itself past the halfway marker of O'Connor's 2003 prediction, but the use of race-conscious admissions programs at public universities is still a hotbed issue, perhaps now more than ever.

III. Current Policy: *Fisher* and How It Measures Up

In 1997, Texas enacted what is commonly referred to as the Top Ten Percent law, which automatically admits to public universities any applicant who "graduated with a grade point average in the top 10 percent of the student's high school graduating class."[28] Proponents of the law argue that deserving and qualified applicants are ensured admission.[29] Those opposed to the law argue that awarding automatic admission solely on class rank bars the evaluation of other potentially qualifying attributes of applicants.[30] This poses a problem in and of itself, because, since the enactment of the law, public universities in Texas, particularly UT Austin, have seen an increasing number of incoming freshmen enrolled through the Top Ten Percent

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

[28] TEX. EDUC. CODE § 51.803(a) (West 1997); *see* DALE, *supra* note 7, at 12.

[29] Steven Thomas Poston, Comment, *The Texas Top Ten Percent Plan: The Problem It Causes for The University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257, 267–68 (2008).

[30] *Id.* at 260. UT Austin President William Powers, Jr. remarked that relying so heavily on class rank ignores certain individuals who may not necessarily be in the top ten percent of their graduating class but excel in other areas. *Id.* (citing Holly K. Hacker, *Class Rank is Low on Many Colleges' Lists: UT Admitting More to Make up for Law Some Say Ignores Other Factors*, DALLAS MORNING NEWS, Dec. 2, 2007, at 1A).

law.[31] By 2008 – the year Abigail Fisher sought admission – over eighty percent of UT Austin's incoming freshman class was admitted by way of the law.[32]

The question – at issue in *Fisher v. University of Texas* – then became, how does the university fill the remaining seats? It did so, and continues to do so, by adopting a race-neutral approach that considers "essays, leadership, awards and honors, work experience, extracurricular activities, community service, and special circumstances such as socioeconomic status or family responsibilities."[33] A few years before Abigail Fisher applied for admission to UT Austin, however, the university added race and ethnicity to those criteria.[34] When Fisher was denied admission, she sued, alleging that the university had already acquired a "critical mass" of minority students by way of the Top Ten Percent law and that there was no reason to consider race on top of that.[35]

But what is a critical mass?[36] During the district court's hearing of *Grutter*, Erica Munzel, Michigan Law School's Director of Admissions, testified that it is within the university's discretion to decide when a critical mass

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[31] Poston, *supra* note 29, at 259. The fear is that, ultimately, "UT Austin will only be able to enroll automatically admitted students who qualify by way of the Plan." *Id.*

[32] *Id.*; *see* DALE, *supra* note 7, at 12.

[33] DALE, *supra* note 7, at 12.

[34] *See* HOUSE RES. ORG., SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW? TEX. H.R. FOCUS REP. NO. 79–7, Reg. Sess., at 7 (2005), http://www.hro.house.state.tx.us/focus/topten79-7.pdf.

[35] Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 501 (2012) [hereinafter *Diversity Within Racial Groups*] (finding the phrase "critical mass" became the accepted terminology regarding the body of minority students the university wished to see represented in its incoming freshman classes). *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

[36] *See supra* text accompanying note 23.

has been reached.[37] The Court accepted the term, but it made clear during its first hearing of *Fisher* in 2012 that the *Grutter* decision did not "hold that good faith would forgive an impermissible consideration of race."[38] In a decision supported by seven justices, the Supreme Court remanded the case to the Fifth Circuit, asking for a "more stringent" review of whether UT Austin should be allowed to consider race within its admissions criteria.[39] Essentially, the Court held that the Fifth Circuit failed to employ strict scrutiny in its review of UT Austin's program.

With its second go at *Fisher*, the Fifth Circuit, in a 2–1 decision, upheld UT Austin's race-conscious admissions program.[40] The court held the program to be narrowly tailored because the consideration of race was necessary to target certain minority groups, affirming the idea that "no workable race-neutral alternatives" could achieve the same goal.[41] After the Fifth Circuit denied her

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[37] *See Grutter*, 539 U.S. at 318. Specifically, Munzel stated that "there is no number, percentage, or range of numbers or percentages that constitute[s] critical mass." *Id.*

[38] Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421 (2013).

[39] Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 764–65 (2015) [hereinafter *Narrowly Tailored but Broadly Compelling*]. In essence, the Court wanted factual proof from UT Austin to support its contention that, in order to achieve diversity, its race-conscious admissions program was necessary, along with the race-neutral approach of the Top Ten Percent law. *Id.*

[40] Fisher v. Univ. of Tex., 758 F.3d 633, 659–60 (5th Cir. 2014).

[41] *Fisher*, 758 F.3d at 644, 657 (citing *Fisher*, 133 S. Ct. at 2420). *Narrowly Tailored but Broadly Compelling*, *supra* note 39, at 791 (quoting *Fisher*, 758 F.3d at 657). The Fifth Circuit mentions that in 2008 – the year that Fisher sought admission – eighty-one percent of UT Austin's incoming freshman class was admitted via the Top Ten Percent law. *Fisher*, 758 F.3d at 657. Out of the remaining nineteen percent of seats left available via the race-conscious, holistic approach, twelve percent of those admitted were white; 3.3 percent were Hispanic or African American. *Id.* To the court, the holistic approach "overwhelmingly and disproportionately" represented white students,

request for a hearing *en banc*, Fisher again appealed to the Supreme Court, which heard the case for the second time on December 9, 2015.[42]

IV. Analysis of the Policies

As the Fifth Circuit pointed out during its second review of *Fisher*, the Top Ten Percent law functions based off a "fundamental weakness" in the Texas high school system.[43] Under this law, UT Austin draws a large number of its applicants from Dallas, Houston, and San Antonio – three areas that hold over half of the Texas population and, unfortunately, see some of the most pronounced cases of segregation within their school systems.[44] Nevertheless, with its look at *Fisher*, the Supreme Court must decide whether the Top Ten Percent law produces adequate diversity at UT Austin, or whether the addition of UT Austin's race-conscious holistic review is necessary in order to produce such diversity.

In 2004, the year before UT Austin implemented its race-conscious admissions program, minority enrollment of African Americans and Hispanics was at a combined 21.4

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thus it agreed with the university's argument that a consideration of race was necessary in order to "target minorities with unique talents and higher test scores to add to the diversity" of the incoming class. *Id.*

[42] *Narrowly Tailored but Broadly Compelling*, *supra* note 39, at 766. *See generally* Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), http://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?_r=0.

[43] *Fisher*, 758 F.3d at 650–51 (noting that the "sad truth," as the court puts it, is that there is a "de facto segregation" of schools within the state of Texas which allows the Top Ten Percent law to achieve diversity).

[44] *Id.* at 651

percent, both having increased from 2003.[45] Caucasian enrollment decreased from 59.3 percent to 58.6 percent.[46] That same year, "77% of the enrolled African American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students."[47] Looking at the statistics generally, these numbers indicate that the UT Austin achieved its goal of a diverse student body without the help of a race-conscious admissions program. I say generally because it is difficult to look at the numbers any other way when UT Austin, much to the disapproval of the Supreme Court's conservative justices, has not defined critical mass.[48]

Though UT Austin is not required to place a numerical value on critical mass, it should be required to define its goal more precisely.[49] Under a strict scrutiny analysis, the Court must verify that UT Austin can only achieve the benefits of diversity by using race in its admissions process.[50] This will be difficult because, as Judge Garza mentioned in his dissent in the Fifth Circuit's second *Fisher* decision, the Court "cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends."[51]

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[45] Jonathan W. Rash, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict Scrutiny*, 8 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 25, 28 (2012).

[46] Press Release, University of Texas at Austin, Fall enrollment figures show greater percentage of minorities at The University of Texas at Austin (Sept. 14, 2004) (on file with UT Austin's website) http://news.utexas.edu/2004/09/14/nr_enrollment.

[47] Fisher v. Univ. or Tex., 631 F.3d 213, 224 (5th Cir. 2011).

[48] *See Diversity Within Racial Groups*, *supra* note 35, at 472 n.23.

[49] *Id.* at 475–76; *see* Fisher v. Univ. of Tex., 758 F.3d 633, 667 (5th Cir. 2014).

[50] Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).

[51] *Fisher*, 758 F.3d at 667.

V. How the Court Will Rule

Chief Justice Roberts and Justices Scalia, Alito, Thomas, and Kennedy have "never voted to uphold the affirmative action programs at issue in any racial affirmative action case that the Supreme Court has resolved on the merits of a constitutional challenge."[52] Yet out of those five justices, Kennedy may be the most important.[53] Many legal analysts believe that Justice Kennedy will be the swing vote in the Court's upcoming decision, a position he seems to have assumed since Justice O'Connor's retirement in 2006.[54] This consideration is crucial because UT Austin's race-conscious admissions program is based heavily off of the Michigan Law School program that was upheld in *Grutter*, a case in which Justice Kennedy dissented.[55] What's more, his views on race-conscious

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[52] Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 48 (2012).

[53] Four of the nine justices who sat for *Grutter* and *Gratz* remain on the Supreme Court – Scalia, Thomas, Breyer, Ginsberg, and Kennedy. This article was written before the death of Justice Scalia, which admittedly, could affect the result in a subsequent affirmative action case. Out of the other four, three were in the *Grutter* majority – O'Connor, Stevens, and Souter. Rehnquist dissented. *See generally Grutter*, 539 U.S. 306. Roberts, Alito, and Sotomayor were the three justices who heard the second *Fisher* case but were not present during *Grutter* and *Gratz* (keeping in mind that Kagan recused herself from the case). *See Diversity Within Racial Groups, supra* note 35, at 9.

[54] Eboni S. Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, 48 VAL. U.L. REV. 519, 523 (2014).

[55] *Id.* at 529; *see* Grutter v. Bollinger, 539 U.S. 306, 389 (2003). In his dissent, Kennedy stated that "the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." *See generally* Spann, *supra* note 52, at 55.

admissions programs, since the *Grutter* decision, have remained relatively the same.[56]

While on the surface his leanings match him to the Court's conservative bloc, Justice Kennedy is different from Roberts, Scalia, Alito, and Thomas when it comes to race-conscious admissions programs.[57] In his *Grutter* dissent, Kennedy reaffirmed what Justice Powell opined in *Bakke*, by holding that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."[58] But where he differs – and quite significantly so – from the Court's liberal bloc, is on its application of strict scrutiny.[59] Referring to its application of strict scrutiny in *Grutter* as "perfunctory," Kennedy believed the majority abandoned the standard, giving too much deference to Michigan Law School's guarantee that its race-conscious admissions program was constitutional.[60] Deference, according to Kennedy, is "antithetical" to strict scrutiny.[61] To him, details matter, and the details in *Grutter* mirror those in *Fisher*—they are practically nonexistent, according to Kennedy's previous stated preferences.[62]

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[56] *Will the Supreme Court End Affirmative Action? A preview of Fisher v. University of Texas at Austin on the Eve of Oral Argument*, CATO EVENTS PODCASTS (Dec. 7, 2015) (downloaded using iTunes).

[57] *See id.*

[58] *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).

[59] Paul Horwitz, *Fisher, Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 492 (2013).

[60] *Grutter*, 539 U.S. at 388–89 (Kennedy, J., dissenting).

[61] *Id.* at 394.

[62] *Grutter*, 539 U.S. at 357 (Thomas, J. and Scalia, J., concurring in part and dissenting in part). Justices Thomas and Scalia refer to Michigan Law School's goal of achieving diversity as a "we know it when we see it" approach. *Id.* He insists that, because the university offers relatively little in understanding what a critical mass is, the approach is "not capable of judicial application." *Id.* Kennedy endorses this opinion in his dissent. *See Grutter*, 539 U.S. at 388–89 (Kennedy, J., dissenting);

With Justice Kagan's recusal from the case – due to her previous position as Solicitor General – Kennedy will more than likely have the deciding vote.[63] If he abandons his historically unflinching stance and casts his vote with the liberal bloc, the result would be a 4–4 tie, in which the Fifth Circuit's ruling would be controlling. However, the Court will likely treat UT Austin's program as parallel to that of Michigan Law School's program, holding the university to its contention that "[its] admissions program is precisely the type of system expressly upheld in *Grutter*."[64] Undoubtedly cognizant of the similarities between *Fisher* and *Grutter*, Kennedy will likely observe his past position and vote to strike down UT Austin's program as unconstitutional under the standard of strict scrutiny.[65]

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see also Will the Supreme Court End Affirmative Action?, *supra* note 56.

[63] *Diversity Within Racial Groups*, *supra* note 35, at 463 n.3.

[64] Brooks H. Spears, Casenote, *"If the Plaintiffs are Right, Grutter is Wrong": Why Fisher v. University of Texas Presents an Opportunity for the Supreme Court to Overturn a Flawed Decision*, 46 U. RICH. L. REV. 1113, 1137 (2012) (citing Brief in Opposition to Motion for Preliminary Injunction at 16, Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. May 5, 2008)).

[65] Rash, *supra* note 45, at 26. *See generally Grutter*, 539 U.S. at 389, 394–95 (Kennedy, J., dissenting); *Fisher*, 758 F.3d at 646. In his *Grutter* dissent, Kennedy notes that eighty to eighty-five percent of applicants to Michigan Law School were admitted based on undergraduate grades and Law School Admissions Test scores alone. *Id.* at 389. Similarly, in *Fisher*, over 80 percent of UT Austin applicants were admitted via the Top Ten Percent law. Kennedy's concern is how universities like Michigan and UT Austin fill the remaining seats by considering race, among other factors. *Fisher*, 758 F.3d at 646. To Kennedy, considering an applicant's race at this point in the admissions process can disadvantage those applicants devoid of any minority status. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). Kennedy asserts that "the numerical concept of critical mass has the real potential to compromise individual review." *Id.* Further, in Kennedy's dissent in *Grutter*, he stated his belief to be that Michigan could have effectively used other race-neutral programs to accomplish the same goal of attaining a diverse student body. *Id.* Judge Garza, the sole

VI. What It Means for Other Race-Conscious Admissions Programs Nationwide

A decision to strike down UT Austin's program would allow the Court to "rewrite the deferential standard espoused in prior cases."[66] In *Grutter*, Justice O'Connor disputed the long-held notion that strict scrutiny is to be "strict in theory, but fatal in fact" and asserted that "context matters" when applying strict scrutiny.[67] However, this notion is exactly what Justice Kennedy opposed when making his remark that deference is antithetical to strict scrutiny.[68] If UT Austin's program is invalidated, Kennedy and the Court's conservative bloc will have a chance to revise the strict scrutiny analysis to be more fatal in fact.

With a strict scrutiny analysis that is more fatal in fact, the Court – especially Kennedy – would likely endorse an instruction that "deference . . . cannot coexist with strict scrutiny."[69] As it stands now, *Grutter* allows an overly-deferential standard in which courts defer to universities in their usage of their race-conscious admissions programs, but after *Fisher*, universities may be required to demonstrate that it "actually needs more diversity in order

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dissenter in the Fifth Circuit's ruling in the second *Fisher* case, believes the same can be said of UT Austin—it did not show that "qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law." *Fisher*, 758 F.3d at 669 (Garza, dissenting).

[66] *See* Rash, *supra* note 45, at 43; *see also* Eric K. Yamamoto, Carly Minner, & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 248 (2006). *Grutter*, among others, was a pivotal case that highlighted a shift in how the Court applied its strict scrutiny analysis.

[67] *Grutter*, 539 U.S. at 326–27 (citing Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995)).

[68] *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

[69] Rash, *supra* note 45, at 43 (noting, however, that universities, for First Amendment reasons, "must be afforded some level of deference" in achieving diversity).

to attain the educational benefits that flow therefrom . . . even before reaching the question of whether the particular policy at issue is narrowly tailored."[70]

While the Court may strike down UT Austin's program, diversity will remain a compelling state interest appropriate for universities to pursue. Several states may elect to ban the consideration of race, however, in order to avoid a strict review from federal courts.[71] Those states that do will consider different factors separate from yet similar to race that could effectively yield the same desired result.[72] So far, in states that have abandoned race-conscious admissions programs, public universities have "increased their emphasis on factors such as overcoming adversity, geographic variety, and socioeconomic disadvantage."[73] In doing so, the future of the ultimate public policy objective established over twelve years ago in *Grutter* will be advanced through a mechanism that does not consider race as one of many factors.

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[70] *Id.* at 44.

[71] Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES, April 22, 2014, http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=1.

[72] Kaitlin Mulhere, *How Wednesday's Supreme Court Case Could Change College Affirmative Action*, TIME: MONEY, Dec. 8, 2015, http://time.com/money/4140410/preview-fisher-texas-supreme-court-affirmative-action/.

[73] *Id.*