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## New Rules for Affirmative Action in Higher Education

A Practical Guide to *Fisher v. University of Texas* for Colleges and Universities

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In May 2005, the University of Texas at Austin (UT) hired Greg Vincent as the first-ever “vice provost for inclusion and cross-cultural effectiveness.”<sup>1</sup> His primary responsibilities were to attract students and faculty of color, and to make enrolled students of color feel more welcome.<sup>2</sup>

Vincent predicted that by 2015, the student body and faculty roster at UT would look “dramatically different.”<sup>3</sup> And for a university plagued by headline-making acts of racial violence—from the dropping of bleach-filled water balloons on black and Asian students,<sup>4</sup> to the egging and defacing of a Martin Luther King Jr. statue,<sup>5</sup> to the “Affirmative Action Bake Sale” and proposed “Catch an Illegal Immigrant” game in 2013,<sup>6</sup> among many others<sup>7</sup>—Vincent certainly had his work cut out for him. Unfortunately, it is my belief that Vincent’s efforts, along with the efforts of all other similarly situated vice provosts, vice presidents, committees on diversity, and admissions offices across the country,

have been made significantly more difficult by the July 2013 U.S. Supreme Court decision *Fisher v. University of Texas*.<sup>8</sup>

In July 2012, nearly one year before the Court decided *Fisher*, Philip T. K. Daniel and I endeavored to predict the outcome of the case in our article *Requiem for Affirmative Action in Higher Education*.<sup>9</sup> As the title suggests, we anticipated that the Court might use *Fisher* to “clarify” the rules of affirmative action in higher education as established in the 2003 decision *Grutter v. Bollinger*, and then remand the case back to Texas and the U.S. Court of Appeals for the Fifth Circuit, which would then be asked to apply this “clarified” standard. Should the Supreme Court elect to do this, we wrote, it would be forced to choose between two sets of rules, or standards of review—one conservative,<sup>10</sup> the other moderate,<sup>11</sup> but both known as “strict scrutiny”—because “the pronouncements of the strict scrutiny standard that exist across *Gratz*, *Grutter*, and [*PICS*],”—three formative Court decisions on affirmative action—are “seemingly incompatible.”<sup>12</sup> Thus the Court would be forced to choose, and choose it did. As anticipated, the incompatibility across *Gratz*, *Grutter*, and *PICS* was resolved by Justice Anthony Kennedy, who articulated a more nuanced, more detailed, and ultimately more conservative set of new rules for affirmative action. Ultimately, his new standard of review presents a far more consequential legal framework for colleges and universities, one through which opponents of affirmative action have acquired new legal mechanisms for challenging traditional, race-conscious affirmative action admissions plans on a court-by-court, state-by-state basis. As Judge Higginbotham, Senior Judge on the Fifth Circuit Court of Appeals, pointed out during *Fisher*’s rehearing on November 13th, 2013:

What is the unfairness of letting [UT] go forward under the [*Fisher*] standard? We obviously—the district court and this court—were seriously mistaken in not following the dissent in *Grutter*, by not having anticipated that it would become [the rule]. Going forward, in fairness perhaps, [UT] ought to be allowed to meet the standard [in *Fisher*]. One can say, “Well that’s always the standard.” Well, of course strict scrutiny was always the standard, *but it was strict scrutiny as stated by Justice O’Connor [and] to which Justice Kennedy dissented* [in *Grutter*.]

In response to *Fisher*, this chapter serves three purposes. First, it recognizes the considerable evolution of the Court’s affirmative action jurisprudence between *Grutter* and *Fisher*, and details *Fisher*’s new rules for

race-conscious admissions plans. Second, it offers practical, easy-to-apply guidance to colleges and universities seeking to comply with these rules. Finally, and most importantly, it informs those committed to social justice and substantive equality that we are on notice: *Fisher* represents a deliberate and measured step forward on the path to colorblindness. It is a blueprint for destabilizing race-conscious admissions plans. This is our warning, and we must react accordingly.

One final point: While *Fisher* introduces real, measurable setbacks for social justice and diversity advocates, it also offers an opportunity to transform our complacent, “check the box” affirmative action admissions plans into results-oriented, truly inclusive mechanisms of social mobility. By now it is clear that traditional affirmative action admissions plans, in operation, disproportionately benefit upper-middle-class and middle-class applicants of color. As a result, these programs are not only failing to help those most in need, but are handing those colleges and universities that would use it a brochure-ready pretext for the continuation of long-running, well-known, and irrefutably well-evidenced admissions plans that discriminate against low-income applicants.

At the same time, other chapters in this volume discuss an admissions system based on socioeconomic status (SES) known as “class-based affirmative action,” which, by design, does not include race as a factor in admissions. While such an admissions plan would most likely be immune to even the most exacting judicial review, and while I firmly believe that colleges and universities should supplement their existing admissions plans—race-conscious or not—with SES indicia in order to better identify, target, and recruit disadvantaged applicants, I do not support an admissions system that purges race from the admissions process in the name of political expediency. While “class-based affirmative action” is a praiseworthy contingency plan for a world where race-conscious affirmative action has been outlawed, I believe it exists today as an unfortunate byproduct of our lingering inability to comprehend America’s ongoing struggle with racism.

### A Decade of Deference: From *Grutter* to *Fisher*

Picture the debate over race-conscious admissions plans as Watson and Crick’s famed double helix, a doctrinal wrapping of sorts, with competing ideological strands bound together in structural symmetry. The University of Texas’s admissions policies, so intractable from the jurisprudential

### Timeline of Significant Cases Impacting Affirmative Action

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*Bakke v. Regents of the University of California* (1978)

*Adarand v. Peña* (1995)

*Hopwood v. Texas* (5th Circuit) (1996)

*Grutter v. Bollinger* (6th Circuit) (2002)

*Grutter v. Bollinger, Gratz v. Bollinger* (2003)

*Parents Involved in Community Schools v. Seattle School District No. 1* (2007)

code behind the debate over affirmative action, could probably account for no less than one full helix. Esteemed royalty, it would seem, in the house of perpetual controversy.

Involvement in precedent-setting Supreme Court decisions is nothing new for UT—the law school’s admissions policies were infamously deemed unconstitutional in perhaps the most significant desegregation case<sup>13</sup> for civil rights advocates on the road to *Brown v. Board of Education*<sup>14</sup>—so it comes as little surprise to followers of Supreme Court jurisprudence that UT’s admissions policies are again tied up in the Supreme Court’s prevailing wisdom on affirmative action.

While UT holds the record, the Court’s initial brush with race-conscious admissions plans came in the form of *Regents of the University of California v. Bakke*,<sup>15</sup> a 1978 case announcing that race could be considered in admissions plans so long as it was “necessary to promote a substantial state interest.”<sup>16</sup> Some seventeen years later, the Court introduced a modern phrasing of this standard of review, known as “strict scrutiny,” which was to be applied to any state action involving racial classifications, including affirmative action.<sup>17</sup> Strict scrutiny, requiring that any racial classifications be “narrowly tailored” to achieve a “compelling state interest,” presented a new challenge for affirmative action in general, and for diversity in particular, as opponents of affirmative action regularly asserted that diversity itself did not constitute a compelling state interest.

After conflicting decisions on diversity emerged between the Fifth Circuit Court of Appeals (in the form of *Hopwood v. Texas*, involving none other than UT) and the Sixth Circuit Court of Appeals (in the form of *Grutter v. Bollinger*), the Court elected to resolve the division by hearing *Grutter v. Bollinger* in 2003.

I coin two terms in discussing how the Court approaches its diversity cases. The first is *mission deference*, which refers to the amount of deference a court will give a college or university with regard to its initial choice to pursue diversity. In other words, if a college or university elects to make diversity a part of its mission or a specific goal, how much will a reviewing court pry into that decision, and how thorough of an explanation will the college or university be required to provide?

The second term I use is *admission deference*, which refers to the amount of deference a court will give a college or university's chosen means of effectuating its diversity goals. In other words, if a college or university crafts race-conscious admissions policies designed to foster a "critical mass of minority students," how much will a court pry into those policies, and how thorough of an explanation will the college or university be required to provide?

#### *Affirming Diversity: Grutter v. Bollinger*

**Background:** The *Grutter* case concerned Barbara Grutter, a white, female Michigan resident who applied to the University of Michigan Law School in 1996. The school, seeking to enroll a "critical mass" of students of color, employed a race-conscious admissions plan at the time she applied. Grutter was rejected, and claimed that the admissions plan discriminated against her on the basis of her race. In response, she sued the school for allegedly violating her right to equal protection of the laws under the Fourteenth Amendment.<sup>18</sup>

**Decision:** In a modern-day expression of *Bakke*'s central holding, the *Grutter* Court announced without qualification that diversity in higher education was a compelling state interest, and that strict scrutiny was the appropriate standard of review. Where *Bakke* had offered colleges and universities little direction in the area, the *Grutter* Court strived to flesh out the features of a legally sound, race-conscious admissions plan.

With regard to mission deference, the Court stated that "[t]he Law School's educational judgment that such diversity is essential to its education mission is one to which we defer," because:

- a. the Law School and its amici provided evidence that diversity would yield educational benefits;
- b. the Court would offer similar deference to other "complex educational judgments in an area that lies primarily within the expertise of the university"; and

- c. the Court had a “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”

With regard to admission deference, the Court established that a college or university’s race-conscious admissions plan would be constitutional if it:

- a. provided individualized review of each applicant;
- b. did not amount to a quota;
- c. did not use race as a determinative factor in the admissions system;
- d. did not unduly harm members of any racial group;
- e. gave serious, good faith consideration of workable race-neutral alternatives to achieving student body diversity;
- f. was limited in time; and
- g. was reviewed periodically.

Strict scrutiny, Justice Sandra Day O’Connor wrote for the Court, “does not require exhaustion of every conceivable race-neutral alternative.” But it does require “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”

*Justice Kennedy’s Dissent:* While accepting that diversity in higher education is a compelling state interest and that strict scrutiny is the appropriate standard of review, Justice Kennedy claimed that Justice O’Connor had watered down the “real and accepted meaning” of strict scrutiny in order to approve the law school’s policy, and therefore had not *really* applied strict scrutiny.<sup>19</sup> In the shape of things to come in *Fisher*, Justice Kennedy made clear that he would prefer race-neutral alternatives to the law school’s race-conscious plan, and lamented how the Court had refused to employ true strict scrutiny, which would have pressured universities to “seriously explore race-neutral alternatives.”<sup>20</sup>

### Gratz v. Bollinger

Decided the same day as *Grutter*, *Gratz v. Bollinger* served to install additional constitutional guardrails on *Grutter*’s endorsement of race-conscious admissions plans. Unlike the law school’s plan in *Grutter*, the undergraduate admissions plan at issue in *Gratz* automatically allocated 20 points to applicants who claimed to be underrepresented or ethnic minorities. The *Gratz* Court ultimately found this formula to be unconstitutional, as it made “‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.”<sup>21</sup> In practice, *Gratz* provided colleges and universities with a clear message: admissions plans that quantify race are essentially unconstitutional-on-arrival.

**More Limits on Diversity: Parents Involved in Community Schools v. Seattle School District No. 1**

**Background:** *Parents Involved in Community Schools*, or *PICS*, tested whether the diversity interest could prevail in the K–12 setting. Two public school districts—Seattle, Washington and Jefferson County, Kentucky—had voluntarily adopted race-conscious student assignment plans aimed at ensuring that the racial composition of the participating schools fell within particular ranges. Because the assignment plans relied on race in rare, tiebreaking situations, some students were denied their first-choice schools on the basis of race.

**Decision:** Authored by Justice Kennedy, the controlling opinion in *PICS* held that the plans failed strict scrutiny review because the schools had used a “mechanical formula” that relied on “crude measurements,” and because race-neutral means of achieving the schools’ goals had not been thoroughly explored before the districts resorted to racial classifications. In the shape of things to come in *Fisher*, Kennedy stated that in the K–12 setting, “individual racial classifications may be considered only if they are a last resort to achieve a compelling interest.” Those contending that “there is no other way,” he wrote, must “provide the necessary support for that proposition.”

**Strict Scrutiny, Evolved: Fisher v. University of Texas**

**Background:** The year after Justice Kennedy emphasized the role of race-neutral alternatives in *PICS*, Abigail Fisher, a white, female Texas resident, applied to the undergraduate program at UT. Had she graduated in the top 10 percent of her high school class, she would have received automatic admission to UT under a state law known as the Top 10 Percent plan. The Top 10 Percent plan was adopted by the Texas Legislature in 1997 in response to the Fifth Circuit’s decision in *Hopwood v. Texas*, which, in spite of *Bakke*’s green-lighting of race-conscious plans, prohibited the use of all race-based criteria in admissions decisions.<sup>22</sup> Abigail Fisher did not qualify for Top 10 Percent plan admission, and also did not qualify for admission under UT’s regular, race-conscious admissions plan. Believing that the latter plan’s consideration of her race violated the Fourteenth Amendment, she brought suit against UT.

**Decision:** In an opinion by Justice Kennedy, the Court held that the Fifth Circuit had misapplied the strict scrutiny standard articulated in *Grutter*. The Court “clarified” the rules from *Grutter* and remanded the case back to the Fifth Circuit.

- With regard to mission deference, Kennedy instructed that a college or university's choice to pursue diversity is "an academic judgment to which some, but not complete, judicial deference is proper." This choice must be accompanied by a "reasoned [and] principled" explanation.
- With regard to admission deference, Kennedy held that "the University receives no deference" on the question of whether race-neutral alternatives might suffice. Instead, while restating that strict scrutiny "does not require exhaustion of every conceivable race-neutral alternative," it does require that colleges and universities "demonstrate, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."<sup>23</sup>

### *Continuities and Changes between Grutter and Fisher*

Philip T. K. Daniel and I suggested in July 2012 that if the *Fisher* Court chose to "clarify" the strict scrutiny standard from *Grutter*, "it could choose to adopt either Justice Kennedy's articulation of strict scrutiny" from *PICS*, that is, "'individual racial classifications . . . may be considered only if they are a last resort to achieve a compelling interest,'" or it could retain Justice O'Connor's qualification in *Grutter*, that is, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative[.]" But importantly, we concluded, "the pronunciations of the strict scrutiny standard that exist across *Gratz*, *Grutter*, and *PICS*," are "seemingly incompatible."<sup>24</sup>

Though Justice Kennedy preserves plenty of language from the *Grutter* decision in *Fisher*, including Justice O'Connor's upper limit, "exhaustion" qualification, his resolution of the *Gratz-Grutter-PICS* inconsistency most closely resembles the "last resort" language he introduced in *PICS*. Table 5.1 provides a side-by-side comparison of the *Grutter* and *Fisher* decisions.

Altogether, Justice Kennedy's modifications have either tightened the *Grutter* vice, or established an entirely new standard of review. While Justice Kennedy's mission deference sounds like a restatement—and a toothless one—of an already ineffectual rule, the qualifications he appends to his admission deference standard are far more consequential, likely requiring more searching reviews from courts and more thoughtful explanations from colleges and universities. At a minimum, this new rule essentially tasks colleges and universities with *verifying the necessity* of their plans; and at a maximum, it could require them to demonstrate that their race-conscious admissions plans produce more, or more



Table 5.1. The *Grutter* and *Fisher* Decisions

|                     | <i>Grutter</i>  | <i>Fisher</i>  |
|---------------------|---|--|
| State Interest      | Educational diversity is a compelling state interest.   | Educational diversity is a compelling state interest.  |
| Standard of Review  | Strict scrutiny, which must not be “strict in theory, but fatal in fact.” <sup>a</sup>  | Strict scrutiny, with the new admonition, “strict scrutiny must not be strict in theory but feeble in fact.” <sup>b</sup>  |
| Mission Deference   | “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”   | <ul style="list-style-type: none"> <li>• The choice to pursue diversity is “an academic judgment to which some, but not complete, judicial deference is proper.”</li> <li>• This choice must be accompanied by a “reasoned [and] principled explanation.”</li> </ul>   |
| Admission Deference | <ul style="list-style-type: none"> <li>• Strict scrutiny requires that a university give “serious, good faith <b>consideration</b> of workable race-neutral alternatives that will achieve the diversity the university seeks.”</li> <li>• Strict scrutiny “does not require exhaustion of every conceivable race-neutral alternative.”</li> <li>• The law school was essentially taken at its word that no workable race-neutral alternatives existed.</li> <li>• Universities do not have to sacrifice selectivity or the individualized review process in order to successfully have met the race-neutral test.</li> </ul> | <ul style="list-style-type: none"> <li>• Strict scrutiny requires that a university “<b>demonstrate</b>, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”</li> <li>• Strict scrutiny “does not require exhaustion of every conceivable race-neutral alternative.”</li> <li>• “[T]he University receives no deference” when claiming that race-neutral strategies will not suffice.</li> <li>• No mention of whether universities have to sacrifice selectivity or the individualized review process in order to successfully meet the race-neutral test.<sup>c</sup></li> </ul> |

a. *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

b. *Fisher*, S. Ct. 133 at 2421.

c. In her dissent, Justice Ginsburg suggests that the new *Fisher* test articulated by Justice Kennedy does *not* mean that universities now have to pursue race-neutral plans even when they endanger selectivity or the individualized review process. The Department of Justice has agreed that colleges and universities do not have to adopt methods that compromise other, critical university values like academic standards. The majority opinion was silent on this issue.

cost-efficient, diversity than any available race-neutral plans that would require comparable administrative resources. Following this logic, race-conscious plans that produce only minimal impact<sup>25</sup> (a point raised by Justice Kennedy in *PICS*) could also be subject to fatal review. Yet regardless of how far this rule could reach in application, it no doubt raises the bar for those colleges and universities employing race-conscious plans.

Arthur Coleman’s analysis in “Understanding *Fisher v. the University of Texas*” similarly highlights the complications introduced by Kennedy’s focus on race-neutral alternatives. Yet he nevertheless concludes that the Court “did not upset the legal framework described in *Grutter*.”<sup>26</sup> This interpretation would come as a surprise to Judge Higginbotham from the Fifth Circuit, not to mention Justice Ruth Bader Ginsburg, who offers a similar riposte with her observation “[The majority opinion] stops short of reaching the conclusion [the *Grutter* framework] warrants.”<sup>27</sup> More concerning, though, is Coleman’s bottled pacification that all colleges and universities currently in compliance with *Grutter* remain “on safe ground in the wake of *Fisher*,”<sup>28</sup> an assurance that, at the least, fails to reflect the complexity of *Fisher*’s variable applicability across states. Such quieting counsel might also surprise those colleges and universities operating race-conscious admissions plans in states where race-neutral alternatives are garnering more and more attention, such as Colorado.<sup>29</sup> Overall, Coleman’s placated approach to *Fisher* serves to dilute the potency of interpretations that urge more precautionary and risk-averse responses to the decision.

### A Practical Guide to Complying with *Fisher*

Unfortunately, the constitutionally sound admissions plans imagined, designed, or forecasted by the *Fisher* Court lack clear or easily reproducible legal architecture. In light of this, and being mindful of the fact that *Fisher* provides opponents of affirmative action with a new, potentially disruptive framework, my strongest piece of advice to colleges and universities using or anticipating the use of a race-conscious admissions plan is to either comprehensively reexamine, or completely reconstruct, your existing admissions plans. These efforts, though formidable, will fuel institutional confidence during subsequent admissions cycles.

When the time comes for executing a full review, keep in mind the following three “North Star” guidelines:

1. **Show your work throughout the entire process.** This includes maintaining a chronological, written record of your diversity goals, the benefits you believe diversity will offer, and the race-neutral alternatives that you considered.<sup>30</sup>
2. **Incorporate evidence as available,** including demographic trends, your past experiences with previous goals, plans and alternatives, and anecdotal student and faculty experiences.

3. **Apply exacting, comparative analyses throughout**, drawing from internal and external resources. To this extent, consider engaging an outside contractor or a trusted advisor to lead or review your process. Experienced consultants should be able to provide objective, vetted expertise, along with guidance informed by best practices. On balance, they should be able to review all available, workable, race-neutral options to see if your college or university can achieve critical mass without resorting to race-conscious policies.

#### *Reexamine Your Mission Goals*

The mission goals of your college or university should be reexamined in light of *Fisher*'s new, albeit relatively toothless, rules on mission deference. Recall that under *Fisher*, a college or university's initial choice to pursue diversity must be accompanied by a "reasoned [and] principled" explanation.

One would be hard-pressed to find a college or university mission devoid of reason and principle. Instead, consider how you could seamlessly integrate your diversity goals—discussed below—into your broader mission. In order to make space for this integration, consider disassembling your mission into its component parts, rearticulating those parts with your diversity goals in mind, and then combining those parts again to form a more fluid and thematically congruent directional structure.

#### *If Diversity is among Your Mission Goals, Reexamine All Critical Mass Goals*

At *Fisher*'s rehearing before the Fifth Circuit Court of Appeals, the leadoff question from the bench concerned whether the parties would still be in front of the court in the absence of Texas's Top 10 Percent plan. In other words, could *Fisher* also test universities' straightforward application of the *Grutter* standard, regardless of any existing, race-neutral plans like the Top 10 Percent plan?<sup>31</sup> "[W]e might well be here today," the attorney for Abigail Fisher responded, "if [the university] were unable to establish a critical mass goal and demonstrate how the tools they were using were fit to that goal." Thus even those race-conscious admissions plans faithful to *Grutter*—or as Justice Ginsburg wrote in *Fisher*, "trained on the Court's . . . *Grutter* pathmarker"—might nevertheless now be legally insufficient.<sup>32</sup>

Establishing a diversity goal—almost always *critical mass*—and approaches to measuring this diversity goal—known as *indicia of critical*

*mass*—is thus essential. If the logic behind critical mass seems circular or confusing, it should. This dual goal/measurement tool is one unfortunate consequence of the 1978 *Bakke* decision, which commenced the rolling of the Court’s anti-quantification snowball.<sup>33</sup> Twenty-five years later, the *Gratz* decision provided the death blow that essentially outlawed all admissions plans that attempted to quantify race. In the wake of these obstacles, proponents of affirmative action have pivoted from hard numbers to qualitative, social sciences concepts, which are often based on feedback from students and faculty.

Some indicia that a college or university has achieved critical mass that have been approved by the Court in *Grutter* and that were stressed in *Fisher* include:

- a racial climate in which all students benefit from the lively exchange of different viewpoints and perspectives including from different racial perspectives,
- a racial climate in which all students are prepared for inclusive civic engagement and leadership,
- beneficial learning outcomes due to a decrease in racial anxiety,
- the elimination of stereotypes,
- the reduction of racial isolation, and
- a racial climate in which minorities do not feel like spokespersons for their race.<sup>34</sup>

In addition, most legal experts, *amicus curiae*, participants in *Fisher*’s oral arguments, and affirmative action realists accept that other logical—perhaps inevitable—guidelines include:

- the college or university’s history of discrimination,<sup>35</sup>
- the college or university’s previous levels of diversity, and
- the racial composition of the state in which the college or university operates (though the Supreme Court has never explicitly invoked statewide demographics as a guideline for critical mass).

It remains unclear whether critical mass demands not just overall student body diversity, but also diversity in individual classrooms (known as diversity-within-diversity), and whether *all* racial or ethnic groups must be well-represented.

Keep in mind that the burden is always on the college or university to define and defend its critical mass goals, its critical mass indicia, and its means of achieving these indicia. And whereas *Grutter* was more

deferential to a college or university's conception of critical mass, *Fisher* clearly states that colleges and universities will receive zero deference with regard their critical mass goals, indicia, or methods of attainment. (In *Fisher*, there was nothing in the record reflecting whether UT's critical mass goals or indicia had been achieved since the implementation of its race-conscious plan, an approach Judge Garza disparagingly described as "know[ing] it when you see it.") In light of this, opponents of affirmative action may now strive to show that available, workable race-neutral plans are able to achieve a college or university's critical mass goal at tolerable administrative expense. But what is "workable," and what is "tolerable administrative expense"?

*Explore All Available, Workable Plans for Achieving Critical Mass at Tolerable Administrative Expense*

By grafting his opinion from *PICS* onto the higher education landscape through *Fisher*, Justice Kennedy seems interested in pressuring colleges and universities to revisit their race-conscious admissions plans and to experiment with race-neutral plans as well. Thus, while the term "workable" no doubt measures the effectiveness of the alternative in producing the college or university's critical mass, it surely cannot require that the alternative be *as efficient* as the use of race. Simply put, if a college or university's goal is to enroll a certain proportion of black or Latino students, there is simply no more efficient way to achieve this goal than to use race-conscious admissions. A strict efficiency standard, therefore, would render all race-neutral strategies unworkable.

Indeed, Justice Kennedy specifically endorsed a number of less efficient means of producing racial diversity at the K–12 level in *PICS* (including drawing school attendance zones with a general recognition of neighborhood demographics, strategically selecting new school sites, recruiting students and faculty in a targeted fashion, and tracking enrollments, performance, and other statistics by race). But, as Thomas Kane and James Ryan of Harvard have asked, is a race-neutral strategy "workable" in creating "sufficient" diversity if it produces, say, 60 percent as many minority students as race-conscious policies do? What about 90 percent?

And finally, at what price in academic selectivity does a race-neutral alternative become "unworkable"? Would a 50-point decline in median SAT scores be a reasonable price, whereas a 200-point decline would be unworkable? We await further clarification on these issues.

Finally, race-neutral alternatives, unlike race-conscious plans, are allowed to represent effectiveness with hard numbers, and this competitive advantage is the driving force behind Justice Kennedy's strongest emphasis on reevaluation and experimentation: the phrase *at tolerable administrative expense*. At a minimum, this language compels colleges and universities to measure the cost-effectiveness of both their existing race-conscious plans and any available, workable race-neutral plans, where "available"—a term absent in *Grutter*<sup>36</sup>—means existing race-neutral plans. The ability of a college or university to tolerate the expenses of race-neutral alternatives thus creates space for and incentivizes experimentation; "tolerable" most likely means that the alternative could be *somewhat* more expensive to administer than existing race-conscious plans, yet still must be pursued under *Fisher*'s mandate.

#### *What Does "The Burden Of Demonstrating" Mean?*

The most defensible race-conscious admissions plans will be those prepared in the shadow of *Fisher*'s elevated burden of proof: that colleges and universities employing race-conscious plans *demonstrate*, by "offer[ing] sufficient evidence,"<sup>37</sup> that they gave good faith, serious consideration of all available, workable race-neutral plans that achieve sufficient diversity at tolerable administrative expense. While the ceiling for judicial satisfaction comes in the form of Justice Kennedy's affirmation that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,"<sup>38</sup> it can no longer be assumed that *Grutter*—in which the law school offered zero evidence that it seriously considered race-neutral alternatives—provides a corresponding floor.

Instead, colleges and universities now need to go above and beyond the *Grutter* protocol. While *Fisher* permits a reviewing court to "take account of a university's experience and expertise in adopting or rejecting certain admissions processes,"<sup>39</sup> "[s]imple . . . assurances of good intention"<sup>40</sup> are insufficient. Thus, in light of *Fisher*'s new edict to "demonstrate," and considering that potential plaintiffs no doubt will demand materials evidencing fidelity to this edict in the course of discovery, colleges and universities now need to be able to *show something on paper*. This anticipatory necessity has received near-universal endorsement, including by the Department of Justice.<sup>41</sup>

Finally, I have put together a range of strategies available to colleges and universities in response to this new obligation to demonstrate. Yet importantly, an airtight strategy (short of exhausting every conceivable

race-neutral alternative) remains elusive: UT claimed that it experimented with race-neutral alternatives for seven years, and even incorporated SES factors into their admissions calculations.<sup>42</sup> UT also devoted a year to reviewing these policies before adopting its race-conscious plan.<sup>43</sup> Nevertheless, at *Fisher*'s rehearing, the attorney for Abigail Fisher insisted on more. "Where's the study?" he asked.

Regardless, one possible scale of preventative measures, from least burdensome to most burdensome, is as follows.

1. University presents no evidence concerning the efficacy of race-neutral alternatives (*Grutter*).
2. University relies on or conducts a study, or refers to the experience of a similarly situated university:
  - a) University relies on *existing* study concerning the efficacy of race-neutral alternatives *at similar colleges and universities*.
  - b) University relies on *existing* study concerning the efficacy of race-neutral alternatives *at university*.
  - c) University refers to the experience of a similarly situated university's *simulation* of admissions cycle using race-neutral alternatives.
  - d) University refers to the experience of a similarly situated university's *implementation* of race-neutral alternatives for admissions cycle.
  - e) University contributes to/relies on *new* study concerning the efficacy of race-neutral alternatives *at similar colleges and universities*.
  - f) University conducts *new* study concerning the efficacy of race-neutral alternatives *at university (Fisher)*.<sup>44</sup>
3. University runs a simulation of admissions cycle using race-neutral alternatives.
4. University implements race-neutral alternatives for admissions cycle.
5. University exhausts every conceivable race-neutral alternative (not required under *Grutter* or *Fisher*).

## Conclusion

Though *Fisher*'s full impact remains to be seen, it has introduced a novel, and potentially viable, means of dismantling race-conscious admissions

policies through its quiet reformation of the *Grutter* standard. Colleges and universities, cognizant of this evolved landscape, should respond in kind by reexamining—or reconstructing—their missions, their diversity goals, and their approaches to actualizing these ambitions. For while many in higher education believe that pursuing racial and ethnic diversity is a beneficial and just endeavor, they nevertheless serve their communities best when they make preparations for the worst.