JUSTICE KENNEDY'S SURPRISING VOTE AND OPINION IN *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

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INTRODUCTION

Abigail Fisher graduated from Stephen F. Austin High School in Sugar Land, Texas and applied for admission to the fall 2008 entering class at the University of Texas at Austin. As she did not graduate in the top ten percent of her high school class, Fisher was not guaranteed admission to UT under the legislatively mandated Texas Top Ten Percent Plan.[1] Her application instead was considered under UT's race-conscious holistic review program promulgated and implemented in furtherance of the University's effort to assemble a diverse undergraduate student body.[2] The application was rejected and Fisher filed suit alleging that UT's consideration of race in the admissions process discriminated against her and other Caucasian applicants in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[3]

In June 2016 the United States Supreme Court, by a 4-3 vote, held that the challenged program did not violate the Constitution.[4] That the case was decided by a deeply divided Court is not surprising. What is surprising is that the majority opinion was written by Justice Anthony M. Kennedy who, prior to *Fisher*, had never voted in favor of a race-conscious affirmative action program.[5]

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1. TEX. EDUC. CODE ANN. § 51.803 (2015).

2. *Freshman Application Review*, TEXAS ADMISSIONS, http://admissions.utexas.edu/apply/decisions/freshman-review (last visited Oct. 23, 2016).

3. *See* U.S. CONST. amend. XIV, § 1 ("No State . . . shall deny to any person within its jurisdiction the equal protection of the laws.").

4. *See generally* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

5. *See* Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 48 (2012) (Justice Kennedy "*never* voted to uphold affirmative action programs at issue in *any* racial affirmative action case that the Supreme Court has resolved on the merits" and "*has* always voted with the conservative bloc to invalidate racial affirmative action"); *see also* Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 86 (2016) (noting Justice Kennedy's "general hostility in race cases" and his principal objection "to racial classifications that are imposed by the state").

His surprising vote and opinion validating the use of race-sensitive affirmative action in higher education are the foci of this essay.

THE FIRST *FISHER* RULING

Fisher's suit against UT was first before the Court in its review of the United States Court of Appeals for the Fifth Circuit's 2011 judgment upholding UT's consideration of race as a factor in admissions decisions.[6] The Court held oral argument in October 2012. In its post-argument conference, five of the eight participating Justices,[7] including Justice Kennedy, indicated that they would rule against UT.[8] Chief Justice John G. Roberts, Jr. assigned to Justice Kennedy the task of writing the majority opinion; Justice Ruth Bader Ginsburg assigned the writing of an opinion in favor of UT to Justice Sonia Sotomayor. Justice Sotomayor circulated a draft dissent to her colleagues' chambers. "[T]hose who read" the draft "said it was a fierce defense of affirmative action and a direct challenge to conservative justices preparing to undercut it."[9] Some of the Justices "were anxious about how Sotomayor's personal defense of affirmative action and indictment of the majority would ultimately play to the public."[10] Seeking a compromise, Justice Kennedy circulated a draft opinion remanding the case to the Fifth Circuit for additional review. Satisfied with that approach, Justice Sotomayor shelved her dissent.[11]

In its June 2013 decision, the Court, over the sole dissent of Justice Ginsburg, remanded the case to the Fifth Circuit.[12] Applying the strict scrutiny analysis set out in *Grutter v. Bollinger* (a decision from which he dissented),[13] Justice Kennedy's *Fisher*

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6. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 247 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

7. Justice Elena Kagan recused herself because of her prior involvement with the case as Solicitor General.

8. *See* JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200 (2014).

9. *Id.* at 206.

10. *Id.*

11. *See id.* at 208–09.

12. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2414–15 (2013).

13. Grutter v. Bollinger, 539 U.S. 306 (2003). *Grutter* rejected an equal protection challenge to the University of Michigan Law School's race-conscious holistic review program. The Court concluded that the law school had a compelling interest in attaining a racially and ethnically diverse student body through the enrollment of a "critical mass" of underrepresented minority students. *Id.* at 329–30. The program was narrowly tailored to accomplish that interest, the Court determined, as race was considered a "plus" factor in an applicant's file, and the files of all applicants of all races were subjected to "a highly individualized, holistic review." *Id.* at 334, 337. While narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative," what is required is "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 339.

majority opinion concluded that the Fifth Circuit had correctly deferred to the University's decision to pursue its compelling interest in the educational benefits flowing from a diverse student body.[14] But, he concluded, the appeals court had improperly deferred to the means chosen by the University to achieve that permissible goal. Those means must satisfy the narrow tailoring requirement and withstand "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications . . . . The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[15] The Fifth Circuit wrongly presumed that the University had acted in good faith in using racial classifications, Justice Kennedy determined, and the case was remanded with the instruction that the Fifth Circuit address the question whether UT offered sufficient evidence demonstrating that its admissions program was narrowly tailored.[16]

FISHER RETURNS

On remand, the Fifth Circuit again entered judgment for UT, holding that the University demonstrated that its race-sensitive holistic review of undergraduate applications was a narrowly tailored and limited use of race and a necessary complement to the Top Ten Percent Plan.[17] The Supreme Court again granted certiorari and this time affirmed, finding it undisputed that race was "a factor of a factor of a factor" in the holistic review calculus[18] and holding that the University met its burden of showing that the admissions policy in use at the time of Fisher's application was narrowly tailored.

Writing for a four-Justice majority of the seven-Justice Court,[19] Justice Kennedy considered and rejected four arguments made by Fisher. Fisher argued, first, that the University had failed to articulate its compelling interest in student body diversity with sufficient clarity and "must set forth more precisely the level of

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14. *See Fisher*, 133 S. Ct. at 2419; *see also Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (stating that a school district "may consider it a compelling interest to achieve a diverse student population" and "[r]ace may be one component of that diversity").

15. *Fisher*, 133 S. Ct. at 2420.

16. *See id.* at 2421.

17. *See* Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).

18. *Fisher*, 136 S. Ct. at 2207.

19. Recall that Justice Kagan had recused herself, see *supra* note 7. Justice Antonin Scalia, an ardent and consistent opponent of race-conscious affirmative action, died a few months before the issuance of the Court's opinion.

minority enrollment that would constitute a 'critical mass.'"[20] Fisher understandably could have hoped that this argument would resonate with Justice Kennedy; thirteen years earlier, in his *Grutter* dissent, he declared that the "critical mass" concept was "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."[21] Abandoning that view in *Fisher*, Justice Kennedy opined that an increase in minority enrollment instrumental to the educational benefits of diversity "is not . . . a goal that can or should be reduced to pure numbers."[22] As UT "is prohibited from seeking a particular number or quota of minority students," the University "cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained."[23]

Second, Fisher argued that the University had already achieved critical mass through the Top Ten Percent Plan and race-neutral holistic review employed between 1998 and 2003.[24] Rejecting that argument, Justice Kennedy observed that UT conducted months of study before concluding that its race-neutral admissions policies had not achieved sufficient racial diversity in its student body. That conclusion was supported by statistical and anecdotal evidence, quantitative data, and evidence that minority students admitted under the race-neutral admissions regime experienced loneliness and isolation.[25]

Third, Justice Kennedy rejected Fisher's argument that UT's consideration of race had only a minimal impact and was therefore not necessary to the advancement of the diversity interest.[26] He noted increases in the percentages of African-American and Latinx residents enrolled as a result of UT's race-conscious holistic review,

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20. *Fisher*, 136 S. Ct. at 2207.

21. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). In a 2013 article, an analyst saw "little reason to think [Kennedy] will feel differently about the Texas version of the same . . . holistic-review-to-get-a-critical-mass approach." Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. 1037, 1041 (2013).

22. *Fisher*, 136 S. Ct. at 2210.

23. *Id.*

24. During the noted time period the Fifth Circuit's decision in Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996), prohibited the use of race as a factor in admissions decisions. *Hopwood* was effectively overruled by the Supreme Court's 2003 *Grutter* decision and, beginning in 2004, UT promulgated and implemented the race-conscious affirmative action program challenged by Abigail Fisher. *See Fisher*, 136 S. Ct. at 2205–06.

25. *See id.* at 2212.

26. During the initial October 2012 oral argument of the case, Justice Kennedy said the following to Fisher's counsel: "You argue that the University's race-conscious admission plan is not necessary to achieve a diverse student body because it admits so few people, so few minorities. And I had trouble with that reading the brief. I said, well, if it's so few, then what's the problem." Transcript of Oral Argument at 22, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (No. 11-345).

showing a "meaningful, if still limited, effect on the diversity of the University's freshman class."[27] And one's agreement with Fisher's minimal impact argument would not invalidate the admissions program: "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."[28]

Fourth, and finally, Fisher urged that there were a number of available race-neutral means of achieving UT's compelling diversity interest, including intensified outreach efforts to African-American and Latinx applicants. Not persuaded, Justice Kennedy pointed out that the University submitted evidence of its ultimately unsuccessful outreach attempts and years-long efforts to achieve diversity by using race-neutral holistic review.[29] Fisher also suggested that the University could change its weighing of academic and socioeconomic factors in the admissions process. Justice Kennedy responded that that proposal ignored the fact that UT tried and failed to increase student body diversity via an enhanced consideration of socioeconomic and other factors, and ran counter to *Grutter*'s declaration that a university should not be forced to choose between diversity and a reputation for academic excellence.[30]

An additional Fisher suggestion, uncapping the Top Ten Percent Plan and admitting more if not all students through a percentage plan, was also refused. The basic purpose of the facially neutral Top Ten Percent Plan—a scheme "'adopted with racially segregated neighborhoods and schools front and center stage'"—was to increase minority enrollment.[31] It was not apparent to Justice Kennedy that an increased reliance on such a plan would result in a more race-neutral admissions policy.[32] And a policy based on class rank alone "would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students" and "capture certain types of people and miss others."[33] Moreover, a policy based on the single metric of class rank perversely incentivizes parents to place and keep their children in segregated and low-performing

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27. *Fisher*, 136 S. Ct. at 2212.
28. *Id.*
29. *See id.* at 2213.
30. *See id.*; Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
31. *Fisher*, 136 S. Ct. at 2213 (quoting Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting)).
32. *See id.*
33. *Id.* Justice Kennedy explained: "A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class." *Id.*

schools and leads to student avoidance of challenging and grade-point-average-lowering courses.[34]

Holding that UT demonstrated that its admissions policy was narrowly tailored,[35] Justice Kennedy closed his opinion with an observation about deferential judicial review of a university's pursuit of student body diversity and an instruction concerning the ongoing scrutiny of race-conscious affirmative action programs: "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."[36] Compare and contrast this view with that taken by Justice Kennedy in his *Grutter* dissent, wherein he argued that "[d]eference is antithetical to strict scrutiny, not consistent with it," and that accepting the institution's assurance that it was acting in good faith suspended and abdicated the Court's "constitutional duty to give strict scrutiny to the use of race in university admissions" and "negates my authority to approve the use of race in pursuit of student diversity."[37] His differing approach to deference, whether because of a change of mind or a change of heart, is telling and critical to his vote and opinion.

As for continuing scrutiny of a university's approaches to diversity, Justice Kennedy remarked that public universities serve as "laboratories for experimentation," with UT in the position "to learn and to teach."[38] UT's data regarding diversity-fostering and diversity-diluting approaches to admissions must be scrutinized for fairness, and the University must evaluate the need for its race-sensitive policy as demographics change and as the positive and negative effects of its affirmative-action program are revealed.[39] The policy challenged by Fisher may not be relied on "without refinement. It is the University's ongoing obligation to engage in

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34. *See id.* at 2214 (quoting Gratz v. Bollinger, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting)).

35. *Id.* "[N]one of [Fisher's] suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be 'available' and 'workable' means through which the University could have met its educational goals, as it understood and defined them in 2008." *Id.* (alteration in original) (quoting Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013)).

36. *Id.*

37. Grutter v. Bollinger, 539 U.S. 306, 394–95 (2003) (alteration in original) (Kennedy, J., dissenting).

38. *Fisher*, 136 S. Ct. at 2214 (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). Justice Kennedy cited Justice Louis D. Brandeis' dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932), wherein the Justice opined: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." For more on Brandeis' states-as-laboratories metaphor, see JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 100–145 (2016).

39. *See Fisher*, 136 S. Ct. at 2214–15. For discussion of the costs and benefits of affirmative action, see RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 110, 118, 125 (2013).

constant deliberation and continued reflection regarding its admissions policies."[40]

Justice Kennedy's outcome-determinative vote against Fisher's equal protection challenge to UT's race-sensitive affirmative action program is surprising given the Justice's general hostility to and prior votes against such plans. His majority opinion did more than just reject Fisher's anti-affirmative-action arguments and positions. It provided clarity and guidance on the "critical mass" concept and the requirements of narrow tailoring that must be met to satisfy strict scrutiny judicial review, and definitively declared that courts owe considerable deference to a university's decision to pursue student body diversity. And although the case was decided by only seven Justices as a result of Justice Kagan's recusal, Justice Ginsburg recently "said the decision was built to last. 'If Justice Kagan had been there, it would have been 5 to 3,' she said. 'That's about as solid as you can get.'"[41] Justice Kennedy's opinion, "restor[ing] constitutional order to college admissions,"[42] is thus a triumph for proponents of diversity-based affirmative action in higher education and a signal defeat for those who claim that any consideration of race in university admissions decisions violates the Equal Protection Clause.

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40. *Fisher*, 136 S. Ct. at 2215. In discussing the University's ongoing monitoring obligations, Justice Kennedy did not mention *Grutter*'s statement that "race-conscious admissions policies must be limited in time" and must have reasonable durational limits and a "logical end point" that can be met by sunset provisions. *Grutter*, 539 U.S. at 342. Taking the law school at its word that it would end its race-conscious program "as soon as practicable," in her *Grutter* opinion Justice Sandra Day O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. Justice Ginsburg, a member of the *Grutter* majority, emphasized that "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.* at 346 (concurring opinion joined by Justice Stephen G. Breyer). Whether that expectational and hopeful aspect of *Grutter* can be viewed as a holding of the Court or as merely dicta remains a question for debate. *See* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO STATE L.J. 83, 92 (2006) ("Of course, an expectation is neither a holding nor a limit."). *But see Grutter*, 539 U.S. at 376 n.13 (Thomas, J., concurring in part and dissenting in part) (referring to "the Court's holding that racial discrimination in admissions will be illegal in 25 years").

41. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?_r=0.

42. Michael A. Olivas, Fisher v. UT *and the Insider Baseball of College Admissions*, ACADEME BLOG (Aug. 10, 2016), https://academeblog.org/2016/08/10/fisher-v-ut-and-the-insider-baseball-of-college-admissions/ (alteration in original).