

The Future of Affirmative Action After *Fisher*: Is It Time to End and Not Mend It?

By R. LAWRENCE PURDY*

Introduction

I WISH TO THANK the University of San Francisco School of Law¹ for inviting me to share my perspective on the role race continues to play in the decisions that impact not only our own lives, but the lives of our friends and neighbors, our colleagues at work, our children, and our grandchildren—decisions such as who gets a particular job, or who receives a letter of admission or a letter of rejection from our nation’s flagship public universities, or from private universities like this great university.

The fundamental question, of course, is what role, if any, should race play in these decisions?

This was the precise issue I dealt with for the better part of seven years during the two landmark University of Michigan lawsuits. You know them as *Grutter*² and *Gratz*.³ Both went all the way to the United States Supreme Court in 2003. Both involved the use of heavily race-conscious—but highly different—admissions policies administered by the undergraduate and law schools at the University of Michigan.⁴

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1. This Article is an adaptation of the remarks delivered by the author during the University of San Francisco Law Review Symposium on February 22, 2013. These comments predate the decision in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

2. *Grutter v. Bollinger*, 539 U.S. 306, 308-09 (2003) (holding that achieving diversity in higher education is a compelling state interest and that the use of race as one factor among many in the admissions process is narrowly tailored to achieve diversity).

3. *Gratz v. Bollinger*, 539 U.S. 244, 295 (2003) (holding that the quantification of race in the admissions process is not narrowly tailored to achieve diversity in higher education).

4. See *Grutter*, 539 U.S. at 316; *Gratz*, 539 U.S. at 256-57; *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 836-41 (E.D. Mich. 2001) (“[T]he evidence indisputably demonstrates that

The rationale offered by the University as justification for resorting to the use of race was the University's claimed compelling interest in enrolling a racially diverse student body.⁵

There are two reasons that I agreed to jump into these cases back in 1997. The first is that *Brown v. Board of Education*⁶—in my view, the greatest decision ever handed down by our Supreme Court—established the clear principle that “racial discrimination in public education is unconstitutional.”⁷ It is a principle I deeply believe in. And it says all we need to know about the role racial discrimination should be allowed to play in public education—absolutely none.

The second reason is best represented by the straightforward language found in Title VI of the Civil Rights Act of 1964⁸: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁹ These words, like those in *Brown*, are clear. They remain, at least on paper, the law of the land. Yet the categorical prohibition against race-based discrimination—which these words represent—has come under severe challenge in recent years, beginning with the position taken by the University of Michigan in *Gratz* and *Grutter*. This prohibition remains under challenge in the *Fisher* case.¹⁰

You just heard Syracuse University Chancellor¹¹ Nancy Cantor's description of the arguments often cited in support of the idea that racial diversity—in and of itself—fosters a better, more positive learning experience.¹² Indeed, the supposed educational benefits of this diversity are said to be so compelling that they outweigh the costs associated with the use of race to achieve them.¹³

the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject. . . . [There is] mathematically irrefutable proof that race is indeed an enormously important factor.”)

5. See *Grutter*, 539 U.S. at 328, 330; *Gratz*, 539 U.S. at 257.

6. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

7. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955).

8. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, 78 Stat. 252 (1954) (codified at 42 U.S.C. § 2000d (2012)).

9. *Id.*

10. Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3875237.

11. At the time of these remarks, Nancy Cantor was the Chancellor of Syracuse University. She is now Chancellor of Rutgers University-Newark.

12. Nancy Cantor, *From Grutter to Fisher and Beyond: The Compelling Interest of Diversity in Higher Education*, 48 U.S.F. L. REV. 261 (2013).

13. See *id.*

Well let me suggest that even setting aside constitutional law principles—principles that I believe prohibit the use of race for such a purpose—the social science is *not* settled on the extent to which racial diversity provides educational benefits.¹⁴ Indeed, one can offer ample evidence that points to serious adverse consequences when racial diversity is achieved through racially discriminatory means.¹⁵

I. What's at Stake in *Fisher*?

One of the most important potential issues for reconsideration by the Supreme Court in *Fisher*¹⁶ is whether the so-called diversity rationale, first anointed in *Grutter*,¹⁷ provides a sufficient justification for discriminating against college and university applicants on the basis of race.¹⁸

14. See Roger Clegg & John S. Rosenberg, *Against "Diversity,"* 25 ACAD. QUEST. 377, 382-87 (2012); ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE: FOUR CRITICAL YEARS REVISITED* 363 (1st ed. 1993) ("The values, attitudes, self-concept, and socioeconomic status of the [student's] peer group are much more important determinants of how the individual student will develop than are the peer group's abilities, religious orientation, or racial composition."); Peter Schmidt, *Debating the Benefits of Affirmative Action*, CHRON. HIGHER ED., May 18, 2001, at A25 (quoting Dr. Astin) ("[The claim that more diverse campuses better educate their students] is yet to be convincingly demonstrated . . ."); J. MITCHELL CHANG, *RACIAL DIVERSITY IN HIGHER EDUCATION: DOES A RACIALLY-MIXED STUDENT POPULATION AFFECT EDUCATIONAL OUTCOMES* 150 (1996) ("Racial diversity has (a) a negative direct impact on overall satisfaction with college among students of color; (b) a marginal, indirect negative impact on retention among all students; and (c) no effect on intellectual self-concept, social self-concept, or college GPA.").

15. See Clegg & Rosenberg, *supra* note 14; Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 41-42 (1992) (quoting various minorities who express feeling stigmatized by affirmative action policies); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 368, 371-72 (2004) (arguing that race-neutral policies could improve bar passage rates); RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT*, 49-65 (2012); Transcript of Deposition of Lehman at 97-98, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928) (testimony of the then dean of University of Michigan Law School) ("I do know that there are members of minority racial groups in the country who oppose the explicit consideration of racial diversity as one factor in admissions because they personally find it stigmatizing.").

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

17. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

18. See Transcript of Oral Argument at 8, 13, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (stating that, while not challenging the diversity-as-a-compelling interest doctrine, there is a flaw in *Grutter* that needs to be addressed); Brief for Congressman Allen B. West as Amicus Curiae in Support of Petitioner at 2, *Fisher*, 133 S. Ct. 2411 (No. 11-345) ("[T]he University of Texas . . . ha[s] no power under the Fourteenth Amendment to use race as a factor in affording educational opportunities to its citizens.") (internal quotations omitted); Brief for Coal. of Bar Ass'ns of Color as Amici Curiae in Support of Respondents at 16, *Fisher*,

Justice Lewis F. Powell Jr., in his 1978 opinion in *Bakke*,¹⁹ first mentioned that an interest in diversity might be a legitimate basis upon which to use race as a factor in university admissions. His discussion of this interest is found in a portion of his opinion in *Bakke* in which no other Supreme Court justice joined,²⁰ and played no role in the outcome of that case. Nevertheless, in *Grutter* without any real analysis, Justice O'Connor simply adopted Justice Powell's lonely view in *Bakke*.²¹ Thus was born the diversity doctrine, which currently permits a public university to use race as a factor in deciding who receives an offer of admission or a letter of rejection. And today, in the wake of *Grutter*, our highest court in *Fisher* is reconsidering the methods adopted by many universities in their efforts to achieve racial diversity.

However, before going any further, there are two things the Michigan cases and *Fisher* are *not* about.

First, the Michigan cases were not about criticizing the general concept of the educational benefits of diversity (the same can be said of *Fisher*). And second, the Michigan cases were not about dismantling affirmative action programs (neither is *Fisher*).

II. A General Observation Regarding Diversity

With regard to diversity, I offer a general proposition with which hopefully everyone can agree: *Every individual is unique*. As a consequence, anytime there is more than a single individual present, the group is diverse. Every person adds to the diversity of a group, to a community, and to our country. This is true, even of individuals who share an immutable characteristic like a similar skin tone.

None of the plaintiffs in the Michigan cases ever argued that diversity was a bad thing. On the contrary, they acknowledged that all sorts of diversity could be good and provide educational benefits to students.²² But they also said that no matter how beneficial diversity

133 S. Ct. 2411 (No. 11-345) (“[T]here remains a compelling governmental interest in achieving and maintaining critical mass in the legal profession, and race-conscious admissions programs are a proper means to achieve that goal.”); Brief for Ass’n of Am. Med. Colls. et al. as Amici Curiae in Support of Respondents at 30, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (“Altering *Grutter* Would Disrupt Admissions Practices Crafted In Reliance Upon the Court’s Precedents.”).

19. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

20. *Id.* at 320–24.

21. See *Grutter*, 539 U.S. at 323–25.

22. See *id.* at 339 (arguing that the school’s plan was not narrowly tailored but not arguing against the educational benefits of student body diversity); *Gratz v. Bollinger*, 539 U.S. 244, 287–88 (2003) (Stevens, J., dissenting); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001) (“The court does not doubt that racial diversity in the law school

might be, no school is justified in using racially discriminatory policies to achieve it.²³

III. Affirmative Action

Nothing I say is intended to suggest we should dismantle affirmative action plans. I am a proponent of affirmative action. I always have been. Properly defined, affirmative action has nothing to do with race. Quite the contrary, affirmative action plans were originally intended to *eliminate* race as an obstacle to equal opportunity.²⁴ It is for that reason I take the position that we should never end affirmative action. Instead, what we need to do is to *end*—and not mend—our mischaracterization of affirmative action, which unfortunately has metastasized into a system of racial preferences, far removed from the original intent of the phrase.

And now for a little history lesson: Most Americans are completely unaware that the phrase affirmative action was first coined by President John F. Kennedy in a 1961 Executive Order.²⁵ In the preamble to his executive order, President Kennedy included powerful constitutional principles:

WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin²⁶

President Kennedy then issued the following directive:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. . . .

may provide . . . educational and societal benefits. Nor are these benefits disputed by the plaintiffs in this case.”).

23. *Gratz*, 539 U.S. at 268; *Grutter*, 539 U.S. at 317.

24. Exec. Order No. 10925, § 301(2), 26 Fed. Reg. 1977 (Mar. 6, 1961).

25. Nat’l Org. of Women, *The Origins of Affirmative Action*, NOW.ORG, <http://www.now.org/nnt/08-95/affirmhs.html> (last visited Jan. 30, 2014) (“The actual phrase ‘affirmative action’ was first used in President John F. Kennedy’s 1961 Executive Order 10925”); *See also Affirmative Action*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/affirmative_action (listing Executive Order No. 10925 as the legal origin of affirmative action).

26. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

(2) . . . all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.²⁷

As you can see, this Executive Order directed the federal government to take affirmative action to ensure that race would not be used to exclude people from government employment and contracting opportunities.²⁸ In other words, it was a directive to *remove—not add*—race as a factor in government employment. Yet sadly, affirmative action has evolved into a system where race matters. And in *Grutter*, it mattered a great deal.

IV. Reestablishing the True Meaning of Affirmative Action

Former Chairman of the Joint Chiefs and retired Army General Colin Powell once said it best: “If affirmative action means programs that provide equal opportunity, then I am all for it. If it leads to preferential treatment, . . . I am opposed. . . . The Army, as a matter of fairness, made sure that performance would be the only measure of advancement.”²⁹

Further support for the notion that race has no legitimate role to play in the most important aspects of our lives comes from the father of retired Army Major General Alfredo Valenzuela. Upon Major General Valenzuela’s father’s return from World War II, his father said: “[W]e all wear green and we all bleed red, . . . there is no difference and don’t let ethnicity play a role.”³⁰

Of course, opposing the use of racial preferences is nothing new. For example, over 150 years before these generals made their comments, Congressman Thaddeus Stevens, a noted abolitionist, established a school for relief and refuge of homeless, indigent orphans.³¹ In his will, Congressman Stevens wrote: “They shall all be carefully educated in the various branches of English education and all industrial trades and pursuits. . . . *No preference shall be shown on account of race or color, in the admission or treatment.*”³² What is important to note here is that the long-ago position taken by Representative Stevens, as well as

27. *Id.* § 301(1)-(2) (emphasis added).

28. *Id.* § 301(1).

29. COLIN POWELL, *MY AMERICAN JOURNEY* 591-92 (1995).

30. Alfredo Valenzuela, Retired Major General of the U.S. Army, Remarks at the Fifth Meeting of the Military Leadership Diversity Commission 41 (January 14, 2010) (transcript on file with author) [hereinafter Remarks by Alfredo Valenzuela].

31. *Thaddeus Stevens Biography*, THADDEUS STEVENS COLLEGE OF TECHNOLOGY, <http://www.stevenscollege.edu/301396.ihtml> (last visited Jan. 28, 2014).

32. Thaddeus Stevens, Last Will and Testament of Thaddeus Stevens of Lancaster, Penn. 6-7, July 30, 1867 (emphasis added).

the more contemporary arguments of General Powell and Major General Valenzuela, are all founded upon the same bedrock principle argued by Thurgood Marshall in *Brown v. Board of Education*.³³

In *Brown*, when he was serving as one of the counsel for the plaintiffs, Thurgood Marshall demanded that the Supreme Court enter a decree commanding the Topeka Board of Education to “discontinue use of race or color as a criterion for admission of students” to public schools.³⁴

Mr. Marshall’s words to the Court are as relevant today as they were when they were first penned back in the early 1950s as part of the voluminous briefing in *Brown*.

To me, that was what the Michigan cases were all about, or *should* have been about: reaffirming the principle adopted in *Brown* over a half century ago that “[r]acial discrimination in public education is unconstitutional.”³⁵

Sadly, however, the Court in *Grutter* deviated so horribly from this principle that this country is now firmly back to a situation where race matters under the law.

Think about that.

“Race matters!”

That was the claim of the old-line segregationists—a concept decidedly rejected decades ago. Yet, apparently it was not. And the battle has moved to a very different playing field. Rather than equal opportunity irrespective of color or ethnicity, which has been our society’s goal for more than a half century, we have reverted to an openly race-conscious concept that has been relabeled as an interest in diversity.

Earlier I mentioned Major General Valenzuela’s statements about not letting race or ethnicity come between brothers-in-arms.³⁶ His remarks were given before a panel of the Military Leadership Diversity Commission.³⁷ Sadly, if the drafters of that Commission have their way, and their policy recommendations end up being adopted, the day when race does not matter may never come. One of the many questionable observations found in the Commission’s report is that

although good diversity management rests on a foundation of fair treatment, it is not about treating everyone the same. This can be a

33. *Brown II*, 349 U.S. 294 (1955).

34. See Memorandum Brief for Appellants at 11, *Brown II*, 349 U.S. 294 (1955), 1954 WL 45731.

35. See *Brown I*, 347 U.S. 483, 493 (1954); *Brown II*, 349 U.S. at 298.

36. Remarks by Alfredo Valenzuela, *supra* note 30.

37. *Id.*

difficult concept to grasp, especially for leaders who grew up with the [equal-opportunity]-inspired mandate to be . . . color . . . blind. Blindness to difference, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged.³⁸

These observations raise several serious questions. If the mandate is to treat everyone fairly, how does that translate into “not . . . treating everyone the same”?³⁹ For example, in what way would it be fair to treat an individual applicant for a seat in the USF law school class of, say, 2016, differently from another because of his or her skin color?

Next, why is the traditional “[*equal opportunity*]-inspired mandate”⁴⁰ of colorblindness no longer the preferred model?

And lastly, aren’t the most successful leaders those men and women who do, in fact, create a *culture of assimilation* within their respective organizations in which *racial* differences are rendered *completely irrelevant*? Isn’t that what the equal opportunity-inspired mandate has always sought to achieve? Isn’t that what Title VI of the Civil Rights Act of 1964 requires?⁴¹

With these questions in mind, let us return home and review the words of the University of San Francisco’s Affirmative Action / Equal Opportunity policy. It clearly and unambiguously states that “the University *does not discriminate* in employment, educational services, and academic programs on the basis of an individual’s race [or] color”⁴² This policy, which includes the critical statement about non-discrimination, is wholly consistent with President Kennedy’s initial use of the phrase affirmative action. In other words, the phrases affirmative action, equal opportunity, and non-discrimination are described as one and the same here at USF. That is to say, all three phrases are fully consistent with an unambiguous policy that forbids discrimination based on race. There is nary a word anywhere in this statement suggesting that USF is committed to anything other than a strict policy that prohibits racial discrimination on this campus and an equally strict policy that guarantees equal opportunity to every person

38. MILITARY LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY FINAL 18 (2011) (emphasis added) (citation omitted).

39. *Id.*

40. *Id.*

41. See 42 U.S.C. § 2000d (2012).

42. *Equal Opportunity and Non-Discrimination Policy*, UNIVERSITY OF SAN FRANCISCO, <http://www.usfca.edu/catalog/policies/non-discrimination/> (last visited Jan. 5, 2014) (emphasis added).

within this University without regard to race, color, or national origin.⁴³

That, I submit, is exactly the way it ought to be. For if nothing else is clear, this one thing should be clear: When it comes to judging the value and worth of our fellow citizens, race should never matter.

Conclusion

On Veterans Day 2011, the United States Navy hosted a unique event—a college basketball game staged on the flight deck of the USS *Carl Vinson*.⁴⁴ The First Carrier Classic featured teams from two of the premier college basketball powers: Michigan State University and the University of North Carolina-Chapel Hill (“UNC”).⁴⁵ Both of the participating universities are among the great universities in the country.⁴⁶ It is likely that very few, if any, representatives of these two universities receive more public attention than do their elite Division I basketball team members.

When the teams took to the floor on the *Carl Vinson*, there were a couple of things one might have noticed. First, the obvious and most important factor: Five players wore the green & white uniforms of Michigan State. The other five wore the Carolina blue uniforms of UNC.

A second observation which may have gone entirely unnoticed was that out of the ten starting players—and I’m going to make a generalization here based on race—nine were young men who likely identify as black while only one likely identifies as white.⁴⁷ To the best of my knowledge, not a single Latino American, Native American, or Asian American was among them.

So, did Michigan State’s team racially reflect the university it was representing? Did the team racially reflect the state it represented, or

43. *Id.*

44. Michigan State vs. North Carolina Recap, SI.COM, http://sportsillustrated.cnn.com/basketball/ncaa/men/gameflash/2011/11/11/71192_recap.html (last visited Jan. 5, 2014); USS Carl Vinson—Carrier Classic: UNC-Michigan State, SI.COM, http://sportsillustrated.cnn.com/multimedia/photo_gallery/1111/carrier.classic/ (last visited Jan. 5, 2014).

45. *Michigan State vs. North Carolina Recap*, *supra* note 44.

46. See *National University Rankings*, U.S. NEWS & WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/> (last visited Jan. 28, 2014) (ranking in 2014 University of North Carolina-Chapel Hill and Michigan State University numbers thirty and seventy-three in the country, respectively).

47. See *Michigan State vs. North Carolina Recap*, *supra* note 44.

the city of East Lansing? The same questions could be asked for the team from UNC.

Of course, in my view, if you were wearing the camo-tinged green and white uniforms, you were a proud Michigan State Spartan.

If you were wearing the Carolina blue uniforms, you were a proud Tar Heel. Your race didn't matter at all.

Every week, the field house in East Lansing, Michigan and the one in Chapel Hill, North Carolina are filled with fans of all races cheering for their respective team. Do you think anyone in either field house is concerned that the racial composition of the teams does not perfectly reflect the university's or state's racial demographics? And if there are a few outliers who actually do care, does that also mean *we* should care?

How were these players chosen to start this first Carrier Classic? That seems fairly simple. The standards are straightforward. And if coaches are doing their jobs correctly the same standard is applied to each young man on both of these teams—irrespective of his race or ethnicity. They were selected as starters for nothing other than their merit as basketball players (which includes a large dose of strong character in order to be great players).

Are these young men diverse?

They absolutely *are* diverse, because each is a unique individual. Each of them deserves our respect and—more importantly—each deserves equal treatment by being measured against the same set of standards regardless of skin color, ethnicity, or any other immutable factor.

A person's race tells us nothing about his or her talent, skills, honor, courage, intelligence, or dedication to any task.

To paraphrase Dr. Martin Luther King Jr., a man's skin color tells us nothing—absolutely nothing—about the content of his character.⁴⁸

Was Dr. King right?

I believe he was.

As for the colors that matter here at USF? There are only two that seem important: green and gold. The rest make absolutely no difference.

48. Martin Luther King Jr., *I Have a Dream*, Address at the March on Washington for Jobs and Freedom 5 (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf> [hereinafter King, *I Have a Dream*].

That is the simple message I hope the Court in *Fisher* opts to embrace.

Postscript: The Supreme Court Does a Catch and Release in *Fisher*⁴⁹

The United States Supreme Court's widely anticipated decision in *Fisher v. University of Texas at Austin*,⁵⁰ sadly, contained little of substance. While the case was reversed and remanded to the Fifth Circuit for further proceedings (to reconsider whether the record adequately demonstrates that University of Texas's ("UT") policy is narrowly-tailored),⁵¹ the controversy between the named parties is all but moot from a practical standpoint. The plaintiff/petitioner, Abigail Fisher, has graduated from college, albeit from Louisiana State University rather than from the defendant, UT. And by all accounts UT is still using race as a factor in undergraduate admissions,⁵² which is the reason it found itself in court in the first instance when it allegedly rejected Ms. Fisher, in part, because of her skin color.

It had been expected that the Court fully intended to reevaluate (pro or con) its ten-year-old decision in *Grutter v. Bollinger*.⁵³ After all, *Grutter*, for the first time since *Brown v. Board of Education*, granted colleges and universities the right to use race as an explicit factor in

49. The following section contains Mr. Purdy's brief observations of the Supreme Court's June 24, 2013 decision in *Fisher*, four months after his presentation at the University of San Francisco School of Law Symposium.

50. 133 S. Ct. 2411 (2013).

51. *Id.* at 2421-22 ("Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored . . .").

52. *Application Review*, U. OF TEX. AT AUSTIN, <http://bealonghorn.utexas.edu/freshmen/decisions/review> (last visited Jan. 1, 2014) (click on "What are special circumstances?") (listing race as a special circumstance that may be considered); *University of Texas at Austin President Responds to Supreme Court Ruling*, U. OF TEX. AT AUSTIN (June 24, 2013), <http://www.utexas.edu/news/2013/06/24/university-of-texas-at-austin-president-responds-to-upreme-court-ruling/> ("Today's ruling will have no impact on admissions decisions we have already made or any immediate impact on our holistic admissions policies.").

53. See, e.g., María C. Ledesma, *Revisiting Grutter and Gratz in the Wake of Fisher: Looking Back to Move Forward*, 46 EQUITY AND EXCELLENCE IN EDUC. 220, 220 (2013), available at <http://www.tandfonline.com/doi/full/10.1080/10665684.2013.779556#tabModule> ("[C]olleges and universities across the country are anxiously awaiting the High Court's decision, which is poised to alter the course of race-conscious practices across postsecondary institutions nationwide."). When certiorari was requested, there seemed to be little reason for the Court to consider the case. By all accounts, the Circuit Court of Appeals had faithfully applied *Grutter's* holding to UT's policy, which was, in fact, modeled after the policy approved in *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217-18 (5th Cir. 2011).

admissions.⁵⁴ *Grutter* signaled a return to one of the most negative aspects of our nation's racial history—a history where, tragically, race mattered. It was expected that *Fisher* would reconsider *Grutter*'s striking constitutional detour from the principle announced in *Brown* when it came to matters involving race and public education. In fact, the extraordinary length of time between oral arguments (October 10, 2012) and the issuance of the decision (June 24, 2013) suggested that a substantive re-analysis of *Grutter* would be forthcoming.⁵⁵ Alas, no re-analysis occurred.

The Court's failure will impact the thousands of current and future college applicants—innocent of any wrongdoing—who face the prospect of experiencing legalized racial discrimination at the hands of our nation's flagship public universities. The impact will also be felt by admissions personnel who are tasked with deciding which applicants receive a letter of acceptance or a letter of rejection based, in part, on the color of an applicant's skin.

As for the opinion itself, *Fisher* looks like something that was cobbled together at the last minute, drafted principally to avoid an internal Court fight over whether *Grutter* should be reaffirmed or overruled, in whole or in part.⁵⁶ It is clear that *that* particular fight was sidestepped. What prompted the Court to coalesce around an end product, notable mainly for its avoidance of the key issues in *Grutter*,⁵⁷ is pure speculation. What is not in doubt, however, is that *Fisher* conducted no meaningful reassessment of *Grutter*.

It seems clear that the Court avoided the potentially difficult issues presented principally because of the puzzling decision made by *Fisher*'s counsel not to seriously challenge any aspect of *Grutter*.⁵⁸ Per-

54. *Brown* did not involve college or university admissions, but the principle it announced—that “racial discrimination in public education is unconstitutional,”—was not limited to the context in which it was decided. *Brown II*, 349 U.S. 294, 298 (1955). See, e.g., *Fisher*, 133 S. Ct. at 2423–25 (Thomas, J., concurring).

55. Given the brevity of the opinion (the majority opinion is only slightly more than seven pages in length, *Fisher*, 133 S. Ct. at 2415–22), one wonders why it could not have been issued within a few weeks, or, at most, a few months following the oral arguments.

56. See *Fisher*, 133 S. Ct. at 2419 (“There is disagreement [within the Court] about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. *But the parties here do not ask the Court to revisit that aspect of Grutter's holding.*”) (citation omitted); *id.* at 2422 (Scalia, J., concurring).

57. Arguably the two major issues were: (1) whether the use of race as a factor in college and university admissions, particularly for the *non-remedial* purpose of enrolling a diverse student body, violates the Equal Protection Clause; and (2) whether strict scrutiny was properly applied by the *Grutter* court to the race-conscious program at issue in that case. See *Grutter*, 539 U.S. at 322, 328.

58. *Fisher*, 133 S. Ct. at 2419.

haps prompted by other Justices friendly to *Grutter's* diversity rationale, Justice Kennedy apparently decided that if the parties did not challenge the validity of *Grutter*, the Court would forego a reassessment, even if some members of the Court thought it was warranted. In the end, it was a terrible punt of several important issues, including what role, if any, race should continue to play in the all-important sphere of public education, and assuming it continues to play a role, whether *Grutter* got it right in how such policies should be judicially tested.⁵⁹

The only saving grace is that Justice Kennedy (and the Court) rather surprisingly reversed the Fifth Circuit, which had upheld UT's *Grutter*-like policy.⁶⁰ If all the Court was going to do in the end was apply *Grutter* to the facts in *Fisher*, it is surprising the Court didn't simply uphold UT's policy, particularly since it is virtually indistinguishable from the law school policy upheld in *Grutter*.⁶¹

Again, it is speculation, but perhaps the reversal in *Fisher* is Justice Kennedy's way of saying what he said in dissent in *Grutter*, i.e., that *Grutter* wasn't really all that great a decision.⁶² Perhaps, too, the reversal in *Fisher* was Kennedy's message to the lower courts on remand, to wit: Read the nuance I've included in *Fisher* to see if you can discern why *Grutter* really didn't get it right from a *strict scrutiny* / *narrow tailoring* aspect. See if you—the Fifth Circuit—can correct *Grutter's* shortcomings. In other words, carefully read my dissent in *Grutter* and apply what I said there to UT's *Grutter*-like policy.

In conclusion, it is difficult to say much substantive about *Fisher* without reviewing every word of Justice Kennedy's dissent in *Grutter*.⁶³ A review of the dissent makes the outcome in *Fisher*—at least to this point (assuming it may return to the Court at some later date)—even more bewildering.

One final comment: Notwithstanding the dodge by the Court, two Justices, Clarence Thomas and Ruth Bader Ginsburg, deserve awards for honesty. Both were undeterred by Petitioner's failure to challenge *Grutter*.

59. See *id.* at 2421 (“[T]he parties do not challenge, and the Court therefore does not consider, the correctness of [the manner in which the Court approved the plan in *Grutter*].”).

60. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011).

61. See, e.g., *Fisher*, 133 S. Ct. at 2433 (“[The University of Texas] has taken care to follow the model approved by the Court in *Grutter* . . .”).

62. See *Grutter v. Bollinger*, 539 U.S. 306, 387–96 (2003) (Kennedy, J., dissenting).

63. The author's detailed commentary on *Fisher* will appear in 79 *Mo. L. Rev.* (forthcoming 2014).

For his part, Justice Thomas was once again eloquent in discussing his opposition to the use of race in public education and left no doubt he would vote to overrule *Grutter*.⁶⁴ It is not a stretch to suspect that much of our nation's citizenry—arguably a majority—would have been delighted had Justice Thomas' views in *Fisher* been the unanimous opinion of the Court (similar in nature to the landmark decision in *Brown*).

For her part, Justice Ginsburg left no doubt she would strongly reaffirm *Grutter*. In her view, nothing in the Constitution should prevent our flagship institutions from adopting race-conscious policies in order to address “the lingering effects of ‘an overtly discriminatory past,’ [and] the legacy of ‘centuries of law-sanctioned inequality.’”⁶⁵ While neither precedent nor, respectfully, logic support her position, Ginsburg held firm that the history of societal injustices is reason enough to permit colleges and universities to engage in race-conscious decision making.

In the end, had Justice Thomas's view prevailed, *Fisher* might have joined the pantheon of landmark decisions leading us ever closer to Dr. King's dream.⁶⁶ Someday, perhaps, his dream will be realized. But it is not likely to happen in this case, no matter the outcome on remand.

64. See *Grutter*, 539 U.S. at 349–78 (Thomas, J., concurring in part and dissenting in part); *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

65. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (citing dissenting opinion in *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003)).

66. See King, *I Have a Dream*, *supra* note 48, at 5 (“I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”).