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FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

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Ohio Northern University Law Review

Student Case Notes

Fisher v. University of Texas at Austin 136 S. Ct. 2198 (2016)

I. INTRODUCTION

With today's American society consisting of the most racially diverse citizenry in the country's history,¹ it is not hard to imagine why race-conscious university admissions programs have created a hotly contested controversy.² The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees equal treatment under the laws to each citizen, regardless of race, and provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³ Thus, public universities administering racial preference in extending enrollment offers exists in a state of uneasy tension with the Equal Protection Clause, as members of certain races—and not others—are given preference in the admissions process on the basis of race.⁴ The Supreme Court of the United States recently decided the case of *Fisher v. University of Texas at Austin* (hereinafter "*Fisher II*"), in which the Court upheld as constitutionally permissible a public university's consideration of race in its admissions program.⁵

Fisher II is just one in a series of cases in which race-conscious university admissions programs have been reviewed by the Court. The Court, in *Regents of the University of California v. Bakke*, conclusively held

1. Francisco M. Negrón, Jr., *Diversity is Dead. Long Live Diversity: The Racial Isolation Prong of Kennedy's Pica Concurrence in Fisher and Beyond*, 24 U. MIAMI BUS. L. REV. 99, 99 (2015-2016) [hereinafter Negrón, *Diversity is Dead*].

2. Johnathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 LAW & CONTEMP. PROBS. 89, 93 (2016) [hereinafter Glater, *Debt, Merit, and Equity*].

3. U.S. CONST. amend. XIV, § 1.

4. See *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) [hereinafter *Fisher II*].

5. *Id.*

that race-conscious admissions programs are “reviewable under the Fourteenth Amendment.”⁶ Though a university has a compelling interest in promoting the educational benefits of diversity,⁷ *Bakke* required that a university’s decision to use race-conscious admissions plans meet strict scrutiny in order to be consistent with the Equal Protection Clause.⁸ In *Grutter v. Bollinger*, the Court reaffirmed the proposition that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”⁹ A university must specifically and narrowly tailor its goals in achieving racial diversity.¹⁰

In *Fisher II*, the petitioner, a Caucasian female, applied for a seat in the University of Texas at Austin’s 2008 freshman class and was rejected.¹¹ She then challenged the University of Texas at Austin’s consideration of race as part of its admissions program on the grounds that it “disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause.”¹² The Court ultimately held that the University of Texas at Austin’s race-conscious admission plan was constitutionally permissible, as it was narrowly tailored to pursue the University’s interest in promoting the educational benefits that spring from student body diversity.¹³ Despite language from the first instance of the case in *Fisher* (hereinafter “*Fisher I*”), requiring a reviewing court to give a university no deference in determining whether its goals are narrowly tailored in pursuing student body diversity,¹⁴ the Court in *Fisher II* articulated that “considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”¹⁵

The dissent was highly critical of the majority’s application of the restrictions set out in *Fisher I*, stating that the Court had granted the University of Texas at Austin “blind deference . . .” in determining whether its goals were narrowly tailored, as required by strict scrutiny.¹⁶ Furthermore, the dissent stated that the University of Texas at Austin’s

6. 438 U.S. 265, 287 (1979).

7. *Id.* at 314-15.

8. *Id.* at 299, 357.

9. 539 U.S. 307, 325 (2003) (The Court upheld the University of Michigan’s consideration of race as part of its holistic review as constitutionally permissible).

10. *Id.* at 333 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

11. *Fisher II*, 136 S. Ct. at 2207.

12. *Id.*

13. *Id.* at 2214.

14. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2420 (2012) (citing *Grutter*, 539 U.S. at 333) [hereinafter *Fisher I*].

15. *Fisher II*, 136 S. Ct. at 2214.

16. *Id.* at 2216.

goals were vague,¹⁷ concluding that the majority's opinion constituted "affirmative action gone wild."¹⁸

Despite the decades of controversy surrounding the use of race-conscious plans in university admissions,¹⁹ *Fisher II* clarifies that such race-based considerations are here to stay, at least for the foreseeable future.²⁰

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Prior to the 1997 academic year, the University of Texas at Austin (hereinafter "the University") reviewed each applicant by taking into consideration the following two criteria: (1) an applicant's SAT score and high school performance, called an applicant's "Academic Index" (AI); and (2) consideration of an applicant's race.²¹ "Preference was given to racial minorities."²² However, in response to the United States Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas*,²³ the University adopted a race-neutral admissions plan.²⁴ This modified plan continued to measure an applicant's AI, but added a new element, the "Personal Achievement Index" (PAI), which assigned a numerical score based on the holistic review of an applicant.²⁵ The PAI was made up of an applicant's "essays, leadership and work experience, extracurricular activities, community service, and other 'special characteristics' that might give the admissions committee insight into a student's background."²⁶

Following the decision in *Hopwood*, the Texas legislature enacted the "Top Ten Percent Law."²⁷ The Top Ten Percent Law required the University to offer enrollment to any applicant who graduated in the top ten percent of his or her high school graduating class.²⁸ The goal of the law was to increase minority admissions within the University.²⁹ The University

17. *Id.* at 2223 (stating that "By accepting these amorphous goals as sufficient for [the University of Texas at Austin] to carry its burden, the majority violates decades of precedent rejecting blind deference . . .").

18. *Id.* at 2232.

19. Graton, *Debt, Merit, and Equity*, *supra* note 2, at 93.

20. Todd Henderson, *Symposium: What Proof Should We Demand to Justify Racist Policies?*, SCOTUSBLOG (June 24, 2016, 10:04 AM), <http://www.scotusblog.com/2016/06/symposium-what-proof-should-we-demand-to-justify-racist-policies/> [hereinafter Henderson, *Symposium: What Proof Should We Demand*].

21. *Fisher II*, 136 S. Ct. at 2205.

22. *Id.*

23. See 78 F.3d 932, 934-35, 948 (5th Cir. 1999) (The University's consideration of race was declared unconstitutional, as it violated the Equal Protection Clause of the Fourteenth Amendment).

24. *Fisher II*, 136 S. Ct. at 2205.

25. *Id.*

26. *Id.*

27. *Id.*; see TEX. EDUC. CODE ANN. § 51.803 (West 2015).

28. *Fisher II*, 136 S. Ct. at 2205.

29. See Negrón, *Diversity is Dead*, *supra* note 1, at 107.

implemented the Top Ten Percent plan in 1998.³⁰ The University filled the majority of the available seats in its freshman class through satisfaction of the Top Ten Percent plan,³¹ and the remainder of the class was filled through combined review of an applicant's AI and PAI scores.³²

The University utilized this plan until 2003, when it created the plan pertinent to the case.³³ Following the Court's ruling in *Grutter* and *Gratz v. Bollinger*,³⁴ the University modified its admission plan for the final time.³⁵ *Grutter* upheld the University of Michigan's holistic review of its applicants, taking into consideration race as a factor, but did not use a mechanical allocation of points based on race.³⁶ The University, after finding that its admission of minority students had stagnated during the *Hopwood* regime,³⁷ modified its admission program to allow race to be considered as a relevant factor.³⁸ The University then adopted its current admissions review program, which continued to admit 75% of applicants through the Top Ten Percent plan, but also implemented holistic review to fill the remaining 25% of the incoming class.³⁹ The holistic plan used a combination of an applicant's AI and PAI scores, but also considered race as a relevant factor.⁴⁰ Under holistic review, the applicant was assigned a "Personal Achievement Score" (PAS) in order to give the admissions committee total insight into an applicant's "special characteristics" that made the applicant a unique candidate.⁴¹ These "special characteristics" included:

the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT

30. *Fisher II*, 136 S. Ct. at 2205.

31. *Id.* at 2206 (The Top Ten Percent plan was ultimately capped to allow no more than 75% of the freshman class to be filled through the plan).

32. *Id.*

33. *Id.*

34. *Id.*; see 539 U.S. 244, 279-80 (2003) (The Court in *Gratz* struck down the University of Michigan's admissions program, which allocated "predetermined points to racial candidates").

35. *Fisher II*, 136 S. Ct. at 2206.

36. *Grutter*, 539 U.S. at 337, 343-44.

37. *Fisher II*, 136 S. Ct. at 2205-06 (The University conducted a year-long study to determine whether its admissions program was promoting student body diversity, concluding that its post-*Hopwood* race-neutral admission program was insufficient).

38. *Id.* (This plan followed in the wake of the decision in *Grutter* permitting consideration of race in holistic review of applicants.).

39. *Id.*

40. *Id.*

41. *Id.*

score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race.⁴²

The University used the consideration of race as a “factor of a factor of a factor” and claimed that race was introduced only in determining an applicant's PAS.⁴³ Furthermore, all applicants whose total admission score—based on AI, PAI, and PAS—was above a certain cut-off were automatically admitted; admissions officers granting enrollment based on the cut-off threshold were unaware of an applicant's race when the determination was made whether to admit an applicant.⁴⁴ The University further claimed that the consideration of race as a factor was “individualized and contextual” in nature.⁴⁵

In 2008, Abigail Fisher (hereinafter “Petitioner”), a Caucasian female ranked outside the top ten percent of her high school graduating class, applied for admission to the University and was rejected.⁴⁶ Petitioner then filed suit in the United States District Court for the Western District of Texas, challenging the University's use of race in its admissions program on the grounds that the admissions plan violated the Equal Protection Clause.⁴⁷ The District Court granted summary judgment in favor of the University, finding no constitutional violation.⁴⁸ The Court of Appeals for the Fifth Circuit affirmed the District Court's ruling based on the University's “good faith” effort to implement a race-conscious admissions plan in conformity with the Equal Protection Clause.⁴⁹ The Supreme Court of the United States granted certiorari and held that the Court of Appeals' use of a “good faith” analysis was the incorrect constitutional standard to be applied when reviewing whether a university's consideration of race in its admissions program is consistent with the Equal Protection Clause.⁵⁰ The Court instructed the Court of Appeals on remand to determine whether the University's race-conscious plan complied with the requirements of strict scrutiny—the correct judicial standard to be applied—and whether the University's implementation of a race-conscious program was narrowly

42. *Fisher II*, 136 S. Ct. at 2206.

43. *Id.* at 2207.

44. *Id.*

45. Abigail Noel FISHER, Petitioner, v. UNIVERSITY OF TEXAS AT AUSTIN, et al., 2015 WL 9919333 (U.S.), 40 (U.S. Oral. Arg., 2015) (Counsel for the University in responding to Justice Alito's question of whether it can be determined which students were admitted on the basis of race).

46. *Fisher II*, 136 S. Ct. at 2207.

47. *Id.*

48. *Id.*

49. *Id.*; see *Fisher v. University of Texas at Austin*, 631 F.3d 213, 247 (5th Cir. 2011) (holding that the “University's decision to reintroduce race-conscious admission was adequately supported by the ‘serious, good faith consideration’ required by *Grutter*”).

50. *Fisher I*, 133 S. Ct. at 2421.

tailored to achieving the goal of pursuing student body diversity.⁵¹ On remand, the Court of Appeals affirmed,⁵² and the Court granted certiorari to hear the case for the second time in *Fisher II*.⁵³

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Kennedy

Justice Kennedy delivered the opinion of the Court and was joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor,⁵⁴ Justice Kagan took no part in the decision.⁵⁵ In Part II of the Court's opinion, Justice Kennedy analyzed the "three controlling principles" set forth by *Fisher I* in determining whether a public university's consideration of race in its admissions programs is constitutionally permissible.⁵⁶ First:

'[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny . . . Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'⁵⁷

Second, a university's decision to pursue "the educational benefits that flow from student body diversity . . ." is largely a measure of "academic judgment."⁵⁸ Due to such a decision being an "academic judgment," a university is given "some, but not complete, judicial deference . . ." and must provide a "reasoned, principled explanation . . ." based on the University's "experience and expertise . . ." that it would benefit from seeking student body diversity.⁵⁹

Finally, the University must show that its method of using race-based consideration in its admissions program was "narrowly tailored to achieve

51. *Id.* at 2421-22.

52. *See Fisher v. University of Texas at Austin*, 758 F.3d 633, 660 (5th Cir. 2014).

53. *Fisher II*, 136 S. Ct. at 2207.

54. *Id.* at 2204.

55. *Id.*; *see* Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan's Recusals*, SCOTUSBLOG (Oct. 9, 2012, 9:50 PM), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/> (Justice Kagan, acting as then-Solicitor General, filed an *amicus* brief on behalf of the Department of Justice as the case was pending in the United States Court of Appeals for the Fifth Circuit, and she recused herself from deciding on the case).

56. *Fisher II*, 136 S. Ct. at 2207-08.

57. *Id.* at 2208 (citing *Fisher I*, 133 S. Ct. at 2418).

58. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419).

59. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419).

the University's permissible goals."⁶⁰ On this point, however, Justice Kennedy clarified that *Fisher I* mandated that a university receive "no deference . . .," and the University bears the ultimate burden in proving that non-racial alternatives were insufficient or infeasible.⁶¹ Despite this burden, the University was not required to show that every conceivable race-neutral plan is insufficient, nor does narrow tailoring "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups . . ."⁶²

Justice Kennedy began Part III of the opinion by highlighting the fact that the University's race-conscious admissions plan is unique and distinct from other admissions plans reviewed by the Court in the past.⁶³ The University's implementation of the Top Ten Percent Law in its admissions review was the single most important factor in determining whether Petitioner would be admitted to the University.⁶⁴ Despite the weight and importance of the Top Ten Percent plan in admissions determinations, Petitioner never challenged it, and instead accepted it as a given premise.⁶⁵ Because the University was not able to discontinue the use of the Top Ten Percent plan, as it was mandated by law, combined with the fact that the University had limited data on the success of its holistic review for admissions, remand for further fact-finding would have produced marginal, if any, results.⁶⁶ Thus, according to Justice Kennedy, the Court was necessarily limited to the narrow issue of "whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected."⁶⁷

After narrowing the issue, Justice Kennedy addressed—and ultimately rebutted—each of Petitioner's four arguments in Part IV of the opinion.⁶⁸ Petitioner's first argument was that the University had failed to "articulate[] its compelling interest with sufficient clarity."⁶⁹ The University, according to Petitioner, had failed to more precisely clarify the point at which it would reach a "critical mass" of minority student enrollment.⁷⁰ Justice Kennedy

60. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419-20).

61. *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher I*, 133 S. Ct. 2419-20).

62. *Id.* (citing *Grutter*, 539 U.S. at 339).

63. *Id.*

64. *Id.* at 2208-09.

65. *Id.* at 2209.

66. *Fisher II*, 136 S. Ct. at 2209.

67. *Id.* at 2210.

68. *Id.* at 2210-14.

69. *Id.* at 2210.

70. *Id.*; see Abigail Noel FISHER, Petitioner, v. UNIVERSITY OF TEXAS AT AUSTIN, et al., 2015 WL 9919333 (U.S.), 49 (U.S. Oral. Arg., 2015) (Counsel for the University argued that it was

made clear that achieving a “critical mass” of minority student enrollment for the purposes of promoting diversity was not a measure that could be reduced to pure numbers, quotas, or percentage-based systems.⁷¹ However, Justice Kennedy stated that merely “asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”⁷²

Justice Kennedy looked to University officials’ articulation of the ultimate goals in using a race-conscious admissions plan to achieve student body diversity. The University stated in its 2004 admissions plan that it sought to realize “the destruction of stereotypes, ‘promot[ion of] cross-racial understanding,’ the preparation of a student body ‘for an increasingly diverse workforce and society,’ and the ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’”⁷³ Justice Kennedy stated that such goals “mirror[ed] the ‘compelling interest’ this Court has approved in prior cases . . .”⁷⁴ and were concrete enough to establish that the University had demonstrated a “‘reasoned, principled explanation . . .’” for its desire to pursue such goals, as required by *Fisher I*.⁷⁵

Concluding that Petitioner had failed to contest the sufficiency of the University’s goals,⁷⁶ Justice Kennedy next turned to Petitioner’s second argument. Petitioner claimed that the University’s consideration of race in its admissions program was unnecessary, as the University had already achieved its desired “critical mass” of minority student enrollment by 2003.⁷⁷ The University had implemented its race-conscious holistic review plan after concluding that the level of minority enrollment had stagnated during the *Hopwood* regime.⁷⁸ It also found that minority students experienced feelings of loneliness and isolation during this period.⁷⁹ According to Justice Kennedy, these factors were persuasive in proving that the University had not yet achieved its diversity goals.⁸⁰

evident that, by 2004, the University had failed to reach “critical mass,” providing justification for the University’s race-based plan).

71. *Fisher II*, 136 S. Ct. at 2210.

72. *Id.* at 2211.

73. *Id.*

74. *Id.*

75. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419).

76. *Fisher II*, 136 S. Ct. at 2211.

77. *Id.*

78. *Id.* at 2212 (The University studied the racial make-up of classes with five or more students and found that, in 2002, 52% of such classes had no African-American students, and 12% of such classes had no Hispanic students).

79. *Id.*

80. *Id.*

Justice Kennedy next turned to Petitioner's third argument, in which she claimed that the University's consideration of race in its admissions program was unnecessary as its effects would be minimal.⁸¹ Justice Kennedy again turned to a study undertaken by the University in 2003. This study found that between 2003 and 2007, enrollment of African-American and Hispanic students increased by 54% and 94% respectively as a result of the University's consideration of race in its holistic review program.⁸² Justice Kennedy rebutted Petitioner's third argument, stating that such increases, although minor, did have a meaningful effect on the University in promoting student body diversity.⁸³ Moreover, the minor impact of the consideration of race was not fatal to the narrow tailoring analysis.⁸⁴ In fact, according to Justice Kennedy, the small role that race-consciousness played in the University's admissions should be a "hallmark of narrow tailoring, not evidence of unconstitutionality."⁸⁵

Justice Kennedy then addressed Petitioner's fourth and final argument—that race-neutral alternatives existed and could have been implemented by the University before resorting to race-conscious consideration in admissions decisions.⁸⁶ In the wake of the *Hopwood* decision, the University increased its outreach and scholarship efforts, as well as its budget for recruiting events.⁸⁷ None of these efforts, according to the University, were successful in attaining the compelling interest in achieving student body diversity.⁸⁸ Furthermore, Petitioner recommended that the University could have uncapped its Top Ten Percent plan. However, Justice Kennedy pointed out that such plans, though appearing race-neutral, are created for the singular goal of promoting minority enrollment.⁸⁹

In addition to demonstrating the race-conscious effect of the Top Ten Percent plan, Justice Kennedy also emphasized that such plans rely on academic performance in high school as a single metric, ignoring the intangible characteristics of an applicant.⁹⁰ For instance, according to Justice Kennedy, such a plan would exclude talented athletes and musicians,

81. *Fisher II*, 136 S. Ct. at 2212.

82. *Id.* (The study showed that in 2003, 11% of Texas residents enrolled through holistic review were Hispanic and 3.5% were African-American, compared to 16.9% and 6.8%, respectively, in 2007).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Fisher II*, 136 S. Ct. at 2212.

87. *Id.* at 2213.

88. *Id.*

89. *Id.* (citing *Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage . . . It is race consciousness, not blindness to race, that drives such plans").

90. *Id.*

or talented students who struggled due to a family crisis before improving their grades just to fall shy of the top ten percent.⁹¹ These plans are “blunt instrument[s] . . . ,” according to Justice Kennedy, in “deep tension with the goal of educational diversity as this Court’s cases have defined it.”⁹² Such plans, by their very nature, exclude students who would otherwise contribute to student body diversity.⁹³ Furthermore, Justice Kennedy stated that if universities utilized percentage plans in the method advocated by Petitioner, such a practice would encourage parents to keep their students in racially-identifiable schools and discourage students from taking more challenging classes.⁹⁴ Justice Kennedy then concluded his analysis of Petitioner’s final argument, finding that Petitioner had failed to show any workable race-neutral alternatives that could be utilized by the University in achieving its goals; therefore, the University had met its burden in showing that its race-conscious admissions policy was narrowly tailored when Petitioner’s application was rejected.⁹⁵

In concluding the opinion of the Court, Justice Kennedy emphasized the fact that universities are “in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness.’”⁹⁶ Most importantly, however, Justice Kennedy articulated that—due to these immeasurable qualities—courts owe considerable deference to a university in determining such intangible characteristics that make it unique.⁹⁷ However, despite this deference, striking a balance between the pursuit of diversity and the Constitution’s promise of equal protection remains a challenge.⁹⁸ It is up to universities to experiment in striking this subtle balance.⁹⁹

Despite considerable deference, and the University’s interest in striking a balance between student body diversity and the Equal Protection Clause, Justice Kennedy ended the opinion with a caveat: the University of Texas has an ongoing responsibility to continually scrutinize the negative and positive effects of its admissions program, and must continually reassess the need for a race-conscious admissions policy.¹⁰⁰

91. *Fisher II*, 136 S. Ct. at 2213.

92. *Id.* at 2213-14 (citing *Grutter*, 539 U.S. at 340).

93. *Id.* at 2213.

94. *Id.* at 2214 (citing *Gratz*, 539 U.S. at 304, n.10 (Ginsburg, J., dissenting)).

95. *Id.* (citing *Fisher I*, 133 S. Ct. at 2420).

96. *Fisher II*, 136 S. Ct. at 2214 (citing *Sweat v. Painter*, 339 U.S. 629, 634 (1950)).

97. *Id.*

98. *Id.*

99. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

100. *Id.* at 2214-15.

B. Dissenting Opinion by Justice Thomas

Justice Thomas joined in Justice Alito's dissent,¹⁰¹ but wrote separately to clarify his belief that the majority's opinion was a radical departure from the Court's precedents.¹⁰² Moreover, Justice Thomas cited his own concurring opinion from *Fisher I* to reaffirm the point that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."¹⁰³ Finally, Justice Thomas articulated that the academic nature of promoting diversity does not change the constitutional imperative and clarified that he would have overruled the Court's decision in *Grutter*.¹⁰⁴

C. Dissenting Opinion by Justice Alito

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, wrote the 51-page dissenting opinion.¹⁰⁵ Justice Alito began the dissent by reviewing what the Court held in *Fisher I*.¹⁰⁶ Justice Alito stated that *Fisher I* required that the University meet strict scrutiny in determining the necessity of a race-conscious admissions program as a compelling interest, and that its goals in achieving such a purpose were narrowly tailored.¹⁰⁷ The Court rejected in *Fisher I* the notion that deference was owed to the University in meeting the strict scrutiny standard for adopting race-conscious admissions programs as a compelling interest.¹⁰⁸ However, Justice Alito emphasized that the University had failed to specify the interests that would be furthered by implementing its race-conscious admissions program, and that the majority had granted a "plea for deference that we emphatically rejected in [*Fisher I*]."¹⁰⁹

Justice Alito then elaborated on the University's failure to prove that its consideration of race actually added to classroom diversity.¹¹⁰ Furthermore, the University failed to define when "critical mass" would be reached, as such a measure is not an absolute number.¹¹¹ Perhaps most striking, however, was Justice Alito's criticism of the University in claiming the Top Ten Percent plan used by the University admitted the "*wrong kind of*

101. *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting).

102. *Id.* (Thomas, J., dissenting).

103. *Id.* (citing *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring)).

104. *Id.* (citing *Grutter*, 539 U.S. at 343); see *Fisher I*, 133 S. Ct. at 2428.

105. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).

106. *Id.*

107. *Id.* at 2216 (citing *Fisher I*, 133 S. Ct. at 2411).

108. *Id.*

109. *Id.*

110. *Fisher II*, 136 S. Ct. at 2216 (Alito, J., dissenting).

111. *Id.*

African-American and Hispanic students . . .” as these students typically come from poor high schools, and the University desires African-American and Hispanic students from wealthy families.¹¹² Such a premise was founded on the idea that poor African-American and Hispanic students admitted through the Top Ten Percent plan were not forced to compete with white students—an “insulting stereotype not supported by the record.”¹¹³ Justice Alito went on to clarify that affirmative action was created to help the disadvantaged; justifying consideration of race on the premise that helping disadvantaged minorities hurts wealthy minorities is, according to Justice Alito, “affirmative action gone wild.”¹¹⁴

In his dissenting opinion, Justice Alito reviewed the Court’s jurisprudence regarding the effect of the Fourteenth Amendment on the consideration of race in university admissions programs. Justice Alito made clear that “racial neutrality is the driving force of the Equal Protection Clause”¹¹⁵ Such racial classification can only survive constitutional muster if it meets strict scrutiny and is narrowly tailored to achieving a compelling interest;¹¹⁶ the government is required to clearly demonstrate that its compelling interest is both substantial and constitutionally permissible.¹¹⁷

Justice Alito went on to state that the University had failed to demonstrate with clarity its stated purpose in pursuing student body diversity as a compelling interest.¹¹⁸ Justice Alito was highly critical of the University’s “critical mass” formulation, stating that it was vague and undefined.¹¹⁹ Such a nebulous goal is not permissible to justify the consideration of race in admissions programs, and the University, therefore, could not meet strict scrutiny.¹²⁰ In addition, Justice Alito emphasized that the majority ignored Court precedent by allowing the University to state broadly and imprecisely its goals in achieving student body diversity, failing to satisfy the strict scrutiny analysis.¹²¹ Although the Court’s precedents did not require the University to articulate a specific number of minority students enrolled, its proposed goals were simply not concrete enough to

112. *Id.*

113. *Id.* at 2217.

114. *Id.* at 2232.

115. *Fisher II*, 136 S. Ct. at 2220-21 (Alito, J., dissenting) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989)).

116. *Id.* at 2221 (citing *Grutter*, 539 U.S. at 327).

117. *Id.* at 2222 (Alito, J., dissenting) (citing *Fisher I*, 133 S. Ct. at 2418).

118. *Id.*

119. *Id.*

120. *Fisher II*, 136 S. Ct. at 2222-23 (Alito, J., dissenting) (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 735 (2007)).

121. *Id.* at 2223-24.

withstand strict scrutiny.¹²² Justice Alito went on to say that “the destruction of racial stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry . . .” are “laudabile goals . . .,” but are too vague and lack the requisite specificity to withstand constitutional scrutiny.¹²³

Next, Justice Alito was highly critical of the University’s use of demographic data, stating that the University had premised diversity on mere racial census.¹²⁴ Justice Alito pointed to such measuring of racial minorities as racial balancing, which was held in *Fisher I* to be “patently unconstitutional.”¹²⁵ Similarly, Justice Alito was highly critical of the majority in not addressing the issue of fewer Asian-American students in certain classes than there were Hispanic students, stating that the majority must have found such disparate treatment “benign, since Asian-Americans are *overrepresented* at [the University].”¹²⁶ This information was based on a classroom study that the University used in justifying its giving preference to African-American and Hispanic students.¹²⁷ Justice Alito articulated that such unequal treatment between Hispanic students and Asian-American students was discriminatory, and was a result of the University’s crude and overly simplistic classroom study.¹²⁸ Justice Alito further clarified that the University considered all Asian-American students as a monolithic body, failing to differentiate on the basis of ethnicity or nationality, constituting a group consisting of 60% of the world’s population.¹²⁹ Such a disparity was difficult for Justice Alito to reconcile, as the majority found that the University’s interest in preventing feelings of isolation and loneliness in minority students was a compelling interest.¹³⁰ Because of this contradiction, and the University’s vague interest in preventing feelings of isolation and loneliness, the University’s consideration of race in its admissions program did not meet strict scrutiny.¹³¹

122. *Id.* at 2222-23.

123. *Id.* at 2223.

124. *Id.* at 2225.

125. *Fisher II*, 136 S. Ct. at 2225 (Alito, J., dissenting) (citing *Fisher I*, 133 S. Ct. at 2419).

126. *Id.* at 2228.

127. *Id.* at 2226 (The small class study found that in classes with five or more students, 52% had no African-American students, 16% had no Asian-American students, and 12% had no Hispanic students. This university concluded after completion of the study, that it had not yet met its goal of achieving classroom diversity.).

128. *Id.* at 2229.

129. *Id.* at 2229.

130. *Fisher II*, 136 S. Ct. at 2235-36 (Alito, J., dissenting).

131. *Id.* at 2235.

Justice Alito next addressed whether the University's purpose and goal in achieving student body diversity satisfied the narrowly tailored approach mandated by *Fisher I*.¹³² Even if, as the University contended, *Grutter* only required the statement of a "generic interest in the educational benefits of diversity . . .," the University's plan failed to be narrowly tailored in achieving that interest.¹³³ Justice Alito emphasized that the University could implement a race-neutral holistic review, in addition to the top ten percent plan, and would still be successful in enrolling students who could contribute to dynamic diversity.¹³⁴

Finally, Justice Alito turned to the majority's three justifications for straying from its traditional view of the strict scrutiny standard.¹³⁵ First, he called "dangerously incorrect . . ." the majority's proposition that further fact-finding would be useless, as there was only a three-year period of study upon which to base whether its admissions plan unfairly disadvantaged Petitioner at the time of her application for enrollment.¹³⁶ However, this goes against the strict scrutiny mandate from *Fisher I*, requiring a university to bear the burden to show its race-neutral efforts were inadequate before it can justify using a race-conscious program.¹³⁷ The majority had essentially granted the University a "three-year grace period for racial discrimination."¹³⁸

The majority's second justification for moving from the normal strict scrutiny analysis, according to Justice Alito, was that the University could not choose to discontinue the Top Ten Percent plan, and therefore, had no interest in keeping data on the types of students enrolled through it.¹³⁹ However, since the case had been in litigation since 2008, and *Fisher I* was decided in 2012, the University was well aware of its burden to show that race-neutral alternatives were not sufficient—lack of choice in implementing the Top Ten Percent plan did not dispose of this burden.¹⁴⁰ Justice Alito then made an interesting point: the University had been less than forthright with its admission policies, as a 2014 investigation showed

132. *Id.* at 2236 (citing *Fisher I*, 133 S. Ct. at 2420 (stating narrow tailoring requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications"))).

133. *Id.*

134. *Id.* at 2236-37 (stating that such a race-neutral holistic review would still enable the University to "admit the 'star athlete or musician whose grades suffered because of daily practices and training . . ." in rebutting the majority's support of the University's consideration of race to enroll students who possess talents undetectable to grade point metrics).

135. *Fisher II*, 136 S. Ct. at 2238-39 (Alito, J., dissenting).

136. *Id.* at 2239.

137. *Id.* (citing *Fisher I*, 133 S. Ct. at 2420).

138. *Id.*

139. *Id.*

140. *Fisher II*, 136 S. Ct. at 2239-40 (Alito, J., dissenting).

that the University frequently admitted well-connected students and intentionally destroyed records leading back to this clandestine practice.¹⁴¹ The University claimed, however, that it was not in the practice of admitting such “legacy” students.¹⁴² Moving along, Justice Alito criticized the majority for excusing the University from producing records that could be used to concretely measure the amount of minority students enrolled through both the Top Ten Percent plan and holistic review.¹⁴³

The third justification for limiting strict scrutiny from *Fisher I* was more simple: the case had gone on for eight years and Petitioner had since graduated from a different university. Such considerations may have justified dismissal, but had no bearing on the merits of the case.¹⁴⁴

Justice Alito then concluded his dissenting opinion, ultimately stating that the majority’s decision was “remarkable—and remarkably wrong.”¹⁴⁵ Justice Alito further clarified that strict scrutiny and narrow tailoring require a university to prove with clarity its compelling interest in achieving student body diversity; however, the University had failed to precisely show any such goal.¹⁴⁶ What was at stake, according to Justice Alito, was “whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve ‘the educational benefits of diversity,’ without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives.”¹⁴⁷

IV. ANALYSIS

A. Introduction

The Court’s decision in *Fisher II* comes thirteen years to the day after Justice O’Connor predicted in *Grutter* in 2003 that within twenty-five years, the consideration of race in university admissions decisions would no longer be necessary in this country.¹⁴⁸ Roughly half-way into the life expectancy

141. *Id.* at 2240 (referencing the Kroll Report from 2014, which uncovered the secret practice of university officials to override normal holistic review to admit politically connected individuals. Records for students admitted in this manner were destroyed in an effort to hide any paper trail.).

142. Abigail Noel FISHER, Petitioner, v. UNIVERSITY OF TEXAS AT AUSTIN, et al., 2015 WL 9919333 (U.S.), 51 (U.S. Oral. Arg., 2015) (Counsel for the University: “University of Texas does not do legacy, Your Honor”).

143. *Fisher II*, 136 S. Ct. at 2240-41 (Alito, J., dissenting).

144. *Id.* at 2242.

145. *Id.* at 2243.

146. *Id.* at 2242-43.

147. *Id.*

148. *Grutter*, 539 U.S. at 310; see Stuart Taylor, *Symposium: Extrapolating from Fisher – Racial Preferences Forever*, SCOTUSBLOG (June 23, 2016, 4:42 PM), <http://www.scotusblog.com/2016/06/>

of affirmative action, however, *Fisher II* stands for the proposition that the consideration of race in university admissions is here to stay.¹⁴⁹ Both *Fisher I* and *Grutter* recognized that achieving student body diversity constitutes a compelling interest for public universities.¹⁵⁰ In order for a university to prove that its compelling interest is reconcilable with the Equal Protection Clause, its consideration of race in admissions decisions must meet “strict scrutiny” and be “narrowly tailored” in achieving its purpose.¹⁵¹ The Court’s jurisprudence also gives some, though not total, deference to a university in determining that the consideration of race in academic decisions is necessary for attaining student body diversity,¹⁵² but grants no deference to the University in determining whether its goals in promoting student body diversity satisfy the narrow tailoring analysis.¹⁵³

The majority’s opinion in *Fisher II* seems to provide two departures from this approach: (1) the requirements of strict scrutiny and narrow tailoring have been relaxed; and (2) near complete judicial deference is given to a university in implementing race-consciousness in its admission decisions.¹⁵⁴ This note will examine the majority’s analysis of the University’s goals in complying with strict scrutiny and narrow tailoring in the context of prior case law, discuss the expansion of judicial deference in affirmative action decisions, and explore the potential future impact that *Fisher II* may have on subsequent affirmative action litigation.

B. Discussion

1. Strict Scrutiny and Narrow Tailoring: *Bakke* and Beyond

Initially, it should be noted that *Fisher I* and *Grutter* still hold precedential value as good case law in affirmative action jurisprudence.¹⁵⁵ However, the majority’s opinion in *Fisher II* departs from these cases, as well as others, by relaxing the restrictions on race-based university admissions plans imposed by strict scrutiny and narrow tailoring.¹⁵⁶

symposium-extrapolating-from-fisher-racial-preferences-forever/ [hereinafter Taylor, *Symposium: Extrapolating from Fisher*].

149. See Taylor, *Symposium: Extrapolating from Fisher*, *supra* note 148.

150. *Fisher I*, 133 S. Ct. at 2418 (citing *Grutter*, 539 U.S. at 324 (“student body diversity is a compelling state interest that can justify the use of race in university admissions”)).

151. *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher I*, 133 S. Ct. at 2418-20).

152. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419).

153. *Id.* (citing *Fisher I*, 133 S. Ct. at 2419-20).

154. See *Fisher II*, 136 S. Ct. at 2216, 2238-39 (Alito, J., dissenting).

155. See John Paul Schnapper-Casteras, *Symposium: Moving Forward from Fisher II*, SCOTUSBLOG (June 24, 2016, 5:13 PM), <http://www.scotusblog.com/2016/06/symposium-moving-forward-from-fisher-ii/> [hereinafter Schnapper-Casteras, *Symposium: Moving Forward*].

156. See Elizabeth Slattery, *Fisher v. UT-Austin and the Future of Racial Preferences in College Admissions*, 17 FEDERALIST SOC’Y REV. 22, 25 (2016) [hereinafter Slattery, *Fisher v. UT-Austin*].

In 1978, the Court in *Bakke* invalidated an admissions program utilized by the University of California, Davis, in which its medical school admissions committee set aside sixteen out of 100 seats for underrepresented minorities.¹⁵⁷ However, the Court in *Bakke* permitted universities to use racial preference in its admissions decisions to promote “the educational benefits that flow from an ethnically diverse student body.”¹⁵⁸ The Court’s permission to consider race in admissions decisions did not come without limitation. A university’s consideration of race *must* meet strict scrutiny to be consistent with the express guarantees of the Equal Protection Clause, for when government decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”¹⁵⁹

In 2003, the Court reaffirmed this position in *Grutter*, clarifying that any use of racial classification in university admissions must meet strict scrutiny in order to pass constitutional muster.¹⁶⁰ Such racial classifications are only permissible if they are narrowly tailored in achieving a compelling governmental interest.¹⁶¹ The Court ultimately upheld the University of Michigan Law School’s race-conscious holistic admissions review because the benefits articulated by the University in administering its admissions program promoted “cross-racial understanding . . .” leading to the “break down [of] racial stereotypes . . .,” helping students to “better understand persons of different races.”¹⁶²

Justice Kennedy in *Fisher I* then adopted this test as the correct judicial standard to be applied when reviewing a university’s decision to implement the consideration of race in its admissions policies.¹⁶³ In *Fisher I*, Justice Kennedy laid out the framework to be used as derived from *Grutter* and *Bakke*, requiring that a university’s consideration of race in admissions program meet strict scrutiny to be constitutionally permissible, be narrowly tailored in achieving those ends, and be demonstrated with clarity and specificity.¹⁶⁴ These compelling interests served far beyond attaining student body diversity, and facilitated the “lessening of racial isolation and stereotypes . . .” while promoting “enhanced classroom dialogue”¹⁶⁵

157. *Bakke*, 438 U.S. at 265.

158. *Id.* at 305, 357.

159. *Id.* at 299.

160. *Grutter*, 539 U.S. at 326 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

161. *Id.*

162. *Id.* at 330.

163. *Fisher I*, 133 S. Ct. at 2421.

164. *Id.* at 2418.

165. *Id.*

Despite these express limitations, Justice Kennedy upheld in *Fisher II* the University's consideration of race without any seemingly concrete, specific, or measurable goals.¹⁶⁶ Justice Kennedy pointed out that merely "asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."¹⁶⁷ These goals included: "ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry . . .'"¹⁶⁸

Thus, put bluntly, so long as a university can articulate certain "buzzwords" as justification for its adoption of race-based admissions policies, its affirmative action plan will survive constitutional scrutiny.¹⁶⁹ The problem with permitting such goals to satisfy narrow tailoring, as Justice Alito pointed out, is that they are exactly the type of "amorphous," immeasurable goals that Justice Kennedy warned against in the majority opinion.¹⁷⁰ Moreover, Justice Kennedy deeply criticized vague goals in *Parents Involved*, stating such abstract goals are "so broad and imprecise that they cannot withstand strict scrutiny."¹⁷¹

How, then, is a university to clearly articulate its goals in pursuing the educational benefits of diversity? The upside to Justice Kennedy's allowing such goals to survive judicial scrutiny is that it alleviates the "catch-22" problem universities often face in establishing diversity as a compelling interest.¹⁷² It is impermissible for a university to implement racial balancing in the form of percentage quotas or demographic comparisons,¹⁷³ but equally impermissible for a university to put forth "amorphous" or immeasurable goals in its justification for pursuing the benefits that come with diversity.¹⁷⁴ With this in mind, Justice Kennedy's opinion grants universities some breathing room to pursue diversity for the "commonsense proposition that diversity along various lines – including racial diversity – yields significant educational benefits on college campuses."¹⁷⁵

166. See *Fisher II*, 136 S. Ct. at 2223 (Alito, J., dissenting).

167. *Id.* at 2211.

168. *Id.*

169. See Slattery, *Fisher v. UT-Austin*, *supra* note 156, at 25.

170. See *Fisher II*, 136 S. Ct. at 2223 (Alito, J., dissenting).

171. *Id.* at 2223-24 (citing *Parents Involved*, 551 U.S. at 785 (Kennedy, J., concurring in part and concurring in judgment)).

172. See Schnapper-Casteras, *Symposium: Moving Forward*, *supra* note 155.

173. *Fisher II*, 136 S. Ct. at 2208, 2210.

174. See *id.* at 2211.

175. See Schnapper-Casteras, *Symposium: Moving Forward*, *supra* note 155.

2. Granting Considerable Deference to Universities in Affirmative Action Review

Perhaps the most striking implication following the wake of the Court's decision in *Fisher II* is that universities are now granted "considerable deference . . ." in determining whether a race-conscious admissions policy is necessary for the promotion of student body diversity.¹⁷⁶ Justice Kennedy made it abundantly clear in *Fisher I* that a university's decision to pursue the benefits of diversity is substantially an "academic judgment to which some, but not complete, judicial deference is proper."¹⁷⁷ However, "no deference is owed when determining whether the use of race is narrowly tailored to achieve the University's permissible goals."¹⁷⁸

As stated earlier, Justice Kennedy looked to the goals the University had laid out in order to achieve student body diversity, citing "ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry . . .'"¹⁷⁹ However, Justice Kennedy relied on the University's statement that it had tried race-neutral alternatives—albeit unsuccessfully—in making its argument that its consideration of race was narrowly tailored to achieve its permissible goals.¹⁸⁰ Moreover, Justice Kennedy rebutted Petitioner's argument that the University's admissions policy was not narrowly tailored because the consideration of race played a minimal impact on admissions decisions.¹⁸¹ However, Justice Kennedy relied on studies undertaken by the University as well as anecdotal evidence offered by faculty and administrators, in demonstrating that the University had not yet reached its "critical mass."¹⁸²

Justice Alito was highly critical of the majority's opinion upholding the University's justification that it had not yet attained a "critical mass" of minority student enrollment, as the University never defined, with any reasonable amount of clarity or precision, when "critical mass" would be reached.¹⁸³ Justice Alito went on to say that the University would know it when it sees that "critical mass" had been reached, stating "in other words: Trust us."¹⁸⁴ According to Justice Alito, the majority granted the

176. See *Fisher II*, 136 S. Ct. at 2214.

177. *Fisher I*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 329).

178. *Id.* at 2419-20.

179. *Fisher II*, 136 S. Ct. at 2211.

180. *Id.* at 2213.

181. *Id.* at 2212.

182. *Id.* at 2211-12.

183. *Fisher II*, 136 S. Ct. at 2216 (Alito, J., dissenting).

184. *Id.* at 2222.

University's "plea for deference—indeed, for blind deference—the very thing that the Court rejected in *Fisher I*."¹⁸⁵

Although Justice Kennedy cited *Fisher I* in stating that no deference was owed to a university when reviewing whether its goals were narrowly tailored,¹⁸⁶ in actuality, near complete deference was granted to the University in allowing it to permit evidence from studies, as well as anecdotal evidence, in arguing that its goals survived the narrow tailoring analysis.¹⁸⁷ It seems that by upholding immeasurable goals, couched in a "critical mass"¹⁸⁸ only identifiable by the University, the majority has mandated that future courts will defer to a university in showing that its use of race is narrowly tailored—a possibility that should have been precluded by the Court's clear rejection of such deference in *Fisher I*.¹⁸⁹ Ultimately, Justice Kennedy trusted the University on its word that "critical mass" had not yet been attained.¹⁹⁰ Because universities should be open to experimentation in testing both the negative and positive effects of the consideration of race in pursuing student body diversity,¹⁹¹ the strict standard of giving no deference to universities when determining if its goals are narrowly tailored has been abandoned in *Fisher II*.¹⁹²

185. *Id.* at 2215.

186. *Fisher II*, 136 S. Ct. at 2208.

187. See Elizabeth Slattery, *Symposium: A Disappointing Decision, but More Lawsuits Are on the Way*, SCOTUSBLOG (June 24, 2016, 1:13 PM), <http://www.scotusblog.com/2016/06/symposium-a-disappointing-decision-but-more-lawsuits-are-on-the-way/> [hereinafter Slattery, *Symposium: A Disappointing Decision*] (stating that, although judges must not defer to a university when determining if its use of race is narrowly tailored, this part "lost any teeth it may have had because Kennedy's opinion lets schools provide scant evidence").

188. See Peter N. Kirsanow, *Race Discrimination Rationalized Again*, 2016 CATO SUP. CT. REV. 59, 63 (2016) (stating "[w]hat is critical mass? Who knows? It is a question that apparently does not interest the majority. In failing to require UT Austin to *define* 'critical mass,' Justice Kennedy has given universities broad license to engage in racial discrimination in pursuit of the elusive critical mass").

189. See *Fisher II*, 136 S. Ct. at 2223 (Alito, J., dissenting) (stating that "Courts will be required to defer to the judgment of university administrators, and affirmative action policies will be completely insulated from judicial review"); see also Taylor, *Symposium: Extrapolating from Fisher*, *supra* note 148; Henderson, *Symposium: What Proof Should We Demand*, *supra* note 20; Kirsanow, *supra* note 188, at 64 (stating "[t]hese [goals] are nothing more than fuzzy obfuscations. If these goals are considered sufficiently specific to constitute a compelling interest, almost any goal short of 'We want to engage in blatant racial balancing' will constitute a compelling interest").

190. See Slattery, *Fisher v. UT-Austin*, *supra* note 156, at 25.

191. *Fisher II*, 136 S. Ct. at 2214.

192. See *id.* at 2223 (Alito, J., dissenting); see also Taylor, *Symposium: Extrapolating from Fisher*, *supra* note 148; Kirsanow, *supra* note 188, at 60 (stating that the Court's "decision missed the opportunity to enforce the narrow tailoring prong of strict scrutiny on which Justice Kennedy appeared so keen in *Fisher I*").

3. *The Future Impact of Fisher II on Affirmative Action Litigation*

Justice Kennedy concluded the opinion of the Court with a limitation: the University has an ongoing obligation to continually reevaluate and scrutinize its need to consider race in its admissions decisions.¹⁹³ However, it is ultimately left to universities—and not the courts—to strike the fragile balance between conforming with the Equal Protection Clause and pursuing the nation’s interest in promoting student body diversity.¹⁹⁴ It would appear, although not with crystal clarity, that courts will have difficulty invalidating affirmative action programs in the future under the framework set forth in *Fisher II*.¹⁹⁵

Any university admissions policy being challenged in the future may withstand a court’s constitutional review, so long as it can mimic the University’s goals as outlined in *Fisher II*.¹⁹⁶ Goals such as “promoting cross-racial understanding . . .” and “preparing students for an increasingly diverse workforce . . .” are sufficient under the *Fisher II* framework to prove that a university’s decision to consider race in its admission policy withstands strict scrutiny.¹⁹⁷ Such goals, according to Justice Kennedy, fall in line with the Court’s prior articulations of a university’s compelling interest in achieving student body diversity.¹⁹⁸ Because such goals are constitutionally permissible, universities in the future can fall in line with the University of Texas to survive constitutional scrutiny, citing to its own evidence that, in its academic opinion, “critical mass” has not yet been attained.¹⁹⁹ Although the Court’s decision in *Fisher II* did not much—if at all—change existing case law,²⁰⁰ the Court’s decision ensures that the life expectancy of affirmative action programs in this country has been extended, potentially indefinitely.²⁰¹ For the time being, universities across the country have been granted permission to continue to consider race in admissions decisions.²⁰²

193. *Id.* at 2214-15.

194. *See Fisher II*, 136 S. Ct. at 2214; *see also* Slattery, *Symposium: A Disappointing Decision*, *supra* note 187.

195. *See* Taylor, *Symposium: Extrapolating from Fisher*, *supra* note 148; *see also* Henderson, *Symposium: What Proof Should We Demand*, *supra* note 20 (stating that the Court “did not say in so many words that the justices will bless virtually every racial preference plan that comes before them”).

196. *See Fisher II*, 136 S. Ct. at 2211.

197. *See id.*

198. *Id.*

199. *See* Slattery, *Fisher v. UT-Austin*, *supra* note 156, at 25.

200. *See id.*

201. Schnapper-Casteras, *Symposium: Moving Forward*, *supra* note 155; *see* Taylor, *Symposium: Extrapolating from Fisher*, *supra* note 148.

202. *See* Slattery, *Symposium: A Disappointing Decision*, *supra* note 187.

V. CONCLUSION

Fisher II expands further the already controversial topic of the consideration of race in university admissions decisions.²⁰³ In upholding the University's race-conscious holistic review of its potential applicants, the Court reaffirmed that a university's pursuit of student body diversity serves a compelling interest.²⁰⁴ The legacy that *Fisher II* leaves behind is that ultimately, affirmative action programs are here to stay, expanding Justice O'Connor's prior expectation that such policies would no longer be necessary within twenty-five years.²⁰⁵ Though the Court articulated in *Fisher II* that a university admissions program must meet strict scrutiny and be narrowly tailored,²⁰⁶ universities are required to be given "considerable deference . . ." by reviewing courts in striking the balance between ensuring the rights guaranteed by the Equal Protection Clause and pursuing the educational benefits that flow from student body diversity.²⁰⁷ Thus, *Fisher II* serves to give a university substantial leeway in determining for itself whether the consideration of race is necessary in its admissions policies, and in deciding how to implement such a policy in furthering its pursuit of attaining student body diversity.²⁰⁸

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203. See Glater, *Debt, Merit, and Equity*, *supra* note 2, at 93.

204. See *Fisher II*, 136 S. Ct. at 2211.

205. See Schnapper-Casteras, *Symposium: Moving Forward*, *supra* note 155.

206. See *Fisher II*, 136 S. Ct. at 2207-08.

207. *Id.* at 2214.

208. See *id.*; see also Schnapper-Casteras, *Symposium: Moving Forward*, *supra* note 155.