# ARTICLE

## *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*: PROMOTING FULL JUDICIAL REVIEW AND PROCESS IN APPLYING STRICT SCRUTINY

*Rebecca K. Lee*[*]

### INTRODUCTION

In recently deciding *Fisher v. University of Texas at Austin*,[1] the U.S. Supreme Court in its 7-1 majority opinion[2] issued a cautious and limited ruling, but one that strengthens the role of evidence-based judicial review and process in applying strict scrutiny. As an initial and important matter, *Fisher* does not disturb the Court's earlier holdings in *Regents of the University of California v. Bakke*,[3] *Grutter v. Bollinger*,[4] and *Gratz v. Bollinger*,[5] and the majority in fact makes clear that those cases are still good law, stating that it "take[s] those cases as given for purposes of deciding [*Fisher*]."[6] In expressing this, the Court continues to recognize that a university's interest in attaining a diverse student body for educational purposes is a compelling interest that could make the consideration of race in university admissions permissible under the Fourteenth Amendment's Equal Protection Clause.[7] While these cases all held that strict

---

* Associate Professor of Law, Thomas Jefferson School of Law. B.A., University of Chicago; M.P.P., Harvard University, John F. Kennedy School of Government; J.D., Georgetown University Law Center. I thank Meera Deo, Brenda Simon, and Kaimipono Wenger for their excellent comments.

1. Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).
2. Justice Elena Kagan did not take part in the consideration or vote of this case. *Id.*
3. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
4. Grutter v. Bollinger, 539 U.S. 306 (2003).
5. Gratz v. Bollinger, 539 U.S. 244 (2003).
6. *Fisher*, 133 S. Ct. at 2417.
7. *Id.* at 2419.

scrutiny would be used to examine whether a university's use of race is narrowly tailored to meet its asserted objective, *Fisher* arguably appears to make the strict scrutiny analysis more strict and more scrutinizing by requiring independent judicial review of a university's admissions program in determining whether the narrowly-tailored prong is met.[8]

It is indeed a positive outcome that student body diversity remains a compelling governmental interest under the Equal Protection Clause, given the pedagogical goals of universities and the longer-term benefits highlighted by the amici in *Grutter*, many of whom focused on this question.[9] *Fisher* takes a closer look at the narrowly-tailored part of the strict scrutiny standard, and clarifies that this must entail a court's separate assessment rather than deference to a university's conclusions.[10] In providing this clarification, *Fisher* does not narrow the use of race in affirmative action programs per se. Rather, it strengthens full judicial review and process under strict scrutiny and upholds the constitutionality of such programs if the standard is met.

## DEFERENCE TO THE UNIVERSITY AND STRICT SCRUTINY

According to the Supreme Court's majority opinion in *Fisher*, written by Justice Anthony Kennedy, the University's judgment and experience deserve deference on its finding that diversity in the student body is needed for its learning aims, but deference should not be accorded to the University on whether its particular admissions process was narrowly cabined to meet its diversity goal.[11] This means that a court must examine whether an admissions program uses an individualized and flexible

---

8. *See id.* at 2419–21.

9. *Grutter*, 539 U.S. at 328–31; *see, e.g.*, Brief for Amici Curiae 65 Leading Am. Businesses in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241), *available at* http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf ("For [the students of today] to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions."); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 12, 19–21, *Grutter*, 539 U.S. 306 (No. 02-241), *available at* http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/GM-both.pdf ("The business world has learned that, just as Justice Powell observed, 'the nation's future does indeed depend [ ] upon leaders trained' in diverse academic environments. The capacities to work easily with persons of other races and to view problems from multiple perspectives are essential skills in the business world of the twenty-first century.") (citation omitted). *See also* Meera E. Deo, *The Promise of* Grutter*: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 97–103 (2011) (discussing the results of a "Perspectives on Diversity" study conducted at the University of Michigan Law School during the 2009-2010 academic year, which demonstrates the importance of student body diversity in the law school context).

10. *Fisher*, 133 S. Ct. at 2419–20.

11. *Id.*

process that considers the applicant's race or ethnicity as one of many relevant factors, and must also determine whether the university could have feasibly implemented an alternative admissions process without the use of racial categorization, rather than rely on the university's own assertion that it considered feasible race-neutral alternatives.[12] On the one hand, the lack of deference to the educational institution on whether workable race-neutral alternatives exist presents a high hurdle for a university to clear in showing the necessity of its admissions program for the court's independent review. On the other hand, it seems to some extent sensible and prudent to require the reviewing court to not entirely defer to a university's conclusions but to look at the evidence in order to separately determine whether the admissions process is both narrowly designed and needed to reach the university's asserted diversity goal.

A standard giving near-complete deference to any party, including to a university, would not actually be much of a standard, and it would appear to deprive the reviewing court of its evidence-based adjudicatory function. Given that a university receives deference as to whether it has a compelling interest in having student body diversity, it would make sense to have the balance of the inquiry not fully rest on the university's findings if strict scrutiny is to serve as more than a superficial judicial standard in terms of process.[13] After all, the particular approach used in implementing any program is just as important as the goal it is designed to achieve. Under strict scrutiny's narrow-tailoring requirement, it follows that this would involve requiring the university to put forth sufficient evidence to demonstrate its need for an admissions program that takes into account race as a factor. At the same time, for strict scrutiny to also not serve as a near-impossible standard, there must be reasonable ways for a state actor to be able to satisfy it so that judicial application of strict scrutiny does not doom any university admissions plan that is supported by the evidence. And the sentiment expressed by the majority in *Fisher*, that "[s]trict scrutiny must *not* be 'strict in theory, but fatal in fact,'" reinforces this expectation.[14]

---

12. *Id.*

13. *See id.* at 2421 ("In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context . . . .").

14. *Id.* (emphasis added).

JUDICIAL REVIEW IN FISHER

In *Fisher*, the Supreme Court found that the Federal District Court and the Court of Appeals for the Fifth Circuit relied on the University of Texas' good faith argument that it carefully considered feasible race-neutral alternatives, and as a result ruled that both lower courts did not conduct an independent judicial review as required under a strict scrutiny standard.[15] Justice Kennedy, in writing for the majority of seven, further pointed out that *Fisher* was decided below on summary judgment, in contrast to *Grutter* which was decided after trial and after all of the evidence had been presented.[16] Accordingly, the Supreme Court vacated the grant of summary judgment in favor of the University—not because the University failed to show that it had actually considered race-neutral options, but because the appellate court below did not determine whether the University had offered sufficient evidence to demonstrate that its admissions program was in fact narrowly-tailored to support its diversity-related educational goals.[17] If the court below, either the Court of Appeals for the Fifth Circuit or the District Court, depending on which court ultimately moves forward with the case,[18] concludes that the University carried its evidentiary burden, then a ruling again may be made on summary judgment.[19] There appears to be no genuine issues of material fact in *Fisher* that would suggest a need for a trial since the parties each moved for summary judgment.[20] But if the reviewing court should conclude that such issues exist or if additional evidence is needed, it would be appropriate for the court to

---

15. *Id.* at 2420–21.

16. *Id.* at 2421.

17. *Id.* at 2421–22.

18. *See* Lyle Denniston, *Texas College Case Moves Ahead (UPDATED)*, SCOTUSBLOG (July 24, 2013, 5:11 PM), http://www.scotusblog.com/?p=167737 (last updated July 25, 2013, 10:10 AM) (noting that the lawyers for the University in *Fisher* filed a motion in the Court of Appeals for the Fifth Circuit to have the case sent back to the District Court for reconsideration following the Supreme Court's ruling, and also that the lawyers for Abigail Noel Fisher filed their own document, arguing that the Circuit Court should make the follow-up ruling); Lyle Denniston, *Next Round in Fisher Case*, SCOTUSBLOG (Sep. 12, 2013, 3:31 PM), http://www.scotusblog.com/2013/09/next-round-in-fisher-case/ (providing a follow-up development in the case and stating that the Fifth Circuit gave the lawyers for both sides a list of questions to answer in a fall briefing cycle so that the Circuit Court could decide whether to proceed with the case or send it to the District Court).

19. *See Fisher*, 133 S. Ct. at 2421 ("In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.").

20. *Id.* at 2417.

recognize the limitations of a summary judgment review and give the University the opportunity to submit all of its evidence at trial.[21] As long as the University can demonstrate with adequate evidence that its program was narrowly tailored to meet its asserted goal of achieving student body diversity, thereby allowing the court to make its own assessment based on this evidence, strict scrutiny should not be a barrier to upholding the program's validity.

## PROMOTING FULL PROCESS IN APPLYING STRICT SCRUTINY

Because the University's admissions program was challenged in *Fisher*, the University was placed in the role of the defendant, and, as defendants often do, the University moved for summary judgment.[22] But as a matter of full process, and to protect the rights of plaintiffs generally, who are usually the less powerful party vis-à-vis the defendant when the plaintiff is an individual suing an institutional entity, allowing a thorough airing of all the relevant facts ought to serve as the proper way to reach a thoroughly-considered decision. This is especially important when addressing complicated and controversial issues.

Requiring independent judicial assessment as part of the constitutional inquiry provides a procedural safeguard when reviewing governmental action under strict scrutiny. Separate and complete judicial review is needed even when the state program at issue appears to have been well-considered and implemented in good faith. Moreover, process should not be abbreviated to suit a certain outcome, even when the outcome may be seen as desirable. Case outcomes, of course, can vary depending on the facts and thus be somewhat unstable or unpredictable, whereas process provides the constancy that ensures the outcome is well-supported.

---

21. *See id.* ("Unlike *Grutter*, which was decided after trial, this cases arises from cross-motions for summary judgment . . . . Whether this record—and not 'simple . . . assurances of good intention,'—is sufficient is a question for the Court of Appeals in the first instance." (citations omitted)); *see also* FED. R. CIV. PROC. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

22. *E.g.,* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 91–92 (1990) (reviewing 140 published federal court opinions in which one party moved for summary judgment and finding that 122 of the summary judgment motions were made by defendants and 18 were made by plaintiffs, and thus that "[s]ummary judgment is a defendant's motion").

## JUSTICE THOMAS' CONCURRENCE AND NON-ANALOGOUS ANALOGIES

### *A. Racial Discrimination Versus Racial Inclusion*

It is worth addressing the arguments made by Justice Clarence Thomas in his fairly lengthy concurrence in *Fisher*, in which he comments that he would go so far as to overrule *Grutter* in order to invalidate a university's use of race in admissions under the Equal Protection Clause.[23] Justice Thomas joined the majority opinion because he agrees that the appellate court below did not use strict scrutiny in assessing the University of Texas' use of race in deciding whom to admit.[24] But in discussing what is needed for strict scrutiny, he disagrees that any educational gains that come from having a diverse student body amount to a compelling state interest.[25] Instead, he states that the Supreme Court refused to accept the contention that educational benefits could justify discrimination based on race to maintain racial segregation in the 1950s, and likewise should refuse to accept the contention that diversity-related benefits could now justify what he refers to as "racial discrimination" on the part of the University.[26] Thomas' view, however, confuses "racial discrimination" with racial inclusion: there is certainly a difference between seeking to entirely exclude traditionally disadvantaged individuals due to ongoing racial animus and stereotypes and seeking to include traditionally disadvantaged individuals to promote equality. [27] Thus, achieving student body diversity by considering race in university admissions is not discriminatory because doing so aims to recruit a racially heterogeneous rather than homogeneous class of students.

### *B. Racial Segregation Versus Racial Integration*

Justice Thomas goes on to point out that under the Court's desegregation cases, racial discrimination is not constitutionally permitted, even in situations where the institution's very existence depended on it because of a fear that white students would exit the school in large numbers if blacks were admitted.[28]

---

23. *Fisher*, 133 S. Ct. at 2422–32 (Thomas, J., concurring).

24. *Id.* at 2422.

25. *Id.* at 2426.

26. *Id.* at 2424.

27. *See, e.g.*, John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2163–64 (2004) (noting that in the Supreme Court's affirmative action cases, the justices took the wrong approach in viewing "classification" based on race to be the same thing as "discrimination" based on race).

28. *Fisher*, 133 S. Ct. at 2425.

He thus concludes that if a school cannot justify race-based measures to prevent its complete closure, then it cannot justify race-based measures to attain educational benefits.[29] But Thomas once more confounds the Constitution's prohibition on racial discrimination in the form of direct exclusion with the use of race to support racial inclusion and equality for better educational outcomes—the latter of which is not prohibited under the Court's decisions in *Bakke*[30] and *Grutter*.[31] Because both the *Bakke* and *Grutter* decisions uphold the validity of a university admissions process that takes into account race toward achieving inclusivity, the question of whether a university could also justify the use of race to prevent the need to shut its doors is irrelevant in this case.

Justice Thomas further finds the University's contention that a diverse student body improves students' leadership skills in a diverse world similar to the argument made by segregationists that segregated educational settings would give blacks more chance to develop their leadership skills without facing racial hostility from whites.[32] But contrary to his wide-brush analogy, these two claims assert different things based on different values: arguing that minority and non-minority students ought to learn together in mixed settings in part to prepare for all kinds of leadership roles in the broader diverse world is rather different from arguing that a racial minority group ought to learn in a racially segregated environment to prepare for only limited leadership roles in segregated situations.[33] The segregationists sought to limit black students' influence as leaders by keeping them in black society, and yet also continued to prepare white students for leadership in society broadly for positions already occupied by whites. The University in *Fisher*, however, sought to better equalize the influence of majority racial groups on the learning enterprise by bringing in more racial and ethnic minorities, so that all groups could be better prepared to lead in an integrated society. Consequently, the arguments in both *Fisher* and *Grutter* concerning leadership training at school, before

---

29. *Id.* at 2425–26. Justice Thomas acknowledges, however, that the University of Texas has not alleged that it will be forced to close if it is not allowed to use race in admissions. *Id.*

30. Regents of Univ. of California v. Bakke, 438 U.S. 265, 307–12 (1978). *Fisher*, 133 S. Ct. at 2416–18.

31. Grutter v. Bollinger, 539 U.S. 306, 325 (2003); *Fisher*, 133 S. Ct. at 2416.

32. *Fisher*, 133 S. Ct. at 2425–26.

33. *See, e.g.*, Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1451 (1993) (stating that integration "is premised on diversity and tolerance" whereas segregationism "is premised on racial domination and superiority").

entering the workforce,[34] are relevant and important.

Justice Thomas is right to point to the example of historically black colleges and universities (HBCUs), whose graduates include a number of black leaders with broad influence, to show that historically black schools also produce black leaders with influence in larger society.[35] But there remains a distinction between excluding minorities from attending the same schools as whites, as the segregationists wanted, and giving blacks the choice to attend any college or university, including a predominantly or historically black college: providing black students a choice regarding whether to attend a HBCU or a non-HCBU is clearly different from giving them no choice but to attend a blacks-only institution.[36] Just as segregation is not the same thing as integration, to be forced to learn in only a racially-homogenous setting is not the same as having the opportunity to learn in a racially-integrated environment. And to provide the latter, a university should be able to consider an applicant's race to open its doors to a more diverse mix of students.

### *C. Using Race to Harm Minorities Versus to Help Minorities*

Justice Thomas raises a fair question as to whether we can actually know whether any sort of racial consideration in university admissions harms or helps racial minorities.[37] One response to this is to consider whether non-minority applicants want the same opportunities that are being provided to minority applicants under the program at issue. So, if a university admissions program takes into account race as a factor and grants applicants of color more opportunities for admission,

---

34. *Grutter*, 539 U.S. at 332; Brief for Respondents at 32, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Fisher.BIO.Final.12.7.2011.pdf; *see also* Rebecca K. Lee, *Implementing* Grutter's *Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133 (2011), *cited in* Brief for the State of California as Amicus Curiae in Support of Respondents at 9, 10, and *in* Brief of Distinguished Alumni of the University of Texas at Austin as Amici Curiae in Support of Respondents at 10, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

35. *Fisher*, 133 S. Ct. at 2426, 2432 n.5.

36. *See* Johnson, *supra* note 33, at 1437–38 (arguing for the need to maintain HBCUs and asserting that black students should have a choice as to whether to attend a predominantly black college or a predominantly white college).

37. *Fisher*, 133 S. Ct. at 2429–30.

> The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities . . . . the University would have us believe that its discrimination is . . . benign. I think the lesson of history is clear enough: Racial discrimination is never benign . . . . The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

*Id.*

would white students also want greater opportunities for admission to the school, or would whites seek to be admitted elsewhere? Put differently, using Thomas' diversity-as-the-new-segregation rationale for argument's sake, imagine we have a racially segregated school system with predominantly non-white schools. In such a scenario, a question to ask is whether many whites would seek admission to the predominantly non-white schools to gain the same benefits as those who attend these schools? The answer is no. In *Fisher*, however, a rejected white college applicant sued the University, demonstrating in this case that whites want the same opportunities given to admitted racial minorities under University of Texas-Austin's admissions plan. Hence, to address Thomas' concern, given that minority applicants in *Fisher* also seek entrance to the University for the same benefits that enrolled white students receive, the use of race in admissions in this case and in similar situations helps minorities rather than harms them.

Finally, Justice Thomas suggests that some minority students may not initially be as academically prepared as majority group entrants for the rigors of university study because of the former group's less-advantaged backgrounds.[38] But to the extent this may be true, we know that a person's abilities can grow to increasingly match a new set of expectations with proper support and guidance, and that one's surroundings, whether new or old, can considerably widen or narrow one's vista concerning career possibilities and access to role models.[39] Consistent with the University's approach in *Fisher*[40] (and in *Grutter*),[41] minority students can succeed if given the chance, based on a full review of their individual admissions applications, to pursue their studies in an environment that challenges them and challenges those with whom they learn, so that they will all better learn together.

## CONCLUSION

Under *Fisher*, student body diversity as a compelling governmental interest to support the use of race in university admissions remains alive and well under the Equal Protection

---

38. *Id.* at 2432.

39. *See* Rebecca K. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition*, 98 MINN. L. REV. HEADNOTES (forthcoming 2013) (reviewing SONIA SOTOMAYOR: MY BELOVED WORLD (2013)).

40. Brief for Respondents, *supra* note 34, at 25–28, 39–40.

41. Brief for Respondents at 43–48, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *available at* http://www.vpcomm.umich.edu/admissions/legal/grutter/UM-Grutter.pdf.

Clause. And in clarifying what is needed for the narrowly-tailored part of the strict scrutiny standard, *Fisher* also shows that full judicial review and process under strict scrutiny must be alive and well, too.