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*Fourteenth Amendment — Equal Protection Clause —  
Public-University Affirmative Action —  
Fisher v. University of Texas at Austin*

*Fisher v. University of Texas at Austin*,<sup>1</sup> like the month in which its plaintiff received a fateful college rejection letter,<sup>2</sup> came into the Supreme Court like a lion but went out like a lamb. Although this challenge to the University of Texas at Austin's admissions policies was widely expected to be the vehicle for the end of public-university affirmative action,<sup>3</sup> it instead purported to stay within the framework articulated in 2003's *Grutter v. Bollinger*.<sup>4</sup> But while ostensibly staying within *Grutter*, Justice Kennedy's *Fisher* opinion brings one of the core propositions of his *Grutter* dissent into the majority: that universities should receive deference in identifying diversity as a compelling interest, but not in selecting the *means* by which they achieve that interest. The result of this tightening of strict scrutiny is likely to be a ratchet effect for the use of race in admissions: the more credible threat of litigation will push universities to develop race-neutral alternatives, and the demonstration of these alternatives at some universities will raise the bar on what it means for *any* university to exhaust race-neutral alternatives. While universities will still be able to work toward diversity through race-neutral means, this case may prove to be an inflection point in the overt use of race in university admissions.

In 2008, the University of Texas at Austin (the University) admitted Texas residents through two routes. First, under the "Top Ten Percent" law, the top ten percent of each high school class received automatic admission.<sup>5</sup> Second, the University admitted additional students by their combined performance on two indexes: an "Academic Index" (which considered high school class rank and standardized test scores),<sup>6</sup> and a "Personal Achievement Index" (which considered factors including work experience, extracurricular activities, and family socioeconomic status).<sup>7</sup> After the Supreme Court clarified in *Grutter*

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<sup>1</sup> 133 S. Ct. 2411 (2013).

<sup>2</sup> Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 6, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS) (noting that Abigail Fisher received a rejection letter from the University of Texas at Austin in the month of March).

<sup>3</sup> See, e.g., Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1 ("Both supporters and opponents of affirmative action said they saw the announcement — and the change in the court's makeup since 2003 — as a signal that the court's five more conservative members might be prepared to do away with racial preferences in higher education.")

<sup>4</sup> 539 U.S. 306 (2003); see *Fisher*, 133 S. Ct. at 2417 ("Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status . . . . We take those cases as given for purposes of deciding this case.")

<sup>5</sup> *Fisher*, 133 S. Ct. at 2416.

<sup>6</sup> *Fisher*, 645 F. Supp. 2d at 591.

<sup>7</sup> *Fisher*, 133 S. Ct. at 2415–16.

that achieving educational diversity was a compelling interest,<sup>8</sup> the University began considering race in the Personal Achievement Index.<sup>9</sup>

Abigail Fisher, then a high school student in Sugar Land, Texas, sought admission to the University's 2008 entering class.<sup>10</sup> As she fell outside her high school's top ten percent, the University considered, and rejected, her application under the Index system. She brought an equal protection challenge to the University's admissions system in the United States District Court for the Western District of Texas.<sup>11</sup>

The Western District of Texas granted summary judgment for the University.<sup>12</sup> Reviewing the history of the University's admissions plans, Judge Sparks found that the University had "done more than merely *consider* race neutral alternatives": it had *carried out* extensive race-neutral efforts to increase diversity.<sup>13</sup> The resulting system, he found, had "obvious similarities" to the program approved in *Grutter*.<sup>14</sup> Judge Sparks held that even if every race-neutral alternative had not been exhausted, the University had "given serious, good faith consideration to workable race-neutral alternatives as required by *Grutter*."<sup>15</sup>

The Fifth Circuit affirmed.<sup>16</sup> Judge Higginbotham's decision turned on his articulation of how strict scrutiny was to be applied in the context of public-university affirmative action. While any government use of race is subject to strict scrutiny, Judge Higginbotham read *Grutter* as commanding that "a university's educational judgment in developing diversity policies is due deference."<sup>17</sup> The court's role, he held, is not to "second-guess the merits of the University's decision," but rather to "scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires."<sup>18</sup>

Judge Garza concurred to argue that while Judge Higginbotham applied *Grutter* correctly, *Grutter*'s strict scrutiny articulation was muddled and wrong. Noting that the cases in which the Court had approved government use of race under the usual strict scrutiny standard "c[ould] be counted on one hand,"<sup>19</sup> Judge Garza criticized *Grutter*'s

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<sup>8</sup> 539 U.S. at 328.

<sup>9</sup> *Fisher*, 133 S. Ct. at 2416.

<sup>10</sup> *Fisher*, 645 F. Supp. 2d at 590.

<sup>11</sup> See *Fisher*, 133 S. Ct. at 2416–17.

<sup>12</sup> *Fisher*, 645 F. Supp. 2d at 613.

<sup>13</sup> *Id.* at 610 (emphasis added).

<sup>14</sup> *Id.* at 609.

<sup>15</sup> *Id.* at 611.

<sup>16</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

<sup>17</sup> *Id.* at 231.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 248 (Garza, J., concurring).

“hopelessly deferential”<sup>20</sup> approach and urged the Court to apply a consistent standard of review to all government uses of race.<sup>21</sup>

The Supreme Court vacated and remanded.<sup>22</sup> Writing for the Court, Justice Kennedy<sup>23</sup> held that the Fifth Circuit did not properly apply strict scrutiny.<sup>24</sup> Justice Kennedy’s analysis began by noting that the Court’s three most recent decisions regarding the use of race in university admissions — *Regents of the University of California v. Bakke*,<sup>25</sup> *Gratz v. Bollinger*,<sup>26</sup> and *Grutter v. Bollinger*<sup>27</sup> — identified the attainment of a diverse student body as a compelling interest, but required that courts apply strict scrutiny to admissions processes designed to attain such diversity.<sup>28</sup> He explained that the Court “[t]ook] those cases as given for purposes of deciding [*Fisher*].”<sup>29</sup> But Justice Kennedy noted that the Court’s “broader equal protection jurisprudence” also “applie[d] in this context.”<sup>30</sup>

Justice Kennedy then articulated a strict scrutiny framework that deferred to a university’s ends, but not its means, in using race in admissions.<sup>31</sup> He held that courts should defer to a university’s identification of diversity as a compelling *end*, so long as “there is a reasoned, principled explanation for the academic decision.”<sup>32</sup> But courts should grant a university “no deference” in assessing whether its *means* are narrowly tailored.<sup>33</sup> Justice Kennedy held that it is insufficient for a university merely to consider alternatives: the university must demonstrate “that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>34</sup>

The Fifth Circuit, Justice Kennedy concluded, improperly applied strict scrutiny by granting deference to the University’s means.<sup>35</sup> Judge Higginbotham had concluded that the University’s policy was the result of a “good faith consideration” of race-neutral alternatives, and that it was not the role of the courts to “second-guess the merits”

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<sup>20</sup> *Id.* at 264.

<sup>21</sup> *See id.* at 266.

<sup>22</sup> *Fisher*, 133 S. Ct. at 2415.

<sup>23</sup> Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor. Justice Kagan did not participate in the case.

<sup>24</sup> *Fisher*, 133 S. Ct. at 2415.

<sup>25</sup> 438 U.S. 265 (1978).

<sup>26</sup> 539 U.S. 244 (2003).

<sup>27</sup> 539 U.S. 306 (2003).

<sup>28</sup> *Fisher*, 133 S. Ct. at 2417–18.

<sup>29</sup> *Id.* at 2417.

<sup>30</sup> *Id.* at 2418.

<sup>31</sup> *See id.* at 2419–21.

<sup>32</sup> *Id.* at 2419.

<sup>33</sup> *Id.* at 2420.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2421.

of that decision.<sup>36</sup> Justice Kennedy held that this deference to the University's good faith was inconsistent with strict scrutiny, quoting the government-contracting case *City of Richmond v. J.A. Croson Co.*<sup>37</sup> to argue that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."<sup>38</sup> Good faith alone cannot justify the use of race; the courts must give "close analysis to the evidence of how the [admissions] process works in practice."<sup>39</sup> Strict scrutiny, Justice Kennedy emphasized, is not context dependent: "The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts."<sup>40</sup>

Justices Scalia and Thomas, in separate concurrences, emphasized their long-held positions that the use of race in public-university admissions is unconstitutional.<sup>41</sup> Justice Scalia's brief concurrence explained that he concurred only because the petitioners had not asked the Court to overrule *Grutter*'s identification of diversity as a compelling interest.<sup>42</sup> Justice Thomas agreed that the Fifth Circuit improperly applied strict scrutiny, but wrote separately to advocate overturning *Grutter*.<sup>43</sup> He emphasized that outside the affirmative action context, the Court allowed government racial classifications only in extraordinary circumstances: wartime and remedying past discrimination by the government.<sup>44</sup> Campus diversity, he argued, did not rise to this level.<sup>45</sup>

Justice Ginsburg, the lone dissenter, would have affirmed the Fifth Circuit.<sup>46</sup> *Bakke* and *Grutter*, she argued, "required no further determinations" than those already made by the lower courts<sup>47</sup>: the University's admissions policies considered race only as a "factor of a factor of a factor," were the result of an extensive year-long review of alternatives, and were subject to periodic review.<sup>48</sup> Justice Ginsburg further argued that the entire discussion of race-neutral alternatives in the affirmative action context was farcical. "[O]nly an ostrich," she mused, "could regard the supposedly neutral alternatives as race un-

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<sup>36</sup> *Id.* at 2420 (quoting *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011)) (internal quotation marks omitted).

<sup>37</sup> 488 U.S. 469 (1989).

<sup>38</sup> *Fisher*, 133 S. Ct. at 2421 (quoting *Croson*, 488 U.S. at 500) (internal quotation marks omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 2422 (Scalia, J., concurring); *id.* at 2422–32 (Thomas, J., concurring).

<sup>42</sup> *Id.* at 2422 (Scalia, J., concurring).

<sup>43</sup> *Id.* (Thomas, J., concurring).

<sup>44</sup> *Id.* at 2423 (citing *Korematsu v. United States*, 323 U.S. 214 (1944); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

<sup>45</sup> *Id.* at 2423–24.

<sup>46</sup> *Id.* at 2434 (Ginsburg, J., dissenting).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009)) (internal quotation marks omitted).

conscious.”<sup>49</sup> The “Top Ten Percent” law was adopted after extensive legislative discussion of the segregation of the state’s schools and cities, and achieving racial outcomes was a clear motivation. Justice Ginsburg thought such motivations permissible, arguing that admissions plans that “candidly disclose their consideration of race [are] preferable to those that conceal it.”<sup>50</sup>

*Fisher*, thus, worked no categorical doctrinal shift: strict scrutiny remains the standard of review for uses of race in admissions, and educational diversity remains a compelling interest. But as the Fifth Circuit’s opinions suggest and a close examination of *Grutter* confirms, Justice Kennedy’s articulation of strict scrutiny in this context differs in meaningful ways from *Grutter*. Indeed, Justice Kennedy’s *Fisher* majority draws heavily on his *dissent* in *Grutter*. The resulting framework — in which courts apply a more stringent form of strict scrutiny to public-university affirmative action programs — is likely to place additional pressure on universities to develop, test, and implement new race-neutral alternatives. If workable alternatives continue to emerge, their development will raise the standard for determining which uses of race in admissions can survive strict scrutiny. While far from the jurisprudential revolution many expected, *Fisher* may nevertheless inaugurate a period in which courts play a greater role in phasing out the overt use of race in public-university affirmative action.

Although *Fisher* at first appears to be a jurisprudential nonentity, it effectively adopts the reasoning of Justice Kennedy’s *Grutter* dissent as the opinion of the Court. A comparison of Justice Kennedy’s *Fisher* majority, Justice O’Connor’s *Grutter* majority, and Justice Kennedy’s *Grutter* dissent makes this shift clear. In *Grutter*, Justice O’Connor approved the admissions plan of the University of Michigan Law School, which undertook a holistic review that considered both academic performance and the applicant’s contribution to the school’s racial and ethnic diversity.<sup>51</sup> Reviewing Justice Powell’s opinion in *Bakke*, Justice O’Connor reiterated that only one interest justified the use of race in admissions: “the attainment of a diverse student body.”<sup>52</sup> Justice O’Connor emphasized that while all uses of race must be subject to strict scrutiny,<sup>53</sup> this analysis is context sensitive: “Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the impor-

<sup>49</sup> *Id.* at 2433.

<sup>50</sup> *Id.* (alteration in original) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting)) (internal quotation mark omitted).

<sup>51</sup> *Grutter v. Bollinger*, 539 U.S. 306, 315–16, 343 (2003).

<sup>52</sup> *Id.* at 324 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978) (opinion of Powell, J.)) (internal quotation marks omitted).

<sup>53</sup> *Id.* at 326–27.

tance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”<sup>54</sup>

Justice O’Connor held that the University of Michigan Law School met this standard, as the school “engage[d] in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>55</sup> Further, she held that the law school had engaged in “serious, good faith consideration” of race-neutral alternatives.<sup>56</sup> Lest the opinion be read as an indefinite authorization of overt uses of race, she took the unusual step of starting a clock: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>57</sup>

Justice Kennedy dissented in *Grutter*, writing alone.<sup>58</sup> He did not dispute that universities could identify racial diversity as a compelling interest.<sup>59</sup> But he dissented to articulate the same means-ends deference distinction he would later advance in *Fisher*, faulting the majority for not adopting it: “The Court confuses deference to a university’s definition of its educational objective,” he wrote, “with deference to the implementation of this goal.”<sup>60</sup> Describing the majority as “deferring to the law schools’ choice of minority admissions programs,” he criticized its “refusal to apply meaningful strict scrutiny.”<sup>61</sup> Justice O’Connor, answering this critique, argued that she was faithfully applying strict scrutiny, but that context sensitivity was baked into this standard of review.<sup>62</sup>

Thus, the means-ends distinction Justice Kennedy articulated in *Fisher* as consistent with *Grutter* was birthed as a *critique* of the *Grutter* majority. Whichever Justice has the better of the constitutional argument, there is a doctrinal shift here, one squarely in tension with the *Fisher* majority’s statement that *Bakke*, *Grutter*, and *Gratz* were “take[n] . . . as given for purposes of deciding this case.”<sup>63</sup>

A review of appellate courts applying *Grutter* suggests that courts have read *Grutter* as directing deference to both a university’s means and its ends. In *Smith v. University of Washington*<sup>64</sup> — a case held over by the Ninth Circuit until the Court’s decision in *Grutter*, and

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<sup>54</sup> *Id.* at 327.

<sup>55</sup> *Id.* at 337.

<sup>56</sup> *Id.* at 339.

<sup>57</sup> *Id.* at 343.

<sup>58</sup> Writing separately, Chief Justice Rehnquist dissented, Justice Scalia concurred in part and dissented in part, and Justice Thomas concurred in part and dissented in part.

<sup>59</sup> See *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

<sup>60</sup> *Id.* at 388.

<sup>61</sup> *Id.* at 393.

<sup>62</sup> See *id.* at 333–34 (majority opinion).

<sup>63</sup> *Fisher*, 133 S. Ct. at 2417.

<sup>64</sup> 392 F.3d 367 (9th Cir. 2004).

thus among the first to apply *Grutter* — the Ninth Circuit approved a law school’s use of race in admissions, noting that *Grutter* required deference.<sup>65</sup> In applying strict scrutiny, the Ninth Circuit wrote, “we must assume that [the university] acted in good faith in the absence of a showing to the contrary and defer to its educational judgments.”<sup>66</sup> The court granted deference to the *means* chosen to achieve diversity: “[W]e defer to the Law School’s educational decision to award a racial or ethnic plus to Asian Americans . . . .”<sup>67</sup>

In the Fifth Circuit’s *Fisher* decision, both Judge Higginbotham and a reluctant Judge Garza concluded that *Grutter* compelled a deferential application of strict scrutiny. Judge Higginbotham’s conclusion that “a university’s educational judgment in developing diversity policies is due deference,”<sup>68</sup> of course, was vacated. But Judge Garza’s concurrence is illuminative. Even while urging the Court to adopt a stricter standard of review for public-university affirmative action, he did not question Judge Higginbotham’s reading of *Grutter*.<sup>69</sup> Instead, like other judges, he concluded that *Grutter*’s strict scrutiny analysis was unambiguously deferential, without any means-ends distinction.<sup>70</sup>

The Fifth, Sixth, and Eighth Circuits have also cited *Grutter* for the broader proposition that greater deference is appropriate under strict scrutiny in certain contexts, without a means-ends distinction. These contexts have included a school district’s use of race in elementary and secondary school admissions,<sup>71</sup> a school district’s firing of a teacher,<sup>72</sup> and a state’s enactment of a Code of Judicial Conduct.<sup>73</sup>

<sup>65</sup> *Id.* at 370, 372.

<sup>66</sup> *Id.* at 372.

<sup>67</sup> *Id.* at 379.

<sup>68</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011).

<sup>69</sup> *Id.* at 247 (Garza, J., concurring) (“[Although] *Grutter* represents a digression in the course of constitutional law, today’s opinion is a faithful, if unfortunate, application of that misstep.”).

<sup>70</sup> Not every court has read *Grutter* as commanding both means and ends deference. In *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), the United States District Court for the Western District of Kentucky favorably quoted the means-end distinction of Justice Kennedy’s *Grutter* dissent, explaining that in light of “a starkly divided” Supreme Court, the court would “agree[] with Justice Kennedy’s . . . distinction in its narrow tailoring analysis.” *Id.* at 856 & n.43. This decision was ultimately reversed by the Supreme Court on other grounds. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>71</sup> *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 267 n.20 (5th Cir. 2005) (“Some deference to the decisions of educational policy-makers, even when the court is strictly scrutinizing *voluntarily*-enacted race-conscious policies, is appropriate.” (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003))).

<sup>72</sup> *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 344 (6th Cir. 2010) (“Academic freedom implicates ‘[t]he freedom of a university to make its own judgments as to education,’ requiring ‘deference to a university’s academic decisions.’” (alteration in original) (citations omitted) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (opinion of Powell, J.); *Grutter*, 539 U.S. at 328)).

<sup>73</sup> *Republican Party of Minn. v. White*, 416 F.3d 738, 783 (8th Cir. 2005) (“‘Deference’ is not a word we associate with strict scrutiny review, but there is indeed a place for limited deference, as shown in the recent case of *Grutter v. Bollinger* . . .”).

Given the number of courts that have read *Grutter* as requiring deference without a means-end distinction, *Fisher*'s bifurcated deference framework will likely result in a meaningful number of courts applying strict scrutiny more stringently than they have in the decade since *Grutter*. These courts, of course, may have read *Grutter* as commanding more deference than Justice O'Connor intended; either way, the standard will now be stricter. The effect of this more stringent application of strict scrutiny will likely be to further speed the development of "workable race-neutral alternatives,"<sup>74</sup> and the development of such alternatives would continue to raise the bar for what it means to exhaust race-neutral alternatives.

The thirty-five years since *Bakke* — in which the Court rejected the use of racial quotas in admissions — have brought a host of changes in admissions practices, suggesting that universities are responsive to court decisions. Some universities have devised admissions policies that consider race as only one aspect of a holistic decision.<sup>75</sup> Others have sought to boost diversity through race-neutral means such as expanded financial aid and targeted recruiting.<sup>76</sup> Texas enacted the "Top Ten Percent" law in response to *Hopwood v. Texas*,<sup>77</sup> in which the Fifth Circuit held the University of Texas School of Law's consideration of race unconstitutional.<sup>78</sup> Florida and California have adopted similar "percentage plans."<sup>79</sup> But court decisions have also led universities to expand their use of race, with *Grutter*'s affirmation that diversity was a compelling interest spurring the University of Texas at Austin to overtly include race in its holistic review process.<sup>80</sup>

In the decade since *Grutter*, courts have monitored the overt use of race in admissions with a light touch.<sup>81</sup> After *Fisher*, the Court's means analysis in public-university affirmative action cases will be more closely aligned with its rigorous means analysis in other contexts, such as its rejection of a government-contracting affirmative action

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<sup>74</sup> *Fisher*, 133 S. Ct. at 2420.

<sup>75</sup> See, e.g., *Grutter*, 539 U.S. at 312–16 ("In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions." *Id.* at 314.).

<sup>76</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223 (5th Cir. 2011).

<sup>77</sup> 78 F.3d 932, 955 (5th Cir. 1996).

<sup>78</sup> *Fisher*, 133 S. Ct. at 2415.

<sup>79</sup> *Grutter*, 539 U.S. at 340.

<sup>80</sup> Opposition to Motion for Preliminary Injunction at 5, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (2009) (No. 1:08-CV-00263-SS) ("UT Austin convened a group of admissions staff, professors, and lawyers to consider whether and how to respond to *Grutter*.").

<sup>81</sup> See, e.g., *Smith v. Univ. of Wash. Law Sch.*, 392 F.3d 367, 379 (9th Cir. 2004) ("[W]e defer to the Law School's educational decision to award a racial or ethnic plus to Asian Americans . . ."); *Fisher*, 631 F.3d 213.



plan in *Croson*.<sup>82</sup> In that case, rather than defer to a city's judgment that a set-aside plan for minority-owned businesses was appropriate, the Court engaged in its own analysis of the disparities in government contracting. Positing that minority-owned businesses may "disproportionately lack capital," the Court suggested that "a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation."<sup>83</sup> By contrast, in *Grutter* the Court was content to "take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula,'" neither demanding evidence that the school had performed an exhaustive search for such a formula nor suggesting Court-devised alternatives.<sup>84</sup> After *Fisher*, courts reviewing public-university affirmative action plans that overtly consider race can be expected to do both.<sup>85</sup>

The application of strict scrutiny to a university's means is likely to accelerate the development of race-neutral alternatives and phase out overt uses of race. As Justice Kennedy wrote in his *Grutter* dissent, the application of strict scrutiny "would force educational institutions to seriously explore race-neutral alternatives,"<sup>86</sup> taking advantage of "the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration."<sup>87</sup> Universities, spurred on by *Fisher*'s stricter means analysis, will likely work with greater urgency to develop race-neutral approaches that achieve diversity. As they do so, the bar will continue to rise on what it means to demonstrate that "no workable race-neutral alternatives"<sup>88</sup> are available. A university will have increasing difficulty claiming that no

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<sup>82</sup> See Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 36–38 (2010) (comparing the Supreme Court's application of strict scrutiny in three contexts: redistricting, remedial affirmative action, and diversity-based affirmative action).

<sup>83</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

<sup>84</sup> *Grutter*, 539 U.S. at 343.

<sup>85</sup> Courts may have difficulty engaging in such a means analysis in the university admissions context. Bids for government contracts, Professor Pamela Karlan notes, can "be ranked against each other along one, entirely quantifiable, dimension: price," while professional school admissions "involve multiple, soft factors." Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1619 (2007). Further, in the admissions process, personal statements and recommendation letters often "mention race in explaining how an applicant has overcome challenges," making it difficult to wholly exclude consideration of race. See Martha L. Minow & Robert C. Post, Op-Ed., *Why Race Matters in School Admissions*, WASH. POST (Oct. 5, 2012), [http://www.articles.washingtonpost.com/2012-10-05/opinions/35498840\\_1\\_applicants-law-schools-race-matters.html](http://www.articles.washingtonpost.com/2012-10-05/opinions/35498840_1_applicants-law-schools-race-matters.html).

<sup>86</sup> *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

<sup>87</sup> *Id.* at 393.

<sup>88</sup> *Fisher*, 133 S. Ct. at 2420.

workable race-neutral alternatives exist if peer institutions have developed and successfully demonstrated such alternatives.<sup>89</sup>

In other contexts, the effect of strict scrutiny has been to eliminate government classifications by race, both overt and concealed.<sup>90</sup> But even while *Fisher* places a higher burden on overt uses of race in admissions, it continues the Court's practice of allowing, in the affirmative action context, race-conscious but facially neutral policies intended to increase student body diversity. This practice contrasts with the Court's general practice of disallowing such policies in other contexts.<sup>91</sup> As Justice Ginsburg noted in her dissent, it strains credulity to argue that the Texas "Top Ten Percent" law, which was designed around the state's residential segregation and motivated by the goal of achieving educational diversity, was not race conscious.<sup>92</sup> *Fisher*'s continued allowance of race-conscious but facially neutral admissions practices, combined with its reaffirmation that racial diversity is a compelling interest (in a majority opinion joined by the two conservative Justices to join the Court since *Grutter*), will allow universities to continue to work toward diversity while driving the ways in which race influences the admissions process further underground. Future cases may test the Court's tolerance for "race-neutral" policies that amount to little more than misdirection, but *Fisher* suggests such policies will receive a wide berth.

Despite the hopes and fears of Court observers, *Fisher* offered no overnight revolution in the Court's affirmative action jurisprudence. Nevertheless, *Fisher*'s recalibration of the affirmative action strict scrutiny analysis may be a meaningful inflection point for the judicial role in monitoring how public universities use race in admissions. Ten years after *Grutter*, the overt use of race in public-university affirmative action lives on. But Justice O'Connor's clock is ticking.

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<sup>89</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (opinion of Powell, J.) (noting that "[t]he experience of other university admissions programs" demonstrated that racial quotas were not the only available means for achieving diversity). Some context sensitivity, however, will be inevitable: Top Ten Percent-like plans have limited applicability to graduate school admissions, and as Justice Ginsburg observed in her *Fisher* dissent, such plans rely on the specific context of segregated residential patterns. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

<sup>90</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (minority set-asides for federal government contracts); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority set-asides for local government contracts); *Batson v. Kentucky*, 476 U.S. 79 (1986) (explicit prosecutorial consideration of race in excluding jurors); *Loving v. Virginia*, 388 U.S. 1 (1967) (state bans on interracial marriage); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (de jure school segregation).

<sup>91</sup> See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the [facially race-neutral] decision, . . . judicial deference is no longer justified.")

<sup>92</sup> *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).