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Volume 94

Essay

Justice Kennedy and the *Fisher* Revisit: Will the Irrelevant Prove Decisive?

Richard Lempert*

I. Justice Kennedy's Options

Most Court watchers expect Justice Kennedy to cast the deciding vote when the Supreme Court hands down its decision in this term's installment of *Fisher v. University of Texas at Austin*¹ or, as it is colloquially titled, *Fisher II*. What divides observers is not whose vote will be crucial, but the law that vote will make. At one extreme, Justice Kennedy could vote to uphold the Fifth Circuit's reaffirmation of its earlier decision. When the case was heard, this would almost certainly have meant affirming the circuit court's decision by an equally divided Court. (Justice Kagan, an almost certain supporter of the Texas holistic admissions plan, has recused herself because when the Fifth Circuit heard the appeal in *Fisher I*², she was Solicitor General and her office, representing the United States, sided with the University.) With Justice Scalia's death, if Kennedy voted to uphold the Fifth Circuit's decision there would be an opinion. At the other extreme, Justice Kennedy could vote to find race-conscious admissions plans unconstitutional, either retreating from his view that the Fourteenth Amendment did not necessarily prohibit all race-conscious governmental

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1. *Fisher v. University of Texas at Austin (Fisher II)*, No. 14-981 (argued Dec. 9, 2015).
2. *Fisher v. University of Texas at Austin (Fisher I)*, 133 S. Ct. 2411 (2013).

decisions or taking an approach like the Court's in *Furman v. Georgia*.³ *Furman* appeared to have outlawed capital punishment, but not all the Justices who voted with the majority regarded the death penalty as necessarily unconstitutional.⁴ What the majority seemed to agree on was that no state had found a constitutionally acceptable way to administer the death penalty.⁵ Justice Kennedy could decide that even though attending to race did not necessarily offend the Fourteenth Amendment, it was nonetheless time to end affirmative action because no school had been able to design a constitutionally compliant affirmative action plan. Such an opinion might, however, leave open the door for a differently designed race-conscious approach.

Neither of these extreme outcomes appear likely. The first, which never seemed plausible, had one thing going for it. Justice Kennedy's ambivalence might have led him to welcome a decision that, unaccompanied by an opinion, would create no precedent. This was possible when the Court might have divided equally, but it no longer is. The second remains a possibility since Justice Kennedy has an almost-perfect record of finding unconstitutional any race-conscious program that the Court has agreed to hear, including *Grutter v. Bollinger*,⁶ which the University of Texas at Austin (UT Austin) took as permission to supplement the Texas "Top Ten Percent Plan" with race-conscious holistic admissions.⁷ Yet even while disapproving of race-conscious program after race-conscious program, Justice Kennedy has consistently said that the Fourteenth Amendment leaves room for the right kind of attention to race, although only recently has he suggested what the right kind of attention might be.⁸

Still, it would be a surprise if Kennedy joined the Court's three consistent opponents of affirmative action and held that racial preferences were in no circumstances constitutional. *Fisher II* is the wrong vehicle for such a judgment. Neither the plaintiff's brief nor her counsel's arguments to the Court challenged the constitutionality of affirmative action regardless of circumstances. Rather the plaintiff's case focuses on whether the degree of integration achieved by the Texas Ten Percent Plan and the possibility of tweaks to that plan means that race-conscious supplementation is not sufficiently narrowly tailored to pass constitutional muster. Although the

3. 408 U.S. 238 (1972).

4. *Id.* at 323.

5. *See id.* at 304–05 (noting an inconsistency between the public belief that murderers should die and the random few who are actually executed).

6. 539 U.S. 306 (2003).

7. *Fisher I*, 133 S. Ct. at 2413.

8. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). I discuss the implications of this case below.

Texas Ten Percent Plan was a race-conscious legislative response to the Fifth Circuit's decision in *Hopwood*⁹ and works to increase minority representation only because many Texas secondary schools are de facto racially segregated, the fact that it does not mention race and applies equally to students of all races is sure to appeal to Kennedy. UT Austin will have a hard time convincing him not only that more needs to be done, but also that the only way to do more is to attend specifically to race.

The most likely outcome in *Fisher II* is that Justices Thomas, Alito and Roberts will find that including race as an element in holistic admissions is unconstitutional since these Justices seem ready to hold that all race-conscious affirmative action programs are unconstitutional. Justice Kennedy is likely to be torn between two outcomes. One is to find for Abigail Fisher, while holding that there is no need to address the constitutionality of race-conscious admissions in general because the racial diversity achieved through the Ten Percent Plan means that explicit attention to race in holistic admissions is not the most narrowly tailored way to address the University's legitimate diversity interests. His other most plausible option is to reiterate the conclusion that, to the surprise of many Court watchers, seven Justices agreed upon in *Fisher I*,¹⁰ namely, to remand the case to the Fifth Circuit with the possibility of developing a more substantial evidentiary base. This time, however, Kennedy would almost certainly write so as to mandate a full district court hearing rather than again leaving the matter to the Fifth Circuit's discretion. Foes of affirmative action would surely prefer the first of these outcomes, while those who would like to see the UT Austin's holistic admissions system upheld would consider a remand for a full hearing as a victory.

Justice Kennedy's judicial philosophy and past pronouncements tell us little about the outcome he would prefer. Moreover, it is possible that legal precedent will have less influence on Justice Kennedy's decision than attitudes and considerations that have little formal legal relevance. Thus, in the series of gay rights that concluded with the extension of the Fourteenth Amendment's protections against discrimination to same sex couples seeking to marry, Justice Kennedy, always the swing vote, seemed moved not so much by legal logic as by an abiding conviction that to deny gay couples the right to marry was an affront to human dignity.¹¹ Considerations and values that are similar in that they are more or less extralegal could also motivate Kennedy's decision in *Fisher II*.

9. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, the Fifth Circuit held that the University of Texas's race-conscious admissions system was unconstitutional. *Id.* at 962. This was binding on schools in Texas until the Supreme Court decided differently in *Grutter*, 539 U.S. at 325.

10. *Fisher I*, 133 S. Ct. at 2422.

11. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

II. A Slap in the Face

I see four factors of little legal relevance that might nonetheless affect Justice Kennedy's decision. First is anger at the Fifth Circuit's handling of the *Fisher I* remand. Reading *Fisher I*, it appears that Justice Kennedy expected the circuit court to act in one of two ways. It might have found that using the more stringent reading of "strict scrutiny" that Kennedy enunciated in *Fisher I*, UT Austin's use of race-conscious holistic admissions did not pass the Fourteenth Amendment's narrow tailoring requirement. Alternatively Justice Kennedy might have been satisfied had the circuit court remanded *Fisher I* to the district court for a fact-finding trial, much like the trial that created the record in *Grutter*.

The Fifth Circuit did neither. Rather it looked again at the record on which it had previously decided and reaffirmed its prior decision. It is hard to see this disposition as anything other than a slap in the face to the Supreme Court. The Fifth Circuit is in effect saying that the record presented to the Supreme Court in *Fisher I* was not only sufficient to decide Fisher's challenge, but could admit of only one outcome. If the Fifth Circuit was astute enough to see this, why wasn't the Supreme Court?

No one would have felt this slap harder than Kennedy, who wrote for the Court in *Fisher I*.¹² Moreover, he dropped substantial hints that UT Austin's policies could not pass constitutional muster. In his *Fisher I* opinion, Justice Kennedy cut back significantly on the leeway that *Grutter* appeared to give universities to design affirmative action programs—leeway the Fifth Circuit accorded UT Austin when it originally heard the case.¹³ *Grutter* seemed to say that not only was it for universities to decide whether racial diversity served a valuable educational function, but also that if a university so decided courts should defer to the university's judgment on how best to achieve that diversity.¹⁴ Justice Kennedy endorsed deference on only the first issue.¹⁵ He effectively reversed part of *Grutter* by holding that judicial deference on how best to achieve diversity has no place in equal protection analysis.¹⁶ Strict scrutiny, even if not fatal in fact, must be as strict as it is for the most invidious racial classifications: "It must be remembered that 'the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight.' . . . The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other

12. *Fisher I*, 133 S. Ct. at 2415.

13. *Id.* at 2420.

14. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

15. *Fisher I*, 133 S. Ct. at 2419.

16. *Id.* at 2420.

contexts.”¹⁷

Kennedy also implied that, as he read the record, it was unlikely that the UT Austin plan could meet the narrow tailoring requirement:

Narrow tailoring . . . requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although “[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.” . . . The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If “a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,” then the university may not consider race [S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.¹⁸

Just in case his description of the relevant law provided the circuit court with insufficient guidance about how he saw things, Kennedy’s description of the facts is a dead giveaway:

The University’s revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University’s entering freshman class was 4.1% African-American and 14.5% Hispanic.¹⁹

If the Texas Ten Percent Plan yielded even greater racial diversity than had been achieved using race-conscious admissions, how could a partial reversion to the prior system, which had achieved less diversity, be considered narrowly tailored? Although answers can be given, a new trial would be needed to provide them. Ingredients of an answer require first recognizing that UT Austin still has never achieved a critical mass of African-American enrollees, and that apparent progress in enrolling Hispanics is far from commensurate with the huge increase in the proportion

17. *Id.* at 2421 (citations omitted).

18. *Id.* at 2420 (citations omitted).

19. *Id.* at 2416.

of Hispanics among Texas high school graduates. When it comes to diversity, the Ten Percent Plan has, at best, allowed Texas to tread water. At a district court hearing, UT Austin might bolster its diversity-within-diversity argument with evidence showing that race-conscious holistic admissions fostered educationally important diversity in ways that went beyond simply increasing minority numbers. It might also have been able to muster demographic information suggesting that, looking ahead, the number of African-American Ten Percent Plan beneficiaries was likely to diminish as Hispanics attended in larger numbers high schools that are now predominantly African-American. It is hard to say what effect such evidence-based arguments might have had on Justice Kennedy, but without a judge's concrete evidence-based findings, these kinds of considerations are likely to have little resonance with him.

I expect Justice Kennedy would have greeted favorably a Fifth Circuit decision for Abigail Fisher and examined unemotionally a decision upholding UT Austin's holistic admissions system that was rooted in detailed trial court findings, but it is hard to believe that he was anything but furious when he saw how cavalierly the circuit court treated his hints and concerns. This would not bode well for the University, except UT Austin wanted the Fifth Circuit to remand for a chance to make a more complete record. Fisher's attorneys were the ones who opposed remand, a point Justice Kennedy confirmed in one of the few questions he posed at the oral argument.²⁰

On matters of race, Justice Kennedy's head and gut—and by gut I mean to include implicit prowhite biases²¹—often seem conflicted. The white-favoring gut usually wins, while the only inroad the head makes is to add a caveat that perhaps the next case will be one in which minority-favoring race consciousness is permissible. The Fifth Circuit's handling of the remand can only strengthen the influence that Kennedy's gut, and the implicit biases that I expect drive it, may have on his *Fisher II* analysis. One can even ask whether anger at the Fifth Circuit's treatment of his earlier opinion could

20. Transcript of Oral Argument at 19, *Fisher II*, No. 14-981 (argued Dec. 9, 2015).

21. Considerable research suggests that most white Americans and some black Americans hold prowhite (or antiblack) biases, and that these biases can influence decisions people make. For example, studies indicate that implicit biases are associated with differences in how physicians treat white and black patients, with the former receiving better treatment and superior pain management. See, e.g., Janice A. Sabin & Anthony G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma*, 102 AM. J. PUB. HEALTH 988, 989 (2012); David R. Williams & Ronald Wyatt, *Racial Bias in Health Care and Health: Challenges and Opportunities*, 314 JAMA 555, 555 (2015). To be clear, I mean neither to say nor imply that Justice Kennedy is a racist, but am rather suggesting that he almost certainly holds biases that he himself might not recognize, but which are more likely than not to characterize men of his generation and which may influence his discretionary judgments.

lead Kennedy to decide against UT Austin not just on narrow tailoring grounds, but with a determination to resolve the conflict between gut and head by deciding, once and for all, that race-conscious university admissions is necessarily unconstitutional. Alternatively, remand may become the more attractive option, for Justice Kennedy may see in Fisher's Fifth Circuit argument against remanding a fear that the University could provide evidence sufficient to justify the attention given race in holistic admissions.

III. Black Lives Matter

Also irrelevant but also possibly affecting Justice Kennedy's views is the way the country was roiled by the police shooting of an unarmed black man in Ferguson, Missouri, and by similar shootings in other parts of the country.²² Although these events receive less news coverage now that the races for the presidential nominations have heated up, they dominated the news when *Fisher II* was argued and the vote following oral argument taken. By themselves these shootings might have moved Justice Kennedy to look with greater sympathy on efforts to boost the life chances of black people by placing a small thumb on the scale of college admissions, for if the gay rights cases tell us anything, it is that Kennedy values human dignity and can empathize with those whose social identities lead to the denial of rights and an inability to reach their full potential. It is hard to imagine a greater affront to full personhood than to have a heightened risk of being killed by a police officer because of the color of one's skin.

But the police shootings weren't the only racially charged issues in the news about the time *Fisher II* was argued. There was the rise of the Black Lives Matter (BLM) movement and widespread protests, some of which turned riotous.²³ Perhaps most tellingly, if we are speculating about potential influences on Justice Kennedy, there was a widely reported incident in which a student photographer asserting a First Amendment right to report was first deflected from entering a public space occupied by BLM protesters and later threatened with physical removal from the area.²⁴ Whatever gut-level sympathies for African Americans the police killings of unarmed blacks may have engendered in Kennedy, they could have been more than neutralized by videos of rioters engaged in property destruction and by what the media

22. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [https://perma.cc/ZP3V-N6YD].

23. See, e.g., Christina Capocchi, *'Black Lives Matter' Protesters Gather; Mall Is Shut in Response*, N.Y. TIMES (Dec. 23, 2015), <http://www.nytimes.com/2015/12/24/us/black-lives-matter-protesters-gather-mall-of-america-is-shut.html> [https://perma.cc/YS3B-5WVZ].

24. Austin Huguélet & Daniel Victor, *'I Need Some Muscle': Missouri Activists Block Journalists*, N.Y. TIMES (Nov. 9, 2015), <http://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html> [https://perma.cc/9FBQ-EASM].

portrayed as the First Amendment threatening actions of BLM student protesters, some of whom were perhaps beneficiaries of affirmative action. (Never mind that it was a white professor who caught the most flack by calling for “muscle” when she could not persuade the photographer to respect the protesters’ enclave.²⁵) If the protests persuade Justice Kennedy that minority college students are prone to suppressing speech, he is likely to think less kindly about programs that bring minority students to campuses.

IV. Mismatch

Kennedy’s decision could also be influenced by legally irrelevant claims that affirmative action harms minorities through “academic mismatch” or “science mismatch.” These arguments were presented to the Court in briefs offered by Richard Sander²⁶ and by Gail Heriot and Peter Kirsanow,²⁷ and they were referenced by Justice Scalia in oral argument.²⁸ Mismatch theory suggests that affirmative action places beneficiaries of affirmative action in classrooms where instruction is pitched to a level that they have trouble following, meaning that these students learn less than they would have learned at less selective institutions and do worse on the job market after graduation.²⁹ So-called science mismatch, which has become a fallback position for affirmative action’s critics since general mismatch claims have been thoroughly debunked, posits that the more a science-interested minority student has benefitted from affirmative action the less likely that student is to graduate with a degree in a science.³⁰ Neither kind of mismatch, if it exists, has obvious constitutional significance, but if Justice Kennedy thinks affirmative action is likely to hurt its intended beneficiaries it could affect his vote. It would allow him to see a decision invalidating affirmative action as one that bravely advances the interests of minority students rather than retards them. Most likely he would miss the resonance that “whites know best” arguments like this have with some of the paternalistic justifications for slavery and the racial segregation that followed.

If Justice Kennedy’s decision were influenced by a belief that minorities suffered due to academic mismatch, it would reflect inexcusable ignorance or

25. *Id.*

26. Brief Amicus Curiae for Richard Sander in Support of Neither Party, *Fisher II*, No. 14-981 (argued Dec. 9, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/09/Sander-brief-for-Fisher-v-University-of-Texas-corrected.pdf> [<https://perma.cc/6B2P-93DU>].

27. Brief Amicus Curiae of Gail Heriot and Peter N. Kirsanow, Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher II*, No. 14-981 (argued Dec. 9, 2015) [hereinafter Brief Amicus Curiae of Heriot & Kirsanow], <http://www.scotusblog.com/wp-content/uploads/2015/09/14-981-tsac-Gail-Heriot-et-al.pdf> [<https://perma.cc/L648-DC2P>].

28. Transcript of Oral Argument, *Fisher II*, *supra* note 20, at 67–68.

29. Brief Amicus Curiae of Heriot & Kirsanow, *supra* note 27, at 22–25.

30. *Id.* at 25.

an inability to understand relevant social science. I say *inexcusable* ignorance because the Court had before it amicus briefs that review the social science evidence and show that the empirical research relied on to support mismatch claims is fundamentally flawed. The briefs reveal that the overwhelming number of studies either find no evidence of mismatch or find that affirmative action students do better in graduation rates and later in life than they would have done had they attended less selective schools (reverse mismatch effects).³¹ The analytic weaknesses of key studies that purport to find evidence consistent with mismatch theory are documented in a brief submitted by eleven leading empirical scientists. They advise the Court that these studies are so methodologically deficient that their results should be dismissed out of hand.³² The critique is more than credible. Few of the brief's signers were previously involved in empirical or legal debates regarding affirmative action, and two signers are members of the National Academy of Sciences.³³ These latter two, along with several others, are widely recognized as among the nation's top social science methodologists.³⁴ Other briefs review the literature that compares minorities who benefited from affirmative action with similarly skilled minorities who attended less selective schools. These studies, most of which focus on undergraduates, find little evidence that minorities are harmed by affirmative action, and some evidence that they benefit significantly from the competitive environments that affirmative action opened up for them. The most extensive review offered the Court is in an amicus brief I wrote.³⁵

The science mismatch claim has, as an empirical matter, a bit more going for it than the academic mismatch claim, but not much. Moreover, the paternalism of arguments built on science mismatch means they have little role to play in affirmative action debates. There are a handful of studies looking at the degrees received by minorities who in their college

31. For a general review, see SIGAL ALON, RACE, CLASS, AND AFFIRMATIVE ACTION 222 fig.10.3 (2015). An example of the kinds of results commonly encountered is Alon's finding that the beneficiaries of race-conscious admissions at elite universities had higher graduation rates compared to the simulated "matched" SES-disadvantaged students who had similar credentials but enrolled at somewhat less selective institutions. The gap favoring underrepresented minorities was eight points (73% versus 65% graduation rates) at the school where they first enrolled, and five points (77% versus 72%) in terms of graduating anywhere with a degree.

32. Brief of Empirical Scholars as Amici Curiae in Support of Respondents at 12–16, *Fisher II*, No. 14-981 (argued Dec. 9, 2015) [hereinafter Brief of Empirical Scholars], <http://www.scotusblog.com/wp-content/uploads/2015/11/LCCR-and-Mintz-Fisher-Amicus-Empirical-Scholars.pdf> [<https://perma.cc/B4Q9-FEFD>].

33. *Id.* at 1–7.

34. *Id.* at 2–3.

35. Brief Amicus Curiae for Richard Lempert in Support of Respondents, *Fisher II*, No. 14-981 (argued Dec. 9, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/11/Lempert-Amicus-in-Fisher-v.-U.-Texas-No.-14-981-Filed-Copy.pdf> [<https://perma.cc/3QYM-JXXN>].

applications or upon entering college express an interest in a science major.³⁶ The studies suggest that these students are less likely to persist to a science degree than they would have been had they attended less competitive institutions.³⁷ Moreover, there is a plausible mechanism that can explain these results. Many students, and in some schools the majority of students, who enter college intending to major in a so-called hard science or engineering end up majoring in the humanities, professional programs, or a social science.³⁸ It appears that one reason why students switch to nonscience majors is because their science course grades are low, either absolutely or relative to what they earn in other courses.³⁹ Beneficiaries of affirmative action have, by definition, academic credentials which predict they will do worse gradewise, at least in their freshman year, than students who receive no affirmative action boost. Admissions credentials are far from perfect predictors, but they do explain some grade variance. Hence students admitted to selective schools with a boost from affirmative action are likely to have lower grades in basic science courses than they would have had if they had attended less selective institutions. To the extent that low science grades motivate switches from science to other majors, students who might have completed science majors at less selective schools may earn degrees in other majors at more competitive institutions.

This argument and its empirical support is, however, not nearly as powerful as its proponents claim. Bowen and Bok, who looked at twenty-eight selective schools, found that affirmative action minorities were about as likely to end up majoring in a science as their white peers.⁴⁰ Differences emerge only when one looks at desistance differences, a statistic that reflects not just science degree completion but also the greater tendency of minorities, relative to whites, to express an initial interest in science.⁴¹ Desistance rate differences may in large measure reflect not academic difficulties, but greater initial ignorance about what science majors entail. Moreover, not only do about half of all students, including whites, who begin college expecting to major in a science end up majoring in another subject, but women are more likely to abandon intended science majors than men.⁴² Indeed, male–female desistance differences are in some data sets almost as

36. See, e.g., Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. HIGHER EDUC. 353, 353–54 (2004).

37. *Id.* at 373.

38. *Id.* at 373–76.

39. Brief of Empirical Scholars, *supra* note 32, at 11.

40. WILLIAM G. BOWEN & DEREK CURTIS BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 382 (1998).

41. See Smyth & McArdle, *supra* note 36, at 376.

42. *Id.* at 354.

large as differences between affirmative action minorities and white students.⁴³ Affirmative action cannot explain the gender differences, and few would insist that women who want to major in science should attend less selective schools than the most selective schools that will admit them or that they will be better off if they do so.

This latter point is crucial. Affirmative action minorities who abandon intended science majors still graduate with degrees from selective institutions. The science mismatch argument against affirmative action is thus paternalistic in the extreme. It suggests that it is the law's business to ensure that students who could have graduated from elite schools, like U.C. Berkeley, with degrees in English or psychology instead graduate from barely selective schools, like U.C. Riverside, with degrees in biology or mathematics. In short, if Justice Kennedy is influenced by oft-debunked mismatch theory or by the limited and often ambiguous evidence supporting science mismatch, it will most likely be because he is unacquainted with the critical literature and too readily accepts claims made mainly by people who have the not-so-secret agenda of limiting or invalidating race-conscious admissions. His vote, however, will still be dispositive regardless of whether mistaken views about mismatch theory motivate it.

V. Scalia's Death

The final irrelevancy that may influence Justice Kennedy is the death of Justice Scalia. How this will cut is difficult to say. Perhaps Justice Kennedy will think it unwise to address the constitutionality of the Texas holistic admissions system, much less the constitutionality of affirmative action, in an opinion unlikely to secure more than four votes. If so, one possibility is to again remand the case to the Fifth Circuit, instructing it that a trial is needed to develop an adequate record. Or the issue could be avoided entirely. Abigail Fisher's standing to bring suit has always been tenuous, since it appears that she would not have been admitted to UT Austin even if no minority applicants had enjoyed preferences. The Court has never thoroughly addressed the standing issue, and if he wished, Justice Kennedy could decide that the Court should rethink its determination of standing and, no doubt, find three other Justices who would agree to dismiss for want of standing. Taking this path would, however, indicate that he erred in his *Fisher I* opinion by not disposing of the case then for want of standing.

Alternatively, Justice Kennedy might realize that once a successor to Scalia is appointed, he may no longer be the swing vote on affirmative action, and he may want to leave his imprimatur on affirmative action while he controls the language in the opinion. This could make a decision

43. *Id.* at 357.

invalidating affirmative action more likely, but it could also lead to an opinion more specifically defining strict scrutiny in the context of college admissions and clarifying situations in which race-conscious government decisions can pass constitutional muster and when they can't.

VI. *Mea Culpa* and a Few Words from the Justice

If the reader by this point sees my discussion as highly speculative, the reader is right. I offer it only as speculation, as possibilities to be pondered rather than tight analysis. My intent has been to explore legally extraneous and largely irrelevant considerations that could affect how Justice Kennedy decides in *Fisher II*. I have my own ideas of what might motivate Justice Kennedy, but my ideas may tell the reader more about me than about the Justice. So let me close with Justice Kennedy speaking for himself and four other Justices just last term in a case holding that the federal Fair Housing Act allowed disparate impact liability:

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. . . . [This court] does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

. . . .

. . . In striving to achieve our "historic commitment to creating an integrated society," we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.⁴⁴

This language suggests that Justice Kennedy may need no irrelevant incentives to invalidate race-conscious admissions. Although allowing Housing Authorities to use race-conscious procedures to combat housing

44. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015) (citations omitted).

segregation, he only approves of plans that do not single out race as the reason for different treatment. In the context of *Fisher II*, his language suggests that he would find the Texas Ten Percent Plan constitutional because no matter how clear the race consciousness that led to its enactment, it is on its face race neutral. However, the same language suggests he would find UT Austin's holistic admissions system unconstitutional because it is not race neutral. Justice Kennedy's opinion for the Court in *Texas Department of Housing*⁴⁵ can be read as implying that no system that explicitly advantages an applicant because of race can be sufficiently narrowly tailored to pass constitutional muster, even though a variety of approaches that use proxies for race, however obvious their race-privileging motivation, can pass constitutional muster.

Will Justice Kennedy go this far in a *Fisher II* opinion that, as the swing vote, he is likely to write? This is unclear. *Fisher II* differs from *Texas Department of Housing* in that there is clear precedent by two well-regarded Justices, Powell and O'Connor, that allow race-conscious admissions to promote educational diversity. Still, even if all affirmative action is not invalidated, no one should be surprised by a Kennedy opinion holding that the racial diversity achieved by the Texas Ten Percent Plan renders any admissions protocol that specifically references race too broadly tailored to be constitutional. Or Justice Kennedy could hold that while race-conscious admissions are not necessarily ruled out, UT Austin must first attempt means of adding to its minority student population that do not explicitly consider a student's race. Unless the case is remanded for a hearing, this is perhaps the best that supporters of affirmative action can expect from a Kennedy opinion. UT Austin claims, however, that it has tried every promising race-neutral measure to increase the number of minority students on campus while strengthening their average qualifications. Perhaps if the Fifth Circuit judges who found twice for the University had remanded the case for a district court hearing, the district court judge would have found facts sufficient to convince even Justice Kennedy that only by explicit attention to race could UT Austin attain its constitutionally compelling diversity interests. Of course, we know now that if the Fifth Circuit had remanded the case, its return to the Supreme Court would have been delayed, and when and if it next reached the Court, the Supreme Court's bench would most likely have been either a decidedly more sympathetic Court or one bent on eradicating affirmative action. No matter how *Fisher II* is decided, we can expect that a Court more like the first, or one more like the second, will before long resolve the issue.

45. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).