Long-Awaited Affirmative Action Decision
Does Not End the Suspense

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Today the U.S. Supreme Court announced, in a 7-1 decision, that it was returning the case in *Fisher v. University of Texas at Austin* to the lower court because that court had used the incorrect standard to evaluate whether the University’s affirmative action admissions program was lawful. While Court watchers had expected either that a conservative majority would outlaw the use of race in admissions decisions altogether, or would overturn the Court’s 2003 decision in *Grutter v. Bollinger* (the University of Michigan case), neither of these outcomes occurred. The Court did say, importantly, that a college must exhaust every race-neutral alternative to obtain a diverse student body before it may use race (or some other protected characteristic) as an explicit criterion in making admissions decisions. In examining a college’s use of race, said the Court, a reviewing court must be satisfied that “no workable race-neutral alternatives would produce the educational benefits of diversity.” This is a very high standard, one that may be impossible for many, if not most, colleges and universities to meet.

The Court criticized the panel of Fifth Circuit judges who, said the majority, were too deferential to the University’s insistence that it had acted in “good faith,” and explained that courts reviewing affirmative action plans must apply “strict scrutiny” to the program. The Court said: “Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without closely examining how the process works in practice,” saying that the college must first have demonstrated that diversity is a compelling
government interest (which the Court said it had done), and must then have “offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”

Justices Scalia and Thomas joined the majority opinion, but also wrote concurring opinions, stating that they believed any use of race to make admissions decisions was unlawful. Justice Ginsburg dissented, stating that the University of Texas had followed Grutter’s guidance in crafting its admissions program, that its evidence satisfied the strict scrutiny test, and thus its admissions program was lawful.