

**USING RACISM TO COMBAT RACISM:  
*FISHER V. UNIVERSITY OF TEXAS AT AUSTIN***

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**I. INTRODUCTION**

In June 2016, the Supreme Court answered a long-held question regarding the admissibility of race-related information when admitting students to a state-sponsored university.<sup>1</sup> The question presented was whether a university's admissions process, when it includes race as a factor, violates the Fourteenth Amendment right to equal protection.<sup>2</sup> This case was of fundamental importance because it analyzed not only the use of strict scrutiny in a school-related perspective, but it also provided a deep and intricate look at the perspective on race in not only the courts but throughout the country at large.

This Note will first analyze the majority's opinion regarding the race-based application process and how the application process did indeed fulfill strict scrutiny while simultaneously giving each student an equal chance and was therefore constitutional.<sup>3</sup> This Note will then analyze the dissent's concerns with the majority's decision, including issues regarding impartial analysis that included negative racial undertones, unequal treatment of students of different races, and issues with the majority's opinion regarding strict scrutiny and what may be constitutional under such an analysis.<sup>4</sup> This Note will then go on to examine the implicit biases within both the majority and dissenting opinions and discuss which analysis seems most appropriate in today's world.<sup>5</sup>

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<sup>1</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2205 (2016) [hereinafter *Fisher II*].

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* Part III.A.

<sup>4</sup> See *infra* Part III.A.

<sup>5</sup> See *infra*, Part IV.

The Supreme Court analyzed the University of Texas at Austin's ("the University") regulation in the majority opinion under a strict scrutiny analysis and further analyzed the reasoning behind the regulation and whether that reasoning behind the regulation was not only fair and equal but also applicable in the world of today.<sup>6</sup> The dissent then went on to point out the flaws that the majority applied in analyzing the University's regulation and the regulation's issues that were fundamentally unfair in themselves.<sup>7</sup>

For the majority of the time that the University has been admitting students, it has used race-based information as a consideration during the application process.<sup>8</sup> This changed significantly over the last twenty years, starting in 1996 with *Hopwood v. Texas*, which invalidated admissions systems that had a preferential treatment toward minority students, stating that such systems violated the Equal Protection Clause.<sup>9</sup> The University began using an admissions system that did not use race as a factor just one year later.<sup>10</sup> In this system, the admissions department gave each student a numerical "Personal Achievement Index" which included the applicant's "essays, leadership and work experience, extracurricular activities, community service, and other special characteristics that might give the admissions committee insight into a student's background."<sup>11</sup> The admissions committee instead used this numerical score to make admission decisions.<sup>12</sup>

The Texas Legislature did not let *Hopwood* go unnoticed.<sup>13</sup> Rather, the legislature enacted H.B. 588, more commonly known as the Top Ten Percent Law.<sup>14</sup> This law guaranteed that any student who graduated in the top ten percent of their Texas high school would receive admission to one of the public universities in the State of

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<sup>6</sup> See *infra*, Part IV.

<sup>7</sup> *Fisher II*, 136 S. Ct. at 2215.

<sup>8</sup> *Id.* at 2205.

<sup>9</sup> *Hopwood v. Texas*, 78 F.3d 932, 934-35, 948 (5th Cir. 1996).

<sup>10</sup> *Fisher II*, 136 S. Ct. at 2205.

<sup>11</sup> *Id.* (quotation marks and citations omitted).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Tex. Educ. Code Ann. § 51.803 (West Cum. Supp. 2015).

Texas.<sup>15</sup> Those top students could then choose to attend any of the public universities in the state.<sup>16</sup> This law was in place until 2003, when a new ruling overturned the old perspective.<sup>17</sup>

In 2003, the Supreme Court decided both *Grutter v. Bollinger* and *Gratz v. Bollinger*, which held that predetermined points cannot be assigned to students who are of a racial minority on a points-based system.<sup>18</sup> Instead, the Court found that it was constitutional to use race as one relevant factor of many in the admissions process.<sup>19</sup> The University then began researching the most effective way to provide “the educational benefits of a diverse student body” and created a new admissions policy that considered race as one of “the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University.”<sup>20</sup> The policy the University chose used a percentage plan: seventy-five percent of incoming freshmen seats would be filled with students falling in the Top Ten Percent Law, while the rest would be evaluated on a scale that took into consideration their academic achievement and their personal achievement—the latter of which included race as a subfactor.<sup>21</sup> The review process utilized for the remaining quarter of the students was referred to as a “holistic-review” process.<sup>22</sup>

In this case, Abigail Fisher (“Petitioner”) filed suit alleging that the University’s application system, which considered race, was in violation of the Equal Protection Clause, which states in relevant part that “no state shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>23</sup>

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<sup>15</sup> *Fisher II*, 136 S. Ct. at 2205.

<sup>16</sup> *Id.*

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

<sup>18</sup> *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 250 (2003).

<sup>19</sup> *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 250.

<sup>20</sup> *Fisher II*, 136 S. Ct. at 2206.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2202.

<sup>23</sup> *Id.* at 2207; U.S. CONST. amend. XIV, § 1.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner was a white, female, Texas resident, who attended and graduated from a high school in Texas.<sup>24</sup> The Petitioner applied for admission to the University in 2008.<sup>25</sup> She did not fall into the top ten percent of her high school graduating class; therefore, the Top Ten Percent Law did not apply to her.<sup>26</sup> In the Petitioner's case, the administration evaluated her application "through holistic, full-file review."<sup>27</sup> Her application was not accepted.<sup>28</sup>

The Petitioner filed a suit indicating that the review process that the University employed disadvantaged her and other people who identified as Caucasian and was therefore in violation of the Equal Protection Clause.<sup>29</sup> The district court entered summary judgment in favor of the University.<sup>30</sup> The court of appeals affirmed the lower court's decision.<sup>31</sup> The case then made its way to the Supreme Court, which vacated the judgment of the court of appeals.<sup>32</sup> This ruling vacated the holding in the case when it first came to the Court in *Fisher I* because of its application of an "overly deferential good faith standard" in assessing the constitutionality of the University's program.<sup>33</sup>

The Supreme Court did not remand the case to the district court but rather remanded the case to the court of appeals, which again affirmed summary judgment in the University's favor.<sup>34</sup> For the second time, the Supreme Court granted certiorari and finally affirmed in the

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<sup>24</sup> *Fisher II*, 136 S. Ct. at 2207.

<sup>25</sup> *Id.*

<sup>26</sup> See *supra* text accompanying notes 14-16.

<sup>27</sup> *Fisher II*, 136 S. Ct. at 2207.

<sup>28</sup> *Id.*

<sup>29</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2416 (2013) ("The University asks students to classify themselves from among five predefined racial categories on the application.") [hereinafter *Fisher I*].

<sup>30</sup> *Fisher II*, 136 S. Ct. at 2207.

<sup>31</sup> *Id.*

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

<sup>33</sup> *Fisher I*, 133 S. Ct. at 2416.

<sup>34</sup> *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 (5th Cir. 2014).

case at hand.<sup>35</sup>

The first time this case got to the Supreme Court in *Fisher I*, it set out three controlling principles that were still observed when it returned the second time.<sup>36</sup> First, the admissions process must withstand strict scrutiny.<sup>37</sup> Second, the decision to pursue any educational benefits reaped from student diversity is an “academic judgment to which . . . judicial deference is proper.”<sup>38</sup> Third, “no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals.”<sup>39</sup> These principles controlled in *Fisher II*, but the Supreme Court did not take a position as to the constitutionality of the admissions program.<sup>40</sup> Instead, the Court decided that the district court’s opinion, holding that the strict scrutiny analysis had been too narrow, was the only necessary perspective as to the constitutionality of the admissions process.<sup>41</sup> The Court remanded the case with instructions to evaluate the record once more under the correct standard regarding strict scrutiny as outlined by the Court.<sup>42</sup>

### III. *FISHER V. THE UNIVERSITY OF TEXAS AT AUSTIN*

#### A. *Majority Opinion*

The majority opinion of the Supreme Court, written by Justice Kennedy, rebuffs all of the Petitioner’s arguments and begins by further suggesting that the Petitioner argued against the wrong issue in the case; namely that the Petitioner was actually more harmed by the Top Ten Percent Law than the University’s holistic-review process.<sup>43</sup>

The Court explained that the Petitioner was more likely to be accepted into the University had the school only used the race-

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<sup>35</sup> *Fisher II*, 136 S. Ct. at 2207.

<sup>36</sup> *See id.* at 2207-08.

<sup>37</sup> *Fisher I*, 133 S. Ct. at 2418.

<sup>38</sup> *Id.* at 2419.

<sup>39</sup> *Fisher II*, 136 S. Ct. at 2208.

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2208-09.

conscious review that the University used for only a quarter of its students.<sup>44</sup> Although the legislature enacted the Top Ten Percent Law to give students from lower-funded, lower-income, and generally more racially-diverse areas a chance to succeed in college, this program still would have likely been better for the Petitioner.<sup>45</sup> This, however, is a moot argument because the University does not have the “authority to alter the role of the Top Ten Percent Law in its admissions process” since it was legislatively mandated.<sup>46</sup>

The Petitioner argued that the University failed to “articulate its compelling interest with sufficient clarity” and that the University “had already ‘achieved critical mass’” of minority students because of the Top Ten Percent Plan.<sup>47</sup> The Petitioner further argued that race had a “minimal impact in advancing the [University’s] compelling interest” anyway, making the University’s argument unnecessary.<sup>48</sup> The Court rejected these advances in turn, beginning with the clarity issue.<sup>49</sup> The Court held that the admissions policy fulfilled strict scrutiny because it articulated “concrete and precise goals” by enacting the policy in order to destroy stereotypes, “promot[e] cross-racial understanding, prepar[e] students for an increasingly diverse workforce and society, [] cultivat[e] a set of leaders with legitimacy in the eyes of the citizenry,” and “provide an academic environment that offers a robust exchange of ideas.”<sup>50</sup> While somewhat unclear, the Court explained that these reasons are enough to fulfill a compelling interest standard necessary in the case because the University provided “‘a reasoned principled explanation’ for its decision” to pursue these goals.<sup>51</sup>

The Court addressed many of the issues by simply listing numbers and percentages. The Court addressed the “critical mass” issue by identifying a classroom study that outlined the relatively low percentages of African-American and Hispanic students enrolled in

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<sup>44</sup> *Id.* at 2209.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2210-11.

<sup>48</sup> *Id.* at 2212 (quotation marks and citations omitted).

<sup>49</sup> *Id.* at 2210.

<sup>50</sup> *Id.* at 2211 (quotation marks and citations omitted).

<sup>51</sup> *Id.* at 2208.

specific classes.<sup>52</sup> Further, the classroom study indicated that there had been a small increase in percentages of African-American and Hispanic students since the implementation of the race-conscious application process; therefore, the University's goals met a compelling interest standard.<sup>53</sup> The Court did not specify how this minimal increase, or any increase at all, would help to reach any of the "concrete and precise goals" articulated by the University, but rather the increase was proof that although the "University had not yet attained its goals," it was well on its way.<sup>54</sup>

Finally, the Court explained that there were no other "race-neutral means of achieving the University's compelling interest."<sup>55</sup> While the Petitioner did suggest some alternate means of achieving the compelling interest, all the proposed suggestions had been previously attempted elsewhere and failed to realize the goal of a truly diverse student body.<sup>56</sup> Further, some of the suggestions would have been detrimental to the Petitioner.<sup>57</sup>

### ***B. Dissenting Opinion***

The dissenting opinion, written by Justice Alito and joined by Justice Thomas, drew attention to the inconsistencies and further issues brought up by the majority.<sup>58</sup> The dissent started out by identifying one of the most important and necessary issues: in order to use race and ethnicity as a factor in admissions, the regulation must pass strict

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<sup>52</sup> *Id.* at 2211-12 (explaining that in 2002, fifty-two percent of undergraduate classes comprising more than five students completely lacked even a single African-American student, while only twelve percent of those same classes included Hispanic students).

<sup>53</sup> *Id.* at 2212 (explaining that in 2003, 14.5% of students at the University were minority students, while in 2007, 22.7% of students in the same category were minority students).

<sup>54</sup> *Id.* at 2212 (explaining that the University "must continually reassess its need for race-conscious review" but that the review seemed to "have been done with care").

<sup>55</sup> *Id.* at 2212, 2214 (quotation marks and citations omitted).

<sup>56</sup> *Id.* (suggesting that intensifying outreach efforts to minority students; altering the weight given to academic and socioeconomic factors, both of which had been attempted and failed; or to uncap the Top Ten Percent Law, which would likely increase minority enrollment and overlook outlying students).

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

<sup>58</sup> *Id.* at 2215, 2217.

scrutiny.<sup>59</sup> Rather than laying out the concrete and specific interest that the regulation is supposed to serve, the Court merely invoked any educational benefit to a diverse student body as an interest.<sup>60</sup> The dissent explained that this simply did not fulfill strict scrutiny and is dismally confused as to why the majority decided to grant the request anyway.<sup>61</sup> Also, the dissent pointed out that the “critical mass” issue furthers this point because the University did not make a conclusion as to what “critical mass” entails; instead, they will simply know it when they see it.<sup>62</sup> In the simplest terms, the “University must identify *some sort of concrete interest*” in order to fulfill strict scrutiny.<sup>63</sup> “Trust us” simply does not cut it.<sup>64</sup>

The dissent then focused on the two most contentious policy arguments against the majority: that the program the University employed was created to help a specific, well-off group of minority students, and somehow the majority missed that the regulation discriminates against another group of minority students: Asian-Americans.<sup>65</sup>

The dissent recognized that the University had argued at the lower courts that minority students admitted under a race-neutral Top Ten Percent Law were not the students that the University wanted, namely because they were “more homogenous,” “more undesirably stereotypical,” and finally because those African-American and Hispanic students “were able to rank in the top decile of their . . . classes only because they did not have to compete against white and Asian-American students.”<sup>66</sup> The University brought forward the need for “diversity within groups of underrepresented minorities,” particularly minority students from more privileged backgrounds.<sup>67</sup> This obviated the conclusion that there is something wrong with the

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<sup>59</sup> *Id.* at 2215.

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

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

<sup>62</sup> *Id.* at 2223.

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> *Id.* at 2222.

<sup>65</sup> *Id.* at 2227.

<sup>66</sup> *Id.* at 2217, 2232.

<sup>67</sup> *Id.* at 2231.

students that are admitted under the Top Ten Percent Law because they are from lower performing, lower income schools.<sup>68</sup> These conclusions are not just racist and inflammatory, but incorrect.<sup>69</sup> In truth, minority students accepted from the Top Ten Percent Law have similar levels of parental education, income levels, and perform just as well as non-minority students.<sup>70</sup>

When looking at the statistics that the majority used to argue its point, the dissent pointed out how the majority used obvious and blatant racism toward another racial group to fulfill their point.<sup>71</sup> The dissent identified that the Court stated that “classroom contributions of Asian-American students are less valuable than those of Hispanic students.”<sup>72</sup> Apparently Asian students are not helpful in calculations of classroom diversity; the majority only referenced Asian students one time.<sup>73</sup> The district court even discussed the University’s policy on Asian-American students, and shockingly stated that the University can “pick and choose which ethnic groups it would like to favor.”<sup>74</sup> Instead of fighting for minority students, as the majority would like to convey that it is, the Court is actually discriminating against those Asian-American students, harkening back to centuries-old racism.<sup>75</sup> The dissent went on to relate the Court’s indifference to the suffering and hardship of Asian-American students to the belief that discrimination against Asian-American students is “benign” because they are “overrepresented.”<sup>76</sup> Further, the minority pointed out that students who are labeled or are forced to label themselves as “Asian-American” harken from an

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2232-33 (comparing the median levels of parental education and income levels of an average Texan, minority students’ median levels of both statistics fell within the normal range).

<sup>71</sup> *See generally id.* at 2232 (discussing how the majority based its opinion on racial stereotypes).

<sup>72</sup> *Id.* at 2227.

<sup>73</sup> *Id.* (referencing Asian-American students one time outside of parentheses).

<sup>74</sup> *Id.* at 2228.

<sup>75</sup> *Id.*; *Gong Lum v. Rice*, 275 U.S. 78, 81-82 (1927) (barring an elementary school girl of Chinese descent from attending a white school because of her race).

<sup>76</sup> *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Texas 2009); *see also Metro Broadcasting, Inc., v. F.C.C.*, 497 U.S. 547, 608 (1990).

incredibly diverse geographic locale, one that includes “roughly 60% of the world’s population.”<sup>77</sup>

This issue is one, though only cursorily reviewed by the dissent, that begins to scratch the surface on a very serious and socially acceptable version of racial discrimination that exists in today’s educational world; namely, the ability for a university to racially discriminate by favoring some racial groups above others.<sup>78</sup> Although the majority does not specifically say it is ignoring racial groups other than African-American and Hispanic students, the dissent pointed out that the majority does implicitly “bless” the University’s perspective that only African-American and Hispanic students are important in quantifying classroom diversity by relying on the University’s classroom study as proof of an increase in said diversity.<sup>79</sup>

Finally, the dissent once more pointed out that the admissions process cannot withstand strict scrutiny simply because it was not narrowly tailored.<sup>80</sup> Without any information about students who were accepted under the University’s admissions plan, there was no way to know if the admissions plan rectified any deficiency that was attempting to be addressed by the use of race-based admissions policies.<sup>81</sup> It is necessary for the majority to have this specific information in order to justify the University’s identified concrete interest.<sup>82</sup> The concrete interest must explain “with clarity why [the University] needs a race-conscious policy and how it will know when its goals have been met.”<sup>83</sup> Only then can the narrow tailoring analysis be “meaningfully conducted.”<sup>84</sup> In simplest terms, the University must at least have a goal in mind when attempting to shape its student body, not just an abstract hope or ideal.

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<sup>77</sup> *Fisher II*, 136 S. Ct. at 2229.

<sup>78</sup> *Id.* at 2228

<sup>79</sup> *Id.* at 2212; *see also id.* at 2227-28.

<sup>80</sup> *Id.* at 2238.

<sup>81</sup> *Id.* at 2238-40.

<sup>82</sup> *Id.* at 2223.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

#### IV. COMMENTARY AND CONCLUSION

##### A. *Commentary*

The Supreme Court mistakenly overlooked major issues when handing down this historic decision. Despite good intentions, the Court furthered and bolstered collateral issues that they were attempting to rectify. By completely justifying the obvious lack of strict scrutiny in the University's argument, the Court has opened the gates for regulatory issues in the future arising from exceptionally vague standards for a compelling interest.<sup>85</sup> The University's "concrete and precise goals," articulated as "promotion of cross-racial understanding," "the preparation of a student body . . . for an increasingly diverse workforce and society," and the "cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry" are simply not narrowly tailored, therefore strict scrutiny must fail as a rule.<sup>86</sup> The Court cast too wide of a net on a basic and fundamental legal principle and possibly set themselves up for failure in the future with a standard that is so vague that it cannot reasonably be implemented. Most alarmingly, the Court legitimized the ability for an entity to identify its own standards and then decide, *completely on its own*, when that interest has been satisfied.<sup>87</sup> This perspective not only permits incredible ambiguity but prevents practical, "careful judicial inquiry" into the use of race in the application process, effectively nullifying strict scrutiny.<sup>88</sup>

Furthermore, and possibly most importantly, the University has based justifying "systemic racial discrimination" by simply stating that such discrimination is necessary to achieve their abstract goals of creating a community that benefits from "the educational benefits of diversity."<sup>89</sup> The University relies on age-old discrimination and even blatant racism toward the students they are trying to support, while completely ignoring other minority students.<sup>90</sup> Adding insult to injury

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<sup>85</sup> See *supra* notes 47-51 and accompanying text.

<sup>86</sup> See *supra* note 50 and accompanying text.

<sup>87</sup> See *supra* note 63 and accompanying text.

<sup>88</sup> *Fisher II*, 136 S. Ct. at 2222.

<sup>89</sup> *Id.* at 2242.

<sup>90</sup> *Id.* at 2231; *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009).

is the fact that the minority students who are being subtly ostracized under the guise of racial equality have been excluded and snubbed by the majority population for decades—the minority even goes as far as to point out a specific instance that relies on a basic premise that is the catalyst for issues outlined in this case.<sup>91</sup>

As pointed out in the dissent, the Court implicitly condoned racial inequality through the ability of a University to pick and choose which races are important for “diversity,” specifically excluding Asian-American students.<sup>92</sup> This brings up the question: what is causing a disparity between the Court’s view of diversity, and a pure view of diversity that includes students from every background? Is this a legal question, or is this a reflection of the direction of race relations in America? This question is best examined by sociologists and legal scholars, but must be scrutinized by the Court if a similar case is ever reviewed again.

While the University’s argument mostly fails because it blatantly disregards the basic standards regarding strict scrutiny, the University’s reasoning is truly the most concerning in this case. The University’s reasoning, that is mirrored in the majority’s explanation, highlights a fundamental issue in our everyday discussion of race: that the perspective on race relations in America today is not where it should be, or arguably where many people believe it is. When this unequal perspective is unknowingly or unabashedly used in our country’s highest court, it underlies an issue that must not only be fairly addressed, but must also be rectified.

### ***B. Conclusion***

While the outcome of this case is positive in a general sense, the Court and the University simply did not make the best conclusion by using outdated perspectives and harmful ideology to bolster a falsely progressive stance. The Court’s reasoning begs the question: why would an outcome meant to help minority students have so many easily identifiable negative racial undertones? Such a decision downplays the fight that many minority citizens and students make every day to fit in

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<sup>91</sup> *Fisher II*, 136 S. Ct. at 2232.

<sup>92</sup> *Id.* at 2227.

seamlessly in a world that often is trying to point them out. This decision is one that is actually harmful to minority students, instead of uplifting as one would hope and assume a decision upholding affirmative action would be.

To uphold such a case is to uphold or to implicitly condone the racial undertones and beliefs apparently held by the majority in this opinion: that students of certain races and classes are less desirable or even less important than other students. Students cannot be passed over just because they are not part of a stereotypically marginalized group. Asian students are a marginalized group but are casually written off as an unharmed bystander.<sup>93</sup> Poor African-American students are labeled as “less desirable.”<sup>94</sup> Hopefully, if a case regarding a similar issue makes its way to the Supreme Court in the future, the Court will rectify its mistakes and use logical and nondiscriminatory reasoning in its outcome.

This case also sets a terrible precedent regarding strict scrutiny and likely will not stand if pushed in the near future for failure to uphold or enact any reasonable standard at all. Had the majority simply outlined a goal for the University to achieve, this case may be an entirely different story. This case could easily be used to justify a negative regulation that does not stand up to our views on strict scrutiny that are widely held today. Together, this case outlines a perfect example of a disappointing and negative argument wrapped in positive and uplifting yet flimsy ideals of equality.

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<sup>93</sup> *Id.* at 2228.

<sup>94</sup> *Id.* at 2233, 2241-42.