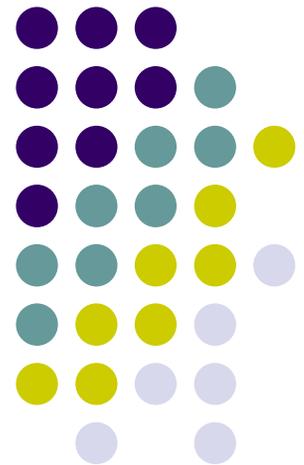


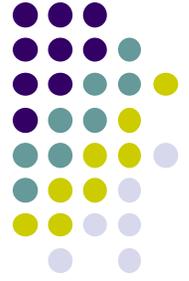
# Lessons from Fisher II

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CCIC  
September 1, 2016

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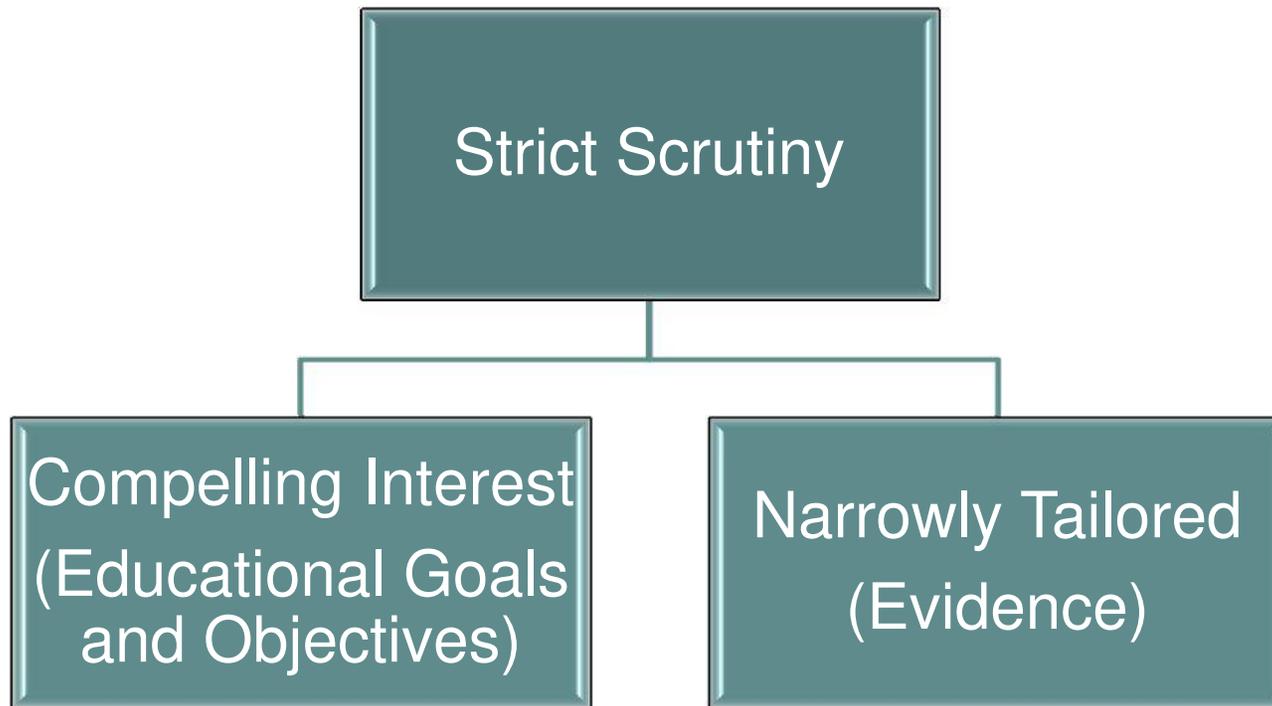
# What we'll cover

- Fisher II: the decision and its implications
- Actions Steps to Consider
- Q&A



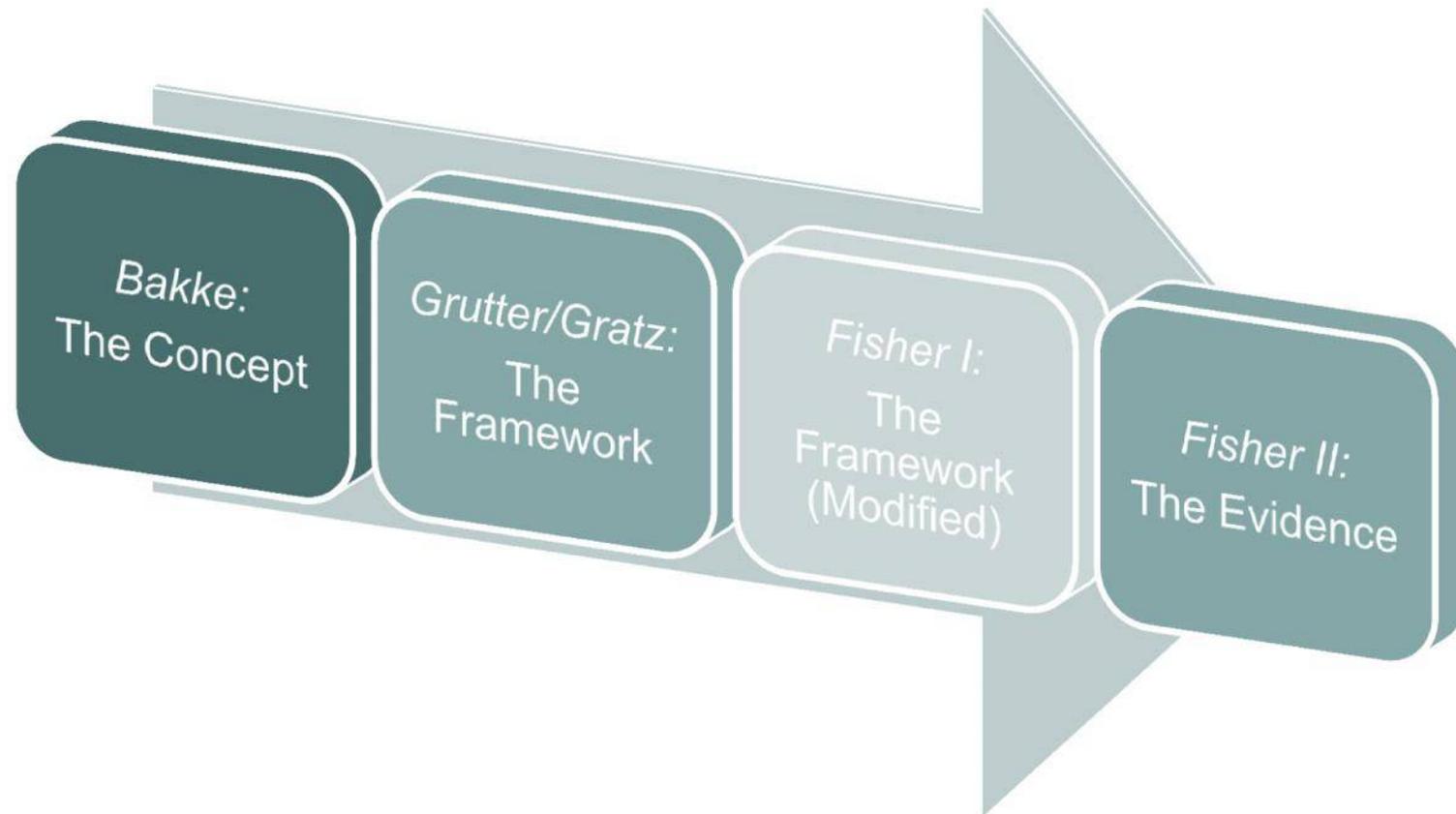
# A (very) brief overview

# Equal Protection and Race





# Affirmative Action in 90-(ish) Seconds





# Background of *Fisher*

# The Top 10% Plan at U. Texas



- Race-conscious admissions were illegal in Texas from 1996 -2003
- Texas Legislature responded with the Top 10% plan
- All students in top 10% of public high school classes admitted

# Supreme Court Changes the Game



- *Gratz*
  - Undergraduate admissions
  - Race cannot be an automatic plus factor
- *Grutter*
  - Educational benefits of diversity a compelling interest
  - Race one of many factors





# The New Plan

- Texas reevaluated admissions after *Grutter*
- Conducted a comprehensive year-long study
- Combined top 10% plan (75% of admitted class) with holistic review (25% of admitted class)

# Abigail Fisher

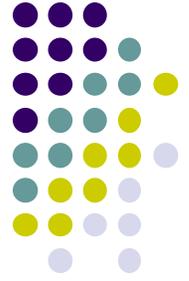


- SAT: 1180

- GPA: 3.59

Top 1% of her class





# Fisher I

- Fifth Circuit upheld University's consideration of race
- Supreme Court reversed because Fifth Circuit had relied on University's "good faith"



## Fisher I – Three Principles

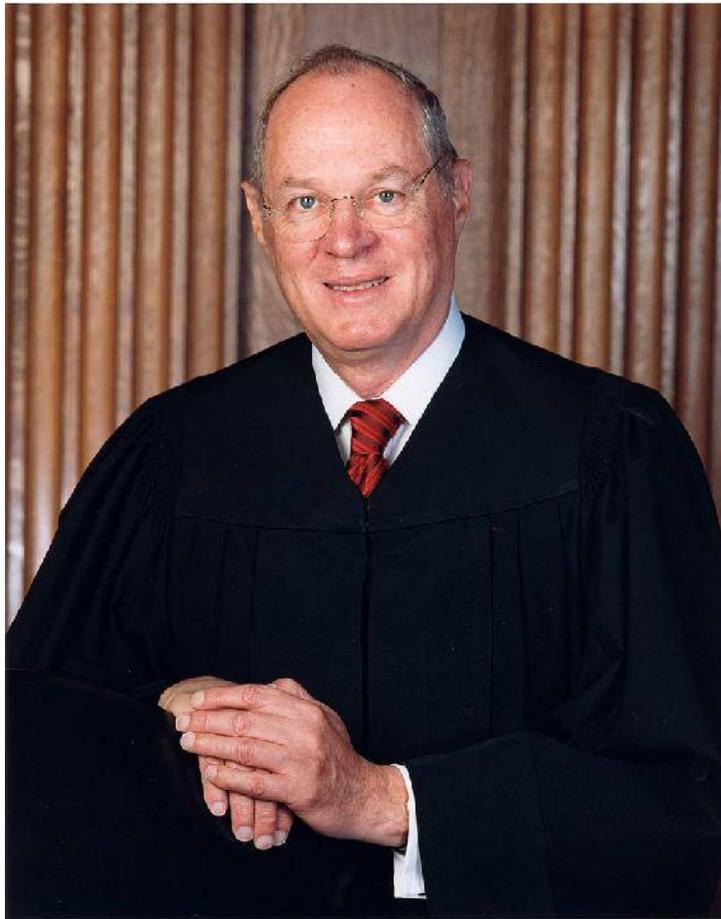
- Strict Scrutiny applies to any disparate treatment based on race.
- Deference to institution's goals/objectives regarding diversity
- No deference as to whether the policy is “narrowly tailored”



# The Fisher II Decision

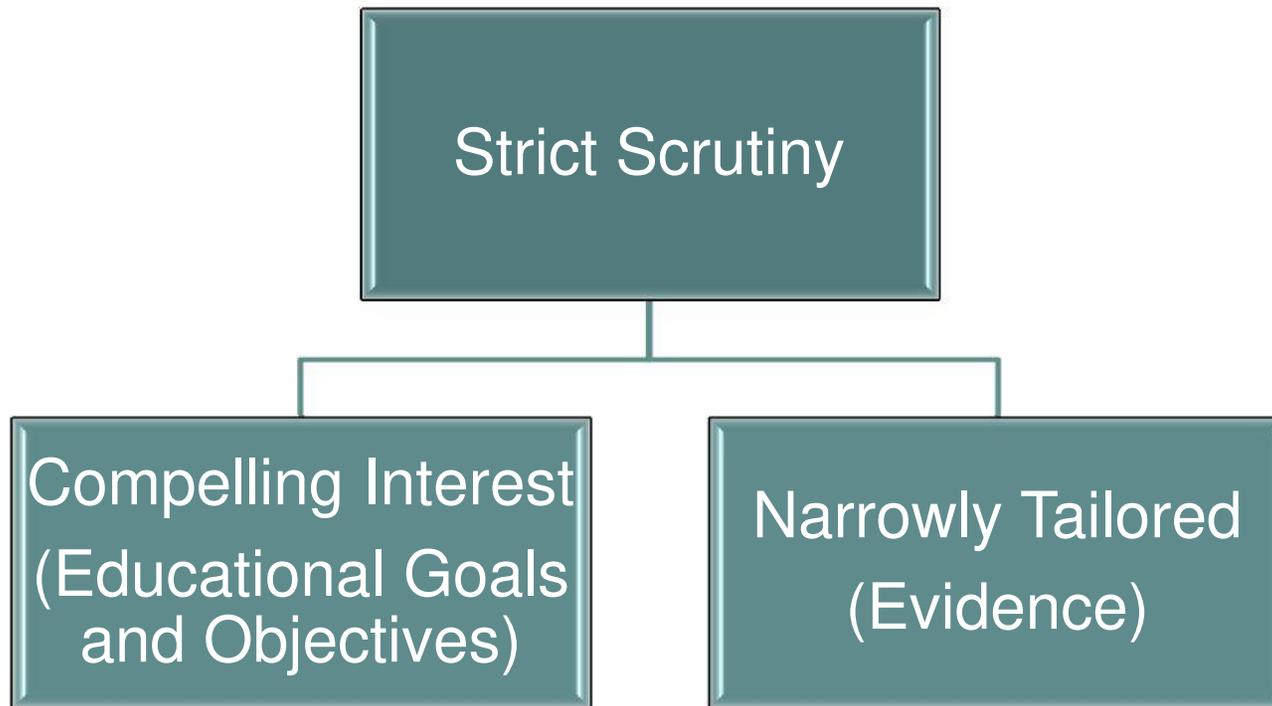


# Justice Kennedy

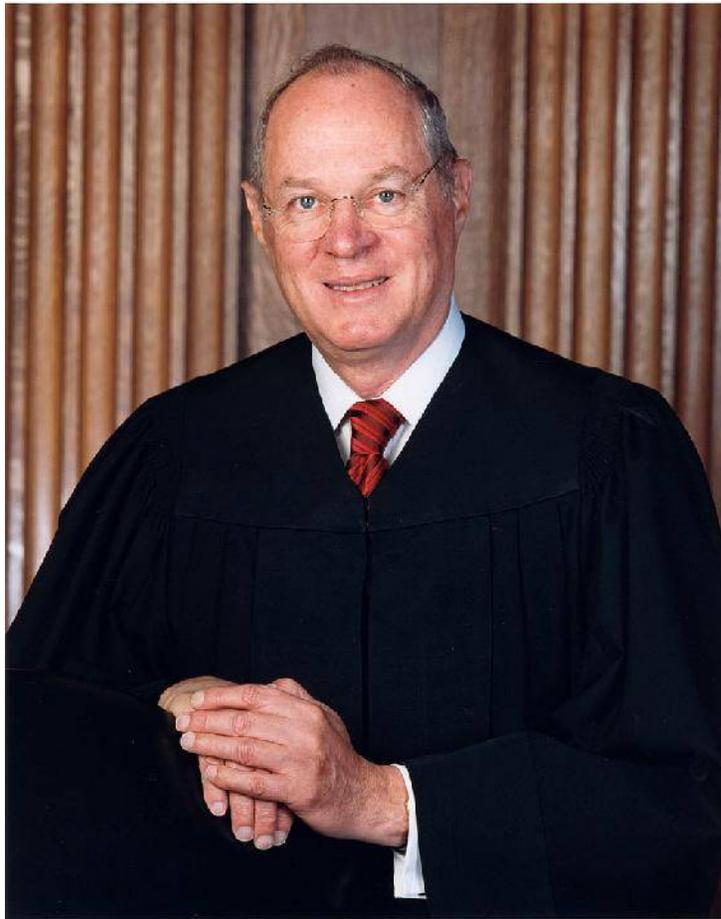


- Voted to strike down diversity in *Gratz*
- Dissented in *Grutter*
- Author of *Fisher I*

# Strict Scrutiny



# Deference on Goals and Objectives



“Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”



# Compelling Interests

“Diversity Writ Large”

“University’s goals cannot be elusory or amorphous—  
they must be sufficiently measurable to permit judicial  
scrutiny of the policies adopted to reach them”



# Texas's Compelling Interests

“Destruction of Stereotypes.”

“Promotion of cross racial understanding”

“Preparation of a student body ‘for an increasingly diverse workforce and society’”

“Cultivation of a set of leaders with legitimacy in the eyes of the citizenry”

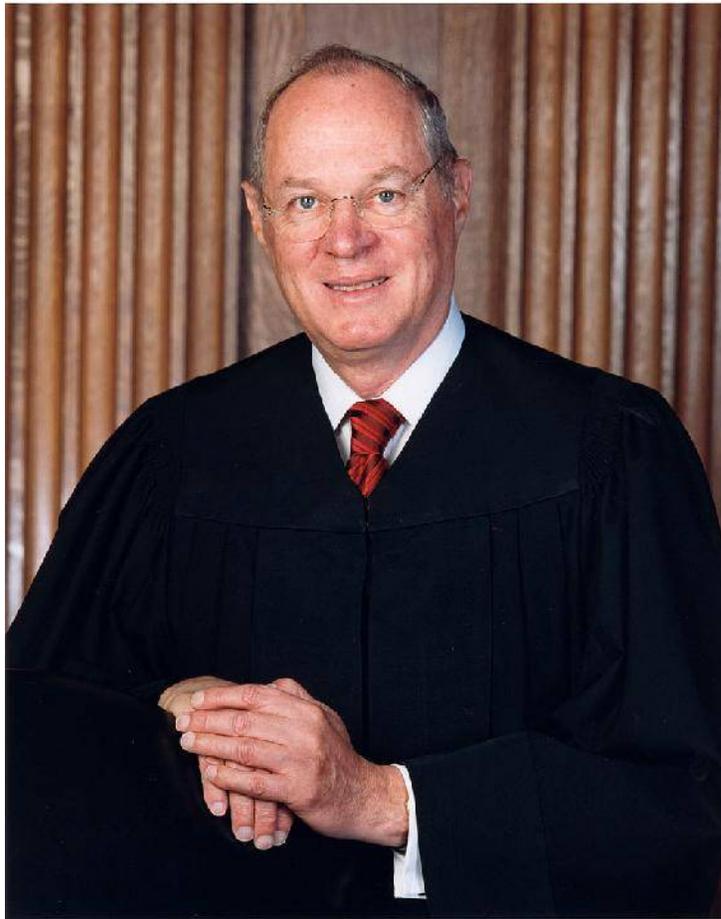
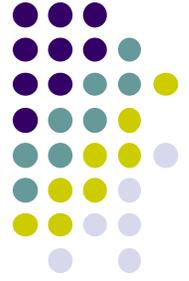
“An academic environment that offers a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies require of future leaders”

# Compelling Interest -- Takeaways



- Educational benefits of diversity here to stay
- Must articulate goals with specificity
- Considerable deference to schools

# No Deference on Narrow Tailoring

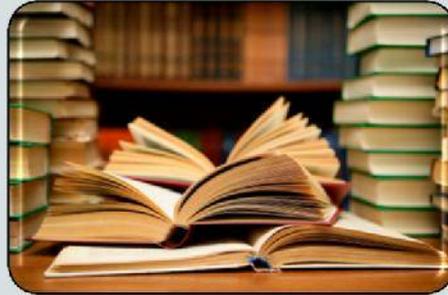


“[A] university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.”

# Is the policy narrowly tailored? Texas met that burden



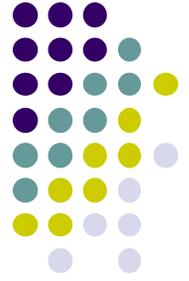
A 39-page policy proposal



“Months of study and deliberation including retreats, interviews, and review of data”



A dedicated stakeholder committee that reported to the president and the board of trustees



# Evidentiary Sources

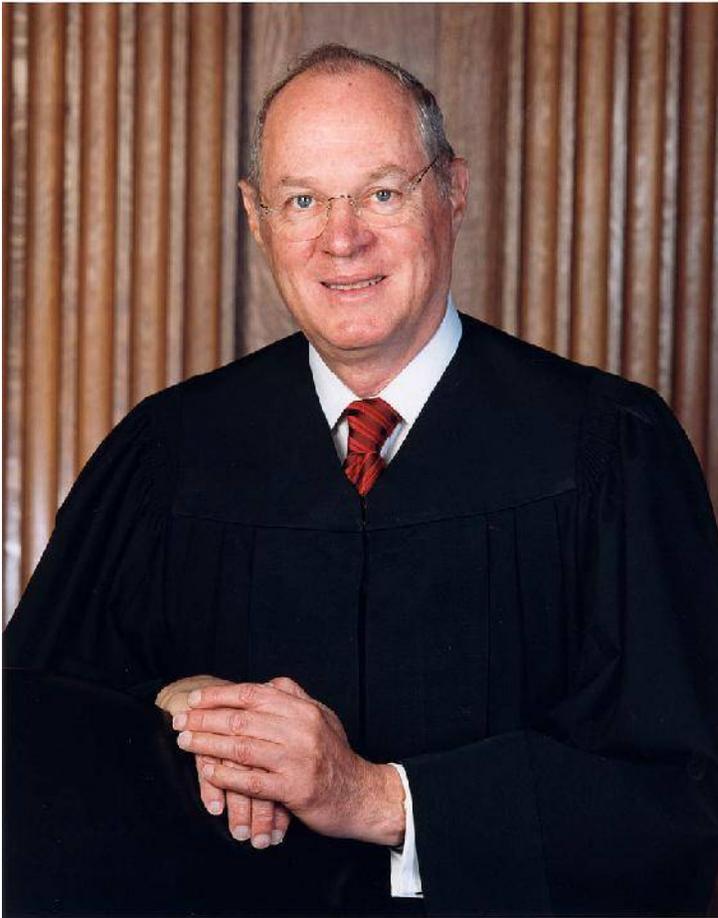
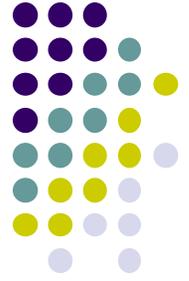
- Diversity stagnation from 1996 to 2002
- Anecdotal evidence
- Classroom data

# Race-blind Alternatives Had Failed



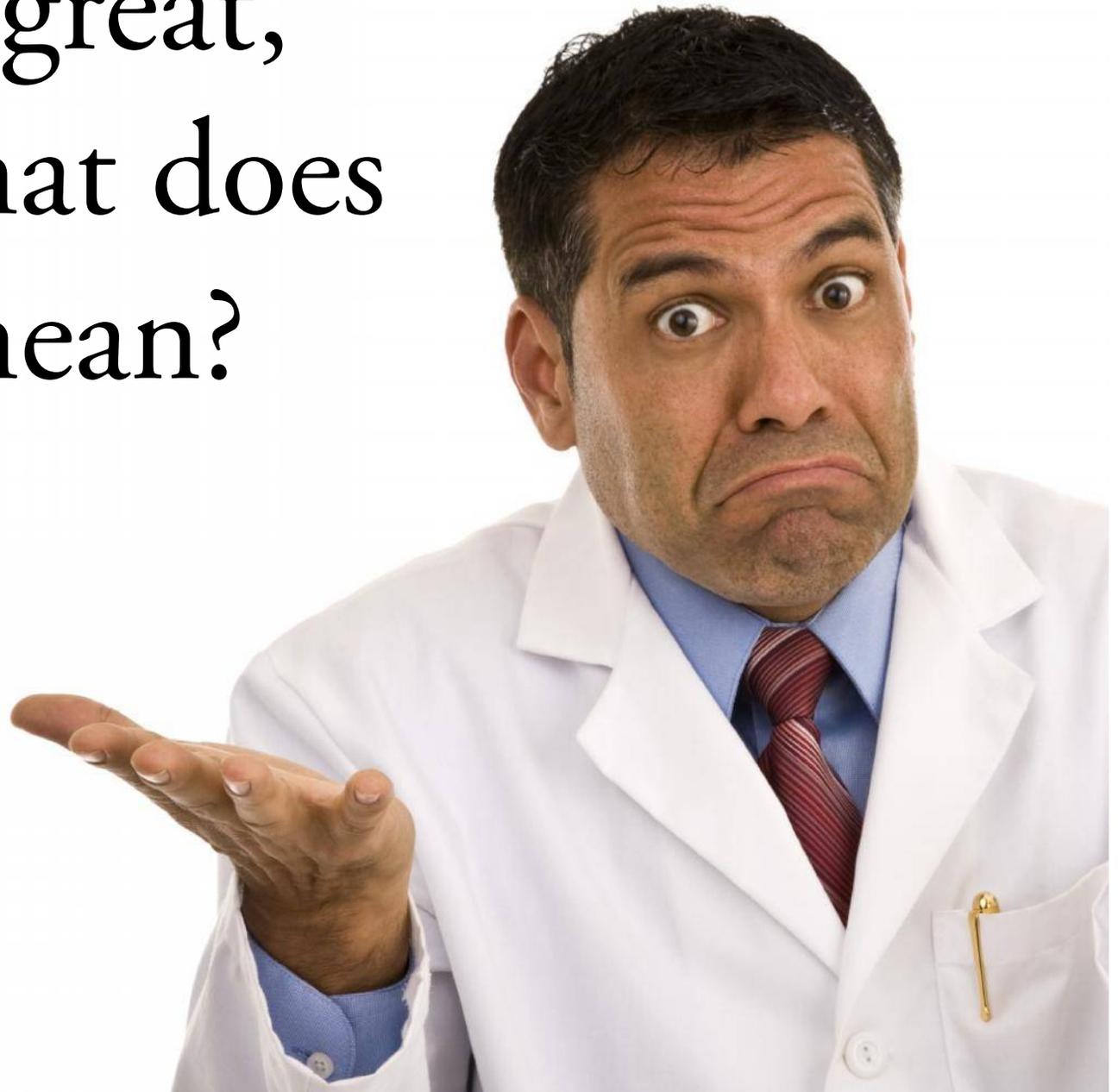
- Race-blind holistic approach did not work
- Outreach efforts prior to 2003
- Increased recruitment budget by \$500,000
- Ten Percent Plan was not a panacea

# Kennedy Limited the Decision



- Texas’s admissions program was unique
- “Continuing obligation to satisfy the burden of strict scrutiny”
- Continual assessment “in light of changing circumstances”

That's great,  
but what does  
it all mean?



# Key Takeaways



- Holistic review lives
- Diversity can be a compelling interest
- Goals and objectives must be specific



# Key Takeaways

- Build evidence to justify use of race-conscious admissions
- Show that you've considered race-blind alternatives and that they have not worked
- “Ongoing obligation to engage in constant deliberation” on whether race-conscious admissions policies are still needed

# Continual Review!



Cite as: 579 U. S. \_\_\_\_ (2016)

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## Opinion of the Court

University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's

must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's

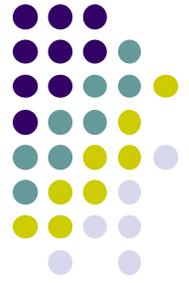
question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

## IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

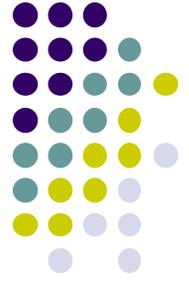
As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U. S., at \_\_\_\_ (slip op., at

# Identify Policies & Review



- What are the institution's goals and objectives?
- Create an inventory of policies that contribute to the institution's goals.





# Formulate the policy

- Frame goals clearly
- Identify & meet with stakeholders
- Communicate with campus community



# Build a Record

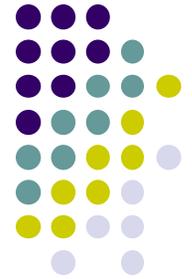


- Collect statistical & anecdotal evidence
- Alternative ways of testing adequacy of race-blind admissions

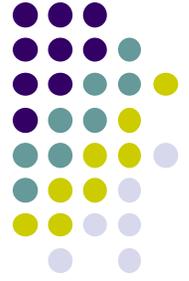


## Build a Record (cont'd)

- Recruitment
- Admissions
- Financial Aid
- Retention
- Overall



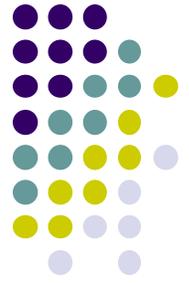
# Future Challenges

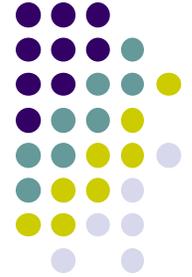


# Future Challenges

- *Fisher II* is a narrow decision
- Focus on evidence
- No certainty for other schools
- Periodic reassessment

# Future Challenges (cont'd)





# Questions?



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