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Supplementary Material

Chapter 11: The Contemporary Era—Equality/Race

Fisher v. University of Texas at Austin, ___ U.S. ___ (2013)

Abigail Fisher was rejected by the University of Texas at Austin when she applied for admission into the undergraduate program in 2008. She sued the university, claiming that the university violated her rights under the equal protection clause of the Fourteenth Amendment by making unconstitutional use of race when making admissions decisions. The University of Texas offered admission to all Texas residents who graduated in the top 10 percent of their high school class. Before Grutter v. Bollinger *(2003), Texas filled out the rest of the class by relying on an Academic Index score and a Personal Achievement Index (PAI) score. The latter focused on leadership abilities and "special circumstances that give insight into a student's background." Although the use of the PAI increased minority representation at the university to 4.5% African American and 16.9% Hispanic, Texas officials believed the school lacked a "critical mass" of students of color. To remedy this deficiency, Texas after* Grutter *explicitly included race as one of the factors used in the PAI. The federal district court on a motion for summary judgment ruled that such a use of race was constitutional under* Grutter *and that decision was sustained by the Court of Appeals for the Fifth Circuit. Fisher appealed to the Supreme Court of the United States.*

The Supreme Court by a 7–1 vote remanded the case to the lower federal courts. Justice Kennedy's majority opinion maintained that race-conscious admissions programs passed constitutional muster only if no race-neutral alternative existed. What did Justice Kennedy believe was wrong with the initial federal circuit court decision? Why did Justice Ginsburg disagree? Who has the better argument? Why did Justice Thomas believe that diversity was not a sufficiently compelling constitutional interest to meet a strict scrutiny standard? Was Kennedy's opinion a straightforward application of Grutter *or have the constitutional rules for affirmative action been modified? What explains the near unanimity in* Fisher*? Can you think of a "strategic" bargain that led conservative and liberal justices to sign on to this particular opinion? Do you think that several justices tried and failed to get majority support for a broader opinion on the constitutionality of affirmative action?*

JUSTICE KENNEDY delivered the opinion of the Court.

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We begin with the principal opinion authored by Justice Powell in *Regents of Univ. of Cal. v. Bakke* (1978). . . . Justice Powell's opinion stated certain basic premises. First, . . . (t)he principle of equal protection admits no "artificial line of a 'two class theory'" that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification.

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Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

In *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), the Court endorsed the precepts stated by Justice Powell. In *Grutter*, the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions."

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. . . . Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose."

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According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." . . . There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

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Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . . True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."

Narrow tailoring also 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. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." . . . Th[is] expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter* did not hold that good faith would forgive an impermissible consideration of race. . . . Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

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Strict scrutiny must not be "'strict in theory, but fatal in fact.'" But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." . . .

JUSTICE KAGAN took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring.

I adhere to the view I expressed in *Grutter v. Bollinger*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." The petitioner in this case did not ask us to overrule *Grutter*'s holding that a "compelling interest" in the educational benefits of diversity can justify racial preferences in university admissions. I therefore join the Court's opinion in full.

Justice THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. I write separately to explain that I would overrule *Grutter v. Bollinger*, and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

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Grutter was a radical departure from our strict-scrutiny precedents. In *Grutter*, the University of Michigan Law School (Law School) claimed that it had a compelling reason to discriminate based on race. The reason it advanced did not concern protecting national security or remedying its own past discrimination. Instead, the Law School argued that it needed to discriminate in admissions decisions in order to obtain the "educational benefits that flow from a diverse student body." Contrary to the very meaning of strict scrutiny, the Court deferred to the Law School's determination that this interest was sufficiently compelling to justify racial discrimination.

I dissented from that part of the Court's decision. I explained that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'"sufficient to satisfy strict scrutiny. I adhere to that view today. As should be obvious, there is nothing "pressing" or "necessary" about obtaining whatever educational benefits may flow from racial diversity.

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[T]he educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. . . .

Our desegregation cases establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. In *Davis v. School Bd. of Prince Edward Cty.* (1954), decided with *Brown v. Board of Education* (1954), the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools, funding for public schools would decrease, and public schools would either decline in quality or cease to exist altogether. Unmoved by this sky-is-falling argument, we held that segregation violates the principle of equality enshrined in the Fourteenth Amendment. Within a matter of years, the warning became reality: After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964. Despite this fact, the Court never backed down from its rigid enforcement of the Equal Protection Clause's antidiscrimination principle.

. . . . If a State does not have a compelling interest in the existence of a university, it certainly cannot have a compelling interest in the supposed benefits that might accrue to that university from racial discrimination. If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. This argument was unavailing. It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.

The University also asserts that student body diversity improves interracial relations. . . . We flatly rejected this line of arguments in *McLaurin v. Oklahoma State Regents for Higher Ed.* (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. It is, thus, entirely irrelevant whether the University's racial discrimination increases or decreases tolerance.

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My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

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. . . . The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities. Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. . . . The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

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[T]he University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

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Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." It taints the accomplishments of all those who are admitted as a result of racial discrimination. And, it taints the accomplishments of all those who are the same race as those admitted as

a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. . . . Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

JUSTICE GINSBURG, dissenting.

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Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation."

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. It is race consciousness, not blindness to race, that drives such plans. As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment."

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Accordingly, I would not return this case for a second look. As the thorough opinions below show, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives. Justice Powell's opinion in *Bakke* and the Court's decision in *Grutter* require no further determinations. . . .