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Supremely Overdue

With Fisher v. University of Texas, the High Court can finally put an end to racial preferences in university admissions

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Abigail Fisher, a white applicant to the University of Texas, contends that the university, in giving preference to minority applicants while rejecting her, discriminated against her unlawfully because of her color. The Supreme Court will hear the case this fall; it is likely that Fisher will prevail. The Texas 10 percent law and the special circumstances of that university present complications, of course, but the makeup of the Supreme Court today differs importantly from that of the Court that decided *Grutter* v. *Bollinger* in 2003, which authorized universities to use race in admissions in some circumstances.

But how will Fisher prevail? Put another way, how much of *Grutter* will remain standing when this decision comes down? Might *Grutter* be flatly overturned? Many fervently hope for that, and I am among them. *Grutter* v. *Bollinger* is one of those decisions that were wrong on the day they were decided; it is the *Plessy* case of the 21st century. *Fisher* v. *University of Texas* is a fine vehicle with which the Court may put *Grutter* into the dustbin of history, where in any case it is very likely to go before long.

In support of Fisher, 17 and one half amicus briefs have been put before the Supreme Court. Every one of them is powerfully argued and penetrating in its way. Without pretending to do full justice to each of those briefs, I here offer as fair and balanced a review of them as I am able, given the unavoidable use of categories and summaries.

First, a number of the briefs call for the outright reversal of *Grutter* v. *Bollinger*. The Texas Association of Scholars puts this best, perhaps, when it says forthrightly: “Racial preferences of any type, and irrespective of the motivation for their use, are unconstitutional under all circumstances.” That wise spirit is echoed

repeatedly, and in every case defended eloquently: “Racial categories are arbitrary and ultimately incoherent” (American Center for Law and Justice); “The Equal Protection Clause prohibits classifications of individuals based on race except in the rarest of circumstances,” and therefore “a governmental racial classification is presumptively invalid and may be upheld only upon a showing of extraordinary justification” (Mountain States Legal Foundation); “Race and ethnically-based admissions policies are crude, inherently ambiguous, and unsound constructs that can never be narrowly tailored to further a compelling interest in diversity” (Judicial Watch and Allied Educational Foundation); “The use of race-conscious policies in pursuit of a non-remedial interest, like the interest in ‘diversity’ approved in *Grutter* v. *Bollinger*, violates the principle of equal opportunity for military personnel” (Allen B. West, member of Congress and lieutenant colonel, U.S. Army, ret.). Summing it all up quite pithily is the statement of the American Civil Rights Union, “The time has come to end racial preferences in college admissions.”

Second, it is entirely possible, perhaps even probable, that the Court will find for Fisher on narrower grounds. In *Grutter* it was made plain that universities ought to rely upon race-neutral alternatives if they can by so doing achieve the appropriate objective. Texas had enacted a law ensuring admission to the University of Texas to the top 10 percent of every high school graduating class in Texas, and had achieved thereby a degree of racial diversity at UT greater than that achieved earlier using preferences. That settles the matter without overturning *Grutter*, according to a brief submitted by the group Current and Former Federal Civil Rights Officials: “The legislature’s 10 percent plan was an effective race-neutral alternative.”

Third, other minorities, Asian Americans and Indian Americans especially, are seriously discriminated against by the preferences used at the University of Texas. Their voices are raised very effectively in some of the amicus briefs submitted. The Asian American Legal Foundation and the Judicial Education Project write: “Racial diversity programs discriminate against Asian-American individuals by treating them as members of an overrepresented and hence disfavored race”; and, moreover, “Discrimination against Asian-American individuals in order to benefit other races is odious and demeaning to individual students.” Yes, odious and demeaning is just what it is. A group of five organizations including the National Federation of Indian American Associations, the Indian American Forum for Political Education, and the Global Organization of People of Indian Origin contends that race is frequently “a decisive factor in college admissions, most greatly disadvantaging fully qualified Asian American students.” This group, joined by the Louis D. Brandeis Center for Human Rights Under Law, presents and defends the painfully telling point that “The pretexts employed to limit Asian American School Enrollment are indistinguishable from those utilized to impose quotas against Jews throughout much of the past century.” Touché!

Fourth, the University of Michigan hornswoggled the Supreme Court in 2003 by insisting that its law school never used numbers or percentages in preferring minorities, but was seeking nothing more than "a critical mass" of minority students. It was a clever and successful dodge. Chief Justice William Rehnquist, in his *Grutter* dissent, examined the numbers closely and demonstrated, with a clarity that ought to have embarrassed my university, that this position was an outright "sham." Now in the amicus briefs in *Fisher* the "critical mass" theory gets a solid drubbing. Twenty-two distinguished scholars of economics and statistics from many universities join in one brief arguing that empirical evidence simply does not demonstrate "that minority students are benefited by a 'critical mass' of minorities in the classroom." Indeed, they conclude, "No reliable empirical evidence known to [these] amici supports the critical mass theory."

They go on to present, in a detailed appendix, sets of comparisons of the performance of blacks and whites in classrooms of different sizes with different numbers of each. The "critical mass" theory is statistically demolished. The theoretical demolition is provided by the Mountain States Legal Foundation, reaching this conclusion: " 'Critical mass,' like societal discrimination, is an amorphous and indefinable concept that cannot be addressed by a narrowly tailored remedy."

Fifth, one of the most infuriating aspects of the *Grutter* decision was the way in which the Court deferred to the University of Michigan, accepting its account of its needs without good evidence. Again in *Fisher* the Fifth U.S. Circuit Court of Appeals accepted the mere declaration of the University of Texas of its need for classroom diversity to achieve its educational mission. But, as the Southeastern Legal Foundation points out, the Supreme Court has previously been consistent in applying the "strong basis in evidence" test where racial classifications have been employed, and "Institutions of higher education are not immune from the obligation to show a strong basis in evidence," which Texas surely has not done. The Cato Institute, in its brief, gives this argument powerful support, showing that "The concerns motivating the strong-basis-in-evidence requirement apply with special force to universities' use of racial classifications to achieve diversity. . . . A university must demonstrate by a 'strong basis in evidence' that its use of racial classifications is necessary to achieve a compelling interest." No such basis in evidence has been provided. The University of Texas has not sustained, and cannot sustain, its burden of proof.

The history of university conduct in this sphere underscores this requirement, and this point is made with quiet drama by the brief of the Center for Individual Rights, the group that carried (along with the Maslon law firm in Minneapolis) the years-long burden of the Michigan cases. The CIR points out that the Supreme Court's current 'narrow tailoring' jurisprudence "encourages stealth." Universities behave deviously, advancing their objectives (in the words of Justice Ruth Bader Ginsburg) with "winks, nods, and disguises." Their declarations are not to be trusted, certainly ought not be deferred to. "Experience with racial preference by

universities," contends the Center for Individual Rights—which has had more such experience than any other organization—"further militates in favor of a searching strict scrutiny." Yes it does; and such scrutiny was almost entirely absent in *Grutter* as also in *Fisher*.

The ugly history of racial discrimination in higher education is examined perceptively in the brief of the California Association of Scholars (joined by the Center for Constitutional Jurisprudence, the Reason Foundation, the Individual Rights Foundation, and the American Civil Rights Foundation). That history, they point out, renders higher education "an unlikely recipient of the Court's deference on issues of race." This brief also explores the very special circumstances under which the uses of race may be found rightly "compelling"—circumstances certainly not realized in the *Fisher* case.

Sixth, the most powerful of all the amicus briefs are those that marshal the evidence—copious, detailed, and reliable evidence—that simply cuts the ground from under the *Grutter* decision. That decision was based entirely on the Court's belief that diversity was a central and absolutely compelling need for the University of Michigan and for all universities. Diversity, that decision concluded, was not simply a good thing, but a thing so absolutely necessary that even the temporary abandonment of the Equal Protection Clause of the Fourteenth Amendment must be allowed in order to achieve it. But this is hogwash. The Court in *Grutter* was bamboozled. Several of the current amicus briefs point that out with cool ferocity.

The brief of Abigail Thernstrom, Stephan Thernstrom, Althea Nagai, and Russell Nieli is nothing short of dynamite. With a careful review of the evidence presented by distinguished, reliable, and impartial social scientists, they prove how incredibly mistaken the premise of that argument was. They examine all that is known about diversity and its impact, and they conclude, without reservation, that the previously supposed merits of diversity are illusory, without foundation. They show that in fact we can now be confident that diversity has consequences almost the reverse of those the Court had supposed. Their quiet language belies the explosive impact of their findings. "The primary justifications for the use of race-based preferences in higher educations admissions that the Court relied on in *Grutter* are flawed and fail to support the notion that there is a compelling state interest in diversity in higher education." They go on to demonstrate the truth of a claim that I have myself been defending for years, on the basis of long experience at the University of Michigan: "The mere fact that racial diversity increases contact between students of different races does not improve race relations among students." That's right; it does not.

An unusual but very informative brief has been submitted by Richard Sander and Stuart Taylor Jr.—in support of neither party! Hence I report that the number of briefs in Abigail Fisher's support is 17 and one half. But this half is important. Sander reports: "Social science research has undermined the central assumption

underlying all racial preference programs in higher education admissions: that they are good for the intended beneficiaries."

Rick Sander is my friend, a fine statistician as well as a professor of law at UCLA. He long ago published an influential essay in which he demonstrated statistically that minority students who, by dint of preference, enroll in law schools to which they would not otherwise have been accepted suffer markedly as a result. They do less well in school, and they prosper less in their subsequent professional lives, than would have been the case had they attended schools for which they were indeed qualified. The artificial mismatch created by affirmative action results in lower class rankings, inferior professional appointments, and substantial injury to their careers. This theme is defended in detail in his amicus brief: "Key assumptions accepted by the Court below are doubtful: Evidence suggests that large racial preferences add little classroom diversity and do not make the university more attractive to minority candidates."

An allied and penetrating explanation of some of the negative consequences of race-preferential admission is presented by three members of the U.S. Commission on Civil Rights: Gail Heriot (my personal heroine), Peter Kirsanow, and Todd Gaziano. They marshal scientific evidence showing that race-preferential admissions, although "intended to facilitate the entry of minorities into higher education and eventually into high-prestige careers," do the opposite. Such preferences "have the effect of discouraging preference beneficiaries from pursuing science and engineering careers, . . . discouraging minority students from becoming college professors, . . . [and] decreasing the number of minority students who graduate and pass the bar."

Finally, there is the one brief that is most persuasive overall, that of the Pacific Legal Foundation, the American Civil Rights Institute, the National Association of Scholars, and the Center for Equal Opportunity, whose president, Roger Clegg, is the most penetrating, knowledgeable, and tenacious of all current opponents of race preferences. This brief argues, along with the Thernstroms and others, that "the benefits that flow from a diverse student body are highly dubious." But more than all the others, this brief underscores the negatives, explaining with care and depth why "the costs attendant to racial classification outweigh any benefits that flow from a diverse student body. Government racial classifications are destructive of democratic society; government racial classifications dehumanize us as individuals; racial preferences in college admissions cause serious harm to the very students the preferences are intended to benefit." No rational person can read this eloquent set of arguments thoughtfully and continue to suppose that racial preferences for the sake of diversity are a good thing. They are poison.

The Pacific Legal Foundation, the ACRI, the NAS, and the Center for Equal Opportunity conclude, appropriately, by explaining why the principles of *stare decisis*, worthy of great respect of course, "do not support the preservation of the highly flawed *Grutter* decision."

These, then, are the principal arguments of the amicus briefs. I will be forgiven, I trust, if I formulate two arguments that are implicit throughout and that deserve explicit emphasis.

First, racial classifications are appraised by the federal courts with "strict scrutiny." Under this high standard, a racial classification, if it is to be permitted, must be "necessary to further a compelling governmental interest." When does a state interest become "compelling"? The concept of a compelling interest deserves reflection.

There may be occasions on which a state is obliged to use racial classifications because, in the light of the racially discriminatory history within some institution, there is no other way in which to give appropriate recompense for the racial injuries earlier done. In such circumstances the use of race may indeed be compelling, because if the state is to do justice, as it is morally obliged to do, there is no alternative. It is that recognition of unavoidable moral obligation that brings the concept of compulsion into this arena.

With this clearer view of the concept of a "compelling state interest," we can see that a program that offers educational advantages, even if those are substantial advantages, cannot be compelling in the moral sense. There may be rare exceptions in extraordinary circumstances, but the state's use of racial classification, departing from the Equal Protection Clause, can in general be justified only by some moral compulsion. This explains why the justifiable uses of race have almost invariably been in remedial circumstances, righting identifiable wrongs. It also helps to explain why using racial categories to avert supposed dangers (as when Japanese-American citizens were ordered into internment camps during World War II) is so deeply offensive.

Second, even if one grants *arguendo* (as I surely do not grant in fact) that there really are substantial merits flowing from diversity in an entering university class, the many undeniable negative consequences inherent in racial categorizing must be weighed against them, as the brief of the Pacific Legal Foundation, et al., makes clear. After that weighing, it is only the residual balance of the two that can serve as a defense of the diversity rationale. Because those negative consequences are in fact grave, the residuum on the side of the diversity rationale is certainly slight, if there is any residuum at all. And it is that residuum of advantage (if any) that must be accepted as compelling if the rationale is to succeed. It is (in sum) the results all things considered that must be compelling for that diversity rationale to be persuasive. Yet that outcome, on balance, is probably negative.

If there are any residual advantages of diversity all things considered (which in my view is not the case), they cannot be morally compelling. The diversity rationale must therefore fail even if the weighing of advantages and disadvantages were to result in a positive outcome for diversity. To call diversity

“compelling” in the context of state action is a category mistake. *Fisher* v. *University of Texas* gives the United States Supreme Court an opportunity to correct this unfortunate error.

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