

# *Fisher v. Grutter*

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## INTRODUCTION

There is no reason for the Supreme Court to have granted certiorari in *Fisher v. University of Texas at Austin*.<sup>1</sup> Unless, of course, the Court plans to overrule *Grutter v. Bollinger*<sup>2</sup>—the case on which the Texas affirmative action plan at issue in *Fisher* was based. If that is its plan, the Court can invalidate the Texas program on some narrow ground that masks the magnitude of what it is doing. Or it can explicitly overrule *Grutter*—a case that no longer commands majority support on a Supreme Court whose politics of affirmative action has now been refashioned by personnel changes. I predict that the Court will invalidate the Texas plan in a narrow opinion that leaves open the theoretical possibility of some future affirmative action plans surviving constitutional scrutiny. But ironically—as a proponent of racial justice—I hope that any decision to invalidate the Texas plan expressly overrules *Grutter* and articulates the Court’s apparent preference for shutting the door on affirmative action completely, rather than disingenuously allowing the light of false hope to seep through a crack in the doorway. If the Supreme Court closes the door, the political process can react directly to the Court’s racial ideology,

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1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

2. 539 U.S. 306 (2003) (upholding racial affirmative action plan adopted by University of Michigan Law School).

rather than continuing to be distracted by the Court's coquettish conception of racial equality. With any luck, this will put the future of affirmative action back in the hands of the political branches—which, of course, is where it belonged to begin with.

### I. GRANTING CERTIORARI

Since the Supreme Court first addressed the constitutionality of racial affirmative action in 1974, it has had trouble finding a stable resolution of the issue.<sup>3</sup> After three decades of experimentation, a majority of the Court finally agreed on a way to accommodate the competing interests in the 2003 *Grutter* decision. Consistent with prior conservative decisions, the race-conscious allocation of resources to minorities instead of whites would remain sufficiently suspect to trigger strict scrutiny. But consistent with Justice O'Connor's dictum in *Adarand Constructors, Inc. v. Peña*, strict scrutiny would no longer remain "fatal in fact"<sup>4</sup>—as it had been in all Supreme Court race cases decided since the infamous *Korematsu v. United States* decision.<sup>5</sup>

The 5–4 decision in *Grutter* reflected a fragile political equilibrium. The Court—like the culture that it represented—was willing to endorse the use of race to provide incidental benefits to racial minorities when doing so would advance the establishment interest in diversity asserted by the university, corporate, and military amici who filed briefs in the case. However, the *Gratz v. Bollinger*<sup>6</sup> decision handed down the same day illustrated that the scope of constitutionally permissible affirmative action would remain sharply limited. By invalidating a seemingly indistinguishable affirmative action program—on the ground that its consideration of race was more mechanical and less holistic than the program upheld in *Grutter*—the Court demonstrated that the consideration of race would become unconstitutional when a majority of the Court thought that race had been given *too much* weight.<sup>7</sup> This echoed the "predominant factor"

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3. See generally GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* (2000) (describing the history of Supreme Court affirmative action decisions).

4. 515 U.S. 200, 237 (1995).

5. 323 U.S. 214 (1944) (upholding the constitutionality of the executive exclusion order forcing certain Japanese Americans into internment camps during World War II).

6. 539 U.S. 244 (2003).

7. See Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 241–42 (2004) (explaining the Court's distinction between using race as a positive factor in a "holistic" evaluation and using it mechanistically to implement a racial quota).

approach to the consideration of race that the Court had previously adopted in the context of redistricting.<sup>8</sup>

The *Grutter* equilibrium accomplished two things. It established that racial affirmative action would remain theoretically available, thereby reaffirming the culture's abstract commitment to the concept of racial diversity. But it also ensured that the practical availability of affirmative action would be sharply limited, by forcing proponents to run a gauntlet of holistic-strict-scrutiny obstacles that would chill the resolve of all but the staunchest defenders of affirmative action. In a sense, this equilibrium struck just the right balance. It permitted the Court—and the culture—to secure the rhetorical benefits of affirmative action without having to incur any significant costs. Only a small number of whites who deemed themselves entitled to the resources allocated to minorities would be disappointed, and most of those whites would not have been the ones to secure the contested resources even in the absence of affirmative action.

Abigail Fisher became one of those disappointed whites when she was denied admission to the University of Texas at Austin. Denying her petition for certiorari, after the lower courts upheld the Texas affirmative action program that she challenged, would have simply preserved the *Grutter* equilibrium. But the Roberts Court instead granted review, thereby intimating that the Court is seeking a new equilibrium more consistent with the Court's apparent preference for resegregating societal institutions. A Court that, ironically, invoked *Brown v. Board of Education*<sup>9</sup> to invalidate a school board's last-resort efforts to prevent the resegregation of elementary and secondary schools in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>10</sup> seems likely to invalidate similarly essential efforts to prevent the resegregation of classrooms at the University of Texas. When one remembers that this is the same Court that invalidated efforts to increase the number of minority fire department officers in *Ricci v. DeStefano*<sup>11</sup> and threatened to invalidate even the preclearance provision of the Voting Rights Act in *Northwest Austin Municipal Utility District No. One v. Holder*,<sup>12</sup> it seems likely that the Court's goal in granting Fisher's petition for certiorari was to per-

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8. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (requiring the plaintiff in a challenge to legislative redistricting to show that race was the predominant factor in the decision to place voters within a particular district).

9. 347 U.S. 483 (1954).

10. 551 U.S. 701 (2007).

11. 557 U.S. 557 (2009).

12. 557 U.S. 193 (2009).

petuate the Supreme Court's preference for channeling more resources to whites and fewer resources to racial minorities.

## II. COQUETTISH CONSTITUTIONALISM

The current Supreme Court's aversion to affirmative action is readily apparent. But the Court does not express its aversion directly. Rather, it speaks in terms of malleable doctrinal tests that divert attention from the Court's hostility. By rooting those tests in the concept of equality itself, the Court seeks to seduce proponents of racial justice into viewing the legitimacy of affirmative action as a matter of judicial, rather than political, policymaking.

The racial affirmative action preferences of the Supreme Court's conservative majority voting bloc seem quite clear.<sup>13</sup> Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas, and Alito have *never* voted to uphold the affirmative action programs at issue in *any* racial affirmative action case that the Supreme Court has resolved on the merits of a constitutional challenge. Even though Justice Kennedy does not always cast his swing vote with the four other conservative Justices on nonracial issues, Justice Kennedy *has* always voted with the conservative bloc to invalidate racial affirmative action. It seems that the racial ideology of the conservative bloc rests on a tacit baseline assumption that the current disproportionately favorable allocation of societal resources to whites is natural and prepolitical. As a result, the conservative bloc seems unlikely ever to uphold the constitutionality of racial affirmative action—precisely because doing so would question the sense of white entitlement that both generates and flows from the baseline assumption on which the conservative ideology rests.

*Parents Involved* provides a telling example. In that case, the conservative bloc invalidated race-conscious student assignment plans that prior school board experience indicated were necessary to prevent the resegregation of public schools, and it did so simply to protect the preference of white parents to send their kids to school with white, rather than minority, children. Even though there was no merit-based difference between the schools or the students involved, the Court deemed the mere associational preferences of white parents sufficient

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13. See Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 437–41 (2009) (describing Supreme Court voting blocs on affirmative action).

to outweigh the societal costs of the school resegregation that would ensue.<sup>14</sup>

There are, of course, strands of the culture that favor, and strands of the culture that disfavor, racial equality. I have previously offered historical, empirical, and theoretical arguments to support my claim that the function of the Supreme Court has traditionally been to aid those strands of the culture that disfavor equality.<sup>15</sup> But when the Supreme Court diverts resources from minorities to whites—as it does each time it invalidates an affirmative action program—it does not do so in the name of white supremacy. Rather, it does so in the name of racial equality. Passing through the looking glass, the Court transforms what looks like a benign remedial measure designed to promote equality for racial minorities into an invidious discriminatory technique for promoting the oppression of whites. The Supreme Court, therefore, uses the concept of *equality* as a tool to perpetuate *discrimination* against racial minorities.

It is fairly easy to conclude that when a white majority chooses to burden itself by adopting a racial affirmative action plan, it values the benefits of affirmative action over the costs that it has chosen to impose on itself. This is especially true in light of Derrick Bell's interest-convergence insight that whites tend to benefit racial minorities only as a collateral consequence of policies that benefit the white majority.<sup>16</sup> There is, therefore, no reason to suspect that racial affirmative action results from any representation-reinforcement defect in the political process. Moreover, the continued underrepresentation of racial minorities in the distribution of virtually all societal benefits negates any plausible suspicion that affirmative action results from a public-choice distortion of the political market.

Accordingly, to justify holding majoritarian affirmative action unconstitutional, the Supreme Court has had to convert the inherently group-based nature of affirmative action into the denial of some supposed individual right to colorblind race neutrality.<sup>17</sup> There are two obvious problems with this conceptual conversion. First, the redressability requirement of the Court's own constitutional standing

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14. See *id.* at 432 (discussing *Parents Involved*); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 628–30 (2008) (discussing *Parents Involved*).

15. See generally GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993).

16. See Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91–106 (Derrick Bell ed., 1980).

17. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[Individuals] ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

rules would seem to preclude judicial recognition of any Article III injury suffered by a disappointed white, who could virtually never establish that he or she would be the one to benefit from taking a societal resource away from a racial minority group member.<sup>18</sup> Second, the legitimacy of any claim that *whites* now possess some individual right to colorblind race neutrality would necessarily rest on the assumption that the current baseline distribution of societal resources is itself colorblind and neutral—notwithstanding the centuries of unremediated de jure racial discrimination on which the current distribution rests.

Rather than acquiesce in the white majority's policy determination of what best serves the interests of the white majority, the Supreme Court has chosen instead to read existing baseline inequalities into the Constitution itself. By thus toying with the constitutional concept of equality, the Court has been able to erect an array of doctrinal barriers that must now be overcome before a majoritarian affirmative action plan can be upheld.<sup>19</sup>

The Court first flirted with the standard of review that should be applied to affirmative action. In an effort to reify some harm that an affirmative action program could be said to impose on the whites who adopted it, the Court vacillated between various levels of scrutiny, and their application to various levels of governmental authority, until it ultimately settled on strict scrutiny for racial affirmative action. In so doing, the Court chose to equate benign discrimination with invidious discrimination, as if the harms that affirmative action imposes on whites are equivalent to the harms that whites have imposed on racial minorities.

The Court then flirted with the nature of governmental interests that might suffice to survive strict scrutiny. It initially seemed to favor remediation for identifiable acts of past discrimination and to disfavor more general efforts to promote prospective diversity. But the Court seems since to have reversed its initial hierarchy of preferences, and it may be that prospective diversity is now the only affirmative action interest that can survive strict scrutiny.

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18. See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426–27, 1446–52 (1995) (“[T]he white majority still secures for itself a disproportionately high percentage of societal resources at the expense of racial minorities. . . . Even in the absence of overt discrimination, reliance on seemingly neutral devices . . . can divert the flow of resources toward the majority.”).

19. For a fuller description of the doctrinal issues addressed in Supreme Court affirmative action decisions, see generally SPANN, *supra* note 3.

The Court next flirted with the degrees of narrow tailoring that would be required to uphold racial affirmative action. It first treated strict scrutiny as permitting the use of racial affirmative action only if all race-neutral alternatives were shown to be inadequate. But it has more recently held that strict scrutiny does not require the exhaustion of all race-neutral alternatives. The analytical inconsistency between the Court's narrow-tailoring decisions in *Grutter* and *Gratz*—cases which seven of the nine Justices found to be indistinguishable in this regard—attest to the elusiveness of the Court's operative standard.

The Court has now flirted with the fatality of strict scrutiny, first proceeding as if the strict scrutiny applied to affirmative action was “fatal in fact” as it had been since the days of *Korematsu*. But then the Court announced, albeit in Justice O'Connor's *Adarand* dictum, that strict scrutiny should *not* be deemed “fatal in fact.” Then, as if someone had called her bluff, Justice O'Connor wrote her majority opinion in *Grutter* actually upholding the constitutionality of a racial classification under strict equal protection scrutiny for the first time since *Korematsu*.

All the while, the Supreme Court has insisted that affirmative action is not available to remedy general “societal discrimination,” even though general societal discrimination is *precisely* the type of diffuse, embedded, and often unconscious discrimination that continues to perpetuate the attitudes and stereotypes that have been transmitted during the nation's long history of racial oppression. Not content simply to sacrifice minority interests for white majoritarian gain, it is as if the Court's doctrinal flirtation with racial equality is designed to tease racial minorities by seductively holding out the hope of eventual equality, but then snatching it back just before it is close enough to grasp.

### III. POLITICAL REALISM

A potential benefit of the Supreme Court's decision to grant certiorari in *Fisher* is that invalidating an affirmative action plan so closely modeled on the plan upheld in *Grutter* will make it difficult to view the Court's distaste for affirmative action as anything other than purely political. To guard against this, the Court may choose to write a narrow opinion invalidating the Texas plan, precisely because it wishes to create the impression that it is utilizing a doctrinal scalpel rather than an ideological blunderbuss in ascribing anti-affirmative action meaning to the Constitution. I would prefer the ideological blunderbuss. Hopefully, exposing the political nature of the Court's racial policymaking by rendering it more transparent will prompt the

culture to realize that political opposition to the Court's racial decisions is both legitimate and potentially effective. But I am unlikely to get my wish. The Supreme Court conservative voting bloc is neither naïve nor stupid.<sup>20</sup>

A doctrinal excuse for granting certiorari in *Fisher* is that *Fisher* presents a novel issue that was not present in the *Grutter* affirmative action plan on which it was based. The *Fisher* plan followed the holistic-consideration dictates of *Grutter*, but it did so *in addition to* utilizing a Top Ten Percent plan under which the University of Texas at Austin automatically admitted students who graduated in the top ten percent of their high school classes. Because many Texas high schools are de facto segregated, the Top Ten Percent plan had the intent and effect of increasing racial diversity at the University of Texas. Although this intent may itself render the Top Ten Percent plan an unconstitutional racial classification under *Washington v. Davis*,<sup>21</sup> in the posture of the *Fisher* litigation, the Top Ten Percent plan was treated as if it were race neutral. The Top Ten Percent plan did produce noticeable undergraduate student diversity in the University as a whole, but in as many as ninety percent of discussion-size classes the number of students from particular minority groups was either one or zero.<sup>22</sup> The University argued that *Grutter* authorized the use of affirmative action to promote a critical mass of minority students needed to achieve diversity in those classes. However, Abigail Fisher argued that the Top Ten Percent plan was a race-neutral alternative method of promoting diversity that rendered any additional consideration of race unconstitutional because it was not narrowly tailored.

If the Supreme Court invalidates the Texas affirmative action program on the narrow ground that the Top Ten Percent plan has itself produced sufficient diversity, the Court will superficially appear to be making a mere doctrinal refinement to its earlier *Grutter*

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20. In fairness to Justices Scalia and Thomas, they probably would explicitly ban all racial affirmative action. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”); *id.* at 240–41 (Thomas, J., concurring in part and concurring in the judgment) (“[U]nder our Constitution, the government may not make distinctions on the basis of race.”).

21. See 426 U.S. 229, 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”).

22. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). Discussion-size classes are defined as enrolling between five and twenty-four students.

holding. But the replacement of Justice O'Connor with Justice Alito suggests that the racial politics of the Supreme Court has now changed so that there is no longer a fifth vote to uphold even limited *Grutter*-type affirmative action. As a result, a narrow holding invalidating the Texas plan in *Fisher* would likely be a mere first step in dismantling what is left of racial affirmative action across the board.

A second step might be to reconsider and reject *Grutter's* holding that diversity is a compelling state interest—as the Court did with respect to primary and secondary education in *Parents Involved*.<sup>23</sup> If the Court really believes in diversity, classroom diversity rather than university diversity is what matters. In the absence of classroom diversity, university diversity alone will do little to enhance the perspectives represented in classroom discussions. But this puts those identifying diversity as a compelling state interest in the position of either having to uphold the Texas plan, or of changing their minds about whether diversity in higher education is a compelling state interest.

A third step might be to hold that even facially neutral plans, like the Top Ten Percent plan, are also unconstitutional under *Washington v. Davis* whenever they are motivated by a desire to increase minority enrollment. This would endanger even affirmative action programs based on factors such as economic or geographic diversity to the extent that those factors correlate with race.

Finally, the Court might simply announce that Justice O'Connor's twenty-five year sunset window for *Grutter* affirmative action has been accelerated,<sup>24</sup> and racial affirmative action is simply no longer needed in our post-racial society. The Roberts Court will then have succeeded in advancing the resegregation agenda that it curiously appears to be pursuing.

Ironically, if this cascading effect comes to pass, it will have been prompted by the Supreme Court's decision to punish the University of Texas for deviating from strict compliance with *Grutter*. Instead of limiting itself to the holistic consideration of race that *Grutter* authorized, the University made the fatal mistake of trying to use a *race-neutral* Top Ten Percent plan to *reduce* its consideration of race. And it did so for the constitutionally impermissible reason of trying to achieve *actual* diversity at the classroom level, rather than mere *formal* diversity at the university level.

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23. 551 U.S. 701, 703 (2007).

24. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

Such a process of nickeling-and-diming affirmative action to death in slow motion will have the same ultimate effect as killing it outright in real time by overruling *Grutter*. But a gradual erosion of concern for existing racial inequalities will suggest that the Court is proceeding doctrinally, rather than politically, in rendering affirmative action unconstitutional. That suggestion may, in turn, instill feelings of resignation and futility in proponents of affirmative action, who might otherwise have been emboldened to summon up political resistance in response to a more overt pronouncement of the Court's racial ideology. Because I believe that the Supreme Court's racial jurisprudence is, in fact, rooted in nothing more than ideological politics, I favor political opposition to the Court's rulings.<sup>25</sup>

Although the Court's political preferences are presented as if they emanate from the Constitution, the Court cannot withstand sustained political opposition. The New Deal court-packing plan provides the most well-known example of how popular political resistance can force the Court to change its constitutional jurisprudence. And in the race context, *Dred Scott*, *Plessy*, and *Korematsu* show that political resistance can lead respectively to constitutional amendments, overruled precedents, and universal condemnation of infamous Supreme Court decisions. There are a variety of political techniques that can be used to resist troublesome Supreme Court decisions, ranging from a strict reading of the Article III case or controversy requirement that permits repeated re-litigation based on narrow readings of precedent, to the more dramatic technique of outright defiance that characterized massive resistance to *Brown* in the south.<sup>26</sup>

The Supreme Court cannot indefinitely ignore political disapproval of its decisions, but it can present its decisions in a manner that is designed to divert such disapproval. However, if the Supreme Court is smart enough to characterize its opposition to racial minority interests as rooted in constitutional doctrine rather than political ideology, we can at least be smart enough not to fall for the Court's camouflage.

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25. Even the Court's grant of certiorari in *Fisher* seems politically calculated. The case was listed on three consecutive conference schedules, thereby delaying the grant of certiorari long enough to keep the case from being argued during the 2011 Term, when the Court would already be ruling on a number of high-profile cases in ways that might be adverse to liberal interests. See Docket Entries, Supreme Court of the United States, *Fisher v. Univ. of Tex. at Austin*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm>.

26. See Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 671-76 (2007) (discussing political techniques for resisting Supreme Court decisions).

## CONCLUSION

If the Supreme Court invalidates the University of Texas affirmative action plan in *Fisher*, it will effectively be overruling *Grutter* and making constitutional scrutiny of affirmative action “fatal in fact.” It will be doing this simply because the substitution of Justice Alito for Justice O’Connor now gives the Court’s conservative voting bloc the power to do so. Although the Court’s opinion will seek to root the decision in constitutional doctrine, it will actually reflect nothing more than the political ideology of the Court’s conservative majority. No matter how narrowly the opinion is written, I hope that it will be widely recognized as political and will elicit an appropriate political response.

I realize that there is some danger in this hope. It may be that the white majority is actually happy to have the Supreme Court invalidate majoritarian affirmative action initiatives because the white majority’s secret desire is to have the Court sanitize its own tacit satisfaction with continued racial inequality by according that preference constitutional cover. But if that is what is going on, I think it would be good for racial minorities to know that about the contemporary white majority. And for the contemporary white majority to know that about itself.

I suppose the Supreme Court could try to prove me wrong. It could simply reject the *Fisher* affirmative action challenge and vote to reaffirm *Grutter*. I must admit that I was surprised by Justice O’Connor’s unprecedented vote to uphold racial affirmative action in *Grutter* itself. Perhaps, Justice Kennedy in his post-O’Connor role as the Court’s new swing Justice is capable of a similar surprise. Or perhaps Chief Justice Roberts will want to demonstrate that his willingness to vote with the liberal bloc in upholding the Obama health care plan was not the outgrowth of a mere one-time political calculation.<sup>27</sup> But what are the chances of lightning striking twice?

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27. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).