

Whatever

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INTRODUCTION

I cannot say that I disagree with any of the analytical observations made by my co-contributors to this roundtable discussion of *Fisher v. University of Texas at Austin*.¹ We all agree that the Supreme Court plans to use the case as an occasion to do something noteworthy to the constitutionality of affirmative action. And we all agree that the Court's actions are likely to provide more comfort to opponents than to proponents of racial diversity. Our views diverge only with respect to doctrinal details about what the Court could or should do. But in translating the racial tensions that smolder beneath the concept of affirmative action into the more sanitized doctrinal issues that the Court has made relevant to its discussion of constitutionality, I fear that we may have lost sight of what is really at stake. At bottom, the affirmative action debate is about our

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1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). The first round of contributions made to this roundtable discussion are Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* *Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77 (2012); James F. Blumstein, Grutter and Fisher: *A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57 (2012); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113 (2012); Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45 (2012); Gerald Torres, *Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97 (2012).

continuing cultural commitment to a long tradition of racial oppression. But by acquiescing in the Court's effort to obscure that oppression with the patina of doctrine, we run the risk of offering analytical insights that may simply be beside the point.

I. CONVERGENCE

Given the contentious nature of the contemporary affirmative action debate, it is striking how much agreement there is among the contributors to this roundtable discussion of *Fisher*. We all agree that the Supreme Court seems motivated to use *Fisher* as a vehicle for cutting back on the availability of affirmative action, but before it can do so, James Blumstein and Vikram Amar remind us that it must first apply inconsistent justiciability precedents to deal with troublesome threshold issues relating to standing and mootness. Because the Court would probably not have granted certiorari unless it thought that the justiciability problems could be dealt with, the Court will likely use *Fisher* to make some modification to its *Grutter v. Bollinger* precedent.² Although *Grutter* was the first case that squarely authorized the non-remedial use of race-conscious affirmative action to promote diversity in higher education, the diversity that *Grutter* envisioned was broader than mere race, and the beneficiaries of diversity included students of all races. Indeed, the white plaintiff Abigail Fisher did not dispute the University's right to pursue student diversity.³

We also seem to agree with Tomiko Brown-Nagin that the University of Texas has been innovative in addressing the current anti-affirmative action backlash through programs such as its Top Ten Percent plan; that the University's race-conscious supplement to that plan addresses the *Grutter* narrow-tailoring requirement by giving race what can plausibly be termed the "infinitesimal" impact of reducing it to what the District Court called "a factor of a factor of a factor of a factor"; that invalidating the University's consideration of race because it affects only a small number of students would create a Catch-22 problem; and that the University plan avoids the separate admission tracks condemned in *Hopwood v. Texas*.⁴ I think there is also little dispute that Latinos and blacks are caught in what Brown-Nagin terms a "diversity paradox," enabling those groups to increase

2. See Amar, *supra* note 1, at 78–84; Blumstein, *supra* note 1, at 57–58 n.2.

3. See Blumstein, *supra* note 1, at 60–62; Brown-Nagin, *supra* note 1, at 115, 120–21.

4. 78 F.3d 932, 936, 962 (5th Cir. 1996); see Brown-Nagin, *supra* note 1, at 115, 119–22, 128.

their political and social power, but not to eliminate the economic and educational disparities that they suffer.⁵

There does not seem to be any dispute about the success of the Texas Top Ten Percent plan in increasing university diversity, or about its failure to provide meaningful diversity in discussion-sized classes. Nor does there seem to be much dispute about the Gerald Torres and Brown-Nagin claim that expert educational and administrative strategies are needed to promote multiracial interactions by overcoming the self-segregation that commonly occurs on multicultural campuses in response to feelings of racial isolation.⁶ Although *Grutter* authorized the use of race-conscious efforts to obtain a critical mass of minority students as part of a holistic admissions process, *Grutter* did not define critical mass. Nevertheless, critical mass cannot doctrinally reflect mere racial balance or racial engineering, but must instead encompass the quantitative and qualitative components needed to secure the pedagogical benefits of diversity. However, at least for the moment, the pursuit of critical mass does not require the University to exhaust all race-neutral alternatives.⁷

Blumstein and Torres emphasize that race cannot alone be used as a proxy for diversity, but it can be used in the quest for those components of cognitive diversity that cannot be measured by standardized tests and class rank alone. And Blumstein stresses that *Grutter*'s non-remedial use of race to promote diversity can be viewed as authorizing the commodification of racial minorities for the educational benefit of admitted white students at the expense of lower-scoring white students who are not admitted.⁸ Although the Top Ten Percent plan arguably makes *Fisher* distinguishable from *Grutter*, it seems likely that the *Fisher* Supreme Court granted review in order to get what Torres terms a “do-over” for the diversity holding of *Grutter*—something that Blumstein views as fairly included in the *Fisher* “questions presented” for certiorari.⁹

There also seems to be general agreement that Chief Justice Roberts, plus Justices Scalia, Thomas, and Alito, will favor abandoning *Grutter*'s diversity rationale for the consideration of race in individual admission decisions, while Justices Ginsburg, Breyer,

5. See Brown-Nagin, *supra* note 1, at 115–17.

6. See Brown-Nagin, *supra* note 1, at 122–23, 130–32; Torres, *supra* note 1, at 98–99, 101; cf. Blumstein, *supra* note 1, at 58–59.

7. See Brown-Nagin, *supra* note 1, at 122–26; Torres, *supra* note 1, at 99–100, 104–05.

8. See Blumstein, *supra* note 1, at 60, 65–67.

9. See Blumstein, *supra* note 1, at 63, 76; Brown-Nagin, *supra* note 1, at 113–14; Torres, *supra* note 1, at 101.

Sotomayor, and Kagan (if she participates) are likely to favor reaffirming this aspect of *Grutter*. The decisive vote is likely to be cast by Justice Kennedy, who dissented from *Grutter*'s diversity holding, but whose *Parents Involved* opinion suggests that he will wish to invalidate the *Fisher* plan on non-deferential narrow-tailoring grounds relating to critical mass under the Top Ten Percent plan, rather than join an anti-educational-diversity opinion that closes the door on affirmative action completely in response to the threat of racial isolation. Leaving the door theoretically open will enable Justice Kennedy to remain the swing vote on the issue of affirmative action.¹⁰ Finally, I suspect that we all agree with Amar's suggestion that the Supreme Court's affirmative action precedents are unclear, and that Justices on both sides of the issue have been more strategic than honest in formulating their arguments.¹¹

II. DIVERGENCE

As I say, given the contentious nature of affirmative action, it is noteworthy that there is so much doctrinal agreement among us. But I think that is because our differences actually reside on a non-doctrinal level. Even differences that might initially appear to be analytical disputes about the proper application of doctrine are more meaningfully viewed as disagreements about our underlying values concerning race.

Doctrinally, Blumstein believes that the Supreme Court should use *Fisher* as an opportunity to reconsider and reverse *Grutter*'s holding that educational diversity is a compelling governmental interest for strict scrutiny purposes.¹² However, Torres and Brown-Nagin believe that *Grutter*'s diversity holding need not be reconsidered, and if revisited, should be reaffirmed.¹³

Blumstein also believes that *Grutter*'s narrow-tailoring requirement cannot be satisfied in *Fisher* because the educational benefits of student body diversity can be achieved without the consideration of racial diversity. And given the diversity already produced by the Top Ten Percent plan, even if the consideration of racial diversity were required, any marginal increase in diversity attributable to race-conscious admissions could not be characterized as narrowly tailored. Moreover, because there is no evidence that race

10. See Amar, *supra* note 1, at 85–90; Brown-Nagin, *supra* note 1, at 117, 138.

11. See Amar, *supra* note 1, at 78, 91–96.

12. See Blumstein, *supra* note 1, at 60, 63–72.

13. See Brown-Nagin, *supra* note 1, at 117–19; Torres, *supra* note 1, at 101–02, 111–12.

consciousness will in fact produce a critical mass of minority students sufficient to ensure classroom diversity, traditional strict scrutiny analysis precludes deference to the University in making the narrow-tailoring determination.¹⁴

Torres and Brown-Nagin believe that because racial diversity is an essential component of student diversity, *Grutter's* narrow-tailoring requirement is satisfied by deference to the University's educational and administrative expertise concerning the admissions strategies that are most likely to produce the critical mass of minority students needed for meaningful minority participation in discussion-sized classes. Both also emphasize the existence of First Amendment academic freedom dimensions to applicants and to the University's ability to pursue its educational mission. In addition, both emphasize the need to read the Fourteenth Amendment in light of in-the-trenches knowledge and real world effects.¹⁵

Concepts like strict scrutiny, compelling interest, narrow tailoring, and critical mass have contestable content that is as imprecise as the underlying concept of equal protection itself. Because the meaning that we attribute to such concepts tends to correspond to the underlying values that we enlist those concepts to serve, it seems artificial to suggest that our disagreements about the constitutionality of affirmative action are disagreements about doctrine. Rather, they are disagreements about the very values that motivate our doctrinal manipulations to begin with. As Torres observed, whether the Supreme Court has chosen the correct path in its approach to affirmative action "will not be answered, however, by arguing over doctrine. It will be answered by what actually happens in the world."¹⁶ The doctrinal debate about affirmative action is but a proxy for the underlying cultural debate that we are having about the desirability of distancing ourselves from our long history of racial oppression. Therefore, we should not lightly acquiesce in any Supreme Court effort to use doctrine to distract us from what is at stake.

III. OPPRESSION

Amar, who stresses the importance of candor in assessing the constitutionality of affirmative action, notes that the Supreme Court is most amenable to race consciousness when the influence of race is

14. See Blumstein, *supra* note 1, at 67–76.

15. See Brown-Nagin, *supra* note 1, at 117–18, 132–38; Torres, *supra* note 1, at 105–11.

16. See Torres, *supra* note 1, at 111.

most successfully camouflaged or concealed.¹⁷ I believe that this is because the social function of the Supreme Court has always been to legitimate racial oppression by hiding it within the interstices of doctrine.¹⁸ And all of the Court's race-neutral talk is simply a way of pretending that race does not matter.

We are a culture that has long been committed to the concept of racial oppression. From the genocide of indigenous Indians; to the invention of chattel slavery; to the Jim Crow perfection of peonage, convict labor, and segregation; to the internment of Japanese American citizens; to the "New Jim Crow" of mass incarceration; we have always been very good at what we do.¹⁹ And every step of the way, the Supreme Court has been there to generate constitutional doctrine explaining why our oppressive practices did not offend our equality ideals. In contemporary culture, the affirmative action debate has simply come to embody our collective ambivalence about relinquishing our commitment to that tradition.

Although everyone seems to agree that the affirmative action debate is about racial oppression, proponents and opponents disagree about which race is being oppressed and which is doing the oppressing. But once one takes a step back from the Supreme Court's doctrinal overlay, it is difficult to view that as a seriously contested issue. If you asked a detached observer from Mars whether whites were oppressing minorities or minorities were oppressing whites, the past, present, and likely future distribution of economic, political, and social resources would make the answer seem pretty clear. Nevertheless, the primary function of the Supreme Court's affirmative action doctrine continues to be largely about obscuring that rather obvious truth.

My fear is that by getting us to sit here debating doctrine while the culture renews its commitment to the oppression of racial minorities, the Supreme Court will have already won. Proponents of racial justice will have been seduced into domesticating their moral outrage into a polite form of sanitized constitutional argument. Indeed, that is why I think the Court is unlikely to overrule *Grutter* and close the door on affirmative action completely. It would make the culture's commitment to racial oppression too obvious for the culture to feel good about itself in reaffirming that commitment. And—if the

17. See Amar, *supra* note 1, at 90–91, 96.

18. See, e.g., GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT & MINORITIES IN CONTEMPORARY AMERICA (1993).

19. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–57 (2010).

Supreme Court is unwilling to uphold the affirmative action plan in *Fisher*—that is why I would prefer for the Supreme Court to close the door on affirmative action completely, rather than leave open a legitimating crack. I have more faith in ordinary politics than in the diversionary constitutional politics of the Court.

I anticipate the objection that at least some affirmative action is better than none. But as a black person who is tired of feeling vulnerable to the largess of a white Supreme Court that gives us the equality of *Dred Scott*, *Plessy*, *Korematsu*, and perhaps *Fisher*, I balance the competing interests differently. I would rather have the Court stop explaining to me why it is constitutionally obligated to sacrifice my interests in the name of equality. Continued racial oppression is the issue. And, as they say, the rest is noise.

CONCLUSION

I claim that the current affirmative action backlash is just the latest in a long line of legal maneuvers designed to make our compulsive cultural addiction to racial oppression appear morally acceptable. Then—as if to prove my point—the Supreme Court’s response is to talk about things like strict scrutiny, compelling interests, narrow tailoring, and critical mass. It is hard to know what to do next. Other than emit a despondent sigh. Yeah. Right.

Whatever.