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Fisher v. Texas: Strictly Disappointing

Russell K. Nieli

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> I don't think that we even need to have a race box on the application.
> —Abigail Fisher

There's no point in denying it: *Fisher v. Texas* was a big disappointment.[1] For those of us hoping for a majority decision that would substantially limit the ability of state colleges and universities to use race as a criteria for admission, *Fisher* failed in the most basic way. Some affirmative action opponents have tried to put a more positive spin on the Court's 7-to-1 decision favoring Abigail Fisher, but the bottom line is this: the *Fisher* decision will change very little and will do nothing to stop academic administrators intent on maintaining the racial bean-counting and quota-like admissions policies that have been in effect now at leading state universities for the last forty years. With only minor adjustments and changes *Fisher v. Texas* means "business as usual."

I had a personal interest in the outcome of the case. Stephen and Abigail Thernstrom, Althea Nagai, and I submitted a spirited amicus brief asking the Court to side with Abigail Fisher in her discrimination claim against the University of Texas.[2] Ours was one of seventeen such briefs, compared to

[1]Fisher v. University of Texas at Austin, 133 S.Ct. 2411 (2013).

[2]Brief Amicus Curiae of Abigail Thernstrom, Stephan Thernstrom, Althea Nagai, and Russell Nieli in Support of Petitioners, Abigail Noel Fisher v. University of Texas et al., No. 11–345, May 2012, http://www.utexas.edu/vp/irla/Documents/Abigail%20Thernstrom%20May%2029%202012.pdf.

Russell K. Nieli is a lecturer in the Department of Politics, Princeton University, Princeton, NJ 08544; russniel@princeton.edu.

more than seventy on the other side coming from a variety of institutions supporting the reigning academic status quo. Despite our underdog status, however, we and others on Fisher's side made powerful arguments, both legal and pragmatic, against racial preferences that we hoped five of the justices would affirm. Justice Kennedy looked as if he might join his four more conservative colleagues—Scalia, Thomas, Roberts, Alito—in a real change in how the Court looks upon the use of race by state institutions.

Our brief forthrightly called for the Court not simply to modify, but to overrule the reigning *Grutter* decision that gave state institutions wide leeway in the use of race in pursuit of demographic diversity.[3] There are good diversities and bad diversities, we argued, and the artificial diversity created by racial preferences surely falls within the latter category:

> By heightening racial consciousness on campus, encouraging students to think of themselves in terms of intellectually superior and intellectually inferior racial groups, undermining self-confidence and reinforcing paralyzing doubts about the abilities of those preferentially treated, telegraphing to black and Latino students that their race or ethnicity can make up for substandard performance in high school and college, and encouraging the growth of protective, self-segregating groups on campus that are inhibited from reaching out in openness and friendship across color lines, racial preference policies have caused and continue to cause great harm to students of all races….Far from constituting a "compelling state interest," their maintenance constitutes no positive interest at all but a great social harm. They deserve the same opprobrium as segregated classrooms and Jim Crow railway cars….For the forgoing reasons, the Court should reverse the ruling of the Fifth Circuit [supporting the University of Texas], should overrule its decision in *Grutter*, and should hold that the use of race as a factor in college and university admissions is constitutionally impermissible.[4]

Unfortunately, attorneys for Fisher didn't ask the Court to overrule *Grutter*, claiming only that even within the *Grutter* framework their client's constitutional rights under the Fourteenth Amendment's Equal Protection Clause had been violated by Texas's race-conscious policies. This was a big mistake. It gave the Court the easy out by deciding the case on very narrow grounds, since Texas's

[3]Grutter v. Bollinger, 539 U.S. 306 (2003).

[4]Amicus Curiae of Thernstrom et al., 32–33.

discriminatory treatment of Fisher could only by a stretch be reconciled with even the permissive standard for the use of racial preferences enunciated in *Grutter*. Had the Court been directly asked to overrule *Grutter*, four votes in favor of such a motion would almost certainly have come from the four conservative justices, who in previous cases had made their disdain for race-based policies perfectly clear. And Justice Kennedy, the potential fifth vote, while he has not been as categorical in his rejection of race-based legislation as his more conservative colleagues, wrote a dissenting opinion in *Grutter* and would probably have been on board at least to restrict, if not overrule, the majority holding in that case.

The Color-Blind Constitution before *Bakke* and *Grutter*

The issues involved in the *Fisher* case are complex and to be fully grasped require some background knowledge of the Supreme Court's dealing with race-based state action since the landmark *Plessy* case of 1896. *Plessy* is best known for its majority opinion enshrining the "separate but equal" doctrine that allowed Southern states to maintain segregated "white" and "colored" facilities, like the segregated Louisiana railway cars at issue in the case, as long as the facilities themselves were of equal quality. In time, however, it was the eloquent and courageous voice of the lone dissenter in *Plessy*—the elder John Marshall Harlan—that would have the greatest impact on subsequent Court decisions on race and public policy. Indeed, in the mid-twentieth century, Justice Harlan's invocation of a "color-blind constitution," one requiring that all Americans be treated by their government *without* regard to their race, was the rallying principle for what would become the modern civil rights movement:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved….The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.[5]

[5]Plessy v. Ferguson, 163 U.S. 537 (1896), Harlan in dissent.

According to the color-blind theory of the Fourteenth Amendment's Equal Protection Clause, governments at every level are prohibited from making distinctions among Americans on the basis of race. For three decades beginning in the 1930s, the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund won a series of Supreme Court cases overturning segregation laws in the South and Border States based on this constitutional theory. A number of these cases had to do with segregated state law schools and graduate schools.

One can get a good idea of what the NAACP and other civil rights organizations stood for in those years by the brief submitted on its behalf by its chief counsel and later Supreme Court justice Thurgood Marshall in the 1948 case of *Sipuel v. Board of Regents of the University of Oklahoma*.[6] Ada Sipuel, an outstanding black college student, was denied admission to the University of Oklahoma Law School, which by state law was prohibited from admitting blacks. "Classifications and distinctions based on race or color," Marshall wrote in the NAACP's legal brief, "have no moral or legal validity in our society. They are contrary to our constitution and laws, and this Court has struck down statutes, ordinances or official policies seeking to establish such classifications."[7] In a related case two years later involving segregation in one of the University of Oklahoma's graduate programs,[8] Marshall and other attorneys working for the NAACP submitted an amicus brief that described the use of racial criteria by government as "irrational, irrelevant, [and] odious to our way of life and specifically proscribed under the Fourteenth Amendment." The brief was titled "The United States Constitution Prohibits Government Classification Based on Race and Ancestry."[9]

Right up to the dawn of the affirmative action era in the early 1970s, what was considered by many as the most advanced and progressive segment of the American public on the issue of race adhered to the Harlan-NAACP interpretation of the Constitution, which demanded strict racial neutrality and indifference to race in all laws and state-sponsored activities. The

[6]Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[7]Cited in Andrew Kull, *The Color-Blind Constitution* (Cambridge, MA: Harvard University Press, 1992), 146.

[8]McLauren v. Oklahoma State Regents, 339 U.S. 637 (1950).

[9]Cited in Kull, *Color-Blind*, 148.

Constitution was color-blind and did not tolerate in public law racial distinctions among its citizens. As in professional baseball in the post-Jackie Robinson era, everyone was to be treated without favoritism or prejudice based on his race or color, at least in situations where government action was involved.

Bakke, *Grutter*, and a Compelling Diversity Interest

Thinking in elite legal circles began to change very rapidly in the late 1960s, largely in response to that era's urban rioting in major American cities by angry blacks frustrated at what some perceived as the slow pace of social change. Despite passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act—each of which, in its way, sought to add legislative clout to the Constitution's color-blind principle of nondiscrimination—leading voices in the nation's law schools came to feel that much more must be done to jumpstart the creation of a stable black middle and working class than could be achieved by the reigning theory of color-blindness and race-neutrality that had so inspired the post-WWII civil rights movement. As a form of compensatory justice for past oppression as well as a creative response to pressing social needs, the Fourteenth Amendment's Equal Protection Clause, it was said, should now be reinterpreted to permit—perhaps even to require—special compensatory privileges to members of groups, preeminently African Americans, who had suffered various forms of racial and ethnic discrimination in the past.

The obvious contradiction between the venerable principle of color-blind justice and the newer principle of "affirmative action" (racial preferences) was usually resolved in one of two ways. Constitutional thinkers could either (1) claim to retain the older principle of color-blind justice as the reigning constitutional ideal while asserting that pressing social needs constituted a truly extraordinary situation and a "compelling state interest" that can override the otherwise central constitutional right to color-blind treatment, or (2) claim that the color-blind principle had to be abandoned and in its place substituted a fundamental distinction between illegal, "invidious racial discrimination" (i.e., discrimination in which a minority group is deliberately demeaned or disadvantaged) and legal, "benign racial discrimination" (i.e., discrimination in which a previously disadvantaged group is appropriately favored in employment, education, and other areas of American life in order to achieve a desirable social goal).

In both cases color-conscious laws had to be constitutionally justified, but under the first (the "compelling state interest" standard) defenders of a color-conscious law had to show—by "strict scrutiny"—that (a) an overriding state interest was at stake, and (b) there was no practical way to achieve that interest without the use of specific race-based criteria. Under the second constitutional theory all that had to be shown was that the intention of the law was "benign" (non-invidious, non-demeaning) and that an important (but not necessarily "compelling") state interest was involved.

These differing versions of constitutional imperatives under the Equal Protection Clause would divide the Supreme Court in the all-important *Bakke* decision of 1978,[10] in which Justice Lewis Powell ostensibly adopted the first standard ("compelling state interest/strict scrutiny"), while the dissenting justices, including a flip-flopping Thurgood Marshall,[11] adopted something close to the second standard ("important state interest/ intermediate scrutiny"). Powell, however, threw out the "compensatory justice" and "social needs" claims as constituting a compelling state interest, substituting instead his own view that state institutions of higher learning— including the University of California at Davis Medical School under challenge in the case for its explicitly racial quota system—had a genuinely compelling institutional interest (as part of its First Amendment-

[10]Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

[11]Marshall's racial opportunism was strikingly revealed in a statement reported by fellow justice William O. Douglas. In a conference discussion of a case involving a racial double standard for admission to the Arizona bar, Marshall said to Douglas: "You [white] guys have been practicing discrimination for years. Now it is our turn." *The Court Years, 1939–1975: The Autobiography of William O. Douglas* (New York: Random House, 1980), 149. Douglas was generally considered the most liberal of the justices of his era and the staunchest supporter of the color-blind theory of the Equal Protection Clause. In his decision in the *DeFunis* case, which dealt with a racial preference scheme at the University of Washington Law School, Douglas displayed an acute awareness of the many harms of sorting students by race:

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone….A segregated admissions process [like that at the University of Washington] creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions….It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience may in an extreme situation justify differences in racial treatment that no fair-minded person would call "invidious" discrimination. Mental ability is not in this category. All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference of one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.
>
> DeFunis v. Odegaard, 416 U.S. 312 (1974), Douglas, dissenting the decision to moot.

related right to academic freedom) in assembling a demographically diverse student body.

But the use of racial criteria to achieve a desirable diversity, Powell said, was only constitutionally permissible if (a) there was no way to achieve the same racial diversity without the explicit use of racial criteria, and (b) race was used only as a modest "plus factor" rather than the all-decisive factor it was in Davis's dual-track admissions system. "Race-only-as-a-modest-plus-factor-to-achieve-an-otherwise-unattainable-student-diversity" was the bottom line in Powell's constitutional holding, and its essentials would be reaffirmed by Justice Sandra Day O'Connor in her decision for the Court in the 2003 *Grutter* case dealing with race preferences at the University of Michigan Law School. It was with *Grutter* and *Bakke* as reigning precedents that the *Fisher* case was decided.

The *Fisher* Decision

As a Texas high school student, Abigail Fisher had her heart set on enrolling at the University of Texas at Austin, where both her father and older sister had preceded her. With no "legacy preferences" as at many private universities, Fisher had to make it on her own without special consideration. Texas had previously enacted a Top Ten Percent Law that gave to students graduating in the top ten percent of their high school graduating class automatic admission to the Texas state university of their choice. Fisher, however, who attended one of the state's more competitive high schools, just missed the cut. But a quarter of the slots in the entering class was also reserved for students not in the top 10 percent of their class (or not attending Texas public schools) who competed in a pool that took account of academic achievement, extracurricular activities, and a number of other factors including race and ethnicity. Fisher hoped to get admitted through this alternate pool since her SAT scores and high school GPA were much higher than those of most of the students accepted in this manner. Alas, it wasn't to be, since in this alternate admissions track being black or Hispanic counted as a huge (though unquantified) "plus factor," and Fisher was simply of the wrong race and ethnicity. A black or Hispanic student with her credentials, she believed, would easily have gained admission.

Fisher's attorneys claimed that her constitutional rights under the Equal Protection Clause had been violated and that Texas had not been in compliance

with the "strict scrutiny" requirement of constitutional review enunciated in the *Grutter* decision. They lost their appeal in both the district court and the circuit court and subsequently appealed to the U.S. Supreme Court. The four conservative justices would almost certainly have been willing to rule in Fisher's favor and very likely, too, to modify or completely overturn *Grutter* in conformity with their color-blind theory of constitutional justice. (In the 1996 *Hopwood* decision that preceded *Grutter* the Fifth Circuit court did just that.)[12] But for reasons that are not entirely clear Justice Kennedy decided not to modify *Grutter* in any way—even though he had filed a dissent in the original *Grutter* decision—opting instead to decide the case on the very narrowest of narrow of terms. The main problem with the lower courts' rulings, Kennedy said, was in their failure to inquire if the desired diversity Texas sought in its student body could be attained without the use of an explicitly racial test. The lower courts, Kennedy said, had wrongly deferred to Texas's own judgment about the use of race in admissions when they should have been more probing about the necessity of such use.

Referring to the long-held views of Justices Thomas and Scalia that even *Grutter*'s limited defense of racial preferences is incompatible with the Equal Protection Clause, Kennedy acknowledged that "there is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity." But he went on to explain that "the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding," and so the case was simply sent back to the circuit court to be retried under a clarified *Grutter* standard. The "strict scrutiny" standard of *Grutter*, Kennedy wrote, "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." This, he concluded, the university had not done.[13]

So narrow was the decision, and so little threatening to the current affirmative action status quo, that two of the Court's more liberal justices, Breyer and Sotomayor, joined in the decision. Only Justice Ginsberg dissented, claiming that Texas had done more than enough to show its compliance with the *Grutter* holding. (Justice Kagan recused herself because of earlier participation in the case as Solicitor General.) The one bright spot

[12]Hopwood v. Texas, 78 F. 3d 932 (5th Cir, 1991).

[13]*Fisher*, 133 S.Ct. at 9, 11, http://www.supremecourt.gov/opinions/12pdf/11-345_l5gm.pdf.

in the *Fisher* case was the concurring opinion of Justice Thomas. Although he agreed with the Court majority that the "strict scrutiny" standard required by *Grutter* had not been adequately applied by Texas, he said that *Grutter* should be overturned since the use of racial categories even under *Grutter* guidelines clearly harms whites and Asians and is inconsistent with the Constitution's color-blind imperative. "There can be no doubt that the University's discrimination [unconstitutionally] injures white and Asian applicants who are denied admission because of their race," Thomas wrote, adding: "[T]he injury to those [black and Hispanic students preferentially] admitted under the University's discriminatory admissions program is even more harmful."[14]

Much of this harm, Thomas explained, comes from the inevitable academic mismatch. He pointed out that while the Asians admitted outside the Top Ten Percent Law averaged 1991 on the three-part SAT exam (math/reading/writing), placing them at the 93rd percentile nationally among all test-takers, blacks averaged a 1524 composite score, placing them at the 53rd percentile. The disparities were similar in terms of high school grades. Of those admitted outside the university's percentage plan the average GPA was 3.07 for Asians, 3.04 for whites, and 2.57 for blacks. This mismatch, Thomas said, is likely to result in reduced academic self-confidence for the lower-scoring group, a corresponding reduction in academic achievement ("underperformance"), final grades in college that typically place blacks in the bottom quarter of their class, and the widespread transfer of academically struggling students from the more demanding science and engineering majors to the less demanding (and less remunerative) non-science majors. And "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."[15] This, for Thomas, was hardly the stuff upon which a "compelling state interest" is built.

Where Do We Go from Here?

As expected, the *Fisher* decision drew a great deal of commentary in the popular press and elsewhere. Opponents of racial preferences had mixed opinions on the decision, with most deeply disappointed, though some saw a

[14] *Id*. at 17.

[15] *Id*. at 18.

genuine movement on the part of the Court to reign in, at least somewhat, widespread disregard for even the minimal restraints on racial preferences required by *Grutter* and *Bakke*. The most trenchant commentary I've seen on the case comes from Vinay Harpalani, a professor of law at Chicago-Kent College of Law who has been one of the strongest academic backers of racial preferences. "Make no mistake about it," Harpalani wrote on his law school's blog, "given the current composition of the Supreme Court, this is the best *realistic* outcome for proponents of affirmative action….We can expect conservative organizations to bring more challenges to affirmative action in the future, but that was bound to happen anyway. Today's ruling [in *Fisher*] does not do anything much to help them: it merely defers the important issues for later consideration."[16] And such later consideration, I might add, could come from a future Court less sympathetic to color-blind justice than the present one.

Harpalani concludes his critique on this note: "Proponents of affirmative action should declare victory for now, but also they should understand that their fight to defend race-conscious admissions policies will surely continue."[17] Continue it will, and those of us on the other side of this dispute will have to redouble our efforts in both the federal courts and the court of public opinion. We must see to it that this corrosive poison that has eaten at the heart of our national unity for over forty years is finally eliminated and that the color-blind principle of constitutional rights so eloquently defended by Justice Harlan in his dissenting opinion in *Plessy*—and reaffirmed by the early civil rights advocates whom that dissent so profoundly influenced—can once again become our nation's governing ideal. It served as that ideal throughout all of what we call the "civil rights era"—roughly between the 1954 *Brown* decision and the 1968 Fair Housing Act—and it can serve as that ideal once again. Our national health and cohesion as a non-balkanized people may critically depend upon it.

[16]Vinay Harpalani, "Affirmative Action Survives—For Now," *IIT Chicago-Kent Faculty Blog*, June 24, 2013, http://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/.

[17]Ibid.