

Fisher v. University of Texas: Race Preference in University Admissions Survives Another Round

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THE *FISHER V. UNIVERSITY OF TEXAS at Austin*¹ case presents the issue of whether a state university may give admission preference to some applicants on the basis of their race, thereby disadvantaging other applicants on the basis of their race. For most Americans, the answer should be clear. Official race discrimination is inconsistent with the American ideal that all persons are equal before the law and must be treated as individuals, rather than as members of racial groups. Everyone thought *Brown v. Board of Education*² made official race discrimination unconstitutional. Further, Title VI of the 1964 Civil Rights Act³ makes official race discrimination illegal for any institution receiving federal funds, such as the University of Texas and nearly all other colleges.⁴

Why then is race discrimination by a state institution still an issue? The answer is that the end of segregation and official race discrimination turned out to be a disappointment or even an embarrassment for civil rights professionals. While blacks were no longer lawfully excluded by law from the University of Texas, still very few attended. A movement therefore arose to move from prohibiting racial discrimination to exclude blacks to permitting or requiring racial discrimination to include them.

The source of the problem can be traced to poor black academic performance. The grim but inescapable fact is that in subjects such as reading and math the average black twelfth grader performs years be-

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1. 133 S. Ct. 2411 (2013).

2. 347 U.S. 483 (1954).

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2012)).

4. 42 U.S.C. § 2000d (2012).

hind the average white twelfth grader.⁵ Therefore, it is unsurprising that very few blacks meet the admission standards of selective schools. The more serious problem with this poor academic performance, as Dr. Cantor points out, is high school graduation.⁶

Instead of attempting to address the problem of poor academic achievement by blacks, institutions of higher education attempt to conceal or overcome it by simply reducing admissions standards for blacks. This reduction serves the schools' objective of avoiding the embarrassment of an all, or nearly all, non-black student body. However, by engaging in this practice, the schools violate principles of justice and harm rather than help the preferred blacks.

The practice of reducing admissions standards in effect adopts as official policy the view that blacks cannot meet or be expected to meet the same admissions requirements applicable to whites and Asians. This policy is inconsistent with interracial respect and could reduce academic confidence and effort for black students. In addition, preferential racial treatment raises suspicion as to, and demeans, the accomplishments of all blacks. Further, it raises the question of group racial differences, which a policy of race neutrality thankfully makes irrelevant.⁷ Finally, it is a prescription for continuing racial hostility, as white and Asian students will never acquiesce to being placed at an educational disadvantage.

How, then, can the practice of race preference in college admissions be justified? It was once claimed that the ordinary admission standards—SAT score and high school GPA—were “culturally biased”

5. See STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 357 (1997).

[In 1994], the average African-American high school senior had math skills precisely on a par with those of the typical white in the middle of the ninth grade

. . . [B]lacks aged seventeen could read as well on the average as the typical white child who was a month past his or her *thirteenth* birthday.

. . . Blacks in the twelfth grade could deal with scientific problems at the level of whites in the sixth grade and write about as well as whites in the eighth grade.

Id.

6. Nancy Cantor, *From Grutter to Fisher and Beyond: The Compelling Interest of Diversity in Higher Education*, 48 U.S.F. L. REV. 261, 263 (2014) (citing NANCY McARDLE, THERESA OSYPUK & DOLORES ACEVEDO-GARCÍA, *DIVERSITYDATA.ORG, SEGREGATION AND EXPOSURE TO HIGH-POVERTY SCHOOLS IN LARGE METROPOLITAN AREAS: 2008–2009*, at 12 (2010), http://diversitydata.sph.harvard.edu/Publications/school_seggregation_report.pdf).

7. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 474 (1994) (implementing a policy of race neutrality makes the question of inherent difference between racial groups irrelevant).

against some racial minorities.⁸ It is now clear, however, that blacks do not out-perform other racial groups when comparing their admission scores; in fact, they tend, unfortunately, to underperform them.⁹ Further, the claim that race preference is necessary to correct the “underrepresentation” of blacks on campus is invalid. First, because selective schools are not meant to be representative institutions, and second, because the underrepresentation argument is not a justification but a tautology: we must admit more blacks in order to have more blacks. Not only is this an inadequate justification for engaging in race preference but, according to the Supreme Court, it “would amount to outright racial balancing, which is patently unconstitutional”¹⁰ and would simply be race discrimination “for its own sake.”¹¹

Moreover, race preference cannot be justified as a remedy for being disadvantaged. One cannot remedy an injury to one person by providing a benefit to a different person. Race is not a proxy for disadvantage, because not all and not only blacks have been disadvantaged. Further, preferential admission to selective schools is not a program for the disadvantaged, but rather, almost always, only for the most advantaged. The University of Texas at Austin School of Law, for example, has never denied a black applicant preferential admission because he or she was not disadvantaged or, indeed, exceptionally advantaged. The result is that a black applicant with well-off professional class parents will be granted admission over a better-qualified white applicant with working-class parents with a grade-school education. Only academic administrators fail to see the injustice of this. Any college or university truly interested in student body diversity should give preference in admissions decisions on the basis of socio-economic status, not race.

Apart from considerations of principle and justice, the use of race preference in student admissions decisions should be rejected on the practical ground that it actually serves more to harm than it does to help the racially preferred students. The effect of race preference programs generally does not give the preferred students an opportunity to get a standard college or university education. Instead, race prefer-

8. See, e.g., Roy O. Freedle, *Correcting the SAT's Ethnic and Social-class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003) (discussing racial bias in SAT scoring and proposing a revised scoring method).

9. See, e.g., ROBERT KLITGAARD, CHOOSING ELITES 160–65 (1984).

10. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

11. See *id.* (citing Freeman v. Pitts, 503 U.S. 467 (1992)) (internal quotation marks omitted) (referring to the unconstitutionality of using racially preferential admissions standards to meet a racial quota).

ence places preferred students in a school more selective than a school they would have otherwise attended. The result is a mismatch of the student's academic qualifications with the school's ordinary admissions requirements.¹² Students are thus necessarily placed at an academic disadvantage—and typically a large one.¹³ The result is that black students are taken out of schools in which they could excel academically and placed in schools where they are almost sure to occupy the bottom of the class.

Law professor and economist Richard Sander concluded that “the production of black lawyers would rise significantly”¹⁴ and blacks would be significantly “better off” if law schools did not practice race discrimination.¹⁵ The nation has spent billions of dollars attempting to encourage blacks and Latinos to study science and engineering—with very little success.¹⁶ There is a simpler way to accomplish this goal: abolish racially preferential admission to selective schools. Many blacks and Latinos preferentially admitted to selective schools who enroll as science and engineering majors get discouraged and drop out of those majors when they cannot keep up with the class.¹⁷ At a less selective school, these students would be more likely to keep pace with their peers, enhancing the chances that they will graduate and even go on to pursue a graduate degree.¹⁸ It is not surprising that students perform better in schools for which they are fully qualified than in schools for which they are not. If the goal is to facilitate the movement of blacks into the economic and educational mainstream, racially

12. See RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH 4–5 (2013).

13. *E.g.*, Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3–4, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2013) (No. 11-345) (“For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points above (and the mean score of whites was 390 points above) the mean black score. In percentile terms, these Asians scored at the 93rd percentile of 2009 SAT takers nationwide, whites at the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile.”); see also Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422 (2004).

14. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 476 (2004).

15. *Id.* at 482.

16. Peter Arcidiacono et al., *What Happens After Enrollment?*, IZA J. LAB. ECON. 1, 20 (2012).

17. *Id.*

18. See Rogers Elliot et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. IN HIGHER EDUC. 681, 684 (1996); Arcidiacono et al., *supra* note 16.

preferential college and university admission is not merely unhelpful; it is counterproductive.

The Supreme Court first ruled on the issue of affirmative action in the famous—or infamous—*Bakke* case in 1978.¹⁹ Four justices would have held, correctly, that Title VI prohibited the federally funded school's use of racial discrimination in admissions decisions.²⁰ This determination would have resolved the case without requiring the Court to consider the question of whether affirmative action is constitutional. The other five justices insisted, however, that Title VI did not mean what it said²¹—that “[n]o person in the United States shall, on the ground of race . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”²² They therefore were required to address the constitutional question. Four justices would have held that strict scrutiny was not applicable to discrimination meant to benefit blacks, and that its use by the school was justified to remedy societal discrimination.²³

The fifth Justice, Justice Powell, took the position that strict scrutiny applied to all official race discrimination, and that the term “societal discrimination” was too vague and uncertain to be a legitimate justification.²⁴ Harvard University,²⁵ Justice Powell naïvely believed, had found the answer to the Court's dilemma: race discrimination is permissible in higher education to meet a school's compelling interest in promoting student body diversity.²⁶ Harvard argued, if it can permissibly prefer a student from Montana to a student from New York, why could it not prefer a black to a white?²⁷ Apparently Harvard had never heard of the Fourteenth Amendment. William J. Buckley Jr. famously said that he would rather be governed by the first 2000

19. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

20. *Id.* at 421 (Stevens, J., dissenting). Justice Stevens was joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist. *Id.* at 408.

21. *Id.* at 340.

22. 42 U.S.C. § 2000d (2012).

23. *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Justices Brennan, White, Marshall, and Blackmun, by concurring in part with Powell's majority, produced the five votes to reverse the judgment below to prohibit the university from establishing race-conscious programs in the future.

24. *Id.* at 289.

25. Harvard University, along with Stanford University, Columbia University, and the University of Pennsylvania, filed an Amicus Brief arguing race should be a permissible factor to be considered in admissions decisions. Brief of Columbia University et al. as Amici Curiae at 11, *Bakke*, 438 U.S. 265 (1978) (No. 76–811).

26. *Bakke*, 438 U.S. at 322–23 (incorporating selected portions of Harvard University's Amicus Brief into the appendix to Justice Powell's opinion).

27. *Id.* at 322.

names in the Boston phonebook than by the Harvard faculty.²⁸ Unfortunately, at least on the issue of race preference in college admissions, we are effectively governed by the Harvard faculty.

Justice Powell's peculiar one-man opinion became the law of racial preference in college and university admissions. It was raised to the status of a majority opinion when the Court adopted it in its five-to-four decision in *Grutter v. Bollinger*.²⁹ There is very little basis, however, for Justice Powell's claim. Very few people (except most speakers at this symposium) believe that student body racial diversity—adding a few more blacks to a class in place of better qualified whites and Asians—is a compelling educational interest, as is required by the strict scrutiny test the *Grutter* majority purported to apply. Nor does anyone believe Justice O'Connor's statement in *Grutter* that race preference can be expected to end in twenty-five years³⁰ because more blacks will then be able to meet the ordinary admission requirements. Justice O'Connor's statement was made ten years ago, and there is no evidence that the racial academic achievement gap is closing.³¹

The central issue presented to the Court in *Fisher*³² was whether to continue the diversity charade. If Justice Alito, who replaced Justice O'Connor, had been on the Court that decided *Grutter*, the decision would almost certainly have gone the other way. Since *Grutter*, the Court has decided two important race discrimination cases: *Parents Involved in Community Schools v. Seattle School District No. 1*³³ and *Ricci v. DeStefano*.³⁴ The Court in *Parents Involved* held that a school district could not consider race as a factor to increase integration, even when choosing students for an oversubscribed high school.³⁵ In *Ricci*—the famous New Haven, Connecticut firefighter case—the Court held that New Haven could not cancel a test to determine promotions when it

28. WM. F. BUCKLEY, JR., *RUMBLES LEFT AND RIGHT: A BOOK ABOUT TROUBLESOME PEOPLE AND IDEAS* 134 (1963).

29. 539 U.S. 306 (2003).

30. *Id.* at 343.

31. *Id.* at 375–76 (Thomas, J., concurring in part and dissenting in part).

32. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

33. 551 U.S. 701 (2007).

34. 557 U.S. 557 (2009).

35. *Parents Involved*, 551 U.S. at 747–48; see also Lino A. Graglia, *Solving the Parents Involved Paradox*, 31 SEATTLE U. L. REV. 911 (2008) (discussing the seeming paradox that the Constitution can require a school district to implement drastic measures that increase racial integration in schools, while also prohibiting schools from considering race as a tie-breaker for student assignments).

appeared that no blacks would be promoted.³⁶ In each case, the usual conservative five-justice majority³⁷ took a very strong anti-race discrimination position. As Chief Justice John Roberts said in *Parents Involved*, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³⁸ That statement sounded as if it meant the end of race preference in college admissions.

In addition, the University of Texas seemed to have an exceptionally weak case. When the Fifth Circuit’s 1996 *Hopwood*³⁹ decision prohibited use of racial preference in determining admission to the University of Texas School of Law,⁴⁰ the Texas legislature enacted the “Top Ten Percent Plan,” which guarantees admission to the (undergraduate) University of Texas to all Texas students who graduate in the top ten percent of their high school class.⁴¹ The students qualifying under the plan account for over eighty percent of the entering class, and the University of Texas is one of the most racially diverse schools in the nation with blacks and Hispanics making up more than twenty percent of the entering class.⁴²

It seemed unlikely that the University of Texas would be able to convince the Supreme Court in *Fisher* that race preference was nonetheless required to further increase the number of blacks and Hispanics in its student body. The Court, however, in effect decided not to decide. It reversed the lower court’s approval of the university’s use of race, without deciding whether racial diversity is a compelling interest justifying race preference.⁴³ Rather than disallowing race preference, as its opponents had hoped, the Court remanded the case with instructions for the lower court to apply strict scrutiny analysis to the narrow tailoring issue in order to determine whether the university’s purported compelling interest could be achieved without or with less use of race.⁴⁴

36. *Ricci*, 557 U.S. at 563; see also Lino A. Graglia, *Ricci v. Destafano: Even Whites Are A Protected Class in the Roberts Court*, 16 LEWIS & CLARK L. REV. 573 (2012) (discussing the constitutionality of the disparate impact provision in relation to *Ricci v. DeStefano*).

37. The author considers Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito to be conservative.

38. *Parents Involved*, 551 U.S. at 748. Justice Kennedy did not join this statement but agreed on the “presumptive invalidity of a State’s use of racial classifications to differentiate its treatment of individuals.” *Id.* at 793.

39. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

40. *Id.* at 935.

41. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 306 (5th Cir. 2011).

42. *Id.* at 306–07.

43. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421–22 (2013).

44. *Id.*

Although Justice Kennedy's opinion, joined by all the other justices except Justice Ginsberg,⁴⁵ failed to completely disallow race preference, it clearly means to warn universities to strictly limit its use. The opinion is unlikely to have any more limiting effect, however, than the opinions of Justice Powell in *Bakke* or Justice O'Connor in *Grutter*. The bottom line is that the use of race is still permitted in admissions decisions. Such permission is all that selective schools need to continue to pursue their overriding objective of avoiding an all, or nearly all, non-black student body. They will continue to do so unless and until prohibited by state law, or the Supreme Court definitively decides to put an end to racially preferential admissions practices.

45. Justice Kagen did not participate in the opinion. *Id.* at 2414.