



THE HIDDEN QUESTION IN *FISHER*

By Brian T. Fitzpatrick*

This Term, the Supreme Court will once again consider whether the University of Texas at Austin is illegally discriminating against white and Asian students in its undergraduate admissions program. The case is *Fisher v. University of Texas at Austin* (“*Fisher II*”).¹ The same case was before the Court three Terms ago (“*Fisher I*”²), but the Court punted that time; in a 7-1 decision, it sent the case back to the lower courts to apply stricter strict scrutiny. The lower courts again upheld the program, however, and the Supreme Court will have to confront the question head on this time. Most commentators expect the University to lose, and I am no exception. This is, indeed, an easy case. But it is an easy case only because it has been litigated upon on a dubious premise. The more interesting and important question is whether this premise is false. This is what I call the “hidden question” of *Fisher*, and it is what I will spend most of this essay discussing.

Before I do, however, I want to discuss the unhidden question that is before the Court. It is a question that has been a long time in

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¹ *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015).

² *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013).

the making. In 1996, in *Hopwood v. Texas*,³ the University was barred by the United States Court of Appeals for the Fifth Circuit from considering race in its admissions decisions because the court thought it violated the Equal Protection Clause of the U.S. Constitution. Predictably, the number of black and Hispanic students admitted to the University declined and the number of white and Asian students increased.⁴ In response, the state enacted a law to redesign admissions to its undergraduate schools. The new plan is known as the “Texas Ten Percent Plan.”⁵ When it was enacted, it guaranteed all Texas residents graduating in the top ten percent of their high school classes — no matter how good the high school — admission to any state university of their choice.⁶ (So many Ten Percent Plan students flooded the University of Texas at Austin that the state eventually capped the number of these students the University had to accept at 75% of each entering class.⁷ Nonetheless, the Plan is still a near-guarantee of admission to students graduating in the top decile of Texas high schools.)

The purpose behind the Plan was no secret: to restore the number of black and Hispanic students admitted to top Texas universities to what it had been before *Hopwood*.⁸ The legislature believed the Plan would do this because high schools in Texas were (and still are) so segregated by race that the top ten percent of each high school would include a large number of black and Hispanic students.⁹ Indeed, the legislature reviewed studies showing that, if it based admissions on class rank to the exclusion of other criteria, the numbers of blacks and

³ *Hopwood v. Tex.*, 78 F.3d 932, 967 (5th Cir. 1996).

⁴ Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 290, 294 (2001).

⁵ See Tex. Educ. Code Ann. § 51.803 (West 1997).

⁶ *Id.*

⁷ Tex. Educ. § 51.803(a-1).

⁸ Fitzpatrick, *supra* note 4, at 296.

⁹ *Id.* at 326–27.

Hispanics would bounce back.¹⁰ The predictions quickly came true: the numbers rebounded right where they were before *Hopwood* as soon as the Plan was implemented.¹¹

Things moseyed along in Texas in fairly happy equilibrium for several years thereafter until 2003, when the Supreme Court decided *Grutter v. Bollinger* and held that public universities could use race in admissions after all—at least if they did so to achieve educational benefits for all students and if they did so in a narrowly-tailored manner.¹² This created a dilemma in Texas. Should it scrap the Ten Percent Plan and return to racial preferences in admissions? Or should it keep the Ten Percent Plan because it was generating the same racial numbers anyway? In a Solomonic decision, the State decided it would do both: keep the Ten Percent Plan but also consider race for the spots the Plan did not fill.¹³ This new consideration of race only slightly increases the percentage of blacks and Hispanics at the University.¹⁴ The question before the Court is whether it is constitutional in light of the fact that the Ten Percent Plan had been generating so much diversity on its own. In doctrinal terms, the question is whether the use of race is narrowly tailored to the educational benefits of diversity when there is a race-neutral means to generate almost as much racial diversity.

The University argues it needs even these few extra students in order to increase the number of blacks and Hispanics *from well-off families*—the blacks and Hispanics admitted through the Ten Percent

¹⁰ *Id.* at 327.

¹¹ *Id.* at 335.

¹² *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹³ *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 638 (5th Cir. 2014).

¹⁴ *See id.* at 644–45 (the new program added “at most . . . 0.92% African-American enrollment and 2.5% Hispanic enrollment”).

Plan are too poor and the University says it does not want other students assuming all persons from those groups are poor¹⁵ – but almost everyone thinks this is about the weakest justification for racial discrimination imaginable. As a result, almost everyone expects the Court to say that the University’s use of race is not narrowly tailored in light of the Ten Percent Plan.¹⁶ I agree. Although such an outcome will not directly threaten the racial preference plans at other universities – I am not aware of any university using racial preferences on top of a race-neutral program that generates the amount of racial diversity the Ten Percent Plan generates – it may expose other universities to arguments that they are required to *try* something like the Ten Percent Plan before continuing to use racial preferences.¹⁷ Indeed, because Title VI of the Civil Rights Act has been interpreted to parallel the prohibitions of the Equal Protection Clause,¹⁸ it may very

¹⁵ Brief in Opposition at 23–24, *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (No. 14-981) (“Ensuring a diversity of backgrounds within - as well as among - racial groups is one of the best ways to help breakdown racial stereotypes”).

¹⁶ See, e.g., Vinay Harpalani, *Fisher v. Texas, the Remix*, ISCOTUS NOW (July 18, 2015), <http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix/>; Alison Somin, *Supreme Court Preview: Of Fisher II and Paper Tigers*, FEDERALIST SOCIETY (Oct. 5, 2015), <http://www.fed-soc.org/blog/detail/supreme-court-preview-of-fisher-ii-and-paper-tigers>; Peter Jacobs, *Looming Supreme Court Battle Could be A Major Blow to Affirmative Action*, BUSINESS INSIDER (Jun. 29, 2015, 2:55 PM), <http://www.businessinsider.com/supreme-court-fisher-v-university-of-texas-decision-could-be-a-major-blow-to-affirmative-action-2015-6>; Ilya Somin, *Important Affirmative Action Case Returns to the Supreme Court*, WASHINGTON POST (Jun. 25, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/29/fisher-affirmative-action-case-returns-to-the-supreme-court/>.

¹⁷ See *Grutter*, 539 U.S. at 339 (“Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”) (emphasis added); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (holding it was an error that “there does not appear to have been any consideration of the use of race-neutral means”) (emphasis added).

¹⁸ See e.g., *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”).

well be that public *and private* universities alike are required to try plans like these. The smart money, then, is on a small victory for the opponents of racial preferences.

But, as I noted, there is a more difficult and important – yet hidden – question underlying this case. The question is whether the Ten Percent Plan *itself* is constitutional. That is, how race neutral *is* this so-called race-neutral alternative? In *Fisher I*, Justice Ginsburg said it wasn't race neutral at all.¹⁹ I think she is correct. As I have argued in the past, the Ten Percent Plan was motivated by the desire to replicate the discrimination against whites and Asians that had been achieved using explicit racial preferences.²⁰ Not only was it motivated as such, but, as I said, it has had that precise effect.²¹ If a law is motivated by racial discrimination and has the effect of racial discrimination, isn't the law racial discrimination? And, if it is, isn't it constitutionally suspect? The short answers to these questions are yes.

This should not be a surprise to anyone. The Equal Protection Clause has long been interpreted to prohibit not only explicit racial classifications but also the use of proxies for race.²² Indeed, we have a special term for discrimination by proxy: "racial gerrymandering." "Racial gerrymandering" is a term most often used to describe efforts to draw voting districts, but governments have used race proxies in

¹⁹ See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious.").

²⁰ Fitzpatrick, *supra* note 4, at 321.

²¹ *Id.* at 335.

²² See *e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose' . . ."); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (stating that strict scrutiny applies "to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination") (citations omitted).

all sorts of other situations: drawing school district boundaries, establishing franchise qualifications, and, even outside Texas, selecting criteria for college admissions.²³ Nonetheless, it is sometimes overlooked—and overlooked in the *Fisher* litigation, in particular—that attempts to gerrymander racial results by race-neutral means may be no more legal than explicit racial discrimination. Under the Equal Protection Clause, not only are explicit racial classifications subjected to strict scrutiny, but so are race-neutral classifications that have the same *purpose* and *effect* as the explicit ones.²⁴ As the Supreme Court put it in *Personnel Administrator of Massachusetts v. Feeney*: “A racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is a . . . pretext for racial discrimination.”²⁵

Consider these past examples. It is unconstitutional to deny blacks the right to vote; thus, it is also unconstitutional to deny convicted felons the right to vote if the state does so in order to disproportionately disenfranchise blacks.²⁶ It is unconstitutional to assign blacks to one public school and white students to another; thus, it is unconstitutional to assign students who live in neighborhoods with a disproportionate number of blacks or whites to one school or another if the state does so in order to affect the racial composition of the schools.²⁷

Shouldn't this mean that, if it is unconstitutional to assign applicants to one university or another based on race, then it is unconstitutional to do the same based on the high school they attended if the

²³ See Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban On Racial Preferences?*, 13 MICH. J. RACE & L. 277, 290 (2007).

²⁴ See *Hunt*, 526 U.S. at 546; *Feeney*, 442 U.S. at 272.

²⁵ *Feeney*, 442 U.S. at 272.

²⁶ See *Hunter v. Underwood*, 471 U.S. 222, 227 (1985).

²⁷ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461–62 (1979).

state does so to affect the racial composition at the universities? I think it may very well mean this. And I am not the only one. A number of other scholars from across the political spectrum agree that race-neutral efforts to increase the representation of one race relative to another are presumptively unconstitutional under the Equal Protection Clause.²⁸

A dissenter has suggested that the proxies-for-race-are-unconstitutional-too principle does not apply when the proxies seek to benefit blacks and Hispanics.²⁹ Although the Supreme Court has treated discrimination against whites and non-whites as equally suspect under the Equal Protection Clause for a long time,³⁰ Michael Dorf has argued that we need only follow this principle in cases involving explicit racial classifications.³¹ In cases involving proxies for race, he has argued that, although we must apply strict scrutiny when the proxies were adopted for the purpose of benefiting whites, we are

²⁸ See, e.g., Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1791 (1996) (recognizing that "race-neutral means still have a race-conscious motivation"); Chapin Ciminio, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1297 (1997) (arguing the government cannot do covertly what it cannot do overtly); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000) (recognizing that race-neutral efforts "may violate the Equal Protection Clause").

²⁹ See Michael C. Dorf, *Universities Adjust to State Affirmative Action Bans: Are the New Programs Legal? Are they a Good Idea?*, FINDLAW'S WRIT (Jan. 29, 2007), <http://writ.news.findlaw.com/dorf/20070129.html>.

³⁰ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978). Indeed, in its very first case invalidating racial discrimination under the Fourteenth Amendment, the Court said the Equal Protection Clause prohibited discrimination against all races. See *Strauder v. State of W. Virginia*, 100 U.S. 303, 308 (1879) ("If in those States where the colored people constitute a majority . . . a law should be enacted excluding all white men from jury service, . . . we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.").

³¹ See Dorf, *supra* note 29.

free to apply something less than that when the proxies were adopted for the purpose of benefiting other races.³² But it is hard to see how Professor Dorf's approach can be squared with the fact that the Supreme Court has *already held* that using proxies for race in order to benefit blacks and Hispanics must satisfy strict scrutiny. For example, the Court's most recent cases on the use of racial proxies – the voting district cases – were cases where the proxies were used to the benefit of blacks; yet, the Court applied strict scrutiny.³³ The Court noted that gerrymandering of voting districts was facially race-neutral because it formally classified voters by neighborhood, but the Court nonetheless followed its previous cases and held that such efforts must satisfy strict scrutiny because they were adopted with the purpose of causing racial effects; it did not matter that the effects were to the benefit of blacks.³⁴

Although I believe that the Supreme Court's precedents therefore cast doubt on the Ten Percent Plan, it is admittedly not clear that this is how the current members of the Supreme Court would read these precedents. In particular, in *Parents Involved v. Seattle School District*, the four most liberal Justices appeared ready to abandon the principle that the Equal Protection Clause treats as equally suspect both discrimination in favor of whites and discrimination against whites – not just, as Professor Dorf suggests, for the use of proxies for race, but for explicit racial classifications as well.³⁵ Although only two of these Justices are still on the Court, I suspect the replacements for the other two (Justices Kagan and Sotomayor) share the same

³² *Id.*

³³ See *e.g.*, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (applying strict scrutiny); *Miller v. Johnson*, 515 U.S. 900 (1995) (same); *Shaw v. Reno* 509 U.S. 630, 653 (1993) (instructing the lower court to apply strict scrutiny).

³⁴ See Dorf, *supra* note 29.

³⁵ See *Parents Involved v. Seattle School District*, 551 U.S. 701, 833–34 (2007) (Breyer, J., dissenting) (arguing for a “constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races.”).

view. Thus, it seems likely that at least four Justices would give universities *carte blanche* to use racial proxies in admissions. Although the votes of these four Justices obviously do not make a majority, Justice Kennedy's separate opinion in *Parents Involved* likewise leaves doubt whether he would still subject racial proxies to strict scrutiny. Although Justice Kennedy concurred in the Court's holding that it was unconstitutional for the school districts to assign students to schools on the basis of explicit racial classifications, he went on to say that the districts could accomplish the same goal in other ways, such as by "drawing attendance zones with general recognition of the demographics of neighborhoods."³⁶ "These mechanisms," he said, "are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."³⁷

Although I think one could certainly read Justice Kennedy's language here to suggest that he no longer thinks that the Constitution is as concerned with racial gerrymandering as it is with explicit racial discrimination, as I have explained in the past, I do not think this reading is the one he intended.³⁸ Not only did Justice Kennedy fail to grapple with any of the many cases strictly scrutinizing race proxies—many of which he authored or joined—but the only case he cited here—*Bush v. Vera*—is a voting district case in which the Court applied strict scrutiny to a race proxy (a race proxy designed to help blacks, no less).³⁹ Rather, in my view, the meaning Justice Kennedy most likely intended was one suggesting that it might be hard to

³⁶ *Id.* at 789 (Kennedy, J., concurring).

³⁷ *Id.*

³⁸ See Fitzpatrick, *supra* note 23, at 289–91 (arguing that applying the "predominant motivation standard" could take these cases out of strict scrutiny).

³⁹ *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

prove that the purposes behind some race proxies were to discriminate on the basis of race – and therefore hard to push the proxy into strict scrutiny – *if* the Court adopted the higher standard of proof on this question from the voting district gerrymandering cases as opposed to the lower standard from other cases (i.e., the “predominant” racial motivation standard as opposed to the “but-for” racial motivation standard).⁴⁰ This explains his citation to *Vera* as well as his statement that it was merely “unlikely” – as opposed to “unthinkable” – that strict scrutiny would apply to racial gerrymandering by the school districts. In sum, I think the most that Justice Kennedy’s opinion can be read to say is that racial gerrymandering still must overcome strict scrutiny in order to comport with the Constitution, but that it may often be hard to prove that facially-neutral programs are sufficiently racially motivated to constitute gerrymandering.

Thus, I think we end up where we started: not only does Texas’s current program need to satisfy strict scrutiny, but its underlying Ten Percent Plan may need to as well. This is not to say that the Ten Percent Plan will fail strict scrutiny; it may well be that it is easier for racial gerrymandering to pass this test for various doctrinal reasons.⁴¹ But it does suggest there is something of an anomaly in the Supreme Court’s strict scrutiny jurisprudence. As Justice Ginsburg noted the last time around, only an “ostrich” would think that the Ten Percent Plan is race neutral.⁴²

This is not the only place this anomaly exists. It exists as well with disparate-impact liability. Under Title VII, in some circumstances employers are not allowed to adopt race-neutral practices that hire and promote employees out of proportion with the racial

⁴⁰ Fitzpatrick, *supra* note 23, at 291.

⁴¹ See Fitzpatrick, *supra* note 23, at 288–89 (“[T]he narrow-tailoring inquiry for racial proxies is much easier to satisfy than the one for explicit classifications.”).

⁴² See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).

demographics of the applicant pool.⁴³ Yet, if employers then adopt hiring and promotion criteria in order to mimic the racial demographics of the pool of applicants, then has not the employer racially gerrymandered its employees? Justice Scalia thought so in *Ricci v. DeStefano*,⁴⁴ and, when the employer is a government (as it was in *Ricci*) that makes it a problem under the Equal Protection Clause for all the same reasons the Ten Percent Plan is a problem.

The Court will not resolve these anomalies in the *Fisher* case, but hopefully it will soon. More and more states are turning to what I call “race-neutral affirmative action” like the Ten Percent Plan in their college admissions, government contracting, and employment practices.⁴⁵ They are doing so because race-neutral affirmative action is more popular with the public than race-explicit affirmative action.⁴⁶ But whether it is any more constitutional is only a question the Court can answer.

⁴³ See *Ricci v. Destefano*, 557 U.S. 557, 583 (2009) (“Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of practices that are fair in form, but discriminatory in operation.”) (internal citations omitted).

⁴⁴ *Id.* at 594 (Scalia, J., concurring) (“I join the Court’s opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.”).

⁴⁵ See Brian T. Fitzpatrick, *Is the Future of Affirmative Action Race Neutral?*, A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY (Samuel Bagenstos and Ellen Katz, eds., forthcoming University of Michigan Press 2014).

⁴⁶ See *id.*