

Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? *Fisher v. University of Texas* Gives the Court (Yet) Another Chance to Say Yes

*Vikram David Amar**

I.	PROCEDURAL CONSIDERATIONS	78
	A. <i>Standing</i>	78
	B. <i>Mootness</i>	80
	1. The Question of Mootness and the Tendering of Damages Sought by Plaintiff....	81
	2. Possible Applicability of the “Capable of Repetition, Yet Evading Review” Idea	82
	3. Nominal Damages and Mootness.....	84
II.	THE MERITS OF THE CASE	85
	A. <i>Justice Kennedy’s View of Strict Scrutiny in Affirmative Action Cases</i>	86
	B. <i>Justice Kennedy Will Not Completely Close the Window on Consideration of Race</i>	87
	C. <i>Applying Strict Scrutiny to the University of Texas Plan</i>	89
	1. Public Perception of Race-Conscious Plans Versus Their Constitutionality	90
	2. Lack of Candor From the Supreme Court on Both Sides of the Affirmative Action Debate.....	91
	3. Dishonesty With Past Precedent.....	94
	4. The Weaknesses of Originalism in Affirmative Action	95
III.	CONCLUSION.....	96

* Professor of Law and Associate Dean for Academic Affairs, UC Davis School of Law

*Fisher v. University of Texas at Austin*¹ may end up being the most important case of the U.S. Supreme Court's 2012–2013 Term. But unlike the monster dispute from the October 2011 Term—the challenges to the Affordable Care Act—*Fisher* doesn't really offer any nail-biting drama as to its outcome. With or without Justice Kagan's recusal, the Fifth Circuit opinion upholding the University of Texas (UT) race-based admissions plan was doomed once the Court granted cert. Either the Fifth Circuit will be vacated on procedural grounds, or, more likely, it will be reversed on the merits.

The real uncertainty is how clearly—and how honestly—the Court will undo the Fifth Circuit's result. Sadly, if past cases are good predictors of future Court behavior, there is not cause for great optimism as to clarity or honesty. In the space below, I explain how muddled and less-than-candid the Supreme Court's treatment of race-based affirmative action has been in a number of doctrinal respects, and offer some thoughts on how this morass sets the stage for the Court's choices in *Fisher* itself.

I. PROCEDURAL CONSIDERATIONS

Let's begin with threshold requirements the Court will need to address in order to even take up the merits in *Fisher*. Regrettably, these procedural requirements concerning the Court's ability to adjudicate the merits of disputes have played out with particular incoherence, if not result-orientation, in affirmative action lawsuits. And unfortunately, as explained below, *Fisher*—if the Court is not careful—may generate more confusion and skepticism.

A. Standing

The uneven path that justiciability doctrines have followed in the affirmative action realm begins with modern standing. One foundational case is the 1975 ruling in *Warth v. Seldin*, which helped define the causation requirement for standing.² In *Warth*, various individuals and organizations sued the town of Penfield, New York, alleging that the town's zoning ordinance excluded persons of low and moderate income from living there, in violation of the plaintiffs' rights under, among other provisions, the Equal Protection Clause of the Fourteenth Amendment.³ The question of whether governmental

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

2. 422 U.S. 490, 504 (1975).

3. *Id.* at 493.

discrimination, overt or tacit, against the poor (who in that case were also racial or ethnic minorities⁴) violated the Constitution was indeed a thorny one, but the Court avoided that prickly issue by holding that none of the plaintiffs had standing to sue.⁵ The Court said that the low- and moderate-income individuals were not proper plaintiffs under Article III of the Constitution because their injury—the inability to live in Penfield—was not caused by the municipal defendant. Even if Penfield rewrote its zoning laws to encourage more low-income housing, the Court said, these particular plaintiffs still could not afford to live there. It was the harsh economic market—not Penfield’s laws—that was causing these particular challengers to live elsewhere.⁶ Because there was no causation, there was no standing.

Fair enough. But in 1993 the Court decided *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,⁷ a case that helped define the injury and causation requirements for standing in affirmative action contests. There, non-minority contractors challenged, under the Equal Protection Clause, a state-law requirement that ten percent of city contracts be awarded to minority-owned businesses.⁸ The problem for the challengers, however, was that they failed to show they would have been awarded any additional city contracts even absent the set-aside program.⁹ That is to say, their bids would likely have been uncompetitive even in the absence of the affirmative action program, meaning the challengers would still have been beaten out in the contracting process by other non-minority companies. Therefore, it was the existence of these other non-minority bidders, and not the set-aside program, that caused the plaintiffs to lose out on the contracts. But the Court ruled that the plaintiff non-minority contractors had standing, holding that in equal protection cases, the relevant injury is not the denial of the tangible benefit itself (in this case, the contracts), but the denial of equal opportunity to obtain the benefit caused by a discriminatory barrier.¹⁰ Put another way, the injury was “the inability to compete on an equal footing in the bidding process.”¹¹ The

4. *Id.* at 502.

5. *Id.* at 502–08.

6. *Id.* at 506.

7. 508 U.S. 656 (1993).

8. *Id.* at 659.

9. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992), *rev'd*, 508 U.S. 656 (1993).

10. *Associated Gen. Contractors*, 508 U.S. at 666.

11. *Id.*

challengers therefore had standing even if they would never have been awarded the contracts.¹²

Associated General Contractors, then, recognized that a constitutional equal protection injury can consist of unfair treatment in a selection process even if the ultimate benefit sought is not forthcoming. In addition to creating considerable tension with *Warth*, the decision also seemingly conflicts with a case that was decided six years later, *Texas v. Lesage*.¹³ In *Lesage*, the Court held that a challenger to a University of Texas race-based affirmative action plan—an applicant who would have been denied admission even in the absence of the plan—could not recover any damages from the University.¹⁴ This means that an injury consisting of unfair procedural treatment has no monetary value. Why, for example, if *Associated General Contractors* is correct, does the *Lesage* Court not allow for the possibility that the plaintiff there could obtain nominal damages for having been treated procedurally unfairly, even if he would not have been admitted absent racial preferences? The Court has permitted nominal damages for other, quite analogous, constitutional procedural injuries that do not result in tangible harm.¹⁵

B. Mootness

A close cousin of standing rules, the mootness doctrine, is the justiciability doctrine that may figure most prominently in *Fisher*. The plaintiff in *Fisher* (who was originally one of two plaintiffs, but is now the only one left) applied to UT as a freshman and was denied admission.¹⁶ She then filed suit in federal court challenging UT's race-based admissions criteria, but at the same time enrolled in another college.¹⁷ In her complaint, she asked for a declaratory judgment that UT's race-based admissions policies violate the U.S. Constitution; an injunction directing UT to consider admitting her without regard to race (on the premise that she would transfer to UT if admitted); and money damages "in the form of" (rather than something like "including, but not limited to") a refund of her admissions application

12. The Court admitted some "tension" between its decision and the ruling in *Warth*, but with a few sentences of elaboration the Court deemed the tension "minimal." *Id.* at 668.

13. 528 U.S. 18 (1999).

14. *Id.* at 22.

15. See, for example, *Carey v. Piphus*, 435 U.S. 247, 248 (1978), where the Court allowed nominal damages for violations of procedural due process, as perhaps the most prominent example.

16. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

17. *Id.*

fee (on the theory that her application had not been processed fairly, and therefore she was entitled to get her money back).¹⁸

But here's the big wrinkle: because it took almost two years for Fisher's case to be resolved by the U.S. Court of Appeals for the Fifth Circuit (which ruled in UT's favor on the merits) and given that she was a senior at LSU at the time cert was granted,¹⁹ she is no longer interested in transferring to UT. Therefore, her claims for declaratory and injunctive relief are no longer alive; in legal parlance, they are moot.²⁰ But what about her small monetary refund claim (for a sum total of roughly \$100)?

1. The Question of Mootness and the Tendering of Damages Sought by Plaintiff

In opposing Supreme Court review some months back, UT told the Court that if the Justices were to grant review, UT could simply offer to refund plaintiff the \$100, thereby mooting the damages claim too. So, argued UT, it would be a waste of time for the Court to grant review, only to have to dismiss the case before deciding it.²¹

That is a very interesting argument. If UT follows through—and as of this writing we don't know whether it will—on its threat and makes a tender of \$100 (or a bit more, just to be on the safe side), what can, or will, the Court do?²² Perhaps it will dismiss the case as

18. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 2, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. A-08-CA-263-SS), 2008 WL 7318510.

19. See Brief in Opposition at 1, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11–345), 2011 WL 6146835. Fisher was scheduled to graduate from LSU in May 2012, before U.S. Supreme Court oral arguments in her case.

20. *Fisher*, 631 F.3d at 217 (“To obtain forward-looking equitable remedies, a plaintiff must show she faces imminent threat of future injury.”) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201–11 (1995); *City of L.A. v. Lyons*, 461 U.S. 95, 105–10 (1983)).

21. Brief in Opposition, *supra* note 19, at 21–22.

22. It is somewhat odd that UT, if it feels this way, didn't make a tender earlier this year when plaintiffs sought en banc review in the Fifth Circuit. The injunctive claims were moot then too, insofar as plaintiffs were already in their junior years and would no longer be interested in transferring. Also, it is interesting that UT said in its brief opposing cert. that it *will* consider tendering if review was granted, rather than simply making the tender at the time certiorari was sought. As of this writing, there is no tender yet. UT may have been waiting for another case in the 2011–2012 Term involving mootness and tender—*Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012)—to come down, to see what, if anything, *Knox* adds to mootness law concerning tender. In *Knox*, the defendant union did make a tender of damages to all of the plaintiff class, but the Supreme Court ultimately rejected mootness and reached the merits (on June 21, 2012), on the ground that the tender was not free from burdensome conditions. *Knox*, 132 S. Ct. at 2287–88. If UT chooses to tender in light of *Knox*, it should do so cleanly, simply sending Ms. Fisher a full refund check with perhaps a little extra for nominal damages and interest. Finally, I note the Court did grant another case for the fall 2012 Term

moot. By granting review, the Court might have wanted to at least force UT to make the tender, which, if it moots the case, would also vacate the Fifth Circuit ruling that some conservative Justices do not like.²³

Or, if the Court wants to reach the merits, it might try to say that late-in-the-day tender is too manipulative to create mootness.²⁴ And UT, in its brief opposing certiorari, did not cite any clear Supreme Court authority on the relationship between mere tender (as opposed to acceptance) and mootness. But I think *California v. San Pablo & Tulare Railroad Co.* is pretty strong authority for UT here.²⁵ That case involved a taxpayer's suit against California to contest a tax levy, and the taxpayer mooted the case merely by offering to pay the tax. Indeed, it even seems that the taxpayer's offer of tender to the State there came after the State had filed its writ of error in the Supreme Court. Yet the Court found mootness without much difficulty, which seems to suggest that even late tender, seemingly made for the explicit purpose of avoiding Supreme Court review and made after the Court has already invested resources in processing the case, can still render a case moot.²⁶

2. Possible Applicability of the “Capable of Repetition, Yet Evading Review” Idea

Of course, mootness doctrine is pretty soft. In particular, the “capable of repetition, yet evading review” exception is always something to consider. However, in *Fisher*, I do not see how it could help. *DeFunis v. Odegaard* was an affirmative action case where the plaintiff, like Ms. Fisher, would never again apply to the particular degree program from which he had been denied.²⁷ The Court held that

that focuses on the effect a tender by the defendant to the lone named plaintiff has on justiciability—*Genesis Healthcare Corp. v. Symczyk*, 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3512 (U.S. June 25, 2012) (No. 11-1059)—but in the context of a class-action-like lawsuit, where the interests of other, albeit unnamed, persons complicate matters quite a bit. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980).

23. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 37 (1950) (ordinarily requiring vacation of lower court rulings when a case becomes moot on appeal in this type of situation).

24. *Cf. Knox*, 132 S. Ct. at 2287 (“[P]ost certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.”) It also bears noting that some courts of appeals have held that tender alone does not moot a case where the defendant tendered the upper limit of what the trial court held was available to the plaintiff to recover rather than the upper limit of what the plaintiff sought, even over plaintiff's protests and desire to appeal. *See, e.g.*, *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85 (2d Cir. 2007).

25. 149 U.S. 308, 313–14 (1893).

26. *Id.*

27. 416 U.S. 312, 319 (1974) (per curiam).

the “capable of repetition, yet evading review” exception did not come into play because the question was not “capable of repetition so far as he was concerned.”²⁸ In the 2009 *Alvarez v. Smith* case, the Court reaffirmed that the exception generally requires that “the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality,” citing, among other cases, *DeFunis*.²⁹ These holdings would seem to foreclose the “capable of repetition” exception for Ms. Fisher, since she will never again be personally subjected to the challenged UT undergraduate admissions process.

The possibility of damages in affirmative action disputes is another reason the “evading review” exception does not fit. The *Alvarez* Court observed that “[s]ince those who are directly affected by the [challenged] practices might bring damages actions, the practices do not ‘evade review.’ ”³⁰ Ms. Fisher certainly had available to her a more robust damages claim than the one explicitly pleaded in her complaint; for example, she could have sought the difference in value between a UT degree and a degree from the school to which she was relegated.³¹ Because similarly disappointed applicants can bring robust damages claims against the University in other cases, UT’s actions will evade review.

In response to this hurdle, the Court could suggest that Ms. Fisher amend her complaint to add additional damages for not having been able to attend UT. After all, her request for an injunction suggests that what she wanted all along was the value of the UT experience and degree. Because she can no longer get that in-kind, money damages are the next best thing. Because such an amendment may yet be accepted or rejected by the district court, the Supreme Court might say that it cannot find mootness to exist by the requisite standard of certainty.

Yet *Alvarez* seems to foreclose that argument, too. In that case, a motion seeking damages was made before the district court, but the district court (where such decisions must be made) had not yet responded to the motion when certiorari was granted and the case was taken away from the district court.³² As a result, the *Alvarez* Court said that the case as it existed before the Supreme Court, with an

28. *Id.* (internal quotation marks omitted).

29. *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009) (quoting *DeFunis*, 416 U. S. at 318–19).

30. *Id.*

31. Since UT did not invoke any dispositive immunities in *Fisher*, it is not clear that they would or could do so in any other damages case.

32. *Alvarez*, 130 S. Ct. at 580.

unamended complaint, was moot.³³ The same is true here. Maybe *Alvarez* is different because the original complaint sought no damages, whereas here Ms. Fisher sought small, but now insufficient, damages. But should that make a difference?³⁴

3. Nominal Damages and Mootness

Finally, there is the possibility that nominal damages claims are never moot. The argument might be that a finding of wrongdoing is the essence of nominal damages, and in this sense they are a retrospective equivalent of a forward-looking claim for declaratory relief, which may be unavailable to certain plaintiffs.³⁵ The tender of a nominal amount of money that is not accompanied by an admission of wrongdoing does not, under this conception, really redress the claims alleged. In Fisher's complaint however, nominal damages were not even specifically sought, so the Court, to pursue this avenue, would have to read them into the complaint—an action some lower courts have declined to take.³⁶

Moreover, this kind of extension of the law surrounding nominal damages, while possible, would create tension with some prior cases. For example, in *Lesage*, whether or not nominal damages were explicitly sought in the complaint, why weren't they available as a possible basis of the "liability" the Court rejected? To say that mootness by tender is avoidable whenever nominal damages are—or even could be—sought would involve significant doctrinal manipulation. But some would say such tactics have been a major theme in affirmative action jurisprudence.

33. *Id.*

34. One other possibility is the catchall "all other relief this Court finds appropriate and just" language at the end of Ms. Fisher's complaint. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 32, *supra* note 18. This could be read to include additional damages beyond a refund. But it is hard to see how this boilerplate language (that exists in virtually all complaints) can do that work. If it could, then virtually no case could ever become moot, because some unspecified damages are always conceivable even if they are not specifically requested.

35. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 615–16 (4th ed. 2010).

36. *See, e.g.*, *Harris v. Garner*, 190 F.3d 1279, 1288 n.9 (11th Cir.), *vacated on other grounds*, 197 F.3d 1059 (11th Cir. 1999); *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 (1st Cir. 1995); *cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (rejecting nominal damages as a way to keep the case alive because nominal damages were not an allowed remedy against a state, but not relying on the seemingly obvious ground that no nominal damages were sought).

II. THE MERITS OF THE CASE

Assuming the Court does reach the merits, the outcome of *Fisher*, by which I mean the technical fate of the Fifth Circuit's decision, seems clear. Chief Justice Roberts and Justices Scalia, Thomas, and Alito have signaled that they think government consideration of an individual student's race is never, or almost never, permissible.³⁷ And Justice Kennedy's dissent in *Grutter v. Bollinger* indicated that, although he does not agree that race may never be considered, he believes the circumstances permitting consideration of race are very narrow indeed.³⁸ These five Justices will be in the majority and Justice Kennedy will write either the opinion for the Court or a key concurrence.³⁹

As explained in more detail below, the pivotal Justice Kennedy is likely to do one of three things on the merits. First, he could hold that traditional, substantive strict scrutiny is required as to the means chosen by the University, and remand the case back to the Fifth Circuit to apply that true strict scrutiny, which has not yet been applied. Second, Justice Kennedy could hold that traditional, substantive strict scrutiny is required and apply that level of scrutiny at the Supreme Court. If he does this, he will almost certainly invalidate the University's program because the program is too aggressive and mechanical (in the way he thought Michigan's was in *Grutter*) and/or because Texas's "Top Ten Percent" plan makes it unnecessary. Third, he could hold that while race and racial diversity may be used at a higher level of generality to decide, for example, where to build a school or what programs to offer to attract a diverse student body, it may never be used in a way that takes into account the race of individual applicants.⁴⁰

To assess each of these three possibilities, we need to delve more deeply into the nuanced substantive jurisprudence on affirmative action in which Justice Kennedy has played a key role. And as we do so in the sections that follow, we necessarily confront

37. This was indicated most strongly in the 2007 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), where these four Justices, along with Justice Kennedy, struck down race-based pupil assignment systems in Seattle high schools and Louisville, Kentucky elementary schools.

38. 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

39. One could forecast with some confidence that the vote will be 5-3; Justices Ginsburg and Breyer joined the majority in *Grutter* and are unlikely to think anything here is significantly different, although Justice Breyer's vote is not quite as predictable, and Justice Sotomayor has yet to vote in a conventional race-based affirmative action case at the Court.

40. This third approach is similar to the approach favored by the rest of the *Parents Involved* majority, especially Justices Thomas and Scalia.

ways in which the Court, including Justice Kennedy, has been far from consistent and far from full-throated in the explanations given for various dispositive doctrinal moves.

A. Justice Kennedy's View of Strict Scrutiny in Affirmative Action Cases

The strong prediction that Justice Kennedy will not affirm the Fifth Circuit's opinion is based largely on his dissent in *Grutter*. There, his big criticism of the majority was that they weren't dutifully applying the true strict scrutiny that the Court purports to require for all race-based government actions, but were instead affording tremendous deference to the University of Michigan Law School.⁴¹ The Fifth Circuit in *Fisher* quite explicitly conferred the very deference to the University of Texas to which Kennedy objected in *Grutter*.⁴² Not only did the Fifth Circuit panel overtly defer to the University on the question of whether diversity is a compelling interest (which the *Grutter* majority did as well), it went beyond anything said in *Grutter* by openly deferring to the University on the means chosen to advance that interest. According to the Fifth Circuit, "the narrow-tailoring inquiry [that is, the question of whether the means chosen are narrowly tailored]—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."⁴³

Indeed, the Fifth Circuit admitted that it was not really evaluating whether the University's program is "necessary" to the accomplishment of a compelling interest—which is what strict scrutiny normally requires. Instead the court said, "Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we . . . scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires."⁴⁴

But Justice Kennedy (along with the other four Justices most skeptical about affirmative action) certainly would not sign on to this approach. To be sure, good-faith consideration of all alternatives before an individual's race is considered may be part of what strict scrutiny requires, but Justice Kennedy thinks it also requires much

41. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

42. *Fisher v. Univ. of Tex. at Austin*, 631 F. 3d. 213, 232 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

43. *Id.*

44. *Id.* at 231.

more; it requires courts to carefully scrutinize the substance—not just the process—of the government’s use of race. As he wrote in *Grutter*, “The Court [majority] confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal. . . . [D]eference is not to be given with respect to the methods by which [the goal] is pursued.”⁴⁵

This also explains why defenders of the University of Texas should not hold out much hope that Justice Kennedy will feel bound by *stare decisis* to uphold the Fifth Circuit’s ruling. The *Grutter* majority never openly admitted that it had extended deference as to the implementation of a university’s goal; that is just what Justice Kennedy and other dissenters characterized the Court as having done in reality. Thus, UT cannot really point to any language in *Grutter* that justifies the Fifth Circuit’s explicit decision to grant the University deference and to review only the decisionmaking process and not its substance.⁴⁶ Even if Justice Kennedy feels bound by *Grutter*, in no event is he likely to embrace the Fifth Circuit’s decision to openly abandon traditional strict scrutiny outright.

*B. Justice Kennedy Will Not Completely Close the Window on
Consideration of Race*

Returning, then, to Justice Kennedy’s three options, there is some uncertainty about whether he will be inclined to reverse narrowly, or more broadly.

The first option—simply remand to the Fifth Circuit for “true” strict scrutiny—is possible, and draws some support from *Adarand*,⁴⁷ but seems unlikely given the Court’s more recent tendency to announce and apply rigorous tests in the affirmative action realm, as exemplified by Justice Kennedy’s own majority opinion in *Ricci v. DeStefano*.⁴⁸

45. 539 U.S. at 388 (Kennedy, J., dissenting).

46. The Fifth Circuit did try to defend its open deference by quoting language from *Grutter* to the effect that “the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.” *Fisher*, 631 F.3d at 232 (quoting *Grutter*, 539 U.S. at 333–34). The court then added, “That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.” *Id.* The Fifth Circuit’s use of the phrase “that is” is misleading here; saying that narrow tailoring must take context into account is not remotely similar to saying that it must be conducted with deference to the government agency being reviewed.

47. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (determining that strict scrutiny applied to a federal race-based set-aside program but remanding to the lower court for application of the test).

48. 129 S. Ct. 2568 (2009).

The third option—holding that race may never be used at the individualized admission stage—is the one conservatives most hope for, but it is also the least likely to come to pass. For starters, notwithstanding language in Justice Kennedy’s concurrence in *Parents Involved* that flirted with a ban on individualized race consideration,⁴⁹ and his separate writing in *City of Richmond v. J.A. Croson*,⁵⁰ he has refused to disclaim *Grutter*’s professed approach altogether.⁵¹ Moreover, Justice Kennedy rarely likes to say never and decide bright-line-rule questions he doesn’t need to in constitutional cases, and affirmative action cases seem no exception.⁵² Finally, Justice Kennedy explicitly said in his *Grutter* dissent, “There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity . . . [provided] each applicant receives individual consideration and that race does not become a predominant factor in admissions decisionmaking.”⁵³ That sounds a lot like acceptance of Justice Powell’s approach in *Bakke*, so long as courts ensure that a meaningful substantive strict scrutiny approach is rigorously followed.

So the most likely *Fisher* result is the second scenario described above, with Justice Kennedy holding that strict scrutiny must be applied to UT’s plan and applying his view of strict scrutiny at the Supreme Court level. The window for race-based affirmative action in higher education⁵⁴ will be narrowed, but left ever-so-slightly open.

49. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem *in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.*” (emphasis added)).

50. 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”).

51. Indeed, he added in *Parents Involved* that if means other than individualized consideration of race do not produce the needed diversity, then a “more nuanced, individual evaluation of school needs and student characteristics that might include race as a component [informed by *Grutter*]” could be “necessary.” *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). While this endorsement of *Grutter* is tepid, it is consistent with Justice Kennedy’s reluctance to close the door on individualized consideration of race altogether.

52. See *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[G]iven that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.”).

53. *Grutter v. Bollinger*, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting).

54. Title VI of the 1964 Civil Rights Act applies to the vast array of private schools and universities that receive federal funds, and in the past Title VI has been construed, see, for example, *Regents of the University of California v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan,

C. Applying Strict Scrutiny to the University of Texas Plan

The explanation Justice Kennedy will probably embrace to explain why UT's race-conscious plan does not meet the strict scrutiny standard is the existence of the "Top Ten Percent" plan.⁵⁵ Even if a Harvard-style "plus" plan⁵⁶ of the kind upheld in *Grutter* can sometimes pass constitutional muster because it is necessary to accomplish educational diversity, it is unlikely to be necessary—and thus constitutionally permissible—if a "percent plan" like Texas's is already operating and accomplishing results that exhibit some meaningful diversity. This move would be most consistent with his concurrence in *Parents Involved* permitting, if not encouraging, the racial identity of groups to be considered when deciding what criteria of geographical assignment and programming should be (akin to deciding what the admissions criteria at UT should be), but distinguishing that from the consideration of the race of individuals when the criteria are applied.⁵⁷

Justice Kennedy need not definitively affirm or disclaim his prior suggestions that race of individuals might sometimes be taken into account, because the percentage plan's modicum of success in achieving diversity makes that question unnecessary to answer. Whether the opinion will require all states to experiment with percentage plans before ever making individualized use of race, or will simply indicate that those states that do have percentage plans that are working reasonably well have no good reason to do anything else, is hard to guess. But either way, Texas cannot make use of race in the way it has tried.

All of this tees up a crucial, but not fully answered, question: why is a percentage plan in which the racial demographics of groups are taken into account in deciding the criteria of admission

White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part), to hold these private schools to the same standards that are applicable to public universities under the Fourteenth Amendment. As a result, *Fisher* will likely determine the fate of all higher education affirmative action, in both private and public universities.

55. Under this plan, students are guaranteed admission to UT provided they graduate in the top ten percent (as defined by grade point average) of their high school class, regardless of standardized test scores and other factors.

56. Justice Powell discussed, with approval, Harvard College's admission plan in *Bakke*. 438 U.S. at 316–18 (opinion of Powell, J.). Harvard's plan allowed for the consideration of race in the broader context of campus diversity, but without rigid quotas or use of race as the only, or even predominant, factor. *Id.* For a more complete description of the Harvard-style plan (emulated by the Michigan Law School in *Grutter* and then the University of Texas in the wake of *Grutter*), see *Bakke*, 438 U.S. at 321–24 (opinion of Powell, J.).

57. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789–90 (Kennedy, J., concurring in part and concurring in the judgment) (describing individualized consideration of race as "a last resort").

constitutionally superior to a Harvard-style plus added at the moment when those criteria are applied?

1. Public Perception of Race-Conscious Plans Versus Their Constitutionality

One answer is that the role race has played in percentage plans may be less visible; these plans appear to use race in a softer, less in-your-face manner. In this respect, I have the same reaction when comparing percentage plans to individualized “plus” plans that I did when I reflected on Justice Powell’s preference for plus plans over quotas. Why was the Harvard plan constitutionally superior to UC Davis’s? Maybe the best answer (and I’m not saying I find it satisfying as a constitutional matter) is that elevating each individual’s race and considering it *sui generis* makes it too salient and thus too contentious.⁵⁸ A concern with how the use of race makes the affected people feel is certainly understandable, such that constitutionality and gentility seem to be related. Race can figure in the mix, but we must blend it in politely, pursuant to some unwritten etiquette that encourages us not to become too visibly absorbed, or even interested, in the necessary evil that is racial redress.

The problem with this kind of reasoning is that the rules and systems of manners and politeness don’t derive from or demand analytic coherence and consistency the way rules and systems of constitutional doctrines generally do and should. As a result, there is a tremendously underexplained, sometimes seemingly arbitrary, quality to the Court’s work product in this realm. In *Bakke*, for example, Justice Powell never really addresses Justice Brennan’s argument that a race-based program’s inscrutability to the public should not count in favor of its constitutionality.⁵⁹ Similarly, in *Parents Involved*, Justice Kennedy admits, as other Justices have as well,⁶⁰ that

58. My brother Akhil Amar and Neal Katyal have suggested in this regard that automatic exclusion of non-minorities from being considered at all for certain slots is “unfair” to them, and reserving slots is also particularly “stigmatic” to minorities. Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 U.C.L.A. L. REV. 1745, 1772 (1996). For a detailed discussion of the differential treatment of set-asides and plus plans, see Vikram David Amar, *Of Hobgoblins and Justice O’Connor’s Jurisprudence of Equality*, 32 MCGEORGE L. REV. 823 (2001).

59. See *Bakke*, 438 U.S. at 379 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“It may be that the Harvard plan is more acceptable to the public than is the Davis ‘quota.’ If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative . . . [b]ut there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.”).

60. See *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (Ginsburg, J., dissenting) (“The United States points to the ‘percentage plans’ used in California, Florida, and Texas as one example of a

considering the racial demographics of the groups affected by decisions about where and how to assign students “is race conscious,” but he goes on to say this “is quite a different matter” than “assigning to each student a personal designation according to [a] system of individual racial classifications, and the legal analysis changes accordingly.”⁶¹ But that’s an intuition or feel (however widely shared) more than an argument; the “is quite a different matter” crux is stated without explanation or defense.

2. Lack of Candor From the Supreme Court on Both Sides of the Affirmative Action Debate

Worse yet, when we fashion doctrine without explaining exactly why the Constitution permits or disallows various things, we risk sliding from underexplanation to manipulation. And such intellectual sleight-of-hand has plagued the affirmative action case law. The troubling lack of intellectual forthrightness in the Court’s opinions, elaborated in the paragraphs that follow,⁶² in some ways mirrors the ways “plus plans” and percentage schemes lack the candor of old-fashioned set-asides.

Take, for example, *City of Richmond v. J.A. Croson*, where a divided Court struck down a Richmond, Virginia contracting set-aside program that reserved a certain percentage of the money the city spent on public construction contracts for minority-owned contracting companies.⁶³ The city argued that the plan was necessary to remedy past discrimination, both by the city itself and within the private contracting industry and beyond, against minority contractors, but the

‘race-neutral alternativ[e]’ that would permit the College to enroll meaningful numbers of minority students. Calling such 10% or 20% plans ‘race-neutral’ seems to me disingenuous, for they ‘unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.’” (citations omitted).

61. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

62. The Court isn’t the only participant in affirmative action dynamics with a history of being less than honest. The regulated actors themselves may be encouraged to act dishonestly. For example, in the contracting setting, which generated much of the case law on which conservative Justices rely in frowning on affirmative action, many government contracts are highly susceptible to fraud, because contracts may be awarded to “minority” firms where minorities are “owners” on the books but not in reality, or are present only as corporate figureheads. And in the admissions and employment contexts, there remains the issue of so-called “box checkers,” individuals who self-identify as racial minorities only to gain competitive advantage. Moreover, many schools are reluctant to acknowledge how much they do take account of race. Additionally, state bar agencies often are not forthcoming with information that might help shed light on how effective race-based affirmative action programs are.

63. 488 U.S. 469, 477, 486 (1989).

majority (which included Chief Justice Rehnquist and Justices White, Stevens, O'Connor, Scalia, and Kennedy) rejected this justification.⁶⁴

The three dissenters—Justices Brennan, Marshall, and Blackmun—would have upheld the plan by applying what they said was intermediate scrutiny—the same standard of review they used when voting to invalidate virtually all gender-based laws they saw during their time on the Court.⁶⁵ They would have upheld Richmond's plan, under this supposedly forceful standard of review, despite two questionable features. The program embodied an overt quota—something the Court has said for decades is impermissibly rigid.⁶⁶ Second, the remedial plan included as set-aside beneficiaries contracting companies owned by Aleuts, as if Richmond had a history of discriminating against Aleutian contractors in its recorded past.⁶⁷

The willingness of the liberal dissenters to defer to an obviously poorly crafted and mechanical racially conscious plan may have been a contributing factor in moving the more conservative majority to the view that the constitutional affirmative action battle would likely be waged on all-or-nothing (or close to it) terms. The *Croson* dissent may have helped convince the conservative Justices that trying to identify a middle ground (the way the Court would do in the abortion setting in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁶⁸ three years later) would be a waste of effort.

Conservatives fare no better, and perhaps worse. To see this, we needn't even leave *Croson*. The majority rejected the plan not just because, as described above, it was shoddily crafted. The majority also thought that the goal of remedying past discrimination was itself not one on which the city should be able to act easily without detailed findings as to exactly what discrimination occurred, when, and by whom—findings Richmond failed to provide.⁶⁹ No one denied that there had been overwhelming, pervasive, and persistent societal discrimination against African Americans in Richmond for generations. Yet the main opinion in *Croson* said, in dismissing the relevance of this history, "It is sheer speculation how many minority

64. *Id.* at 498–99.

65. *Id.* at 535–36 (Marshall, J., dissenting). See, for example, *Craig v. Boren*, 429 U.S. 190, 197 (1976), where Justice Brennan, joined by Justices Marshall and Blackmun, among others, applied intermediate scrutiny to strike down an Oklahoma law that discriminated based on gender, and *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723–24 (1982), where Justice O'Connor's opinion, joined by Brennan and Marshall, applied intermediate scrutiny to invalidate a gender-based college admissions policy.

66. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

67. See *Croson*, 488 U.S. at 550 n.11 (Marshall, J., dissenting).

68. 505 U.S. 833 (1992).

69. *Croson*, 488 U.S. at 498–506.

firms there would be in Richmond absent past societal discrimination.”⁷⁰

This is true, but it would remain true even if Richmond had made the kind of findings of past discrimination that the conservative Justices said they wanted. Knowing the “when,” the “where,” and the “how much” about discrimination in the past still leaves unclear exactly what the world would look like today had that past wrongdoing never existed.⁷¹ To deny government the ability to redress past discrimination precisely because its enormity creates uncertainty about whether the proposed remedy is perfectly calibrated to the wrong creates a perverse situation. The greater the past injustices, the more powerless the government is today to deal with their effects, which are undeniably real and lingering, but inevitably somewhat fuzzy in their particulars.

For this reason, the goal of remedying past discrimination has largely been abandoned as a legal justification for affirmative action programs, at least in the higher education setting. Instead, diversity of the student body as a pedagogical asset is the primary interest that universities assert to defend race-based programs. I do not disagree with the idea that diversity can be a compelling interest. But I do think that most defenders of affirmative action, were they completely honest, would say that the remedial justification, especially in the case of African Americans, is the most natural, obvious, and compelling reason to maintain race-based programs. And yet, the honest reason why many proponents of affirmative action continue to think race-based programs are necessary is not discussed much in higher education cases, in large part because it was shut down unfairly in cases like *Croson*.⁷²

70. *Id.* at 499.

71. The same could be said about the desire for detailed findings of past discrimination in *Bakke*. Even if we knew exactly how, when, where, and how aggressively the University of California in all its campuses had discriminated against would-be minority medical school students in the past, would we have any good sense of whether sixteen out of one hundred slots at UC Davis Medical School that were reserved for minorities was too high, too low, or just the right number?

72. One unexpected entailment of this move is the odd idea that if, some have argued, race-based affirmative action actually hurt minority students by “mismatching” them with schools where they are less likely to succeed (a claim whose proof has not yet satisfied me), there would still be a question about whether race-based affirmative action would be permissible under *Grutter*, because it helps others at the universities and society more generally. Interestingly, the *Grutter* Court never said, or even intimated, that benefit to the minority applicants is required for satisfaction of strict scrutiny under the diversity rationale.

3. Dishonesty With Past Precedent

Problems of candor plague not only the substantive outcomes the Court reaches in its affirmative action cases, but also extend (perhaps even more so) to the methodological moves it makes in reaching its results. Consider the role of stare decisis and the selective reading of past precedent. A particularly noteworthy example is Chief Justice Robert's invocation of *Brown v. Board of Education*⁷³ in his plurality opinion in *Parents Involved*.⁷⁴ Chief Justice Roberts asserted, "[W]hen it comes to using race to assign children to schools, history will be heard."⁷⁵ He continued by quoting language from *Brown II* to the effect that "full compliance" with *Brown I*'s edict required school districts "to achieve a system of determining admission to the public schools on a nonracial basis."⁷⁶

It is true that the Court wrote these words, which, when analyzed in isolation, seem to condemn all governmental consideration of the race of students. But to read *Brown* as a case about colorblindness is to ignore much of the analysis and language that the Court used to explain why it was invalidating the segregation schemes before it. Indeed, perhaps the most famous language from Chief Justice Earl Warren's opinion for the Court in *Brown* spoke not in terms of colorblindness, but in terms of the special damage that is done to minority racial groups when race is used by government in an overt attempt to create racial hierarchy and stigma. "To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁷⁷

Chief Justice Roberts's plurality opinion thus quoted the language about achieving a "system of determining admission to public schools on a nonracial basis" without acknowledging that this language was nested in a setting where—unlike the modern Seattle and Louisville settings—there was a clear stigma and message of inferiority visited upon one race. Such an omission is historically and intellectually confounding at the very least. Ultimately, while the result in *Brown* can technically be reconciled with a colorblind approach, the analysis and language in *Brown*, read in their entirety

73. (*Brown I*), 347 U.S. 483 (1954).

74. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746–47 (2007) (striking down race-conscious student-assignment plans in Seattle and Louisville).

75. *Id.* at 746.

76. *Id.* at 746–47 (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955)).

77. *Brown I*, 347 U.S. at 494.

and against the historical backdrop of 1954 America, make *Brown* very weak *stare decisis* support for a total or near-total ban on governmental race consciousness.

4. The Weaknesses of Originalism in Affirmative Action

When we move from reading past cases to interpreting the text of the constitutional document itself, the hypocrisy unfortunately persists. For about twenty years the conservatives on the Court have been arguing for originalism, a particular approach to constitutional interpretation that seeks to understand and apply the text of the document as “intelligent and informed people of the time”⁷⁸ of enactment would have. In other words, under originalism, the meaning that counts is “the original meaning of the text”—how the text of the Constitution was originally understood by interpreters of the day.

Originalism in some form is a very attractive—indeed, irresistible—idea. However, throughout the modern affirmative action cases, the most conservative Justices have never spent much time explaining how their view that government cannot use race in any way whatsoever—that the Constitution is “colorblind,” so to speak—can be squared with the fact that the very same Congress that passed the Fourteenth Amendment did, in fact, use race-based programs to help African Americans.

In *Parents Involved*, Justice Breyer finally began to call out the colorblind-Constitution Justices on this point. In his dissent, he reminded observers that the federal government, even in the nineteenth century, sometimes offered relief to all African Americans, not just newly freed slaves.⁷⁹ While such programs were controversial, they did exist shortly after 1868. Justice Thomas, the most ardent colorblind-Constitution Justice and also a staunch proponent of Scalian originalism, had only this to say by way of response:

The dissent half-heartedly attacks the historical underpinnings of the colorblind Constitution. . . . What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. Race-based government measures during the 1860s and 1870s to remedy state-enforced slavery were therefore not inconsistent with the colorblind Constitution.⁸⁰

78. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997).

79. *Parents Involved*, 551 U.S. at 828–30 (Breyer, J., dissenting).

80. *Id.* at 773 n.19 (Thomas, J., concurring).

Justice Thomas's clipped response is nonresponsive for two reasons: First, the programs at issue in the 1800s extended beyond former slaves to other African Americans, and thus could not be easily characterized as surgically redressing slavery. Second, Justice Thomas does not address the fact that slavery itself was not illegal until December, 1865, when the adoption of the Thirteenth Amendment made it so. If the government has the authority to use race to rectify slavery (which was not illegal when maintained), why can't the government as a more general matter use race to rectify racial problems (such as de facto segregation) that also go beyond past state lawlessness?

III. CONCLUSION

Affirmative action cases are likely to divide the Court for the foreseeable future; consensus is too much to hope for. But we can and should insist on candor, clarity, and coherence—three qualities that have not marked the Court's procedural, substantive, and methodological treatment of affirmative action cases thus far. *Fisher* provides the Court yet another chance to, if not straighten everything out, at least speak more straightly.