The U. S. Supreme Court Should Accept Abigail Fisher's Petition for Certiorari and Overturn *Grutter*

By Larry Purdy*

In 1992, Justice Sandra Day O'Connor, joined by Justices David Souter and Anthony Kennedy, observed that the decision in *Plessy v. Ferguson*, establishing the *separate-but-equal* doctrine, was "wrong the day it was decided."[1] They were right.

Sadly, the same must be said of the opinion authored eleven years later by Justice O'Connor in *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003). However, an opportunity to correct this *wrong* is pending before the Supreme Court in the form of Abigail Fisher's appeal from a Fifth Circuit Court of Appeals' decision that, reluctantly, followed the rationale adopted in *Grutter*.[2]

Like Ms. Grutter and the University of Michigan Law School, Ms. Fisher was denied admission to the University of Texas at Austin after her application was subjected to race-conscious admissions procedures similar to those approved in *Grutter*.[3]

With all due respect to the Court's decision in *Grutter*, and to the Fifth Circuit judges who struggled to apply it in *Fisher*, the Supreme Court should agree to review Ms. Fisher's case and use the opportunity to reverse *Grutter*.

The reason for this suggestion is simple: In *Grutter*, by the narrowest of margins, the Court unwittingly resurrected the sin of *Plessy*. In doing so, it reestablished a lamentable doctrine under which applicants to a public university are given the message that no matter their personal hardships, no matter the cultural barriers they have had to fight through, no matter the level of their individual efforts and personal achievements, and notwithstanding the words of the Fourteenth Amendment and, more recently, the language of Title VI of the Civil Rights Act of 1964, the protection against racial discrimination does not extend to them—solely because their skin may be the wrong color.

The principle of the Fourteenth Amendment is known by Americans—young and old—of every race:

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[1] *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (Justices O'Connor, Souter and Kennedy, jointly concurring in the judgment).

[2] *Fisher, et al. v University of Texas at Austin, et al*., 631 F.3d 213, 247 (5th Cir. 2011) ("I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. *The Supreme Court has chosen this erroneous path and only the Court can rectify the error*.") (emphasis added) (Judge Garza, specially concurring).

[3] *Id*. at 218.

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.[4]

Though perhaps less well-known, Title VI of the Civil Rights Act of 1964 is even more clear:

> No person in the United States shall, on the ground of race, color, or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.[5]

The question before the Court in Ms. Fisher's appeal is this:

> How does a *non-remedial* educational interest in *anything*, including the well-intentioned desire to enroll a racially diverse student body,[6] justify allowing a state to racially discriminate against innocent university applicants during the admissions process and, at the same time, comply with the words of both the Amendment and the Statute, above?

The following words are taken from a pre-*Grutter* case dealing with the question of race:

> Classifications based on race carry a danger of stigmatic harm. *Unless they are strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. *City of Richmond v. J.A. Croson, Co*., 488 U.S. 469, 493 (1989) (emphasis added).

The author of these words? Justice Sandra Day O'Connor.

Yet in *Grutter*, Justice O'Connor embraced a new and strikingly inconsistent position prefaced by her claim that the Court had "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 539 U.S. at 328. Though she was marginally correct,[7] in fact, however, "strictly reserv[ing] suspect racial classifications

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[4] Fourteenth Amendment to the U. S. Constitution, Sec. 1.

[5] 42 U.S.C. § 2000d (2000).

[6] "Respondents assert only one justification for their use of race in admissions: obtaining 'the educational benefits that flow from a diverse student body.' [cite omitted] In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity." *Grutter, supra*, 539 U.S. at 328. In the paragraph that follows in *Grutter*, the Court makes clear that the Law School's "compelling interest" is not directed at any effort to remedy past discrimination. *Id*. *See* note 10, *infra*.

[7] *Cf. Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 569 (1990) (upholding FCC policies permitting the use of racial classifications that were "substantially related to the achievement of the Government's interest" in promoting "expanded minority ownership and greater broadcast diversity"). *Metro Broadcasting* was later overruled (see note 10, *infra*).

for remedial settings" had become the accepted guidepost for the Court in questions dealing with race. It was a principle she rigorously defended[8] throughout her years on the Court—until the morning of June 23, 2003 when her opinion in *Grutter* was released.

A perfect illustration of Justice O'Connor's views prior to *Grutter* are the opening words of her dissent in the 1990 case of *Metro Broadcasting, Inc. v. FCC*. In a case in which the Supreme Court applied a less-than-strict scrutiny standard of review to race-based preference programs that were *not* intended "as a remedy for . . . past wrong[s]"[9], she began with these words:

> At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as *individuals*, not 'as simply components of a racial . . . class.'" (cite omitted.) . . . [T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. *This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens*. The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution.[10]

Ironically, it is precisely the sort of "renewed toleration of racial classifications" and "lessened equal protection standard,"[11] condemned by Justice O'Connor in *Metro Broadcasting*, that most accurately describe the outcome she eventually reached in *Grutter* wherein she uncritically and without any meaningful—much less "strict scrutiny"—review, adopted the Law School's non-remedial *diversity* rationale as an acceptable excuse to racially discriminate against its law school applicants.

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[8] *See, e.g*., Justice O'Connor's additional words in *Croson*, 488 U.S. at 505-06; and her dissent in *Metro Broadcasting,* highlighted in the body of the brief, above.

[9] *See* note 6, *supra*, and Justice Stevens concurring opinion in *Metro Broadcasting, supra*, 497 U.S. at 601.

[10] *Metro Broadcasting, supra*, 497 U.S. at 602-03 (Justice O'Connor, dissenting) (emphasis added). As it turned out, *Metro Broadcasting* proved to be an aberration that was overruled by the Court less than five years later in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Justice O'Connor, writing for the majority in *Adarand*, reminded us that the "Fourteenth Amendments . . . protect[s] *persons*, not *groups,*" and that holding even so-called "'benign'. . . racial classifications to different standards [of review] does not square with [this principle]." *Id*.

[11] "The Court, in *a review that is nothing short of perfunctory*, accepts the . . . Law School's assurances that its admissions process meets with constitutional requirements." *Grutter, supra*, 539 U.S. at 388-89 (Justice Kennedy dissenting).

As a consequence, the bedrock principle first enunciated by Justice John Marshall Harlan in his lonely dissent in *Plessy*, later to be adopted unanimously in *Brown v. Bd. of Educ.*,[12] has begun to recede.

Justice Harlan's 115-plus-year-old words bear endless repeating: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). These words were echoed by Thurgood Marshall and his colleagues almost 60 years later in *Brown*: "That *the Constitution is color-blind* is our dedicated belief."[13]

Mr. Marshall and his colleagues began their argument with this observation: "It is [our] thesis [that] the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[14] They then framed the question for the Court in *Brown*—the same question that should have been addressed by the Court in *Grutter*—as follows:

> . . . *[W]hether a nation founded on the proposition that "all men are created equal" is honoring its commitments* to grant "due process of law" and "the equal protection of the laws" to all within its borders *when it*, or one of its constituent states *confers or denies benefits on the basis of color or race*.[15]

There can be no misunderstanding of where Mr. Marshall and his colleagues stood: "The broad general purpose of the [Fourteenth] Amendment—*obliteration of race and color distinctions*—is clearly established . . ."[16] Later in this same brief, they added:

> The sole basis for the decision [in *Shelley v. Kraemer*, 334 U.S. 1 (1948)] . . . was that *the Fourteenth Amendment compels states to be color blind* in exercising their power and authority.[17]

Among the more ironic aspects of *Grutter* is that the non-remedial *diversity* rationale adopted in the case is neither a novel argument (in principle) nor measurably different from the arguments made by the State of Kansas in *Brown*. In *Brown*, the State sought to have the Court uphold the claimed right of School Boards of Education to use racial classifications in assigning

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[12] 347 U.S. 483 (1954).

[13] 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 578 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS 49] (emphasis added.)

[14] *Id* at 528.

[15] *Id* at 529 (emphasis added).

[16] *Id* at 531 (emphasis added).

[17] *Id* at 535 (emphasis added).

students to public schools "in the exercise of their discretion and best judgment."[18] It was an argument rightly rejected by a unanimous Court in 1954. Yet *Grutter's* language, penned nearly a half century later, essentially accepted an echo of the same argument. In doing so, the Court in *Grutter*, in effect, reversed the fundamental principle established in *Brown*—"that racial discrimination in public education is unconstitutional"[19]—based on nothing more substantive than this slight iteration of the State of Kansas' argument in *Brown*: "The Law School's *educational judgment that diversity is essential to its educational mission is one to which we defer*."[20]

One is hard-pressed to imagine a more *insubstantial* reason for permitting the use of race than the one offered by the Law School in *Grutter*, to wit: to achieve the educational benefits that allegedly flow from a diverse student body. This is particularly true because the same educators and social scientists who claim these ambiguous educational benefits to exist also openly admit to a string of serious detriments as well. Chief among them are William Bowen and Derek Bok, the authors of a book cited by Justice O'Connor in support of the Court's holding in *Grutter*.[21] As it turns out, the blatant racial discrimination directed against certain college and university applicants, innocent of any wrongdoing on their part, is but one of many adverse consequences associated with these policies, as fully conceded by Bowen and Bok.[22]

Finally, and perhaps even more ironically, buried within her opinion in *Grutter*, Justice O'Connor herself provides the fundamental reason why this gauzy non-remedial *diversity* rationale cannot withstand scrutiny under the Fourteenth Amendment:

> As we have explained [in prior cases], "*whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection*."[23]

Yet, in 2003 a new and needlessly injurious color line, akin to the one drawn in *Plessy* and far removed from the principle established in *Brown*, was reinserted into the Constitution by *Grutter*. With all due respect, it should be removed.

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[18] LANDMARK BRIEFS 49, *supra* note 13, at 83.

[19] *Brown v. Bd. of Educ*., 349 U.S. 294, 298 (1955).

[20] *See, Grutter, supra*, 539 U.S. at 328 (emphasis added).

[21] William Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

[22] *Id*. at 258-69; and *also see, e.g.,* Derek Bok, BEYOND THE IVORY TOWER (1982) at 93; and Larry Purdy, GETTING UNDER THE SKIN OF "DIVERSITY": SEARCHING FOR THE COLOR-BLIND IDEAL (2008) at 161-198, 217-229.

[23] *Grutter, supra*, 539 U.S. at 327, citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (emphasis added).

The Court in *Grutter* erred when it adopted a *non-remedial* interest in attaining a diverse student body as a compelling interest sufficient to justify the use of race in college and university admissions decisions

In arguably every context wherein an individual's immutable skin color is implicated, but particularly where the issue of race directly impacts public education, this Court should return to the principle adopted in *Brown*. Its directive was simple and straightforward.

> *"[R]acial discrimination in public education is unconstitutional*. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this *principle*."[24]

To reestablish this principle, the Court need only to revisit and pay particular attention to Thurgood Marshall's request in *Brown* that the Court enter a decree commanding the State of Kansas "to discontinue the use of race or color as a criterion for the admission of students."[25]

It was, word-for-word, the identical decree Barbara Grutter was seeking in her case against the University of Michigan's Law School.[26]

It is the same decree Abigail Fisher seeks in the present case.

The principle adopted in *Brown*, that "racial discrimination in public education is unconstitutional," cannot be stated more clearly. Yet it was this principle that was turned on its head in *Grutter* with the Court's adoption of the *diversity* rationale. This imprecise,[27] non-remedial and, in every respect, constitutionally insignificant rationale should be overturned; and the Court's jurisprudence should be returned to its oaken roots as immortalized in *Brown*.

Even the progenitor of the *diversity* rationale, Justice Lewis F. Powell, Jr., described the reason why *diversity* itself, and particularly as practiced, can never withstand strict scrutiny. "Preferring members of any one group," he wrote, "for no reason other than race or ethnic origin is discrimination for its own sake. This," he concluded, "the Constitution forbids."[28]

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[24] *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (emphasis added).

[25] 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 735 (Phillips B. Kurland & Gerhard Casper, eds., 1975) [hereinafter "LANDMARK BRIEFS 49A"] (quoting from Memorandum Brief for Appellants in Nos. 1, 2, and 3, and for Respondents in No 5 on Further Reargument with Respect to the Effect of the Court's Decree at 11).

[26] *See* R. Lawrence Purdy, *Prelude:* Bakke-*Revisited*, 7 TEX. REV. OF LAW & POLITICS 313, 344 (Spring 2003).

[27] To appreciate how imprecise and convoluted the *Grutter*-endorsed *diversity* rationale has become, *see* discussion accompanying notes 38-42, *infra*, of the recent "Military Leadership Diversity Commission," which includes a recommended Services-wide definition of *diversity*.

[28] *Univ of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

An apt criticism of the *diversity* rationale was earlier provided in *Grutter* by Sixth Circuit Court of Appeals Judge Danny J. Boggs:

> There are . . . fundamental problems with the broad-brush rationale of diversity. The fundamental premise of our society is that each person is equally "diverse" exactly because of her equality before God and the law. The very words of the Declaration of Independence are: "all men are created equal . . . and are endowed by their Creator with certain inalienable rights." Thus, the starting basis is one of equality, not of separately assigned categories that are used to measure diversity. From that starting point, every person's experiences are "diverse" from those of every other.[29]

In his dissent, Judge Boggs illuminated a path that was fully consistent with *Brown*. In the end, however, the Court in *Grutter* chose to defer to the "discretion and best judgments" of educators and school administrators—the very path rejected in *Brown*—and to condone the racial discrimination that resulted.

Writing in dissent in *Grutter*, Justice Clarence Thomas and three of his brethren offer a series of deeply compelling reasons—laid out in four separate dissents—illustrating why, today, *Grutter's* holding should be revisited and reversed. None was more simply stated than this by Justice Thomas:

> The majority upholds the Law School's racial discrimination *not by interpreting the people's Constitution but by responding to a faddish slogan of the cognoscenti*. . . . I respectfully dissent . . . because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will [twenty-five years from now].[30]

Justice Thomas, of course, had much more to say:

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races[31] or are based on illegitimate motives, but also because *every time the government places citizens on*

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[29] *Grutter v. Bollinger*, 288 F.3d 732, 792 (6th Cir. 2002) ("*Grutter II*").

[30] *Grutter, supra*, 539 U.S. at 350-51 (emphasis added). Justice Thomas was responding, in part, to the Justice O'Connor's statement that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id*. at 343. Of course, Justice O'Connor's statement is illogical if *diversity* is a compelling interest because the very interest described arguably has no end point.

[31] For examples of explicit harms that can occur to "favored races," *see* social science studies analyzed in Briefs for *Amici Curiae* Richard Sander and Stuart Taylor, Jr., and Gail Heriot, *et al*. in support of the Petitioner. *Also see* studies directly rebutting the so-called "educational benefits of diversity" that are among the materials cited by Justice Thomas in *Grutter, supra*, 539 U.S. at 364-65; *and see*, generally, source materials cited *supra* notes 21-22.

> *racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all*. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." [Cite omitted][32]

He added this coda. "For the immediate future . . . the majority [in *Grutter*] has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." He immediately followed with Justice Harlan's timeless words in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[33]

Grutter changed all that in 2003 in the context of public education. And it did so for a reason so insubstantial that even a justice who was willing to concede *arguendo* "a university's considered judgment that racial diversity among students can further its educational task, *when supported by empirical evidence*,"[34] was led to join Justice Thomas' vigorous criticism of the Law School's approach. Justice Anthony Kennedy wrote in dissent:

> Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.[35]

While there are many words to describe the evil of using race as a factor in decision-making, particularly when used in a *non-remedial* context, Justice Kennedy was on the mark with this simple descriptive: "corrosive."[36] Justice Kennedy concluded that the "unhappy consequence [of *Grutter's* failure to apply strict scrutiny to the diversity rationale] will be to perpetuate the hostilities that proper consideration of race is designed to avoid," a perpetuation he asserted would, "of course, be the worst of all outcomes."[37]

A prime example of how *diversity* has metastasized within our politically correct culture is found in a March 2011 report issued by a Congressionally-appointed "Military Leadership Diversity Commission." The Commission drafted, for potential Service-wide adoption, the following definition:

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[32] *Grutter, supra*, at 353-54 (Justice Thomas, concurring in part and dissenting in part) (emphasis added).

[33] *Id* at 378.

[34] *Grutter, supra,* 539 U.S. at 387-88 (emphasis added) (Justice Kennedy, dissenting).

[35] *Id* at 388.

[36] *Id* at 394.

[37] *Id*.

> *Diversity* is all the different characteristics and attributes of individuals that are consistent with Department of Defense core values, integral to overall readiness and mission accomplishment, and reflective of the Nation we serve.[38]

Not only is this definition all but incomprehensible, it is much worse. For example, it goes without saying that race and ethnicity have nothing to do with Department of Defense core values. These core values are "duty, integrity, ethics, honor, courage, and loyalty."[39] Everyone wearing a uniform must live by them. In fact, it is a singular devotion to the latter irrespective of a service member's race or ethnicity that is critical to DOD's "overall readiness and mission accomplishment."

What is not incomprehensible, however, is the concluding phrase of the Commission's definition, "reflective of the Nation we serve." This is nothing more than an open invitation to use whatever means are necessary to effect *racial balancing* within the military. The text of the Commission's report makes this goal absolutely clear[40] notwithstanding the fact that racial balancing is prohibited under every single Court case including *Grutter*.

The Commission's report also contains the following comments which would have been unimaginable prior to *Grutter*:

> . . . [A]lthough good diversity management rests on a foundation of fair treatment, *it is not about treating everyone the same*. This can be a difficult concept to grasp, especially for leaders who grew up with the [Equal Opportunity]-inspired mandate to be . . . color blind . . . Blindness to difference, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged (cite omitted).[41]

These bizarre statements represent an unthinking resurrection of the arch segregationists' position that *race matters*. But they go even further by suggesting that attention to our racial differences should not be "suppressed" but "rather . . . leveraged," yet another illustration of

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[38] *See* "From Representation to Inclusion: Diversity Leadership for the 21st Century Military: Final Report" ("MLDC Report") at xiv.

[39] DOD Memorandum 101.

[40] E.g., "The Commission found that top military leaders are representative neither of the population they serve nor of the forces they lead." MLDC Report at xvi. "The Commission's recommendations include that DoD and the Services . . . require accountability for recruiting from underrepresented demographic groups, . . . * * * and persistent accountability for achieving the goals of diversity and inclusion." *Id* at xvii. Achieving these diversity goals is made an explicit criterion for selection to 3- and 4-star ranks. And the goals are based on internal accountability reviews that "will enable military leadership to . . . see evidence about demographics . . ." *Id* at xviii.

[41] MLDC Report at 18.

how *Grutter* has placed the Fourteenth Amendment's and *Brown's* shared concept of a "color blind" Constitution at grave risk.

The Commission's conclusion recognizes the incongruity of its deviation from "fair treatment" when it says this:

> The Armed Forces have led the Nation in the struggle to achieve equality. To maintain this leadership, they must evolve once again, renewing their commitment to providing *equal opportunity for all*.[42]

In the end, one cannot square the Commission's statement that "it is *not* about treating everyone the same" (added to the Commission's surprisingly condescending attitude towards leaders who grew up believing in "equal opportunity" and strove to be "color-blind") with the bedrock principle of providing "equal opportunity for all." This is the sad progeny of *Grutter*.

Thurgood Marshall and his colleagues in *Brown* argued that "The State of Kansas has no power [under the Fourteenth Amendment] to use race as a factor in affording educational opportunities to its citizens."[43]

The same principle should have been reaffirmed in *Grutter*, but was not.

Fisher provides the Court with an opportunity to correct this wrong by *readopting Brown's* principle and *reestablishing* it as the law throughout the land. Thus would our highest Court end the needless racial discrimination condoned by *Grutter*, a decision that, by every measure, was wrong the day it was decided.[44]

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[42] MLDC Report at xix (emphasis added).

[43] LANDMARK BRIEFS 49, supra note 11 at 31.

[44] For an excellent analysis of the multiple problems posed by *Grutter*, *see* J. Harvie Wilkinson III, *The Seattle and Louisville cases: There is No Other Way*, 121 HARV. L. REV. 158 (June 2007).