

Michigan Law Review First Impressions

Volume 111


2012

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Charlie Gerstein

University of Michigan Law School

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Recommended Citation

Charlie Gerstein, *What Can the Brothers Malone Teach Us About Ficher v. University of Texas?*, 111 MICH. L. REV. FIRST IMPRESSIONS 97 (2012).

Available at: https://repository.law.umich.edu/mlr_fi/vol111/iss1/1

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WHAT CAN THE BROTHERS MALONE TEACH US ABOUT FISHER V. UNIVERSITY OF TEXAS?

*Charlie Gerstein**

INTRODUCTION

In 1975, the Brothers Malone took the entrance exam for the Boston Fire Department. At the time, the Department was under a court-ordered affirmative action plan: it divided its pool of test-takers into groups of black and white applicants and gave substantial preference to those in the former. The Brothers listed themselves as white and didn't make the cut.¹

In 1977, the Brothers Malone again took the entrance exam for the Boston Fire department, this time listing themselves as black. The Brothers became firemen. Within a few years, someone at the Fire Department grew suspicious of the Malones. An investigation ensued. The Department determined that the Brothers had falsified their applications. Eventually a Suffolk County Judge was forced to decide whether the Malones were black or white.² Judge Herbert Wilkins sought three kinds of evidence to make his determination.

[T]he Malones might have supported their claim to be Black[:] (1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community.

He found the Brothers Malone to be white. They had “fair skin, fair hair coloring and Caucasian facial features.” The Malones’ birth certificates and their parents’ birth certificates show that the Malone family had been reported “consistently as white for three generations.” Finally, “there was no evidence that the Malones identified themselves personally or socially as Blacks.”³ By the time Judge Wilkins ruled, eleven Boston firefighters were under investigation for allegedly fibbing about their race.⁴

Does this episode trouble you? Are you uncomfortable with a judge taking a look at a pair of brothers and saying “they’re white?” Or with a judge

* J.D. Candidate, University of Michigan Law School. I would like to thank Aaron Nathan, Emmy Parsons, Molly Alarcon, and Kate Gilbert, without whom this Essay would be a crumpled piece of paper in my trashcan. I would also like to thank Professor Nicholas Bagley for his thorough and helpful comments.

1. Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1232 (1994).

2. *Id.* at 1233 (quoting *Malone v. Haley*, No. 88-339, (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989)).

3. *Id.*

4. Peggy Hernandez, *Firemen Who Claimed To Be Black Lose Appeal*, BOSTON GLOBE, July 26, 1989, at 13–14.

and declaring that they don't "socially [identify]" as black? If so, rest easy: this is the only such instance to be readily found in legal databases. While race remains a factor of legal significance in several contexts, courts avoid adjudicating litigants' race.

This Essay argues that squeamishness about deciding people's race can explain some otherwise baffling trends in affirmative action jurisprudence. The Supreme Court's fear of letting government agencies decide, as a factual matter, the race of individual students may explain its odd and seemingly inconsistent reluctance to use race as a factor in admissions. Part I discusses various legal strategies for adjudicating race and why we may be uncomfortable with them. Part II argues that *Gratz v. Bollinger* and *Grutter v. Bollinger* can be explained through the lens of the Malones, using the Fifth Circuit's reading in *Fisher v. The University of Texas*, the challenge to Texas's affirmative action program heading to the Supreme Court this term. Part III proposes a new reading of *Grutter*—arguing that *Grutter* serves to protect a school's right to select students on nonracial grounds—and suggests some implications for the program at issue in *Fisher*.

I. DISCOMFORT WITH ADJUDICATING RACE

Race seems fundamentally impossible to adjudicate in a satisfying manner. Professor Christopher Ford outlines several possibilities for race adjudication, drawing examples of classificatory systems from apartheid South Africa, caste-system India and the Jim Crow South. All of these schemes can be divided into two basic, self-explanatory possibilities: "self-ascribed" and "other-ascribed" identifications.⁵ The former invite the unscrupulous to deceive; the latter seem counter to our basic notions of self-description and self-determination. Apartheid South Africa comes closest to what Ford calls "racial due process," with hearings, appeals, and extensive evidentiary proceedings available to contest a legally binding racial determination.

Consider next the intricacies of the Equal Employment Opportunity Commission's "spot checks" of employer-reported minority statistics; they are, to say the least, unlikely to be accurate. Without delving too deeply into the issue, it suffices to note that the Commission discourages the use of self-reported statistics because of their tendency to invade employees' privacy. Instead, the Commission's guidelines encourage employers trying to disprove allegations of underutilizing minority workers to conduct a "visual survey" of their employees. The employers are then encouraged to report the racial composition of their workforces. Indeed, the foxes are running the henhouses.

Government adjudication of race may also conjure a deeply unpleasant image in our collective memory.⁶ Indeed, in an era of anti-miscegenation

5. Ford, *supra* note 1, at 1267.

6. See PAUL CONNERTON, *HOW SOCIETIES REMEMBER 1* (1989) (discussing the characteristics and formation of collective memory).

laws and de jure segregation, American states needed ways to decide who belonged to which racial group. And each state had one. Virginia entrusted racial determinations to bureaucratic agents.⁷ In 1944, the state codified its bureaucratic system, including a provision for what to do when the Registrar of Vital Statistics feared someone's race was "incorrect."⁸ If the court clerk was, say, about to issue a marriage license but then found "reasonable cause to disbelieve" the bride or groom's race, the clerk was to withhold the license until "satisfactory proof" was provided.⁹ The punishment for a "false" racial self-identification was a year in prison.¹⁰ Missouri, for its part, had juries determine the racial status of individual litigants.¹¹ Each state provided a definition of who counted as black. Ohio defined someone as black if she had "any distinct and visual admixture of African blood."¹² Georgia characterized as black "all negroes, mulattoes, mestizos and their descendants, having any ascertainable trace of Negro or African, West Indian or Asi-Asiatic Indian blood in their veins."¹³ Does this seem meaningfully different from what Judge Wilkins did?

Are you uncomfortable now?

II. RELUCTANCE TO DEFINE RACE EXPLAINS THE DISTINCTION IN *GRATZ* AND *GRUTTER*

Much ink has been spilled about the "split double-header"¹⁴ of *Grutter v. Bollinger* and *Gratz v. Bollinger*.¹⁵ In those opinions, the Supreme Court drew a distinction between the affirmative action programs at issue—one that may be difficult to justify or understand at first; but it can be explained by the Court's squeamishness about race.

The distinction these cases concoct baffles many first-year constitutional law students. Post-*Gratz* and *Grutter*, a school may constitutionally use race as an explicit bonus in an admissions process that holistically reviews each application for the purpose of establishing a critical mass of minority students (with the size of a critical mass differing for different minorities), but it may not assign specific point values to minority status, even in an other-

7. Ford, *supra* note 1, at 1275.

8. *Id.* (citing Act of February 22, 1944, ch. 52, 1944 Va. Acts 51, 54).

9. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 436 (1988) (quoting An Act to Preserve Racial Integrity, 1924 Va. Acts 534).

10. An Act to Preserve Racial Integrity, 1924 Va. Acts 534, available at http://www2.vcdh.virginia.edu/encounter/projects/monacans/Contemporary_Monacans/racial.html.

11. Ford, *supra* note 1, at 1275–76.

12. DAVID H. FOWLER, *NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST, 1780–1930*, at 201 (1987).

13. *Id.* at 362.

14. *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting).

15. 539 U.S. 244 (2003).

wise similarly holistic admissions process. In essence, these cases hold that race is only an acceptable factor in admissions when it is interpreted in light of an applicant's broader life experience. Regardless of one's opinion on the merits of either case, the distinction may seem silly at best and purposefully disingenuous at worst. "If honesty is the best policy," Justice Ginsburg explained in her dissent in *Gratz*, "surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."¹⁶

The Fifth Circuit in *Fisher v. University of Texas at Austin* has taken the holdings of *Gratz* and *Grutter* to their natural conclusion, effectively writing race out of the college admissions calculus.¹⁷ In *Fisher*, the appellate court noted that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*."¹⁸ And if we take the Fifth Circuit's view, the black daughter of a cardiac surgeon will likely lose in a heads-up contest to the white daughter of a low-income high school dropout, *ceteris paribus*. Indeed, the Fifth Circuit writes that permissible consideration

does not *define* an applicant by race but instead ensures that she is valued for all her unique attributes. . . . Both *Bakke* and *Gratz* firmly rejected group treatment, insisting that the focus be upon individuals and that an applicant's achievements be judged in the context of one's personal circumstances, of which race is only a part. So deployed, a white applicant raised by a single parent who did not attend high school and struggled paycheck to paycheck and a minority child of a successful cardiovascular surgeon may both claim adversity, *but the personal hurdles each has cleared will not be seen to be of the same height*.¹⁹

This reading of *Gratz* and *Grutter* leads inexorably to the conclusion that race in and of itself, divorced from correlative social and economic phenomena, *cannot* be weighed in an applicant's favor: for how can we use race to allocate admissions benefits if we do not define someone to be of a particular race? Quite simply, if race may be considered only as part of a holistic person, without regard to balancing members of that race with members of other races, without reducing individuals to members of that race, and without giving preference to members of that race over white students from disadvantaged backgrounds, what could "race" possibly do? The Fifth Circuit's reading thus writes race out of the admissions calculus.

Considering these cases in light of the Brothers Malone, removal of race as a consideration may have been the Court's intention in *Gratz* and *Grutter*. The majorities in these cases wasn't advocating subterfuge; rather, they urged that we abandon race in favor of other factors that, in their view, more closely approximate an index of social disadvantage. In permitting race to

16. *Gratz*, 539 U.S. at 304.

17. 631 F.3d 213, 213 (5th Cir. 2011), *cert. granted*, 2005 WL 2034942 (U.S. Feb. 21, 2012) (No. 11-345)).

18. *Id.* at 218.

19. *Id.* at 221 (emphasis added).

be evaluated only in light of the social context in which the applicant was raised, the Court effectively precluded any admissions advantage from accruing to on the basis of a hard-and-fast determination of her race. The majorities in *Gratz* and *Grutter* avoided the thorny problem Judge Wilkins faced—they sought to avoid situations in which the government must necessarily decide someone's race.

Parents Involved in Community Schools v. Seattle School District No. 1, the Court's most recent pronouncement on race in schools, advances this reading.²⁰ In *Parents Involved*, Justice Kennedy (the Justice whose vote will almost certainly determine the ultimate fate of *Fisher*) expresses concern with the consequences of racial definitions:

When the government classifies an individual by race, it must first define what it means to be of a race. *Who exactly is white and who is nonwhite?* To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.²¹

So Justice Kennedy naturally proposes a host of methods that a school district may use to increase the racial diversity of its student body, all of them facially race-neutral but intentionally race-conscious. In *Parents Involved*, Justice Kennedy—perhaps inadvertently—explores the consequences of reading *Grutter* to preclude race as an admissions factor; as part of his proposed methods, committees must instead decide on the basis of factors that correlate with race.

A pair of hypotheticals illuminate Justice Kennedy's position. Imagine the Brothers Malone had applied to the University of Michigan Law School in 2002, describing themselves, of course, as black. Let every other aspect of their application be true. Under the *Gratz* plan, an admissions officer who gets wise to the Malones, and the admissions committee that sorts out the mess, would be forced to define whiteness per se before they can define the Malones as white. These hypothetical Malones (as the real Brothers did) will claim that the University asked only for "racial self-identification" and that this is how they so identify. But the *Gratz* plan, as the Court briefly and obliquely notes, involved "a factual review of an application to determine whether an individual is a member of one of these minority groups."²² That this is "the only consideration" accompanying the distribution of points to members of minority groups troubled the Court and seems to have influenced its negative treatment of the *Gratz* plan.²³ If the admissions committee was suspicious of the Malones under a *Gratz* plan, it would have to explain what happened to the points in their scores and would, therefore, have to determine and openly declare that they were not, in fact, black.

20. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2003).

21. *Id.* at 797 (emphasis added).

22. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003).

23. *Id.* at 246.

Under the *Grutter* plan, however, the courts and admissions officers wouldn't have to wade into this mess: rather, they could evaluate the charlatan brothers in light of their overall applications, accepting or rejecting them without ever declaring their claim to minority status spurious. If the admissions committee smelled something fishy, it could simply reject the application without any record of a racial determination. The split double-header, then, allows schools to have the benefits of diversity without engaging in the unpleasant process of adjudicating race. But it has done so by eliminating race as a factor divorced from its social context—race as a physical set of traits, at least—from the admissions process.

If we change the hypothetical slightly, we can see the divergence between some of the Justices' positions in *Gratz* and *Grutter* and reveal their common concern with the definitional problem. Justice Rehnquist was suspicious of the law school's motives: he believed that the holistic review was little more than a racial quota masquerading as diversity plan.²⁴ The majorities, on the other hand, believed the law school's contentions.²⁵ Either way, as the following hypothetical shows, *Grutter* avoided racial determinations while *Gratz* encouraged them.

Imagine we have two white applicants who, by academic standards alone, would be at least marginally qualified for admission to the law school. Were they to fib about their race on their applications, under the *Grutter* plan they could be admitted for one of several reasons. In Justice Rehnquist's view, the applicants would be admitted because the school was engaging in thinly-veiled racial balancing—seeing an opportunity to increase minority enrollment without sacrificing other numerical standards, the law school would, in his view, pounce on the opportunity. But under the *Grutter* majority's view, the applicants might be admitted and might not be, but only because of their contribution to a diverse student body in ways reflected by their application as a whole—if their story didn't seem to add up to a significant contribution to diversity, an admissions officer would likely reject them.

Under either view of the school's motives, the *Gratz* plan would reject the applicants, assuming the "factual review" reveals their chicanery. The *Gratz* dissenters, of course, would be fine with this result: in their view, if a school is going to treat applicants differently by virtue of their race, then it ought to do so openly and systematically. But as the two contrasting hypotheticals show, regardless of one's view of the motives of the law school, and regardless of the status of the applicants involved, *Grutter* avoids the pesky definitional problem that a school would face under a *Gratz*-like plan.

III. MAYBE *GRUTTER* ISN'T SO CRAZY AFTER ALL

The program at issue in *Fisher* uses race as an admissions factor in a vanishingly minimal manner. After dividing applicants into in- and out-of-

24. *Grutter v. Bollinger*, 539 U.S. 306, 379 (2003) (Rehnquist, J., dissenting).

25. *Id.* at 306.

state groups, the University of Texas assigns each applicant an Academic Index Score (“AIS”) and a Personal Achievement Score (“PAS”). The latter is designed to “recognize qualified students whose merit as applicants was not adequately reflected by their [AIS].” As such, it takes into account “special circumstances that may reflect—beginning in 2004—the applicant’s race.”²⁶ But, the Fifth Circuit writes, quoting the district court’s grant of summary judgment to the university, that “race is considered as part of the applicant’s context whether or not the applicant belongs to a minority group, and so—at least in theory—it ‘can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever.’”²⁷ Indeed,

UT does not monitor the aggregate racial composition of the admitted applicant pool during the process [so] the admissions decision for any particular applicant is not affected by the number of other students of her racial group who have been admitted during that year . . . [and] *UT’s admissions procedures do not treat certain racial groups or minorities differently when reviewing individual applications.*²⁸

Under this plan, it seems very unlikely that race as a factor in and of itself does much at all. And, in reality, it probably hasn’t done much, at least when compared to other affirmative action plans. Certainly, the Fifth Circuit would have us think so.²⁹

The *Grutter* rule examined in this light may seem hardly different from a rule forbidding consideration of race and allowing consideration of other social factors. But it is different. As the experience at the University of Michigan Law School pre- and post-Proposition Two suggests, the *Grutter* rule was doing *something*: since its demise, black, Hispanic and Native American enrollment fell 34.1 percent in one year.³⁰ The *Grutter* rule allows schools to *say* that they’re using race so that those schools can continue to use other relevant social factors of their choosing, factors which often correlate closely with race, without fear of running afoul of constitutional law and while continuing to select students with other desirable qualifications.

Imagine that Michigan Law wanted to institute a program to increase enrollment from Detroit, which is overwhelmingly nonwhite.³¹ Under any conceivable holding in *Gratz* and *Grutter*, it could permissibly do so. But were it to do so today, Michigan Law would expose itself to criticism that it is violating Proposition Two—and probably a lawsuit to that effect. As such,

26. *Fisher v. University of Texas at Austin*, 631 F.3d 213, 228 (2011).

27. *Id.*

28. *Id.* at 229 (emphasis added).

29. *Id.* at 235 (“The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas and the percentage of African-Americans at UT is half the percentage of Texas’s African-American population.”).

30. Elizabeth Redden, *Now and Then: Minorities and Michigan*, INSIDE HIGHER ED (June 19, 2007, 4:00 AM), <http://www.insidehighered.com/news/2007/06/19/michigan>.

31. *Detroit (city) QuickFacts*, U.S. CENSUS BUREAU (Jan. 31, 2012, 5:15 PM), <http://quickfacts.census.gov/qfd/states/26/2622000.html> (listing Detroit as 7.8 percent white, non-Hispanic).

the school would be deterred, at the margin at least, from adopting this kind of policy. Similarly, were Michigan Law to use race-conscious but facially race-neutral polices (like those Justice Kennedy advocated in *Parents Involved*), it would no longer be able to select its students in as nuanced a manner as it could under *Grutter*. Forcing it to be ham-handed in this respect would leave the law school without the tools it needs to select minority students with other desirable characteristics: mainly, LSAT scores. So Proposition Two, which precisely mimics what a contrary holding in *Grutter* would have done, may significantly deter the Law School from pursuing those polices that Justice Kennedy advocated, such as programs promoting racial diversity through ostensibly geographical preferences.

The *Grutter* rule, then, is prophylactic. Universities “‘occupy a special niche in our constitutional tradition,’ with educational autonomy grounded in the First Amendment,” the Fifth Circuit wrote in *Fisher*.³² “Academic freedom . . . includes a university’s selection of its student body.”³³ That freedom certainly contemplates a university’s right to select students of diverse geographic, economic and linguistic backgrounds. Only when it runs up against the external constitutional norm forbidding disparate treatment on the basis of race does the university’s right get tricky. But if the Supreme Court were to forbid a university from considering race, it risks a potentially enormous chilling effect on the university’s ability to consider other relevant factors, an ability to which the university has a constitutional right.³⁴

In light of the familiar framework of prophylaxis from First and Fifth Amendment jurisprudence, the *Grutter* Court might have stumbled upon an eminently sensible rule, one that avoids the troubling definitional problems illustrated by the Malones’ case and achieves a diverse student body in a way that protects a university’s right to choose its students by nonracially conscious means. Though each of these nonracially conscious means is, of course, constitutional, the *Grutter* Court has added a layer of prophylactic protection such that other forces do not push schools to eschew those means.

This alternative reading of *Grutter* suggests that the Court ought not to strike down the University of Texas’s plan, regardless of its view of the constitutionality of race qua race as a factor in admissions. The plan uses race in the minimally troubling manner of the *Grutter* plan and certainly, as the Fifth Circuit noted, does not appear to be a quota by another name. And it avoids stigmatizing students by forcing them to “live under a state-mandated racial label.”³⁵ One must then wonder why the Court has granted certiorari in *Fisher*. Perhaps the Court is planning to reconsider the notion of critical mass it detailed in *Gutter* and rule that the University of Texas has reached one, suggesting a more active role for the Court in policing the outer boundaries of affirmative action plans. Regardless, it seems very likely that the

32. *Fisher*, 631 F.3d at 231 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

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

34. *Id.*

35. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2003).

Court is planning to overturn *Grutter* or at least substantially retreat from it. Before scrapping it though, the Court should consider the full effects of its decision in *Grutter*.