

IS *BAKKE* NOW A SUPER-PRECEDENT AND DOES IT MATTER?
THE U.S. SUPREME COURT'S UPDATED CONSTITUTIONAL
APPROACH TO AFFIRMATIVE ACTION IN *FISHER*

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INTRODUCTION

During Chief Justice Roberts's 2005 confirmation hearings, Senator Arlen Specter asked whether *Roe v. Wade*¹ and some other U.S. Supreme Court decisions had become "super-precedents."² This terminology, related to *stare decisis* (the importance of following precedent), had been rarely used. Scholars suggest the term arose in a 1970s law journal article by William Landes and Richard Posner,³ and subsequently was employed by U.S. Court of Appeals Judge J. Michael Luttig in 2000 when he referenced *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴ as an example of super *stare decisis*.⁵ This Essay examines the existence of another possible super-precedent.

One fascinating aspect of the Supreme Court's affirmative action decision last term in *Fisher v. University of Texas*⁶ is the vitality of the originally fragile, yet middle of the road, 1978 Justice Powell opinion in *Regents of the University of California v. Bakke*.⁷ The Powell opinion

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1 410 U.S. 113 (1973).

2 Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, at C1.

3 Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 364 (2007) (citing William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976)).

4 505 U.S. 833 (1992).

5 *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000) ("[T]he Supreme Court . . . intended its decision in [*Casey*] to be a decision of super-*stare decisis* . . .").

6 133 S. Ct. 2411 (2013).

7 438 U.S. 265 (1978). See *Fisher*, 133 S. Ct. at 2415 ("The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in . . . *Bakke*.").

was also the lynchpin of *Grutter v. Bollinger*⁸ and *Gratz v. Bollinger*.⁹ Moreover, numerous educational institutions and lower courts have relied on the opinion, perhaps due to its pragmatic compromise. This Essay therefore shows that the Powell opinion has taken on the trappings of a super-precedent. But the Essay also shows that even the Supreme Court's recent reliance on Powell, paradoxically, may not save affirmative action in the long term.

I. DEFINING A SUPER-PRECEDENT

Around the time of the Roberts hearings, Jack Balkin criticized the super-precedent notion as confused.¹⁰ Nonetheless, Jeffrey Rosen,¹¹ Michael Gerhardt,¹² and Dan Farber¹³ thought the concept had explanatory power, and this Essay will assume their correctness given the term's use in Congressional hearings. Balkin's critique, however, helpfully describes three possible types of super-precedents.¹⁴ The first is an important Supreme Court decision that has withstood several strong challenges over an extended time. Second, it can be a case that is the foundation for a large amount of legal doctrine, which would otherwise become vulnerable. And third, it could involve a once controversial issue, that has since become part of American constitutionalism's canon. I would add a fourth category, namely a case where there has been substantial and longstanding societal reliance.

A super-precedent could fit all these types. Gerhardt gives a particularly useful general definition:

Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one

8 539 U.S. 306, 323 (2003) ("Justice Powell's opinion announcing the judgment of the [*Bakke*] Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

9 539 U.S. 244, 270 (2003) ("In *Bakke*, Justice Powell reiterated that '[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.' (quoting *Bakke*, 438 U.S. at 307)).

10 Jack Balkin, *Don't Talk to Me about Superprecedents*, BALKINIZATION (Oct. 30, 2005), <http://balkin.blogspot.com/2005/10/dont-talk-to-me-about-superprecedents.html> (last visited Aug. 20, 2013).

11 Rosen, *supra* note 2, at C1.

12 Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) ("[A]t least as a descriptive matter, there may be something akin to 'super precedent' in constitutional law.").

13 Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176 (2006) ("I opt for a version of stare decisis in which rulings are not overturned except for strong reasons, and only for compelling reasons in the case of... 'bedrock' precedents.").

14 Balkin, *supra* note 10.

area of constitutional law). . . . Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.¹⁵

Paul Collins and Lori Ringhand have suggested that a super-precedent is a case where a Supreme Court nominee would not be confirmed without the right position.¹⁶

Now it seems obvious that *Marbury v. Madison*,¹⁷ *Brown v. Board of Education*,¹⁸ and Justice Jackson's opinion in *Youngstown Steel & Tube Co. v. Sawyer*¹⁹ fit several of these categories. *Griswold v. Connecticut*²⁰ should also be included too, given the Senate's rejection of Judge Robert Bork's Supreme Court nomination after he questioned the decision during confirmation hearings. *Brown* fits the third category most obviously (formerly controversial case that now embodies our values), but probably the others as well. *Marbury* seems to fit the last three. *Youngstown Steel* fits two and four, and possibly three. It also resembles *Bakke* because it was the opinion of a single Justice. *Griswold* fits categories two, three, and four.

Roe v. Wade and *Casey* pose a more difficult question. On the one hand, many efforts to overturn *Roe* have failed, including several led by the federal government, placing the case in category one. But *Roe* is certainly not a well-regarded part of American constitutionalism a la category three.²¹ In *Casey*, the Court emphasized factor four about societal reliance, but that argument is hotly contested for good reason. Nonetheless, Senator Specter, Judge Luttig, Charles Fried²² and others (such as Justices Souter, Kennedy, and O'Connor in *Casey*) seem to place the 1973 *Roe* decision in the first category, and perhaps the second and fourth, whether they agree with the case or not. Fried, who led the Supreme Court charge against *Roe* as Reagan's Solicitor General, testified at the Roberts hearings that *Roe* is "a big tree, but it has ramified and exfoliated" and that reversing it "would be an enormous disruption."²³

15 Gerhardt, *supra* note 12, at 1205–06.

16 Paul M. Collins, Jr. & Lori A. Ringhand, *Super Precedents, Litmus Tests, and Supreme Court Confirmation Hearings* 31 (2012), <http://www.psci.unt.edu/~pmcollins/Collins%20Ringhand%20MPA%202012.pdf> (last visited Sep. 24, 2013).

17 5 U.S. (1 Cranch) 137 (1803).

18 347 U.S. 483 (1954).

19 343 U.S. 579 (1952).

20 381 U.S. 479 (1965).

21 E.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

22 Rosen, *supra* note 2.

23 *Id.*

II. BAKKE'S BACKGROUND

The core reason why Justice Powell's 1978 *Bakke* opinion should be viewed as a super-precedent is because it has shown stunning vitality given its initial fragility. Hundreds of educational institutions, workplaces, and lower courts have adopted programs modeled on the opinion, though only one Justice out of nine signed it. Moreover, many institutions without formal affirmative action plans take race into account as a factor in admissions, hiring, and promotion decisions – sometimes as a tiebreaker, sometimes more. This is societal reliance category four. There were two aspects to Powell's opinion which show the balancing of interests. First, he reasoned that courts should subject affirmative action admissions plans to strict scrutiny to ensure individualized consideration of all applicants. Thus he invalidated the Cal-Davis plan set aside of 16 places for minorities.

But second, relying on the Harvard admissions plan, he said that educational institutions could consider racial diversity, because universities had compelling First Amendment interests in doing so. Thus, whether an applicant was older, was an athlete, had overcome adversity, or was born abroad, could also enhance the educational experience. Powell though rejected Cal-Davis's argument that such plans could be employed to remedy the nation's history of discrimination, or discrimination by the professions. Such a rationale would place no limits on the racial entitlements allowed. I must say that this part of his opinion is unfortunate, because the remedial goal has always been a crucial foundation for affirmative action, and this goal is justified by the nation's lengthy and tragic apartheid-like history. Moreover, the Court could certainly impose limits on such measures.

Indeed, four Justices, led by the liberal icon William Brennan, took the position that such plans should only receive intermediate scrutiny and that Davis met that standard, based on both diversity and remedying prior discrimination. The four conservative Justices, however, bypassed the constitutional question, but found that the plan violated a federal statute. The question then became what was the Court's holding. As previously mentioned, lower court decisions and numerous societal institutions interpreted Powell's middle of the road opinion as controlling,²⁴ since he formed part of a coalition of five Justices who would at least allow diversity-based flexible plans.²⁵

The Supreme Court decided some later affirmative action cases but none withstood strict scrutiny. For example, in *Wygant v. Jackson*

²⁴ See, e.g., *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (1970).

²⁵ *Marks v. United States*, 430 U.S. 188, 193-94 (1977).

Board of Education,²⁶ the Supreme Court ruled that a state lacked a compelling interest in favoring black teachers with less seniority over white teachers, during layoffs, despite the goal of ensuring that there were sufficient role models for minority children. Further, in *City of Richmond v. J. A. Croson Co.*²⁷ and *Adarand Constructors, Inc. v. Peña*,²⁸ the Court essentially rejected minority set-asides by finding that the plans were not precisely tailored to remedy a history of discrimination. The educational diversity arguments were not relevant in the set-aside context. The *Adarand* case uses especially poor reasoning since the Court gave no deference to the federal government's authority to adopt such a plan, even though the Fourteenth Amendment expressly authorizes Congress to enforce equal protection. Moreover, *Adarand* was so broad it overturned an earlier case called *Fullilove v. Klutznick*,²⁹ and effectively nullified the reasoning in *Metro Broadcasting, Inc. v. FCC*.³⁰ Nonetheless, through all this, Powell's opinion remained, perhaps because it had the elements of a compromise.

III. HOPWOOD LEAPS FORWARD

Though many ordinary Americans, judges, legal scholars, and lawyers have long opposed affirmative action, the Powell opinion controlled nationally from its origins in 1978 until the Fifth Circuit's 1996 decision in *Hopwood v. Texas*.³¹ There, the court authored a strongly worded ruling against *Bakke*. This was a departure from other lower courts, and contradicted the major theory regarding how to determine the Court's ratio decidendi.³²

Hopwood explained that Powell presumed racial minorities in the classroom had shared opinions that differed from their white counterparts. This reflected racial stereotyping.³³ *Hopwood* said admitting people with differing political views, regardless of race, would better promote diversity. In addition, Powell's approach meant that wealthy black students might get admitted with lower scores than poor whites who had to overcome adversity.

26 476 U.S. 267 (1986).

27 488 U.S. 469 (1989).

28 515 U.S. 200 (1995).

29 448 U.S. 448 (1980).

30 497 U.S. 547 (1990).

31 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

32 *See Marks*, 430 U.S. at 193-94 (addressing situations when "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of" a majority).

33 *Hopwood*, 78 F.3d at 942-43.

Thus, *Hopwood* outlawed race-based affirmative action in admissions throughout the Fifth Circuit, and that included Texas.³⁴ Subsequently in 1998, California voters outlawed affirmative action, and Michigan, Wisconsin, and Nebraska adopted similar referenda.³⁵ Initially these votes devastated minority enrollments, especially at places like Berkeley Law School.³⁶ But these institutions and states developed other affirmative measures that were discussed in the Supreme Court's recent *Fisher* case.³⁷ Nonetheless, *Hopwood* and these referenda made affirmative action opponents optimistic that Powell's opinion was on its deathbed.

IV. GRUTTER AND GRATZ

The Supreme Court's 2003 decision in *Grutter*, upholding the Michigan Law School affirmative action plan, was a surprising and ringing endorsement of Powell's *Bakke* opinion. Justice O'Connor authored a 5-4 majority stating that the Michigan Law School admissions plan provided for individualized consideration, as well as diversity beyond race and quotas.³⁸ She elaborated that Michigan Law School had a compelling interest in a "critical mass" of racial minorities at least for a period of twenty-five years.³⁹ O'Connor's opinion relied heavily on briefs filed by prominent American business leaders, and former leaders of the U.S. military, which explained that diversity was essential in a globalized marketplace.⁴⁰

Justice O'Connor's reliance on these established institutional interests for affirmative action, rather than the goal of remedying discrimination, is reminiscent of the Court's 1960s use of the Commerce Clause to justify federal laws against discrimination in public accommodations and restaurants.⁴¹ Yet Justice Powell's early analysis was gaining strength, as it was now embraced by a majority.⁴² Moreover,

³⁴ *Id.* at 945-46.

³⁵ Priscilla Ocen, & Khaled A. Beydoun, *Taking Affirmative Action Off the Table*, AL JAZEERA (Mar. 30, 2013, 1:44 PM), <http://www.aljazeera.com/indepth/opinion/2013/03/2013329193459128484.html>.

³⁶ Marvin Lim, Note, *Percent Plans: A "Workable, Race-Neutral Alternative" to Affirmative Action?*, 39 J. COLLEGE & UNIV. L. 127, 144 (2013). See also Greg Stohr, *Black Enrollment Falls as Michigan Rejects Affirmative Action*, BLOOMBERG (Sep. 23, 2013), <http://www.bloomberg.com/news/2013-09-24/black-enrollment-falls-as-michigan-rejects-affirmative-action.html>.

³⁷ *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2415 (2013).

³⁸ *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (1970).

³⁹ *Id.* at 341-44.

⁴⁰ *Id.* at 330-31.

⁴¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

⁴² Justice O'Connor admired Justice Powell greatly. Peter Schmidt, *Sandra Day O'Connor Says Affirmative Action Faces Uncertain Future*, CHRON. HIGHER EDUC. (Apr. 6, 2007),

Justice O'Connor was expressly deferential to the university *à la* Powell regarding Harvard. The Court strongly rejected *Hopwood's* attacks on Powell's reasoning, and its attacks on his opinion's precedential significance. It bears mention that critics questioned, with good reason, O'Connor's out of the blue pronouncement in *Grutter* of a twenty-five year time limit for affirmative action in U.S. society, and contended that she did not really use strict scrutiny given her deference.⁴³

The Court's contemporaneous decision striking down the Michigan undergraduate affirmative action program in *Gratz* also relied on Powell. There, the Court said the undergraduate program granted such a strong preference to racial minorities, in scoring their applications, that it amounted to a quota that systematically disadvantaged white applicants.⁴⁴ Nonetheless, affirmative action opponents were disheartened by these results and by the reaffirmation of Powell.⁴⁵ These cases suggested that *Bakke* should also be viewed as a category one super-precedent given its survival.

V. FISHER

Last term's *Fisher* decision also relied on Justice Powell's *Bakke* opinion (as amplified by Justice O'Connor in *Grutter*). In an unusual 7-1 split, with some liberal and conservative justices forming a majority, the Court remanded for a more rigorous examination of whether the plan was narrowly tailored.⁴⁶ The University of Texas affirmative action plan has always been unique, built as it was on top of an alternative strategy for increasing minority numbers. After *Hopwood*, Texas decided that any student who finished in the top ten percent of their public high school class rank would be admitted.⁴⁷ Though facially neutral and consistent with *Hopwood*, this ensured the enroll-

<http://chronicle.com/article/Sandra-Day-OConnor-Says/38513> ("Justice O'Connor, who upheld Justice Powell's *Bakke* opinion as the law of the land in her *Grutter* decision, choked back tears as she reminisced about how Justice Powell had been a mentor and close friend. 'I continue to miss him very much,' she said.")

43 One plausible theory that has emerged is that Justice O'Connor devised the twenty-five year figure in *Grutter* because it had been about twenty-five years since *Bakke*.

44 *Gratz v. Bollinger*, 539 U.S. 244, 249-51 (2003).

45 *Ending Racial Double Standards*, CTR. FOR INDIVIDUAL RIGHTS, <http://www.cir-usa.org/cases/michigan.html> (last revised July 23, 2013) ("The Court's rulings in *Gratz* and *Grutter* fell far short of CIR's goal of a clear legal ruling striking down the use of racial preferences solely to achieve diversity. While there is little principled support in the Constitution for racial double standards, the Court did not end their use. Instead, it eliminated only the more mechanical preferences used by Michigan's undergraduate college, while permitting the UM law school system, which purportedly considered race on an individualized basis to stand.")

46 *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2414-15 (2013). Justice Kagan recused herself.

47 *Id.* at 2415-16.

ment of a certain number of minority students since many Texas schools were racially lopsided.⁴⁸ But once *Grutter* rejected *Hopwood*, Texas also adopted an explicit Michigan type affirmative action plan to enroll even more minorities.⁴⁹

Justice Kennedy authored the *Fisher* majority and said that O'Connor's *Grutter* opinion used strict scrutiny.⁵⁰ Kennedy also explained that *Grutter* properly showed deference to the university's First Amendment interests in diversity as compelling.⁵¹ This follows Powell in *Bakke*, which Kennedy also cites. But Kennedy elaborates that the lower courts in *Fisher* had failed to employ the narrowly tailored part of strict scrutiny.⁵² Here though, he equivocates. At one point, he says that narrowly tailored requires that "no workable race-neutral alternatives" be effective.⁵³ But he uses more flexible language at another point.⁵⁴ Thus, the case leaves open major questions about affirmative action that will only be answered by lower court interpretations and perhaps by another Supreme Court opinion.⁵⁵

Despite Kennedy's skepticism on means-ends, many Supreme Court watchers were surprised since there seem to be five solid anti-affirmative action votes. Moreover, Kennedy had never supported an affirmative action plan on the Court. In that sense, the legacy of Powell's *Bakke* opinion seems surprisingly alive thirty-five years later and despite newer challenges. Even socially moderate to conservative

48 See *id.* at 2432–33 (Ginsburg, J., dissenting) ("Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.").

49 *Id.* at 2415–16.

50 *Id.* at 2415.

51 *Id.* at 2418.

52 *Id.* at 2421.

53 *Id.* at 2420–21.

54 *Id.* ("[N]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003))).

55 On remand, the appellate court in *Fisher* asked the parties to address the following issues:

- (1) Should the court in its discretion remand to the district court for further proceedings?
- (2) Should any remand to the district court be accompanied by instruction from this court?
- (3) If this court elects to not remand how ought it apply strict scrutiny as directed by the Supreme Court on the record now before it?
- (4) Are there remaining questions of standing?
- (5) Is the University due any deference in its decision that "critical mass" has not been achieved?
- (6) Has the University achieved "critical mass"? If your answer is yes, please explain when it did. If your answer is no, please explain when it is likely to do so, should the *Grutter* plan remain in place.
- (7) What workable alternatives to the use of race were available to the University that were not being deployed?

Letter from Lyle W. Cayse, Clerk, U.S. Court of Appeals for the Fifth Circuit, to Counsel, *Fisher v. Texas* (Sep. 12, 2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/Fisher_briefing_order.pdf.

establishment interest groups like business, the military, and major universities in conservative states, support Powell's notion of affirmative action without quotas. Moreover, the European Court of Justice adopted Powell-type reasoning in a case from Germany.⁵⁶

But some will respond that *Fisher* has only left a shell of Powell and O'Connor's affirmative action. Justice Alito has replaced O'Connor and he does not share her views.⁵⁷ Moreover, though Kennedy avoided the awkwardness of overturning O'Connor's ten-year-old *Grutter* precedent while she was sitting in the front of the Court as he read his *Fisher* opinion, Kennedy has opened the door for harder scrutiny.⁵⁸ Also, many Americans think that admissions preferences should be class-based, not race-based, perhaps partly because we have a black President.⁵⁹

There are strategic reasons why the conservatives in *Fisher* may have held their powder. The same week as *Fisher*, they ruled against the constitutionality of a key part of the Voting Rights Act.⁶⁰ Thus, they spent significant ammunition in support of their color-blindness position there. And perhaps most importantly, they had already granted certiorari in an affirmative action case for the next term that may prove more suitable for a major ruling. Specifically, the divided (and often reversed) en banc U.S. Court of Appeals for the Sixth Circuit has struck down the Michigan referendum that outlawed affirmative action, because the referendum purportedly burdened the rights of minorities in the political process.⁶¹

56 Case C-405/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-06363 (court upholds gender affirmative action in Germany because it permitted some personalized assessment of male applicants). See also DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 433 (3d ed. 2012).

57 Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012, <http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html> (last visited Nov.22, 2013) ("Her replacement by Justice Samuel Alito Jr. who has been hostile to affirmative action programs, may have altered the balance on the court on whether such admission programs are constitutional.").

58 Adam Liptak, *Justices Step Up Scrutiny of Race in College Entry*, N.Y. TIMES, June 25, 2013, at A1 (mentioning that both former Justices O'Connor and Stevens were in the courtroom when Justice Kennedy summarized his opinion).

59 Compare Jeffrey M. Jones, *In U.S., Most Rejected Considering Race in College Admissions*, GALLUP POLITICS (July 24, 2013), <http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx> (67% of U.S. adults opposed to racial preferences), with David Leonhardt, *The New Affirmative Action*, N.Y. TIMES MAG. (Sep. 30, 2007), available at <http://www.nytimes.com/2007/09/30/magazine/30affirmative-t.html> (support for "preferences based on socioeconomic status" reaches "almost 85 percent of Americans, according to a 2005 New York Times poll").

60 *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

61 *Schuetz v. Coal. to Defend Affirmative Action*, 701 F.3d 466 (6th Cir. 2012), cert. granted, 133 S. Ct. 1633 (2013).

The Roberts Court conservatives may look forward to rejecting affirmative action in that case, when the Chief Justice can also celebrate the democratic value of upholding a referendum (though that would perhaps be in tension with *Romer v. Evans*⁶²). But even then, it seems unlikely the Court would outright reject Powell or O'Connor's university focused opinions, given the unique referendum context. *Fisher* therefore may be the precursor to a more significant decision.⁶³

CONCLUSION

This Essay has shown that *Bakke* has many aspects of other super-precedents. It is a well tested precedent in court, it has become the foundation for legal doctrine in the area, and there has been substantial societal reliance in the U.S. and even abroad. Federal agencies under President Obama have recently announced that *Fisher* means *Bakke* is still good law.⁶⁴ On the other hand, Ringhand and Collins can argue that a Supreme Court nominee could be confirmed without endorsing *Bakke*, unlike *Griswold*. Moreover, if the Court overturns the Sixth Circuit next term and reaffirms the tightening of strict scrutiny, *Bakke* may be a super-precedent in a narrow realm only. If nothing else, however, *Bakke's* durability shows the power of a pragmatic, middle of the road, approach to divisive constitutional issues, and that is important, even if its super-precedent status diminishes.

62 517 U.S. 620 (1996).

63 For example, this past term's significant voting rights decision in *Shelby County* followed a seemingly minimalist voting rights decision several years ago involving a utility board. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). Yet Chief Justice Roberts there introduced the concept of the equal sovereignty of the states there, that later played a vital role in *Shelby County*. See Linda Greenhouse, *The Cost of Compromise*, N.Y. TIMES OPINIONATOR (July 10, 2013, 9:00 PM) <http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise> (arguing that Justice Ginsburg refused to join the majority in *Fisher* because Ginsburg did not want to compromise her principles such that it might be used against her in a later decision as in the *Austin-Shelby County* pairing of cases).

64 U.S. DEPT. OF JUSTICE& U.S. DEPT. OF ED., QUESTIONS AND ANSWERS ABOUT *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* (2013), available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.pdf>.