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Casting Shadows: *Fisher v. University of Texas* and the Misplaced Fear of "Too Much" Diversity

Susannah W. Pollvogt

> Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before.[1]
>
> - Justice Alito

Justice Alito's comment, made during the recent oral argument before the Supreme Court in *Fisher v. University of Texas at Austin*[2], is troubling on many levels. Significantly, the comment suggests that Justice Alito has not recently re-read *Regents of the University of California v. Bakke*[3] or *Grutter v. Bollinger*[4]—the two Supreme Court decisions that will likely control the outcome in *Fisher*. This is because both *Bakke* and *Grutter* acknowledge two distinct justifications for race-conscious admissions policies, and the justification these cases ultimately endorse is the one Justice Alito appears to be unfamiliar with.

Specifically, per *Bakke* and *Grutter*, the two possible bases for the use of race-conscious admissions policies are: (1) remedial justifications and (2) educational excellence justifications. Remedial justifications posit that, because past race discrimination in admissions decisions limited the number of racial minorities who had access to higher education, race-conscious admissions policies are needed today to bolster the number of students of color in student bodies, and thereby overcome historical deficits. Justice Alito was focused on this type of remedial justification when he characterized the purpose of such policies as "help[ing] students who come from underprivileged backgrounds."[5]

Justifications based in educational excellence work quite differently. Educational excellence justifications are premised on the notion that the use of background-conscious—including race-conscious—admissions policies allows school administrators to compose a diverse body of students that are more likely to espouse diverse viewpoints, which will in turn will support a robust academic conversation and intellectual environment.

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[1] Transcript of Oral Argument at 43, Fisher v. University of Texas at Austin 132 S. Ct. 1536 (2012) (No. 11-345).
[2] 132 S. Ct. 1536.
[3] 438 U.S. 265 (1978)
[4] 539 U.S. 306 (2003).
[5] Transcript of Oral Argument at 43, Fisher v. University of Texas at Austin 132 S. Ct. 1536 (2012) (No. 11-345).

Justice Alito's comment is curious because remedial justifications—those that he seems to believe are in play in *Fisher*—were soundly rejected over thirty years ago in *Bakke*.[6] His comment is also curious because the "very different argument" that Justice Alito did not think he had "seen before" was the educational excellence justification that was explicitly endorsed as constitutionally sound by the Court in *Bakke*, and later reaffirmed in *Grutter*.[7]

Because the Court has twice endorsed the educational excellence justification for race-conscious admissions policies, it is surprising that Justice Alito purported to be unfamiliar with that justification. But Justice Alito's confusion in fact represents a larger confusion on the Court—one that was apparent at oral argument in *Fisher* and that can be traced back to passages in the *Grutter* decision itself—about the relationship between remedial and educational excellence justifications for race-conscious admissions policies.

The Court has the opportunity to sort out this confusion through its forthcoming decision in *Fisher*.

Academic Excellence in Bakke

In his 1978 plurality opinion in *Bakke*, Justice Powell made a strong case for the fundamental importance of educational diversity to the mission of academia.[8]

At issue in *Bakke* was the constitutionality of the admissions policy employed by the Medical School of the University of California at Davis ("U.C. Davis").[9] It is important to note that the type of policy at issue in *Bakke* was entirely different than the type of policy at issue in both *Grutter* and *Fisher*. Under the policies at issue in *Grutter* and *Fisher*, admissions decisions are made by considering race as one factor in a holistic assessment of admissions applications.[10] By contrast, the U.C. Davis policy called for a very blunt "set-aside" mechanism that reserved a certain number of slots in the incoming class for racial minorities.[11]

Because the policy in *Bakke* relied on facial race classifications, Justice Powell applied strict scrutiny, which required the University to prove that it had a compelling interest justifying use of the policy, and that race classifications were necessary to achieve that interest.[12]

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[6] *See Bakke*, 438 U.S. at 310.
[7] *Id*. at 311-12; *Grutter*, 539 U.S. at 328.
[8] *See Bakke*, 438 U.S. at 311-15.
[9] *Id.* at 269-70.
[10] *Grutter*, 539 U.S. at 315-16; Fisher v. University of Texas at Austin, 631 F.3d 213, 216-17 (2011).
[11] *Id.* at 269-70.
[12] *Id.* at 290-91.

The University offered four interests in support of the policy. Justice Powell rejected the first goal—reaching a certain numerical representation of minority students—as facially invalid discrimination for its own sake.[13] He also rejected the second goal—ameliorating the effects of past discrimination—as insufficiently precise.[14] Regarding the third goal—increasing the number of physicians in underserved communities—Justice Powell determined that the school had failed to show that racial preferences were necessary to achieve that goal.[15]

Thus, the only governmental interest Justice Powell found sufficiently compelling was that of "attain[ing] . . . a diverse student body,"[16] which he characterized as "clearly . . . a constitutionally permissible goal for an institution of higher education."[17] Justice Powell further emphasized that this interest was grounded in weighty First Amendment freedoms.[18]

Justice Powell then went on to the second prong of strict-scrutiny analysis: an examination of whether the policy was narrowly tailored. He concluded that the strict numerical "set-aside" for minority students was too blunt of an instrument to meet this demanding standard.[19] Justice Powell offered that it would be permissible, by contrast, for the school to consider race as one factor among many in an individualized assessment of applicants.[20] And going forward, schools began constructing their admissions policies in precisely this manner.

Although the *Bakke* decision was only a plurality opinion, it holds an important place in the Court's affirmative action jurisprudence because it stated unequivocally that generalized remedial justifications could not support race-conscious admissions policies. Only educational excellence justifications, with their grounding in the First Amendment, were sufficiently compelling.

Grutter *and the Seeds of Confusion*

Twenty-five years later, the Court in *Grutter* confirmed via majority opinion the validity of the core conclusion of Justice Powell's plurality decision in *Bakke*: that promoting a diverse educational environment is a compelling state interest for purposes of strict scrutiny review.[21]

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[13] *Id.* at 308-09
[14] *Id.* at 310.
[15] *Id.* at 310-11.
[16] *Id.* at 311.
[17] *Id.* at 311-12.
[18] *Id.* at 313.
[19] *Id.* at 315.
[20] *Id.* at 317-19.
[21] *Grutter*, 539 U.S. at 328.

The admissions policy at issue in *Grutter* was that of the University of Michigan Law School.[22] That policy self-consciously sought to comply with Justice Powell's opinion in *Bakke* by using race as only one factor in a holistic assessment of each individual candidate.[23] Further, the school asserted only one state interest in support of the policy: that of enhancing educational diversity of the sort described by Justice Powell in *Bakke*.[24]

The *Grutter* Court approved of the school's compelling interest in educational excellence and its narrowly tailored approach to achieving that goal, reaffirming *Bakke's* rightness. But the *Grutter* Court went further. Specifically, the Court disaggregated race as a component of the diversity that supports educational excellence, and subjected the inclusion of race to yet another layer of scrutiny.[25] Justice O'Connor, writing for the Court, recognized the current salience of race to maintaining a diversity of viewpoints, but then characterized this relevance as unfortunate and necessarily time-limited:

> Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.[26]

From this unexamined normative assumption that race should not "matter" as an aspect of identity, and the related—and equally unsupported—prediction that, as we progress as a society, race will inevitably cease to matter, Justice O'Connor concluded that race-conscious admissions policies must be "limited in time."[27] She even went so far as to speculate that such policies would be unnecessary in twenty-five years.[28]

There are several problems with this contention. First, it is based in impressionistic claims about social reality that are generally beyond judicial competence.[29] Second, the twin claims that (1) in an ideal world, race would not matter, and (2) we are progressing toward such a world because race discrimination itself is in a state of inevitable decline, are both highly contested

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[22] *Id.* at 313-16.
[23] *Id.* at 314.
[24] *Id.* at 314-15.
[25] *Id.* at 341-42.
[26] *Id.* at 333.
[27] *Id.* at 342 ("In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.").
[28] *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").
[29] Justice Powell himself acknowledged: "The kind of variable sociological and political analysis necessary to produce such rankings [of the relative hardships borne by different racial groups] simply does not lie within the judicial competence - even if they otherwise were politically feasible and socially desirable." Bakke, 438 U.S. at 297.

and contestable. Under this analysis, race matters *only* because it is and has been an axis of discrimination. This seems wrong, and even patently offensive.

Further, by relying on these problematic assumptions, Justice O'Connor's analysis fails to apprehend the value and purpose of educational excellence as a justification for race-conscious admissions policies. In *Bakke*, Justice Powell drew a clear distinction between remedial justifications, which are aimed at absolving the sins of past discrimination, and educational excellence justifications, which are forward-looking, and not dependent on assertions about a social reality of race subordination (or the supposedly inevitable dissolution of such subordination). Pursuant to an educational excellence justification, one assumes that the school seeking to diversify its student body is in the best position to assess the type and degree of diversity that should be cultivated at any point in time, in order to maximize educational benefits at that school. The Court should defer to these judgments, which are fact-specific, context-dependent, and informed by both educational expertise and First Amendment freedoms.

Manifestations of Confusion in Fisher

The Court's confusion about the distinction between remedial and academic excellence justifications then manifested during the oral arguments in *Fisher*.

The policy of the University of Texas ("UT") at issue in *Fisher* bears a striking resemblance to the admissions policy validated in *Grutter*, in part because UT carefully patterned its policy on the Supreme Court's precedent. Specifically, for a certain portion of the applicant pool, UT considers not only an applicant's "Academic Index," but also on an applicant's "Personal Achievement Index," which is meant to take into account individual, non-quantifiable attributes. The Personal Achievement Index is based on a holistic assessment of each applicant's file. Within this assessment is a consideration of "special circumstances," which may include socioeconomic status and race, among various other factors.

This aspect of the admissions policy operates side-by-side with a "top ten percent" plan, under which all Texas applicants graduating within the top ten percent of their high school graduating class are guaranteed admission to UT. The top ten percent plan, which contains no facial race classification, has been the primary factor in increasing racial diversity within the UT student body.

As described above, subjecting a law or policy to strict scrutiny under the Equal Protection Clause involves a two-prong analysis: first, a court determines whether the challenged law or policy serves a compelling state interest; second, the court determines whether the mechanism employed by the law or policy is narrowly tailored to serve that compelling interest. In *Fisher*, it was uncontested that the University of Texas's race-conscious undergraduate admissions policy (1) is

designed to serve the acknowledged compelling state interest in student-body diversity and (2) serves this interest in a manner that complies with *Grutter*.[30]

On what basis, then, did Fisher challenge the University of Texas' policy? Not surprisingly, Fisher's argument picks up on the doctrinally ambiguous "time limitation" requirement announced in *Grutter*. Specifically, Fisher argued that, to prove that its policy was narrowly tailored, the University had to prove that a race-conscious admissions policy was *still* necessary today, in 2012, to achieve the goal of student-body diversity.[31] This argument is essentially an end-run around the standards established in *Bakke* and *Grutter*—it requires schools to prove *on an ongoing basis* that diversity—including racial diversity—remains a compelling state interest, but cloaks the attack as an argument under the tailoring prong of strict scrutiny.

Having framed the issue in this manner, Fisher then argued that the race-conscious component of UT's admissions policy was no longer necessary because the top ten percent plan had succeeded so dramatically in increasing racial diversity within the student body. This argument resulted in the following opening passage in the Fifth Circuit's decision in *Fisher*, which is humming with anxiety that UT might one day be home to too much diversity:

> While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*, UT's program acts upon a university applicant pool shaped by a legislatively[]mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon of the otherwise-plain legality of the *Grutter*-like admissions program . . . .[32]

Thus, the only basis for challenging UT's precedent-compliant policy was the fear that, when combined with the successful top ten percent policy, the University might be creating excessive diversity.

This anxiety about excessive diversity was echoed at oral argument before the Supreme Court. Questioning from a number of Justices had a distinct "are we there yet?" quality. For instance, the Justices pressed counsel for UT to identify a number or percentage of minority students that would indicate that the school had reached a "critical mass" of minority enrollment.[33] Justice Scalia was fixated on

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[30] *Fisher*, 631 F.3d at 213 ("[T]he University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger* . . . .").
[31] *Id.* at 31,
[32] *Fisher*, 631 F.3d at 216-17.
[33] *See, e.g.*, Transcript of Oral Argument at 14, *Fisher*,132 Sc. Ct. 1536 (No. 11-345), where Justice Sotomayor pressed, "[s]o could you tell me what a critical mass was? I'm looking at the

how UT determined whether there were "enough" minorities in any given class.[34] In this way, the Justices were backing UT into a doctrinal corner, because if the school were to admit that it was assessing sufficient diversity against a numerical standard, it would be admitting to relying on unconstitutional quotas. Counsel for UT resisted the Court's efforts to characterize the policy in this manner, stressing that race was only one component of the diversity the University sought, and that the need for diversity was assessed in a nuanced manner.[35]

At the end of the day, the concern that a school might achieve too much diversity does not fit well with the educational excellence justification endorsed in *Bakke* and purportedly reaffirmed—albeit in a confused way—in *Grutter*. Because this concern assumes that, once some quantifiable "critical mass" of minority students has been reached, the need for schools to consciously construct diverse students bodies will disappear. Under an educational excellence justification, by contrast, we would assume that schools are free to continuously reassess their diversity needs and refine their admissions policies to achieve an optimal student-body composition. And schools would be permitted to include consideration of race in this analysis, so long as race still "matters" as a part of identity.

Conclusion

In deciding *Fisher*, the Court should strive to craft a rule for all time—a rule that affords universities sufficient latitude to assemble robust, diverse student bodies in the face of our ever-changing, pluralistic society. But based on the dialogue initiated by the Justices during the *Fisher* oral argument, the Court seems to be headed in a different direction. In a sense, the Court seems to be stuck in time—specifically, in a mythical time where we have ended the social practices that suppress diversity in powerful institutions, such that these institutions no longer need to remedy the lingering harms of past discrimination. There is plenty with which to argue in this premise itself, but what is most important is that it entirely misses the point. Per the Court's own precedent, diversity-enhancing admissions policies are desirable not because they supposedly cure the ills of past discrimination, but because they foster vibrant intellectual environments—the goal of every academic institution in selecting students for admission.

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number of blacks in the University of Texas system. Pre-*Grutter*, when the state was indisputably still segregating, it was 4 percent. Today, under the post-*Grutter* system, it's 6 percent. The 2 percent increase is enough for you, even though the state population is at 12 percent? Somehow, they've reached a critical mass with just the 2 percent increase?" *See also id.* at 17, where Justice Sotomayor asked counsel to define the point at which "a district court or a university know[s] that it doesn't have to do any more to equalize the desegregation that has happened in that particular state over decades..." and at 49, where Justice Sotomayor asked about the point at which the Court should "stop deferring to the University's judgment that race is still necessary?" *See also id.* at 46-47, where Chief Justice Roberts asked counsel, "[w]hen will I know that you've reached a critical mass?"

[34] *See id.* at 34-35. Justice Scalia was also concerned with what resources the University might be spending to gather this information, evoking an image of a vast cadre of affirmative action officers swarming the UT campus to monitor sufficient levels of racial diversity in every classroom. *Id.*

[35] *Id.* at 39-40.