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THE FORESEEABLE CONSEQUENCES OF ENDING RACE-BASED ADMISSIONS POLICIES*

Professor Tanya Washington Hicks**

Race-conscious admissions efforts lie on the jurisprudential chopping block as the United States Supreme Court readies itself to hear oral arguments in *Harvard v. Students for Fair Admissions* on Halloween.[1] This case and its companion case, *University of North Carolina v. Students for Fair Admissions*, present a full-frontal challenge to the constitutionality of using race in admissions at institutions of higher-education.[2] Many court watchers and scholars predict a majority of the Supreme Court is poised (and perhaps appetent) to overturn *Grutter v. Bollinger*—a case that embraced

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Professor Washington Hicks considers herself to be an activist scholar, and a belief that the true value of the law lies in its capacity to improve the human condition animates her work.

1. *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/ [https://perma.cc/L787-8Y3E]; Brandon Hasbrouck, *American Horror Story: The Supreme Court*, BOS. GLOBE, https://www.bostonglobe.com/2022/10/03/opinion/american-horror-story-supreme-court/ [https://perma.cc/F82X-Q5DS] (Oct. 3, 2022, 12:51 PM). *See generally*, Students for Fair Admissions, Inc. v. President & Fellows Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

2. *Students for Fair Admissions, Inc. v. University of North Carolina*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/ [https://perma.cc/XVA9-MPLM]. *See generally*, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022).

educational diversity, of which racial diversity is but one constituent aspect, as a compelling constitutional goal.[3] I agree with the presage, but not because of the ideological shift on the highest court in the land[4] or because of "racial-exhaustion" and a desire amongst a majority of the Court to quicken colorblindness.[5] Though these realities will inform the inevitable ending of race in admissions, I believe the determinative factor is that the concept of racial diversity was never properly defined in terms of its educational relevance.

Careless analysis casts racial diversity as a stand-in justification for "*real* affirmative action," rather than as a way to serve legitimate educational prerogatives.[6] The path leading to this precipice for higher education, college-aspiring students of color, and our society as a whole is littered with cases presenting judicial inventions that frustrate the full realization of racial diversity's educational promise and academic and intellectual yield.[7] The use of race in admissions has

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3. Adam Harris, *This is the End of Affirmative Action*, ATLANTIC (July 26, 2021), https://www.theatlantic.com/magazine/archive/2021/09/the-end-of-affirmative-action/619488/ [https://perma.cc/NQ72-NZRT]; *see* Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

4. Rob Garver, *Supreme Court to Revisit Affirmative Action as Conservative Majority Flexes Muscle*, VOA (Jan. 26, 2022, 8:49 AM), https://www.voanews.com/a/supreme-court-to-revisit-affirmative-action-as-conservative-majority-flexes-muscle-/6412865.html [https://perma.cc/3B6Q-K9NB].

5. Kimberly Atkins Stohr, *John Roberts's Constitutional Color-Blindness Threatens Civil Rights*, BOS. GLOBE, https://www.bostonglobe.com/2022/09/22/opinion/john-robertss-constitutional-color-blindness-threatens-civil-rights/ [https://perma.cc/KCP8-CULA] (Sept. 22, 2022, 12:31 PM).

6. *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (quoting Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002)) ("Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'"); *see also* Tanya Washington, *The Diversity Dichotomy: The Supreme Court's Reticence to Give Race a Capital "R"*, 72 U. CIN. L. REV. 977, 978 (2003) ("The majority's qualified endorsement of racial diversity as an educational imperative weakened its recognition that racial diversity's educational yield is a compelling interest. By reaching the right result for the wrong reasons, the majority may have frustrated advocates' ability to present the racial diversity rationale as a constitutionally viable justification for race conscious admissions policies, and ultimately may have done more harm than good.").

7. *See* Tanya Washington, *Jurisprudential Ties that Blind: The Means to Ending Affirmative Action*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 1–2 ("Beginning with the Court's determination of the limited purpose and power of the Equal Protection Clause in *Plessy v. Ferguson*, . . . the Supreme Court has deliberately devised and drawn upon [several jurisprudential inversions] to recast the central covenant of the Equal Protection Clause as racial neutrality, rather than racial equality. . . . [T]his reading of the Clause renders affirmative action efforts largely rhetorical.").

been critically wounded by a thousand jurisprudential cuts,[8] and though the policy is not dead yet, its passing is imminent.[9]

The constitutional value of educational diversity, which the Court affirmed in *Grutter v. Bollinger*, is at the heart of the *Harvard* case.[10] The rationale for considering race in admissions debuted in Justice Powell's plurality opinion in *Regents of the University of California v. Bakke*.[11] But the constitutional status of educational diversity languished in jurisprudential purgatory for 25 years because it was not acknowledged as a compelling constitutional goal by a majority of the Court.[12] Justice Powell cast the deciding vote in *Bakke* to invalidate a race-conscious admissions quota that set aside sixteen seats for Black medical school applicants.[13] With his vote, Justice Powell advanced educational diversity as the only justification for the use of race that *could* withstand strict constitutional scrutiny, absent particularized *de jure* racial discrimination.[14] In his opinion, he was careful to characterize racial heterogeneity as an aspect of educational diversity that serves educational prerogatives as defined by colleges and universities—the purveyors of the quintessential marketplace of ideas.[15] Justice Powell explained:

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8. Jacqueline Hubbard, *Affirmative Action is on Life Support*, WEEKLY CHALLENGER (Oct. 10, 2019), https://theweeklychallenger.com/affirmative-action-is-on-life-support/ [https://perma.cc/7C3D-74CR].

9. Edwin Rios, *Supreme Court Could Strike Blow Against Affirmative Action in Harvard Case Ruling*, GUARDIAN (Aug. 2, 2022, 11:37 AM), https://www.theguardian.com/us-news/2022/aug/02/supreme-court-affirmative-action-harvard [https://perma.cc/QPE5-H7TS].

10. *See Grutter*, 539 U.S. at 325.

11. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

12. *See* John C. Jeffries, Jr., Bakke *Revisited*, 2003 SUP. CT. REV. 1, 10–11 (2003) ("[A]nti-affirmative-action activists began to claim not merely that Powell's position was ill-founded or illogical or unwise . . . but that it was not the law[,] . . . arguing that the five Justices who approved race-conscious admissions had no common ground and therefore that their votes could not be summed up in favor of any position.").

13. *See Bakke*, 438 U.S. at 269–70.

14. *Id*. at 311–12, 319–20 ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

15. *Id.* at 312. Casting the selection of those students who would contribute to the marketplace of ideas as an exercise of academic freedom protected by the 1st Amendment. *Id.* at 313. As Justice Powell notes

> it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. Thus, in arguing that its universities must be accorded the right

> Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body . . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics *of which racial or ethnic origin is but a single though important element*.[16]

For Justice Powell, the compelling constitutional goal was the educational benefits derived from racial diversity, not racial heterogeneity in and of itself.[17]

Even as the *Grutter* decision confirmed the precedential force of Justice Powell's lonely recognition of educational diversity as a compelling interest, the opinion distorted the relationship between racial diversity (i.e., the means) and educational benefits derived from racial diversity (i.e., the constitutional end).[18] This analytical misstep resulted from the Court's reluctance to highlight the educational relevance of racial diversity and to distinguish it from remedial uses of race, despite evidence presented by the University of Michigan School of Law documenting the relationship between racially heterogeneous learning spaces and higher-order thinking and educational imperatives.[19] As I observed in my very first law review article:

> to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

16. *Bakke*, 438 U.S. at 314–15.

17. *Id.* at 315.

18. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

19. *See* Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. ILL. L. REV. 691, 702–03 (2004) (noting that Justice O'Connor, in the section of her opinion in *Grutter v. Bollinger* that identifies the interests being served by the law school's use of race-based admissions, "is careful to avoid attaching the adjective 'racial' to the word 'diversity'"). Though the *Grutter* opinion described the educational benefits derived from racial diversity as "substantial" and referenced the many expert reports and studies documenting racial diversity's educational yield, its constitutional analysis of the relevance of racial diversity to educational outcomes was anemic. *See Grutter*, 539 U.S. at 330–32.

> While, concededly, racial diversity shares with remedial affirmative action a consequential increase in racial heterogeneity in classrooms across the nation, the focus of the diversity rationale is neither retributive nor restorative. As distinguished from affirmative action programs and policies, diversity's underlying rationale is pedagogical and its orientation is prospective; it seeks to achieve an educationally relevant end. The racial diversity rationale is education policy that contemplates as its chief aspiration the provision of a learning environment enriched by the admission of a student body with multifarious experiences. Within the scope of its importance as a legitimate educational aspiration, diversity distinguishes itself from affirmative action and finds its independent constitutional footing.[20]

Educational diversity embraces race as an asset, not as a liability. Rather than acknowledging the educational relevance of racial diversity, the Court shoehorned racial diversity into a remedial affirmative action framework.[21] In *Grutter*, Justice O'Connor gave a curt nod to racial diversity's educational relevance, even as she cloaked educational diversity in remedial affirmative action garb.[22] Let me be clear: I support the use of race in higher education admissions processes to mitigate and remedy historical and continuing racial discrimination, including *de facto* discrimination. And I believe the *Bakke* Court was wrong in rejecting the amelioration of societal

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20. Washington, *supra* note 6, at 984 (citations omitted).

21. Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 107 (2012) (noting that, after describing the "nuanced approach" to strict scrutiny for analyzing the diversity interest, Justice O'Connor "went on to apply the strict scrutiny standard of narrow tailoring developed to fit the interest in remedying past discrimination in the affirmative action context, rather than constructing a standard of narrow tailoring to fit the interest in student body diversity in public higher education").

22. *Id.* at 79 ("The Court's analysis of the 'diversity interest' suffers first from confusion over the conceptual distinction between remedial affirmative action on the one hand, and the aspirational diversity interest on the other. This conceptual confusion is compounded by the analytical deficiency of our equal protection doctrine to accommodate a non-remedial interest.").

discrimination ("*de facto* discrimination") as a compelling interest.[23] However, remedial affirmative action and racial diversity, as a constituent element of educational diversity, serve different constitutional goals. By conflating them, the *Grutter* opinion failed to give educational diversity the full-throated defense it deserves.[24] Though a slim majority of the *Grutter* Court supported educational diversity as a constitutionally compelling goal, the majority's reasoning deprived racial diversity of its constitutional value in service of educational ends.[25] Thus, the Court made the right decision for the wrong reasons, thereby sowing the seeds of its own overruling.

Following the *Grutter* decision, educational diversity has barely survived as a pretextual justification for using race in admissions.[26] In every challenge to the use of race in college and university admissions, the rationale has come perilously close to being ruled unconstitutional.[27] Whether educational diversity is a constitutionally compelling interest is squarely before the Court in the *Harvard* case, and the future use of race in admissions hangs in the balance. The Court could uphold *Grutter's* precedential embrace of the educational benefits of racial diversity as a constitutionally compelling interest and determine Harvard's use of race to be sufficiently narrowly tailored to achieve that goal. The Court could uphold *Grutter's* imprimatur of educational diversity but find that Harvard's specific use of race fails

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23. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

24. Hawkins, *supra* note 21, at 77.

25. *Id.* at 107–08.

26. Richard Thompson Ford, *Derailed by Diversity*, CHRON. HIGHER EDUC. (Sept. 2, 2022), https://www.chronicle.com/article/derailed-by-diversity [https://perma.cc/C4J8-DQBW] ("Diversity has kept affirmative action on life support but deprived it of the opportunity to thrive.").

27. *See, e.g.*, Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) ("[T]he way 'to achieve a system of determining admission to the public schools on a nonracial basis,' . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (citation omitted) (quoting Brown v. Bd. of Educ. (*Brown II*), 349, U.S. 294, 300–01 (1955))); *id.* at 758 (Thomas, J., concurring) ("The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decision-making."); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 315 (2013) (Thomas, J., concurring) ("I write separately to explain that I would overrule *Grutter v. Bollinger*, . . . and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." (citation omitted)); Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 389 (2016) (Thomas, J., dissenting) (reiterating that *Grutter* should be overruled).

to meet strict scrutiny's narrowly tailored requirement because, as Students for Fair Admissions alleges, it discriminates against Asian-American applicants.[28] The Court could reverse *Grutter* and categorically ban the use of race in admissions decisions by colleges and universities, thereby invalidating Harvard's race-conscious admissions policy *a priori*. Finally, the Court could reverse *Grutter* and, as it did in *Dobbs vs. Jackson Women's Health Organization*,[29] punt the constitutional question to state legislatures to either regulate the use of race in admissions decisions in their state colleges and universities or outlaw it altogether.[30]

As an educator who has curated law school learning spaces and facilitated classroom discussions for two decades, I am convinced that higher-order thinking and rigorous, intellectually rich discourse are informed and enhanced by racial heterogeneity.[31] I am also convinced that racial homogeneity in the classroom, which is a likely consequence of "race-neutral" admissions policies, will substantially and substantively diminish the educational experience for White students, who will be confined to all white learning spaces. I am equally convinced that a Supreme Court opinion requiring institutions of higher education to *unsee* race will usher in a return to overt racially discriminatory admissions practices and will ensure a dearth of future doctors, lawyers, judges, teachers, engineers, scientists and other degreed professionals of color, which will adversely impact society

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28. *See Bakke*, 438 U.S. at 287 ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); Brief for Petitioner at 75, Students for Fair Admissions, Inc. v. President & Fellows Harvard Coll., No.20-1199 (May 2, 2022) ("If the district court had applied strict scrutiny, it would have found Harvard liable for penalizing Asian Americans. There is no evidence that Asian-American applicants actually have less desirable personal qualities. . . . Harvard's burden is particularly high here because it penalized Asian Americans in the most 'subjective' parts of its process.") (citations omitted).

29. *See generally* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

30. *See* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 314 (2014) (plurality opinion) (upholding amendment to Michigan's constitution "prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions," reasoning that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters").

31. Tanya Washington, *Students' Demand for Diverse Faculty is a Demand for a Better Education*, CONVERSATION (Dec. 2, 2015, 6:05 AM), https://theconversation.com/students-demand-for-diverse-faculty-is-a-demand-for-a-better-education-50698 [https://perma.cc/EF2J-PSXM].

and our democracy.[32] These dire (desired?) consequences are predictable, which calls the question: Given how educational imperatives *will be* impaired by prohibiting consideration of race in admissions, is a return to racial homogeneity in America's college and university classrooms and in the ranks of our professional class the foreseeable end that justifies the inevitable means?

I'm just sayin'!

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32. Meredith Deliso, *What's at Stake as Supreme Court Revisits Affirmative Action in College Admissions*, ABC NEWS (Jan. 28, 2022, 6:06 AM), https://abcnews.go.com/US/stake-supreme-court-revisits-affirmative-action-college-admissions/story?id=82468299 [https://perma.cc/4M7U-MRLG] ("Disparities in admissions have implications for those who enter professional fields, like law or medicine, as well as higher education faculty[.] . . . I think it will make the quality of education less robust and less rigorous . . . [and] it will mean we also end up with fewer racially diverse professors and professionals. It's going to have adverse and broad consequences for our society.") (quoting Tanya Washington, Professor, Georgia State University College of Law).