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View from the Gallery – Oral Argument in *Fisher v. University of Texas–Austin*

by Rachel Godsil

Hotly contested cases are a form of political theater. The primary actors are the lawyers for the parties and the Supreme Court Justices themselves. However, truly significant cases elicit broader participation akin to a Greek chorus in the form of *amici curiae* (defined as "friends" of the Court). *Fisher v. University of Texas,* the Court's most recent challenge to affirmative action in higher education, appears to be one of those cases; it elicited an enormous number of amicus briefs from a wide range of perspectives.

At issue is Abigail Fisher's claim that the University of Texas violated her rights under the Equal Protection Clause by considering race as one factor among many in its admissions policy. Ironically, perhaps, Ms. Fisher has already attended and graduated from Louisiana State University—so the harm to Ms. Fisher is speculative. The case compelled attention because it is seen as a potential challenge to *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Court held in a Justice Sandra Day O'Connor opinion that a university may conclude that obtaining the educational benefits of diversity, including racial and ethnic diversity, constitutes a compelling interest and therefore, so long as its means is narrowly tailored, is constitutional. The Court noted the constitutional tradition of granting "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." 539 U.S. at 328. And the Court affirmed the Law School's goal of attaining a "critical mass" of underrepresented minority students in order to achieve the educational benefits that diversity is designed to produce.

The parties, Ms. Fisher and William Powers, the president of the University of Texas, were present in the gallery, but the courtroom was crowded with others equally concerned with the outcome of the case. Many were the lawyers who had authored amicus briefs in the case — myself included (I co-authored a brief on behalf of experimental social psychologists describing the "stereotype threat" phenomena first identified by Claude Steele and Joshua Aronson in the mid-1990s, which explains the effect on performance of the anxiety that a person will confirm a negative stereotype about their identity group. Stereotype threat has been shown systematically to depress performance of minority students on tests such as the SAT, and, accordingly, we argued to the Court that a truly meritocratic admissions policy should take this effect into account.)

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Others had unique connections to the role of race at the University of Texas, including the grandson and other members of Heman Sweatt's family, who as amici shared the story of the brave man who successfully obtained admission of African Americans to the University of Texas Law School in *Sweatt v. Painter*, 339 U.S. 629, one of the important cases that paved the way for *Brown v. Board of Education*. Students from the University of Texas' Black Student Association attended, as did one of my own students who, despite having spent all night in line in front of the Court, was thrilled to be sitting behind Jesse Jackson and Al Sharpton. Most notable, perhaps, were the presence of both Cecilia Marshall, the wife of the late Thurgood Marshall, and former Justice Sandra Day O'Connor.

The Plan at Issue

The University of Texas' admissions plan that is at issue in *Fisher* has a tangled history. It is in large part a reaction to earlier litigation challenging the University of Texas' use of race in admissions. Prior to the *Grutter* decision, in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held unconstitutional the University of Texas School of Law's consideration of race in admissions. In response, UT revised its admissions policy and excluded the consideration of race. (See generally Brief Submitted by Respondents University of Texas, pp. 6-10.) The new policy adopted a Personal Achievement In-

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Russell Means

We dedicate this issue of *Poverty & Race* to Russell Means, who passed away in October, the charismatic Oglala Sioux who co-led (with Dennis Banks) the 1973 Wounded Knee protest and sustained activism throughout his life, calling attention, internationally as well as here at home, to the nation's history of injustice against its indigenous peoples.

Rachel Godsil (rachel.godsil@shu.edu) is the Eleanor Bontecou Professor of Law at Seton Hall Univ. Law School and the Director of Research to the American Values Institute.

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dex (PAI) to be used with its Academic Index (AI), which included a "holistic review of an applicant's leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances." "[S]pecial circumstances" included factors such as the "socio-economic status of a family," "language spoken at home," and "socio-economic status of school attended" (but not an applicant's race). UT also devoted substantial efforts to developing race-neutral initiatives that it hoped would increase enrollment of underrepresented minorities, such as creating several scholarship programs aimed at recruiting highly qualified students of all races from lower socio-economic backgrounds and students who would be the first in their family to attend college.

These efforts were unsuccessful. UT experienced an immediate and serious decline in enrollment among underrepresented minorities. Between 1995 and 1997, African-American enrollment dropped almost 40% (from 309 to 190 entering students) and Hispanic enrollment dropped by 5% (from 935 to 892 entering students). The Texas Legislature responded to *Hopwood* by enacting the top 10% law (House Bill 588), which guarantees admission to UT to any graduate of a Texas high school who is ranked in the top 10% of his or her high school class, beginning with the 1998 admissions cycle. Tex. Educ. Code § 51.803. An acknowledged purpose of the law was to increase minority admissions, given the loss of race-conscious admissions.

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UT found that the top 10% law increased minority admissions, but at significant cost to educational objectives. It is atypical for a major university to base admissions decision solely on class rank, without regard to other standard markers of academic achievement and potential. And UT found that basing the admissions decision on "just a single criterion" undermined its efforts to achieve diversity in the broad sense.

Many have also argued that the racial diversity the law does add is mostly a product of the fact that Texas public high schools remain highly segregated in regions of the state—Latino students tend to live in the Rio Grande Valley, and Black students are isolated in urban areas such as Dallas and Houston. That limits the diversity that can be achieved within racial groups and creates "damaging incentives."

Even with other diversity initiatives Black and Latino enrollment remained low.

The portion of the class admitted pursuant to the top 10% law has ranged from roughly 60 to 80%. To fill the remaining seats in its freshman class, UT used the full-file review process developed after *Hopwood*—which considered numerous individual characteristics (but not race).

With both the top 10% plan and the holistic review in place, even with other diversity initiatives, Black and Latino enrollment remained low. In Fall 2002, only 3.4% of the freshman class was African-American and 14.3% was Latino, below 1996 levels. The numbers were 4.5% and 16.9%, respectively, in 2004.

School officials were also concerned that the diversity they had attained failed to reach so many classrooms. They found that nearly 90% of undergraduate classes of the most common size at UT—sections with 10-24 students—enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one Latino student. Slightly larger classes were similarly constituted. In classes enrolling 25-49 students, over 70% had zero or one Black student enrolled. Classes of this sort are the most likely to allow for discussion or exchanges where the educational benefits of diversity are realized.

Following the Supreme Court's decision in *Grutter*, UT added race and ethnicity as factors to be considered among the "special circumstances" criteria in the PAI. Beginning in 2005, UT has enrolled 4.5%-6% Black students and 15% and 25% Latino students. By comparison, Texas high schools graduate approximately 15% Black students, and the percent of Latino students has grown to 40%.

The Oral Argument as Theater

The case was argued by Burt Rein for Abigail Fisher, Greg Garre for the University of Texas, and Solicitor General Donald Verilli, who appeared in in support of UT. Missing was the voice of the underrepresented Black and Latino students.

Not surprisingly, the questioning reflected the sharp divisions on the Court. Justices Sotomayor, Ginsberg and Breyer's questions reflected an adherence to the precedential value of *Grutter*, the view that the Texas plan is consistent with *Grutter* and thus should be upheld. Chief Justice Roberts, along with Justices Scalia and Alito, challenged whether an applicant's race or ethnicity can be reasonably ascertained and whether the concept of "critical mass" has any meaning. Justice Kennedy's position is less clear. His questions indicated that he is wrestling with what role race actually plays in the Texas plan. Justice Kagan was not physically present, since she recused herself from hearing the case. As a former Dean of a law school, her perspective would have added great value.

Summations of the gist of the Justices' questions fail to convey the tenor

of the questions—and the degree of emotion presented by these far from dry legal issues. And perhaps most relevant, summations cannot provide a reader with a glimmer of whether the questions displayed an attempt to engage the lawyers in a genuine discussion of the issues or whether the questions were sound bites intended persuade.

A Challenge to *Grutter*?

Justice Breyer early in the argument asked Fisher's lawyer, Bert Rein, directly: "whether you want us to— or are asking us to overrule *Grutter*. *Grutter* said it would be good law for at least 25 years, and I know that time flies, but I think only nine of those years have passed. And so, are you? And, if so, why overrule a case into which so much thought and effort went and so many people across the country have depended on?"

Rein disclaimed that Fisher's goal is for the Court to overrule Grutter altogether. Rather, he claimed, UT's failure was its use of race in this particular plan—in light of other possible alternatives. Justice Ginsburg appeared unconvinced, asking Mr. Rein during his rebuttal how the UT plan differed from the "Harvard plan which —that started all this off in 1978, decided by Justice Powell? Is it any different from how race is used in our military academies?"

Judges as Admissions Officers

Rein's response elicited a new set of concerns from Justices Sotomayor and Breyer. Justice Sotomayor queried: "So now we're going to tell the universities how to run and how to weigh qualifications, too?" And Justice Breyer remonstrated: "There are several thousand admissions officers in the United States, several thousand universities, and what is it we're going to say here that wasn't already said in *Grutter* that isn't going to take hundreds or thousands of these people and have Federal judges dictating the policy of admission of all these universities? The notion of institutional competence and the appropriate degree of intrusion of courts is common in constitutional litigation. Often, Justices contend that the Court should exercise "restraint" and refrain from inserting themselves into areas that are traditionally the domain of the states or private actors. Such an argument would seem persuasive, particularly in the realm of higher education.

Who Counts?

Almost immediately after Greg Garre stood up to argue on behalf of UT, he was challenged to justify the University's method of determining "who counts." Chief Justice Roberts questioned whether "someone who is one-quarter Hispanic check the Hispanic box or some different box?" In response to Garre's contention that a student has an opportunity to check the multiracial box or to self-determine Hispanic, the Chief Justice shot back "What about one-eighth?"

Likely more salient to the ultimate decision is the issue of what constitutes critical mass.

Later, during a discussion of what constitutes a "critical mass" for purposes of satisfying *Grutter*, Justice Alito raised a similar challenge, asking how UT "justif[ies] lumping together all Asian Americans" rather than determining whether they have a "critical mass of Filipino Americans? Cambodian American?".

The issue of how people of color self-identify is generally seen as an internal challenge the individual experiences, as is the very real distinctions within the broad category of "Asian American." However, in the context of the political theater of this case, the questions seemed clearly to intend a very different effect—to suggest that self-identifying as a "Hispanic" would simply be a ploy to game a college admissions officer. However, the record provides no evidence that such "gaming" is occurring – in light of the fact that the number of Latinos has remained so far below the number of graduating students. This form of identification is commonplace—in the Census, k-12 education and virtually every other context.

Defining Critical Mass

Likely most salient to the ultimate decision of the case is the issue of what constitutes a critical mass. In *Grutter*, the Court held that it was consistutional for a university to seek a critical mass of under-represented minority students and relied on the definition of critical mass used by the Michigan Law School's Director of Admissions: "meaningful numbers" or "meaningful representation" that "encourages underrepresented minority students to participate in the classroom and not feel isolated." However, during oral argument, Justice Alito made his position plain in his question to Rein, "Do you understand what the University of Texas thinks is the definition of a critical mass? Because I don't."

The following colloquy between Chief Justice Roberts and UT's lawyer, Garre, best reflects the challenge:

Mr. Garre: Another is that we did look to enrollment data, which showed, for example, among African Americans, that African- American enrollment at the University of Texas dropped to 3 percent in 2002 under the percentage plan.

Chief Justice Roberts: At what level will it satisfy the critical mass?

Mr. Garre: Well, I think we all agree that 3 percent is not a critical mass. It's well beyond that.

Chief Justice Roberts: Yes, but at what level will it satisfy the requirement of critical mass?

Mr. Garre: When we have an en-

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because using two languages exercises the prefrontal cortex section of the brain.

Meanwhile, outcomes from the restrictive language policies of Arizona, California and Massachusetts, which move away from or else effectively ban bilingual education, have been discouraging.

In their edited volume of research studies and research reviews, *Forbidden Language: English Learners and Restrictive Language Policies,* UCLA Professor Patricia Gándara and Northwestern University researcher Megan Hopkins find that, contrary to what English-only proponents had promised, the evidence fails to show that English-only policies resulted in improved educational programming or better educational outcomes for English language learners. Gándara and Hopkins recommend increased use of methods and programs such as dual immersion in which students' home languages are respected as assets and where English learners are fully incorporated into schools rather than separated from other students.

Dual immersion provides a small counterweight to a trend Patricia Gándara terms "triple segregation." Research by Gándara and other experts shows Latino students disproportionately concentrated and separated by ethnicity, by economic class and by language. Latinos are now the nation's largest "minority" group and are more likely than even African-American students to attend often overwhelmed, unstable high-poverty schools.

In a recent survey of about 900 Arizona teachers, 85% of them said they felt that segregating English learners from English-speaking students in school is harmful to education. Other research indicates that those Arizona teachers have good instincts. For example, in a 2010 study, Russ Rumberger and Loan Tran of the University of California-Santa Barbara analyzed data on segregation levels and achievement in 50 states. They concluded that increasing integration of English language learners with native English speakers would be the most effective thing policymakers could do to improve overall achievement of English language learners. Rumberger and Tran find that the degree of segregation within a school explains most of the variation in English language learners' achievement. In other words, the more integrated English language learners are with English speakers, the better the English language learners tend to do in school.

All students performed better in dual immersion schools.

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Deborah Sercombe stands amid students opening lunch boxes, eating sandwiches and munching on chips in the din of the school cafeteria. She offers a simple and obvious but necessary observation:

"You enable those friendships, you enable integration by putting kids together," she says. "You put kids together in classrooms, and just like this, right here, you put them together just eating lunch. You get them working together with equal status, throughout the day every day. That's the foundation right there." ❑

Resources

The Center for Applied Linguistics: A wealth of information and resources, particularly for educators, related to two-way immersion programs across the nation. http://www.cal.org/topics/ell/immersion.html

Bialystok, E., Craik, F., & Luk, G. (2012). "Bilingualism: Consequences for mind and brain." *Trends in Cognitive Sciences,* 16(4), 240-250.

Collier, V.P. & Thomas, W.P. (2009, November). *Educating English Learners For a Transformed World*. Albuquerque, NM: Fuente Press. Go to www.dlenm.org and click on Fuente Press for a book description and sample material.

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vironment in which African Americans do not --

Chief Justice Roberts: When—how am I supposed to decide whether you have an environment within particular minorities who don't feel isolated?

Mr. Garre: Your Honor, part of this is a—is a judgment that the admi

Chief Justice Roberts: So, I see—when you tell me, that's good enough.

The Chief Justice's questions make a mockery of the thoughtful words of Justice O'Connor in *Grutter*, which reflect directly Justice Powell's reasoning in *Bakke*: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed,' absent "a showing to the contrary.") .

* * *

From a perspective of viewer in the gallery who is of the view that UT's plan should be upheld as consistent with *Grutter*, perhaps the highlight of the argument was the final words of Solicitor General Verrilli: "I think it is important, Your Honors, not just to the government, but to the country, that our universities have the flexibility to shape their environments and their educational experience to make a reality of the principle that Justice Kennedy has identified in, that our strength comes from people of different races, different creeds, different cultures, uniting in a commitment to freedom, and to a more perfect union. That's what the University of Texas is trying to do with its admissions policy, and it should be upheld." ❑