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Diversity, Democracy and White Racial Identity: *Schuette v. Coalition to Defend Affirmative Action*

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DIVERSITY, DEMOCRACY AND WHITE RACIAL IDENTITY: *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

Spring of 2014 will bring an opinion in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court's latest case implicating affirmative action in higher education. When issued, it will follow the Court's last pronouncement on affirmative action, made in June 2013 in *Fisher v. University of Texas*. In that opinion, the Supreme Court affirmed that an institution of higher education's consideration of race in the admissions process is subject to strict scrutiny when under constitutional review.[1] In doing so, the Court also implicitly reaffirmed the diversity rationale, as articulated in *Grutter v. Bollinger*, which allows institutions of higher education to consider race in the admissions process when necessary to admit a diverse entering class. For diversity advocates the *Fisher* holding was a relief, if not a decisive victory, regarding affirmative action, as Justices Scalia and Thomas made clear that the only reason they refrained from striking down the diversity rationale was because they had not been explicitly asked to do so.[2] *Schuette* now presents yet another opportunity for the Court to revisit the diversity rationale, and as such, the continuing viability of affirmative action in higher education is again in question.

The issues to be resolved in *Schuette* also present an opportunity to examine perceptions of race and racial inequality in our democracy, and to consider how the diversity rationale shapes those perceptions. Following the Supreme Court's decision in *Grutter* to affirm the diversity rationale, anti-affirmative action activists mobilized in opposition. In Michigan, activists successfully placed Proposal 2 onto Michigan's 2006 statewide ballot, an initiative to amend the Michigan Constitution to "prohibit all sex- and race-based preferences in public education, public employment, and public contracting."[3] After a balloting process in which activists resorted to deceptive tactics,[4] it ultimately received enough votes to pass by a margin of 58 percent to 42 percent.[5] Now enshrined in the state's constitution as Article 1, Section 26, Proposal 2 ensures that race, sex, color, ethnicity, or national origin cannot be considered in admissions decisions within the State of Michigan, despite the fact that consideration of the same is specifically permitted by *Grutter*.

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Proposal 2 was eventually challenged by the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), in conjunction with a group of concerned faculty members and prospective and current students at the University of Michigan (the Cantrell Plaintiffs). Writing for the Sixth Circuit, Judge Cole struck down Proposal 2, explaining that it unconstitutionally "'targets a program that inures primarily to the benefit of the minority' and reorders the political process in Michigan in a way that places special burdens on racial minorities."[6] Advocates for other types of admissions criterion, he continued, including athletic ability, geographic diversity, or family alumni status, have several options for having the state adopt an admissions policy that considers that factor, including "lobbying the admissions committee, petitioning university leadership, influencing the school's governing board, or initiating a statewide campaign to alter the state constitution."[7] "In contrast," he further explained, "minority students seeking to adopt a constitutionally permissible race-conscious admission policy can only do one thing: amend the Michigan constitution, a process that is described as 'lengthy, expensive, and arduous…'"[8] Judge Cole ultimately concluded that because Proposal 2 forces minorities to "surmount procedural hurdles in reaching their objectives over which other groups do not have to leap," it thus presents an equal protection violation.[9]

Now on *certiorari* to the Supreme Court, the final decision in *Schuette* may significantly impact the fate of race-conscious admissions policies in higher education. Current arguments in support of Proposal 2, however, also reflect problematic understandings of the nature of race and racism in the United States—understandings that are formed, in part, by current deployments of the diversity rationale itself.

The diversity rationale has a *negative* impact on white understanding of race and racial inequality. Although deployed in support of a more racially inclusive higher education sector, the rationale does not actually contribute to progressive thinking about race and identity. Rather, it perpetuates an old story about using black and brown bodies for white purposes, as institutions of higher education often do when they admit students of color to capitalize on the social and cultural capital that amasses to "diverse" institutions in the United States. The University of Wisconsin, for example, photoshopped a student of color into an admissions brochure to portray a more racially diverse campus than it actually had. As scholars have thoughtfully noted, using students of color in this way commodifies racial identity, distancing individuals from an integral aspect of their personhood.[10] When diversity is pursued for primarily aesthetic reasons, it is also often unaccompanied by initiatives to genuinely improve the racial climate on campuses and surrounding communities. These weak commitments to diversity easily buckle under the pressure of hard times; indeed, diversity initiatives are often the first to be jettisoned in times of financial hardship.[11]

The diversity rationale also reinforces the transparency of white racial identity, while emphasizing innocent white identity, because it is untethered to notions of social and racial justice, the nature of both individual and structural discrimination, or consideration of the impact of white privilege in both the admissions process and society more generally. Unaware of the privileges that inure to being white, students cannot understand the racialized disadvantages that often attach to being non-white. Whites begin, then, to perceive diversity initiatives and affirmative action programs as a sort of "reverse discrimination," where Whites are the innocent victims of programs and policies that benefit undeserving non-Whites who didn't "work as hard" as victimized Whites. One need look no further than Abigail Fisher, the lead plaintiff in *Fisher v. University of Texas*. Asked why she was challenging the University of Texas's use of race in its admission policies, she explained that the *only* difference between her application and that of her minority peers that were awarded admission was "the color of [their] skin,"[12] and that in challenging the policy, she "hop[ed] that [the Supreme Court would] take race out of the issue in terms of admissions and that everyone will be able to get into any school that they want no matter what race they are but solely based on their merit and if they work hard for it."[13]

Superficial deployments of the diversity rationale in higher education also leave college students unprepared for democracy. As explained by Danielle Allen, citizenship consists of "long-enduring habits of interaction [that] give form to public space and so to our political life."[14] In a pluralistic society with no shortage of racial inequalities, full citizenship cannot be realized unless everyone is given an opportunity to form those social and political habits of interaction. A commitment to equal citizenship, then, necessarily requires a commitment to bringing everyone into the franchise, even as it requires recognition that privilege cannot be maintained for particular groups. For Whites, this commitment can only develop when accompanied by an honest assessment of white privilege, an understanding of how that privilege perpetuates racism and differential societal status, and a willingness to release that privilege.

Current deployment of the diversity rationale, however, fails to encourage those developments, resulting instead in white racial-identity performance that is unaware that collective democratic action involves communal decisions that will "inevitably benefit some citizens at the expense of others, even when the whole community generally benefits."[15] Affirmative action might be considered one such decision, particularly because the "benefit" is actually a correction for racial exclusion. Whites, however, are often unprepared to incur any cost if the ultimate benefit inures to people of color—even if that benefit is actually part of a just redistribution. This zero-sum view of dominance and power underlies the problematic distribution of power, privilege, and political representation by race and makes impossible the sort of inclusive democracy for which we should strive.[16]

Which brings us back, then, to *Schuette*. The very Michigan constitutional amendment that prompted the case is an example of the problems with the current deployment of the diversity rationale. Divorced from any conception of remediation or social justice, diversity is a palatable goal as long as it remains non-threatening. When, however, Whites are asked to relinquish some measure of privilege to bring others into the franchise, diversity is quickly jettisoned; unanchored from moorings that fully articulate the need for diversity, it becomes all too easy to assert that the pursuit of diversity is not just inconvenient, but also reverse racism. In the context of the *Schuette* case, Proposal 2, deceptively cloaked in language that purported to promote equality, ultimately passed. Passing a ballot initiative to amend a state constitution sounds like a legitimate democratic exercise, but was actually the use of a democratic process to further exclude minorities and other socially marginalized groups from access to representation, participation and power.

In his Sixth Circuit opinion, Judge Cole admirably highlighted the democratic defect that Proposal 2 and the ensuing amendment to Michigan's constitution reflect: Proposal 2 effectively makes it more difficult for minorities to petition their government officials to properly account for structural disadvantage based on race or ethnicity. Proposal 2 does not, as Michigan Attorney General Schuette argued in his Supreme Court brief, merely require equal treatment of the laws.[17] Rather, by endorsing a constitutional amendment that requires absolute "race-neutrality," structural disadvantage by race is ignored as long as it is not reflected in official policy. As a result, state admissions policies that do account for structural advantage by allowing admissions officers to consider race or ethnicity as one factor in decisions become the only "discriminatory" policies that need to be dismantled.

The irony, of course, is that it is precisely a superficial deployment of diversity that has helped advance this inversion of equal protection jurisprudence. Both ahistorical and acontextual, the diversity rationale ignores issues of racial or social justice, and is silent on the privilege typically afforded Whites in the public school system, from elementary school to higher education. Such a view of race and discrimination in the United States has informed the Supreme Court-sanctioned "colorblind" approach to equal protection, which finds a potential equal protection violation whenever the state differentiates between similarly situated groups.[18] In the context of race, this has led to the preservation of facially neutral laws that have a disparate impact on minority groups, such as Proposal 2. These laws are upheld so long as no intentional discriminatory purpose is found. At the same time, race-conscious government policies that are implemented with the specific intent to ameliorate racial inequality are prohibited.[19]

To be clear, the goal of diversity is not the problem, as I support and endorse efforts to diversify institutions of higher education. Indeed, institutions

that function as gatekeepers to valuable social and cultural capital are fundamentally illegitimate if that access is limited to the racially and economically privileged. Rather, it is the ways in which Whites react to those goals, as informed by the superficial deployment of the diversity rationale, that is the problem. Although the diversity narrative is one of inclusion, by magnifying the transparency phenomenon, the rationale encourages simplistic and unrealistic notions of merit, while discouraging recognition of white privilege. It also perpetuates white identities grounded in racial innocence, such that would-be plaintiffs are free to challenge even the diversity rationale, itself, as unfair to Whites.

Unless remedied, the impact of the diversity rationale on white racial identity and understanding of race has long-term negative consequences for racial justice. We are, for example, potentially on the precipice of a Supreme Court decision in *Schuette* that will provide a model for others opposed to affirmative action to eliminate it through "democratic" processes. To prevent this, institutional narratives about diversity and use of the diversity rationale as justification for race-conscious measures must shift away from narratives about the usefulness and benefits of diversity toward a narrative that also address the illegitimacy of all-white institutions. Diversity is not just about training students for a global marketplace, citizenship, or deepening intellectual exchange—it is also about broadening access to social and cultural capital for all, including poor people and people of color.

At colleges and universities, this means more than a blurb about diversity in the glossy pages of admissions materials. Instead, institutions should initiate broader campaigns committed to informing potential and current members of university communities that their mission necessarily includes broadened access for all. All schools may not necessarily adhere to such a mission, but institutions that advocate a commitment to the diversity rationale in admissions purportedly do and so can be expected to deepen their commitment to diversity in ways that positively impact white racial identity.

Relatedly, institutional commitments to individualized review must be better contextualized for students. Admissions is an inherently individualized, subjective, and idiosyncratic process. That reality, however, should not be used only to justify the consideration of race, but should also be used to help students understand the multitude of factors that are considered in the applications of each student. Individualized review may consider the athletic background of some students, the legacy status of others, and the unique social experiences of minority students—experiences that are informed by race, no matter what the student's ultimate worldview. Individualized review may also consider the racial or ethnic background that privileges some students prior to college. Other factors like class or disability may (or may not) mitigate or compound marginalization or privilege on account of race and ethnicity, and

admissions officers will often have to make hard decisions about how these factors affect students, and whether the institution would be best served by that student's admission and enrollment. To this extent, individualized review does not attempt to *remedy* societal discrimination, but it does take into account the social impact of race on *all* applicants—white and non-white—and on the institutions themselves, and should be discussed as such. The goal is not necessarily to make every rejected (or admitted) applicant perfectly happy with an institution's admissions decisions, but to help the Abigail Fishers of the world accept those decisions by enabling them to understand the larger societal context in which those decisions are made.

In the post-admissions context, a more substantive commitment to diversity might look like mandatory classes for incoming students about the racialized nature of opportunity and inequality in the United States.[20] Given the aspects of white identity most negatively impacted by superficial deployments of diversity, such a course would explore white and non-white racial identity, racial privilege, or narratives of meritocracy in the United States. This approach signals not just a commitment to improved racial climate, but a step toward unpacking myths about merit while making white privilege more visible, such that anti-racist white identity can develop. Lest such a mandate seem unnecessary, consider the Minneapolis Community and Technical College, where a Professor of English and African Diaspora studies was formally reprimanded under the College's anti-discrimination policy for making white students feel uncomfortable in her classroom discussions of structural racism and white privilege.[21]

Ultimately changes like these can help mediate the flawed social and political climate that led to Proposal 2 in the first place. In the meantime, we must rely on the Supreme Court's forthcoming opinion in *Schuette* to uphold Judge Cole's attempts to right the political defect that our current diversity rationale has promoted. Given, however, the hints that several Justices dropped in *Fisher*, you'll forgive me if I am not holding my breath.

NOTES

1. Fisher v. Univ. of Tex. at Austin, 570 U.S. __(2013) ("To be narrowly tailored, a race-conscious admissions program . . . must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.").
2. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. __ (2013)(Scalia, J., concurring)("…[T]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception. The petitioner… did not ask us to overrule Grutter's holding that a "'compelling interest"' in … diversity can justify racial preferences in university admissions. I therefore join the Court's opinion in full."); *Fisher*, 570 U.S. __ (2013)(Thomas, J., concurring); ("I join the Court's opinion… 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) Fisher v. Univ. of Texas, 570 U.S. __ (2013).
3. Anti-affirmative action activists had previously successfully championed a similar proposition in California. California Civil Rights Initiative (209).

4. *See*, Operation King's Deram v. Connerly, 501 F. 3d 584, 591 (2007)("The record and district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. Neither Defendant group has submitted anything to rebut this. By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.")
5. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan, 701 F.3d 466 (2012).
6. *Id.*, at 477.
7. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan, 701 F.3d 466 (2012).
8. *Id.*
9. *Id.*
10. Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151 (2013).
11. *Id.,* at 2211 (explaining that institutional diversity initiatives are often eliminated or reduced when economic hardship necessitates spending cuts).
12. Mike Tolson, *Supreme Court to Take Up UT Admissions Case,* Hous. Chronicle (Oct. 7, 2012).
13. Adam Liptak, *Race and College Admission, Facing a New Test by Justices*, N.Y. Times, Oct. 8, 2012, at A1.
14. Danielle S. Allen, Talking to Strangers: Anxieties of Citizenship since *Brown v Board of Education* 10 (2004).
15. *Id.*
16. See Lani Guinier & Gerald Torres, The Miner's Canary 111(2002), for a description of a zero-sum conception of power in the United States in which one group's benefit necessarily comes at another's expense. Guinier and Torres, however, also conceptualize a more transformative understanding of power that allows groups to discover that the hierarchy of power itself—not one another—is their common antagonist. *Id.* at 130.
17. Reply Brief, Schuette v. Coalition to Defend Affirmative Action 5, No. 12-682.
18. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. Ill. L. Rev. 615,637-55 (2003)(using the court's colorblindness jurisprudence, including *Univ. of CA v Bakke*, in the context of affirmative action to illustrate how this framework treats Whites with racial privilege as politically vulnerable, while treating socially subordinate persons of color as privileged**.**
19. *See, e.g.* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down an admissions policy that awarded a specific number of points to minority applicants because race was purported outcome determinative); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) (striking down controlled-choice plans that sought to integrate schools and broaden minority access to competitive schools because the racial identity of students was considered in school assignments).
20. Research has found, for example, that courses on multiculturalism and race relations positively impact racial attitudes. *See* Rachel Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall,* 88 Cal. L. Rev. 2241, 2264 (2000)(exploring the change in the educational experiences of students at Boalt Hall after the elimination of affirmative action).
21. *Want to Teach Your Students About Structural Racism? Prepare for a Formal Reprimand*, Slate, December 3, 2013, http://www.slate.com/articles/life/counter_narrative/2013/12/minneapolis_professor_shannon_gibney_reprimanded_for_talking_about_racism.html.