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FORUM

Affirmative Action Admissions Regimes are Unconstitutional: Strict Scrutiny Should Mean Something

Myles McKnight and Benjamin Edelson

Harvard's affirmative action saga continues, or so we hope. After losses in the Federal District Court and the First Circuit Court of Appeals, the non-profit group seeking to do away with Harvard's race-obsessed admissions regime has filed a Petition for Writ of Certiorari in our Nation's highest tribunal. Students for Fair Admissions petitions the Court to consider overruling *Grutter v. Bollinger,* the narrow 2003 decision which held that the University of Michigan Law School's race-conscious admissions program was constitutional because it satisfied strict scrutiny. *Grutter*'s loose reasoning leads us to think that the Court should overrule, so we'll canvass just one reason for believing so here.

Whatever you make of the merits of Harvard's affirmative action program, there are constitutional questions that lurk beneath the operation of any state-sponsored policy which prescribes differential treatment on the basis of race. No one denies this. Policy is one thing, constitutionality another. And when government policy (or the policy of institutions that receive government funding, like Harvard) makes racial classifications, reviewing courts must apply the test of strict scrutiny to determine whether or not those policies meet constitutional muster.[1] For the unfamiliar: A race-conscious policy satisfies strict scrutiny if it 1)

[1] *Adarand v. Peña,* 515 U.S. 200 (1995)

furthers a *compelling* (i.e. *necessary*) state interest, and 2) is "narrowly tailored" such that the policy minimizes, to the extent possible, differential treatment on the basis of race. If a policy discriminates on the basis of race only to the degree necessary to meet a compelling interest, it stands the test of strict scrutiny.

Harvard argues that its policy meets this standard. We think that's wrong. In fact, we don't think an affirmative action regime like Harvard's can *ever* satisfy strict scrutiny for reasons we'll present below. But first, some preliminaries.

The compelling interest claimed by the law school in *Grutter* was the procurement of the educational benefits that stem from having adequately diverse classrooms (what Justice Thomas calls "classroom aesthetics").[2] In fact, of the interests historically offered as justifications for affirmative action admissions practices, the Court has held that this is the *only* one that can be compelling.[3] Before turning to whether or not this interest actually *is* compelling, we should point out that there is serious reason to doubt that this interest is truly the one that animates affirmative action policies like Harvard's.

Let's grant, for a moment, that the end to which the policy is tailored is the procurement of the educational benefits that stem from classroom diversity. (The alleged compelling interest is not racial diversity *qua* racial diversity, but rather the *educational benefits* that stem from that diversity).

Why limit the diversity to racial diversity? If the interest in the educational benefits that stem from racial diversity is indeed compelling, presumably there are other forms of diversity that would produce similarly significant, and similarly valuable, educational benefits. And those would be compelling too, right?[4]

We can, in fact, think of other diversity domains wherein composition shifts would shock the academic *status quo* at elite universities just as much as or even more than adjustments in racial composition, thereby providing educational benefits at least as tangible and significant. Here are a few: political, ideological, and religious diversity among professors and students. Nevertheless, it is no secret that evangelical Christians and conservatives go dramatically underrepresented at institutions like Harvard or, say, Princeton. Can it really be that the educational benefits that stem from racial diversity are compelling interests while the educational

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[2] *Grutter v. Bollinger,* 539 U.S. 306, 123 S. Ct. 2325 (2003)

[3] See Justice Powell's opinion in *Bakke. Bakke,* 438 U.S. 265 (1978)

[4] It's true that many schools, including Harvard, consider certain other forms of diversity during the admissions process (Harvard also considers geographic diversity, for example).

benefits that stem from political, ideological, and religious diversity are not? Indeed, in the context of academe, where the cause of truth-seeking through academic discourse is advanced, one would think that the most prized form of diversity would be ideological. There can be little doubt that healthy ideological diversity would have *at least* as tangible an impact on the ability of students to navigate an ideologically, racially, and religiously diverse world as racial diversity would.

All of this should give us real pause before buying into the notion that the educational benefits that stem from racial diversity are the real interests at play. To us, it seems more plausible that the interest is something akin to the following: *the rectification of societal ills and tragedies of minority underrepresentation.* We think that this is a laudable interest, but it is *not* the one once alleged by the University of Michigan Law School or the one alleged by Harvard today. Moreover, the fulfillment of this specific interest by affirmative action was explicitly thrown away by Justice Powell in *Bakke.*

If you disagree with us so far, you might be tempted to respond: "Ah, well, conservatives and evangelicals are not historically marginalized groups. It's wrong to analogize intellectual and religious diversity to racial diversity in this way!" Well, you've proved our point: *Your* interest lies in the rectification of historic societal ills.

Let's leave this aside. As a matter of fact, we do have reason to conclude that the asserted interest of procuring educational benefits is not the one that the Court should evaluate here. This is because the phrase "educational benefits that flow from racial diversity" is actually a gross misstatement of the more precise interest motivating Harvard's scheme. We construe it as follows: the procurement of the educational benefits that stem from racial diversity, *consistent with the maintenance of prestige and the general standards of the institution.*

In our view, that second clause ("…prestige and general standards of the institution") is a necessary component of the true interest to be weighed. Before explaining why this is the case, we should first take care to note that the maintenance of institutional prestige couldn't possibly be a compelling interest. The compelling interest doctrine, as applied to race-conscious policies, provides the courts with a mechanism to smoke out illegitimate racial differentiation in all but situations of total necessity; "compelling" does not mean "preferable" or "laudable." As historically applied to race-conscious policies, strict scrutiny has rejected interests even as important as the "best interests" of children. Race-conscious policies have otherwise typically stood only when they serve interests of such immense necessity as

national security, the functionality of government, and safety from violence.[5] In any case, should you prefer a looser conception of "compelling interest" than we do, it's still immensely difficult to see how the maintenance of institutional prestige could ever rise to the qualification of compulsory. To quote Justice Scalia: "If that is a compelling state interest, everything is."

So, if we're correct in construing the relevant interest as we do, an affirmative action scheme like Harvard's cannot pass the test of strict scrutiny. And if *that* is the case, it is unconstitutional. So, why are we correct?

Suppose you were devising an admissions scheme designed to secure the educational benefits that stem from classroom diversity. You're not interested in prestige or maintaining the "high standards" for admission that make your university so elite – you know that those interests couldn't be compelling. So, how do you do it? Your policy will need to be narrowly tailored, meaning it will have to be as race-neutral as possible while still increasing the diversity of your classrooms. If your interest lies only in the educational benefits that flow from increased racial diversity, perhaps you'll come up with a lottery system so that your admitted class will be more reflective of a diverse applicant pool. Or, maybe you'll adopt an approach to evaluating applications that gives less weight across the board to factors that, on average, tend to cut against the admissions chances of disadvantaged minority students (e.g. SAT scores). This would substantially reduce the disadvantage faced by applicants from historically marginalized communities. Because reduced consideration of such factors would apply to *all* applicants, you might not have to consider racial background at all.

But instead, you opt for a scheme that deliberately favors applicants from some minority groups by applying different standards of admission to students on the basis of their racial identities.[6] Anyone can see that *that* scheme is not narrowly tailored to the interest in the way that the aforementioned alternatives might be; there are more race-neutral ways to attain sufficient classroom diversity than this

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[5] From Justice Thomas in *Grutter:* "Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.' Cf. Lee v. Washington, 390 U. S. 333, 334 (1968) (per curiam) (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); Croson, supra, at 521 (Scalia, J., concurring in judgment)."

[6] That this is the mechanism by which affirmative action policies achieve their ends is not a subject of debate.

scheme. Indeed, such a race-conscious admissions scheme can only be narrowly tailored if the interest itself is adjusted to accommodate the claim of narrow tailoring. Thus, an affirmative action admissions regime like Harvard's, which applies different standards to different races in order to produce classroom diversity without sacrificing any degree of prestige, is only narrowly tailored in the context of an interest which includes the maintenance of the prestige secured by exclusive admission standards. And the interest in prestige and exclusivity, as we have suggested, cannot be compelling.

Importantly, we haven't passed judgment on the *policy* merits of affirmative action. We believe that the rectification of societal ills and tragedies of minority underrepresentation are important and laudable interests. They are, moreover, perfectly constitutional interests. However, this does not mean that the Constitution gives wide latitude to policymakers who wish to realize these aspirations by devising policies that prescribe differential treatment between races. Rather, our Nation's reckoning with its painful history of racial discrimination has led to the application of a rigorous legal safeguard designed to smoke out all but the most indispensable considerations of race. That safeguard is strict scrutiny. For a policy that discriminates between individuals on the basis of race to survive a constitutional challenge, it must do battle with strict scrutiny. The sort of policy we address here loses that battle.