Revisiting *Grutter* and Its Diversity Rationale: A Few Reactions to Professor Blumstein's Critique

Vikram David Amar[*]

There is much thought-provoking material in each of the original articles produced for this online roundtable, and a long reaction essay could be written about any one of them. Space constraints prevent that indulgence, however, and so I shall limit myself to offering a few thoughts on just one of the articles: Professor Blumstein's intriguing analysis of *Grutter v. Bollinger* and how that case might and ought to apply to *Fisher v. University of Texas at Austin*.[1] In particular, I focus on three of Professor Blumstein's suggestions that required me to think more deeply about how race-based affirmative action in higher education fits into the larger constitutional and equal protection landscapes.

***

The first of Professor Blumstein's points I shall address is his discomfort with the way in which the diversity rationale justifies race-conscious policies "not for the sake of the black and minority students' own education but largely for the sake of affording educational benefits to others."[2] Professor Blumstein is troubled by what he views as an instrumentalization and commodification of the minority students.[3]

In my own initial Roundtable article, I lamented the doctrinal abandonment (caused by what I view as intellectual missteps of the U.S. Supreme Court itself) of the remedial rationale for race-based affirmative action, in favor of an exclusive focus on educational

[*] Professor of Law and Associate Dean for Academic Affairs, UC Davis School of Law

1. James F. Blumstein, Grutter *and* Fisher: *A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57 (2012).

2. *Id.* at 64.

3. *Id.* at 66–67.

diversity.[4] And I noted that, technically speaking, the Court has not required that diversity-based affirmative action programs be shown to actually help the enrolled minority students in order for the programs to survive strict scrutiny.[5] Moreover, race-based commodification, in the form of slavery, remains the single most egregious insult to liberty and justice in American constitutional history. Nor is government-maintained slavery the only example of instrumentalization forbidden by the U.S. Constitution in its current form. When one looks at the entire Constitution—the Third Amendment's prohibition of the quartering of troops in private homes during peacetime, the Fifth Amendment's protections against government mandating self-incrimination and the surrender of property without just compensation, the First Amendment's protection against mandating that individuals be vessels for government speech, and the so-called anticommandeering federalism principle prohibiting Congress from mandating that state governments exercise their regulatory power on behalf of federal goals—a structural pattern emerges: government often is not allowed to directly use individuals simply as the instruments or tools of its own objectives.[6]

Yet, I am still not as worried by the "commodification/ instrumentalization" problem as Professor Blumstein appears to be. My reasoning here is threefold. First, it seems to me that university admissions folks instrumentalize or commodify applicants no matter which admissions criteria are employed. If a public college looks only

4. Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* Fisher v. University of Texas *Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 93 (2012).

5. *Id*. at 93, n.72.

6. But when individuals (or states) are acting as free riders and thus contributing to the problem—rather than being just handy tools to fix a problem created by others—mandates are much more constitutionally permissible. This explains why the federal government can mandate taxes, and jury and military service, among other things, even if the individuals so mandated are contributing to problems only passively. Military defense, government spending (on roads and other infrastructure), and a system of criminal and civil justice requiring juries are, broadly speaking, "public goods" in the sense that people benefit from them and have an incentive to be free riders unless they are mandated to contribute. Free riding is itself a big part of the problem that Congress is trying to solve when it imposes mandates in these areas. So long as the mandate is "congruent and proportional" (to borrow a phrase from another federalism context) to the free-rider problem that the very existence of the individuals being mandated is creating, then the mandate seems less objectionable. This is precisely why an anti-instrumentalization norm running through the Constitution ought not to have called into question the Affordable Care Act. *See* Vikram David Amar, *Reflections on the Doctrinal and Big-Picture Questions Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FLA. INT'L U. L. REV. 9, 14 (2010) (discussing how regulation can sometimes take the form of a mandate and arguing that the Patient Protection and Affordable Care Act "is one of the most natural and defensible kinds of mandates").

at high school grades and standardized testing scores—and does not consider race or other elements of the each applicant—it is doing so at least in part to produce a student body that will make the school look more elite and prestigious in the rankings game and to the outside world. Surely traditional admissions criteria are not designed simply to reward hardworking applicants—use of grades and scores rewards not just hard work but also innate academic aptitude. Nor are colleges that use only "objective" criteria trying simply to identify those applicants who could make the best use of the college's educational resources; to be sure, the colleges care about the students, but they also care about the short- and long-term success of the colleges themselves. Indeed, it is somewhat ironic that looking at more, rather than fewer, aspects of a candidate's overall personhood would generate a greater sense of impermissible commodification.

My second response follows closely from my first: under the diversity rationale that focuses on a number of different kinds of diversity (not racial diversity alone), virtually all admitted students, not just racial minority students, are in some sense being commodified. The standardized test whiz, the musician, the computer geek, the older "returning" student, the actor, the farm kid from the underrepresented rural Midwest, the athlete from the big inner-city school, all are being admitted—and I suppose, in some respect, all are being used—by the university to enhance the institution and the educational experience of other students. When commodification/ instrumentalization is so broad and pervasive, it loses much of its normative taint under the Constitution—this is why taxes (which instrumentalize all of us) are viewed differently than takings (which make public use of only a small subset of us).

Finally, we must bear in mind the voluntary nature of participation in an affirmative action program. Minority applicants needn't choose to attend a school in which their race likely played a factor in their admission; they are free to instead attend a school where their "objective" academic indicators (e.g., prior grades and standardized test scores) place them more comfortably in the mainstream. Because matriculation is voluntary, I think we can infer that the vast majority of minority students who do choose to attend schools where their minority race played a role in their admission believe that the access to the (presumably) more elite institution outweighs any stigmatic or psychological cost of being "used" for the benefit of other students. In this respect, at least if we are to credit the market-based choices minority applicants make, educational diversity can be seen as "win-win." In short, the commodification/ instrumentalization present in affirmative action seems to me no

worse than, and probably much less troubling than, the use that universities make of Division I athletes in exchange for a scholarship and a first-rate education. Certainly, it is nothing like the commodification represented by slavery.

A caveat: if minority students are making choices to attend institutions based on misinformation, or insufficient information, about whether they would be helped or hurt by attending the more elite institutions, that information gap needs to be filled for my confidence in the win-win nature of the diversity-based affirmative action to continue. That is why even though I am dubious about many of the substantive hypotheses of the so-called "mismatch theorists,"[7] I support their efforts to obtain the best possible information from educational institutions in order to test their claims that minorities would likely be better off if they chose not to attend institutions that made use of their race to admit them. At a minimum, if these claims have merit (and, again, I am far from convinced that they do), then applicants would need to be so informed so they could make choices about their own individual circumstances that guarantee that, even if they are being used, they are not being misused.

***

The second and third observations/arguments that Professor Blumstein advances that I want to address concern what he views as inconsistencies between the premise of *Grutter*—that, all other things being equal, race might inform the kind of student one is—and the decisions of the Court in the racial districting and race-based peremptory challenge cases.[8]

As to the racial gerrymandering cases, I think Professor Blumstein's analysis contains an incomplete description of the doctrinal limits the Court has imposed on legislative bodies engaged in the drawing of district lines; the Court has not frowned on *all* use of race in districting, but rather only the use of race that is "predominant" such that it crowds out "traditional districting principles."[9] Indeed, as I have written elsewhere,[10] the "predominance"

---

7. *See* Amar, *supra* note 4, at 93 n.72 ("[S]ome have argued . . . race-based affirmative action actually hurt[s] minority students by 'mismatching' them with schools where they are less likely to succeed . . . .").

8. Blumstein, *supra* note 1, at 70–72.

9. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958 (1996) ("For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race. By that, we mean that race must be 'the predominant factor motivating the legislature's [redistricting] decision.' ").

test, which focuses on whether the district drawers have focused on race to the exclusion of other relevant factors, is very similar to—and not in tension with—the "whole person" approach to race-based educational affirmative action first articulated by Justice Powell in *Regents of University of California v. Bakke* and then embraced by Justice O'Connor's majority opinion in *Grutter*.[11] In fact, many of us predicted the result in *Grutter* after Justice O'Connor (the expected swing vote there) joined Justice Breyer's majority opinion in the districting case of *Easley v. Cromartie*[12] two years earlier. In that case, district lines that made use of race were upheld because there was insufficient evidence that race "predominated" and crowded out all other relevant voter characteristics.[13] *Cromartie* made clear that the impermissible stereotyping that is forbidden in district line drawing is not the idea that race might affect a voter (which is the premise analogous to the notion that race might affect a student in educational affirmative action), but rather that race might *define* the voter. Viewed in this way, there is no real tension—and indeed there is resonance—between the districting doctrine and *Grutter*'s limited sanction of the use of race as one factor among many in education admissions.[14]

The modern peremptory challenge cases are a bit more complicated,[15] but at the end of the day I don't find insoluble tension between them and *Grutter* either. To be sure, there is strong language in various of the peremptory challenge cases (sometimes written by Justices who would permit race- or gender-based educational

---

10. Vikram David Amar, *Of Hobgoblins and Justice O'Connor's Jurisprudence of Equality*, 32 MCGEORGE L. REV. 823, 827–28 (2001).

11. Grutter v. Bollinger, 539 U.S. 306, 314 (2003) (upholding law school admission policy that sought to admit "a mix of students with varying backgrounds and experiences who will respect and learn from each other" by considering a number of aspects of each individual's background, one of which was race); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12, 314 (1978) (opinion of Powell, J.) (concluding that attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education, but qualifying this conclusion by stating that "[e]thnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body").

12. 532 U.S. 234 (2001).

13. *Cromartie*, 532 U.S. at 241, 258.

14. *Grutter*, 539 U.S. at 314.

15. One reason they are complicated is that the rhetoric of juror fungibility they employ is itself in deep tension with the rationale of earlier Sixth Amendment cases, in which the Court often discussed the particular "qualities" or "distinct flavors" that different groups defined by demographic characteristics bring to jury service. *See, e.g.*, Ballard v. United States, 329 U.S. 187, 193–94 (1946) (discussing the subtle differences between males and females and asserting that if either sex were to be excluded from jury participation, "a flavor, a distinct quality [would be] lost"). For extensive analysis of these issues, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

affirmative action, as in the case of Justice Blackmun and *J.E.B. v. Alabama*[16]) that seems to condemn the notion that government can ever act on the belief that race or gender could affect a juror's performance of his or her job. But at least in the race setting, there is a larger backdrop against which we must interpret that language and the results of the cases. If race-based peremptories were freely permitted, and each side used race-based peremptories in an equal and opposite way, the result would be a reduction, overall, in the number of minorities who sat on juries. This is a function of the fact that each side is given the same number of peremptory challenges in any given case, combined with the fact that racial minorities are, by definition, mathematical minorities.

A simple numerical example may help drive the point home. Suppose a jurisdiction had a demographic makeup of 75% whites and 25% minorities. And suppose that the initial draw of twelve would-be jurors exactly mirrors these percentages—that is, nine whites and three minorities are drawn. Suppose further that each side is given three peremptory strikes, and that each side uses its peremptories to aggressively remove people based on their white or minority race, respectively. So one side (perhaps the side of a Title VII plaintiff) uses its three strikes to remove three white would-be jurors, and the other side uses its three strikes to remove the three people of color who were initially drawn.

So now we are left with six whites, six slots to fill, and no peremptory challenges. Those six empty slots are then filled, and (again, if we are assuming a draw that reflects the demographics of the larger pool), on average only 1.5 (or 25% of six) minority jurors would be selected, and 4.5 whites (75% of six) would join the group. The overall makeup of the jury after all is said and done would be 10.5 whites and 1.5 minority folks—half the number of minority persons who were initially drawn before each side was allowed to engage in a racial peremptory war. Because this scenario could repeat itself across many or most juries, allowing each side to use race could very likely diminish minority jury participation writ large. This systemic effect is

16. 511 U.S. 127, 140 (1994) ("When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.' ").

what makes the race-based peremptory-challenge cases easy for those of us who care about inclusion.[17]

The most appropriate analogy between the peremptory-challenge setting and the realm of education affirmative action would be one in which a jurisdiction took race into account to increase the chances that each jury contained some people of color so as to "look like" the larger community it is supposed to represent. Imagine, for instance, the same jurisdiction as the one described above, in which a policy is adopted that requires (or at least aspires to the result) that, in the initial draw of twelve jurors, no more than ten of them can be white. If the first ten who are drawn happen to be white (because ten is not a large enough sample size to always reflect the larger pool), then the last two must be drawn from a list of would-be jurors comprised only of minorities—or at least a list in which minorities are numerically overrepresented (so that we avoid the problem of formal set-asides or quotas). It is not at all clear to me that all the Justices who voted in the majority in the race-based peremptory-challenge cases would frown on such a policy.

***

I profited from reading and thinking about the arguments Professor Blumstein made in his initial contribution even though I may not agree with some of them, and I look forward to reading any reaction he has to the points I make in the preceding paragraphs.

17. The situation concerning gender-based peremptories is more complex, inasmuch as neither women nor men are much of a numerical minority.