The Education of an Admissions Office

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The one thing all of the essays in this collection agree on is that there was no compelling *legal* reason for the Supreme Court to grant certiorari in *Fisher v. University of Texas at Austin*.[1] On the fiftieth anniversary of Alexander Bickel's great work, *The Least Dangerous Branch*, several authors recur to the passive virtues that ought to guide the Court in disposing of this case, and several question whether there is the legal warrant to hear it.[2] But as the opinion in *Citizens United* illustrated, this Court does not need a legal reason to reach an issue it wants to address.[3] Watching this, I feel like Thomas More in *Anne of the Thousand Days* despairing: "Cromwell, when you counsel the king, tell him what he ought to do, but never what he is able to do. If he knew his true strength it would be hard for any man to rule him."[4] It is as if the Court were its own counselor-sibilants hissing into its own ear: "We are the final arbiters of the Constitution and of our own limits." For those who would claim the mantle of conservative they must reckon with the ghost of Alex Bickel.

Yet one answer comes from the Justices themselves: We shouldn't hesitate to correct a constitutional evil like racial discrimination merely because it represents settled law. After all,

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1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

2. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–43 (Yale Univ. Press 2d ed. 1986) (1962); 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, 78–84 (2012); Girardeau A. Spann, Fisher *v.* Grutter, 65 VAND. L. REV. EN BANC 45, 46–48 (2012); Gerald Torres, Fisher v. University of Texas: *Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97, 100–01 (2012).

3. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); *see also* Tamara R. Piety, Commentary, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16 (2010) ("*Citizens United* has been roundly criticized for its . . . display of judicial immodesty (or 'activism') . . . .").

4. Sir Thomas More speaking to Thomas Cromwell in the film ANNE OF THE THOUSAND DAYS (Hal Wallis Productions 1969).

Plessy v. Ferguson was wrong and while the Court did not overrule it directly in *Brown v. Board of Education*, it was a short step to *Gayle v. Browder* when, in response to fifty thousand black people in a single city boycotting the segregated Montgomery city buses, the Supreme Court rescued the Fourteenth Amendment from the crabbed formal reading that had held it prisoner.[5] Didn't *Lawrence* correct *Bowers* when it was shown to be wrong?[6] When liberty is at issue, its defense can yield no vice.[7]

But what is the liberty interest here? Government has no obligation to provide any specific service to the people.[8] When it does, however, there is an obligation to make the conditions of its availability transparent and open to all who qualify.[9] No unjustifiable barriers may be constructed. Of course, all of the work is in the question of what is justifiable. At least since *Brown* (when *Brown* is understood as an anticlassification decision), race has been an unjustifiable barrier to the receipt of a government service.[10] Thus, if race is the factor that conditions receipt of the service, it is almost always impermissible. But, of course, the jurisprudence of racial justice in this country is much more complicated than that, if for no other reason than that the history of race and its malignant uses (and not just slavery or overt Jim Crow laws) is much more complicated than a simple logical toggle switch. Given that only in specific remedial situations can race be the determining factor, the question really becomes: When and under which conditions can race even be *noticed*?

But before we get to answer that question, it is useful to look again at the movement *Brown* set in train. *Brown* is not *just* an anticlassification decision. It was also about integrating previously segregated public facilities.[11] And schools, because of the role they play in our society, are different from most other institutions. In many

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5. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896); Gayle v. Browder, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd per curiam*, 352 U.S. 903 (1956).

6. Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986).

7. Okay, perhaps this reference to the icon of the right, the late Senator Barry Goldwater, is a little extreme.

8. *See, e.g.*, DeShaney v. Winnegabo Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

9. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

10. *Brown*, 347 U.S. at 493.

11. *Id.* at 495.

ways, the education and socialization that occurs in schools, from the elementary to the postgraduate level, is crucial to who we are as a people. That was the lesson from *Sweatt v. Painter* and from *McLaurin v. Oklahoma*.[12] It was compounded in *Brown* because of the perceived vulnerability of the young children in that case.[13] What is important to note is that race could not help but be noticed. Race was at the very heart of those cases. But if *Brown* is understood just as an anticlassification case, then it is easy to see that the harms to Linda Brown and the other children in Topeka, Kansas, Heman Sweatt in Austin, Texas, and George McLaurin in Norman, Oklahoma were exactly the same. The state was excluding them because of their race from a government good to which they were otherwise entitled. The liberty interest at issue was exactly the same as the equality interest.

That point is easy to miss because it is a fundamentally different claim than the one Ms. Fisher raised. Her bill of particulars, however, is designed to create a superficial similarity. Her liberty interest is not one rooted in equality. If it were, then she would have to make the claim that she was prevented from attending the University of Texas at Austin because she is a white woman. That claim is patently false. And in any event, she was offered admission to a sister UT campus with the promise that if she maintained a high enough grade point average she could transfer to Austin.

"But wait," she might exclaim, "I am better than *some* black and brown applicants who were admitted, and thus I am being treated unfairly because of my race." Of course, the Supreme Court has never constitutionalized standardized tests or the normalizing of high school grades, so the question of unfairness is a little more complicated than "she got in instead of me; she is a racial minority and I am white; so I must have been excluded because I am white." If that were the case, the liberty interest and the equality interest would share an identity. But in any rationing scheme where there is clearly not an arbitrary and illegitimate decision-forcing device and where the norm of equality is not implicated, then the question devolves into whether the admissions officers used some criteria that violated her liberty interest. Since she is not claiming that she should be admitted to the exclusion of all black or brown students, what she must be claiming is that she has a liberty interest in being compared to only those black or brown students she feels were inferior to her in a meaningful way. But of course, what is meaningful to her and what is meaningful to the University of Texas are not necessarily identical. Nor should they be.

12. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma, 339 U.S. 637 (1950).

13. *Brown*, 347 U.S. at 493.

Except for the Texas Top Ten Percent Plan ("TTP") and the preference for residents, the University is not required to adhere to externally imposed admission criteria. They are merely required not to use race or any other impermissible category to exclude an otherwise qualified candidate.

One of the lessons that the TTP taught the University of Texas is not that they could achieve racial, ethnic, and class diversity with a demographically neutral algorithm, but that the old criteria they had used to select classes in the past incorrectly identified those who could take advantage of, and thrive in, a university setting. It taught them humility in the face of what every other school was insisting on as proof of excellence. Because there were TTP admittees who were outperforming non-TTP admittees who scored 200–300 points higher on the traditional standardized admissions tests, the admissions office was clearly overlooking some attributes of the applicants who would have traditionally been denied admission.[14] It performed another important benefit: it expanded the pool of students to permit the University of Texas to accomplish its stated mission of educating and training a diverse group of future leaders.

Under the TTP, the system worked to collect those students who both made the University more diverse, and who might otherwise have been overlooked under traditional criteria. But since the class still had discretionary slots to fill, the TTP performed another service. It provided a desideratum that could guide admissions without being slavishly tied either to a relentless algorithm or to standardized tests that obscure as much as they reveal.[15] In order to do this, however, the students needed to be identified and their qualities assessed in concert with the goals of the University. Neither the percentage plan nor the tyranny of standardized tests would permit the University to assemble the best class.[16]

The State of Texas requires the University of Texas to provide an education of the first class.[17] By using the lessons they had learned

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14. Larry Faulkner, *The "Top Ten Percent" Law is Working for Texas*, THE UNIVERSITY OF TEXAS AT AUSTIN (Oct. 19, 2000), http://www.utexas.edu/student/admissions/research/faulknerstatement.html.

15. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 968–80 (1996).

16. *Id*.

17. "Establishment of University; Agricultural and Mechanical Department. The legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled, 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an Agricultural, and Mechanical department." TEX. CONST. art. 7, § 10.

under the admissions plan prior to *Hopwood*;[18] the admissions protocols post-*Hopwood*, but prior to the TTP; the classes assembled under the TTP; and by implementing a plan on all fours with that approved of in *Grutter*,[19] the University of Texas tried to live up to its mission and its legislative mandate. The admissions office ought to be given credit for having the humility that all great students really have. The University admissions officers knew that they could continue to learn only by challenging the established wisdom. From these lessons, they endeavored to provide an education of the first class to train a diverse cross section of Texans from whom, as history has indicated, the future leaders of the state would come. That is all the University was trying to do.

18. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (rejecting an admissions plan that "discriminate[d] in favor of [minority] applicants by giving substantial racial preferences in its admissions program" as unconstitutionally discriminatory), *cert. denied sub nom.* Texas v. Hopwood, 518 U.S. 1033 (1996).

19. Grutter v. Bollinger, 539 U.S. 306 (2003) (approving a policy that "[did] not define diversity solely in terms of racial and ethnic status and [did] not restrict the types of diversity contributions eligible for 'substantial weight,' but . . . reaffirm[s] the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers").