

ENGL 114 Progress and Its Critics

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“Time’s Up! Pass Your Exams Forward: A Critical Response to Gail Heriot’s “Fischer v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle”

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“Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.”

–Justice Thurgood Marshall, *Regents of University of California v. Bakke*

On June 23, 2016, the Supreme Court decided *Fisher v. University of Texas*, a case involving the use of affirmative action as a means to promote greater diversity in higher education. Abigail Fisher alleged that the University of Texas violated the Fourteenth Amendment’s Equal Protection Clause by considering her race, and the races of all applicants, in its admission procedures. The Court held that colleges and universities may implement affirmative action policies “subject to judicial review...[that] can withstand strict scrutiny” (Oyez). This and subsequent findings in *Fisher* prompted Gail Heriot, writing for the *Cato Supreme Court Review*, to declare that “there may be reason for modest optimism” amongst supporters of race-neutral admissions policies (Heriot 63). The Court’s decision to require “reasoned, principled” explanations of its policy, combined with “narrow tailoring” that proves its necessity, she argues, amounts to “a more sensible vision of the Constitution’s requirements in the higher education context” (Oyez; Heriot 63). Further, for Heriot, *Fisher v. University of*

Texas represents the Court's burgeoning recognition that affirmative action policies "don't work" and symbolizes progress down "the road to removing race from consideration in college and university admissions" (Heriot 64). Is Heriot right? Has affirmative action failed its latest test?

Heriot bases her assertion that affirmative action has failed on three related forces. Primarily, she argues that "one consequence of widespread race-preferential policies is that minority students tend to enroll in colleges and universities where their entering academic credentials put them toward the bottom of the class" (Heriot 65). This, she argues, "has the predictable effect of lowering the college or professional school grade the average non-Asian minority student earns...[because] while some students will outperform their entering credentials...most students perform in the general range that their entering credentials suggest" (66). Heriot calls this data the "mismatch", and she concludes that it results in the reduction of the number minority, particularly black, graduates with degrees in science, engineering, or intentions to attend graduate programs, especially law school (66-68). In Heriot's view, the remedy is race-neutral policies, which she argues are backed by studies indicating that a student with "entering academic credentials...in the middle or the top of her class is more likely to persevere and ultimately succeed than an *otherwise identical student* attending a more elite school" that places her lower in the ever-present GPA arms race (67). But by this logic, Heriot would require that a school like Yale admit fewer black students.

While this paper does not offer a rigorous refutation of the underlying data, I do question Heriot's conclusions. To support her aforementioned claim, Heriot cites a recent study of Duke University, which found "approximately 54 percent of black males switched out of science and engineering majors" compared to 6 percent of white males that switched (67). Does this statistic

indicate that black students felt inadequate in a competitive school? It is difficult to conclude that black students left the programs because they felt unqualified. Put another way, without individual rationales behind this data, we could just as easily conclude that those students changed interests, a common practice for many undergraduates, and chose to pursue different majors. Heriot's data suggesting that "the average African-American first-year law student has a grade-point average in the bottom 10 percent of his or her class" is particularly damning – certainly a failing grade for affirmative action (66). And so, we should ask: Why do colleges and universities continue to pursue affirmative action?

First though, we should ask which colleges meaningfully employ affirmative action policies. In "The Effects of *Gratz* and *Grutter*: A Public Policy Analysis," Kari Mattox writes that, post-*Gratz* and *Grutter*, affirmative action's frequency of use has not changed at selective institutions, nor has it changed at state institutions, which have never engaged in "a large shift toward the implementation of race based affirmative action policies" (27). It's Vanderbilt that is pursuing black students, not the University of Tennessee. With this in mind, one could argue, as Heriot does, that, "like an out-of-touch emperor dismissing bad news from the battlefield, higher education has ignored this literature [that suggests affirmative action has failed]," preferring instead to declare that "the troops must carry on" down affirmative action's casualty-laden path to diversity (69). Or, one could recognize that colleges and universities, especially in the Ivy League and peer institutions, make other considerations when building a first-year class. One such consideration is merit.

Traditionally, we define merit as something akin to worthiness; one is worthy of admission to a particular college because one is intelligent, works hard, and will as a result succeed. A strong critique of affirmative action comes from the possibility that unworthy

applicants can slip through the cracks and enroll in colleges for which they are unprepared, as indicated by entering credentials (Heriot 65). However, as *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* argues, this critique is premised on the idea that higher grades equal greater diligence and worthiness, and “it is not clear that students who receive higher grades and test scores necessarily worked harder in school” (277). The authors continue by arguing:

Grades and test scores are a reflection not only of effort but of intelligence, which in turn derives from a number of factors, such as inherited ability, family circumstances, and early upbringing, that have nothing to do with how many hours students have labored over their homework. Test scores may also be affected by the quality of teaching that applicants have received or even by knowing the best strategies for taking standardized tests... (277).

Academic success reflects more than just grades and test scores. When considering an applicant, colleges examine both entering credentials and the circumstances that produced them in order to avoid mischaracterizing an otherwise qualified student as less qualified because they received fewer advantages. Affirmative action considers these disparities whereas credential-based definitions of merit necessarily do not consider extenuating circumstances. Instead, they reduce worthiness to mere points of data. Moreover, definitions of merit that include race recognize that admissions staff do not “decide who has earned a ‘right’ to a place in the class,” because we, as a society, generally believe that no one is entitled to a spot at Harvard (277). Rather, admissions staff accept – “on the merits” – those students who promise to “take full advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society” (277). This approach to merit is exemplified in the following:

Yale is committed to improving the world today and for future generations through outstanding research and scholarship, education, preservation, and practice. Yale educates aspiring leaders worldwide who serve all sectors of society. We carry out this

mission through the free exchange of ideas in an ethical, interdependent, and diverse community of faculty, staff, students, and alumni (Mission Statement, Yale University).

Diversity, understood in this sense, is not a vain pursuit of the Good but a practical means through which society can address “long-term societal needs” (Bowen, et al., 278). What, if anything, represents a more “compelling state interest” than educating the next generation of policy- and decision-makers (*Regents v. Bakke*)?

The central issue with race-neutral policies is that they hinder elite colleges and universities, like Yale, in fulfilling their educational missions. As Bowen, et al., argue, race neutrality would reduce the number of black students on elite college campuses, “probably shrinking their number to less than 2 percent of all matriculants at the most selective colleges and professional schools” (280). Moreover, such policies reduce black students to “less than 1 percent of all students” at the most selective law and medical schools (282). Consider the following:

[S]ince starting to admit larger numbers of black students in the late 1960s, the Harvard Law School has numbered among its black graduates more than one hundred partners in law firms, more than ninety black alumni/ae with the title of Chief Executive Officer, Vice President, or General Counsel of a corporation, more than seventy professors, at least thirty judges, two members of Congress, the mayor of a major American city, the head of the Office of Management and Budget, and an Assistant U.S. Attorney General (284).

We would be remiss not to include the first black President of the United States among this elite group.

Heriot’s data may suggest that black students would graduate with higher GPAs if we implemented race-neutrality, but experience shows us that she is wrong to conclude that “affirmative action is a hindrance, not a help, for preference beneficiaries” (Heriot 67). I concede that black students are presented with a unique set of challenges when matriculating to elite institutions (including the “mismatch”), but the conclusion we draw cannot be to drastically

restrict black students' opportunity to reap the benefits of a Princeton diploma and become societal leaders simply because Princeton might be more difficult for them. The conclusion we should draw is that affirmative action gives an opportunity for hope and change – for representation and tangible gains in status and resources – to the people the elite have so often left behind. A conservative Supreme Court majority paternalistically deciding which challenges black students can and cannot tackle, which barriers they can and cannot break, and which positions they should and should not have access to is not principled. It's the same story told to the same people by a newer voice. You don't throw the baby out with the bathwater simply because the water's too hot; you feel the water and adjust the temperature.

I have argued that race-conscious affirmative action policies create an expansive black elite where race-neutral policies cannot. Why *should* this be the aim of public policy? We've already discussed the practical justification: an expansive black elite helps underrepresented communities while also benefiting society. But even if you are skeptical about these benefits, why is affirmative action the right thing to do? In a moral sense, affirmative action is justified by corrective justice.

Corrective justice is a theory of moral responsibility requiring “one who harms another through wrongful conduct to make amends to his victim” (Forde-Mazrui 707). In the words of Kim Forde-Mazrui, “that justice requires rectification of injustice, the righting of a wrong, is intuitive to most people” (707). Moreover, since *Marbury v. Madison*, corrective justice seems integral to the American legal system; indeed, the Court held: “ But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy” (Forde-Mazrui 707; *Marbury*, Oyez). So, the question is not whether

the Constitution and American society accept the validity of corrective justice, but whether black people have a claim, an outstanding wrong to be righted.

That slavery was wrong is uncontested, and that it harmed black Americans is also uncontroversial. Thus, the injury is clear. But can we attribute this injury to American society, which necessarily implicates its people, of whom none were alive when the crime was committed? Forde-Mazrui gives us reason to affirm. Central to this debate is whether or not antebellum American society recognized slavery as a violation of black Americans' rights. One can (as Forde-Mazrui does) argue that abolitionist and enslaved people's (who were part of society) opinions on slavery could have plausibly made a majority of American society or that the Founder's reluctance to include the words "slave" or "slavery" in the Constitution indicates a contemporary recognition of the wrongness of slavery (711-712). However, a more compelling justification can be found in the passage of the Thirteenth, Fourteenth, and Fifteenth (Reconstruction) Amendments, all of which aimed at dismantling America's peculiar institution and its terrible legacy (713). In this light, "the societal discrimination perpetrated against blacks for another century thereafter was thus undertaken not only against a background of moral notice, but in violation of the letter of the Constitution" (713).

Black codes, Jim Crow, and further denials of the "privileges and immunities" to which emancipated black people were entitled represent an even stronger injury – an injury comprised of repeated violations of tangible, legal rights (Fourteenth Amendment). Because the federal government actively perpetrated (*Plessy v. Ferguson*) or tacitly approved (allowing state violations) discrimination, it is complicit in the crime. And because "We the People" established the United States" and authorized the federal government to act on our behalf by ratifying the Constitution; because We the People "identify as Americans and take responsibility for events

and endeavors of national significance;” We the People take collective responsibility when the Constitution fails to meet its obligations (Forde-Mazrui 717-720). Though America is not populated by the same people that perpetrated these crimes, We the People, as a collective entity, are still responsible; we never “inherited” these crimes because “the society that committed the wrong is still thriving” (724, quoting Vincene Verdun). Therefore, under the theory of corrective justice, black Americans are entitled to remedy because the Constitution – no, the People – failed in carrying out its promise and duty to create an equitable society.

In offering this moral justification of affirmative action, I don’t mean to challenge Heriot’s concern with the practical consequences of affirmative action. While I disagree with the conclusions she reaches based on her data, I understand the need to confront the data and pose the question: has affirmative action failed? To attempt an answer, I find it necessary to synthesize the practical and moral arguments that I have offered above.

In “From ‘Separate Is Inherently Unequal’ to ‘Diversity Is Good for Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar,” David Wilkin argues that *Regents of University of California v. Bakke* “encouraged those defending affirmative action in *Grutter* to use arguments couched in the language of ‘diversity,’ as opposed to the kind of moral arguments grounded in the existence of past or present discrimination against blacks that characterized *Brown*” (1558). I agree that *Bakke* represents a shift in “legitimate ‘law talk’ by judges, lawyers, and the public at large,” but I contend that *Bakke* does not abandon moral arguments (1558). Popular conceptions of affirmative action recognize the consistency between contemporary policies aimed at racial progress and the policies of the past; as Willard Dix recently wrote in *Forbes*, “the term ‘affirmative action’ was first used to describe a policy of actively ‘seeking to promote the rights or progress of...disadvantaged persons’...”. Indeed,

affirmative action's original intent is best characterized by President Kennedy's recognition of the "urgent need...[to] encourage by positive means equal opportunity" (Equal Opportunity Commission). Further, concurring in part with the majority opinion in *Bakke*, Justices Brennan, White, Blackmun, and Marshall argue that historical precedent and legislative action indicates that "race-conscious *remedial* action is permissible [emphasis added]" (*Bakke*, Oyez). Perhaps, the Supreme Court employed a strategic shift in language "to minimize white opposition to the goal of equality (by finding for Bakke) while extending gains for racial minorities through affirmative action" (Oyez). And so, we might consider the language of diversity this generation's equivalent of "a normative politics that explains why achieving racial justice is 'the right thing to do'" (Wilkins 1610). In other words, corrective justice explains, morally, why we should pursue race-conscious policies targeted towards groups that have historically been at the "mercy of society's rulemakers" and without the power to make rules for themselves (1614). Affirmative action promotes those groups to the station of rulemaker and grants them the power to affect change.

What can we conclude about affirmative action? Has it failed its latest test? As I have argued, Heriot's race-neutral ideal ignores a reality that suggests affirmative action has helped society to reap the benefits of diversity by diversifying the nation's elite. By suggesting that black students would achieve more without affirmative action, Heriot manipulates data in a way that allows her to implicitly claim that society would benefit from colorblind jurisprudence, or "the [legal] argument that the United States Constitution prohibits (or should prohibit) racial classification by the agencies of government" (Kull vii). However, the Court, and the federal government, have routinely "rejected the color-blind ideal" and consciously allowed "a system that permitted race-based distinctions" (*Harvard Law Review*). Further, Heriot discounts the

value of the moral case in favor of affirmative action. Consequently, I find it difficult to conclude that affirmative action has failed this test.

The debate surrounding the use of affirmative action in college admissions is not over. As the Supreme Court leans farther to the right, supporters of race-neutral policies and affirmative-action skeptics will continue to bring suit. Before we reach a final judgement on race-conscious policies, we must continue to explore the relationship between diversity in college admissions and racial progress. Most importantly, our nation must make peace with its past sins in a way that recognizes and atones for their existence. We cannot pretend that the Constitution does not see color; it did, and it does now. The question is: Will this generation use race for remedy or further injury?

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