Solving the McCleskey Dilemma: Embracing Racial Diversity in Schools

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Once more the Supreme Court is poised to add a modern gloss on Brown v. Board of Education, updating the decision’s meaning in light of changing demographics and increasingly sophisticated school admissions policies. In its October Term 2012, the Court will hear arguments in Fisher v. University of Texas at Austin, in which it will grapple yet again with the permissibility of using race as a factor in school admissions. Although less than a decade has passed since the Court in Grutter v. Bollinger narrowly affirmed the constitutionality of taking race into account when seeking to admit a diverse group of students to universities, commentators speculate that the decision in Fisher could augur the death of affirmative action. Already four Justices have signaled their adherence to an absolutist conception of a colorblind
Constitution, opining that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” With the likelihood that Justice Kennedy, a dissenter in *Grutter*, will align with these four Justices in *Fisher*, the Court appears ready to further circumscribe—if not effectively prohibit—the use of race in school admissions.

Defenders of the race-based school admissions policy in *Fisher* would be wise to find inspiration in an unlikely decision and in the views of an even unlikelier Justice, which underscore the indispensability of ensuring racial diversity in our schools. The Supreme Court’s decision in *McCleskey v. Kemp* laid bare the enduring racial biases that individuals harbor, antipathies that, according to Justice Scalia, courts are powerless to eradicate. While Justice Scalia might be right to suggest that the judiciary lacks the ability to ensure that all Americans have racially progressive views untainted by unconscious biases, the Court should not block states from using non-judicial means to ensure that students are exposed to a racially diverse classroom, which fosters cross-racial understanding and eviscerates invidious stereotypes. Diversity in education is a vital instrument for ensuring that unconscious racial prejudices no longer color our institutional and social relations.

Part I explains the University of Texas at Austin’s (“UT”) admissions policy and the Fifth Circuit’s decision upholding it. Part II describes the *McCleskey* Dilemma—broadly, the inability of courts to wholly eliminate the sources and effects of unconscious racial biases—and links it to the pursuit of diversity in the classroom. Finally, Part III argues that race-based school admissions policies, like the program employed by UT, are a potential solution to the *McCleskey* Dilemma.

I.

**FISHER v. UNIVERSITY OF TEXAS AT AUSTIN**

UT has developed an intricate framework to secure a diverse student body. UT overlays a “holistic, multi-factor approach, in which race is but one of many considerations” on top of the state’s Top Ten Percent Law, which guarantees admission to Texas high school seniors who graduate in the top ten percent of their class. Before the Supreme Court in *Grutter* sanctioned the use of race-based admissions policies, Fifth Circuit precedent barred UT from considering race when assembling a class of incoming students. UT relied

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8. *See id.*
9. *Fisher* v. Univ. of Tex. at Austin, 631 F.3d 213, 218, 224 (5th Cir. 2011).
10. *Id.* at 223.
instead on the Top Ten Percent Law to facilitate admission of first-year classes that included substantial numbers of underrepresented minorities. Evaluating its regime after *Grutter*, UT discovered that the Top Ten Percent Law, while producing significant minority enrollment, did not yield a racially diverse group of students in small classes and failed to mitigate feelings of remoteness among minority students.

To remedy the lingering problem of racial isolation in the classroom, UT sought to develop a policy consistent with the Court’s holding in *Grutter*. The Court in *Grutter* upheld the University of Michigan Law School’s admissions policy, which afforded various types of diversity “substantial weight” in the evaluation process and aimed to enroll a “critical mass” of underrepresented minority students. Reiterating that “all racial classifications imposed by the government” are subject to strict scrutiny and can therefore survive constitutional challenge only if narrowly tailored to further a compelling governmental interest, the Court explained that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”

The Court pointed to the benefits that flow from classroom diversity in determining that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” Turning to the narrow-tailoring prong of the strict scrutiny inquiry, the Court emphasized the need for “individualized consideration in the context of a race-conscious admissions program.” Schools must take a holistic view of a student’s application, considering race only as a “plus” in a “flexible, nonmechanical way.” Stressing the need to account for all aspects of an applicant’s qualifications and background, the Court instructed universities that consider racial factors to adopt admissions policies that “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.”

The Court consequently declared “outright racial balancing” in admissions “patently unconstitutional,” but it allowed for “[s]ome attention to numbers.”

11. See id. at 224. For instance, underrepresented minorities accounted for almost forty percent of students admitted to UT’s last class prior to the introduction of race as a factor in admissions decisions. See id.

12. Id. at 225.

13. Id. at 225–26.


15. Id. at 326–27.

16. See infra Part III.

17. Grutter, 539 U.S. at 325.

18. Id. at 337.

19. Id. at 334.

20. Id. at 337.

21. Id. at 330.

22. Id. at 336.
Underscoring the need for individualized consideration of applicants, the Court in the companion case of *Gratz v. Bollinger* invalidated the University of Michigan’s use of race in its undergraduate admissions. 23 Unlike the program approved in *Grutter*, the policy in *Gratz* treated race in a mechanical way, making it the decisive factor in securing admission “for virtually every minimally qualified underrepresented minority applicant.” 24

Harmonizing its quest for racial inclusion with the dictates of *Grutter*, UT introduced race as a component of the evaluation process that complements the Top Ten Percent Law. 25 After seats have been allocated to students meriting automatic admission on the basis of high school performance, UT fills the remainder of its in-state class through assessment pursuant to the Academic and Personal Achievement Indices. 26 The Personal Achievement Index scores an applicant in part on the basis of her background, considering race in addition to several other factors. 27 Using the Top Ten Percent Law in tandem with the Indices, UT has noticeably enhanced diversity within individual classrooms and majors. 28

The Fifth Circuit in *Fisher* sustained the constitutionality of UT’s admissions policy as consonant with the requirements of *Grutter*, turning aside the challenge pressed by two unsuccessful UT applicants. 29 The court reasoned that “[a]lthough the aggregate number of underrepresented minorities may be large” when using only the Top Ten Percent Law, “the enrollment statistics for individual groups when UT decided to reintroduce race as a factor in admissions decisions does not indicate critical mass was achieved.” 30 The court found UT’s attempts to achieve a critical mass of underrepresented minorities sufficiently flexible to resist classification as a quota or an attempt at racial balancing. 31 “Although a university must eschew demographic targets,” the court explained, “it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.” 32 The admissions program moreover lent itself to individualized assessments, allowing “applicants of every race [to] submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.” 33 All three members of the panel joined the opinion, though Judge

24. *Id.* at 272.
25. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 226 (5th Cir. 2011).
26. *Id.* at 227.
27. *Id.* at 228.
28. *Id.* at 226.
29. *Id.* at 247.
30. *Id.* at 245.
31. *Id.* at 237.
32. *Id.* at 238.
33. *Id.* at 236.
Garza wrote a special concurrence. He conceded that the majority opinion correctly applied binding precedent but nevertheless expressed his hope that the Supreme Court would revisit *Grutter*, a decision that, in his estimation, “represents a digression in the course of constitutional law.”

One of the challengers of UT’s admissions policy petitioned the Supreme Court for certiorari. Her brief argues principally that the Fifth Circuit’s decision contravened *Grutter*. Alternatively, if the Supreme Court concludes that the Fifth Circuit appropriately construed *Grutter*, she asks the Court to reconsider *Grutter*. Drawing on the challenger’s alternative argument, amici in support of her have called on the Court to revisit *Grutter*. The Court granted certiorari, with arguments scheduled for October Term 2012.

II.

**OUTLINING THE MCCLESKEY DILEMMA**

The issues implicated in *Fisher* resonate in myriad domains beyond a university’s admission’s office. Indeed, concerns animating the discourse in *Fisher* draw substantial vitality from the underpinnings of the Court’s decision in *McCleskey v. Kemp*, a seemingly unrelated decision confronting racial disparities in a state’s administration of the death penalty. The dialogue between the majority and the dissenting Justices in *McCleskey* reveals a poignant remedy problem: the inability of the judiciary to wholly eliminate the sources and effects of racial discrimination. To unite disparate areas of race jurisprudence and thereby magnify the ameliorative effect of its policy, UT should argue that its race-based admissions program—which fosters cross-racial understanding and breaks down stereotypes—presents a potential solution to the vexing remedy dilemma captured in *McCleskey*.

**A. McCleskey v. Kemp**

In a decision with overtones extending to all reaches of race jurisprudence, the Supreme Court in *McCleskey v. Kemp* rejected a Georgia inmate’s attempts to nullify his death sentence on the ground that racial discrimination permeated the state’s capital-sentencing regime. Habeas petitioner Warren McCleskey, an African American, presented the results of the Baldus Study to argue that race played a determinative role in the imposition of his death sentence. The Baldus Study revealed that defendants

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34. *Id.* at 247 (Garza, J., concurring).
36. *Id.* at 35.
39. *Id.* at 286.
charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing African American victims, and that African American defendants were 1.1 times more likely to receive a death sentence than defendants of other races. Justice Brennan cogently summarized the import of the statistical evidence: “[T]here was a significant chance that race would play a prominent role in determining if [McCleskey] lived or died.”

The Court rejected McCleskey’s equal protection and Eighth Amendment claims, deeming the Baldus Study insufficient to prove purposeful discrimination in his case. Asserting that the majority had paid only lip service to the powerful statistical data before the Court, the dissenting Justices found McCleskey’s evidence persuasive enough to demonstrate that “racial factors entered into the decisionmaking process that yielded [his] death sentence.”

Although the terms of the dispute ostensibly centered on the quantum of evidence required to prove purposeful discrimination in a particular case, boiling beneath the surface—and animating the Justices’ views—was the thorny question of remedy. For its part, the majority noted “the jury’s function to make the difficult and uniquely human judgments that defy codification and that build[d] discretion, equity, and flexibility into a legal system” and railed against McCleskey’s attempts to circumscribe the jury’s prerogative as “antithetical to the fundamental role of discretion in our criminal justice system.” Even were it inclined to reverse course and find that McCleskey had articulated a cognizable constitutional claim, the majority nevertheless determined that a proper remedy would be impossible to craft. “[T]here is no limiting principle to the type of challenge brought by McCleskey,” wrote the majority, as it “throws into serious question the principles that underlie our entire criminal justice system” and would lead to constitutional attacks on every conceivable criminal penalty based on membership in any number of articulable classes. Although he criticized the majority for “fear[ing] . . . too much justice” by worrying about constraints on a possible remedy, Justice Brennan was unable to outline an appropriate limiting principle for the constitutional violations claimed by McCleskey. Nor did the other dissenters mention much in the way of remedy, save for Justice Stevens’s brief attempt to

40. Id. at 287.
41. Id. at 321 (Brennan, J., dissenting).
42. Id. at 292, 313.
43. Id. at 359, 361 (Blackmun, J., dissenting).
44. Id. at 311 (internal quotation marks omitted).
45. Id. at 314–19.
46. Id. at 318.
47. Id. at 315.
48. Id. at 315–18.
49. Id. at 339 (Brennan, J., dissenting).
explain that racial discrimination in capital sentencing could be abated by restricting imposition of a death sentence to “certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to” race.50

Before the Court issued its decision, Justice Scalia poignantly encapsulated McCleskey’s remedy problem in a memorandum circulated to the Court.51 Although he expressed general support for Justice Powell’s draft opinion, Justice Scalia disagreed with a central premise—that, were McCleskey’s claims buttressed by “sufficiently strong statistical evidence,” a constitutional violation would lie.52 Justice Scalia instead peered deeper into human nature and the judiciary’s role in ordering social relations to justify joining the draft opinion: “Since it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones], is real, acknowledged by the [cases] of this court and ineradicable, I cannot honestly say that all I need is more proof.”53 His views found voice in the ensuing majority opinion, which alluded to the inability of courts to wholly preclude jurors from relying on animus and caprice, remarking that individuals “bring to their deliberations qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”54

B. The McCleskey Dilemma

Justice Scalia thus enunciated the core of the McCleskey Dilemma: the relative powerlessness of courts when faced with human acts potentially—even likely—motivated by hidden racial biases. McCleskey itself is an incandescent example of this phenomenon. Suppose the Court had accepted McCleskey’s arguments and found that the Constitution mandated invalidating his capital sentence, procured as it was through a racially biased process. What steps could the Court have taken to ensure that no Georgia defendants were sentenced to death on account of racial factors? It could have gone so far as to upend the state’s capital-sentencing regime, guaranteeing that no one would be sentenced to death as a result of a racially discriminatory system. Yet this would merely push the question back, failing to remedy the core problem. Even were Georgia—and other states—to abolish the death penalty and construct a criminal-justice system in accordance with the most racially progressive policies, racial antipathy could still drive the decision-making processes of jurors and prosecutors. No matter the Court’s response to McCleskey’s plight, any unconscious racial biases would likely animate the decisions rendered by

50. Id. at 367 (Stevens, J., dissenting).
51. See generally Dorin, supra note 7.
52. Id. at 1066–67 (internal quotation marks omitted).
53. Id. at 1067 (alteration in original) (internal quotation marks omitted).
54. McCleskey, 481 U.S. at 311 (internal quotation marks omitted).
the individuals making the critical calls in the criminal process—the prosecutors deciding who and what to charge and the jurors deciding whether to convict. Try as it might, the Court—with its ironclad commitment to discretion as the heart of the criminal-justice system—would be unable to assure minority defendants that they were charged and convicted absent invidious racial discrimination playing a central role.

And the McCleskey Dilemma is not confined merely to criminal cases. Any discretionary decision-making process—from crafting legislation to selecting airplane travelers for enhanced screening—is likely infected with what Justice Scalia referred to as “the unconscious operation of irrational [racial] sympathies and antipathies”\(^{55}\) that the judiciary is incapable of eradicating.

Perhaps courts cannot cure the McCleskey Dilemma. But they should not stand in the way as school officials strive to solve the vexing problem. By adopting admissions policies that foster diversity in the classroom, schools like UT are putting children and young adults in a unique position to gain a genuine understanding of individuals of different races. Schools, if given the autonomy to hone race-based selection programs, can help produce adults with fewer unconscious, invidious biases.

III.

SOLVING THE MCCLESKEY DILEMMA

The McCleskey Dilemma comprises two fundamental pillars: humans by and large harbor unconscious racial biases that affect their decision-making processes, and courts are not able to directly eliminate these biases and their manifestations. In these respects, the Dilemma tracks the views that Justice Scalia voiced in his memo. Yet where Justice Scalia’s judiciary acknowledges these unfortunate premises and fatalistically deems the problems ineradicable, a court system dedicated to realizing Brown’s promise of racial egalitarianism and equal opportunity should enthusiastically embrace the use of race by school officials to secure a racially diverse student body. By exposing schoolchildren and university students to classmates from diverse backgrounds, we can help enervate unconscious prejudices and ensure that race does not hinder advancement and fulfillment.\(^{56}\)

An unfortunate reality, the specter of racial discrimination still haunts our everyday interactions. Recent research suggests that humans are “infected with racial bias and that often that bias resides outside of our awareness.”\(^{57}\) Such implicit racial attitudes influence snap judgments, personal preferences, and

\(^{55}\) Dorin, supra note 7, at 1067 (internal quotation marks omitted).

\(^{56}\) See, e.g., MARTHA MINOW, IN BROWN’S WAKE 156 (2010) (cataloging concrete benefits of diversity in the classroom).

even “positions arrived at after careful consideration such as the policy choices of legislators, policemen, and employers.”

Although overt bigotry is thankfully on the wane, subtle, unconscious racism persists. This hidden dimension of individuals’ racial biases poses particularly acute constitutional difficulties. With unconscious racism unlikely to leave an imprint on a legislative record or police report—and reliance on disparate impact as the touchstone of an equal protection claim foreclosed—courts are ill equipped to pinpoint and rectify instances in which racial discrimination affects official action. Encouraging policies that break down stereotypes and foster empathy is thus a judicial necessity.

The Supreme Court has recognized the limits of the judiciary’s capacity to confront and mold private preconceptions. In Palmore v. Sidoti, the Court took the unusual step of intervening in a child-custody dispute. After the child’s white parents divorced, her mother married an African American man. The trial court awarded custody to the father, reasoning that the child, if placed in the custody of her mother, would suffer “social stigmatization” because of her mother’s interracial relationship. “It would ignore reality,” declared the Supreme Court as it reversed the trial court’s decision, “to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.” It acknowledged that “[t]he Constitution cannot control such prejudices” and that “[p]rivate biases may be outside the reach of the law.” But neither the Constitution nor the law, proclaimed the Court, can tolerate or “directly or indirectly[,] give [such biases] effect.”

Palmore thus demarcated the boundaries of judicial interaction with discriminatory racial attitudes: while courts are unable to ameliorate private prejudices, they will not sanction the acknowledged implementation of such biases. What remains is a vast middle expanse in which other institutional actors can attempt to promote racial understanding and eliminate subtle racism. Justice Scalia is right to acknowledge the real-world limits on the judiciary’s power to craft remedies, but he is wrong to deem racial prejudice ineradicable and bar other governmental entities from attempting to occupy this middle ground. Indeed, UT and other schools adopting race-based admissions policies have provided a compelling template for using classroom diversity to solve the McCleskey Dilemma. Because racial diversity in education offers great hope for moving toward racial equality in both thought and deed, the Supreme Court

58. Id. at 957–58.
59. See id. at 959.
62. Id. at 430.
63. Id. at 431 (internal quotation marks omitted).
64. Id. at 433.
65. Id.
66. Id.
in *Fisher* should embrace these race-based admissions policies.

Seizing non-judicial means to undermine hidden racial discrimination and recognizing that “diversity takes on a special meaning in the school,” school officials have used admissions procedures to secure racially diverse classes. As scholars have noted, “[d]ecades of social science research since *Brown* have shown how schooling children from different [racial] groups together can prevent social stigma,” reduce prejudice, and “increase friendships, empathy, and liking for others of different races.” Courts and commentators have drawn on this research to extol the virtues of diversity in the classroom. In fact, the Supreme Court itself adjudges “student body diversity . . . a compelling state interest that can justify the use of race in university admissions.” According to the Court, diversity facilitates cross-racial understanding among students, which “helps to break down racial stereotypes, and enables students to better understand persons of different races.” Scholars have agreed, arguing that “by providing a space for people of all races to grow together” at a time when “people are particularly open to new ideas and . . . have a tendency to bond with others,” diverse educational settings “teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy.”

Justice Breyer referred to the eradication of racial prejudice through educational diversity as the “democratic element” of the compelling interest at stake in affirmative action jurisprudence. “It is an interest,” wrote Justice Breyer, “in helping our children learn to work and play together with children of different racial backgrounds. . . . [And] in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.”

Not only is racially diverse schooling a potent ameliorative agent for weakening the grip of prejudice, it could mitigate the judiciary’s need to referee divisive race-based disputes—in the employment and legislative redistricting contexts, for instance. Opponents of affirmative action fear that continuing to classify people in terms of race will corrode the polity, engendering racial strife at every stage of a person’s life by “plac[ing] a racial thumb on the scales.” By upholding UT’s policy in *Fisher* and allowing schools to take race into account at the admissions stage, the Supreme Court might be able to confine the use of racial classifications to the educational domain. With adults having

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68. *MINOW*, supra note 56.
70. *Id.* at 330 (internal quotation marks and alteration omitted).
73. *Id.*
been schooled in racially diverse settings and having achieved a degree of cross-racial understanding, the need for remedial race-based measures later in life might diminish. Thus the judiciary would be able to limit racially motivated intervention in the non-educational context, instead allowing diverse schools to produce “institutions that integrate in the normal course of business”75 and citizens on guard to prevent racial discrimination.

CONCLUSION
FULFILLING BROWN’S PROMISE

Recognizing the fundamentality of racial diversity in the classroom, UT is channeling the enduring pledge of Brown, a decision that “sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.”76 Fisher thus presents the Supreme Court with an invaluable opportunity to afford a member of the old Confederacy a chance to attack the racial biases that have plagued American society for centuries. The Court should allow—indeed, encourage—efforts aimed at promoting diversity in education, a tool with the potential to strike a mortal blow to unconscious racial prejudice and vanquish the McCleskey Dilemma. Embracing these racially progressive policies of school administrators could take us tantalizingly close to producing a generation of citizens who realize Brown’s “promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools.”77

75. Reva B. Siegel, From Colorblindness to Antibalkanization An Emerging Ground of Decision in Race Equality Cases, 120 YALE L.J. 1278, 1348 (2011).
76. Parents Involved, 551 U.S. at 868 (Breyer, J., dissenting).
77. Id. at 867.