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**CASTING SHADOWS: *FISHER v. UNIVERSITY OF TEXAS AT AUSTIN*
AND THE MISPLACED FEAR OF “TOO MUCH” DIVERSITY**

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*Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before.*¹ -Justice Alito

I. INTRODUCTION

Justice Alito's comment, made during the recent oral argument before the Supreme Court of the United States in *Fisher v. University of Texas at Austin*,² is troubling on many levels. Significantly, the comment suggests that Justice Alito has not recently reread *Regents of the University of California v. Bakke*³ or *Grutter v. Bollinger*⁴—the two Supreme Court decisions that will likely control the outcome in *Fisher*. *Bakke* and *Grutter* acknowledged two possible justifications for race-conscious admissions policies, and the justification these cases ultimately endorse is the one Justice Alito appears to be unfamiliar with.

Specifically, per *Bakke* and *Grutter*, the two possible bases for the use of race-conscious admissions policies are: (1) remedial justifications and (2) educational excellence justifications.⁵ Remedial justifications posit that, because past race discrimination in admissions decisions limited the number of racial minorities who had access to higher education, race-conscious admissions policies are needed today to bolster the number of students of color in student

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1. Transcript of Oral Argument at 43, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012).

2. No. 11-345 (U.S. argued Oct. 10, 2012).

3. 438 U.S. 265 (1978) (plurality opinion).

4. 539 U.S. 306 (2003).

5. *See id.* at 328 (comparing remedial justifications and educational justifications for race-conscious admissions policies).

bodies, and thereby overcome historical deficits.⁶ Justice Alito focused on this type of remedial justification when he characterized the purpose of such policies as “help[ing] students who come from underprivileged backgrounds.”⁷

Justifications based in educational excellence work quite differently. Educational excellence justifications are premised on the notion that background-conscious—including race-conscious—admissions policies allow school administrators to compose diverse student bodies that are more likely to espouse diverse viewpoints, which will in turn support robust academic conversations and intellectual environments.⁸

Justice Alito’s comment is curious because the remedial justifications he implied are at issue in *Fisher* were rejected soundly over thirty years ago in *Bakke*.⁹ His comment is also curious because the “very different argument” Justice Alito did not think he had “seen before” was the educational excellence justification the Court explicitly endorsed as constitutionally sound in *Bakke*, and later reaffirmed in *Grutter*.¹⁰

Because the Court has endorsed the educational excellence justification for race-conscious admissions policies on two occasions, it is surprising that Justice Alito purported to be unfamiliar with that justification. But Justice Alito’s confusion in fact represents a larger confusion on the Court—one that was apparent at oral argument in *Fisher* and can be traced back to passages in the *Grutter* decision itself—about the relationship between remedial and educational excellence justifications for race-conscious admissions policies. It is as if certain members of the Court cannot accept the notion that

6. See *Bakke*, 438 U.S. at 369 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that “race-conscious admissions criteria” can be used to remedy past discrimination).

7. Transcript of Oral Argument, *supra* note 1, at 43.

8. See *Grutter*, 539 U.S. at 329–30 (describing the educational justifications for race-conscious admissions policies).

9. See *Bakke*, 438 U.S. at 310 (stating that granting additional rights to groups “perceived as victims of ‘societal discrimination’” as a privilege was not justified and has never been approved by the Supreme Court).

10. Justice Alito’s comment was in response to an argument by counsel for the University of Texas that admitting minority candidates under the school’s affirmative action policy “directly impacts the educational benefits of diversity.” Transcript of Oral Argument, *supra* note 1, at 42. This argument echoed the sentiments of *Bakke* and *Grutter*. See *Bakke*, 438 U.S. at 311–12 (referring to “the attainment of a diverse student body” as “a constitutionally permissible goal for an institution of higher education”); *Grutter*, 539 U.S. at 328 (deferring to the school’s judgment that “diversity will . . . yield educational benefits”).

promoting diversity is not necessarily about “us” (the presumptive gatekeepers of access to cultural capital) helping “them” (disadvantaged people of color), but instead about a unified effort to create an environment of academic excellence that benefits all members of the community.

The Court has the opportunity to sort out this confusion through its forthcoming decision in *Fisher*.

II. ACADEMIC EXCELLENCE IN *BAKKE*

In his 1978 plurality opinion in *Bakke*, Justice Powell made a strong case for the fundamental importance of educational diversity to the mission of academia.¹¹ At issue in *Bakke* was the constitutionality of the admissions policy employed by the Medical School of the University of California at Davis (“U.C. Davis”).¹² It is important to note that the type of policy at issue in *Bakke* was entirely different than the type of policy at issue in *Grutter* and *Fisher*. Under the *Grutter* and *Fisher* policies, admissions decisions were made by considering race as one factor in a holistic assessment of admissions applications.¹³ By contrast, the U.C. Davis policy called for a very blunt “set-aside” mechanism that reserved a certain number of slots in the incoming class for racial minorities.¹⁴

Because the policy in *Bakke* relied on facial race classifications, Justice Powell applied strict scrutiny,¹⁵ which required U.C. Davis to prove that the policy served a compelling interest, and that race classifications were necessary to achieve that interest.¹⁶

Addressing the first prong of strict-scrutiny review, U.C. Davis offered four interests in support of the policy:

11. See *Bakke*, 438 U.S. at 312–14 (discussing the notion of academic freedom and explaining how diversity furthers the goals of academia).

12. *Id.* at 269–70.

13. *Grutter*, 539 U.S. at 315–16; *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

14. See *Bakke*, 438 U.S. at 275–76 (describing how U.C. Davis reserved a “prescribed number” of admissions slots for “special applicants,” all of whom turned out to be members of racial minority groups); see also *id.* at 348–49 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting the use of the term “set-aside” to describe a racial quota system in a federal law regarding grants for public works (quoting 123 Cong. Rec. 5,327 (1977))).

15. *Id.* at 289–91.

16. See *id.* at 299 (“When [political judgments] touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”).

(i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.¹⁷

Justice Powell rejected the first goal—reaching a certain numerical representation of minority students—as “facially invalid,” describing preference for one group over another based only on race or ethnicity as “discrimination for its own sake.”¹⁸

He also rejected the second goal—countering the effects of past discrimination—as insufficiently precise:

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.¹⁹

Regarding the third goal—increasing the number of physicians in underserved communities—Justice Powell determined that the school had failed to show racial preferences were necessary to achieve that goal.²⁰

Thus, the only governmental interest Justice Powell found sufficiently compelling was the fourth goal—“attain[ing] . . . a diverse student body,”²¹—which he characterized as “clearly . . . a constitutionally permissible goal for an institution of higher education.”²² Justice Powell further emphasized that this interest was grounded in weighty First Amendment freedoms:

17. *Id.* at 305–06 (footnote omitted) (citation omitted) (quoting Brief for Petitioner at 32, *Bakke*, 438 U.S. 265 (No. 76-811)).

18. *Id.* at 307.

19. *Id.* at 310.

20. *Id.* at 310–11.

21. *Id.* at 311.

22. *Id.* at 311–12.

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . .

. . . .

. . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.²³

Because Justice Powell identified a state interest sufficient to justify the law, he went on to the second prong of strict-scrutiny analysis: an examination of whether the policy was narrowly tailored to serve that interest.²⁴ He concluded that the strict numerical set-aside for minority students was too blunt an instrument to meet the narrow-tailoring standard.²⁵ Justice Powell offered that it would be permissible, by contrast, for the school to consider race as one factor among many in an individualized assessment of applicants.²⁶ And going forward, schools began constructing their admissions policies in precisely this manner.

Although the *Bakke* decision was only a plurality opinion, it holds an important place in the Court’s affirmative action jurisprudence because it stated unequivocally that generalized remedial justifications could not support race-conscious admissions policies. Only educational excellence justifications, with their grounding in the First Amendment, were sufficiently compelling.

III. *GRUTTER* AND THE SEEDS OF CONFUSION

Twenty-five years later, the majority in *Grutter* validated the core conclusion of Justice Powell’s plurality decision in *Bakke*: Promoting a diverse educational environment is a compelling state interest for

23. *Id.* at 312–13.

24. *See id.* at 314–15 (“[T]he question remains whether the program’s racial classification is necessary to promote this interest.”).

25. *See id.* at 315 (reasoning that by focusing exclusively on race and ethnicity, the university’s policy would frustrate, rather than promote, true diversity).

26. *Id.* at 317–19.

purposes of strict scrutiny review.²⁷ The *Grutter* Court also confirmed the *Bakke* plurality's assertion that using race as one factor in a holistic assessment of a candidate can satisfy strict scrutiny's narrow tailoring requirement.²⁸ But the *Grutter* Court went further than to reaffirm *Bakke*. The *Grutter* Court added the requirement that, in order to be narrowly tailored, a race-conscious admissions policy must be time-limited.²⁹ The current confusion in *Fisher* arises from this problematic time-limitation requirement.

At issue in *Grutter* was the admissions policy of the University of Michigan Law School.³⁰ That policy self-consciously sought to comply with Justice Powell's opinion in *Bakke* by using race as only one factor in a holistic assessment of each individual candidate.³¹ Further, the school asserted only one state interest in support of the policy: enhancing educational diversity as described by Justice Powell in *Bakke*.³²

The *Grutter* Court approved the school's compelling interest in educational excellence and its narrowly tailored approach to achieving that goal, essentially reaching the same result based on the same reasoning the *Bakke* Court would have reached had Michigan Law School's policy been before it.

But the *Grutter* Court went further. Specifically, the Court disaggregated race as a component of the diversity that supports educational excellence, and subjected the inclusion of race to yet another layer of scrutiny.³³ Justice O'Connor, writing for the Court, recognized the current salience of race to maintaining a diversity of viewpoints, but then characterized this relevance as unfortunate and necessarily time limited: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."³⁴

27. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

28. *See id.* at 334 ("Universities can . . . consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.").

29. *Id.* at 342.

30. *Id.* at 311.

31. *Id.* at 314.

32. *Id.* at 328.

33. *See id.* at 341–42 (examining race as an element of diversity and determining that there must be durational limits to race-conscious policies).

34. *Id.* at 333.

From this unexamined normative assumption that race should not “matter” as an aspect of identity, and the related assumption that, as we progress as a society, race will inevitably cease to matter, Justice O’Connor concluded that “race-conscious admissions policies must be limited in time.”³⁵ She even went so far as to speculate that such policies would be unnecessary in twenty-five years.³⁶

There are several problems with the analysis employed to support the time-limitation requirement. First, it is based in impressionistic claims about social reality that are generally beyond judicial competence.³⁷ Second, the twin claims that (1) in an ideal world, race would not matter, and (2) we are progressing toward such a world because race discrimination itself is in a state of inevitable decline, are both highly contested and contestable.³⁸ Under this analysis, race matters *only* because it is and has been an axis of discrimination. This seems wrong, and even patently offensive.

Further, by relying on these problematic assumptions, Justice O’Connor’s analysis fails to apprehend the value and purpose of educational excellence as a justification for race-conscious admissions policies, as set forth by Justice Powell in *Bakke*. Justice Powell strenuously emphasized the distinction between remedial justifications for race-conscious admissions policies on the one hand, which are aimed at absolving the sins of past discrimination, and educational excellence justifications on the other hand, which are forward-looking and not dependent on assertions about a social reality of race subordination (or the supposedly inevitable dissolution of such subordination). Pursuant to an educational excellence

35. *Id.* at 342. Justice O’Connor then described how a time limit could be implemented: “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.” *Id.*

36. *See id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

37. Justice Powell himself made a related point about the Court’s limited ability to judge the relative political and social position of various groups in society: “The kind of variable sociological and political analysis necessary to produce such rankings [of the relative hardships borne by different racial groups] simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 (1978).

38. *See, e.g.*, Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 150 (1994) (noting that while some scholars argue an ideal society will be colorblind, other scholars “stand in opposition to the theory of colorblindness”); David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857, 861 (2011) (arguing that despite changes in how racism is perceived in the United States, “[d]eep-seated notions about race dating back to slavery, Jim Crow, and segregation persisted and remain very much alive today”).

justification, one assumes that the school seeking to diversify its student body is in the best position to assess the type and degree of diversity that should be cultivated at any point in time, in order to maximize educational benefits at that school. In recognition of limited judicial competence, the Court should defer to such fact-specific, context-dependent judgments.³⁹

Justice O'Connor added the time-limitation requirement based on the assumptions that race discrimination will inevitably fade away, and with it, the relevance of race as an aspect of identity. Putting aside this pie-in-the-sky prediction about the future of race discrimination in the United States, and the offensive assertion that race only "matters" because it is a basis for discrimination, the problem with Justice O'Connor's analysis is that it conflates the remedial and educational excellence justifications that Justice Powell took great pains to distinguish.

IV. MANIFESTATIONS OF CONFUSION IN *FISHER*

The Court's confusion about the distinction between remedial and academic excellence justifications then manifested during the oral arguments in *Fisher*.

The policy of the University of Texas at Austin ("U.T. Austin" or "University") at issue in *Fisher* bears a striking resemblance to the admissions policy validated in *Grutter*, in part because U.T. Austin carefully patterned its policy on Supreme Court precedent.⁴⁰ Specifically, for a certain portion of the applicant pool, U.T. Austin considers not only an applicant's Academic Index, but also an applicant's Personal Achievement Index, which is meant to account for individual qualities that would not otherwise be considered if assessment of the candidate were limited to the Academic Index

39. Justice O'Connor addressed this concept in an earlier part of her majority opinion in *Grutter*, prior to addressing durational limits:

Our scrutiny of [Michigan Law School's interest in diversity] is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.

Grutter, 539 U.S. at 328. In *Fisher*, the plaintiff argued that such deference to a university's judgments does not comport with strict scrutiny review. See Brief for Petitioner at 53, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. May 21, 2012) (arguing that the Court "should expressly clarify or overrule *Grutter* . . . to . . . restore the integrity of strict scrutiny review in the higher educational setting").

40. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 216 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012).

alone.⁴¹ The Personal Achievement Index is based on a holistic assessment of each applicant’s file.⁴² This assessment also considers “special circumstances,” which may include socioeconomic status and race, among various other factors.⁴³ This aspect of the admissions policy operates in conjunction with a “Top Ten Percent Law,” under which all Texas applicants graduating within the top ten percent of their high school class are guaranteed admission to U.T. Austin.⁴⁴ The Top Ten Percent Law, which contains no facial race classification, has been the primary factor in increasing racial diversity within the UT Austin student body.⁴⁵

As described above, subjecting a law or policy to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution involves a two-prong analysis. First, a court determines whether the challenged law or policy serves a compelling state interest; second, the court determines whether the mechanism employed by the law or policy is narrowly tailored to serve that compelling interest.⁴⁶ In *Fisher*, it was uncontested that U.T. Austin’s race-conscious undergraduate admissions policy (1) serves the acknowledged compelling state interest in student-body diversity and (2) serves this interest in a manner that complies with *Grutter*.⁴⁷

On what basis, then, did Fisher challenge U.T. Austin’s policy? Not surprisingly, Fisher’s argument capitalizes on the doctrinally ambiguous time limitation requirement announced in *Grutter*. Specifically, Fisher argued that U.T. Austin had to demonstrate that a race-conscious admissions policy is *still* necessary today to achieve student-body diversity in order to prove that its policy was narrowly tailored, or necessary, to achieve the compelling state interest in educational diversity.⁴⁸ This argument is essentially an end-run

41. *Id.* at 227–28.

42. *Id.* at 228.

43. *Id.*

44. *Id.* at 224.

45. *See id.* at 261 (Garza, J., concurring) (noting that a much higher percentage of minority students were admitted as a result of Top Ten Percent Law than the Personal Achievement Index).

46. *See supra* note 16 and accompanying text.

47. *See Fisher*, 631 F.3d at 230 (“UT [Austin] undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions . . . mirror those approved by the Supreme Court in *Grutter*.”).

48. To show that the use of racial classifications is necessary, petitioner argued that:

UT [Austin] also must demonstrate that its use of race in admissions is “necessary to further” an *unmet* compelling government interest. . . . UT [Austin]

around the precedent established in *Grutter* because it requires schools to prove that diversity, including racial diversity, remains a compelling state interest *on an ongoing basis*, while cloaking the attack as an argument under the narrow-tailoring prong of strict scrutiny.

Having framed the issue in this manner, Fisher then argued that the race-conscious component of UT Austin's admissions policy was no longer necessary because the Top Ten Percent Law had succeeded in increasing racial diversity within the student body, thereby obviating the need for a separate race-conscious diversity program.⁴⁹

This argument resulted in the following opening passage in the Fifth Circuit's decision in *Fisher*, which is humming with anxiety that U.T. Austin might one day be home to "too much" diversity:

While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*, UT [Austin]'s program acts upon a university applicant pool shaped by a legislatively[]mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain legality of the *Grutter*-like admissions program⁵⁰

Thus, the only basis for challenging U.T. Austin's precedent-compliant policy was the fear that, when combined with the successful Top Ten Percent Law, the University might be creating excessive diversity.

This anxiety about excessive diversity was echoed at oral argument before the Supreme Court. Questioning from a number of Justices had a distinct "are we there yet?" quality. For instance, the Justices pressed counsel for both parties to identify a number or percentage of minority students that would satisfy the critical mass requirement.⁵¹ Justice Scalia was fixated on how U.T. Austin

thus needed a strong factual basis that the student body *did not already include* the "meaningful number" of minority students needed to meet an educational goal in student-body diversity before restoring race into its admissions system.

Brief for Petitioner, *supra* note 39, at 31 (emphasis added).

49. Brief of Plaintiffs-Appellants at 50–51, *Fisher*, 631 F.3d 213 (No. 09-50822).

50. *Fisher*, 631 F.3d at 216–17 (footnote omitted).

51. Early in the argument, for example, Justice Sotomayor pressed Fisher's counsel: So could you tell me what a critical mass was? I'm looking at the number of blacks in the University of Texas system. Pre-*Grutter*, when the state was indisputably still segregating, it was 4 percent. Today, under the post-*Grutter* system, it's 6 percent. The 2 percent increase is enough for you, even though

determined whether there were “enough” minorities in any given class.⁵² In this way, the Justices backed UT Austin into a doctrinal corner. If the University were to admit that it was assessing sufficient diversity against a numerical standard, it would be admitting to relying on unconstitutional quotas. Counsel for U.T. Austin resisted the Court’s efforts to characterize the policy in this manner, stressing that race was only one component of the diversity the University sought, and that the need for diversity was assessed in a nuanced manner.⁵³

At the end of the day, the concern that a school might achieve too much diversity does not fit well with the educational excellence justification endorsed in *Bakke* and purportedly reaffirmed—albeit in a confused way—in *Grutter*. Because this concern assumes that, once some quantifiable “critical mass” of minority students has been reached, the need for schools to consciously construct diverse student bodies will disappear. Under an educational excellence justification, by contrast, we would assume that schools are free to continuously reassess their diversity needs and refine their admissions policies to achieve optimal student-body compositions. And schools should be permitted to include consideration of race in this analysis, so long as race still “matters” as a part of identity.

V. CONCLUSION

In deciding *Fisher v. University of Texas at Austin*,⁵⁴ the Court should strive to craft a rule for all time—a rule that affords universities sufficient latitude to assemble robust, diverse student bodies in the face of our ever-changing, pluralistic society. But based

the state population is at 12 percent? Somehow, they’ve reached a critical mass with just the 2 percent increase?

Transcript of Oral Argument, *supra* note 1, at 14; *see also id.* at 16–17 (asking Fisher’s counsel to define the point at which “a district court or a university know[s] that it doesn’t have to do any more to equalize the desegregation that has happened in that particular state over decades”); *id.* at 49 (asking counsel for U.T. Austin about the point at which the Court should “stop deferring to the University’s judgment that race is still necessary”); *id.* at 46–47 (asking counsel for U.T. Austin when the Court will know that the University has “reached a critical mass”).

52. *Id.* at 34. Justice Scalia was also concerned with what resources the University might be spending to gather this information, evoking an image of a vast cadre of affirmative action officers swarming the U.T. Austin campus to monitor sufficient levels of racial diversity in every classroom. *See id.* (“[S]omebody walks in the room and looks [the students] over to see . . . who looks Asian, who looks black, who looks Hispanic? Is that . . . how it’s done?”).

53. *Id.* at 39–40.

54. No. 11-345 (U.S. argued Oct. 10, 2012).

on the dialogue initiated by the Justices during the *Fisher* oral argument, the Court appears headed in a different direction. In a sense, the Court seems to be stuck in time—specifically, in a mythical time where we have ended the social practices that suppress diversity in powerful institutions, such that these institutions no longer need to remedy the lingering harms of past discrimination. There is plenty with which to argue in this premise itself, but what is most important is that it entirely misses the point. Per the Court’s own precedent, diversity-enhancing admissions policies are desirable not because they supposedly cure the ills of particular past instances of discrimination, but because they foster vibrant intellectual environments—the goal of every academic institution in selecting students for admission.