The Aesthetics of Affirmative Action

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ABSTRACT

Justice Thomas’s dissent in *Grutter v. Bollinger*—which dismissed diversity as an “aesthetic”—highlighted the Supreme Court’s least-discussed rationale for affirmative action in higher education: the claim that visible diversity in elite institutions bolsters those institutions’ “perceived legitimacy.” This Article takes seriously that claim, and Thomas’s critique, as distinctively aesthetic arguments about the role of appearances in public life. By distinguishing the perceived legitimacy argument from others made on behalf of affirmative action, the Article traces for the first time its origins, scope, and unacknowledged popularity. By identifying the aesthetic logic of the Court's argument and drawing on philosophy’s long theorizing about how aesthetic objects are created and judged, this Article is able to explain one of the most heavily criticized aspects of *Grutter* and its companion case, *Gratz*: their apparent preference for obfuscation in the use of race in university admissions.

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[PLEASE NOTE: I’ve put this piece on hold for a while in anticipation of this Term’s affirmative action case: Fisher v. University of Texas. As a result, what follows is still very much a draft—not just in the sense of a work under revision, but in the sense of an article still being written. The Introduction remains partly aspirational: in certain instances, it points to sections or arguments that have yet to be added. Wherever possible, I have tried to indicate within the text any gaps still to be filled—and to give at least an outline of how I might go about filling them.]