Affirmative Action and Admissions at a Jesuit Law School

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The United States Supreme Court's 2003 decisions[1] regarding affirmative action in higher education have prompted observations about the issues the Court addressed, the importance and effect of Supreme Court pronouncements, and the effect of admissions decisions on the achievement of the mission of Jesuit law schools.

I applaud the Court's upholding the use of race as a factor in admission decisions in order to promote diversity as symbolically important, but believe that current levels of most affirmative action programs have been inadequate. Now that the Supreme Court has upheld the use of race and ethnicity in university admissions, Loyola University Chicago should greatly increase its commitment to a diverse student body in order to benefit society and to fulfill the Jesuit commitment to serving the poor and to striving to create a just society.

THE DECISIONS

The Court's decisions concluded that race may be used as a factor in determining admission to colleges and professional or graduate schools to help bring about the educational benefit of an increased diversity in the student body. However, race may not be the sole factor nor be given a set value in admissions decisions.[2] Rather, it can be one of

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1. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003)

2. *Gratz v. Bollinger* involved a challenge to the University of Michigan undergraduate college admissions program, while *Grutter v. Bollinger* involved a challenge to the admissions program of the University of Michigan Law School. Regarding the undergraduate admissions, the university used numerous factors in making admissions decisions including high school grades, standardized test scores, high school quality and curriculum, geography, relationships to alumni and race. During the period under scrutiny, these factors were given numerical scores and a score of one hundred was required for admission. All African-Americans, Hispanics, and Native Americans were given twenty points because of being "underrepresented minorities." The petitioners in *Gratz* were white students who demonstrated that students from underrepresented minorities were routinely admitted to the university and had admissions scores which would have been lower than theirs except for the additional twenty points awarded on the basis of race or ethnicity. The Supreme Court held that the petitioners had standing to complain of their disparate

many factors used in admissions decisions. The Court majority elevated the position taken a generation earlier by Justice Powell in *Regents of the University of California v. Bakke* to become the Court's standard for determining whether such use of race is permissible under the Fifth and Fourteenth Amendments to the United States Constitution.[3] In 2003, the Court examined the admissions programs of the University of Michigan, which is a state school and therefore governed by the Fourteenth Amendment. However, these decisions also govern the actions of private schools as well as state schools. Private educational institutions receive substantial amounts of federal money, including loan guarantees supporting most students' ability to pay tuition and other costs. The laws regarding these appropriations require that private universities not engage in prohibited racial discrimination.[4] Thus, if the Court had found unconstitutional any use of race in admissions by the University of Michigan, it would have effectively invalidated its use by private institutions.

In sum, the Supreme Court's recent decisions stand for the following propositions, which have both practical effect and symbolic importance. First, unequal opportunities persist in this country on a racial basis, but

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treatment, that race or ethnicity could be considered as a positive factor in admissions decisions without violating the Fourteenth Amendment Equal Protection Clause, but that the granting of twenty points to every member of these groups was not a narrowly tailored mechanism to achieve increased educational diversity because it caused race or ethnicity to be a determinative factor rather than merely a permitted plus factor in admissions. The Court invalidated the university's undergraduate admissions policy, while permitting use of race or ethnicity to be considered in future admissions decisions, which need to be individualized decisions about each student rather than giving such great weight to race and ethnicity to effectively guarantee admission to all minimally qualified students of those races or ethnicity.

Grutter v. Bollinger involved the admissions program of the University of Michigan Law School. The law school looked at a variety of factors to determine which students to admit, including undergraduate grades, LSAT scores, personal statements, letters of recommendation, and "an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School." *Grutter,* 539 U.S. at 315. Although the diversity sought by the school was not limited to racial and ethnic diversity, the law school sought to increase the number of underrepresented minority students and to achieve a "critical mass" of such students to "ensur[e] their ability to make unique contributions to the character of the Law School." *Id.* at 316. In upholding the constitutionality of the law school admissions policies, the Court held that the law school program did not amount to a quota or a separate admissions track, both impermissible under *Regents of the University of California v. Bakke*. *Id.* at 329. The Court distinguished the law school admission process as different from the undergraduate program struck down in *Gratz*, because the law school did not effectively guarantee admission to all minority group members, because the admissions decisions were made on an individualized basis using a multi-factor analysis, because the law school did not limit credit for diversity to only underrepresented racial groups, and because all of the students admitted were highly qualified. *Id.* at 336–39.

3. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978).

4. Discrimination violating the Equal Protection Clause would also constitute discrimination prohibited when practiced by recipients of federal funds. *Gratz,* 539 U.S. at 276 n.23.

they are diminishing. Second, the government or private educational institutions may help in remedying the inequities by considering race in educational admissions. Third, education is improved by increased diversity, including racial diversity, in student bodies. Finally, within a generation or two, the disparities in opportunity and achievement will vanish, at which point it will no longer be appropriate or necessary to consider race in making admissions decisions.

A contrary decision, outlawing race as an admissions factor, would have had important symbolic meaning. Although its disapproval of using race as a basis for decision making would be consistent with the goal of achieving a color blind constitution, it would also have been interpreted as an abandonment of efforts to eliminate existing racial disparities in our country.

Recognizing the real and symbolic importance of the cases, in a rare outpouring of amicus curiae filings, hundreds of organizations signed briefs in these cases, demonstrating their concern about the issues at stake. Most parties submitting amicus briefs favored the university's position. The Supreme Court majority, in *Grutter v. Bollinger*, cited with approval several of those amicus briefs, particularly those representing the positions of major corporations and of the military establishment. In their briefs, the corporations and military leaders indicated their support for diverse student bodies to better enable them to carry out their own operations successfully.[5]

The outcomes of the cases were uncertain but not surprising. The decision upholding as constitutional the law school's admissions policies was supported by a bare 5–4 majority. The Court reiterated its holding in *Bakke* that quotas and separate admissions procedures by race were unconstitutional.[6] It distinguished the law school's policies designed to produce a "critical mass" of African-American students as a permissible goal, rather than an impermissible quota. On the other hand, in the undergraduate case,[7] the Court struck down the school's system of awarding a set number of points to African-Americans and other minority group members, a mechanism apparently designed to ensure the admission of a class with desired percentages of those groups. The law school carefully monitored the admissions process and continually adjusted the value assigned to race to achieve a critical mass. Thus, the Court could easily have invalidated as unconstitutional under *Bakke* this admissions process as an impermissible quota,

5. *Grutter*, 539 U.S. at 308.
6. *Id.* at 336; *Bakke,* 438 U.S. at 315.
7. *Gratz*, 539 U.S. at 306.

functionally equivalent to the Michigan undergraduate program which was struck down.

United States Supreme Court decisions within the previous fifteen years had narrowed allowable affirmative action in employment and contracting.[8] In light of these precedents outside the educational context, significant questions arose about whether the *Bakke* decision or Powell's concurrence in that case were correct statements of the law.[9] The one-vote margin in the case endorsing Powell's reasoning suggests the possibility that a change in the composition of the Court in the next few years might result in a reversal of the decision if the Court were willing to revisit the issue.

Noting that a quarter century had passed since the *Bakke* decision, the Court expressed the view that the use of race in university admissions should not be necessary in another twenty-five years.[10] Perhaps some of the Justices saw this time limit as merely a hope rather than a prediction, while others may have seen it as a constitutional requirement needed in order to meet the narrow tailoring requirement of strict scrutiny analysis. One or more of the Justices may have insisted upon this reference as a condition for joining the majority opinion. The twenty-five year reference has received—deservedly so—much criticism. It is difficult to understand why a practice could be constitutional now but would cease to be constitutional in a quarter of a century, in the absence of an amendment to the Constitution. Similarly, should the practice become unconstitutional in the future, it likely is unconstitutional today. The experience of the past quarter century has shown that the racial disparities in society, although somewhat narrowed in the interim, have not disappeared. If affirmative action to overcome barriers to equality is still needed in twenty-five years, it would seem logical that it would continue to be constitutional.

I have welcomed the increased diversity of student bodies in the last quarter century, and believe that this diversity has contributed to an

8. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995) (holding that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest"); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that strict scrutiny should be used in evaluating state and local affirmative action programs and invalidating a city plan to set aside a certain amount of public money for minority-owned businesses).

9. *Bakke*, 438 U.S. at 265.

10. *Grutter*, 539 U.S. at 341–42. The court reasoned that race-conscious admissions policies must have a time limit to withstand challenge and, noting that twenty-five years have elapsed since *Bakke*, indicated that race-based admissions decisions should no longer be needed in another twenty-five years. *Id*. The reasoning of the court on this point is unclear and may reflect disagreements among the justices in the *Grutter* majority or may be intentionally ambiguous.

increase of opportunity and a decrease in the grave societal injustices of inequality and racial discrimination. Achieving those goals should have been a sufficient justification for the benign use of race in affirmative action plans. Unfortunately, the Court has long rejected these rationales and approved of race as an admissions factor only on the theory that diversity in the student body improves the resulting education.

WOULD A DECISION OUTLAWING USE OF RACE IN ADMISSIONS HAVE MADE A SIGNIFICANT DIFFERENCE?

A decision making race constitutionally impermissible as an admissions factor would have had a limited practical effect, although its symbolic importance would have been substantial. A few states have ended affirmative action in admissions in the last decade, so there is limited evidence to use in speculating on the effects of the Court having ruled out race as an admission factor.

California and Washington passed ballot referenda prohibiting affirmative action in educational admissions, employment, and contracting.[11] Almost a decade before the Supreme Court addressed the issue, the Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*[12] declared that *Bakke* was no longer valid law and prohibited the use of race in admissions decisions at the University of Texas, a decision binding in Texas, Louisiana and Mississippi.[13] In addition, Florida's governor, Jeb Bush, in 1999 abandoned affirmative action policies in educational admissions. Thus, evidence from half a dozen states for several years is available regarding the effect of ending race preferences in university admissions.

Initially, the numbers of African-American and Hispanic students entering undergraduate and law schools in those states fell dramatically.[14] These decreases created political pressure to adopt ostensibly race-neutral policies intended to increase the number of minority students, although not necessarily to the degree which had existed under affirmative action.

11. CAL. CONST. art 1, § 31(a) (enacted by vote on Proposition 209 in November 1996); Washington State Civil Rights Initiative, WASH. REV. CODE § 49.60.400 (adopted in November 1998 and became effective Dec. 3, 1998).

12. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

13. *Id.* at 934.

14. Rene Sanchez, *Black, Hispanic Admissions Plunge at 2 Calif. Campuses*, WASH. POST, Apr. 1, 1998, at A01. At University of California at Berkeley the numbers of African-American and Hispanic students admitted declined from 1997 to 1998 from 562 and 1045 to 191 and 434. At UCLA blacks admitted declined forty-three percent, while the number of Hispanics declined thirty-three percent. *Id*.

For instance, Texas instituted a program which guaranteed undergraduate university admission to any high school graduate in the state in the top ten percent of his or her class.[15] Because of the high level of segregation in Texas schools, this measure assured the admission of many minority students, as well as majority students from primarily white rural schools, who might otherwise not have been admitted. This measure, and somewhat similar ones in California and Florida,[16] did reflect a public perception that it was appropriate to admit more minority group members to the state schools without explicitly considering their race in making admissions decisions. These programs did not, however, result in as high a percentage of minority students being admitted as had occurred previously under affirmative action. In California, the number of minority students admitted to the highest ranked state schools declined significantly, while the numbers of minority students at lesser ranked state schools did increase substantially.[17]

These percentage plans only work as long as high schools remain substantially segregated, a strange basis for a program intended to foster equality in educational opportunity. In a school almost exclusively containing African-American or Hispanic students, those in the top ten percent of the class will almost all be black or Hispanic. If a school taught a mixture of races and ethnicities, and minority students in general did not perform as well as other students, the top ten percent of students might include relatively few minority students, even in a school whose population was mainly of black and Hispanic students. Regardless of the successes of such programs, they have little relevance to law or medical schools, particularly at highly selective state schools such as those in Michigan and Texas, which attract many students from out of state. Because the students from whom professional schools choose their classes are graduates from colleges throughout the country rather than from high schools in the state, high school graduation rank is irrelevant.[18]

15. Kris Axtman, *Affirmative Action, Texas Style, Stirs Criticism*, CHRISTIAN SCI. MONITOR, Feb. 12, 2003, at D3.

16. *Id.*

17. *Id.*

18. Our selective four-year colleges and professional programs lack diversity in various ways. Although this Essay is primarily concerned with racial and ethnic diversity, increasingly those admitted to better undergraduate, and all professional schools, disproportionately come from more wealthy backgrounds. Among the causes of this disparity are tuition and cost increases well in excess of the inflation rate for the past two decades, increases in student debt as the primary means of financing education, and the greater ability of affluent families to provide experiences or special instruction to make their children more competitive in the admissions process.

Even with affirmative action programs, the percentages of minority group students admitted to law schools have been inadequate. Between 1975 and 1990, African-American law students increased substantially in both numbers and percentages. Since that time, the percentage has remained fairly constant at between four to five percent of all law students, far less than the twelve to thirteen percent African-American share of the national population. This result, while a clear improvement over the situation existing a quarter century ago, represents, in my opinion, an inadequate increase in the number of African-American attorneys. Now that the Court has allowed law schools to continue to consider race in making admissions decisions, we need to improve and expand programs that contribute to breaking down racial barriers in our profession at a faster rate than has occurred in recent decades.

A Decision Invalidating Affirmative Action Would Have Been Widely Disregarded

What would have been the effect on admissions programs of legislative or court actions barring the use of race as a factor in admissions? I believe that most university admissions programs would formally have ended all consideration of race if so ordered, and would try to assure that nothing in their files would show disobedience to the law. Nevertheless, many admissions committees would continue to try to achieve the same ends as those previously achieved under affirmative action programs. Most law schools, for example, claimed before the decision that they considered numerous factors in deciding whom to admit and would continue to do so even if race were not allowed to be one of those factors.

Had the Michigan program been invalidated, admissions mechanisms would have been changed easily by eliminating race as a factor but continuing to use a multifactor analysis including non-quantifiable factors such as recommendation letters and student essays. Many who are in positions of authority at educational institutions throughout the country strongly favor, as do I, using measures to increase the numbers of previously underrepresented students in our colleges and universities. Their commitment to this goal would have continued even if race was held not to be a permissible factor in admissions decisions. In furtherance of this goal of increasing minority enrollment, they would have sought to use every possible method of doing so short of outright defiance of the Court decision.

Greater emphasis perhaps would be given to admitting prospective students engaged in community activities assisting minority youth or others, or to individuals who have struggled to overcome problems

associated with poverty or immigration. There could be increased recruitment at schools with high minority populations, admissions advantages to those coming from poorer backgrounds or from families of lower educational achievement, and greater value could be given to students participating in types of activities more likely to be engaged in by members of a minority group. This list is only indicative of approaches which might indirectly favor members of minority groups applying to educational institutions for admission. In addition, these emphases would advance the achievement of a Jesuit mission emphasizing service and a preferential option for the poor.

Both personal experience and the study of constitutional law convince me that court decisions often fail to change behavior. I have been at different times a lobbyist at a state legislature and an elected local government official. In both capacities, I have had various opportunities to observe officials' reactions to court decisions governing their actions. There were frequently patterns of technical compliance and narrow interpretations of court orders so as to allow, if possible, the continuation of the policies that had been invalidated. My experiences lead me to assume that officials who favor a policy, particularly if it is backed by their supervisors or by public opinion among their electorate, will often persist in implementing that policy despite contrary court decisions.

Constitutional law developments provide support for my view that court orders which are unpopular are not necessarily obeyed, except perhaps by those directly subject to them whose behavior is subject to ongoing court oversight. For instance, despite Supreme Court decisions over thirty years old invalidating government sponsored prayer in schools, many school districts, particularly in the South and West parts of the country and in less urban areas continued with obviously illegal prayer, in part because nobody in the communities opposed the prayers or was willing to become a litigant to enforce existing precedent. Similarly, many courts fail to implement decisions regarding the appointment of counsel for indigent persons in criminal cases. Usually they are nominally followed, but the funding levels have not been adjusted to reflect the increase in caseloads or complexity of cases, so that the guarantee of effective assistance of counsel to the indigent remains an unfulfilled goal. For example, many local governments in communities with large numbers of minority citizens continue affirmative action programs in contracting and employment which would be unlikely to withstand court challenges. Similarly, a court or legislative action outlawing race as a factor in university admissions would be disobeyed in many jurisdictions, although there likely would

be technical compliance.

Affirmative action in education continues to be necessary and has had a clear and positive, but inadequate, effect. If the Supreme Court had ruled that race could not be used in admissions decisions, many schools would probably have found ways to assure that the percentage of African-American and Hispanic students did not decline greatly. Nevertheless, the Supreme Court's recent decision may be most significant not for its consequences in practice, but rather for its symbolic impact. A decision invalidating the use of race in educational admissions might have been seen as evidence that our society had abandoned its decades-long efforts to redress racial discrimination and inequality. In the past, other Supreme Court decisions have been seen as having symbolic effects greater than their actual rulings.

For example, the Supreme Court decisions in the late nineteenth century invalidating civil rights law and upholding segregation have been viewed as symbolizing a retreat from the post-Civil War efforts at eliminating the effects of slavery and preventing the creation of unequal classes of citizens. *Brown v. Board of Education*[19] resulted in almost no desegregation for fifteen years and de facto educational segregation in elementary and high schools has been increasing for the past decades, but the symbolic importance of *Brown* as a repudiation of American apartheid is nevertheless substantial.

ADMISSIONS AT JESUIT LAW SCHOOLS

This law journal issue is concerned with "justice" as a pervasive goal of Jesuit education. Accordingly, I wish to suggest what admissions policies would best reflect that concern to achieve justice. Jesuit and Catholic universities and law schools have been engaged in the past decade in earnest discussions regarding their missions and what, if anything, makes them distinctive from other educational institutions. These discussions involve a wide variety of matters such as staffing, religious content of curriculum, commitment to service to others and to the poor, relationship to the communities in which the schools are located, appropriate use of limited resources, and the nature of student bodies served by the institutions.[20]

19. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

20. Loyola University Chicago School of Law recently finished a process of three years of meetings to arrive at a strategic plan for the law school; discussions of Jesuit mission were an important part of this process and of the plan adopted. Numerous law review articles have discussed the role of Jesuit schools in legal education. *See, e.g.*, John J. Fitzgerald, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245 (2001) (discussing that Catholic law schools have a

Although there is no uniformity among the schools, Jesuit universities such as Loyola University Chicago have changed tremendously in the past half century. Once they were characterized as institutions with immigrant-heavy student populations, with many students being the first generation in their family attending a university. Many of the schools had night programs so that working people could attain higher education. Most of the students were Catholic; in addition, the schools often admitted members of other religions and members of minority groups who faced significant barriers to admission at many other schools. Jesuit schools usually emphasized professional education as well as undergraduate study.[21]

Today, the student bodies at many Jesuit institutions have changed. Like other highly competitive and often costly institutions, these schools have been admitting more affluent students, more students from families with higher educational attainment, fewer children of recent immigrants, and fewer students seeking part-time education while working full-time.

Jesuit schools' commitment to excellence and dedication to mission should not lead them to become carbon copies of other fine educational institutions. They should aim to be distinctive in a variety of ways. One important way to demonstrate their dedication to service for others and commitment to the poor would be to implement policies to be among the few excellent universities dedicated to educate a truly diverse student body including far larger numbers of persons from disadvantaged racial and economic groups and recent immigrant backgrounds. Because we believe that diversity inside and outside the classroom is beneficial to the educational experience and can result in a better society, we should create admissions policies that bring about those ends. We should make a conscious decision not to copy the admissions policies of most prestigious institutions which have emphasized higher LSAT scores, the enrollment of more affluent students, maintaining small numbers of minority group students, and leaving the education of most immigrants and less affluent persons to other, less prestigious, institutions.

Loyola University Chicago would make itself nationally distinctive as a well-ranked law school with an enrollment of African-American

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fundamental responsibility to train future lawyers to take up Christ's call and to instill a sense of Christian mission in their students); Daniel J. Morrissey, *Bringing the Messiah Through Law: Legal Education at the Jesuit Schools*, 48 ST. LOUIS U. L.J. 549 (2004) (discussing that Jesuit law schools should reach out to all humanity and act as a model for friendship and understanding among women and men of diverse backgrounds).

21. Morrissey, *supra* note 20, at 568–69.

and Hispanic students several times greater in percentage terms than its competitors. Its academic offerings would in part reflect its concerns to serve minority communities and the poor. It would in its enrollment, staff, and student body show its commitment to serve a city whose population is disproportionately poor and from minority groups. This would benefit Chicago, benefit Loyola, and benefit our student body.[22]

Seeking to achieve these goals would require changed strategies for attracting applicants, increased grants and loans to students, and possibly some changes in educational programs. If it resulted in taking some students with less educational preparation and achievement than the norm for the school, it would be appropriate to create programs to assist those students to succeed in law school. These proposals would be financially costly and might run counter to attempts to increase the school's ranking based on achievement in standardized testing, but these changed admission goals would make Jesuit education distinctive and would contribute towards the attainment of the historical mission of Jesuit schools and to worthwhile improvements in our society.

22. It is possible that Loyola University Chicago would attract a great many highly talented students of all backgrounds once its distinctive student body and programming became known.