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Grutter v. Bollinger: A Constitutional Embarrassment

by George C. Leef

"All animals are created equal—but some are more equal than others." So goes the crucial line in George Orwell's classic *Animal Farm*. The Supreme Court's recent decision in *Grutter v. Bollinger* makes one think of that line, since it gives constitutional approval to the policies used at many colleges and universities that group applicants by race and treat certain groups as "more equal than others." Racial preferences can't be used too overtly, the Court said, but they are acceptable, and if one takes the rhetoric of the decision seriously, it would seem that the nation would be in a terrible state if colleges and universities didn't use them.

Grutter has been wildly cheered by most of the higher education community and social interventionists generally. By "social interventionists," I refer to those who believe that virtually every aspect of society can be improved by the application of their wisdom, whether it's the housing market, health care, preparation for retirement, or anything else. Social interventionists are never content to leave processes alone if they can take over and direct them. When it comes to universities, student admissions can't just be left up to a simple rule like "admit the academically best students possible." Instead, social interventionists delight in trying to engineer a student body that is "diverse" and have convinced themselves that doing so is both noble and immensely beneficial.

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The Problem of Government Education

I would not care in the least if any private college or university wanted to use racial preferences to assemble a student body that it regarded as having the ideal mix of people. They should be free to discriminate on the basis of race—or religion, musical tastes, family background, political views, acceptance of vegetarianism, or anything else—if they want to. The trouble occurs when government-funded institutions adopt such preferences. We can blissfully ignore the choices of private institutions that can neither tax nor control us. When dealing with government, however, people cannot escape its power and are entitled to expect that they will not be treated differently from others, or compelled to support institutions that do.

This is one of the vast number of controversies that would never arise if government did not undertake activities that go outside

its proper sphere of protecting individual rights. Governments do not need to run colleges and universities. Voluntary action is quite capable of providing us with all the various educational opportunities we might desire. If the market for education were allowed to function and the government exited the field, the heated political disputes over admissions, textbooks, curriculum, and so on, would cease. The discrimination-in-admissions battle is just one more reason why the entire government education empire should be privatized.

As long as we have government-run universities, however, we should hold them to the law. The Fourteenth Amendment forbids the states from denying any citizen the equal protection of the laws. Enacted just after the Civil War in an attempt to head off a regime of official discrimination against former slaves and free blacks, the Fourteenth Amendment has come to mean generally that government may not treat some citizens better or worse than others based on irrelevant characteristics, such as ancestry. When a government college or university adopts a policy that establishes different admission criteria for applicants depending on what their race is (or is *claimed* to be—people learn to game the system by saying that their lineage to a distant ancestor puts them in a favored group), it is certainly not treating all people as legal equals.

"Diversity Is Educationally Beneficial"

So how did the Supreme Court evade the equal-protection clause to arrive at the conclusion that racial discrimination in university admissions is permissible, provided that it's done in an "individualized" manner? (In the companion case, *Gratz v. Bollinger*, the Court held that the University of Michigan's undergraduate admissions policy was impermissible because it automatically gave black, Hispanic, and American Indian applicants 20 points toward the 150 needed. That was too much favoritism. So the meaning of the two cases is that racial preferences are all right, but don't be so blatant as to use a point system.)

Justice Sandra O'Connor's opinion wheeled out one of the most frightful concepts in constitutional jurisprudence—compelling state interest. When government wants to do something that the Constitution forbids, it argues that there is a "compelling state interest" that the Court should recognize, and that it's permissible for government to violate the Constitution because of that interest. Sometimes the Court "interprets" the Constitution to get around unwanted limitations on the power of government, and sometimes it finds that a "compelling state interest" overrides them. The result is the same. Our rights and liberties erode.

In this case, the compelling state interest is the "education benefits" that are supposed to come from having a "diverse" student body. That conclusion, backed up by nothing more than some dubious research and the testimony of university officials who want to be able to discriminate, is the linchpin of the Court's opinion.

The last time the Supreme Court dealt with the issue of racial preferences in admissions was the *Bakke* case in 1978. There, a badly divided Court wound up holding that states could not use racial quotas, but that race might be considered as a "plus factor" in individual instances. A line in Justice Lewis Powell's opinion that preference advocates were quick to seize on was that universities might have an educational interest in having a racially diverse student body. That soon became the new justification for racial preferences. They weren't being used to remedy past discrimination (as the older "affirmative action" argument went), but were being used to obtain the benefits of diversity.

But was there anything to Justice Powell's speculation? To make the "diversity is educationally beneficial" argument work when it was sued by several white applicants who had been rejected despite having significantly stronger academic records than the minority students who were accepted, the University of Michigan needed some evidence. It had one of its faculty members, Professor Patricia Gurin, conjure up a study that arrived at the desired conclusion. There *were* signifi-

cant educational benefits to having a "diverse" student body, she proclaimed.

Most people would assume, on hearing that conclusion, that the study irrefutably demonstrated that students learn their chemistry, calculus, history, and so on better when the student body is "diverse." Whether that would be a "compelling state interest" is debatable, but the purported benefits were not of that sort. Rather, they were extrapolated from student surveys probing their attitudes on such things as their level of intellectual confidence, whether they have friends of different ethnicities, and whether they're "good listeners." That's all this decision rests on, a very rickety support for a constitutional holding.

The Gurin study has been subjected to withering scrutiny. For example, Professors Thomas Woods and Malcolm Sherman conclude in a paper written for the National Association of Scholars that "there is no evidence that campus racial diversity has any educationally significant effect, direct or indirect, on any of the academic and civic outcome variables that the University of Michigan has discussed."* Moreover, there is evidence pointing the other way that is at least as persuasive—that the fixation on racial quotas in education leads to divisiveness, polarization, and deviation from the university's educational mission.

Nevertheless, Justice O'Connor accepted Michigan's feeble argument whole. Then she magnified those dubious "educational benefits" molehills into a Himalaya Range of social improvement, saying that universities need to be able to racially engineer their student bodies so we can have "cross-racial understanding" and to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."

This is a non sequitur of breathtaking proportions. Are we really to believe that so much hangs on the ability of universities to reject some white and Asian students with stronger academic profiles in order to get more students from racially preferred backgrounds? If schools couldn't or didn't practice such discrimination, would "cross-racial understanding" become unattainable? Would it be impossible to find "leaders with legitimacy"?

How Much "Diversity" Do We Need?

If the reason for believing that educational benefits follow from student-body diversity is weak, the reason for believing that those benefits depend on reaching some particular number of minority students is nonexistent. Suppose that Michigan admitted students solely on the basis of academics. There would still be some racial diversity—and plenty of diversity of other kinds. Students would still interact with a diverse faculty and live in a diverse world. To defend its desire to reach a certain level of "minority representation," the university used what amounted to a quota system. But why not just accept whatever degree of racial diversity would come from admitting the most qualified students?

The university answered there had to be a "critical mass" of minority students so that they wouldn't feel "isolated." For that proposition no evidence exists. Do we know that, for example, black students won't speak up in class unless it contains a certain number of other black students? No. The very idea is both insulting and risible. We aren't talking about first-graders here. We're talking about young adults, and there is no reason whatsoever to assume that young adults from these groups have much to add to the educational environment, but won't add it unless they have several other students "like themselves" in the classroom.

Alas, the absurd "critical mass" argument found favor with a majority of the justices. It is hard to believe that this flimsy justification for discriminatory admission policies is anything other than a constitutional fig leaf, a fiction designed to hide the fact that the Court has decided that preferential policies are a good thing and universities should be allowed to use them, no matter what the Constitution says.

*Thomas E. Woods and Malcolm J. Sherman, "Is Campus Racial Diversity Correlated with Educational Benefits?" National Association of Scholars, April 4, 2001. The executive summary, with a link to the full report, is online at www.nas.org/reports/umich_diversity/umich_execsum.htm.

What is really at the core of the enthusiasm among social interventionists for racial preferences in higher education (and elsewhere) is, I believe, a peculiar feature of their way of looking at the world. That feature is what we may call groupthink, the tendency to evaluate phenomena not from the standpoint of individuals, but of groups. Groupthinkers don't much worry about whether laws and procedures treat individuals fairly. Instead, they worry whenever they see that a group which they perceive as having somehow suffered in the past is not advancing as rapidly as they think it should. Whenever that's the case, groupthinkers don their social interventionist robes and try to make things better.

Because the average incomes of blacks, Hispanics, and American Indians are below the national average, groupthinkers believe that these groups have to be helped. Enabling more of such students to get into top colleges and professional schools, they assume, must be a benefit to the group, so it's a good policy to follow. Never mind that most students who benefit from racial preferences come from fairly affluent families, and never mind that the correlation between having attended a prestige school and success in later life is quite weak. As long as minority-group representation is up at places like the University of Michigan, groupthinking interventionists are happy.

Former Harvard president Derek Bok has said that it just wouldn't do "to have an all-white university." (Chinese, Japanese, Koreans, Indians, and others may be surprised to learn that, for admissions purposes, they're "white.") That statement perfectly symbolizes the groupthink outlook. Bok frets over the group mixture of the student body, apparently believing that the rest of America does, too.

But does the composition of the student body at Harvard or Michigan or anywhere else matter to people who aren't obsessed with group identity? I think not. I strongly doubt that a Mexican landscape worker ever thinks, "American is all right because Harvard has a quota for students with Spanish-sounding surnames" or that a black auto worker ever thinks, "It's a really good thing that Michigan's law school maintains a critical mass of black students." Most of us are interested in ourselves individually, not as group members. If top colleges chose their students just on academic ability, hardly anyone would pay the slightest attention—except, of course, groupthinkers.

Interventionists are good at convincing themselves that their meddling is terribly important. Despite mountains of evidence that programs such as rent control, Social Security, and "public education" are harmful, one almost never hears them say, "That was a bad idea; we should have just left well enough alone." In this case, interventionists are just *certain* that their well-intentioned racial blending on campus is essential for a host of wonderful outcomes. But their protestations that the use of racial preferences is necessary are no more convincing than are interventionist statements on the need to allow them to do other things their way—the "need" for a national health-care system, for example. They habitually exaggerate the benefits of their policies and ignore the costs.

Sir Henry S. Maine observed in his book *Ancient Law* that "the movement of the progressive societies has hitherto been a movement from status to contract." That is, progress required the abandonment of social organization in which a person's rights depended on his class, and adoption of the idea that everyone should be equally free to negotiate for whatever he wants in life. Maine was right. By giving its blessing to government use of racial preferences in education, the Supreme Court has taken a step backward, a reversion toward the time when the law said, "Tell me who you are, and then I'll let you know how you will be treated." That's bad enough, but we also have to worry that *Grutter* will spawn more government action in the future, based on the assessment that the Court may call any foolish interventionist notion a "compelling state interest" if backed up by some dubious "research" and fervent wishful thinking.

All in all, a bad day's work at the Supreme Court. □