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Higher Education Policy-Making in the Melting Pot of Stakeholder Voices: The Michigan Affirmative Action Cases

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On March 18, 2004, the U. S. Census Bureau predicted that the nation's Hispanic and Asian populations would triple over the next 50 years, and non-Hispanic whites would drop to about half of a total population of 419.9 million by the year 2050.

Nancy Cantor

As the demographic landscape of this nation becomes less and less white, we are reminded almost daily, even on college campuses, how difficult it is to erase the racial stereotypes and resentments that permeate our larger, more segregated society and keep us from truly seeing, hearing, and knowing each other.

Moreover, the broader context within which these resentments are fueled is one of a knowledge economy with unprecedented returns to higher education. It is a tight economy, where competition for jobs is keen, and job loss and unemployment are dreaded. Therefore, a place at the table of selective higher education is a very scarce, very scrutinized resource. When everyone wants a piece of the pie, some who always assumed they would go to the college of their choice now fear being shouldered aside.

It is in this context, of public scrutiny and competition for individual rights, that educational policy on college admissions, is being shaped and even politicized these days. In the present discussion, I will illustrate this public scrutiny of educational policy-making – and the melting pot of stakeholder voices involved – in the context of affirmative action and higher education admissions, but I could have chosen other examples where expectations, scrutiny, and conflicting demands are just as intense: the cost of tuition and its influence on access and affordability; immigration and higher education; economic development and university research.

Moreover, although I shall examine affirmative action in the legal arena of the cases brought against the University of Michigan, it is also clear that scrutiny in the legislative arena is on the increase as well. For example, more public attention was paid in the recent California debate over a proposition to prevent the collection of data on race (the "racial privacy" proposition 54) than when Proposition 209 forbidding race-conscious affirmative action was passed in November 1996. Indeed, from the courts to the legislatures, in states across the country, public opinion is galvanizing around issues of race, access, and higher education.

Melting Pot of Voices in the Michigan Affirmative Action Debate

In the six year debate over the Michigan affirmative action cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, more diverse sectors and stakeholders in our great melting pot of races and voices were heard than in *Brown*, *Bakke*, *Hopwood*, or even during the era of the Civil Rights legislation. This change may have been brought about by the electronic nature of our media or by the intensity of clashing demands for a place in society—or both.

The debate also demonstrated how intertwined the <u>local</u> and <u>national</u> contexts can be, and how both local and national aspirations

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and demands are played out. Cases in California, Texas, and Michigan, for example, all produced very different outcomes and dialogues. I believe it mattered enormously to the outcome of *Grutter* and *Gratz* that they were filed in Michigan, a Midwestern, industrial, labor state, instead of California, with its own very complex multi-racial politics, or Texas, with its culture of individualism. In fact, part of the miscalculation by the Center for Individual Rights (the organization supporting the plaintiffs in the Michigan cases) was not realizing how the Michigan context would recall history and grab the national imagination about the future in ways that emphasized the national "compelling interest" part of the argument more than the narrower "individual rights" part of the argument.

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During the six years of debate over these cases, at least five large categories of stakeholder voices/positions emerged, with both a national and a local Michigan articulation. Here, in chronological order as they entered the debate, are brief sketches of each.

"Bowling Alone"[1] Voice of Individual Rights. This is the voice that spoke the loudest for the first two to three years of this national dialogue. It is the voice of the plaintiffs and numerous others interviewed in the public media, expressing resentment about the loss of a place that they view as having been rightfully earned and expected. It reflects how scarce a seat at the table of higher education truly is and how much some fear losing access in the face of the nation's changing demography. This voice is always articulated at the level of individual comparisons, never at the level of comparative pools of applicants – vastly larger for majority than minority applicants. Everyone seems to know a case where they assert that a seemingly less deserving minority applicant was admitted and some presumptively more deserving white student was *therefore* rejected. Their resentment is not tempered by any realization that the white student's true competition is not the relatively small pool of applicants of color, admitted or rejected. Instead, it comes from other (also apparently less deserving) white students invited to attend the college of their choice.

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This is the voice of presumption and expectation. In the Michigan context, it is the voice of Jennifer Gratz, who expected to be admitted as an undergraduate to the University of Michigan and did not apply anywhere else. Meanwhile, amongst the pool of white applicants – numbering ten times the pool of applicants of color in Jennifer's year – are many other white students with tests and grades less than Jennifer's, whose dreams were not dashed.

Social Justice Voice of Emerging Minority Populations. This is the voice of both demography and history. It reflects the bleak racial disparities in our multiracial society in health, housing, employment, and the criminal justice system. It has experienced segregation and discrimination as bad as it has ever been in our nation's cities, and it contains a powder keg of resentments about exclusion from and the need for access to the American dream. Locally, this is Detroit, with its race history of riots, white flight, segregation, and poverty. This is the University of Michigan, with top "feeder" states for applicants that have some of the most racially segregated K-12 schools in the Nation. This is the predominantly black city of Benton Harbor, Michigan that erupted in riots last summer next door to the virtually all white St. Joseph, Michigan. This voice speaks of individual rights as civil rights, justice for those denied a piece of the American dream. This voice has heard nearly 50 years of broken promises about equal educational opportunity. This is the voice of the student "interveners" who filed briefs in the Michigan cases, arguing for redress for a history of institutional discrimination.

Voice of Societal Productivity, Security, and Legitimacy. From the midst of these competing views, a third coalition of voices emerged to focus on the health—in fact, the very survival—of our society. These voices include groups such as the corporations, labor unions, and military leaders that filed "friend of the court" briefs in the Michigan cases. The testimony that diversity is necessary in the workforce came not only from the *amicus* brief filed by the AFL-CIO but also from the brief filed by a host of companies that included General Motors, 3M, American Airlines, American Express, Coca-Cola, Bank One, Dow Chemical, Eastman Kodak, Eli

1 Robert D. Putnam, 2000, *Bowling alone: The collapse and revival of American community,* New York: Simon & Schuster.

Lilly, General Mills, General Electric, Hewlett-Packard, Lucent Technologies, Microsoft, Intel, Xerox, and Johnson & Johnson, to name only a few.

The lawyers who wrote on behalf of the AFL-CIO asserted, and I quote: "higher education represents a unique opportunity and, from the vantage point of the workplace, the last opportunity, to foster interaction between diverse individuals."[2]

Similarly, the military did not want to lose the ground they had gained after realizing, at the end of the war in Vietnam, that the very survival of the military was at stake because of racial discord between officers and enlisted men. At the U. S. Military Academy at West Point, where there were only 30 African-American cadets in 1968[3], a successful affirmative action program has yielded more than 300 today.[4] Minorities now make up 19% of the officer corps in the armed forces generally, and 8.8 % of all officers are African-Americans.[5]

In addition to voicing concerns about economic productivity and national security, this coalition heard from major national leaders, such as former President Gerald Ford. He warned that the very legitimacy of our democratic institutions was at stake in the affirmative action cases because selective higher education produced the lion's share of our nation's leaders. Joining President Ford were other major organizations in Michigan who connected the local with the national contexts. General Motors took a leadership role in organizing the brief from the Fortune 500 companies and the United Auto Workers took that role on the labor front. Colin Powell went on talk radio Detroit, endorsed affirmative action, and invoked it in describing his own path to success in the military.

Voice of Educational Institutions and Admissions Policies. These are the voices of our public and private institutions and their allied organizations, such as ACE, AAU, NASULGC, ETS, and the College Board, that want to keep institutional autonomy over policy-making as it affects their core educational mission. They regard academic admission as a choice based on many factors, not an entitlement based solely on past accomplishments. In selecting students from a pool of qualified applicants, as the former president of Princeton, William Bowen once remarked, no one wants to compose a freshman class made up entirely of high school valedictorians. These institutions see merit as broadly defined, not restricted to any particular measure and especially not to test scores. In the Michigan context, the pool of admitted applicants included white students with lower test scores who had been accepted while white students with higher test scores had been rejected. As the experts who created these tests repeatedly asserted during these debates, no single standardized test should stand on its own as a (uniquely reliable or valid) tool for predicting success at college or beyond.

Voice of the Disciplines in the Cases. Last to be heard in this debate were the voices of the scholars and their disciplines – social science and constitutional law – that were woven through the court records. They reflected the multiplicity, and in some ways, the division in perspective of the earlier voices in this melting pot of stakeholders. The social sciences and educational research addressed the compelling societal interest in creating a multiracial democracy, and the legal scholarly arguments focused on achieving access via the narrow tailoring of affirmative action to meet the constitutional protections of the fourteenth amendment (equal protection) in the service of protecting individual rights. In many respects, the social science arguments were about race and inter-group relations in America, while the legal arguments were about individual educational opportunity. In other words, while the social science data addressed the very hard work of overcoming race disparities, building integrated living and learning communities, and of dispelling stereotypes, the legal arguments looked for narrow, procedural ways to garner access to educational opportunity. The social science arguments recognized the long road ahead, while the legal arguments looked for time-limited and specifically-crafted solutions. The social science arguments called for admitting a "critical mass" of students of color from all walks of life (to dispel stereotypes), while the legal arguments wanted to minimize the burden on the majority.

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2 A*micus* brief filed by the AFL-CIO in *Grutter* and *Gratz*, *p.17.*

3 *Grutter and Gratz*, Consolidated *Amicus* brief of Lt. Gen. Julius W. Becton Jr., et. al.., p. 19.

4 *Ibid*, p. 19.

5 *Ibid*, p. 17.

Encompassing Individual Rights, Civil Rights, and the Good of the Nation

As it turned out, Justice Sandra Day O'Connor, writing for the majority in *Grutter*, blended social science and the law in ways that reflect all of these stakeholder voices as she shifted the ground of the argument from individual rights to social health.

She wrote:

"The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools represent the training ground for a large number of the Nation's leaders, Sweatt v. Painter, 339 U.S. 629, 634, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity."[6]

She emphasized the compelling interest of diversity for the legitimacy of our democratic institutions, the training of our leaders, the productivity of our economy, the security of our armed forces, and the harmony of our society.

Justice O'Connor did not deny the pain of those who fear being displaced, or of those who want the scale, for once, to tip in their direction. But she asserted, and so can we, that race-conscious policies can achieve a critical mass of students of color from all walks of life without placing an undue burden on the chances of white students because of their race. She crafted a narrow path that merged social science and the legal perspectives.

During oral arguments in *Grutter*, Justice Ruth Bader Ginsburg had asked: "Do we know what would be the increase of the named plaintiffs, the increase in their chance of admission, were there no affirmative programs?"

Maureen E. Mahoney, attorney for the law school, answered: "I don't know what the increase for the – for Barbara Grutter would have been, for instance, we do know that across the class, it would have been approximately 5 percent."

"One might say that that could vary, you know, by individual," she continued. "The record evidence would indicate, however, that Barbara Grutter would not have been admitted under a race-blind program, although that issue has not been litigated to conclusion."

Instead of mechanical "preferences," the Court supported universities making thoughtful, though decidedly race-conscious, choices. Although Barbara Grutter, the white applicant who sued the Michigan Law School, was not admitted, other white students—as well as students of color—with grades and scores lower than hers were admitted, because the Michigan Law School evaluated many assets beyond tests and grades. Their goal was to engage a broader pool of the nation's future talent base and to give each of them a better education.

Moving Forward from Across the School Yard?

As reasonable as the race-conscious procedures endorsed by the Court are, the real victory in *Grutter* and in *Gratz* is less about affirmative action as a procedure and more about the re-emergence of a dialogue about race and racial harmony as a compelling national imperative. The real message from the six years of debate in the Michigan cases is that we as a nation simply must figure out how to create opportunity for Americans of color. Then we must try to all benefit from living and learning in a multiracial democracy.

Just as this debate began with the clash of voices between those asserting individual rights as already earned entitlements and those demanding anew the civil rights they never fully obtained, it ended (for the moment), with a call to action from the Court to try to move forward together, for the good of *all.* Ironically, this transition from "Bowling Alone" to living and working together – from individual rights to societal health – has the potential to make everyone better. White students with the skills and inclinations to work comfortably in a multiracial, global

6 Sandra Day O'Connor, writing for the majority in *Grutter v.Bollinger, et.al.*, No. 02-241, Supreme Court of the United States, June 23, 2003, pp 3-4.

workplace will be more marketable. Students of color who take their place at the table of selective higher education will also begin, finally, to move up the economic and social ladder of opportunity and into our otherwise segregated neighborhoods and schools. And when this social change begins to take form, then our democratic institutions will gain legitimacy sorely lacking in the years since *Brown v. Board*.

That is the dream laid out in the melting pot of stakeholder voices heard in this debate. But, we must ask now, in the months following the decisions, are we ready to turn from individual rights to societal health? Unfortunately, it is still not clear that this country wants to move forward together, as can be seen by a quick scan of some of the voices that have emerged post-*Grutter*.

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The Department of Education wants college admissions based on race-neutral mechanical procedures that would use social class as a proxy for race, despite years of research showing that integration based on socio-economic status, however desirable, is not sufficient to achieve racial diversity in selective higher education.[7]

Ironically, using class instead of race to achieve diversity would tend to exclude the children of minority parents who have made it to the professional classes, the students best-equipped, at least at the outset, to dispel racial stereotypes, which are best undermined with evidence of the great diversity *within* any group.

In Michigan and in other states, Ward Connerly has been promoting blanket legislative referenda in an effort to trick the public into believing that if we don't talk about race it will go away.

The media is weighing in with story after story of racial tensions and self-segregation on college campuses, as if we could imagine otherwise in a country in which fewer and fewer schoolchildren ever sit next to a person of another race or ethnicity before they get to college.

And educators are scratching their heads and wondering how to achieve that much-desired integration, on campus and beyond, while attention is distracted and effort drained on fighting off yet further procedural assaults, from the Center for Equal Opportunity and others.

Fulfilling the Promises of *Brown*

As the voices of impatience, even resentment, re-emerge post-*Grutter*, we should not forget the lessons of 50 years of unfulfilled promises since the Court's call to action in *Brown v Board*. We need to understand that the Court and the Congress can shift the ground of the argument, as Justice O'Connor has done, but we are the ones who must change the ways in which we conduct our business and live our lives. And we'll have to step up the pace if we want to meet the Court's 25-year deadline.

Higher education needs affirmative action now, so we can roll up our sleeves, open our hearts and minds, and try to begin this work. Affirmative action, as we have learned on my campus and hundreds more, is simply one step from the corner of the yard. To go further, we need to recognize how hard it is to talk and eat together, to speak up and complain about each other, to respect and learn from each other, when we have all been shouting from our respective corners.

If we want a healthy society, we had better let our colleges and universities try to change our habits of separation on the ground, not only in the Courts. They can—and we must—succeed. ■

7 Bowen's recent analysis of applicants from 19 selective institutions again demonstrated that, for example, giving all applicants from the poorest fourth of society the same edge as relatives of alumni, would result in minority enrollments dropping by nearly half, from 13.4% to nearly 7.1% at those 19 colleges and universities. See William G. Bowen, *The Thomas Jefferson Foundation Distinguished Lecture Series*, University of Virginia, April 6, 2004.

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