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Grutter or Otherwise: Racial Preferences and Higher Education

Larry Alexander* Maimon Schwarzschild†

*University of San Diego, larrya@sandiego.edu
†University of San Diego, maimons@sandiego.edu

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Abstract

Last year's Supreme Court decisions on affirmative action, Gratz and Grutter, are dubious as constitutional law, bringing to mind what John Hart Ely said about Roe v. Wade: "[I]t is not constitutional law, and gives almost no sense of an obligation to try to be." There was at best a cosmetic difference between the University of Michigan undergraduate school's crude "20-points-extra for minority applicants" (which the Court struck down) and the Law School's "holistic" and disingenuous preferences (which the Court upheld). The idea that the Law School has a "compelling state interest" in these racial and ethnic preferences is utterly inconsistent with the Court's suspect classification-compelling interest jurisprudence now extending back over many decades.

Yet the Grutter decision does not require public colleges and universities to have racial preferences in admissions, much less in faculty hiring or promotions. The decision merely permits admissions preferences. So the question is thrown back to the universities, or to the state legislatures, to decide about preferential affirmative action as a matter of policy. And in this article, we suggest that racial preferences, at least in higher education, have proved very bad as a matter of policy.

First, if you are going to give racial preferences, you have to identify people by race. It is not only invidious for the government to do that, it is increasingly impossible as people marry and have children outside the racial "affirmative action" boxes.

Second, racial preferences are bad for students and for educational institutions themselves. Preferences dilute admissions standards that, while far from perfect, are much better than "race" as admissions criteria. Preferential admissions tend to

lower educational standards too, as schools try to disguise the educational gap between those admitted preferentially and those admitted by standard criteria. One of the worst outgrowths of racial preferences is that students admitted through such preferences are systematically mismatched educationally. A generation of minority students, who would have done well, or certainly no worse than average, at colleges where they would have been admitted on their merits, have instead been ”cascaded” upwards to colleges where their preparation is significantly below average and where, entirely predictably, they do poorly.

Preferences, moreover, lead to identity politics and racial segregation on campus; they promote nihilism about academic quality; and they create a culture of dishonesty which inevitably spills over into many aspects of educational life. This article urges public - and private - colleges and universities to hold students and faculty of whatever race or ethnicity to the same high standards, and to reject the educational politics of racial and ethnic division which are implicit in preferential affirmative action.

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by

Larry Alexander* and Maimon Schwarzschild**

The Supreme Court decisions on affirmative action have arrived.[1] They are dubious as constitutional law, bringing to mind what John Hart Ely said of Roe v. Wade: "[I]t is not constitutional law and gives almost no sense of an obligation to try to be."[2] Yet because the cases were about whether affirmative action is permissible, not whether it is required, the salient question -- now more than ever -- is whether preferential affirmative action is a good thing. At least in higher education, we will suggest, there is overwhelming reason to think it is not.

The outcome of the Supreme Court cases should perhaps have been no surprise. The set-up was perfect for Justice O'Connor, who has made something of a career of being the Court's swing voter, and who has a penchant for opinions that split unsplittable babies.[3] The University of Michigan's

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*Warren Distinguished Professor of Law, University of San Diego.

**Professor of Law, University of San Diego.

[1]Gratz v. Bollinger, 123 S. Ct. 2411 (2003); Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

[2]John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale Law J. 920, 947 (1973).

[3]See, e.g., Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring in an "establishment clause" case involving public aid to private – including parochial – schools, but refusing either to endorse the "neutrality" test favored by the plurality or the "no aid to any religious mission" principle of the dissent); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992) (O'Connor, J., joining two other justices in striking down "undue burdens" on abortion for reasons of stare decisis while repudiating the "trimester scheme" and other key elements of Roe v. Wade); Wygant v. Jackson Board of Education, 476 U.S. 267, 284 (1986) (O'Connor, J., concurring in striking down

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two racial preference admissions schemes – the undergrauate school's crude "20 points if you're a minority,"[4] and the law school's holistic and dishonest "how does each person contribute to an educationally-enriching diverse student body?"[5]– were perfect for O'Connor's rejection of forthright racial goals and endorsement of non-forthright ones.[6] As is fairly widely recognized, the law school's scheme is dishonest because it is not what it is billed to be, namely, a holistic, individual assessment of applicants, conducted with an eye to the quality of the educational environment: rather, it is like the undergraduate system, a plan that is concerned with meeting goals for racial representation. Educational benefits are doubtful and, in fact, largely window dressing driven by language in Justice Powell's opinion in *Bakke*.[7] As for the "holistic" individual assessments, they always seem to produce something very close to a particular percentage of particular minorities. Nor is there ever any question of ensuring "critical masses" of, say, farm children, Appalachians, evangelical Christians, or ex-businessmen or businesswomen, all of whom might contribute to legal education as much as or more than people identified by their race. Justice O'Connor presumably knows all this, although she pretended not to.

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a minority preference in teacher layoffs, but refusing either to join the plurality's rejection of racial preferences or the dissenters' endorsement of them).

[4]Gratz v. Bollinger, supra fn.1.

[5]Grutter v. Bollinger, supra fn. 1.

[6]Justice O'Connor joined in Chief Justice Rehnquist's majority opinion in *Gratz* holding unconstitutional the undergraduate school's 20 point preference for minorities, and she authored the majority opinion in *Grutter* upholding the law school's "holistic" race-as-a-factor admission scheme.

[7]Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

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The finding that Michigan's interest in maintaining an elite law school is a compelling interest sufficient to justify a racial classification is utterly inconsistent with the Court's suspect-classification/compelling-interest jurisprudence now extending back over many decades. Are the "means" -- racial preferences -- really "necessary" to ensure that the law school will be of elite quality? In California there are several public law schools, generally conceded to be among the most elite in the country, which are forbidden by the state constitution to indulge in racial preferences. As for "diversity" as a "compelling interest", imagine a state government's plan to "diversify" some heavily minority branch of state government by giving preferences to whites. Does anyone believe Justice O'Connor would uphold those?[8] The compelling interest test for racial classifications is dead – at least in this case.

What Justice O'Connor's opinion amounts to is that if universities can disguise their admissions systems so that it is not too obvious that they are pursuing racial representation for its own sake, they can get away with it, although they are admonished that using race as a criterion is a dirty business and that they should try their hardest to eliminate it by, say, 2028. If strict scrutiny of racial classifications has to be diluted or denatured in order to uphold this plan, then so be it, although the Court will claim not to be doing so. And after all, perhaps diversity is a compelling interest? Look at all the amicus

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[8]Suppose that racial preferences *were* necessary for ensuring that the University of Michigan's law school remained "elite." Is maintaining an elite law school a compelling governmental interest, as strict scrutiny demands? Would it justify, say, the internment of Japanese-Americans, as in Korematsu v. United States, 323 U.S. 214 (1944), if somehow racial internments were necessary for producing elite law schools? Or perhaps more realistically, would it justify forcibly conscripting, say, Jews or Asians, if these groups failed to apply to Michigan's law school in sufficient numbers to maintain its elite status? Of course not. Q.E.D.

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briefs from corporate America saying that it is.[9]

Whether or not the Supreme Court should have held racial preferences by the government to be unconstitutional, what seems clear to us is that the culture of racial preferences in higher education has proved very bad as a matter of policy. And the policy question is now what counts, because the Grutter decision does not require colleges and universities to engage in racial preference in admissions (much less in faculty hiring or promotion): the decision merely permits admissions preferences. So the question is thrown back to the universities, or to the state legislatures, to decide as a matter of policy.

For better or worse, racial preferences in higher education have been a fact of life for several decades in the United States. More is therefore known from experience, or ought to be, than could have been known when the preference policies were introduced -- perhaps with the best of intentions -- years or decades ago.

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[9]Why do corporations file briefs in support of racial preferences? First, it sounds good, at least in those influential circles where "affirmative action" is a matter of politico-moral self-congratulation if not an article of faith. These briefs are like the television commercials that would have you believe the oil company cares about the environment. When corporations endorse racial preferences to produce "diversity," they are similarly trying to sound progressive so that people will see them in a warmer, softer light and buy their products.

Second, however, managers of a corporation might endorse affirmative action (or any other political cause) even if it is not good for the corporation, to advance their personal views or agendas: an example of "agency costs."

Third, corporations fear pressure from activists. If a corporation is threatened, explicitly or implicitly, with boycott, the corporation may conclude that it costs less to submit rather than to incur the boycott.

Finally, large corporations may obtain a competitive economic advantage if legal rules impose expensive or counterproductive programs equally on them and on their smaller, poorer competitors who can less afford to comply.

What all this suggests is that the endorsement of racial affirmative action by corporate America should carry little or no weight.

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1. Racial preferences at public universities require government officials to classify individuals by race; but racial (and ethnic) classifications are unscientific, arbitrary, and often nearly meaningless

Human beings are not divided biologically into three, or five, or any number of "races." Human beings are one interbreeding species. Each individual is genetically unique. No matter into which racial box one is arbitrarily put, one can have children with someone from another box, and the children must then be arbitrarily assigned to some box. In the nineteenth century, people spoke about the "French race" and the "German race." That might seem silly today, but it is no sillier than speaking of the "white race," or bracketing (or separating) Somalis and Zulus, or Melanesians and Polynesians, or Mongols and Malays. If an ex-slave from Jamaica married the daughter of an English planter, and their son married the daughter of a Trinidadian Indian and a Chinese merchant, what box would the University of Michigan have their daughter check, and why? If that question cannot be nonarbitrarily answered -- and it cannot -- it is not because the example is farfetched. It is not. Everyone fits this example. Everyone is genetically unique, and all of us are members of one interbreeding species. Any division into "races" is arbitrary;[10] and, when done by government, it tends to be obnoxious.

And if race is arbitrary, so too is "ethnicity." Who, for example, is a Hispanic? A poor Indian from Oaxaca? A writer of German ancestry from Santiago? An emigrant from Barcelona? A Jewish academic from Buenos Aires?

In everyday life, to be sure, when we refer to someone's race or ethnicity, we need not be

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[10]There is broad scholarly support for this proposition. *See, e.g.*, NAOMI ZACK, PHILOSOPHY OF SCIENCE AND RACE 58-62 (2002); JOSEPH L. GRAVES, JR., THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENIUM (2001); Joshua M. Glasgow, "On the New Biology of Race," 100 J. PHIL. 456 (2003).

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speaking scientifically, and it may do no harm to be arbitrary. People classify themselves and each other in all sorts of ways. Sometimes these classifications hurt, but sometimes they are not of much consequence. In any event, there are as many classifications as there are classifiers, and classifications morph and change over time. But when the government classifies people racially and ethnically, and then makes valuable entitlements such as admission to a university turn on those classifications, matters are different. Because race and ethnicity are scientifically baseless and arbitrary, government will necessarily classify -- and bestow favor and disfavor -- arbitrarily. The precedents for such classification are not encouraging: the Jim Crow South, apartheid South Africa, Balkan states at various points during the twentieth century, and -- with lots of pseudo-science to back it up -- Nazi Germany. Not regimes most Americans would wish to take as models.

2. Racial classifications by government lead to racialism, and racialism leads to division and often to racism.

When government classifies by race in order to award preferences, that very fact encourages people to think that "races" are real categories, not bogus ones, and that one's race is an exceedingly important rather than a superficial fact about oneself and others. In other words, it encourages people to pay close attention to race and to think in racial terms. That is what is meant by "racialism."

Racialism in itself might seem relatively harmless. After all, racialism -- thinking that race is real and important -- is not the same thing as racism, which is thinking that some people deserve less concern and respect than others solely because of their race. Yet racialism surely has a built-in tendency to engender racism.

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For one thing, racialism's message is that the races are different from one another. If races were the same, there would be no point in distinguishing them. But if the races are different, then however much we might like to "celebrate difference," we are apt in fact to have racial antagonism. If what is important about me -- what you "celebrate" -- is not my common humanity with you, but my difference from you (because of my race or ethnicity), I shall see myself as different, and I shall be disposed to nurture and accentuate my differences. This is quite common on campuses: students admitted because of their "difference" tend to magnify their difference and often segregate themselves from others. Once differences are magnified, antagonisms tend to magnify as well. This is all too common in human experience. People would not have to be exhorted to "celebrate difference" if they did so naturally and un-self-consciously.

Above all, so far as colleges and universities are concerned –

3. Racial preferences in higher education are bad for students and for the institutions themselves

The overall costs of racial (and ethnic) preferences outweigh the occasional benefits.

This is not to deny that there are individual success stories that are the results of racial preference: young people who, but for such preference, would not have attended an elite university, yet having been admitted, go on to achieve success in school and beyond. University admission processes are imperfect, and racial preferences sometimes correct what would have been an erroneous decision. Of course, anecdotes about such successes do not take into account the success stories that might have been told had those excluded -- because their race was not preferred -- been admitted instead.

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The educational and social costs are several:

(a) Diluting admissions standards

The typical criteria for admission to selective colleges and universities -- GPA and SAT (and their postgraduate equivalents such as the LSAT, MCAT, and GRE) -- although imperfect as measures of aptitude for higher education, are nonetheless pretty good, especially when compared to proposed substitutes like race, or thinly-veiled proxies for race, such as "life experience." In efforts to disprove the merits of GPA and SAT, some defenders of preferences point to individual minority students who do as well in college as some non-minority students, but who were admitted with lower GPAs and/or SATs. But of course, these findings do not prove that the GPA/SAT is a poor predictor, for minorities or anyone else. A GPA/SAT index predicts how the *median* student with that index will perform, not how *every* student with that index will perform. Students in the right-hand tail of the bell curve of people with a lower index will overlap with people in the left-hand tail of the bell curve of people with a higher index. If you compare only those people in the area of overlap, you will draw the erroneous conclusion that the indexes don't predict well. But that is to ignore the median person with each index, not to mention those in the right tail of the higher index bell curve and the left tail of the lower index bell curve.

The fact is that those admitted through racial preferences are in general less qualified -- not necessarily unqualified (whatever that means), but less qualified -- to do college and postgraduate work than those admitted without preferences.

(b) Lowering of educational standards at schools that admit by preferences

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If students admitted through racial preferences are less qualified -- and, in general, they are -- this will have consequences for the quality of education that they and others on campus will receive. Predictably, having a body of racially and ethnically identifiable students who are at a competitive disadvantage with the other students leads to grade inflation to disguise the poor performance of a racially identifiable group. No one wants such a readily visible group of students to fail or to do poorly. Likewise, it leads to the creation of bogus departments and majors, similar to -- but generally more extensive than -- the "athletes' courses" and majors designed to keep athletes above water at universities with admissions preferences for athletes. Virtually every university with serious racial preferences has one or more departments that are safe houses for the less qualified racially preferred: departments that are frequently staffed by faculty who are themselves hired on the basis of racial preferences; departments that substitute political polemics and esteem-raising for rigorous, disinterested scholarship.

One of the worst outgrowths of racial preferences is that students admitted through such preferences are systematically mismatched educationally. A student who would have been an A or B student majoring in a serious discipline at State University turns into a C or D student majoring in ethnic studies at Elite University. A generation of minority students, who would have done well, or certainly no worse than average, at colleges where they would have been admitted on their merits, have instead been "cascaded" upwards to colleges where their preparation and qualifications are significantly below average, and where – entirely predictably – many do significantly less well than average, and in subjects that are more polemical and less rigorous than average; and all too many fail. Upon emerging from college, minority graduates – especially those from the more prestigious schools – are liable to be

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stigmatized as affirmative action graduates, their capabilities and their skills mistrusted. Perhaps the most poisonous aspect of this is the lingering self-consciousness it provokes: "Do my colleagues on the job secretly look at my ethnicity or the color of my skin and assume that I am not up to the job?"

Meantime, on campus, the presence of less qualified and racially-identifiable students and faculty, coupled with the official line that "difference" is celebrated, inevitably encourages a more general erosion of real academic standards. No one wants to believe that he or she is less qualified than his or her peers, whether one is a student or a professor. Perhaps one is just "differently qualified." Indeed, perhaps the prevailing academic standards, those by which relative quality is gauged, are themselves just figments of European, or male, or capitalist values, no more (or perhaps less) valid than other standards. Perhaps there are just "different" standards for good literature, maths, history, economics and science, and no standard is superior to the others.

This heady blend of identity politics and postmodern nihilism has already had destructive effects on many disciplines on many campuses. Much of this is a direct outgrowth of racial and other identity preferences in admissions and in faculty hiring and promotion.

(c) Racial balkanization and segregation.

The combination of emphasizing racial differences and attacking standards for admissions and hiring tends to balkanize campuses. If races are different, and if standards are illegitimate, why not accentuate the differences through racially separate dorms, organizations, and cliques, as well as academic departments, and why not at the same time demand the admission of still more students and the hiring of more faculty based on race? After all, the differences are real and important. And no legitimate standards are compromised by expanded racial admissions and hiring. Preferential admission

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based on race, far from satisfying anyone, leads to escalating racial demands and racial separation, and -- perversely or otherwise -- to an increasing sense of grievance among many "beneficiaries" of preferences.

Sadly, the racial segregation one finds on campuses today is not solely attributable to beliefs in "difference." It is also attributable to an unspoken fear that the once-conventional academic standards, far from being illegitimate, are in fact valid measures of academic wherewithal. Better to congregate with others admitted preferentially, whether in choosing an academic major or in choosing with whom to eat at the lunch table, rather than to mix freely with those whose stronger qualifications might expose one to humiliation.

(d) Pervasive dishonesty.

The currency of academic life is, or ought to be, candor. When intellectual honesty vanishes from research, publication, and teaching, the purpose of the academy is compromised or lost. Yet preferential admissions and hiring lead directly to "political correctness" and its assault on academic candor. There is a constant fear that frank discussion of racial preferences and the standards they compromise will wound the pride of those racially preferred. Enter an array of campus speech codes and conventions -- the informal ones are far more pervasive than the formal ones --as protection against any possible outbreak of candor.

4. Universities are not interested in race for reasons of educational "diversity."

We can be brief about this. In recent years, universities have sought to justify racial preferences

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by the alleged contribution of racial diversity to the education of those admitted under the normal standards. Those arguments are insincere: the universities are interested in race, not diversity of views or backgrounds. No universities give preferences in admission or in faculty hiring to evangelical Christians, to children of military families, or to many groups that are quite underrepresented in student bodies and particularly on faculties. (How many faculties have sought out a "critical mass" of conservative Republicans to ensure diversity?) Much of the rhetoric about "diversity" stems from the fact that the idea appeared in the -- lone -- opinion of Justice Lewis Powell in the Supreme Court's *Bakke* decision in 1978, and was seized upon, more or less opportunistically, by those who were already convinced that the cause of civil rights (or their particular conception of it) calls for racial and ethnic preferences.

5. What Is to Be Done About Racial Disparities in Qualifications for Selective Universities?

Whenever any child fails to achieve his or her full educational potential, that is a loss no matter what the child's race. For minority children the loss may be particularly sharp, insofar as minority families may have fewer non-educational resources, on average, with which to help their children establish themselves in life. No doubt many minority children fail to reach their education potential, and this is reflected in the disproportionately small percentage of blacks, in particular, who can gain admission to selective universities without the aid of racial preferences. And there are no doubt many white and Asian students who fail to realize *their* potential, even if the percentage is not as high as that of blacks. But every case of such failure is a personal and community loss, no matter the race of the

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child.

Why are some minorities proportionately less qualified to attend selective universities? Poverty and poor schools are among the obvious suspects, although cultural attitudes matter as well. Distressingly, the black-white gap in SAT scores occurs even in middle class suburbs, where whites and blacks are socio-economically similar; and poverty is often an effect, as much as it is a cause, of poor educational preparation.[11]

We have argued that the government does much harm, and little good, by maintaining racial and ethnic preferences, especially in higher education. Do we offer any different, or better, suggestions for what the government should do?

The main thing the government should offer is strong and effective public schools, primary and secondary; and public colleges and universities that have academic integrity. Racial preferences systematically erode the integrity of higher education, in various ways which we have tried to indicate. The erosion of higher education also has an ugly way of penetrating down (it would "trickle down" if erosion could trickle) to the secondary and even to the primary school levels. Grade inflation, lowered ("dumbed down") standards, bogus courses, racial and ethnic cheerleading, intellectual nihilism, and cant about diversity are now common in middle and high schools, and even in grade schools. They undermine the quality of public education, which particularly disserves the children of poorer families -- and hence many children of minority families -- who truly depend on the public schools for a way up in life. A cynic might wonder whether upper-middle-class advocates of racial preferences are not

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[11]*See, e.g.*, JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT (2003).

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promoting their own children's interests by seeking to weaken public education at all levels, thus strengthening their children's inherited advantage by weakening the potential competition from poorer children, who must rely on the public schools for their preparation in life.

Apart from primary and secondary education, a child's home life is surely the other important contributor, or non-contributor, to preparation for higher education. For young people to qualify for selective universities, it surely helps if they grow up in stable, nurturing families, where children are read to, where books are common household items, where homework is supervised, where good grades demanded, and where destructive peers and behavior put off-limits. Government programs cannot readily guarantee these conditions, but to the extent that public policy can promote the relevant values, it ought to do so -- if the goal is that children of all races should have the chance to realize their real academic potential.

Meantime, public universities and colleges should put an end to racial and ethnic preferences. They should eliminate bogus academic departments: those that substitute racial or ethnic or political sloganeering for any serious pursuit of knowledge. Most important, they should hold students (and faculty members) of whatever race or ethnicity to the same high standards, rather than cultivating lower standards and lower expectations for particular groups of people.

Ethnic and racial warfare have again and again proved poisonous to societies around the world. The best hope for a decent future is to seek and to promote people's common humanity rather than their superficial differences. That was the "progressive" point of view at the inception of the modern civil rights movement, and it still should be. American higher education ought to put the emphasis there, and not on the bankrupt educational politics of racial and ethnic division.

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