Northwestern University Law Review Colloquy Vol. 103

DIVERSITY AND RACE-NEUTRALITY

Kenneth L. Marcus[*]

The most important, elusive, and misunderstood aspect of federal affirmative action jurisprudence is the requirement of "serious consideration." Before commencing or continuing race-conscious, nonremedial affirmative action plans, public institutions, including colleges and universities, must apply "serious, good faith consideration" to workable race-neutral alternatives (RNAs).[1] This requires not only that less racially intrusive alternatives be unavailable, but also that institutions establish this unavailability through a largely undefined process of "serious consideration."[2] The measure one should use to establish this (un)availability remains unknown. In higher education, since RNAs typically tout diversity, it is easy to assume that they should be measured against their ability to increase the representation of previously underrepresented student racial and ethnic groups. In fact, such measures raise serious constitutional problems to the extent that they indicate that the actual goal of the RNA's is racial balancing. This Essay argues that because the only legally viable purpose for nonremedial race-conscious admissions practices are "the educational benefits that flow from a diverse student body,"[3] only direct measures of those educational benefits are proper for "serious consideration." In other words, RNAs must be evaluated against their ability to raise actual educational achievement.

I. THE INCREASING IMPORTANCE OF THE RNA REQUIREMENT

RNAs are programs that strive to meet diversity goals in a manner that is not race-conscious.[4] The requirement that RNAs be seriously considered

---

[*] Lillie and Nathan Ackerman Chair in Equality and Justice in America, Baruch College School of Public Affairs, The City University of New York. The author previously served as Staff Director, U.S. Commission on Civil Rights (2004–2008) and was delegated the authority of Assistant Secretary of Education for Civil Rights (2003–2004). An earlier version of this Essay was presented at the 15th Annual Education Law Conference at the University of Southern Maine and the University of Maine Law School. Roger Clegg, George La Noue, Mark Weber, and various conference participants provided helpful comments, but fault for any deficiencies remains with the author.

[1] *See* Grutter v. Bollinger, 539 U.S. 306, 339–40 (2003).

[2] For the first sustained attempt to elucidate this process, see George R. La Noue & Kenneth L. Marcus, "*Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. (forthcoming 2008) (manuscript on file with the Northwestern University Law Review).

[3] *Grutter*, 539 U.S. at 328 (internal citations omitted).

[4] For an overview of available programs, see OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004).

has developed over time. It began as a scholarly analysis of the "narrow tailoring" prong of the strict scrutiny test,[5] and was introduced into affirmative action jurisprudence in Justice Lewis Powell's *Wygant* opinion, which established that courts must "give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense."[6] RNAs were transformed by Justice Sandra Day O'Connor's *Croson*, *Adarand*, and *Grutter* opinions into a separate, enforceable requirement that public and educational institutions *themselves* seriously consider race-neutrality before resorting to race-conscious measures.[7] Most recently, the RNA requirement has been institutionalized in the *Parents Involved in Community Schools* decision as an independent basis for striking down affirmative action plans.[8]

The requirement is important because its enforcement is at the same time both simple and complex. In many cases, an institution may ignore race-neutral alternatives altogether and therefore be vulnerable to a legal challenge, which is quick, simple, and cheap. This simplicity is in contrast with other grounds on which post-secondary racial preference schemes may be challenged, most of which are resource-intensive, factually complicated, and politically sensitive. For example, a particular institution's admissions scheme might be challenged on whether it more closely resembles the University of Michigan's undergraduate college in *Gratz v. Bollinger* or its law school in *Grutter v. Bollinger*. This determination may require considerable fact-intensive review, subjective determinations, and a battle of expert witnesses.

By contrast, if an institution has not even considered the use of race-neutral alternatives, a challenge by the U.S. Department of Education's Office for Civil Rights or a private litigant is more or less cut and dried.[9] Since many institutions do nothing to meet this requirement, they are sitting

---

[5] *See* Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972).

[6] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (Powell, J., plurality op.) (1986) (quoting Greenawalt, *supra* note 5, at 578–79 (1975)). Specifically, Powell faulted the Board of Education for resorting to layoffs of nonminority teachers when the use of hiring goals would have been less intrusive. *See id.* at 283–84.

[7] City of Richmond v. J.A. Croson, 488 U.S. 469, 507 (1989); Adarand Constructors v. Pena, 515 U.S. 200, 237–38 (1995); *Grutter*, 539 U.S. at 339–40.

[8] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2760–61 (2007). For a more extensive discussion of the development of this doctrine, see La Noue & Marcus, *supra* note 2 (manuscript at Part I).

[9] While most analyses focus on the prospect of litigation before Article III courts, it is my observation that administrative action by the Office for Civil Rights is both more frequent and more important. For an explanation of this point, see Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY B. OF RTS. J. 837, 856–58 (2007).

ducks in the face of any potential challenge. In this sense, serious-consideration cases are important because they are so easy for the plaintiff to prove. In 2004, the Office for Civil Rights challenged a number of school districts for failing to consider race-neutral alternatives to the use of racial preferences in their magnet-school student assignment plans. If the districts had actually considered RNAs, the permissibility of those preferences would have been a legally and politically difficult question; absent this consideration, the cases were much less difficult.

The serious-consideration requirement, however, is not always this simple. While serious consideration is clearly required, there is little guidance on exactly what this means. Although in many cases institutions apply little or no consideration and the outcome is simple,[10] when institutions provide some consideration, even if perfunctory, it becomes difficult for courts to determine whether the consideration is sufficient. This is due in part to the courts' failure thus far to adopt principles for the evaluation of diversity reviews. Extrajudicial guidance on this issue is also limited, consisting of one or two government reports,[11] various trade and professional publications by attorneys for organizations such as the College Board,[12] and one law review article.[13] Otherwise, the field is largely clear. The claim that one does not even know what it would mean to "seriously consider" race-neutral programs has some justification.

II. THE MEASURE OF SUCCESS

For those who would apply the serious-consideration requirement properly, the most difficult question is how to measure the likely success of race-neutral diversity programs. If their effectiveness is to be evaluated, it must be evaluated against a particular standard. Since many members of the higher education community think of diversity programs as efforts to increase minority representation, it is tempting to measure such plans

---

[10] The President-Elect of the Association of American Law Schools, Rachel Moran, has confirmed the suspicion held by many observers outside of higher education, that colleges outside of California and Texas are largely ignoring this requirement. *See* Rachel F. Moran, Symposium, *Of Doubt and Diversity—The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 231 (2006) ("Despite federal efforts to promote these alternatives, colleges and universities have not paid as much attention to this part of the *Grutter* opinion."). Some prominent higher education attorneys have claimed in conversations with the author that some of their clients are taking this requirement seriously, but they have been unwilling to name the institutions that do so.

[11] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *supra* note 4; U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL PROCUREMENT AFTER *ADARAND* (2005) at xi.

[12] *See, e.g.*, ARTHUR COLEMAN, SCOTT R. PALMER & STEVEN WINNICK, RACE-NEUTRAL POLICIES IN HIGHER EDUCATION: FROM THEORY TO ACTION (forthcoming 2008); ARTHUR L. COLEMAN & SCOTT R. PALMER, ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES (2006).

[13] *See* La Noue & Marcus, *supra* note 2.

against their ability to achieve this goal.[14] However, an institution's use of such narrow measures would likely indicate that its professed commitment to multifactored diversity is pretextual. Alternatively, an institution seeking the judicially approved educational benefits flowing from multifactored diversity would logically measure the success of diversity programs in terms of their ability to achieve either multifactored diversity (indirect measures) or the educational benefits themselves (direct measures).[15] That is to say, an institution might *directly* evaluate the extent to which diversity programs increase intergroup understandings, break down stereotypes, etc., or *indirectly* evaluate the extent to which these programs foster the multifactored student diversity, which is expected to advance the pursuit of these goals.

A. Racial Diversity Measures

It is natural for most higher education participants and commentators to evaluate race-neutral admissions programs against their ability to increase the representation of previously underrepresented student populations.[16] Exclusive use of such measures, however, creates significant litigalitigation risk since it implies that race-conscious measures are employed to achieve impermissible racial balancing, rather than to yield the compelling educational benefits that flow from a multifactored diversity. After all, the measure of success that an institution employs can speak volumes about the goals it is trying to achieve.

For example, in 2000 the University of Texas at Austin bragged that its race-neutral Texas Ten Percent Plan had succeeded by enabling Texas to bring its 1999 enrollment for African-American and Hispanic students back to pre-*Hopwood v. Texas*[17] levels.[18] This was an impressive claim since the

---

[14] The transparency of these efforts to achieve particular racial compositions is one of the worst-kept secrets in academe. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 291–93 (2001); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–34 (2000); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1042 (1998).

[15] The concept of "direct measures" is developed in Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 6 (2001). Roithmayr, however, develops the concept very differently than does this Essay. For a discussion of "direct measures," in the context of serious consideration of race-neutral alternatives, see La Noue & Marcus, *supra* note 2 (manuscript at 34–35).

[16] *See* Forde-Mazrui, *supra* note 14, at 2346.

[17] 78 F.3d 932 (5th Cir. 1996).

[18] *See* Larry Faulkner, *The "Top 10 Percent Law" Is Working for Texas*, The Univ. of Tex. at Austin Office of the President, Oct. 19, 2000, http://www.utexas.edu/student/admissions/research/faulknerstatement.html (link). These boasts may come back to haunt Texas in light of subsequent developments. After the *Grutter* decision came down, Texas replaced its percentage plan with a race-conscious approach, which is subject to a pending constitutional challenge in *Fisher v. Texas*, 556 F. Supp. 2d 603 (W.D. Tex. 2008). In that case, an unsuccessful student applicant claims that Texas's current use of racial preferences is impermissible in light of Texas's admission that it not only seriously considered, but successfully adopted, a race-neutral alterna-

Fifth Circuit's 1996 *Hopwood* decision had barred the use of race as a factor in student admissions.[19] Based on Texas's public pronouncements, however, it is clear that the program measured its success based on its ability to enroll African-American and Hispanic students, rather than its ability to enroll students who exhibited the wide range of diversity-characteristics (economic, geographic, political) which a multifactored diversity scheme would seek. Unsurprisingly, there is considerable evidence that this "racial balancing" was indeed Texas's goal.[20] While this goal has considerable support within the academy, it is decidedly not compelling in the eyes of contemporary affirmative action law.

The U.S. Supreme Court has repeatedly emphasized that, by itself, increasing racial or ethnic representation is not a sufficiently compelling interest to justify the use of racial preferences.[21] Rather, the legally cognizable diversity interest consists of an institution's efforts to achieve the educational benefits that flow from the interchange of varied and opposed viewpoints and perspectives, as may be accomplished by admitting students who collectively create a multifactored diversity.[22] To judge a plan exclusively against its ability to attract African-American and Hispanic students would imply a pretextual character to the institution's pursuit of multifactored diversity. To the extent that the educational benefits flowing from multifactored diversity are indirectly measured by a program's ability to produce such diversity, they must be measured according to numerous characteristics, and not just race and ethnicity.

B. Indirect Measures

Some may choose to measure RNAs according to their ability to achieve a multifactored diversity. In other words, racially preferential practices will be measured against the ability of race-neutral alternatives to succeed, more or less as well, at achieving the full range of diversity characteristics which institutions seek as a means of achieving certain educational benefits. These diversity characteristics may include race and ethnicity only as part of a wider range of attributes that may include socioeconomic, geographic, and ideological diversity, as well as a diversity

---

tive. *Fisher*, 556 F. Supp at 605–06. The Center for Equal Opportunity and civil rights activist Edward Blum have made similar claims in a complaint brought against Texas before the Office for Civil Rights.

[19] *See Hopwood*, 78 F.3d at 962; Faulkner, *supra* note 18.

[20] *See* Faulkner, *supra* note 18 (discussing increases in the admission and retention levels of African-American and Hispanic students to the University of Texas at Austin since the Top Ten Percent Law took effect). Michigan made precisely this point to the Supreme Court in *Gratz*, arguing that the "purpose and intended effect" of Texas's facially-neutral plan "is to achieve some measure of racial diversity." Brief for Respondents at 13, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), *available at* http://conlaw.usatoday.findlaw.com/supreme_court/briefs/02-516/02-516.mer.resp.lb.pdf (link).

[21] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978).

[22] *See Grutter*, 539 U.S. at 330; *Bakke*, 438 U.S. at 314.

of skills, interests, and experiences, and demonstrated ability to overcome different kinds of disadvantages.

This approach is less likely to produce litigation than the narrower racial diversity measures but is also arguably less candid. In many cases, the approach insulates diversity programs by concealing the social justice concerns that motivated their creation. In addition, for institutions that sincerely seek the educational benefits that flow from diversity—or at least claim to do so—indirect measures are at best weak indicia of that ultimate goal. Furthermore, absent unusual considerations, an exclusive reliance upon indirect measures may also appear pretextual. Why not measure educational benefits directly if this is the motivation for diversity programs?

Even accepting that educational benefits flow from multifactored diversity, this does not mean that diversity attributes can serve as a proxy for educational achievement. A program that garners the requisite diversity may not capture the educational benefits that are expected to flow from it. The focus should be on the extent to which various diversity programs are able to translate educational strategies (attaining multifactored diversity) into ultimate goals (specific educational benefits). Unless the ultimate educational goals are immeasurable, there can be no excuse for an institution's failure to measure them in any evaluation that purports to constitute "serious consideration."

C. Direct Measures

If an institution's purpose in pursuing affirmative action is to produce the educational benefits that flow from multifactored diversity—the only permissible purpose according to the Supreme Court—then the measure of that institution's success, logically, should be its ability to achieve those educational benefits. Given the seriousness with which the Court treats any form of racial preference, it follows that serious consideration of race-neutral alternatives must include an assessment of whether those alternatives can achieve the same (or equally worthy) educational benefits as a proposed racially conscious scheme. In other words, to pass court scrutiny, institutions must seriously consider whether the same level of educational attainment believed to be available through the inclusion of racial and ethnic criteria in a multifactored diversity approach can also be achieved through nonracial means. Despite its logical basis, there are two problems facing this approach.

The first problem with the direct educational benefits approach is that there is no broad consensus on what those benefits are or whether race-conscious actions actually achieve them—particularly when they are not accompanied by active efforts to achieve intergroup student engagement.[23]

---

[23] *See* Mitchell J. Chang, Nida Denson, Victor Sáenz & Kimberly Misa, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. HIGHER ED. 430, 432 (May/Jun 2006) ("[T]he research literature suggests that the educational potential of 'diversity' is not reducible

The extent to which even race-conscious measures have succeeded in attaining educational benefits has been widely disputed in the literature, as the Court has more recently recognized in *Parents Involved in Community Schools*.[24] Even those who support preferential programs sometimes observe that racial diversity alone is insufficient to achieve educational benefits absent additional measures to promote active engagement.[25] If racially-conscious programs do not achieve demonstrable educational benefits, their failure is not a shortcoming of the direct benefits measure; rather, this failure would suggest a deficiency in either the manner in which the programs are designed and executed or the justification for the use of racial preferences. Some diversity advocates, however, have long insisted that diversity yields strong benefits in a host of areas, including both higher education and the public schools.[26] In *Grutter*, for example, the University of Michigan successfully persuaded the Supreme Court, based in significant part on the work of Patricia Gurin, that student diversity yields important educational benefits. Specifically, Michigan argued that its law school's "admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[27] Diversity programs must identify specific, demonstrable educational benefits and determine whether their race-conscious programs achieve those benefits more effectively than RNAs do.

Michigan's proffered educational benefits may serve as an illustrative example. Suppose that an institution seeks, as did Michigan, to promote cross-racial understanding, break down racial stereotypes, and enable students to better understand persons of different races. A less deferential court might be suspicious of an institution that defines educational goals in such racially conscious ways; after all, if the goal is entirely educational,

---

simply to the mere presence of members of underrepresented groups; rather, its value appears to depend on whether it leads to greater engagement in diversity related activities.") (citation omitted).

[24] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2776–79 (2007) (Thomas, J., concurring) ("Scholars have differing opinions as to whether educational benefits arise from racial balancing."). The U.S. Commission on Civil Rights also recently reached this conclusion in the context of elementary and secondary education. *See* U.S. COMM'N ON CIVIL RIGHTS, THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION 15 (2006), *available at* http://www.usccr.gov/pubs/112806diversity.pdf (finding that "[t]here is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvement in academic performance" and that "[s]tudies of whether racial and ethnic diversity result in significant social and non-educational benefits report varied results") (link).

[25] *See, e.g.*, P. Gurin, E.L. Dey, S. Hurrado & G. Gurin, 72 *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, HARV. ED. REV. 330, 333 (2002), *available at* http://www.edreview.org.turing.library.northwestern.edu/harvard02/2002/fa02/f02gurin.htm ("[S]tructural diversity is a necessary but insufficient condition for maximal educational benefits; therefore, the theory that guides our study is based on students' actual engagement with diverse peers.") (link).

[26] This issue continues to generate considerable controversy. *See generally* La Noue & Marcus, *supra* note 2 (manuscript at 34 n.144 and sources cited therein).

[27] *Grutter*, 539 U.S. at 330 (quoting App. to Pet. for Cert. 246a) (alteration in original).

then why should a college not seek the broadest range of cross-cultural understandings, the removal of all cultural stereotypes, and the cultivation of better understanding of all people? Either way, however, these educational goals are clearly measurable, as Dr. Gurin's expert report in the Michigan case established.[28] Institutions can measure the extent to which they are achieved through different programs: student admissions programs, student exchange programs, freshman orientation training, travel abroad programs, ethnic studies courses, experiential learning courses, *etc.*

Second, a diversity program that achieves educational benefits without increasing the representation of underrepresented groups may still be considered a failure within the higher education community (and by the institution's accreditors). It has been argued that most people form their positions on racially preferential admissions at least partly on the basis of moral principle.[29] For such persons, it may be unsatisfactory to consider only the direct benefits of diversity programs. After all, a pure direct benefits measure may validate a diversity program on its ability to raise overall diversity-related educational attainment even if the program entirely failed to increase the enrollment of minority students. Diversity advocates typically support higher education diversity at least in part as an ultimate end, not only as an instrumental good. Alternatively, even if an institution is primarily motivated by the educational benefits, which it believes will flow from diversity, it may still favor racial and ethnic diversity as a means to accomplish that ultimate goal, based on independent (if nonpredominant) considerations favoring diversity. This second problem, however, arises from institutions called on their bluffs about being motivated solely by educational benefits. In this respect, the problem is merely a superficial—and improper—barrier to implementing a direct measure approach.

Diversity policies are predicated on their ability to yield educational benefits; it would thus be appropriate for the institution to adopt policies which maximize the full range of benefits that diversity is said to advance, not just those which align with social justice values which may be embraced by some portion of the university community. Ideally, this approach will enable the institution to focus with undiminished concentration upon its ultimate educational goals.

CONCLUSION

The serious-consideration requirement deserves much more attention than it has thus far received. Whatever one's views of the normative desi-

[28] *See* Expert Report of Patricia Gurin at § V.D., Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-75321), Grutter v. Bollinger, 137 F. Supp. 2d 874 (E.D. Mich. 2001) (No. 97-75928), *available at* http://www.vpcomm.umich.edu/admissions/legal/expert/studies.html (discussing the report's methods for measuring growth and development among college students) (link).

[29] *See* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 170 (2003); Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON CIV. RTS. L. J. (forthcoming Oct. 2008) (manuscript at 40, on file with the Northwestern University Law Review).

rability of RNAs, they are now deeply embedded in contemporary affirmative action jurisprudence. Since *Grutter*, it is now unmistakably clear that state actors and federally assisted agencies (including universities) that employ racial or ethnic preferences (including universities) must engage in a serious evaluative process to determine whether these preferences could be replaced by effective RNAs.

Some may argue that any sustained explication of the Supreme Court's serious-consideration requirement affords the Court's affirmative action jurisprudence a degree of literalness that it does not merit. Those who are more cynical or more skeptical may not take the Court at its word, seeing the serious-consideration requirement as mere lip-service to a traditional narrow-tailoring element which has been rendered insignificant in light of the degree of deference, which the Court afforded to the University of Michigan's perfunctory consideration in *Grutter*.[30] Yet it cannot be gainsaid that the Court has continued to give teeth to the serious-consideration requirement as recently as *Parents Involved in Community Schools*.[31] As long as the serious-consideration requirement remains a part of affirmative action jurisprudence, it has a potential bite which may be more lethal than any other element of the strict scrutiny analysis. While many institutions apparently still ignore this requirement, or only perfunctorily purport to satisfy it, they do so at considerable litigation risk.

When universities evaluate the various available RNAs, they must select a measure against which to determine their effectiveness. The most obvious measure—their ability to maintain or increase minority enrollment—is also the surest legal loser. Other measures also have problems which are more subtle. In a nutshell, if institutions seek the educational benefits that flow from diversity, they may gauge their success either directly (by measuring educational benefits themselves) or indirectly (by measuring the diversity intended to produce such benefits). While indirect measures may have features that are attractive from the perspective of some social justice concerns, they are significantly less convincing as a means of demonstrating compliance with applicable law. In the end, there is no substitute for direct measures.

---

[30] *See* La Noue & Marcus, *supra* note 2 (manuscript at 13–14).

[31] *See* 127 S. Ct. 2738, 2760–61 (2007).