Dubious Diversity

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BACK IN THE LATE 1980S, several of my Yale Law School classmates and I launched into yet another earnest and well-meaning discussion about racial diversity. On that particular evening we turned to the faculty and proceeded empirically. As we counted the individuals of minority race, I casually added to the list the name of Stephen Carter, soon to be well known to the general public as the author of "Reflections of an Affirmative Action Baby," and already known at Yale as a serious scholar and no-nonsense teacher who tended to avoid public involvement in Yale's persistent internal battles about law school diversity. Immediately, a classmate--bright, progressive, and now well into a successful law career--blurted out indignantly, "No! Carter doesn't count as a . . . "

My classmate caught himself, blushed, and let his incomplete utterance hang in the air. We felt his embarrassment. Even among friends he had the good sense to be flustered at having nearly put into words the widely held opinion at Yale Law School that to be counted as an African American you had to meet at least two criteria: Your skin had to be black, and your opinions had to be left-liberal.

For those concerned about the deceptions upon which the diversity rationale depends, the Supreme Court's 5-4 decision in Grutter v. Bollinger will provide little comfort. Justice Sandra Day O'Connor wrote for the majority, and she was joined by Justices Stevens, Souter, Breyer, and Ginsburg. She held that "educational benefits that flow from a diverse student body" are a "compelling state interest"--a good, that is, of overriding importance--which permits public universities, despite the Fourteenth Amendment's core purpose "to do away with all governmentally imposed discrimination based on race," to count race as one factor among many in university admissions decisions.

But can the quest for racial diversity avoid stereotyping? Are the official means and ends of the diversity rationale in harmony and consistent with actual practice? What kinds of intellectual habits does the diversity rationale cultivate? To these questions, the majority gives answers that range from the highly unsatisfying to the deeply disturbing.

Both sides agreed, as Justice O'Connor notes, on the huge impact of racial preferences on the admissions process at the University of Michigan Law School. Barbara Grutter's experts testified that race "is an extremely strong factor in the decision for acceptance" (disclosure: Grutter's lawyers serve as co-counsel in a lawsuit to which I am a party). The Law School's experts concurred: "a race blind admissions system would have a 'very dramatic,' negative effect on underrepresented minority admissions." Justice O'Connor embraced the Law School's contention that if it did not grant racial preferences to underrepresented minorities--African Americans, Hispanics, and Native Americans--it would not achieve a "critical mass," which means "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." And she accepted the Law School's conclusion that without a critical mass, it could neither reap diversity's benefits nor play its important role in training minorities for positions of civic and commercial leadership.

Effectively establishing as the law of the land Justice Powell's strictures in the landmark 1978 Bakke decision that public universities may use race only as a "'plus' factor" while ensuring that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," Justice O'Connor purported to subject the Law School's policy to the strictest scrutiny and found it constitutional.

In fact, Justice O'Connor's scrutiny is lax and her reasoning is weak. First, the idea of a "critical mass" is a sham. As Justice Rehnquist argued in his dissent, joined by Justices Scalia, Kennedy, and Thomas, in practice the goal of a "critical mass" in Law School admissions functions as a quota whose purpose is to achieve racial balancing, which Justice O'Connor's majority opinion recognizes as "patently unconstitutional."

In a typical year, the Law School will admit a class of between 1,130 and 1,310 students; the class will contain between 91 and 108 African Americans, between 47 and 56 Hispanics, and between 13 and 19 Native Americans. The Law School, however, does not explain why critical mass varies so dramatically among underrepresented minorities. The data, though, are telling. Year after year, the Law School admits African Americans, Hispanics, and Native Americans in approximately the same proportions in which they apply.

Moreover, the Law School can't keep its story straight about the purpose of obtaining a critical mass of minority students. On the one hand, the Law School seeks minority students for the benefits that come from a racially and ethnically diverse student body. On the other hand, the Law School claims that critical mass is needed so that minority students can express themselves in class without feeling isolated or like spokesmen for their race. In other

words, the Law School wants minority students for the distinctive viewpoint that they bring and wants them in significant numbers so that they will not feel that they are at the law school in order to represent a distinctive viewpoint.

Second, although she claims to be endorsing Justice Powell's views on diversity, Justice O'Connor in effect changes his meaning. In Bakke, Powell argued that a public university could seek a heterogeneous student body so long as race was only one factor in student admissions and one component of heterogeneity. Yet aside from repeating the Law School's assurances, O'Connor gives little reason to believe the Law School seeks any form of diversity--say diversity of political party or religion--beyond racial or ethnic diversity.

Third, contrary to Justice O'Connor, who defers to "the Law School's assessment that diversity will, in fact, yield educational benefits," diversity's benefits in the areas where everyone agrees it counts most--the robust exchange of ideas in the classroom and the development of friendships between students of different races--remains hotly contested. Indeed, as Yale Law School professor Peter Schuck observes in his meticulously argued and indispensable new book, "Diversity in America," the weight of evidence casts serious doubt on the claims that affirmative action programs promote either lively classroom debate or interracial understanding. Nor would one guess from O'Connor's analysis the sad fact explored by Schuck that "preferentially admitted students . . . tend to have much lower academic performances and higher drop-out rates."

The flaws of the diversity rationale should not be surprising. A law school is an educational institution, and the diversity that truly educates is what John Stuart Mill calls "diversity of opinion." While himself a man of the left, Mill argued forcefully that the vigorous contest between conservative and progressive opinion was crucial to the refinement of both and a great boon to moral and political life. Although the Law School pays lip service to diversity of opinion, the diversity based on racial preferences that it practices works to defeat it.

This is in part because the Law School policy traffics in stereotypes. Protestations to the contrary notwithstanding, the diversity rationale for granting underrepresented minorities a substantial advantage in the competition for scarce seats at elite universities presupposes a minority viewpoint. On the basis of what the justices in the Grutter majority have previously said, one might have thought that this practice, akin to racial profiling, was unconstitutional. In U.S. v. Virginia, the 1996 case striking down single sex military training at the Virginia Military Institute, Justice Ginsburg, in an opinion joined by Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer, argued that one reason that VMI must admit women was that their exclusion was based on constitutionally prohibited generalizations about the tendencies, roles, and abilities of a group that had long been subject to discrimination.

The diversity rationale also officially countenances treating minority students as a means to improving the education of majority students while disguising the costs. It's not only that all minority students are stigmatized. Forced to compete with the best and brightest white and

Asian students, minority students with substantially lower academic skills are bound to resent their competition and eventually lash out at the academic criteria by which they are judged and unfortunately often found wanting. And those responsible for administering affirmative action programs expose themselves to the corrupting effects of arranging matters so as to have their cake and eat it too: They want theirs to be an elite university that maintains exceptionally high standards and so serves as an effective credentialing mechanism insuring graduates' access to high paying and prestigious jobs--but also an institution consistent with their vision of social justice, whose costs they do not pay.

Finally, the diversity rationale contributes to the cultivation of intellectual conformity inside the university, with ripple effects throughout the wider culture. The chief beneficiaries of affirmative action at elite universities come from middle and upper middle class families. It is widely presumed that these beneficiaries will come to class and make points and tell stories about being victims of societal and unconscious discrimination and about the need for government to take aggressive action to combat the nation's pervasive racism.

As it happens, the diagnosis and the prescription are shared by the vast majority of administrators and faculty at elite universities. As a result, the diversity rationale helps to create an echo chamber in the classroom, with minority students reinforcing the opinions of their white professors. The homogeneity of opinion causes everybody's intellectual habits to suffer.

There is a direct line from the widespread embrace of the diversity rationale to the vulgar, if representative, warning about the future of the Supreme Court issued by Yale Law School professor Bruce Ackerman in the American Prospect in the wake of Bush v. Gore: Ackerman warned that "the president will nominate a right-wing extremist who happens to have a Hispanic surname rather than a black face." The underlying message is the same one that I heard 15 years ago from my Yale Law School classmate: Real Hispanics, like real blacks, are determined not by the color of their skin but by the conformity of their opinions to the left wing of the Democratic party.

Proponents of affirmative action contend that the consequence of its elimination--elite campuses composed almost entirely of whites and Asians--is unthinkable. It's not. Were racial preferences eliminated, and were race-neutral means not found to achieve racial diversity, those minority students no longer able to gain admission to elite schools on the basis of their academic skills would still attend very good schools a rung or so lower in the rankings and would graduate with excellent opportunities--perhaps improved, given that they would have been competing in the classroom against students with similar academic skills--to make their mark in the world.

In view of our nation's cruel history of racial discrimination, the prospect of an almost all white and Asian Harvard or Yale, Swarthmore or Oberlin is certainly unnerving to contemplate. But given our universities' chief and overriding responsibility to promote free

inquiry and to foster intellectual integrity, the reality of the diversity rationale for affirmative action--which traffics in stereotypes, rewards hypocrisy, and cultivates intellectual conformity--is difficult to swallow.

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