

**Equal Educational Opportunities for Underrepresented Minorities:
How Schools Should Respond to the Supreme Court's
Affirmative Action Decisions**
by Valerie L. Simons

The recent Supreme Court cases on affirmative action in higher education admissions at the University of Michigan were critical and timely rulings for those decision-makers in educational institutions who have lacked guidance for a generation about how to achieve a diverse student body without running afoul of the Constitution. By upholding the admissions program at the law school, while striking down the admissions program at the undergraduate school, the Supreme Court sent a strong message about what is, and what is not, constitutional under the Fourteenth Amendment outside the context of remedying past discrimination. The implications of such a message cannot be understated. For the first time, the Supreme Court has pronounced that diversity is a constitutionally-recognized goal that can be pursued. Such a pronouncement is stunning in its potential application to both colleges and universities and potentially primary and second schools around the country that have struggled to defend their diversity programs without a clear constitutional foundation. The Supreme Court has provided such a foundation. But now the question becomes: how should educational institutions respond?

The two cases, to put it mildly, are hardly a blueprint for a school admissions officer or committee to follow to ensure a constitutional admissions program. However, the cases do provide certain parameters that schools must work within as they examine and/or develop affirmative action admissions policies and procedures for the upcoming school years.

**A School Must Examine and Define its Own
Educational and Diversity Goals**

Critical to the success of the "diversity rationale" was how it was specifically defined: the educational benefits that flow from a diverse student body. Although such a rationale has now been constitutionally-sanctioned, it will not suffice for a school to merely reproduce the rationale in its literature and admissions packet.

A school that wants to achieve a diverse student body must first examine and define its own educational mission. In other words, it's impossible to justify the "educational benefits that flow from a diverse student body" without first identifying what type of educational benefits are actually sought. For example, the law school wanted to admit a "group of students who individually and collectively are among the most capable" and who exhibited a "strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." Indeed, the success of the diversity rationale in the educational context depends, in large part, on the deference



the Supreme Court affords to educational institutions to determine how they want to educate their own students. Thus, schools must be cognizant of their primary roles as educators, before determining how diversity might be able to contribute to and complement their educational missions.

Once a school articulates its educational goals, it can determine how diversity, and what type of diversity, can help to achieve those goals. Diversity is almost limitless in its definition and can certainly include, but is not limited to, racial and ethnic diversity. For the law school, racial and ethnic diversity specifically included African-Americans, Hispanics, and Native Americans because they were not currently represented in significant numbers at school. While the law school acknowledged such historical discrimination against Jews and Asians, students from those backgrounds were already represented in significant numbers at the school. Thus, how a school identifies its own "underrepresented minorities" will depend on its own historical admission patterns, including the current racial composition of the school and the applicant pool.

A school can consider and afford substantial weight to many bases of student diversity, including students who traveled abroad, are fluent in several languages, have overcome adversity or come from diverse racial and ethnic backgrounds. In the context of diversity policies that are race-conscious, a school is not "remedying past racial discrimination" but rather admitting students from groups who have been historically discriminated against and thus bring a perspective different from that of members of groups that have not been the victims of discrimination. The inclusion of such students in meaningful numbers -- *i.e.*, the "critical mass" -- encourages them to participate in the classroom and not feel like spokespersons for their race. As such, there would not be a "minority viewpoint" but rather a variety of viewpoints among minority students. Consequently, students receive the educational benefits of diversity in and outside the classroom by participating in discussions that are more dynamic, spirited and informed. Indeed, the benefits of diversity extend past the school. As American businesses and high-ranking retired officers and civilian leaders of the United States military made clear, a diverse student body better prepares students to succeed in an increasingly diverse workforce and officer corps. Thus, the benefits of diversity not only contribute to the educational mission of a school, but also contribute to the fundamental success of the country itself.

The School Must Provide Narrowly Tailored Mechanisms Through Which to Achieve its Diversity Goals

Once a school defines its educational and diversity goals, the most critical question becomes: is it truly necessary to take race into account during the admissions decision-making process? In other words, what does the racial composition of the applicant pool and the current student body suggest



about future classes? If there are race-neutral means in which to achieve a more diverse class - perhaps increasing recruiting to targeted student populations or even continuing with current policies because they will achieve a "diverse student body" in the next year or two - such means should, and indeed must, be considered. However, schools do not have to consider *every* conceivable race-neutral alternative. For example, a school need not choose between maintaining high academic standards or providing equal educational opportunities to members of all racial groups. The Constitution does require, however, that a school make a good faith effort to consider race-neutral means to achieve racial diversity before turning to race-conscious means.

Once a school makes a good faith determination that it cannot achieve racial diversity through race-neutral means, it may consider particular racial backgrounds as a "plus factor." However, such a plus factor cannot mean that a candidate's racial background is in any way a determining factor for admissions. On the contrary, the admissions policies must be flexible and individualized so as to consider all possible elements of "diversity" in light of the particular qualifications of each candidate. Thus, a school can consider racial background alongside with other soft variables such as a candidate's personal essays or economic background but not necessarily according them the same weight.

The plus factor is easier to describe than it is to apply -- just ask the University of Michigan. While both schools wanted to achieve the educational benefits that flow from a diverse student body, the law school successfully applied its racial plus factor while the undergraduate school failed. The key difference was that the law school's policies allowed for a flexible, individualized review of each candidate's unique characteristics, including race. The undergraduate school's policies relied on a mechanical review that automatically awarded racial bonus points. The law school permitted each candidate to fairly compete against all other candidates, while the undergraduate school created separate admissions tracks based on race. Such separate admissions tracks in the context of affirmative action will always be unconstitutional.

So, how does a school constitutionally take race into account? To achieve the critical mass of underrepresented minorities, a school must pay attention to numbers. For example, at the law school, there was clearly a range that was essential to ensuring the critical mass. The law school monitored the range through the use of daily admissions reports. But it was clear, once an entering class was selected, that the school did not have a fixed number of spots reserved exclusively for minority students: the numbers of under-represented minority students who ultimately enrolled differed substantially from their representation in the applicant pool and varied considerably from year to year. A fixed number of spots reserved exclusively for minority students, or a "quota," will not be permitted. Even



the functional equivalent of a quota, such as the undergraduate school's "automatic racial bonus points" is unacceptable. Any type of quota or mechanical point-system precludes the essential element of a constitutionally-valid affirmative action policy: the individualized and flexible consideration of each candidate's qualifications and how such qualifications contribute to achieving the goal of obtaining the educational benefits that flow from a diverse student body.

Time Limitations

Unquestionably, the Supreme Court cautioned that even the law school's admission policies -- that withstood constitutional scrutiny -- cannot last forever. A school with affirmative action policies must conduct "periodic reviews" of its policies and discontinue them if such reviews show that race-conscious methods are no longer necessary. Indeed, any race-conscious admissions program must be terminated "as soon as practicable." The Supreme Court concluded that it anticipated that the use of racial-conscious admissions policies would not be necessary to achieve the goal of diversity in 25 years.

Looking to the Future

In light of the Supreme Court's affirmative actions decisions, schools must reexamine their admissions policies to see if they are constitutionally valid. Although there is no perfect blueprint for success, there are definitely pitfalls that can be avoided. However, even with the parameters for success as described above, schools will struggle to answer the practical and legal questions that the Supreme Court failed to address, only some of which include:

How can a large university, especially one with limited resources, narrowly tailor its admission program to allow an individualized review of each candidate? It is difficult to see how applicable the law school's program will be to schools with large applicant pools and entering classes. For example, how possible is it to "individualize" a process that considers thousands and thousands of applications? Schools in such situations may want to first decrease the original applicant pool by way of "hard variables" such as test scores or GPA. Once the applicant pool is narrowed, it may be possible to utilize an individualized approach to determine the entering class. Of course, the catch is that the use of "hard variables" by their current nature will have a disparate impact on minority students and thus may unfairly limit their representation in narrowed applicant pool and make the achievement of the critical mass harder to achieve.



How long will affirmative action policies be allowed? Does the 25-year deadline apply to all admissions programs? What happens to schools that are only now developing and implementing affirmative actions policies? Shouldn't they have a reasonable time-frame, like the University of Michigan, to implement their programs? It is possible that the phrase "as soon as practicable" suggests a more flexible time-frame, similar to a desegregation context, in which to pursue affirmative action policies.

Will the Michigan decisions have any impact on primary or secondary schools that want to achieve a diverse student body through selective enrollment policies? The Court based its decision to uphold the law school's admission program, in large part, upon deference to the university environment and the benefits that flow from the "robust exchange of ideas" from a variety of viewpoints. Arguably however, the diversity rationale should apply to any educational institution that wants to achieve the educational benefits that flow from a diverse student body. Taking affirmative steps to ensure that all members of society have access to educational opportunities should not be exclusive to the realm of higher education.

Regardless of how these questions are ultimately answered, the Supreme Court has given the green light -- albeit with certain qualifications -- for schools to take affirmative steps to ensure equal educational access and opportunity for all students.

Now is the time to take such steps -- let's not waste the opportunity to make a difference.

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