Books, Articles, and Items of Academic Interest

Compiled, with Commentary, by Carol Iannone

23 June 2003 was a dark day for the United States of America. On that day the Supreme Court handed down its decision in *Grutter v. Bollinger*, allowing preferences in admissions to the University of Michigan Law School based on race and ethnicity and for the purported goal of securing the educational benefits of diversity, a purpose deemed a "compelling state interest" by the Court. Writing for the majority, Justice O'Connor accepted the Law School's claim that a "critical mass" of minority students had been achieved not through quotas but through "individualized review," even though the number of minorities accepted each year exactly tracked their various proportions of the admissions pool, as was pointed out in the dissent written by Chief Justice Rehnquist.

On the same day, in *Gratz v. Bollinger*, the Court disallowed the automatic awarding of bonus admissions points to minorities in Michigan's undergraduate division as constituting a quota system. This hardly compensated for *Grutter*, however, which effectively overrides the Fourteenth Amendment and the principle of equality of individuals under the law that has been the bedrock of the American ideal. (See Edward J. Erler, "The Michigan Affirmative Action Cases: An Historical Perspective," *Imprimis*, September 2003.) The following are some of the notable responses from opponents of racial preferences. A number of them appeared in *National Review* and *National Review Online*. Both have shown an especial and welcome interest in this crucial discussion. (See the editorial, "Travesty: The Court Failed to Do Its Duty," *National Review*, 14 July 2003.)

> "Not in my most nightmarish speculation about what the Court might do regarding these cases did I envision that the justices of the highest court in the land would actually accord 'diversity' not only equivalent status to the equal-protection clause of the Fourteenth Amendment, but to make the latter subordinate to the former," writes Ward Connerly ("Murder at the Supreme Court," *National Review Online*, 26 June 2003). He continued, "Let it be said that when given a chance to complete the liberation of black Americans, on June 23, 2003 five justices consigned them to another generation—or, perhaps, a term of indefinite duration—of virtual enslavement to the past."

Another commentator who sees the dire implications of the decision is Peter Wood ("Affirming Faction," *National Review Online*, 27 June 2003).

Wood lamented the "bad news," adding ominously that "[j]ust how bad it is has yet to register with many people."

Wood's observation is borne out by Peter Kirsanow ("Michigan Impossible: *Grutter* compliance may be a problem," *National Review Online,* 1 July 2003), who reports that a "review of post-Michigan commentary reveals a gathering consensus among conservatives to just 'move on.'" Kirsanow paraphrases the thoughts of his conservative colleagues: "We fought the good fight and lost—maybe it's time to take a different tack, such as racial-privacy initiatives, and hey, if they don't fly, maybe in 25 years it'll all be over anyway." This attitude is nothing short of astonishing, and not only because of the naivete regarding what was merely a tentative, toothless *suggestion* of a 25 year limit to affirmative action on the part of the Court in *Grutter.* Even more astounding is the bland complacency with which these conservatives countenance the obviation of the "proposition" that "all men are created equal," the proposition that many conservatives (and liberals too) have insisted constitutes the very definition of America. Now that the "proposition" has been overruled, one would have expected widespread alarm rather than the kind of supine quiescence that Kirsanow reports.

Marcia Coyle ("Battle Over Affirmative Action Expected to Expand," *The National Law Journal,* 11 July 2003), quotes the reaction of Michael Greve of the American Enterprise Institute and co-founder of the Center for Individual Rights, the organization that led the battle against race-based admissions policies in Texas, Washington, and Michigan. "I just think this was a complete wipeout," Greve declared.

"What happens in the litigation community?" he continued. "It becomes harder to drum up money for this and harder to persuade people this is a righteous fight. I personally would not think there's enough oomph behind this movement now to say, 'Let's hold the Supreme Court to what it pretended to be saying,'" that is, insistence on "narrow tailoring" and "individualized review" of all applicants.

Abigail Thernstrom, quoted in the same article, agrees: "It's a total defeat. It really doesn't matter if there is a Supreme Court resignation. This is a momentous decision rewriting the equal protection clause of the 14th Amendment and the Supreme Court is not going to overturn precedent with abandon because there is a new justice."

Unfortunately, the estimable Greve may himself be partly responsible for helping to craft the CIR platform against affirmative action that failed to convince the Court. (Although the purported educational benefits of diversity had been challenged in friend-of-the-court briefs, these were not part of the plaintiff's own arguments.) In an article in the *Chronicle of Higher Education* ("Affirmative Action Is on the Rocks," 20 April 2001), Greve accepted the importance of diversity as an educational ideal but endeavored to show that affirmative action is not needed in order to obtain it. CIR's legal affairs

director, Curt Levey, wrote a similar article ("Diversity on Trial," *National Review Online*, 11 June 2001). They both suggested lowering standards for all applicants, de-emphasizing objective criteria like SAT scores, and, as Greve put it, employing "individualized file review that makes it impossible to trace racial discrimination."

John J. Miller ("'Diversity'...D'oh!" *National Review*, 28 July 2003) argues that CIR made a mistake in relying only on equal protection and the consequent unconstitutionality of race preferences and in not challenging the validity of diversity as an educational ideal in itself. Miller cites Peter Wood: "I say this more in sadness than in anger, but CIR made a tactical error" in not confronting "the diversity argument."

Peter Kirsanow agrees, as quoted by Michael Kirkland, UPI Legal Affairs Correspondent (in a UPI release published on 25 July 2003): "The whole idea of diversity as a compelling state interest was not litigated . . . . They believed they could win on a 14th Amendment (equal protection) analysis."

Nevertheless, not everyone is ready to give up. Miller suggests some strategies for resistance, and in the same issue of *National Review* in which Miller's article appears, John O'Sullivan ("Affirmative Action Forever?") outlines some ways in which opposition to affirmative action might arise, one of them being that continued mass immigration will bring the proportion of the minorities eligible for preferences to over half the population in the coming decades, thus greatly increasing the burden on the unprivileged groups.

For his part, Kirsanow, a member of the United States Commission on Civil Rights, believes that "Michigan renders preference programs extremely vulnerable to legal assault." And the CIR is ready to continue the fight. Curt Levey is quoted in the Coyle article: "*Grutter* and *Gratz* together make it virtually inevitable there will be a lot of litigation on the narrow tailoring grounds. The Court said you can't use race in a mechanical way and it should not be a decisive factor. Those are vague terms so we're going to have to litigate in the lower courts to make sure that is a meaningful distinction and our victory in *Gratz* is not for nothing."

Taking a different tack, Ward Connerly has begun a Civil Rights Initiative in the state of Michigan to outlaw racial discrimination and preferences in public institutions. ("Taking it to Michigan: Announcing the 'Michigan Civil Rights Act,'" *National Review Online*, 8 July 2003)

Unfortunately, Henry Payne ("Putting Preferences to a Vote," *National Review Online*, 10 July 2003), is obliged to report the thuggish behavior displayed by preference supporters during the press conference at which Connerly introduced the measure. Payne's article also exposes the sense of absolute, apodictical entitlement on the part of minorities that affirmative action has encouraged.

In addition, John J. Miller ("Betsy's Choice: Michigan Republicans Confront Ward Connerly," *National Review Online*, 17 July 2003), gives a dispiriting reminder that President Bush and the GOP support diversity as racial proportionality and will oppose such state initiatives as Connerly is sponsoring as "divisive." Despite the fact that his administration actually argued against Michigan's admissions policies in both cases, President Bush declared after the decisions were handed down: "Today's decisions seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law."

Additional responses to *Grutter*

Carl Cohen ("Winks, Nods, Disguises—and Racial Preferences," *Commentary*, September 2003). The man who first exposed Michigan's discriminatory admissions practices and expresses his consternation and surprise that the Supreme Court has given constitutional validity to racial discrimination.

John Perazzo ("Rewarding the Unqualified" *Frontpagemagazine.com*, 3 July 2003) illustrates the large disparities in qualifications between the preferred and the non-preferred groups admitted to various selective schools.

Carol Iannone ("The Kennedy Dissent and the Abomination of *Grutter*," *National Review Online*, 1 August 2003) draws attention to the little noted dissent of Justice Kennedy in *Grutter*. Unlike the other dissenters, notably Justices Scalia and Thomas, Kennedy is a firm *supporter* of affirmative action who nevertheless found that "the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."

In an exchange of letters in the *New York Review of Books* (14 August 2003), Stanley Rothman and Ronald Dworkin discuss Rothman's recent survey countering the claim that diversity enhances the educational experience. (Rothman's survey is summarized in the *Public Interest*, "Racial Diversity Reconsidered," Summer 2003). Rothman's final rejoinder, not printed by the *NYRoB*, can be found at *NAS Online Forum* <ttp://nas.org/forum_blogger/forum_archives/2003_09_14_nasof_arch.htm>. The exchange is important for revealing the intellectual sloppiness and duplicity of which preference supporters are capable.

Other

Steven Malanga ("Union U.," *City Journal*, Summer 2003), exposes the radicalization of yet another academic field, labor studies, now promot-

ing a one-sided political agenda, recruiting students as pro-union activists, and turning the idea of liberal education on whatever is left of its head.

Alan Quist, *Fed Ed: The New Federal Curriculum and How It's Enforced* (published by the Maple River Education Coalition, 2002, and available from EdWatch.org or Amazon.com) outlines how this widely used and virtually mandated curriculum created by the Center for Civic Education at the behest of the federal government is subverting American constitutional ideals and purveying global, multicultural, socialist, and group-entitlement concepts instead.