

How To Achieve Faculty Diversity In Public Higher Education: Minority Faculty Preferences And Their Alternatives

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ABSTRACT

Most educators in American public higher education vigorously embrace the goal of diversity for both faculty and students. One approach frequently utilized is preferential programs for targeted minorities for both faculty employment and student admissions. The Supreme Court has recently recognized that achieving a diverse student body in a public college or university is a sufficiently important interest to constitutionally justify implementation of a preferential admissions plan for minority students. The unanswered issue explored in this article is whether diversity may similarly serve as a sufficient justification for preferential hiring of minority faculty candidates. Also discussed are alternatives that institutions of higher learning may pursue in order to achieve faculty diversity without utilizing race- or ethnic-conscious faculty preferential hiring programs.

INTRODUCTION

The Supreme Court has acknowledged that achieving diversity within the student body of a state public college, university, or system of higher education (university) is a compelling state interest that may justify preferential admissions for racial and ethnic minorities (minority or minorities) (*Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003). The unanswered and more complex constitutional issue addressed in this article is to determine when a university may adopt an affirmative action program that entails preferential hiring of minority faculty (minority faculty preference). Central to this determination is whether achieving a diverse faculty is a sufficiently compelling state interest that may constitutionally empower a university to do so.

PURPOSE AND NATURE OF MINORITY FACULTY PREFERENCES

Purpose Of Minority Faculty Preferences

Minority faculty preferences typically seek to achieve one or more of the following diversity objectives: (1) rectifying an underrepresentation of minority faculty at a particular university that is the result of past and/or present discrimination, (2) achieving a critical mass, in other words, a diversity, of minority faculty at a university or within a specific unit of a university, and/or (3) enriching and broadening the educational experience of the students. Whether any one or more of these state interests are constitutionally sufficient to justify a minority faculty preference is one of the primary questions addressed in this article.

A university generally has no constitutional duty to adopt a minority faculty preference in the absence of a court order to do so (*City of Richmond v. J.A. Croson Co.*, 1989). Many educators nevertheless zealously believe that extending preferential faculty employment opportunities to underrepresented minorities is both ethically mandated (Laycock, 2004), and essential for eradicating the long saga of minority underrepresentation in higher education (Montvale, 2003).

Nature Of Minority Faculty Preferences

Minority faculty preferences often vary in their structure and goals (Eastern Oregon University, 2001; Wright State University, 1998). Preferential mechanisms, for example, may take a variety of forms. Sometimes they include assigning an undefined, noncontrolling “plus” to the evaluations of applicants who are members of a targeted minority (Grutter v. Bollinger, 2003). Another approach entails adding a fixed number of points to the composite evaluation score of targeted minority applicants (Gratz v. Bollinger, 2003). In extreme and constitutionally suspect cases, the preference entails reserving employment consideration solely for applicants who are a targeted minority.

Minority faculty preference programs typically have one of two goals. Some programs seek to eliminate minority faculty underrepresentation caused by past or present discrimination. Alternatively, the goal of many such programs is to enhance the educational experience of students.

Incidence Of Minority Faculty Preferences

It presently is difficult to ascertain the number or nature of minority faculty preferences in the United States. Few universities voluntarily make their programs publicly available, instead reserving them solely for personal inspection at the institution itself (Northern Arizona University, 2006). Nonetheless, commentators and studies suggest that countless universities have adopted and continue to utilize such programs (Garry, 2004).

EQUAL PROTECTION PARADOX OF MINORITY FACULTY PREFERENCES

The Supreme Court has declined to address the constitutionality of minority faculty preferences (University of Nevada v. Farmer, 1998). It therefore is incumbent upon educators, commentators, and lower courts to discern the constitutional legitimacy of minority faculty preferences from myriad obfuscatory and contradictory Supreme Court opinions addressing equal protection under the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Const. Amend. IVX ¶ 1).

Minority faculty preferences pose an inexorable equal protection paradox. A minority faculty preference uses preferential treatment to help minorities secure faculty positions and achieve equal economic opportunity promised by the Fourteenth Amendment (Fullilove v. Klutznick, 1980) while depriving white and nonpreferred minorities of this very equality. The challenge is to discern when a university’s interest in having a diverse faculty is so compelling that it is justified under the Fourteenth Amendment to use race- and ethnic-conscious preferences.

One line of equal protection precedents addresses the constitutionality of state race- and ethnic-conscious economic affirmative action plans (employment affirmative action), such as public employment and public contracting (Kohlbeck v. City of Omaha, 2006). A second line of equal protection case law focuses on race- and ethnic-conscious public education admissions plans (education affirmative action) (Regents of Univ. of Cal. v. Bakke, 1978). While these two lines of equal protection jurisprudence ostensibly embrace the same analytical standard, strict scrutiny, they apply this standard quite differently. Since minority faculty preferences involve considerations of both public employment and public education, it is necessary to reconcile these lines of equal protection jurisprudence in order to solve the equal protection dilemma posed by minority faculty preferences.

Following is data regarding the current demographic and economic state of faculty public employment in the United States. This article then provides parallel equal protection analyses of employment and education affirmative action, together with an analysis of the standards that should be used to evaluate minority faculty preferences.

FACULTY EMPLOYMENT IN HIGHER EDUCATION

Public college and university faculty collectively represent a numerically significant and well-compensated profession, which many professionals aspire to join. But this coveted profession is, and will remain, available to only a relatively select few. This scarcity of opportunity only serves to make minority faculty preferences all the more controversial.

Employment Of Faculty In Higher Education

In 2003 there were nearly 1.15 million full- or part-time faculty at public institutions of higher education (American Association of University Professors, 2006). The forecast is for generally positive growth in faculty employment through 2014 (Bureau of Labor Statistics, 2006). Nevertheless, there is a nearly 30-year trend that suggests a continued, significant reduction in full-time tenure and full-time tenure-track faculty positions (American Association of University Professors, 2006), and “competition will remain tight for tenure-track positions at 4-year colleges and universities....” (Bureau of Labor Statistics, 2006).

Demographics Of Faculty Employment In Higher Education

In Winter 2003-2004, minorities collectively comprised 15.6 percent of full-time faculty in degree-granting institutions in the United States (U.S. Department of Education, 2005). Within this total, representation of specific minorities was as follows (U.S. Department of Education, 2005) (percentages rounded): Black, non-Hispanic was 5.2 percent, Hispanic was 3.2 percent, Asian/Pacific Islander was 6.5 percent, and American Indian/Alaska Native was .5 percent.

The proportion of minority faculty significantly varies according to faculty rank. Total minority faculty representation, for example, ranged in the foregoing study from 11.8 percent for professors to 19 percent for assistant professors. Representation of specific minorities also varied according to faculty rank. Black faculty, for example, comprised only roughly 3.2 percent of professors and 6.2 percent of assistant professors.

Economics Of Faculty Employment In Higher Education

The comparatively generous remuneration and benefits accorded faculty reinforces the importance of faculty employment in higher education for individual faculty members.

Faculty compensation varies according to numerous factors, such as rank, discipline, type of institution, geographical location, accreditation, and reputation of institution. In a 2004-05 survey of full-time faculty, the American Association of University Professors (2006) found that the average salary was \$91,548 for professors, \$65,113 for associate professors, \$54,571 for assistant professors, \$39,899 for instructors, and \$45,647 for lecturers.

A survey conducted by the United States Department of Labor (2005) shows that the average pay for full-time professors is nearly two and one-half times that for state and local government workers. The typically generous benefits attendant to faculty employment similarly exceeds those received in other occupations (U.S. Department of Labor Bureau of Labor Statistics, 2006).

HISTORICAL OVERVIEW OF EMPLOYMENT AFFIRMATIVE ACTION AND EDUCATION AFFIRMATIVE ACTION

Employment and education affirmative action are among the most controversial issues in contemporary American society. These preferential programs have experienced a constitutional roller coaster ride for decades. Further tumult is expected since the Supreme Court recently has agreed to hear during its 2006-07 term two appeals (Meredith v. Jefferson County Board of Education, 2006; Parents Involved in Community Schools v. Seattle School District No. 1, 2006) involving the contentious issue of race-based admissions in K-12 schools (CBS News, 2006).

Historical Overview Of Employment Affirmative Action.

Affirmative action in public employment had its genesis in the watershed civil rights cases of the 1950s and 1960s, such as *Brown v. Board of Education* (1955), and the landmark civil rights acts of the 1960s, such as the Civil Rights Act of 1964 (Fullinwider, R., 2005). Commencing in the late 1960s and early 1970s, judicial orders, executive orders, federal legislation, and voluntary public and private preferential programs gave rise to myriad employment affirmative action.

Voluntary and involuntary employment affirmative action enjoyed considerable constitutional validation through the mid-1980s. Federal programs of this nature flourished during this period premised on the Supreme Court's decision in *Fullilove v. Klutznick* (1980).

The seminal Supreme Court decision in *City of Richmond v. J.A. Croson Co.* (1989) turned the constitutional tide turned against employment affirmative action. The Court embraced strict scrutiny as the equal protection standard to constitutionally evaluate employment affirmative action. As Justice Marshall (p. 757) observed in dissent in this case, the Supreme Court's decision represented a "full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts." Employment affirmative action programs in the ensuing years to the present often have been abandoned, radically restructured, or stricken by courts as violative of the Fourteenth Amendment (*Kohlbeck v. City of Omaha*, 2006). Notwithstanding this retreat, some employment affirmative action have successfully navigated the equal protection challenge and survived. (*Jana-Rock Constr., Inc. v. New York State Dep't of Econ. Dev.*, 2006).

Historical Overview Of Education Affirmative Action

The Fourteenth Amendment enacted in 1868 prohibited states from continuing to deny a public education to individuals because of their race or ethnicity. Nearly a century later, the Supreme Court in *Brown v. Board of Education* (1954) struck down segregationist school programs that existed in many states. Title VI of the Civil Rights Act of 1964 went further and mandated equality in education for persons of all races and national origins.

While the law has long promised equality for all races and ethnicities in public education, realization of this promise has been slow in coming. Studies indicate that many minorities still languish in inferior public K-12 schools and other educational programs.

The United States General Accounting Office (2002) reports in a 2000-01 study that 71.6 percent of African-American children and 76.3 percent of Hispanic children attended a school in which minorities made up a majority of the student body (Frankenberg, Lee and Orfield, 2003). Moreover, schools in predominantly minority communities have far fewer educational resources than in other communities (United States General Accounting Office, 2002).

In order to help overcome racial and ethnic disparity in public education, education affirmative action became commonplace during the 1970s, 1980s, and early 1990s. These programs flourished under the constitutionally vague and permissive standards articulated by Justice Powell in his controlling opinion in *Regents of Univ. of Cal. v. Bakke*, (1978).

Commencing in the mid-1990s and continuing until 2003, the tide significantly turned against education affirmative action. This reversal stemmed from a flurry of federal appellate court decisions that struck down a number of programs for education affirmative action on the ground that they violated the Fourteenth Amendment and its guarantee of equal protection (*Doe v. Kamehameha Schools*, 2005; *Hopwood v. Texas*, 1996). The federal circuit courts in these cases held that diversity is not a compelling state interest and standing alone does not justify preferential admissions policies at universities. Then in a stunning turnaround, the Supreme Court determined that achieving a diverse student body is a compelling state interest and justifies education affirmative action (*Grutter v. Bollinger*, 2003).

CONSTITUTIONAL STANDARD FOR minority faculty preferences: STRICT SCRUTINY

Largely overlooked in the arena of public affirmative action are minority faculty preferences. Until the Supreme Court addresses this subject, the constitutionality of these programs must be divined from the Court's decisions discussed below regarding employment and education affirmative action programs.

Constitutional Standard For Employment Affirmative Action

The Supreme Court held in *City of Richmond v. J.A. Croson Co.* (1989) that state employment affirmative action is subject to strict scrutiny, the most exacting of all constitutional tests for evaluating discriminatory governmental conduct. The Supreme Court reiterated this holding six years later in *Adarand Constructors v. Peña* (1995), and the Court has not deviated from this constitutional position.

Underlying the Supreme Court's endorsement of strict scrutiny in *City of Richmond v. J.A. Croson Co.* (1989) is the perception that the Fourteenth Amendment is "a constitutional provision whose central command is equality" (Kennedy, p. 734), that "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause" (Scalia, p. 735) and that "(o)ur Constitution is color-blind, and neither knows nor tolerates classes among citizens...." (*Plessy v. Ferguson*, 1896, p. 559). As succinctly stated by Justice Sandra O'Connor (p. 493):

*Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that (government) is pursuing a goal important enough to warrant use of a highly suspect tool (*Richmond v. J. A. Croson Co.*, 1989). (internal quotation marks and citation omitted).*

The Supreme Court has chosen strict scrutiny as the constitutional standard for evaluating employment affirmative action notwithstanding that equality for all classes in certain circumstances may entail unequal economic opportunities for some classes. In the Court's view, the danger of governmental discrimination against individuals on the basis of their race or ethnicity is greater than the danger that some classes occasionally must bear the burden of unequal opportunities for success (*City of Richmond v. J. A. Croson Co.*, 1989).

Constitutional Standard For Education Affirmative Action

The Supreme Court in 2003 reviewed two cases that dealt with race- and ethnic-conscious student admissions programs at the University of Michigan. The Supreme Court upheld the education affirmative action plan for the university's law school (*Grutter v. Bollinger*, 2003), but struck down on equal protection grounds the university's undergraduate plan (*Gratz v. Bollinger*, 2003). In each case the Court analyzes the education affirmative action in question using strict scrutiny. Because of the importance of these cases to the constitutional analysis of minority faculty preferences, the factual background of these cases is summarized below.

In *Grutter v. Bollinger* (2003) the University of Michigan law school utilizes an admissions plan that is committed to realizing the purported educational benefits of a diverse student body. Diversity encompasses consideration of myriad factors including an applicant's race and ethnicity. Underrepresented minorities receive a "plus" and their race or ethnicity is accorded "substantial weight" in the admissions selection process. Moreover, the law school is committed to attaining a "critical mass" of underrepresented minority students.

As a result of the foregoing admissions plan, the law school admits a number of minorities who otherwise would not have been allowed to enroll. A white applicant who is denied admission sues the law school for violation of the Fourteenth Amendment. The Supreme Court rejects the plaintiff's equal protection challenge. The Court holds that achieving a diverse student body is a compelling state interest and that the law school's plan is narrowly tailored to achieve this interest, thereby satisfying strict scrutiny.

Gratz v. Bollinger (2003) involves an undergraduate admissions program at the University of Michigan. Under this admissions plan, an applicant can achieve a maximum 150 points, with admission typically assured if an applicant received at least 100 points. Admission criteria encompass numerous factors, including the race and ethnicity of an applicant. An individual who belongs to a category of underrepresented minorities automatically receives 20 points and is virtually assured of admission if minimally qualified. Two qualified white applicants who are denied admission at various times sue the university for violation of equal protection under the Fourteenth Amendment. The Supreme Court ruled in favor of the plaintiffs finding that the university failed to meet its burden under strict scrutiny.

Constitutional Standard For Minority Faculty Preferences

Strict scrutiny is the appropriate equal protection standard for evaluating minority faculty preferences since these preferences embody considerations common to employment and education affirmative action programs, which are both examined utilizing the standard of strict scrutiny. The difficult issue is which strict scrutiny standard should be used: the arduous standard used for economic affirmative action or the permissive standard used for education affirmative action?

The answer to the foregoing equal protection query is – neither. Neither the strict scrutiny standard for economic affirmative action nor the strict scrutiny standard for education affirmative action is appropriate for minority faculty preferences. As explored in the remainder of this article, the strict scrutiny standard to be used for evaluating minority faculty preferences is a metamorphosis of the two standards now used in other economic and educational situations, together with a number of additional unique elements.

GENERAL CONSIDERATIONS FOR CRAFTING A CONSTITUTIONAL MINORITY FACULTY PREFERENCE

When crafting a minority faculty preference, a university must observe several equal protection canons. First, every minority faculty preference is individually evaluated on a case-by-case basis for “context matters when reviewing race-based governmental action under the Equal Protection Clause” (Grutter v. Bollinger, 2003, p. 328). In addition, constitutional generalizations should not be applied to inappropriate factual situations (Gomillion v. Lightfoot, 1960). Each equal protection inquiry also must consider relevant differences between various affirmative action programs and the situations in which they are used (Adarand Constructors, Inc. v. Peña, 1995).

Applying the foregoing rules, a university must thoroughly determine and only consider facts that are relevant to its minority faculty preference. A university must primarily focus on facts that relate to the current status and interests of the university, providing for periodic reviews to consider any changes to the status quo. Furthermore, a university should both avoid rote adoption of another university’s minority faculty preference and also reject old data that is no longer relevant. It is instructive for a university to heed the following words of Justice O’Connor: Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context (Grutter v. Bollinger, 2003, p. 327).

Every minority faculty preference program must satisfy three general prerequisites in order to be constitutional under strict scrutiny. There must be a compelling governmental interest for adopting the plan. This interest must be factually established with constitutional sufficiency. The plan must be narrowly tailored to effectuate the state’s compelling interest without unduly trammeling upon the rights of innocent third parties (Doe v. Kamehameha Schools, 2006). These three constitutional prerequisites are discussed in order below.

COMPELLING GOVERNMENTAL INTEREST AND MINORITY FACULTY PREFERENCES

Affirmative action programs as a rule are adopted in order to rectify a specific racial or ethnicity imbalance. The primary state interest furthered by employment affirmative action is to correct a minority underrepresentation in its workforce. The primary state interest furthered by education affirmative action is to eliminate an

underrepresentation of minority students, in other words, to achieve a critical mass of minority students. Minority faculty preferences typically aspire to further several state interests more fully discussed below.

Compelling Governmental Interest And Employment Affirmative Action

The Supreme Court has recognized that a state has a compelling interest in dismantling and remedying an existing system of public discrimination as well as undoing the continuing effects of a prior system of discrimination (*City of Richmond v. Croson Co.*, 1989). Economic affirmative action has been approved to rectify the effects of discrimination in public employment (*Rutherford v. City of Cleveland*, 2006) as well as public contracting (*W. States Paving Co. v. Wash. State DOT*, 2005).

Compelling Governmental Interest And Education Affirmative Action

“Today, we hold that the Law School has a compelling interest in attaining a diverse student body” (O’Connor, J., *Grutter v. Bollinger*, 2003, p. 332). “In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body” (O’Connor, J., *Grutter v. Bollinger*, 2003, p. 343). With these two statements the Supreme Court at the same time dramatically altered equal protection jurisprudence in public education and created a host of questions regarding what is permitted.

The Supreme Court categorically recognizes that a university has a compelling state interest in attaining a “critical mass” of minorities in its student body (*Gratz v. Bollinger*, 2003). But for what purpose must a university need this critical mass of minority students?

A university’s interest in having a diverse student body solely for the sake of having diversity is constitutionally invalid. Justice Powell explains in *Regents of Univ. of Cal. v. Bakke* (1978):

If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. (p. 307).

The Supreme Court explains in *Grutter v. Bollinger* (2003) that student diversity may be a compelling state interest because of the benefits it creates for students. Such benefits include improved cross-racial communication and cross-cultural understanding, eradication of racial stereotypes, enhanced learning outcomes, enlivened educational experience, and preparation of students for leadership positions in industry, society, government, and the military.

In *Grutter and Bollinger* (2003), Justice O’Connor (p. 335) observes that a diverse student body furthers additional compelling state interests that focus more on benefits for society than on educational benefits for students. A diverse student body in higher education, for instance, engenders public trust that the path to leadership is “...visibly open to talented and qualified individuals of every race and ethnicity.” She further observes (p. 332-33):

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Compelling Governmental Interest And Minority Faculty Preferences

On balance, it appears that minority faculty preferences are constitutionally justified if necessary to achieve one or both of two compelling governmental interests. The first interest is to undo the disadvantage that minority faculty candidates presently suffer due to past discrimination (*Dean v. City of Shreveport*, 2006). The second interest is that the plan is needed to achieve a critical mass of minority faculty, which in turn is essential to actualize students’ education.

Supreme Court decisions support the proposition that a university has a compelling interest in eradicating discrimination against minority faculty and in eliminating underrepresentation of minority faculty that is due to the university's discrimination (*Dean v. City of Shreveport*, 2006). Moreover, it is not necessary to prove that each beneficiary of a minority faculty preference is personally a victim of the offending university's discriminatory practices (*City of Richmond v. J. A. Croson Co.*, 1989).

The Supreme Court, on the other hand, never has held that a university has a compelling interest in attaining a critical mass of minority faculty, in other words, attaining a diverse faculty. The Supreme Court explicitly recognizes, however, that there may be governmental interests that it has not been called upon to review and that are sufficiently compelling to satisfy strict scrutiny (*Grutter v. Bollinger*, 2003). An extrapolation of the Supreme Court's reasoning in *Grutter v. Bollinger* (2003) and Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke* (1978) suggests that a university has a valid, albeit yet unacknowledged, compelling interest in having a diverse faculty provided that this is essential for the education of its students.

The judiciary for many years has acknowledged the importance of the American educational system and its unique niche in our constitutional system (*Keyishian v. Board of Regents of Univ. of State of N. Y.*, 1967). Universities enjoy broad freedoms of speech and thought that emanate from the First Amendment, as well as educational autonomy which entitles them to select their students (*Grutter v. Bollinger*, 2003; *Regents of Univ. of Cal. v. Bakke*, 1978).

A persuasive argument can be made that the educational benefits that students derive from a diverse student body similarly flow from a diverse faculty. Faculty, more than students, is responsible for students' development of critical thinking, expansion of ethical and cultural awareness, and acquisition of knowledge. Faculty is the primary impetus for motivating students to achieve and for helping them prepare for their future in business, society, and government.

Universities must be cognizant that the desire for a diverse faculty, in the absence of discrimination, is constitutionally defensible only as a means to further the growth and education of students (*Regents of Univ. of Cal. v. Bakke*, 1978). Seeking a diverse faculty solely in order to have minority faculty, therefore, is inadequate. Similarly, a desire to have minority faculty so they can serve as role models for students is constitutionally infirm. In addition, it is unconstitutional racial balancing for a university to seek a diverse faculty solely to reduce an historical underrepresentation of minority faculty or to remedy the deleterious effects of societal discrimination, such as poor secondary schools for many minorities.

REQUISITE FACTUAL EVIDENCE AND MINORITY FACULTY PREFERENCES

A poorly defined and often contradictory aspect of equal protection analysis is the requirement that a university show its compelling state interest with sufficient factual evidence.

Requisite Factual Evidence And Employment Affirmative Action

Economic affirmative action intended to remedy minority underrepresentation caused by discrimination must with "some specificity" identify the discriminatory conduct and negative effects to be corrected (*City of Richmond v. J. A. Croson Co.*, 1989). This proof is required to assure that the state has a strong basis to justify using remedial action (*Wygant v. Jackson Bd. of Educ.*, 1986). It also is required to enable the state to precisely devise a remedy that does not improperly benefit classes that have not suffered from discrimination and to minimize the harm that is caused to whites and nonpreferred minorities (*City of Richmond v. J. A. Croson Co.*, 1989).

In numerous cases, economic affirmative action has been deemed unconstitutional because the state has failed to satisfy its evidentiary burden (*City of Richmond v. J. A. Croson Co.*, 1989).

Requisite Factual Evidence And Education Affirmative Action

“The Court defers to the Law School's educational judgment that diversity is essential to its educational mission” (O'Connor, J., *Grutter v. Bollinger*, 2003, p. 321). In one sentence the Supreme Court in *Grutter v. Bollinger* (2003) effectively abdicated to a university the Court's responsibility to assure a sufficient factual justification for the university's preferential treatment of minority student applicants. The Court indicated that its confidence in doing so was bolstered by certain unspecified studies, a plethora of anecdotal testimony by various individuals, and the presumed good faith of the university administrators (*Grutter v. Bollinger*, 2003).

Requisite Factual Evidence And Minority Faculty Preference Plans

Traditional equal protection analysis requires a university to answer two factual inquiries in order to justify a minority faculty preference. First, what factual evidence justifies the university's need for a diverse faculty? Second, what factual evidence substantiates the degree of diversity sought, in other words, the critical mass of minority faculty sought?

A university may establish a compelling interest in attaining a diverse faculty either by factually establishing its discrimination against minority faculty candidates, or by establishing its need for diversity in order to actualize the education of students. Because of negative repercussions associated with a university proving its own discrimination against minorities, typically it is a better strategy for a university to justify its desire for a minority faculty preference on the compelling student educational benefits that emanate from such a plan.

Application of the Supreme Court's deferential approach in *Grutter v. Bollinger* (2003) to minority faculty preferences demonstrates that little hard evidence is needed to establish a university's compelling interest in attaining a diverse faculty. A number of supportive studies, persuasive testimony from university administrators, and plentiful positive commentary from business, civic, and public officials will carry the day.

The evidence proffered to justify a minority faculty preference must be premised solely on the educational benefits for the students. Other benefits articulated in *Grutter v. Bollinger* (2003), such as making it apparent that higher education is available to everyone regardless of race or ethnicity, are not applicable because they may flow from a minority diverse student body but not from minority faculty preferences.

Once a university establishes its compelling interest in a diverse faculty, factual evidence must be proffered that demonstrates the appropriate level of minority faculty and the preference that is needed to achieve this diversity. While the Supreme Court in *Grutter v. Bollinger* (2003) deferred to the judgment of university administrators regarding the appropriate critical mass for minority students, such deference in the context of public employment is improper.

Throughout its history of equal protection jurisprudence, the Supreme Court has unfailingly insisted on factual justification for state preferential treatment of minority employees and job applicants. There is no reason to depart from this position in the context of preferential treatment of minority faculty job applicants.

Faculty are an integral part of the educational environment, but they also are individuals with their own compelling interests – the right to equally compete, to equally seek employment, and to equally earn a livelihood. A university must be accountable if it seeks to deny this equality to faculty candidates based on their race or ethnicity, and it must be required to factually justify the disparate treatment it seeks to impose. While a university may be entitled to deference regarding the best interests of its students, it is not entitled to the same deference regarding its treatment of its employees and job applicants. In this context, the university is an employer first and an educational institution second, and its presumed good faith cannot supplant hard evidence.

A university can use statistical comparisons to factually justify a minority faculty preference. To do so, a university first selects the appropriate faculty population to use for computing minority faculty participation. Utilization of aggregate figures for all minorities is overly broad. Similarly, the population used should take into

account variables that may affect the extent or distribution of minority faculty-student interaction, such as academic disciplines.

A tangential issue that bears investigation is whether the faculty population utilized should take into account faculty rank, tenure, and/or nature of employment contract, such as full-time or part-time. Since the constitutional focus should solely be on the effect that minority faculty have on students and not on racial balancing for each of these criteria, this suggests that there should not be any differentiation. This viewpoint is strengthened if, on average, substantially equivalent intellectual, cultural, and ethical learning and growth is realized by students from all faculty, regardless of rank, tenure, and nature of employment. This question merits further investigation.

Once a university determines the faculty population to use in determining its minority faculty participation, it then must determine the norm or control group for minority faculty participation. Since candidates for many faculty positions are recruited nationally (Chronicle of Higher Education, 2006), nationwide data for comparable minority faculty representation is probative. This value generally establishes the critical mass of minority faculty that the university can validly expect, and it also can serve as a long-term goal for its minority faculty preference.

It is not permissible to use the racial and ethnic makeup of the general population or of the student body as a goal for minority faculty representation. This approach is racial balancing and is prohibited by the Fourteenth Amendment (Regents of Univ. of Cal. v. Bakke, 1978).

NARROW TAILORING OF MINORITY FACULTY PREFERENCES

The final prerequisite for a race- or ethnic-conscious affirmative plan is that it be narrowly tailored to accomplish its identified compelling state interest. The Supreme Court explains that this requirement seeks to assure that a plan "fit with greater precision than any alternative means" (Associated Gen. Contractors v. City of San Francisco, 1987, p. 935), assuring "that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype" (Richmond v. J. A. Croson Co., 1989, p. 721).

Requisite Narrow Tailoring And Employment Affirmative Action

Narrow tailoring focuses on four factors: (1) the potential effectiveness of alternative remedies, (2) the flexibility and duration of the program and availability of waivers, (3) the relationship between the preference and the relevant labor market, and (4) the program's impact on third party rights (United States v. Paradise, 1987).

The Supreme Court stringently examines narrow tailoring in connection with economic affirmative action. The failure of a state to narrowly tailor a preferential plan has precipitated frequent invalidation of economic affirmative action plans by the courts.

Requisite Narrow Tailoring And Education Affirmative Action

The Supreme Court acknowledges that the requirement of narrow tailoring applies to education affirmative action. In *Gratz v. Bollinger* (2003), the Supreme Court struck down a preferential undergraduate admissions plan at the University of Michigan because it was not narrowly tailored. The Court found that the plan failed to individually consider each applicant and failed to adequately assess all of the qualities of each candidate.

In contrast to its decision in *Gratz v. Bollinger* (2003), the Supreme Court found in *Grutter v. Bollinger* (2003) that the law school's plan was narrowly tailored and upheld its constitutionality. The law school plan awarded only a nondeterminative "plus" to targeted minority candidates, and it considered myriad qualities and characteristics of all candidates, regardless of race or ethnicity.

Requisite Narrow Tailoring And Minority Faculty Preferences

A university that seeks to adopt a minority faculty preference has a host of steps that it must take in order to narrowly tailor its plan.

First, both prior to implementation of a minority faculty preference program and during the program's duration, a university must explore using reasonable, nondiscriminatory alternatives instead of a preferential faculty selection process. This topic is explored further below.

A second factor a university must include in its minority faculty preference plan is a periodic, comprehensive, and probing review process, as well as a flexible mechanism to adjust or terminate the program if warranted by changed circumstances. Courts reviewing analogous affirmative action plans emphasize that plans should be short-term, perhaps with a sunset provision incorporated (Grutter v. Bollinger, 2003, p. 342).

To assure that a minority faculty preference is not overly broad, the plan should establish flexible goals that are regularly revisited to assure that they do not rigidly exceed what relevant statistical analyses indicate is appropriate. Thus, the use of quotas, fixed percentages, or set numbers for targeted minority faculty is forbidden (Cavalier v. Caddo Parish Sch. Bd., 2005). The final element in narrow tailoring requires sensitivity to the effect that the minority faculty preference has upon whites and nonpreferred minorities. These innocent third parties should not have to bear a burden greater than reasonably necessary to effectuate the remedial purposes of a preferential plan, and absolute barriers to nonminority participation, such as considering only minority faculty candidates, are constitutionally indefensible (Britton v. South Bend Community School Corp., 1987).

ALTERNATIVES TO UNIVERSITY MINORITY FACULTY PREFERENCES

The Supreme Court consistently chastises universities and other public actors to diligently explore race- and ethnic-neutral, i.e. "color-blind", alternatives before implementing a preferential affirmative action program of any sort. While a university is neither required to explore every conceivable alternative nor to first try alternatives and have them fail, (La Noue, G.R., 2005) it is essential that the institution make a good faith effort to investigate the efficacy of color-blind alternatives to fulfill its diversity goals.

Studies emanating from a variety of disciplines and a review of other relevant literature suggest two broad approaches for achieving a diverse faculty without extending preferential treatment to members of any racial or ethnic group. One approach entails efforts by each individual university to bolster the diversity of its own faculty. The other approach calls for a much more ambitious undertaking by all levels of government to eradicate fundamental systemic social and economic conditions that correlate with disparate rates of educational and professional success for diverse groups.

University Efforts To Achieve Color-Blind Diversification Of Faculty

Many universities seek to offer their students a diverse faculty. While many institutions share this common goal, the benefits sought from having a diverse faculty vary. The quest for faculty diversity is sometimes justified by the desire to have minority faculty who can serve as role models for students of the same race or ethnicity. The underlying premise, questioned by many, is that the presence of minority faculty instills in minority students the belief that success is possible for them as well. Another premise is that minority faculty have a greater sensitivity than white faculty to the social-economic and psychological experiences and perceptions of minority students. This perspicuity of minority faculty in turn enables them to better understand and assist minority students of the same race or ethnicity. Yet another rationale is that minority faculty serve as positive representatives of their particular race or ethnicity for the edification of white students. Also, the existence of a critical mass of minority faculty may help to dispel racial stereotypes entertained by white students by illustrating that there is a variety of viewpoints among minorities as opposed to a unitary "minority viewpoint." (Kim, J.K., 2005).

Educators, government officials and commentators endlessly debate and disagree on the efficacy of faculty diversity for achieving the foregoing educational outcomes (Long, B.T., 2003). Notwithstanding this controversy, there is nothing inherently unlawful or unconstitutional about seeking or obtaining this heterogeneity. From a legal point of view, the goal of diversity is not the issue, rather it is the means used to realize this end that entails judicial scrutiny (Taxman v. Board of Education, 1996).

A variety of sources suggest that there is an insufficient pool of certain minorities with the requisite education and credentials to satisfy the demand of universities across the country (Huston, T.A., 2006). Institutions that seek to increase their minority faculty representation should consider the array of strategies discussed below for overcoming this difficulty.

The typical university that enjoys neither national fame nor fortune must often explore aggressive and imaginative recruitment and outreach strategies for bolstering its minority faculty. An institution ought to consider, for example, expanding the venues in which it advertises for faculty beyond the Chronicle of Higher Education. It can look at nontraditional sources, such as trade journals and traditionally minority-read publications. Universities also may dispatch recruiters to various trade and professional meetings where they may meet and cultivate relationships with minority professionals who may entertain a career change to higher education.

Networking is another approach to recruiting minority faculty. For example, a university may network with other colleges and universities in order to recruit their diverse students for present or future faculty openings. Early recruitment of prospective faculty is particularly important given that minority students who do pursue graduate education disproportionately gravitate toward professional programs, such as law and medicine, and less to PhD programs that furnish most faculty. A supportive program of internships and cooperative education could further bond these students to the particular institution enhancing its opportunity to further broaden the future diversity of its faculty.

A longer-term strategy for increasing minority faculty representation is for a university to create a dynamic, supportive relationship with local and regional K-12 programs. First, it is particularly important for a university to develop close relationships with K-12 programs in lower socioeconomic regions since these areas typically include the greatest diversity of students. Once these relationships are in place, a university may in turn implement a variety of programs that are proven to help minority students to succeed in college and to go on to pursue both professional and academic careers (Girves, J.E., Zepeda, Y. & Gwathmey, J.K. 2005; Maruyama, G., Burke, M., & Mariani, C., 2005).

A frequently overlooked aspect of enhanced minority faculty participation requires a university to review its procedures for both recruiting and retaining faculty. It is essential that an institution assure that faculty hiring, promotion and tenure processes are fair to all faculty regardless of race or ethnicity, and that the standards are uniformly applied. (Alger, J.R., 2000). Are faculty applicants from historically black or minority universities, for instance, fairly considered alongside faculty applicants from institutions with predominantly white student populations? Similarly, are faculty evaluation standards broad enough to recognize the value of publications in nontraditional journals and forums and the instruction of diversity courses, which frequently attract greater participation by minority faculty (Garry, P.M. 2005)? Do faculty evaluations fairly evaluate all faculty regardless of color, or is a bias against faculty of color implicit in the instruments (Huston 2006)?

Mentoring is yet another valuable tool that a university may use to retain new faculty regardless of their race or ethnicity (Girves et al., 2005). It is reported that senior faculty often take under their wing junior faculty who have much in common with themselves, which may inadvertently serve to unfairly isolate minority faculty (Alger, J.R., 2000). A conscious institutional effort to extend mentoring to all faculty will help ameliorate this potential disparity.

It merits observation that before a university sets out to realize its goal of faculty diversity, it first must carefully and thoughtfully define what it means by diversity. While many universities primarily define diversity in terms of race and ethnicity, this definition may largely miss the diversity mark for it fails to consider a plethora of other relevant factors that may be important to the learning and educational experience of students. Shouldn't diversity, for instance, encompass not only a person's race and ethnicity but also his or her experiences such as

economic, social or physical challenges, exposure to personal adversity or tragedy, and work experience (Nadel, M. 2006)? While this critical issue goes beyond the parameters of this article, it seems apparent that a broader definition of diversity would not only be more inclusive, but it also would significantly expand the available pool for achieving a diverse faculty.

Governmental Efforts To Facilitate Color-Blind Diversification Of Faculty

Societal discrimination refers to the diminished economic and educational opportunities that persons in lower socioeconomic categories experience due to inadequate housing, governmental services, and medical care, substandard K-12 education, and a lack of vocational training. As a result of societal discrimination, minorities are frequently underrepresented in both public employment and public education.

Without expressly saying so, the Supreme Court in *Grutter v. Bollinger* (2003) in effect permits universities to use preferential admission standards to ameliorate underrepresentation of minority students that is caused in whole or in part by societal discrimination. Ironically, the Supreme Court for years has forbidden public employers, such as universities, from using preferential programs to deal with underrepresentation of minorities in public employment that is caused by societal discrimination.

While government is not legally obligated to remedy the causes of societal discrimination, it is clear that minorities and other disadvantaged persons will continue to suffer unequal opportunities until the government until it does. For instance, studies clearly indicate a correlation between the quality of a person's K-12 education and his or her likelihood to succeed in higher education (Lizotte, B.N., 2006) and, concomitantly, to eventually have the opportunity to be college faculty. For this reason, educators and commentators advocate improved educational and training opportunities for all persons from underprivileged backgrounds, regardless of their race or ethnicity. (Dale, C.V., 2002).

CONCLUSION

The constitutional standard for university minority faculty preferences is strict scrutiny. But it is a unique amalgamation of equal protection jurisprudence not previously seen.

This novel equal protection standard is more permissible than strict scrutiny emanating from the Supreme Court's review of economic affirmative action. The standard applicable to minority faculty preferences, for instance, recognizes the goal of a diverse faculty as a compelling interest even absent a history of discrimination. This standard also grants universities significant latitude to craft a plan that they believe will actualize the education of their students.

Strict scrutiny as the standard for minority faculty preferences imposes significant restraint on universities, more so than in connection with student admissions. Universities cannot arbitrarily determine the critical mass for minority faculty. They cannot reserve opportunities solely for minority candidates, or unfairly skew the selection process in a manner that effectively excludes whites and nonpreferred minorities. Universities also must recognize that they have both a legal and moral obligation to explore alternatives to minority faculty preferences.

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