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Racial Preference in Law School Admissions: The Public Interest in a Diverse Legal Profession

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RACIAL PREFERENCE IN LAW SCHOOL ADMISSIONS: THE PUBLIC INTEREST IN A DIVERSE LEGAL PROFESSION

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In this paper I will relate racial preference in law school admissions to the public interest in a diverse legal profession. I will justify racial preference in law school admissions on the ground that it has been necessary to, and has succeeded in, bringing about a diverse legal profession in the United States. This fact is beyond dispute. I will then explain why I think that, *even if law schools are not permitted to use racial preference in admissions*, the number of minority law students in the aggregate will not decline significantly, and that we will continue to have a diverse legal profession. The worst that can happen – if it is a "worst" – is that there may be a decline in the number of minority law students coming from the "elite" law schools.

Racial preference in law school admissions means that law schools affirmatively take race into account in the admissions process, where the question is *which* of the *qualified* applicants will be admitted. Law school admission has long been, and continues to be, determined primarily by a consideration of comparative LSAT scores and grades. All admitted applicants at any law school have sufficiently good LSAT scores and grades that they are likely to successfully complete the course of study at that law school. Taking race into account does result in a substantial number of minority applicants being admitted with lower grades and LSAT scores than many of the white applicants who are admitted and at least some of the white applicants who are not

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admitted.[1] However, all of the minority students who are admitted are fully qualified for admission at that law school, and at Wayne State and many other law schools, virtually all of them graduate, as do virtually all of the white students. Furthermore, most minority students pass the bar examination on their first try, as do most white students.

When racially preferential law school admissions policies were first adopted in the middle 1960s, the primary purpose for doing so was *not* to attain a racially diverse student body in law schools, although the programs had this clearly desirable educational effect.[2] Rather, the primary purpose was to increase the representation of racial minorities in the legal profession where they were seriously under-represented. At the time of *Regents v. Bakke*[3] in 1978, for example, no more than two percent of the lawyers in this country were African American and the representation of Hispanic Americans and Native Americans was even lower.[4] In order to achieve the objective of improved minority

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1. The differences in comparative LSAT scores for minority applicants and white applicants at the University of Texas Law School is summarized in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). In the 1992 year, the mean GPA/LSAT for resident white applicants was 3.56/164; for black applicants, it was 3.30/158; for Mexican-American applicants, it was 3.24/157; and for "other minority" applicants it was 3.58/160.

2. Since my focus is on the public interest in a diverse legal profession, I do not address the educational interest of law schools in achieving a diverse legal body. *See, e.g.*, the discussion of this interest in Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316-19 (1978). *See also*, Howard Lesnick, *What Does Bakke Require of Law Schools?* 128 U. PA. L. REV. 141 (1979).

3. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

4. The data showing under-representation of minority lawyers at that time is discussed in Robert A. Sedler, *Racial Preference, Reality and the Constitution:*

representation in the legal profession, it was absolutely necessary for law schools to adopt racially preferential admissions policies.

For reasons directly traceable to the consequences of the long and tragic history of racial discrimination in the United States, there was, and continues to be, an enormous economic gap between African Americans as a group and whites as a group, which in turn leads to an enormous racial educational gap. The same racial educational gap exists for other racial-ethnic minorities such as Hispanic Americans and Native Americans.[5] This unpleasant and undisputed fact, coupled with the fact that in the aggregate there will be many more white applicants than minority applicants at a particular law school, means that if race were not affirmatively taken into account in the admission process – that is, if admission were determined solely by comparative LSAT scores and grades – relatively few minority students would have been admitted at most law schools.

The same is true today as regards the applicant pool at any particular law school: because of the racial educational gap and the substantially larger number of white applicants, if race were not affirmatively taken into account in the admissions process, relatively few minority students would be admitted at that law school. This is the stark reality of the situation.

There can be no doubt that racial preference for minority applicants produces unfairness to the non-admitted white applicants who have

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Bakke v. Regents of the University of California, 17 SANTA CLARA L. REV. 329, 346-47, ns. 65-71 (1977) [hereinafter Sedler, *Bakke*].

5. See the discussion and review of the data in Sedler, *Bakke, supra* note 4, at 350-353, ns. 80-88; Robert A. Sedler, *The Constitution, Racial Preference, and the Equal Participation Objective, in* SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY AND RACE 123, 139, n.17 (Robert A. Goldwin & Art Kaufman eds. 1988) [hereinafter Sedler, *Racial Preference*].

higher grades and LSAT scores than a number of the admitted minority applicants. The racial preference is racial discrimination,[6] and the discrimination seems particularly unfair when the minority students who receive the preference come from the same advantaged backgrounds as the non-admitted white students and still more unfair when the preference works against less advantaged white students. The proponents of racial preference in law school admissions must acknowledge the unfair results that racial preference produces for individual white applicants.

I submit, however, that while racial preference in law school admissions may be unfair to individual white applicants, it is not unjustifiable. It is not unjustifiable, because it serves the public interest. Moreover, there is a very strong public interest in a racially diverse legal profession and in the full participation of racial minorities in this very important aspect of American life. Minority lawyers bring to the profession the perspective that comes from the experience of being a minority person in America, and the equal participation of minorities in the legal profession makes the legal profession truly representative of all Americans. Because of racial preference in law school admissions, the representation of racial minorities in the legal profession has substantially increased, both in terms of percentage and in terms of actual numbers, and the legal profession today is very different from what it was a generation ago. Minority lawyers serve as judges, prosecutors and law professors. They are lawyers for the government, "members of the firm," and bar association officers. They are in a position to contribute directly to the American legal system, to

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6. A discussion of the constitutional issues in regard to racially preferential law school admissions is beyond the scope of this paper. On this subject, *see* Robert A. Sedler, *The Constitution and Racial Preference in Law School Admissions*, 75 MICH. B.J. 1160 (Nov. 1996).

make that system responsive to the needs of minority persons, and to build the confidence of minority persons in the legal system and the administration of justice precisely because minority lawyers are an integral part of that system. I submit, therefore, that racially preference in law school admissions advances a strong public interest, and therefore, is justifiable.[7]

I do not believe that most of the opponents of racial preference in law school admissions are opposed to the equal participation of racial minorities in the legal profession. Rather their insistence seems to be that today at least, racial preference in law school admissions is *not* necessary to achieve a diverse legal profession. They maintain that with a completely race-neutral admissions policy at all law schools, minority students still will be admitted to law school in substantial numbers and will continue to become lawyers.

As a strong proponent of a racially diverse legal profession, who also tries to be an objective observer, I believe that they are correct in their insistence. While the educational gap between racial minorities as a group and whites as a group continues to exist, the last twenty years or so have seen a substantial increase in the numbers of minority students graduating from college and in the numbers of minority students with good grades and good LSAT scores.

It has been contended by the opponents of racial preference in law school admissions that a race-neutral admission process would bring about the admission of a substantial number of minority applicants at the "non-elite" law schools, since the minority students now admitted to the "elite" law schools under racial preference would have the same credential level as the white students seeking admission to the "non-elite" law schools. Under this view, racial preference results in

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7. *See generally* the discussion of the "equal participation objective" in Sedler, *Racial Preference, supra* note 5 at 125-135.

"mismatching," because minority students are admitted with lower credential levels than white students, which is true today at both the "elite" and the "non-elite" law schools. So, if the "elite" law schools did not use racial preference to admit minority students, there would be, as Thomas Sowell has put it, a "redistribution of minority students to settings where they meet the same standards as the other students around them."[8] With the "redistribution" of minority students in this way, the elimination of racial preference in law school admissions would not have any significant effect on the ongoing efforts to maintain and increase minority representation in the legal profession. It would only mean that fewer minority lawyers would come from the "elite" law schools and more would come from the "non-elite" law schools.

It can be argued, however, that there are advantages for a lawyer who comes to the profession from the "elite" law schools, and that in order for the legal profession to be truly diverse, it must include a fair representation of minorities from "elite" law schools as well as from "non-elite" law schools. Otherwise, we may have a "two-tier" legal profession, with white lawyers coming both from both "elite" and "non-elite" law schools and minority lawyers coming mostly from "non-elite" law schools.

In any event, even if the law schools cannot use racial preference in admissions, both the "elite" and the "non-elite" law schools can secure the admission of at least some of the minority students now being admitted under racial preference by a consideration of factors that

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8. See Thomas Sowell, *Mismatching minority students with universities ensures failure*, DETROIT NEWS, April 21, 1996, at 3B. My understanding is that in *Hopwood* it was shown that the credential level of many minority students admitted under racial preference at the University of Texas was sufficient to secure their admission without regard to race at the other public law schools in Texas, such as Texas Tech and the University of Houston.

purportedly correlate with race, such as economic disadvantage or geographic residence. I would note in this regard that there are very good reasons to give preference in admissions to all economically disadvantaged students. But as a practical matter, "an economically disadvantaged" preference may bring in fewer minority students, since many of the minority students applying to law school today do not come from economically disadvantaged backgrounds. Residence may be a more useful correlative with race, since the minority population is concentrated in the central cities of major American metropolitan areas. My point here is that even if the law schools, "elite" or otherwise, cannot use racial preference in admissions, they are likely to try to secure the admission of a reasonable number of minority students by using factors that correlate with race. This is constitutionally permissible as long as these "correlative" factors are administered in a racially neutral manner and result in the preferential admission of white students as well as minority students. [9]

In the final analysis then, whether or not racial preference in law school admissions is legally permissible may turn out not to be all that important. What is most important in my view is that this nation continue its progress toward achieving a diverse legal profession, in which racial minorities are full and equal participants with whites. This has been the result of the use of racial preference in law school admissions for the last 30 years, and I am confident that minority students will continue to attend law school in substantial numbers, with or without racial preference in law school admissions. So long as this is so, the public interest in a diverse legal profession will continue to be advanced.

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9. *See generally Hopwood*, 78 F.3d at 945-6.