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Affirmative Action in Higher Education Symposium: Comment

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Lee C. Bollinger*

This issue—affirmative action in higher education—is an issue of enormous significance for the country. So I don't for a second treat this as just another conversation about an important legal question. I think this is one of those issues that define the country.

I'll tell you what I did as President of the University of Michigan, and in the course of that I'll try to explain the ways in which we formulated the cases that went to the Supreme Court and resulted in very important clarifications to the Fourteenth Amendment and affirmative action. Then I want to close with a few comments about the current case before the Supreme Court and how I think this issue, at this time, will require somewhat different thinking than in the past.

One of the things that happens to you when you get involved in a major case is that it tends to consume you. So for five or six years of my life, the *Grutter* and *Gratz*

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cases were a large part of what I focused on. I was Dean of the University of Michigan Law School from 1987 to 1994. At that time, the attitudes in the country—about people in government, about affirmative action, and about race in America— began to change. This shift occurred in tandem with the Republican victories of that period and the Reagan Administration. It became clear to us at the University of Michigan Law School that we needed to think about our admissions policy in light of that and other considerations. We came up with a policy of considering people on an individual basis but taking race into account as one among many factors. We revised the law school policy and that policy was upheld in 2003 in the *Grutter* case.

Then, as soon as I became President of the University of Michigan, I was told two things were going to happen which were not good. The first was that we were going to have an NCAA investigation because of problems with the Fab Five basketball team and the second was that we were going to be the next litigant, the next institution sued, on the basis of our affirmative action policy.

At this point, we faced a question: Does one try to avoid litigation, and capitulate, really, against things like the cost of defending the lawsuit all the way to the Supreme Court, which would be millions of dollars? And a lot of things said about the policy at the University of Michigan—even things that were true—were difficult to defend. Again, at this particular time there was, and I think still to this day is, a strong sense among some people in this society such as Roger Clegg that affirmative action is discrimination. And you have to take that point of view

very, very seriously. Under that pressure, do you say, 'I just don't want to take this on?' I decided, as President, that we would defend this policy with everything we could bring to the argument.

It's important to remember the context. In the 1990s, the first major court ruling on diversity in higher education came in the *Hopwood* case that challenged the University of Texas Law School's admissions policy considering race. The facts of *Hopwood* were not the best for defending affirmative action. But in that decision, the Fifth Circuit declared that the Texas Law School's admissions policy was unconstitutional. That sent a shock across higher education. The next step was Proposition 209, in which California banned affirmative action in its Constitution, and then came the Michigan case.

So this was major. It raised the question: 'Who is going to stand up and defend this?' It was vital to do so, in my view. I want to say some things about why it was vital, how we structured the argument, and to give advice to defendants of affirmative action in higher education and beyond.

My view was, 'We're going to make a stand on this.' I had a Board of Regents that was prepared to stick it out, and an institution that was proud of this policy and wanted to defend it. Now we had to construct the way we were going to think and talk about this issue. There were several different things we had to do at that time, and I think they still have to be done in defense of diversity to this day.

I believed that if we approached this as just a Univer-

sity of Michigan case, we very likely would lose. The policy of the law school in particular was no different from policies at universities all across the country, public or private. Given the climate at the time, if it were just the University of Michigan, it would have been be easy to say, 'That's aberrational; let's strike it down.'

To have a stronger voice, we had to make sure that this was seen as a higher education issue. The problem was that nobody has the natural inclination to associate themselves with a defendant, because you say, 'Why do I need that? Why do I need to sign an *amicus* brief?' Once you start down that road, you don't know what might come out about your own particular policies. It took a lot of work to get the major higher educational associations to join in. But they did, and we developed a very strong voice.

Additionally, I thought we had to frame this as a societal issue. I thought we should always talk in terms of *Brown v. Board of Education*. We could not say, "This is a *Bakke* issue," because nobody understood *Bakke* except a few professors who taught it over and over again. Generally speaking, if you said you had a big *Bakke* issue on your hands, nobody would think, "Wow, that's really important." But if you said, "This is a *Brown v. Board of Education* issue," that meant we have a problem of segregation and of discrimination in our society, and we must do what we can as a society to change that.

Since 1954, this has been one of our society's greatest achievements: that we have gone from the decision of *Brown* to where we are today, though we're not by any

means done. This progress is the envy of the rest of the world. Europe has a huge problem with trying to integrate groups and to develop a diverse society. We have actually succeeded in ways that no other country has done, and we should stand on that principle.

Those of us defending the policies of the University of Michigan decided that we needed to say: 'What happened historically in the United States is not just that higher education did its part, but that other sectors of the society participated as well: the military, the corporate world, the media world, and so on.' And that became, then, the goal.

The first thing I did was call up Gerald Ford. We needed a moderate Republican who would say, 'I believe that what the University of Michigan and what higher education are doing is right.' And President Ford, to his everlasting credit in my mind, said he would do that. He had nothing to gain by this. He said, 'I just believe in it, and it's the right thing to do.' And he wrote this op-ed—we offered to draft the op-ed for him, as people do in the political world—but he said, 'No, I want to write it myself.'

In his New York Times op-ed, Gerald Ford recalled his days as a college football player, playing with an African-American teammate. When they played against Georgia Tech, the opposing coach said, 'If that player is on the field, we will not play you.' To the everlasting disgrace of the program, the African-American player did not play. And that bothered Gerald Ford ever since. It was Gerald Ford, in my view, who broke the barrier that had stopped other parts of society beyond higher education from standing up for this.

We then got General Motors and about forty other corporations to sign on with *amicus* briefs. Then I had lunch with Pulitzer Prize-winning journalist David Halberstam, and I asked David, 'What can we do on this?' And he recommended that I talk to Jim Cannon, who had worked in the Ford White House. Jim Cannon said, 'I'm a member of the board of one of the military academies. We, of course, want to have an integrated officer corps. We take race into account because we need it for military purposes.'

So we had to make it an American case affecting every part of America. Because if you unraveled one part of this societal framework, *one part,* you would have unraveled the whole. And that would threaten the basic success that the country has had with affirmative action. I also think that it was important to link this case to *Brown*, because you cannot think about affirmative action in this society and higher education without understanding the context.

Roger Clegg and others use terms like 'discrimination' to define the essence of affirmative action. They speak about the costs of it. All that I understand. But it's also extremely important to realize that this society has a history that provides the context in which we are doing this.

Bakke, as everyone on the symposium panel has said, held that you cannot institute affirmative action as a remedy for past discrimination. That, I believe, was fundamentally wrong on the part of Justice Powell, and it became, basically, the law of the land. But that strand of Powell's opinion didn't prohibit courts from taking account

of context. If you believe in diversity as an educational value, and you think that race and ethnicity are important in that mix of considerations, it's almost impossible to talk about the issue without having a sense of the history. What makes the educational value significant is the context, the historical context in which we have lived.

And that's how we structured the brief. We said, 'No, we're not trying to remedy past discrimination; we are trying to build educational diversity. The University of Michigan is an institution that believes one of its societal functions is to bring people together.

It was also very important that we took the issue to the public. One of the things that lawyers will tell you, when you're in very high profile litigation, is, 'Do not speak to the public; do not give speeches about this; do not go on the air, because we are in a war, and anything you say might be a mistake and it might be used against us and so on.' And I said 'That's not the way we're going to do this litigation. This litigation is about something that the people in this country need to know about, and hear about, and we have to do our part to try to educate the public and sway public opinion to what we think is the right way to think about this.' So I gave many speeches, I wrote many things; a lot of us did. And I think that's very, very important to do.

Finally, I'll make one last point before saying a few words about *Fisher*.

The theme of race still mattered. You could not live in Michigan and believe that the society had become integrated to the point where it didn't matter anymore what

your race was—that you were African American. That argument was just impossible to believe. Detroit, like a number of other cities in the United States, is more segregated today than it was in 1960. This is a fact of American life. It is not *de jure* segregation, but it is certainly *de facto* segregation. The fact is, we are still a society where there is a great deal of separation.

One of the things that I said then I still say even today. Many people say, 'What does affirmative action do? You know, if you go on campuses, there's a lot of self-segregation.' And I say—I learned this from Nancy Cantor, a psychologist who was my provost at the University of Michigan—that diversity is not easy. Crossing boundaries of race and ethnicity is hard work. If the first time students encounter a diverse environment is when they arrive as freshmen, seventeen or eighteen years old, having lived and been schooled in all-white or all-black school systems, you should not expect this to just go easily. Self-segregation on campuses is proof of what still needs to be done in this society, rather than proof of the costs of affirmative action or its lack of effectiveness.

So we built the *Grutter* and *Gratz* cases around these themes, and around *Brown*, and around 'this is an American case' and not just a higher education case. We said that it matters in the reality of how people learn. And by the way, this way of framing the issue is not some newly invented approach to educational diversity. George Washington argued, and we all still do, that having a national university to bring people together from all over the country is one of the best ways to bring about a more unified and coherent society.

We all take account of geographic consideration. I got into Columbia by being from the University of Oregon. I have no doubt that the admissions staff considered the fact that I was from Oregon. I don't think they had had anybody from Oregon at Columbia Law School then, and probably not for a long time before.

So now I'll make just a few comments about *Fisher*. I don't know, and of course none of us know why the case was taken. As Jonathan Alger said, this could be a very narrow decision. I can think of three or four different ways in which the Court could reach a decision that would not erode the *Grutter v. Bollinger* doctrine. So that's possible.

It's also possible that the Court may take up the bigger issue. It's odd to me that a very conservative approach to thinking about the Constitution would be so quick to take little account of *stare decisis*. We've seen this in some other cases.

There is every good reason to retain *Grutter*. A week ago in a public forum at Columbia, I interviewed U.S. Attorney General Eric Holder, and he said that he doesn't see any change in America that would justify new facts or a new result. It's odd to think about an overturning of that very important decision in *Grutter* that finally brought clarity to this area of the law that had not been clear—because of *Bakke*—for many decades.

One of the things we have to be careful about is that the consequences of going back on the *Grutter* holding and changing the course of this could be very, very significant for the country. We should not take lightly what has hap-

pened in the United States since *Brown v. Board of Education*. Just think about how this society has brought people of color into the judiciary, into positions of leadership all across the society, as well as bettered the lives, I think, of all of us. We should never be casual about what it is we're talking about.

That leads to my last point. One of the things some people say is, 'Look, we believe in racial and ethnic diversity. But please, let's just do it by taking account of low-income status and have economic diversity.' Well, this is a complicated matter. The scholarship says that we will not get a critical mass of the racial and ethnic diversity if we fail to take account of the race of the applicants and only consider the income bracket the applicant comes from. Socioeconomic status really is not a proxy for race, not a successful one in any case.

And I want to make a final and important point. I worry that—and I worried when we were arguing these cases through the late 1990s and up through *Grutter*—that there is a feeling that we can just have both. That is, we can produce racial and ethnic diversity without considering race or ethnicity because we can figure out, in the admissions process, how to do this by different means—through zip codes, what school you come from, and so on. My view is that if the Supreme Court were to hold that it is unconstitutional to take race or ethnicity into account, universities across the country must abide by that decision. The last thing we want is for our great universities, our great colleges, our great institutions of higher education to be playing loose with the Constitution of the United States. And so one of the things I will be watching closely

over the next year is what people are saying about proxies and what arguments are being made, if not for proxies, for other ways of promoting diversity that wouldn't actually abide by a new constitutional principle but we could use anyway. In my mind, that's the disaster that we could be bringing upon higher education.

So therefore, back to the beginning. I think this is a fundamentally important question in America, and we would be wise to think about it in that way.