

## Admissions in Legal Terms

--Michael A Olivas, University of Houston Law Center

At the invitation of the group's convenors, I have been asked to write down some thoughts on the legal dimensions of this important issue, and to point to legal arguments for conducting specialized programs and pipeline projects. The fact that I live in Texas leads some observers to think that I must be an advocate for pipeline programs, but I have objected to the metaphor for many years, and once wrote:

A pipeline is "a foreign mechanism introduced into an environment, an unnatural device used to leach valuable products from the earth. It requires artificial construction; in fact, it is a dictionary perfect artifice. It cuts through an ecosystem and can have unintended and largely uncontrollable, deleterious effects on that environment. It can, and inevitably does, leak, particularly at its joints and seams. It can also rust prematurely, and if any part of it is blocked or clogged, the entire line is rendered inoperative. For the admissions process, I prefer the metaphor of the "river." It is an organic entity, one that can be fed from many sources, including other bodies of water, rain, and melting snow. It can be diverted to create tributaries without altering its direction or purpose, feeding streams, canals, and fields; it can convey goods, drive mills and turbines, create boundaries, and irrigate land—all without diminishing its power... The metaphor chosen to describe the admissions process is important for its characterization of the problem, for the evidence mounted to measure the problem, and for the solutions proffered to resolve the problem. Let me illustrate briefly. Characterizing the problem of minority underenrollment at any level as a "pool problem" suggests a supply shortage or, at best, a failure to cast one's line in the right fishing hole. The pipeline metaphor reinforces this view of the problem, suggesting that minority enrollment is simple a delivery glitch, or that admissions committees would admit minorities if they only used better conveyances. After all, pipelines do not produce anything of value; they only carry or convey products. While both the supply function and the conveying function are important, they are not, individually, rich enough metaphors to portray the complex phenomenon of both functions intertwining to produce undergraduates and transform them into graduate or professional students.

A river, in contrast, provides nutrients and conveys resources, unlike its more static counterparts that do one or the other, but not both. It constantly changes form, seeking new flows and creating new boundaries. It can even wear down rock, as observers of the Rio Grande and Grand Canyon can attest. This is what I wish to convey; that demography and efforts by schools to do the right thing will inevitably lead to improvements over time.

Because I studied for the Catholic priesthood for eight years, I hold the view that anyone can be saved, and I am always the most optimistic person in the room. That having been said, I may be the one person in this group that does not think of these programs in purely legal terms, but in organizational theory ways or normative terms. It also means that things come in threes for me, so I offer these three lenses in the issue of the programs. Consider them as motivational, efficacy, and boundary-spanning grounds; they also are proxies for what are the real issues, who are your friends, and where do you look for guidance?

## I. Restrictionist and conservative pressures will likely increase

Organized interests regularly monitor educational programs and benefits that appear to have gender or racial/ethnic restrictions, and groups such as the Center for Individual Rights (CIR) will continue to prompt defense of any programs that single out underrepresented students. These efforts have led to many institutions folding up the tents and abandoning their equity efforts, even in institutions that have had very few minority initiatives or successful programs. For example, Texas A& M University, a school that chose not to implement *Grutter* in admissions, even after *Hopwood* had been reversed by the U. S. Supreme Court, and even after underachieving for years in a state with rapidly-increasing minority populations, was sued by CIR over a small, HHS/NIH/USDA-funded summer minority apprenticeship program and settled before trial and agreed to discontinue the effort. CIR filed a similar action for a journalism program at Virginia Commonwealth University, and intimidated the institution into ending its minority summer journalism program, partially funded by a foundation.

Conservative advocacy groups also set their sights even upon those programs, such as Texas' Top Ten Percent program, a race-neutral initiative that grants automatic admission to public colleges for the state's graduating students who are in the top ten percent of their classes. When TAMU surfaced a plan to extend its admissions beyond that required of all state colleges, the Center for Equal Opportunity and the American Civil Rights Institute kicked up such dust that the institution backed away, even though there is no legal prohibition against them doing so. Indeed, there are public colleges in Texas that have extended their automatic admissions criteria (required by statute of all institutions to be set at 10%) to twenty percent, as TAMU had considered doing. (For one example, see <http://www.uh.edu/admissions/undergraduate/apply-freshman/admissions-criteria.php#automatic> .)

In the area of immigration-related restrictionists, particularly groups that oppose immigration reform or who lobby against the regularization of undocumented immigrants and programs that address undocumented college students, there is a firestorm that arises, fanned by the Lou-Dobbs-ification of cable television and talk shows. While explication of this complex topic is beyond the scope of this piece, three recent examples will suffice to reveal the political salience of this topic. First, the failure to enact the DREAM Act, even within a military reauthorization spending bill reveals the deep cleavages between those who support comprehensive immigration reform and those who are opposed to any form of legalization, even for highly education undocumented college students (those who would likely be the beneficiaries of any such revision or legalization). The unpopular war, the weakened administration, and the politicization of this legislation have made it impossible to address this issue. Second, when states have made efforts to extend state resident tuition or even extend admission to undocumented college students who have graduated from their public schools, a number of objections have been raised, such as in North Carolina and Arizona; conservative groups have challenged any immigration-related college reforms in court, and while they have lost these challenges, the damage has been done. Finally, even the recent presidential debates have featured a race to the bottom, as immigration reform has become the third rail of politics; as recently as December, 2007, one major Republican candidate railed against another for his support for

immigration reform and resident tuition status for undocumented college students in his state. Until there is comprehensive immigration reform, this issue will likely leach into discussions of educational equity and access for immigrant students.

## II. Mainstream and progressive groups offer advice and make suggestions that are unlikely to be efficacious

I have detailed above the aggressive efforts of those who oppose reasonable efforts to integrate college student bodies and faculties. At the same time, even supporters of such efforts are not as helpful as they could be. I would analogize these to the bumptious immigration reforms for drivers license undertaken in a naïve and un-nuanced manner by New York Governor Eliot Spitzer, only to have to beat a hasty retreat. (As I saw these events unfold, I prayed: please save us from our supporters.) For example, consider two good faith efforts by credible and established organizations. In its recent efforts to help colleges and schools craft legally-viable options, a group sponsored by the College Board issued a series of reports to respond to the *Gratz* and *Grutter* decisions, and to the rise of statewide racial initiatives. The reports help sort out the complex issues, as in the March, 2007 **From Federal Law to State Voter Initiatives** concludes, “attention to longer term investments (such as support for pipeline-building programs) and shorter term strategies (such as rigorous evaluation and pursuit of all available avenues—race-conscious and race-neutral—likely to advance institution goals) can frame a comprehensive and coherent action agenda that is compelling in the court of law, just as it is in the court of public opinion.” In another 2007 report, **Echoes of Bakke**, the same authors write: “it is important that institutions seeking to justify race-conscious policies in such ways [by using diversity practices] heed the Court’s long-standing admonition (reaffirmed in the school assignment cases) that ‘societal discrimination’ can never be a compelling interest justifying race-conscious measures by a discrete institution. The Court has observed consistently that interests unlimited in scope or time can never meet the threshold of strict scrutiny analysis. (Consider the following: At what point can a single institution pursuing broad social goals declare that its race-conscious policies have succeeded, and how would that institution establish such evidence?)”

But the first recommendation (that schools pursue pipeline programs) suggests that these programs are somehow immune from CIR challenges, and that such programs appreciably add to the sum. I have monitored such programs--across disciplines--for years, and have reluctantly come to believe that most of these are so small, transitory, soft-money-dependent, and contingent that they almost mask the failure of mainstream opportunity structures. Money for these initiatives comes and goes, depending upon foundation priorities, and the cycle re-discovers minority pipeline programs ever few years, as the mandala turns. Virtually no institutional reward structures encourage senior faculty, especially the accomplished ones, to undertake pipeline programs, whether minority-specific or more generic. And while I have never considered doing this kind of work as a tradeoff against my more fundamental scholarship activities or teaching obligations, many colleagues do consider this work as less important and more peripheral. And if you are in a public institution or in a college in a state with racially-restrictive constitutional provision (or governor-initiatives, as in Florida), then the game is hardly worth the candle. More importantly, I cannot in good faith conjure up a single institution in the country, at least not historically-white ones or major producer schools, that could ever plausibly

conclude that “its race-conscious policies have succeeded” and worry about what evidence could be adduced to extricate itself. Such admonitions strike me as counterproductive and chimerical, or, at the least, unnecessary.

And the AAAS makes a very eloquent argument in **Standing Our Ground** for STEM programs to diversify those essential fields, but it is not clear to all observers that diversity programs can turn on perceived labor needs or national priorities. If such diversification were an agreed-upon priority, it would not have been possible for the GAO to review federal agencies for their under-performing record in gender equity, as was noted in the AAAS report. I appreciate the efforts that some professional associations have played in undertaking and producing specialized programs to diversify their professions and to draw attention to the problems, but this supportive role and cultivation of the process cannot fundamentally alter the production-function of campus-based efforts, where they really count. Various programs must affect and shape students (and junior faculty, for those programs that seek to develop the professoriate) in their academic programs to be truly transformative and meaningful; no peripheral agency or organization, however well-intentioned, can substitute for the home garden. I certainly think that professional associations and scholarly communities can cajole, shape, cheerlead, and assist, but at the end of the day, what counts is training and credentialing students (and faculty) where they are and where they will serve. Relying upon the periodic attention of funders or the profession as a whole cannot provide the long term personal and institutional commitments needed to remedy the serious problems. I applaud and recognize efforts by AAAS [ the many such initiatives include those found at [www.aaas.org](http://www.aaas.org), [http://sciencecareers.sciencemag.org/career\\_development/miscinet](http://sciencecareers.sciencemag.org/career_development/miscinet) (minority scientists network), and others] , AIBS [ <http://www.aibs.org/diversity> ], ASHE’s Institute on Equity Research Methods and Critical Policy Analysis [ <http://www.ashe.ws> ], and many others, but I do question the extent to which these can counter the systemic failure of graduate programs to recruit and graduate underrepresented minority students. Of course, there are institutionally-based programs, such as those at Rice in Statistics (The Rice University Summer Institute of Statistics [ [http://www.stat.rice.edu/~jrojo/RUSIS\\_Information.pdf](http://www.stat.rice.edu/~jrojo/RUSIS_Information.pdf) ]) and CalTech’s Minority Undergraduate Research Fellowship program ( <http://www.murf.caltech.edu> ). All the participants can name others, including some that are well-established and long running. But until the major elite feeder schools institutionalize these efforts and produce scientists, engineers, scholars, lawyers, etc., such specialized and targeted programs cannot meet the increasing needs of society. And rather than help with these underlying problems, restrictionist and conservative groups would rather challenge and dismantle these programs than add positively to the efforts. Where are they in offering initiatives to actually do something about the problems, rather than simply standing by and shooting the wounded on the battlefield? When will they sue an institution that is near-exclusively white or one that consistently underperforms by not enrolling minority students? Where are their integrative and developmental efforts? When will they propose acceptable pipeline programs, rather than attacking them?

III. The Supreme Court does not always make a fine distinction between K-12 and Higher Education

A number of higher education advocates have held their breath since *Parents Involved*, the Seattle and Louisville case decided in 2007 by the U.S. Supreme Court, as the racial attendance policies were held to be unconstitutional. There are many decisions in one sector that leach into the other, but this decision may augur less for college law than it does give signals about how race cases will be decided by this Court in the future. It is true that there are college siting and attendance cases, ones that have clear racial consequences, but *Parents Involved* will, in my estimation, not have substantial postsecondary implications. *Grutter* is likely safe for the time being, more because the Court would unlikely accept such a case for some time. *Bakke* applied for over twenty five years before it was largely upheld by the University of Michigan Law School admissions case. In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, the Court held:

“The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*, 539 U.S., at 328, 123 S.Ct. 2325. The specific interest found compelling in *Grutter* was student body diversity ‘in the context of higher education.’ *Ibid.* The diversity interest was not focused on race alone but encompassed ‘all factors that may contribute to student body diversity.’ *Id.*, at 337, 123 S.Ct. 2325.” (at p. 2753)

It also differentiated the postsecondary context:

“In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’ 539 U.S., at 329, 123 S.Ct. 2325. See also *Bakke*, at 312, 313, 98 S.Ct. 2733 (opinion of Powell, J.). The Court explained that ‘[c]ontext matters’ in applying strict scrutiny, and repeatedly noted that it was addressing the use of race ‘in the context of higher education.’ *Grutter* at 327, 328, 334, 123 S.Ct. 2325. The Court in *Grutter* expressly articulated key limitations on its holding-defining a specific type of broad-based diversity and noting the unique context of higher education-but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.” (at p. 2754)

But the U.S. Supreme Court and other courts have not consistently identified a line between higher education and K-12 cases. For example, I list three (of many such) examples where the differentiation has been clear and not-so-clear (high school newspapers and yearbooks, grooming standards, and inequities claimed on the basis of “regions” within a state):

- *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988) (school administrators may exercise editorial control over contents of high school newspapers produced as part of school curriculum) “We have nonetheless recognized that the First Amendment rights of students in the [k-12] public schools ‘are not automatically coextensive with the rights of adults in other settings,’ and must be ‘applied in light of the special characteristics of the school environment.’”

- *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972) (striking down public college dress code and grooming requirements) “Today the court affirms that the adult’s constitutional right to wear his hair as he chooses supersedes the State’s right to intrude. The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.” Dissent: “I dissent, first, because I see no distinction between high schools and junior colleges under the *Karr v. Schmidt* holding, which is now the law of this Circuit; ....”
- Residence and attendance zones in higher education: *Richards v. LULAC*, 868 S.W. 2d 306 (Tex. 1994) (striking down challenge to Texas state college funding formulae based upon geographical residence in “border area” of South Texas) “ The constitutional directive to maintain ‘an efficient system of public free schools’ does not apply to higher education as that term is used in this case.”

## Conclusion

I have made three observations, and attempted to muster evidence for maintaining gains and increasing access for disadvantaged groups, particularly in the post-baccalaureate professional and graduate level, although my points apply with equal weight to the undergraduate experience and the transition for high school to college. First, restrictionist and conservative pressures will likely increase; second, mainstream and progressive groups offer advice and make suggestions that are unlikely to be efficacious; and third, the Supreme Court does not always make a fine distinction between K-12 and higher education. I am surely not the first person to make these points, and others have made one or the other observation in ways that are both eloquent and trenchant. But I have always considered myself an observer who was the last in the room to resort to legal action and the least likely to resort to the courts, unless all else fails. Therefore, I despair when I see the issues discussed today to be conducted in administrative law frameworks or to have become so legalized.

Notwithstanding the naysayers and the restrictionists, whose agendas are not aimed at progressive action or equity, but largely at preserving white privilege, I think that the country’s demography is in our favor and that when the smoke clears and the adults take over, we will not merely endure, but prevail. Indeed, it is the demographic trends that make these groups uneasy, as it will be more difficult to preserve their historical advantages when there are simply more qualified people of colors and immigrants. Mark my word—when that day dawns, there will be much more support for pipeline programs and for the cultivation of what will then be “minority” talent.

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