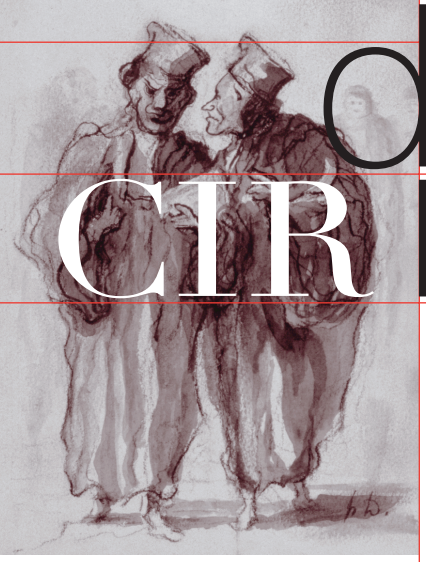

CIR docket report

Winter 2003

Supreme Court to Hear CIR's Cases Against Racial Discrimination in School Admissions

Staff members were plenty excited this December 2 when they got the news: the Supreme Court has agreed to hear both of CIR's cases against the admissions policies of the University of Michigan—*Grutter v. Bollinger* and *Gratz v. Bollinger.* CIR has argued and won precedent-setting cases before, including some (such as *Reno v. Bossier Parish School District* and *U.S. v. Morrison*) before the Supreme Court. Still, it is not every day that CIR gets to litigate the most important civil rights cases in a generation. The Court will hear oral arguments on the two cases in March. Decisions are expected by June.

The last Supreme Court case to address the use of race in college admissions was back in 1978—*Regents of the University of California v. Bakke*. That case ruled out quotas as a tool for remedying generalized past discrimination. But the 5-4 decision was hardly a model of judicial clarity—which may explain why subsequently appellate courts in Texas and Georgia barred the use of race in college admissions, while courts in Michigan and Washington permitted schools to use racial criteria in the interest of fostering "diversity."

The essence of CIR's argument in *Grutter* and *Gratz* is that admissions offices cannot justify raising hurdles against individual student applicants based on their race. That is exactly what college and university administrators at many selective institutions of higher education currently do. Admissions officers insist on classifying applicants according to race, often even affixing special color-coded stickers to the application folders. They then deem that some racial groups are "underrepresented" and hence worthy of an extra boost (often the equivalent of an extra 100 or more SAT points) in the admissions process. In practice, this means that other racial groups (such as whites and Asians) are deemed "overrepresented." Since they do not contribute to diversity—racially defined—they are viewed as unworthy of extra consideration in admissions.

The university elites who favor these racially discriminatory practices can talk all they want about "diversity," but their hypocrisy is obvious. Strangely enough, the only diversity they seem to value and find "enriching"

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CIR Battles the Racial Spoils System in Federal Contracting

Paul Patin and Jeff Weinstock are owners of a small business, Dynalantic Corporation, which makes simulation equipment, including flight simulators for aircraft. Simulators are important, especially post-September 11, because the equipment allows U.S. military personnel to practice their skills safely while conserving fuel and minimizing airplane maintenance costs. As one might expect, Dynalantic has sold a lot of equipment to the Department of Defense.

Most Americans have probably never heard of the federal government's controversial 8(a) program administered by the Small Business Administration (SBA). Under the program, "socially and economically disadvantaged businesses" are entitled to special treatment in government contracts. Agencies set aside certain procurements for 8(a) participants only. In theory, the program is supposed to make sure that "socially and economically disadvantaged businesses" get a share of the billions of dollars that the federal government pays for goods and services each year.

Paul and Jeff could only scratch their heads at the idea of a "disadvantaged" business. No evidence exists that their industry has any history of discrimination. So they were just stunned when they learned that they could not bid on a contract for helicopter simulators because the contract was reserved for "minority contractors" only. Under the law, an 8(a) qualified firm must be predominantly owned and controlled by a "socially disadvantaged person." African-Americans and Hispanic Americans, among many others, are presumed to fall into this category. (see page

Dynalantic headquarters in Ronkonkoma, New York

Dynalantic specializes in simulator equipment, such as the Huey II Instrument Flight Trainer Suite pictured here

3) Paul and Jeff turned to CIR because, even with a clearcut victory in court, their case would not be lucrative enough to interest a commercial law firm over the long term. Paul and Jeff just want to do business. It would be difficult to obtain damages under the law; all they are seeking is forward-looking relief. CIR, of course, is very interested in the case (*Dynalantic Corp. v. U.S. Dept. of Defense, Small Business Administration, and Dept. of the Navy*) because of the principle involved.

One would expect that those in government responsible for federal procurement and contracting (especially in the field of national defense) would be primarily concerned with the efficient use of government funds. Unfortunately, CIR's research for this case shows that the facts are otherwise. Behind a facade of race-neutrality, the SBA program conceals illegal racial preferences that siphon millions of taxpayer dollars to supposedly "disadvantaged" business owners, some of whom have net worths of millions of dollars.

During the Clinton era, even more time and money was wasted on Commerce Department "studies" which attempted to track "disparities" in the number of contracts which go to "small disadvantaged businesses." Of course, the American economy is pretty big and complex, so even the federal government with resources to waste on this kind of research had trouble keeping track of everything American inventiveness creates. It so happens that the government never actually got around to studying the simulation industry. Paul and Jeff were arbitrarily excluded from bidding on a contract—because of their race.

CIR expects to win this case. In *Adarand Constructors, Inc. v. Pena* (1995), the Supreme Court extended "strict scrutiny" to federal procurement. This means that the federal government cannot use racial quotas except as a "narrowly tailored" remedy for past discrimination. The principle is clear—but misguided people will still try to justify racial and ethnic discrimination in federal government contracting. After all, money is at stake. And some people (mainly law school professors) have an ideological stake in perpetuating race and victim consciousness. As of this writing, the *Dynalantic* case is pending in U.S. District Court for the District of Columbia. Stay tuned.

Are You Disadvantaged—According To The Small Business Administration?

You could be entitled to a presumption of "social disadvantage" if you identify yourself as a member of one of the following racial or ethnic groups:

Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).

Not on the list? There is still hope.

The SBA considers American citizens from Portugal to be of Hispanic descent and entitled to a presumption of social disadvantage.

Jennifer Gratz (left) and Barbara Grutter (right) are the lead plaintiffs in CIR's twin lawsuits against the University of Michigan

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is diversity of skin tones. They don't show the slightest interest in whether the student body (or the faculty) holds a "diverse" set of political, philosophical, or religious opinions unrelated to race—or in how the absence of such diversity might affect the quality of intellectual exchange on campus.

CIR has been pursuing its cases against the University of Michigan since 1997. No one can say for sure why the Court has finally agreed to hear cases about race preferences in college admissions now. Interestingly, the Court agreed to hear *Gratz*, even though Jennifer Gratz's appeal had not yet been decided by a lower appellate panel. Normally, the Court will not take a case until an appellate court has ruled, but the Court can bypass this step when a case is of "imperative public importance." CIR hopes the Court is finally prepared to provide guidance, not just more muddle, in a contentious area.

The CIR staff is aware that a great deal now depends on its efforts. The American public agrees with CIR that it is wrong for tax-funded institutions to privilege one group of applicants over another based on race. But public opinion is one thing, and legal argument is something else. CIR will have to demonstrate in court that racial diversity is not a "compelling" government interest.

Win or lose, CIR is determined to do its best to move our country away from the shameful practices of the past—categorizing people by race and restricting their opportunities on that basis. Liberals are obsessed with race, and it seems they cannot rest until they have made everyone else as "race conscious" as they are. But we at CIR are obsessed, too—with an ideal that has made our country strong, great, and free—fair treatment for each and every American based on his or her individual abilities.

Letter from CIR President Pell

The Art of Legal Warfare

The U.S. Supreme Court's announcement last month that it would hear CIR's two Michigan admissions cases provoked little of the usual hysteria or outrage that we've come to associate with CIR victories in this area.

Over at PBS's Newshour, Harvard's Christopher Edley—a longtime supporter of race preferences—agreed that the Court was right to try to settle the controversy and even allowed that the existing law was a mess.

As much as the Court's announcement, this fact shows just how far CIR has come in changing the terms of the debate on race preferences. For a long time, Professor Edley and others insisted that there was no problem with the law, thank you very much.

Though we have yet to achieve our goal—a decisive, final victory before the nine Justices—Professor Edley's new-found sense that the law doesn't exactly permit the University of Michigan to run a dual admissions system shows that these cases already have served a valuable strategic purpose.

More than any speech, any book, or any study, the facts of these cases have permanently and decisively shifted the terrain of public debate in our favor.

Opinion polls consistently show that an overwhelming percentage of every demographic group—blacks, whites, men, women, Republicans and Democrats—firmly oppose the use of separate racial standards in admissions and employment. In other words, they understand that this isn't a problem with the law; it's a problem with what colleges are doing.

These poll numbers are based on widespread knowledge of the actual practices of college admissions offices. And knowing what it now knows about those practices, the public isn't likely to change its view of race preferences anytime soon.

This knowledge wouldn't exist but for CIR's near decade-long legal effort. That's why we've always said that a handful of carefully selected legal cases is the most cost-effective way we know to restore meaningful self-government.

CIR doesn't bring cases in order to generate headlines or to facilitate fundraising. Nor does CIR spend a lot of time writing articles or commissioning studies about how to engineer an ideal society.

Instead, we're busy defending the best American traditions of liberty and fairness. We find cases that tell a powerful story about the importance of keeping government within the formal bounds of its constitutional authority. Then we patiently lay the groundwork for a successful Supreme Court decision years before our cases ever actually arrive at the Court's steps. And we rely on pro bono legal assistance from liberty-minded lawyers all over the country to fight most of the court battles. As a result, CIR is able to provide its clients legal services worth many times what our limited budget otherwise would allow.

Our experience with race preferences shows that CIR's approach to strategic litigation works. It's what we call "the art of legal warfare." And we're using that same template to assemble precedent-setting cases in other areas of the law, particularly in the areas of freedom of speech and expression, religious liberty, and federalism.

Right now, though we're focused on the immediate goal of winning the Michigan cases, we're also laying the groundwork for future trips to the Supreme Court. With the continued support of our friends and our volunteer, pro bono lawyers, CIR intends to remain a robust force for liberty, not just this year, but for decades to come.

CIR In the News....

CIR President Terry Pell appears on PBS' "News Hour with Jim Lehrer," where he debated Harvard Law Professor Christopher Edley

CIR President Terry Pell and Harvard Law Professor Alan Dershowitz appear on MSBNC's Hardball with Chris Matthews

CIR client Jennifer Gratz appears on "CBS' 60 Minutes"

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