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# U.S. Supreme Court Affirms Student Body Diversity

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On June 23, the United States Supreme Court handed down two separate opinions regarding the constitutionality of the admissions policies at the University of Michigan.

In *Grutter v. Bollinger*, No. 02-241, 2003 WL 21433492, 539 U. S. ____ (2003), the Court, in a 5-4 decision, endorsed Justice Powell's principal opinion in the landmark *Regents of Univ. of California v. Bakke* decision [438 U. S. 265 (1978)]. Justice Powell had concluded that the educational benefits that flow from a diverse student body present a compelling state interest that justifies the use of race as a "plus" factor, among many factors, in the admissions process at a professional school. The *Grutter* majority opinion, authored by Justice O'Connor and supported by Justices Stevens, Souter, Ginsberg, and Breyer, found that application of the *Bakke* standards to the University of Michigan Law School's admissions process, including an individualized review of each application, was sufficiently "narrowly tailored" to be lawful.

On the other hand, in *Gratz v. Bollinger*, No. 02-516, 2003 WL 21434002, 539 U. S. ____ (2003), the Court held, in a 6-3 vote, that the University's undergraduate admissions process, where minorities automatically received 20 points on a 150 point scale, with 100 points being the general admission threshold, was not tailored narrowly enough to survive the strict scrutiny applied to racial classifications, and therefore violated the Equal Protection Clause of the 14th Amendment to the U. S. Constitution, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. Section 1981.

The law of equal protection requires that racial classifications are *suspect* – subject to the Supreme Court's strict scrutiny and justified only where there is a compelling state interest. The Court found that the educational benefits that flow from a diverse student body result in a compelling state interest to use race as a plus factor, based upon five principal reasons. First, the Court relied upon social science evidence introduced at trial, including expert studies and reports that show the value of student body diversity. Second, the Court noted that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," citing the "friend of the court" briefs filed by the 3M Company et al., and General Motors Corporation. Third, the Court noted that retired officers and civilian leaders of the U. S. military asserted in their friend of the court brief that "a highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill its principle mission to provide national security," with those leaders coming primarily from the Reserve Officer Training Corps (ROTC) sponsored by colleges and universities. Fourth, the Court cited the brief of the United States, which asserted that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Finally, the Court noted that universities in general, and law schools in particular, "represent the training ground for a large number of our Nation's leaders" and that in order for our leaders to have legitimacy, it is "necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

Application of the "Narrowly Tailored" Standard
to the Law School Process and the Undergraduate Process

Even with compelling state interests, the use of race as a factor has to be, according to established Supreme Court precedent, "narrowly tailored." The Court in *Grutter* found that the admissions process at the Law School was narrowly

tailored because it did not provide quotas for minorities, it did not include separate admission tracts, there was no insulation of minorities from competition with the entire pool of candidates, there was an individualized, holistic consideration of each application, and the process considered multiple factors other than race to create a diverse pool of admitted candidates. Other possible bases for diversity admissions pursuant to the admissions policy at the Law School included "examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." The Court also concluded that race-neutral alternatives had been seriously considered in good faith, that there was no undue harm to non-minority candidates, and that it took the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" to attain a diverse student body, and that it would "terminate its race-conscious admissions program as soon as practicable." The Court noted that 25 years had passed since Justice Powell's opinion in *Bakke*, and that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

As to the undergraduate admissions process, the Court in *Gratz* found that the process was not narrowly tailored, since it did not provide for individualized consideration of each application, and minorities automatically received 20 points for being a minority.

Practical Impact of the Court's Decisions

The Court made clear that the rationale of Justice Powell's opinion in *Bakke* is now the law of the land, and effectively rejected the conclusions made by the Federal 5th and 11th Circuit Courts of Appeal that Justice Powell's diversity rationale should not be followed. The *Grutter/Gratz* Court's endorsement of diversity as a compelling state interest was critically important to hundreds of entities that had filed friend of the court briefs in support of diversity, including colleges and universities, businesses, and military leaders.

Given that the Court cited with approval and without qualification its prior decisions limiting the constitutionality of minority contractor "set-aside" programs, the Court's *Grutter/Gratz* decisions do not appear to have changed the law in this arena. The prior minority set-aside cases cited by the Court in *Grutter* or *Gratz* include *Adarand Constructors, Inc. v. Pena*, 515 U. S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U. S. 469 (1989). In *Adarand*, the Court held that a subcontractor compensation program where the federal government offered financial incentives to prime contractors for hiring disadvantaged subcontractors was subject to a heightened level of scrutiny to the extent that "disadvantage" was based on race. In *City of Richmond*, the Court considered a city program that required prime contractors who were awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to minority businesses. The Court held that the city failed to sufficiently prove that its set-aside program was designed to remedy past discrimination where the city did not show past discrimination in the local construction industry.

Given that the Court cited with approval and without qualification its prior classic decisions regarding affirmative action in employment, the Court's *Grutter/Gratz* decisions do not appear to have any significant potential impact on affirmative action in employment law. The prior cases cited by the Court in *Grutter* or *Gratz* that dealt with affirmative action in employment include *Sheet Metal Workers v. EEOC*, 478 U. S. 421 (1986), *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara Cty*, 480 U. S. 616 (1987). In *Sheet Metal Workers*, the

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Court upheld the principle of remedying violations of Title VII by imposing affirmative race-conscious relief. There, the lower court ordered a union who had been found guilty of violating Title VII by discriminating against non-white workers to establish a 29 percent non-white membership goal. In *Wygant*, the Court held unconstitutional a provision in a collective bargaining agreement under which the school board extended preferential protection against layoffs to some minority employees. The Court instructed that a public employer, like the school board at issue in *Wygant*, that seeks to remedy the effects of past discrimination must ensure that it has convincing evidence that remedial action is warranted before it embarks upon an affirmative-action program. Finally, in *Johnson*, the Court held that a public agency could voluntarily adopt a narrowly tailored affirmative-action program based upon an appropriate statistical analysis identifying that certain job classifications had underrepresentation of women and/or minorities.

Colleges and universities and any other educational institutions that use race as a factor in their admissions policies will obviously need to review these policies in light of the standards applied in *Grutter/Gratz*. Automatic preferences for race, separate admission or consideration tracks, and review of applications that is not "individualized" will need to be promptly addressed. The narrow-tailoring standards, including no quotas, no insulation of minorities from competition with the pool as a whole, no undue harm to non-minorities, good faith consideration of race-neutral alternatives, and time limitations (sunset or periodic review) will need to be addressed.

Although not directly addressed by the Court, any race-exclusive scholarship, preference, or honors program which is financed or administered by colleges or universities or other educational institutions should be reviewed in light of the standards set by the Court in *Grutter/Gratz*.

The Court's observation that it chose to defer to the academic judgment of the Law School that diversity was important to its educational mission will be a helpful citation for future use by educational institutions in various contexts.

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