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Racial and Ethnic Preferences in College Admissions: How Much is Too Much?

Donald F. Uerling

Two 2003 Supreme Court decisions—*Grutter v. Bollinger* and *Gratz v. Bollinger*—considered challenges to the use of racial preferences in the admissions policies of two different colleges at the University of Michigan. Taken together, these two Equal Protection Clause decisions stand for the propositions that the educational benefits resulting from a diverse student body can be a compelling government interest and that race and ethnicity can be used as a “plus” to promote that interest, but not to the extent that such a preference insulates minority applicants from competition with other applicants and ensures the admission of nearly every minority applicant who is minimally qualified.

Introduction

In American higher education, there has been a general belief that racial and ethnic diversity in a student body adds a valuable dimension to the educational experience of all students. Also, there has been a sense that higher education has a role to play in solving some of the problems associated with past discrimination against certain groups of people. Because racial and ethnic minorities have been underrepresented in the student bodies of many institutions, some admissions policies and procedures have sought to promote the admission of more minority students by using racial preferences. But the use of race to benefit some students because of race or ethnicity raises the issue of potentially unlawful “reverse” discrimination.

This article focuses on a discussion of two 2003 Supreme Court decisions—*Grutter v. Bollinger* and *Gratz v. Bollinger*—that considered challenges to the use of racial preferences in the admissions policies of two different colleges at the University of Michigan. Taken together, these two Equal Protection Clause decisions stand for the propositions that the

educational benefits resulting from a diverse student body can be a

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compelling government interest and that race and ethnicity can be used as a “plus” to promote that interest, but not to the extent that such a preference insulates minority applicants from competition with other applicants and ensures the admission of nearly every minority applicant who is minimally qualified.

In each case, the nine justices participating rendered a number of opinions--six in *Grutter* and seven in *Gratz*. This disparity among the points of view held by the justices suggests the difficulty of the issues involved. In each case, the majority opinion garnered only five votes. In the discussion that follows, the focus is on the majority opinion in each case, for it is the reasoning in those opinions that provides guidance to be followed in devising legally permissible admissions policies.

The Cases

Grutter v. Bollinger

The first of the two cases was *Grutter v. Bollinger*, that involved a challenge to the use of racial preferences in the admissions process at the University of Michigan Law School. In this 5-4 decision, Justice O'Connor

delivered the opinion of the Court, and it is that opinion that is discussed here.

The opinion summarized basic relevant information about the institution and its admissions program. The Law School ranks among the nation's best. Each year it receives more than 3,500 applications and admits a class of about 350 students.

In 1992, a faculty committee crafted an admissions policy that would implement the Law School's goals of admitting a diverse group of capable students who were likely to be successful both in school and in the practice of law and who would bring a mix of varying backgrounds and experiences. In particular, the policy sought to ensure that its efforts to achieve diversity complied with the Supreme Court's most recent ruling on the use of race in university admissions, *Regents of University of California v. Bakke* (1978). The committee report was adopted and became the Law School's official admissions policy.

The hallmark of this admission policy is a focus on academic ability coupled with an assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them. The admissions policy requires the evaluation of each applicant based on all the information available in the application file. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average and Law School Admissions Test (LSAT) score because they are important, even though imperfect, predictors of academic success. The policy stresses that no applicant should be admitted unless that applicant is expected to do well in law school.

In addition, admissions officials look beyond grade point averages and test scores to other criteria important to the Law School's educational objectives. A number of "soft variables," such as the enthusiasm of those submitting recommendations, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection, are considered in assessing the applicant's likely contributions to the intellectual and social life of the institution.

The admissions policy also aspires to achieve a diverse student body that would have the potential to enrich everyone's education. The policy does not restrict the types of diversity that could be given substantial weight in the admissions process. The policy does, however, reaffirm a commitment to one particular type of diversity—racial and ethnic diversity—with special reference to the inclusion of students from groups that have been historically discriminated against—African-Americans,

Hispanics, and Native Americans—who without this commitment might not be represented in the student body in meaningful numbers.

Barbara Grutter was a white Michigan resident who applied in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed her on a waiting list, and subsequently rejected her application. In 1997, she filed suit in the United States District Court for the Eastern District of Michigan against the Law School and various University officials. She alleged that defendants discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. Grutter further alleged that her application was rejected because the Law School used race as a predominant factor, giving applicants who belonged to certain minority groups a significantly greater chance of admission than applicants not from those racial groups. She sought compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race.

During a 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. The Director of Admissions at the time Grutter applied testified that he did not direct his staff to admit a particular percentage or number of minority students but to consider an applicant's race along with all other factors. During the height of the admissions season, he would consult daily reports that kept track of racial and ethnic composition of the incoming class; this was done, he testified, "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body" (*Grutter*, 2003, p. 233). The successor Director of Admissions testified that "critical mass" meant a number that encourages underrepresented minority students to participate in class and not feel isolated. She also asserted that race must be considered because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate grade point averages and Law School Admissions Test scores.

The Dean of the Law School testified that critical mass meant a number such that underrepresented minority students did not feel isolated or like spokespersons for their race. He testified further that the extent to which race was considered varied for one applicant to another, in some cases playing no role, while in others being a determinative factor. The chair of the faculty committee that drafted the 1992 policy emphasized that the Law School seeks students with diverse interests and backgrounds to

enhance class discussions and the educational experience both inside and outside the classroom. He explained that the commitment to racial and ethnic diversity was not intended to remedy past discrimination but, rather, to include students who may bring a perspective different from that of students from groups not victims of such discrimination. The Dean of another law school, who had been a faculty member when the 1992 policy was adopted, submitted several expert reports on the educational benefits of diversity and testified that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "minority viewpoint" but rather a variety of viewpoints among minority students.

The plaintiff's expert witness testified that his analysis of admission data led him to conclude that membership in certain minority groups was an extremely strong factor in admissions decisions and that applicants from minority groups were given an extremely large allowance compared to applicants from other groups. He conceded, however, that race was not the predominant factor in the admissions calculation. The defendant's expert witness focused on the predicted effect of eliminating race as a factor in the admissions process. In his view, a race-blind admissions system would have had a dramatic negative effect on the number of minority admissions.

At the end of the trial, the district court concluded that the Law School's use of race as a factor in admissions decisions violated the Equal Protection Clause. Applying the strict scrutiny test, the district court determined that the asserted interest in assembling a racially diverse student body was not "compelling" and that even if it were, the use of race in the admissions process was not "narrowly tailored" to further that interest. The district court granted plaintiff's request for declaratory relief and enjoined the defendants from using race as a factor in admissions decisions.

Sitting en banc, the United States Court of Appeals for the Sixth Circuit reversed and vacated the injunction. The court held that the Law School had a compelling interest in establishing diversity and that its use of race was narrowly tailored because race was merely a potential "plus" factor in the admissions decision. The court of appeals thought that the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.

The Supreme Court of the United States granted *certiorari* to resolve a disagreement that had surfaced among courts of appeals on a question of national importance: Whether diversity is a compelling interest that can

justify the narrowly tailored use of race in selecting applicants for admission to public universities.

The Court began its analysis with a review of the landmark *Bakke* case, which ruled that a racial set-aside program reserving 16 out of 100 seats in a medical school class for members of certain minority groups was impermissible. *Bakke* produced six separate opinions, none of which commanded a majority of the Court. Justice Powell provided a fifth vote that invalidated the set-aside program, but reversed a state court injunction against any use of race whatsoever. The only holding for the Court was that a state has a substantial interest in diversity that may be served by a properly devised admissions program involving the competitive consideration of race and ethnicity. Since the splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies, and public and private universities across the Nation have modeled their admissions programs on his views about permissible race-conscious policies.

In this *Grutter* case, the Supreme Court discussed Justice Powell's *Bakke* opinion in some detail. In his view, when a government decision touches on an individual's race or ethnic background, then that individual is entitled to a judicial determination that the burden asked to be borne on that basis is "precisely tailored to serve a compelling governmental interest." Of the several interests asserted by the university, only one survived his scrutiny. He rejected an interest in reducing the historic deficit of minorities in medicine as racial balancing; he rejected an interest in remedying societal discrimination because of the unnecessary burdens imposed on innocent third parties; and he rejected an interest in increasing the number of physicians who would practice in underserved communities because the program was not geared toward that goal. Justice Powell did, however, approve the university's interest in "the attainment of a diverse student body." He grounded his analysis in the concept of academic freedom, part of which extends to a university the right to select its students. But he was careful to emphasize that race is only one element in a range of factors to be considered in attaining the goal of a heterogeneous student body.

The *Grutter* opinion then explained the constitutional analysis used in cases involving racial classifications. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." All government actions based on race—a group classification that is in most instances

irrelevant and therefore prohibited—should be subject to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. “[S]uch classifications are constitutional only if they are narrowly tailored to further compelling governmental interests” (*Grutter*, 2003, pp. 2337-38). Absent such a searching inquiry, there would be no way for a court to determine which race-based classifications are benign or remedial and which classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. This strict scrutiny is applied to all racial classifications to assure that government is pursuing a goal important enough to warrant use of a highly suspect tool.

Turning then to the question of whether the Law School’s use of race was justified by a compelling state interest, the Court noted that the Law School had asserted only one justification for the use of race in the admissions process—obtaining the educational benefits that flow from a diverse student body. The Court noted that some of its other affirmative-action cases since *Bakke* had suggested that the only justification for race-based government action was to remedy past discrimination, but pointed out that it had never held that this was the only use of race that could survive strict scrutiny. For the first time since *Bakke*, the Court addressed the use of race in the context of public higher education, and held that the Law School did have a compelling interest in attaining a diverse student body.

The Court deferred to the Law School’s educational judgment that such diversity is essential to its educational mission, noting that it had long recognized that “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition” (*Grutter*, 2003, p. 2339). The conclusion that the Law School had a compelling interest in a diverse student body was informed by the view that attaining such a student body was at the heart of its educational mission and that good faith on the part of a university is presumed absent a showing to the contrary.

The Law School’s interest was not to simply assure that within the student body there would be some specified percentage of a particular group based on race or ethnic origin; that would amount to outright racial balancing, which is patently unconstitutional. Rather, the concept of critical mass was defined by reference to educational benefits that diversity is designed to produce. The Court thought these benefits to be substantial and noted the Law School’s assertions of the benefits of diversity in some detail: promotes cross-racial understanding; helps break down racial

stereotypes; enables students to better understand persons of different races; enlivens classroom discussions; promotes learning outcomes; better prepares students for an increasingly diverse workforce and society; and develops needed skills through exposure to diverse peoples, cultures, ideas, and viewpoints.

The Court reiterated its view of the overriding importance of education in preparing students for work and citizenship, in sustaining our political culture and heritage, and maintaining the fabric of society, noting that “education is the very foundation of good citizenship” (*Grutter*, 2003, p. 2340). Also important to the Court was that public institutions of higher education be accessible to all, regardless of race or ethnicity. “[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders” and “to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity” (*Grutter*, 2003, p. 2340).

In this case, the Law School’s mission was supported by having a critical mass of minority students. “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race, unfortunately still matters” (*Grutter*, 2003, p. 2341).

But even in a limited circumstance where drawing racial distinctions is permissible to further a compelling state interest, the means chosen to accomplish the government’s asserted purpose must be specifically and narrowly framed to accomplish that purpose. This narrow tailoring is required to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

To be narrowly tailored, a race-conscious admissions program cannot use a quota system; it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants. Instead, a university may consider race or ethnicity only as a “plus” in a particular applicant’s file, without insulating that individual from a comparison with all other candidates for the available seats.

The Supreme Court found that the Law School’s admissions program had the hallmarks of a narrowly tailored plan. It did not operate as a quota, in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. It did not insulate the individual applicant from a comparison with all other applicants. Instead, it permitted

consideration of race as a “plus” factor, while still insuring that each candidate compete with all other candidates.

Of significance to the Court was that, when using race as a “plus” factor, an admissions program must remain flexible enough to ensure that applicants are evaluated as individuals and that an applicants’ race or ethnicity is not the defining feature of their applications. “The importance of this individualized consideration in the context of a race-conscious admissions program is paramount” (*Grutter*, 2003, p. 2343).

The Court found that the Law School’s race-conscious admissions program adequately insured that all factors that may contribute to student body diversity were meaningfully considered alongside race in admissions decisions. Furthermore, all underrepresented minority students admitted were deemed qualified in regard to other factors, such as test scores and grade point averages. Also, the program gave substantial weight to diversity factors other than race, frequently resulting in the admission of nonminority applicants whose test scores and grades were lower than those of underrepresented minority applicants who were not admitted.

Nor does narrow tailoring require exhaustion of every conceivable race-neutral alternative; narrow tailoring does, however, require good faith consideration of race-neutral alternatives that would achieve the diversity the university seeks. The Court agreed that the Law School sufficiently considered other race-neutral alternatives, such as a lottery system or decreased emphasis on test scores or undergraduate grades and was satisfied that the Law school considered other race-neutral alternatives capable of producing a critical mass of students from underrepresented groups without abandoning the academic selectivity that was the cornerstone of its educational mission.

Narrow tailoring also requires that a race-conscious admissions program not unduly burden individuals who are not members of the favored racial or ethnic groups. The Court was satisfied that the Law School’s admissions program did not impose such a burden, because while race was used as a “plus” factor, the individualized inquiry into the possible diversity contributions of each applicant meant that no one was foreclosed from consideration.

Finally, the Court noted that a core purpose of the Fourteenth Amendment was to do away with all government-imposed discrimination based on race; accordingly, race-conscious admissions policies must be limited in time. The requirement of a termination point assures that the deviation from the norm of equal treatment is a temporary matter, a measure taken in the service of the goal of equality itself. Taking the Law

School at its word that it would like nothing better than to find a race-neutral admissions formula and would terminate its race-conscious admission program as soon as practicable, the Court stated its expectation that 25 years from this decision the use of racial preferences would no longer be necessary.

Because the Equal Protection Clause did not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body, the plaintiff's statutory claims based on Title VI and 42 U.S.C. § 1981 also failed, because these statutory prohibitions against discrimination were co-extensive with the Equal Protection Clause.

The judgment of the Court of Appeals for the Sixth Circuit was affirmed.

Gratz v. Bollinger

The second of the two cases was *Gratz v. Bollinger*, which involved a challenge to the use of racial preferences in the admissions process at the University of Michigan's College of Literature, Science, and the Arts (College). In this 5-4 decision, Justice Rehnquist delivered the opinion of the Court, and it is that majority opinion which is discussed here.

Jennifer Gratz and Patrick Hamacher, both Caucasian residents of Michigan, applied for admission to the College. Gratz applied for the fall of 1995. She was notified in January of that year that a final decision had been delayed until April, based on the University's determination that although she was well qualified, she was less competitive than the students who had been admitted on first review. She was notified in April that the College would not offer her admission. Hamacher applied for the fall of 1997. A final decision as to his application was postponed; he was notified that although his academic credentials were in the qualified range, they were not at the level needed for first review admission. His application was denied in April 1997.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan against the University, the College, and various officials. Their complaint was a class-action lawsuit alleging violations of equal protection of the laws under the Fourteenth Amendment and for racial discrimination in violation of 42 U.S.C. § 2000d *et seq.* (Title VI of the Civil Rights Act of 1964), 42 U.S.C. § 1981, and 42 U.S.C. § 1983. The plaintiffs sought punitive and compensatory damages, declaratory and injunction relief, and an order requiring an offer of admission to Hamacher.

The University had changed its admissions guidelines a number of times during the period relevant to this litigation, and the *Gratz* opinion summarized those various guidelines. The Office of Undergraduate Admissions (OUA) oversaw the College's admissions process. To promote consistency in the review of applications, the OUA used written guidelines for each academic year, and admissions counselors made decisions in accordance with those guidelines.

The OUA considered a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. The OUA also considered race. During the relevant time period, the University considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities" and admitted virtually every qualified applicant from these groups.

From 1995 to 2000, the OUA used various combinations of factors other than grade point averages and ACT scores to identify those applicants who would be offered admission. Included in these factors were certain characteristics of the applicant's high school, as well as certain personal characteristics of the applicant. A major consideration was whether the applicant was a member of an underrepresented minority group. From 1995 to 1998, the admissions guidelines provided that qualified minority applicants be admitted as soon as possible because it was believed that such applicants would then be more likely to enroll. Also, admissions were managed so that some seats were protected for certain groups, including minorities.

Beginning in 1998, the OUA used a "selection index," on which an applicant could score a maximum of 150 points. This index called for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). Each applicant received points based on high school grade point average, standardized test scores, academic quality of high school, strength of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance was that under a "miscellaneous" category, applicants were entitled to 20 points based on membership in an underrepresented racial or ethnic minority group.

Then, beginning in 1999 a system was devised for "flagging" certain applications for additional review if the applicant was academically prepared to succeed, had achieved a minimum selection index score, and

possessed certain traits important to the composition of the freshman class. One of these traits was being a member of an underrepresented group.

The district court began its Equal Protection analysis by reviewing the *Bakke* decision, and finally concluded that the University of Michigan had presented “solid evidence” that a racially and ethnically diverse student body produces significant educational benefits and that achieving such a diverse student body constituted a compelling government interest. The court then considered whether the admissions guidelines were narrowly tailored to achieve that interest. The court emphasized that the admissions program did not utilize rigid quotas or seek to admit a predetermined number of minority students.

In the district court’s view, the practice of awarding 20 points for membership in an underrepresented group was not the functional equivalent of a quota, because minority applicants were not insulated from review by virtue of those points. The court thought this preference was permissible, and granted defendant’s motion for summary judgment. However, the earlier admission guidelines that protected some places in the class for underrepresented minority applicants kept nonminority applicants from competing for those seats and were the functional equivalent of an impermissible quota. The district court found this approach to be impermissible, and granted plaintiffs’ motion for summary judgment.

Both parties appealed to the Court of Appeals for the Sixth Circuit, which heard the *Gratz* case en banc on the same day that it had heard the *Grutter* case. After the court of appeals issued an opinion upholding the Law School admissions program in *Grutter*, but before it issued an opinion on the undergraduate College program in *Gratz*, the plaintiffs petitioned the Supreme Court to grant certiorari in both cases, and the Court did so.

Before the Supreme Court, the parties revisited the strict scrutiny analysis required by the Equal Protection Clause. The petitioners argued that the University’s use of race in undergraduate admissions was not a compelling government interest and thus violated the Fourteenth Amendment. But the Court, citing the reasons set forth earlier in the day in the *Grutter* case, rejected that argument.

The Court then turned to the second phase of the strict scrutiny analysis, which required the University to demonstrate that the use of race in its current admissions program employed “narrowly tailored measures that further compelling governmental interests.” “Because ‘[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, . . . , our review of

whether such requirements have been met must entail “*a most searching examination*” (Gratz, 2003, p. 2427).

The Supreme Court found that the University’s policy, which automatically gave 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, was not narrowly tailored to achieve the interest in educational diversity that the University contended justified the program. The primary problem was that this policy did not provide for individualized consideration of all the qualities the applicant possessed and the individual’s ability to contribute to the unique setting of higher education. Rather than race being used as only one factor, without being decisive, the admissions program’s “automatic distribution of 20 points ha[d] the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant” (Gratz, 2003, p. 2428). In contrast, other desirable personal characteristics were awarded fewer points. And, an examination of the way that certain application files were flagged further illustrated an overemphasis on minority status.

The University contended that the volume of applications made it impractical to use the system upheld in *Grutter*. But the Court rejected that contention; “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system” (Gratz, 2003, p. 2430).

The Court concluded that because the University’s use of race under the current freshman admission policy was not narrowly tailored to achieve the asserted compelling interest in diversity, the policy violated the Equal Protection Clause, as well as Title VI and 42 U.S. C. § 1981. The Court reversed that part of the district court’s decision granting the University summary judgment with respect to liability and remanded for further proceedings.

Discussion

Many American colleges and universities have programs in place to recruit and enroll more minority students. For those crafting admissions policies, *Grutter v. Bollinger* and *Gratz v. Bollinger* have resolved some issues, but other issues remain.

The two cases reiterated a proposition already generally understood—for purposes of constitutional analysis under the Equal Protection Clause,

state-imposed classifications based on race or ethnicity are subject to the “strict scrutiny” test, which means that such a classification must be narrowly tailored to further a compelling governmental interest.

In the 1978 *Bakke* case, Justice Powell’s opinion provided the only holding for the Court, which was that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” (438 U.S. at 820, 98 S. Ct. at 2733). Many public and private universities have modeled their own admissions programs on the *Bakke* holding, and now both *Grutter* and *Gratz* have endorsed Powell’s position.

But the *Bakke* holding included two parts: first, diversity may be a substantial government interest justifying the use of race or ethnicity; and second, a properly devised admissions program would involve the competitive consideration of race and ethnic origin. Both *Grutter* and *Gratz* endorsed the view that having a diverse student body is a compelling state interest that can justify the use of race in college and university admissions. Both decisions also held that the view that race and ethnicity may be considered as factors but cannot be used to insulate those favored applicants from competition with others not favored.

It is the second part that poses the practical problem for admissions offices: How much preference is too much? Clearly, a “quota” involving setting aside a certain number or percentage of seats for minority applicants would be impermissible. On the other hand, using race or ethnicity as a “plus” factor when comparing a minority applicant’s file against those of nonminority applicants would be permissible. But at what point does the “plus” become such a heavily weighted factor that it is impermissible? *Grutter* suggests that if some minority students have been denied while some nonminority students with lower grade point averages and test scores have been admitted on the basis of other kinds of diversity, that is evidence of a permissible use of preferences. *Gratz* indicates that if minority students are awarded so many points as to make race or ethnicity outcome-determinative, then that much of a preference would not be permissible.

Excerpts from the two Supreme Court cases summarize the basic legal principles.

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her

application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount (*Grutter*, 2003, p. 2343).

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. . . . [E]ach characteristic of a particular applicant was to be considered in assessing the applicant's entire application (*Gratz*, 2003, p. 2428).

The current [College] policy does not provide such individualized consideration. . . . [T]he [College's] automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant (*Gratz*, 2003, p. 2428).

In addition to racial and ethnic preferences in admissions, some colleges and universities use other programs to increase the number of minority students. Two examples are minority-based scholarships and minority-based learning communities. If "quotas" are not permissible, then surely a scholarship program for which only minority applicants are eligible would be constitutionally impermissible. (See, e.g., *Podberesky v. Kirwan*, 1994; absent a showing that program was intended to remedy current effects of past discrimination, raced-based scholarship program unconstitutional). Similarly, if a learning community has membership in a certain racial or ethnic group as a threshold requirement for admission and excludes nonminority students from participation, that would seem to constitute an impermissible "quota" system. But advocates of such a program may contend that there are good reasons for such learning communities. For example, it could be argued that minority students do better in a program that addresses their specific learning needs; however, it could be argued that such an assumption of inherent differences based on race or ethnicity is presumptively wrong from both legal and practical perspectives.

Both *Grutter* and *Gratz* imply an important point about the purposes of "affirmative action" admissions programs in higher education. At those colleges and universities with a strong majority of white, nonminority students, the efforts to enhance diversity are not directed only toward the educational interests of the relatively small number of minority students, but also toward the educational interests of the relatively large number of nonminority students. The educational benefits flowing from a diverse student body are intended to be enjoyed by all students.

Grutter and *Gratz* involved admissions programs at a state university, and thus the primary challenge was that this “state action” violated the Equal Protection Clause. Most private institutions would not be “state actors” for purposes of the Fourteenth Amendment, so challenges to the use of minority preferences in their admissions programs would necessarily be based on other grounds, such as Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) or 42 U.S.C. § 1981. Title VI would be applicable to any institution—public or private—that receives federal funds. Section 1981 extends “equal rights under the law” to applicants at either public or private institutions.

Conclusion

A prevailing belief in higher education is that having a diverse student body will result in educational benefits for all students. In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court held that to enhance the level of diversity, racial and ethnic preferences may be used as a “plus” factor, but not to the extent that a minority applicant is insulated from comparison with nonminority applicants. Minority status should not ensure admission.

Probably there are cultural differences between different racial and ethnic groups, but once past the legacy of discrimination, those differences are rather difficult to identify. Surely the day will come when race and ethnicity will be of no more significance than any other personal characteristic. But that day has yet to arrive.

References

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- Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978).
- Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
- 42 U.S.C. § 1981. Equal rights under the law. (a) Statement of equal rights: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind,

and to no other. (b) "Make and enforce contracts" defined: For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) Protection against impairment: The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.