

## **The New National Determinants for the use of Race in Collegiate Admissions**

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**Robert M. Hendrickson, Ph.D.  
The Pennsylvania State University**

**M. Christopher Brown II, Ph. D.  
Fredrick D. Patterson Research Institute**

**Jason E. Lane, Ph.D.  
University of North Dakota**

### **Introduction**

A new nation-wide set of determinants for using affirmative action in collegiate admission decisions is now in place. The recent Supreme Court decisions in the pair of cases (*Gratz v. Bollinger*, 123, S. Ct. 2411 2003; *Grutter v. Bollinger* 123 S. Ct. 2325 2003) filed against the University of Michigan for allegedly discriminating against Caucasian Americans affirmed the legality of using race-conscious procedures and set forth criteria for how, why, and when such procedures cohere with the dictates of the Fourteenth Amendment's Equal Protection Clause. While the Court ruled it permissible for colleges and universities to incorporate race into admission policies when pursuing a compelling state action, the Justices were also careful to explain how such policies need to be structured in order to be considered legal.

The use of affirmative action in collegiate admissions has been under fire from almost every section of the country for the past several years (Swink, 2003). While issues pertaining to race became an area of federal concern following the adoption of the Fourteenth Amendment of the U.S. Constitution, decisions regarding the legality and appropriateness of using race for determining a prospective student's admittance to college has been primarily left to the states, their citizens, or the institutions themselves. Now, twenty-five years following their eclectic and controversial decision in *Regents of the University of California – Davis v. Bakke*, a majority of the Court acknowledged the legality of using race in admission decisions, affirmed the dictates set forth by Justice Powell in the *Bakke* decision, and established the parameters, practices and policies institutions throughout the nation must work within to ensure their admission procedures withstand judicial review.

**Grutter v. Bollinger, 123 S. Ct. 2325 (2003)**

While *Gratz* and *Grutter* were companion cases emanating from litigation against the same institution and raising the same legal question, the *Grutter* ruling appears to be the foundational case of the two, as the opinions in *Gratz* are based on and refer often to the argument set forth in *Grutter*. (For this reason *Grutter* is discussed first). As one of the top law schools in the nation, the University of Michigan's Law School selects a class of approximately 350 students from the more than 3,500 applications it receives each year. In assembling the class of 350, the Law School strives to "admit a group of students who individually and collectively are among the most capable...[by selecting students with] substantial promise for success in law school...[and] a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." In assembling each year's class of students, the institution seeks to include students with a wide range of background and experiences to ensure a heterogeneous learning environment that will assist students in being productive members of increasingly diverse living and working environments. Further, the Law School believes that the existence of a "critical mass" of minority students creates an enhanced learning environment for all students by concomitantly decreasing the pressure of students to "represent" the minority view point and demonstrating that a single "minority point of view" does not exist.

The petitioner, a white Michigan resident who had been rejected from admission to the law school, filed suit against the University claiming the Law School violated the protections afforded her by the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 among other federal statutes pertaining to racial discrimination. The petitioner "alleged that her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups'" (*Grutter*, 2332-2335). Additionally, *Grutter* maintained no compelling interest existed for the Law School to use race as a factor in the admissions process.

The Court began by reviewing Justice Powell's decision in *Bakke* and relied heavily upon his analysis and arguments in deciding the case. The Court concurred with the Powell's findings in *Bakke*, affirming that a compelling interest existed for colleges and universities to foster diverse learning environments, thus enhancing students' ability to operate and compete in a global economy (p. 4505). Citing again to Powell's opinion, the Court found that race could be used in making admission decision as long as it was one of many factors and did not have a decisive influence upon the decision making process.

Applying strict scrutiny to the *Grutter* case, the Court determined that the formation of a diverse student body constituted a compelling state interest for using race in the admissions decision. At the foundation of the Justices' opinion were two pillars of legal precedent: Powell's opinion in *Bakke* and the

long standing principle of deferring to academic institutions in a myriad of functional areas, including admission decisions. One of the most important tenets of O’Conner’s opinion is that a multicultural learning environment is now necessitated by the globalization of our economy and culture. Having found a compelling state interest to allow the Law School to incorporate race into its admissions processes, the Court turned its attention to the details of the admissions policy to determine whether or not it was narrowly tailored to achieve this compelling interest.

In order to be deemed *narrowly tailored*, and thus pass muster under the strict scrutiny of the Court, the admissions policy must avoid any type of quota system and cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants" (*Grutter*, 2342, citing *Bakke* at 315). The Court determined that even though the law school strives to achieve a “critical mass” of those minority groups it deems underrepresented (i.e., African-Americans, Hispanics, and Native-Americans), the policy in question did not act as a quota system as applicants are all individually reviewed and have an opportunity to compete for each seat. No seats are specifically reserved for those from the underrepresented groups nor did one’s race give the candidate an unfair advantage such as occurred in the undergraduate admission process reviewed in *Gratz*.

***Gratz and Hamacher v. Bollinger, 123 S. Ct. 2411 (2003)***

Unlike the flexible system of individualized review utilized by the Law School, the University of Michigan’s School of Literature, Science, and Arts, (LSA) based admission decisions on the mechanical assignment of points for student achievements and characteristics. The petitioners in this case, Jennifer Gratz and Patrick Hamacher, filed suit against the University of Michigan asserting the institution, by denying them admission to the School of LSA, violated the petitioners’ equal protection guaranteed by the Fourteenth Amendment by subjecting them to racial discrimination in violation of 42 U.S.C. §§1981, 1983, and 2000 *et seq.* The petitioners sought to represent a class of individuals representing past, present, and future applicants who may have been discriminated against by the University because they were not one of the “underrepresented racial groups.”

Gratz and Hamacher were both residents of Michigan, Caucasian, and applied for admission to Michigan’s LSA in 1995 and 1997, respectively. The petitioners, determined by the University to be qualified applicants, were first denied early admission to the School and then rejected outright. Gratz subsequently enrolled at the University of Michigan –Dearborn and Hamacher enrolled at Michigan State University. The plaintiffs’ complaints revolved around the University’s use of race in admission

decisions, noting that individuals classified as “underrepresented minorities” were being admitted with lower GPA’s and standardized test scores than applicants from other ethnic origins.

At the University of Michigan’s LSA School, each admission counselor is vested with the power to make decisions regarding an applicant’s admission. In an attempt to provide consistency among admission counselors’ decisions, standardized scoring systems were adopted by the office. A number of factors in addition to high school GPA and standardized test scores are considered, such as the applicant’s high school quality, curriculum strength, geography, alumni relationships, leadership engagement, and race. While the scoring system and admittance procedures have changed multiple times since Gratz and Hammacher were denied admission, the most recent policy (and that reviewed by the Court) awarded points to applicants based on the applicant’s academic, co-curricular, or other miscellaneous characteristics. This “selection index” allowed an applicant a maximum of 150 points and was divided into the following admission decision categories: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject).

As the issue of the legality of using race in collegiate admissions was addressed extensively by the Court in *Grutter*, Rehnquist did not rehash the issue in the Court’s opinion. Noting the opinion in *Grutter*, the Chief Justice moved to the question of whether the LSA’s admission policy was narrowly tailored to further a compelling government interest. All use of race by government entities are subject to the strict scrutiny of the Court [*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)]. To withstand strict scrutiny, “respondents must demonstrate that the University’s use of race in its current admission program employs ‘narrowly tailored measure that further compelling governmental interests’ *Adarand*, 515 U.S. at 224” (p. 45).

After careful review of the admissions process and the enrollment reports, the Court concluded that the LSA’s policy was not narrowly tailored enough to achieve a compelling state interest of assembling a diverse class of students. The reason for the denial being that the process rewarded a person for their skin color more than any other characteristic. Where being a member of an underrepresented minority earned an applicant twenty points, having outstanding artistic ability or accomplishing a great feat of civic engagement or leadership earned an applicant only five points. Further, the enrollment record indicated a trend disturbing to the Chief Justice: almost all underrepresented minorities were offered admission to the school. This indicated that awarding of 20-points gave minority students such an advantage over non-minority students that race had become a determining factor for granting admission to the school, thus creating virtually separate admission processes. The Court determined the mechanistic and bifurcated system employed by the LSA was not narrowly tailored toward achieving the intended goal of the policy.

### **Flexibility v. Mechanistic: how race can be used in admission decisions**

The most notable component of these cases is the Court's insistence on individualized review of applicants if racial diversity is going to be a considered factor. With ever increasing demands for a college degree and shrieking fiscal resources, admissions offices all over the country have sought ways to streamline the decision making processes. At many institutions, the decision to admit a student is left up to a single admissions counselor, who usually consults a complicated formula that accounts for high school GPA, standardized test scores, leadership potential, community service, and often race. These formulas, such as the case with Michigan's LSA School are often mechanistic; the rationale for using such procedures often being that admissions offices simply do not have the necessary staff to individually review the every single applicant. This may be the case, "but 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* at 54). Basically, administrative efficiency or lack of financial resources, does not trump Constitutional requirements.

What separates the Law School program from that used by the LSA School? The LSA admission program assigned students a numeric score based on a number of criteria. The score a student received determined their admissibility. Among all the criteria for which points were awarded, being a member of a predetermined class of "underrepresented minorities" scored the applicant 20 additional points – more points than awarded for any other single characteristic. In this program an individual was believed to add diversity merely because of the color of his skin and that that diversity outweighed any other. In comparison, a student of outstanding artistic ability, even if that student rivaled Picasso, could earn only five additional points. Further, the record indicated and the University officials concurred that virtually every minority applicant was admitted to the school, even though some of their academic scores were well below those of non-minority students who had been rejected. The Court struck down the program for two primary reasons. First, there was no individualized review of applicants. The program seemed to value the color of a person's skin, more than the sum of his experiences. Second, the awarding of twenty points gave minorities such an advantage that it created a bifurcated system in that almost all underrepresented minorities were admitted to the School, while all other applicants were left to contend for the remaining seats. This, the Court believed, too closely resembled the quota system struck down in *Bakke*. As Justice Powell noted, an admission program should be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." (*Bakke* at 315).

The strength of the Law School's admission program, on the other hand, is its emphasis on individualized review of each applicant and its publicly stated commitment to diversity on multiple avenues. The Court in both *Bakke* and *Grutter* emphasized the point that race should only be one of many factors a university should consider when seeking to assemble a heterogeneous student body. Justice O'Connor observed in her opinion,

The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic – e.g., an unusual intellectual achievement, employment experience, non-academic performance, or personal background. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School (*Grutter* at 55).

As mentioned above, the institution sought to assemble critical masses of particular underrepresented ethnic groups to enhance the learning environment for both minority and non-minority students. The Law School experts argued that having such a mass of students frees minority students from the expectation of representing their entire race, thus providing them with a more conducive learning environment. For non-minority students, being a part of a diverse learning environment enables them to be more productive citizens in an increasingly diverse world. The Law School, however, emphasized that race was not the only characteristic taken into account when attempting to assemble a diverse student body. While the LSA argued the same point, the Law School was able to demonstrate through its records that it frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants with grades and test scores lower than underrepresented minority applicant (and other nonminority applicants) who are rejected" (*Grutter* at 55-56). This was clearly not the case for the LSA, which admitted almost every minority applicant.

### **Future Challenges to the Use of Race**

While the Court may have affirmed the legality of using race in collegiate admission processes, the dictates set forth by the Court may have opened the door for litigation in other areas. As Justice Scalia, with whom Justice Thomas concurred, indicated,

[O]ther suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their

campuses – through minority-only organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies) (*Grutter*, 102).

Within the confines of *Gratz and Grutter*, the opinion of the Court clearly favored individualized review over mechanistic and mathematical calculations of the value of one's race. The Court struck down the LSA's procedures because, even though race was one of many factors assessed, the way in which the value of one's race was calculated gave members of certain racial backgrounds a disparate advantage over those not of the designated races. While the Court's opinion applies only to collegiate admission processes, there are a number of programs within other areas of academe that posit support of minority students by limiting or refusing access to students not considered part of an underrepresented group. Scalia and Thomas suggest that colleges and universities should expect future challenges to such programs. Even though the Court supported race-conscious programs, it was very clear on the limitations that must be placed on its use. If the Court extends this standard to other areas of university life, institutions are going to have to reassess the way in which they structure other minority-based educational and co-educational programs.

### **Epilogue: Michigan's Revised Undergraduate Policy**

In response to the Court's rulings, the University of Michigan has completed an overhaul of their undergraduate admission process. The revised process continues to use race as a criteria, but does so in a way, University officials claim, that is compliant with the Court's desire for non-mechanistic and individualized review of applicants. The new process includes the addition of a number of questions to be completed by either the student or the student's admission counselor. Students are now required to submit responses to three essay questions along with their application. In an attempt to showcase a student's intellectual, cultural, and ethnic diversity, students allowed to choose from a number of essays depending on the applicant's background and intended major. Each applicant is required to choose to answer one of the following questions about diversity:

- 1) At the University of Michigan, we are committed to building an academically superb and widely diverse educational community. What would you as an individual bring to our campus?
- 2) Describe an experience you've had where cultural diversity –or lack thereof—has made a difference to you.

While an applicant's experience in regard to either personal or societal diversity clearly continues to be a component of the admissions process, it only one of three essay questions, "designed to provide the richest possible picture of the student's intellect, character and personal values" (University of Michigan, 2003). Further, in addition to providing information regarding the applicant's personal and academic characteristics, each applicant's high school guidance counselor is requested to comment on the applicants, "socio-economic, personal, or educational circumstances that may have affected this student's academic achievement..." (University of Michigan, 2003).

In response to the Court's requirement for "individualized" and "holistic" review of applicants, the University of Michigan added additional staff (sixteen part-time readers and five full-time admissions counselors) to handle the increased work load (Schmidt, 2003). No longer are applicants simply assigned a point value and then granted or denied admission based on the quadrant of the scoring schema in which they fell. Each application will be reviewed by both a reader (most of whom are former educators) and an admissions counselor. The two recommendations will then be forwarded to a senior level administrator in the Office of Undergraduate Admissions. If the recommenders agree with each other, the recommendation will be accepted. If disagreement exists and the manager cannot reconcile the differences, the application will be forwarded to a committee for review.

While the University's revised policy has not undergone any type of judicial review, policy makers and administrators should take note of three aspects of the new methods. First, the University did not simply alter the manner in which an applicant's ethnic origins were evaluated as part of the admissions process. While continuing to focus on a student's academic ability, the new process is structured to evaluate the student based on a broad base of intellectual, creative, geographic, and racially diverse characteristics and experiences. Second, the cost of having a race-conscious admissions policy is not inexpensive. According to the Court, if a college or university desires to incorporate an applicant's race in the decision making process, the process must be flexible, holistic, and individualistic. This requires substantial more attention from admissions counselors than most institutions now allow. As indicated above, the new review process at the University of Michigan required an additional 21 employees to review the applications and is expected to cost \$1.5 - \$2 million in its first year (Schmidt, 2003). It is likely that many institutions will have to discard their race-conscious admissions policies simply because they will be unable to afford the costs required of such policies; particularly in an era of shrinking state appropriations. Third, it is likely that there will be a resurgence in the involvement of faculty in the undergraduate admissions process. At Michigan, faculty establish the admissions criteria for each academic program and will now participate in the initial review processes and participate in the review committees. Those institutions desiring to facilitate admission processes that include race as a criterion



need to be aware of the legal requirement post-Gratz and Grutter. While it is impossible to predict whether Michigan's new procedures will withstand judicial review, the process appears to address many of the concerns of the Court. Regardless, it is apparent that any race-conscious policy will now require significant allocation of employee time and institutional fiscal resources.

### **Conclusion**

The implications of these two rulings on admissions practices are significant. If institutions are going to rely on the diversity argument to use race as a factor in admission, they must design a process that is flexible, uses individualized assessment, has all applicants competing for spaces, and uses all of those qualities, including race, that aid in achieving diversity. These cases may leave institutions unable to rely on a mechanical or formula-like process if they want race to be a factor used in the admissions process. Such institutions may have to go to an individualized, flexible process similar to the one used at the University of Michigan Law School. This will be a process that requires the participation of significant numbers of individual university employees in order to process the volume of applicants in a flexible, non-mechanistic, individualized way.

### **References**

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