THE SUPREME COURT DECISIONS IN
GRUTTER V. BOLLINGER AND GRATZ V. BOLLINGER

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I. INTRODUCTION

On June 23, 2003, the U.S. Supreme Court issued landmark decisions in two cases addressing affirmative action in college and university admissions. The Court ruled that student body diversity in higher education is a "compelling state interest" that can justify race-conscious admissions policies. It upheld the University of Michigan law school admissions policy as a "narrowly-tailored" means to achieve that interest, but held unconstitutional the University of Michigan undergraduate admissions system. The cases produced 13 separate opinions.

This White Paper describes the admissions policies the Court reviewed and the lower court proceedings in the Michigan cases (section II), summarizes aspects of the Supreme Court decisions (section III), addresses selected questions college and university admissions officers may have about the cases (section IV), and suggests further questions officials may wish to ask about their own institutional policies in light of the Michigan decisions (section V).

This Paper is not legal advice. Administrators are encouraged to consult with the institution's counsel in this sensitive area of law.

II. BACKGROUND

The undergraduate admissions policy 1/

In Gratz v. Bollinger, plaintiffs challenged the policy used for undergraduate admissions at the School of Literature, Science and the Arts (LSA) of the University of

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1/ See Gratz v. Bollinger, 122 F. Supp. 2d 811, 826-833 (E.D. Mich. 2000); see also Gratz v. Bollinger, 2003 WL 21434002 (June 23, 2003).

Michigan for the years 1995-2000. Although the Supreme Court addressed only the most recent policy, how the policy changed over the years is noteworthy.

In the earlier years, LSA considered race at three points in the admissions process. First, during the rolling admissions process LSA protected a number of seats for certain groups of applicants, including under-represented minorities, athletes, in-state residents, and foreign students. At the end of the admissions cycle, any of the protected seats that remained open could be filled by applicants from other groups who were not admitted on first review. Second, LSA took race into account in grids that cross-tabulated adjusted grade point average (GPA) with ACT/SAT score. In various years, LSA: (1) used four separate tables, with the table used depending on whether an applicant was in-state or out-of-state, and minority or non-minority; (2) used two tables -- one for in-state and legacy applicants; the other for out-of-state applicants -- with separate minority and non-minority "action codes" determining whether an applicant with particular scores would be admitted, rejected, delayed, or postponed for later reconsideration; and (3) used the same two tables and added 0.5 points to the GPAs of under-represented minorities. Third, LSA automatically rejected non-minority applicants who failed to achieve a threshold score, without detailed review of their files. All applicants from under-represented minority groups received further review, regardless of their scores.

In 1998, LSA changed its system and began ranking all applicants, using a 150-point scale. Under this system, applicants received 20 points for being a member of an under-represented minority group. Applicants also could receive 20 points for socioeconomic status or for participation in intercollegiate athletics. Smaller numbers of points were awarded for geographic factors (6 points), alumni relationships (4 points), outstanding essays (3 points), and leadership and service skills (5 points).

Beginning in 1999, LSA implemented the policy that the Supreme Court eventually reviewed. It continued to use the 150-point system, but no longer protected seats for minorities nor automatically rejected non-minority applicants based on point scores. It also began to permit admissions counselors to flag for further consideration applications with point scores that otherwise would not result in admission, including those of under-represented minorities, recruited athletes, students from certain parts of Michigan, and applicants with "unique life experiences, challenges, circumstances, interests or

talents." The new policy also permitted admissions counselors to flag non-minorities' as well as minorities' files for individualized review, and un-flagged minority applicants no longer received individual review.

The law school admissions policy 2/

In Grutter v. Bollinger, the plaintiff challenged the law school's admissions policies from 1995 to the present. The law school aims to "admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." Admissions decisions are based on LSAT scores, undergraduate GPAs, and such "soft" variables as the enthusiasm of recommenders, quality of undergraduate institution, quality of applicant's essay, and areas and difficulty of undergraduate courses. Although the law school uses an index score based on LSAT and GPA, and generally gives a preference to high index scores, the law school's policy is that admissions decisions should not be based solely on index scores. Every application is read in its entirety, and all information in the application is considered pertinent in the admissions decision. Admissions reviewers may exercise discretion to admit some applicants even if they have relatively low index scores.

The policy states two reasons for admitting students with low index scores: (1) some students' index scores may not be good predictors of their performance, and (2) some students may help the law school "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." Applicants in the second category, referred to as "diversity admissions," include "students with distinctive perspectives and experiences," which may be the product of life experiences or of racial and ethnic status. In recent years, the law school attempted to increase enrollment of students from groups that have been discriminated against in the past, such as African Americans, Mexican American, Native Americans, and Puerto Ricans raised on the U.S. mainland.

The law school aims to achieve a "critical mass" of minority students in each class to "ensure their ability to make unique contributions to the character of the law

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2/ See Grutter v. Bollinger, 137 F. Supp. 2d 821, 825-835, 842 (E.D. Mich. 2001); see also Grutter v. Bollinger, 2003 WL 21433492 (June 23, 2003).

school." Although the law school does not specify how many students constitute a "critical mass," current and former law school officials estimated that it ranges from 10 percent to 17 percent of the class. During the admissions season, the dean and director of admissions review daily reports on the racial and ethnic composition of the incoming class to ensure that a "critical mass" of minority students is enrolled.

The lawsuits -- lower court proceedings

Lower court proceedings in *Gratz v. Bollinger*

Jennifer Gratz and Patrick Hamacher, white residents of Michigan, applied for admission to LSA in 1995 and 1997, respectively. Although LSA told Gratz and Hamacher that their credentials were in the "qualified" range, it admitted neither candidate on first review of their applications, and ultimately denied both admission. In 1997, they filed suit in the U.S. District Court for the Eastern District of Michigan, claiming that by considering race as a factor in its admissions policies LSA violated the Equal Protection Clause of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. The court permitted 17 African American and Latino students and a non-profit organization, Citizens for Affirmative Action's Preservation, to intervene as defendants. The intervenors alleged that the case threatened African American and Latino students' access to higher education.

The district court held that LSA's admissions programs from 1995 through 1998 violated the Equal Protection Clause, but upheld the 1999-2000 programs as constitutional. The court found that precedent and expert reports supported a finding that LSA had a compelling interest in building a diverse student body. The court concluded that the current policy met the standards established by Justice Lewis Powell in Regents of the University of California v. Bakke (1978) because it neither used quotas nor shielded minority applicants from competition for admission. The court held, however, that the 1995-1998 policies were unconstitutional because they impermissibly used race by protecting seats for minorities, using facially different grids, and automatically rejecting only non-minority applicants below threshold rankings.

Lower court proceedings in *Grutter v. Bollinger*

Barbara Grutter, a white resident of Michigan who applied for and was denied admission to the University of Michigan Law School in 1996, alleged that the law school

impermissibly uses race as a predominant factor in admissions. Ms. Grutter claimed that the law school admissions polices from 1995 to the present violate the Equal Protection Clause, Title VI, and § 1981. The court permitted 41 individuals and three pro-affirmative action groups who supported the admissions policies to intervene as defendants.

The district court held that the law school's use of race in admissions decisions violated the Equal Protection Clause and Title VI. The court concluded that the Law School's interest in admitting a diverse class was not compelling because that interest was neither recognized by a majority of the Court in Bakke nor required to remedy past discrimination. The court also held that the law school's admissions policies were not narrowly tailored to serve an interest in diversity.

On appeal, the Sixth Circuit, en banc, reversed the district court in a 5-4 decision. The court concluded that the binding holding of Bakke is that diversity is a compelling state interest and that the law school's admissions policies were narrowly tailored to serve this interest because they conformed to Bakke's guidelines. The parties also appealed in Gratz, but the Sixth Circuit did not issue a decision because petitions for certiorari were filed shortly after the Sixth Circuit decided Grutter. The High Court granted the petitions. The case was argued on April 1, 2003.

III. SUPREME COURT DECISIONS IN GRUTTER AND GRATZ

The Supreme Court issued separate decisions in Grutter and Gratz. In Grutter, a 5-4 majority held that student body diversity in higher education is a compelling state interest that can justify race-conscious admissions policies, and upheld the University of Michigan law school admissions policy as a narrowly tailored means to achieve that interest. In Gratz, a 6-3 majority held that the undergraduate admissions system was not narrowly tailored and thus was unlawful.

The Supreme Court decision in *Grutter*

In Grutter, Justice O'Connor authored the majority opinion, joined by Justices Breyer, Ginsburg, Souter and Stevens. The Court applied the "strict scrutiny" standard that pertains to race-conscious decisions, but noted that this standard is not "strict in theory but fatal in fact" and must account for "context." "Not every decision influenced by race is equally objectionable," the Court said, "and strict scrutiny is designed to provide a framework for carefully examining the importance

and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."

Compelling interest

The Court first held that the law school has a compelling interest in the educational benefits that flow from a diverse student body. Drawing heavily on Justice Powell's opinion in Bakke, the Court "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." Justice O'Connor's opinion noted that "universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." Other Supreme Court cases that addressed affirmative action in contracting did not rule out diversity (or other possible non-remedial interests) as a permissible justification for race-based governmental action, the Court said.

The Court gave deference to the law school's judgment that diversity is essential to its educational mission, cited "a constitutional dimension, grounded in the First Amendment, of educational autonomy," and said it would presume the university's good faith. The benefits of student diversity are "substantial," the Court said, citing evidence that diversity advances education by breaking down stereotypes, improving classroom discussion and preparing students for the workforce and citizenship. While race does not necessarily determine viewpoint, the Court found, being a member of a minority group is "likely to affect an individual's views." The Court also seemed to cite societal benefits of keeping higher education opportunity open to all races, to enable "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation" and permit universities to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."

Narrow tailoring

The Court also held the law school policy narrowly tailored to meet the compelling interest in diversity. While "outright racial balancing . . . is patently unconstitutional" -- and a university admissions system may not use quotas, have "separate admissions tracks" for minority students, or insulate minority group members from "competition for admission" -- an admissions system may "consider race or ethnicity more flexibly as a 'plus' factor in the context of an individualized

consideration of each and every applicant." The law school policy met those criteria, the Court held:

First, the law school did not use a quota system. The Court distinguished the law school's goal of attaining a "critical mass" of underrepresented minority students from a quota. "[S]ome attention to numbers" is lawful, the Court said. Underrepresented minority enrollment in relevant years varied between 13.5 and 20.1 percent, "a range inconsistent with a quota." Second, the law school gave applicants "individualized consideration." It did not automatically admit or disqualify them based on race or award "mechanical, predetermined diversity 'bonuses.'" The policy gave substantial weight to diversity factors other than race, and the law school's weighing of those factors "can make a real and dispositive difference for nonminority applicants as well" as minorities. Third, it did not "unduly harm" nonminorities, because the law school took into account their potential contribution to diversity. Fourth, while "all governmental use of race must have a logical end point," in higher education admissions that requirement can be met by "sunset provisions" and "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." The Court said it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

The Court did not require the law school to exhaust "every conceivable race-neutral alternative," sacrifice its reputation for excellence by lowering standards, or abandon individualized application review. Instead, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks," and the law school met this burden. The Court was not convinced that race-neutral systems such as "percentage plans," used for undergraduate public university admissions in some states, would work for graduate or professional schools, and noted such plans may preclude individualized review. However, universities "can and should draw on the most promising aspects of these race-neutral alternatives as they develop."

Justice Ginsburg authored a concurring opinion in which Justice Breyer joined. Justices Scalia, Thomas, and Kennedy and Chief Justice Rehnquist each wrote dissenting opinions. The Chief Justice argued that the majority applied a standard more lenient than the "strict scrutiny" required to review government race-consciousness. The university's goal of

achieving a "critical mass" of minority students was not credible, he said, because the numbers admitted from different minority groups varied significantly and the percentage of applicants and admittees from each group correlated strongly.

The Supreme Court decision in *Gratz*

In a separate decision in Gratz v. Bollinger, the Court noted the holding in Grutter that diversity is a compelling state interest, but concluded that the LSA policy was not narrowly tailored and thus violated the Equal Protection Clause, Title VI, and § 1981. Chief Justice Rehnquist authored the majority opinion, joined by four other Justices. (Justice Breyer also agreed that the LSA policy was unlawful but did not endorse the majority's analysis.)

Whereas Justice Powell's opinion in Bakke "emphasized the importance of considering each particular applicant as an individual," the Court found that the LSA policy "does not provide such individualized consideration." The LSA scoring system automatically distributed 20 points to all minority applicants, out of a possible 150 points (100 points guaranteed admission), making the factor of race "decisive" for "virtually every minimally qualified underrepresented minority applicant." This, the Court held, distinguished the LSA policy from the Harvard admissions policy approved in Bakke. Although LSA admissions officers could flag applications of nonminorities as well as minorities for individualized review, the Court said this did not make the policy narrowly tailored because almost all qualified minorities were admitted without such review.

Justice Scalia's dissenting opinion in *Grutter*

Dissenting in Grutter, Justice Scalia predicted that the Court's decisions would "prolong the controversy and the litigation" concerning race-conscious admissions. Future lawsuits, he forecasted, may focus on: whether an admissions policy "contains enough evaluation of the applicant 'as an individual' . . . and sufficiently avoids 'separate admissions tracks'"; whether an admissions office goes "below or above" critical mass or pursues it "so zealously . . . as to make it a de facto quota system"; whether in a particular setting "any educational benefits flow from racial diversity" (an issue Justice Scalia said was not contested in Grutter); or whether an "institution's expressed commitment to the educational benefits of diversity" are "bona fide." Lawsuits might also be brought "on behalf of minority groups intentionally short changed in the

institution's composition of its generic minority 'critical mass,'" said Justice Scalia.

IV. A FEW KEY QUESTIONS

Institutional officials will now be faced with the task of assessing, with advice from counsel, how the Michigan decisions relate to their own institutional admissions policies and other race-conscious programs. The task often will not be easy. The Michigan cases show that, although the Supreme Court agreed that diversity can be a permissible justification for race-conscious admissions decisions, whether a particular policy is lawful depends on its particulars and how it is applied. In many cases, assessment of the lawfulness of an admissions policy or other race-conscious program will depend heavily on specific facts. Confident predictions regarding whether a particular program would be sustained will sometimes be difficult to make.

The cases also demonstrate broad skepticism among the Justices about how affirmative action may lawfully be implemented. In Bakke, four Justices would have held that higher education institutions may consider race in admissions to address societal discrimination and that courts should use a standard more deferential than "strict scrutiny" to review affirmative action. The Court did not adopt those views, and it is noteworthy that the current Justices voiced little support for them in Grutter/Gratz.

With the foregoing considerations in mind, this section addresses a few questions that administrators are likely to have concerning the impact of the Michigan decisions. Section V poses several more questions that admissions officers may wish to ask about their own institutional admissions policies.

What types of institutions are covered? The majority opinions in both cases held that the plaintiffs' statutory claims should have the same result as the constitutional claims. Thus, although Gratz and Grutter involved a public university -- and the Equal Protection Clause of the Constitution covers only "state actors" -- the decisions also apply generally to independent universities, which are subject to applicable civil rights statutes. The decisions focus on higher education admissions policies -- for graduate and undergraduate schools -- and do not directly address primary or secondary school admissions policies. However, a court might also apply in the

pre-college context the Grutter holding that student body diversity in higher education constitutes a compelling interest that can justify race-conscious admissions policies.

What activities are covered? The opinions of the Court explicitly address only admissions decisions. They do not discuss other activities incident to the admissions process, in which race might be a consideration, such as recruitment, pre-enrollment enrichment programs, and retention programs. They also do not explicitly address other activities in which race is sometimes considered, such as race-oriented student groups, clubs and sororities, and minority-associated dormitories and mentoring programs. They do not explicitly address financial aid. In each of those areas, institutions are encouraged to review with counsel the relevance of Grutter/Gratz and other legal developments to particular programs.

Other than race, what types of affirmative action are covered? Both of the policies the Court reviewed gave special consideration to members of underrepresented racial and ethnic minority groups. The Court thus did not directly address policies that may treat applicants differently based on sex, disability, sexual orientation, or other factors. Courts generally apply to such classifications standards more deferential (to varying degrees, depending on the classification) than the strict scrutiny standard applicable to race and ethnicity. Courts have applied strict scrutiny to certain other classifications, such as those based on alienage, as well as race and ethnicity. Title VI covers discrimination based on national origin as well as race.

Timing. The legal standards the Court announced for review of admissions policies went into effect immediately. Institutions are encouraged to consult counsel regarding whether procedures should be reviewed in time for the current admissions cycle.

Impact on other laws and decisions. Before the Supreme Court decided the Michigan cases, lower courts reached varying results in challenges to race-conscious admissions policies, and some states enacted laws addressing such policies. Identified below are certain considerations pertinent to the impact of the decisions in selected states where laws or court decisions have restricted race-conscious admissions in higher education.

- Louisiana, Mississippi, and Texas. Grutter overrules the 1996 Hopwood v. Texas holding of the U.S. Court of

Appeals for the Fifth Circuit, which covers Louisiana, Mississippi and Texas, that diversity is not a compelling interest that can justify race-conscious admissions. After the Hopwood decision, many institutions in those states suspended consideration of race in admissions decisions. Press reports indicate that some of those institutions may now review their admissions policies in light of Grutter and Gratz.

- California, Florida, and Washington State. These states have enacted state laws and regulations that restrict race-consciousness by government, including public universities. Those policies are not vitiated by Grutter/Gratz and remain in effect.

- Alabama, Florida, and Georgia. The U.S. Court of Appeals for the Eleventh Circuit, which covers Alabama, Florida, and Georgia, held in 2001 that a University of Georgia admissions policy that gave a fixed number of points to minority applicants was not narrowly tailored. Johnson v. Board of Regents of the University of Georgia. To the extent they are inconsistent, the legal standards announced in Grutter/Gratz now supersede the standards applied in that case.

Admissions process features. As noted in the decision summaries above, the Grutter and Gratz opinions discuss features of the LSA and law school admissions policies in the context of the Court's "narrow tailoring" analysis. Admissions officers are encouraged to review with the institution's counsel their institution's policies and procedures in light of that discussion. Certain key policy features that figured in the Court's discussion are encapsulated below.

The Court in Grutter indicated that the absence of certain features helped to make the law school policy narrowly tailored. The policy did not:

- Involve "racial balancing".

- Use quotas.

- Have "separate admissions tracks" for minorities.

- **Insulate minority applicants from competition for admission.**

- **Automatically admit or deny admission based on race.**

- **Award "mechanical, predetermined diversity 'bonuses.'"**

The law school did:

- **Give applicants "individualized consideration."**

- **Permit underrepresented minority enrollment to vary in relevant years between 13.5 and 20.1 percent and to differ from minority representation in the applicant pool. These variations, the Court said, were "inconsistent with a quota."**

- **Give "some attention to numbers" of minority students during the admissions process, but, admissions officials said, admissions decisions were not changed based on that information.**

- **Give substantial weight to diversity factors other than race, in a manner that could "make a real, dispositive difference for nonminority applicants as well" as minorities.**

- **Admit only those minority students deemed qualified.**

- **Take into account nonminority applicants' contribution to diversity.**

- **Frequently admit nonminority applicants with grades and test scores lower than those of some rejected minority applicants.**

- **Undertake "serious, good faith consideration of workable race-neutral alternatives that [would] achieve the diversity the university seeks."**

The Court in <u>Gratz</u> held that certain features contributed to making the LSA admissions policy <u>not</u> narrowly tailored.

- **It automatically distributed to minority applicants 20 out of a possible 150 points (applicants with 100 points were immediately admitted).**

- It did not provide "individualized consideration."

- It admitted "virtually every minimally qualified underrepresented minority applicant."

- Although admissions officers could flag nonminority and minority files for further review, virtually all qualified minorities were admitted without such review.

- That LSA received a large volume of applications, making individualized review impractical, did not relieve the university of its constitutional responsibility to conduct individualized reviews.

V. SELECTED QUESTIONS ADMISSIONS OFFICERS ARE ENCOURAGED TO CONSIDER ABOUT THEIR INSTITUTION'S ADMISSIONS POLICIES

Admissions officers and other university administrators may wish to ask the following questions about their institution's own admissions policies.

- Does the institution take race and ethnicity into account in making admissions decisions?

- What is the institution's rationale for considering race and ethnicity? For example, does the institution believe that diversity furthers the institutional mission? What is the factual basis for that belief?

- Does the institution promote the benefits of racial and ethnic diversity in programs other than the admissions policy?

- What kind(s) of diversity fit(s) the institutional mission? Is the institution pursuing each of these types of diversity? Does the admissions process adequately account for the potential contribution of both nonminority and minority applicants to institutional diversity?

- How is race considered in the admissions process? Is each application reviewed in an individualized manner? If not, what should be done to accomplish individualized review? What additional resources would be required? What changes in the admissions process would be entailed?

- Is a points system used to assess applications? Are different cut-offs used for minority and nonminority applicants? Do minority applications receive further review if they have a score or ranking at which nonminority applications do not receive further review?

- If admissions officers use a rubric in reviewing applications, is the rubric sufficiently flexible to allow individualized review?

- Have race-neutral alternatives been considered and found inadequate to achieve the institution's goals? What is the basis for that finding?

- Does the admissions policy include a mechanism for periodic review to determine whether race-consciousness remains necessary? What method is or should be used to make that determination? How often should the policy be reviewed? Who should perform the review? Should that process be open or confidential?

VI. CONCLUSION

The Michigan decisions clarified some questions regarding college and university admissions, but they also raise challenging questions, including about how race-conscious admissions policies and other institutional programs are conceived, expressed, and implemented. The decisions present an opportunity for institutional officials to review programs on their campuses to ensure that the programs are appropriate under applicable legal standards, and fit the institutional mission and goals.