Supreme Court Upholds Limited Role for Affirmative Action in Admissions.

I. **Introduction.**

This summer the U.S. Supreme Court issued rulings in two landmark cases in which the constitutionality of the use of race in higher education admissions decisions was directly addressed. The decisions in these two cases, *Grutter v. Bollinger*, No. 02-241 (U.S. June 23, 2003), and *Gratz v. Bollinger*, No. 02-516 (U.S. June 23, 2003) climaxed years of debate, reaching back several decades to the Court's last ruling on the use of race in university admissions in the famous case of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). While this new guidance from the Court has been welcomed, a close review of the rulings indicates that some questions still remain.

II. **The Law School Admissions Case - *Grutter v. Bollinger***

The *Grutter* case involved admissions policies used by the University of Michigan ("UM") law school. The school focused primarily on an applicant's academic credentials but, in addition, gave "substantial weight" to the ways in which an applicant might contribute to the "diversity" of the student body. Racial and ethnic diversity were specifically mentioned as important, the objective being to achieve a "critical mass" of underrepresented minority students. Other kinds of diversity contributions were also recognized, however, as entitled to consideration in the admissions process. Each candidate was to be evaluated individually in light of all available information in his/her file.

Grutter was a white female with a 3.8 college grade point average and high scores on the standardized law school admissions examination who was denied admission. She sued, claiming that race was used as a primary factor in admissions and that members of certain minority groups (African-American, Hispanic, and Native American) were preferred in admissions over candidates from "disfavored" racial groups (*i.e.*, Caucasian individuals) with similar credentials. This, she alleged, violated the Fourteenth Amendment and several federal anti-discrimination laws. In a hearing before the trial judge, evidence was received indicating that membership in the three identified minority groups was "an extremely strong factor," though perhaps not the predominant factor, in the admissions process. There was also testimony that a race-blind admissions process would have the effect of dramatically reducing the number of admitted applicants from these minority groups. The district court found in favor of the plaintiff, but that decision was overturned by the Sixth Circuit Court of Appeals in a split decision.

The Supreme Court agreed with the court of appeals, holding that UM's use of race did not offend the Equal Protection clause of the Fourteenth Amendment or federal civil rights statutes. It acknowledged that a "strict scrutiny"analysis must be applied to any racial classification, an analysis that sets a high standard for justifying government action challenged on Constitutional grounds. "Strict scrutiny" in an Equal Protection case means, first, that the classification is sustainable only if it furthers a "compelling" government interest. In this instance, UM identified the "educational benefits that flow from a diverse student body" as the single interest or reason supporting the use of race. Many in recent years had argued that, based

on Supreme Court rulings, a classification based on race could be upheld only when necessary to "remedy past discrimination" and that "diversity" was not of sufficient importance to be regarded as "compelling." The Court put such an argument to rest, deferring to the judgment of UM that a broadly diverse student body, including specifically one that included a "critical mass" of minority students, produced varied and substantial educational benefits. The promotion of racial understanding, the preparation of students to function in a racially diverse world, and the opening of higher education opportunities to individuals of all races were cited as examples of such benefits.

The second component of strict scrutiny analysis, usually referred to as the "narrowly tailored" element, requires that the means chosen to promote the compelling interest be no broader than is reasonable necessary (*i.e.*, be narrowly tailored) to accomplish that purpose. The Court stated that any admissions system using a quota or placing applicants on separate tracks based on race would fail under this test. However, "Universities can . . . consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant," which, in the Court's view, fairly described the operation of the UM Law School admissions system. Moreover, here an individualized inquiry into the file of each applicant was conducted, race/ethnicity was not the predominant factor nor were any "points" awarded for this qualification, other kinds of diversity were considered (work experiences, overcoming of personal hardship or family adversity, travel, unusual achievements, etc.), and the race-conscious admissions formula was not intended to be permanent, in the sense that UM was working toward a time when it would no longer be needed.

Finally, the Court observed that the program did not unduly harm or burden members of other racial/ethnic groups, because all applicants had the opportunity to advance their own "diversity" factors favoring admission. For these reasons, the Court found the use of race in the UM Law School admissions process to be "narrowly tailored" to achieve the desired compelling interest and, therefore, to be valid against constitutional and statutory challenge.

III. **The Undergraduate Admissions Case - *Gratz v. Bollinger***

The *Gratz* case was filed by two applicants, a Caucasian female and a Caucasian male, to the UM undergraduate program in literature, sciences, and the arts ("LSA") whose applications were rejected. The federal district court granted the plaintiffs' motion to allow the case to proceed as a class action, with the class being made up of all Caucasian applicants who, from 1995 forward, were denied admission to the LSA program.

The LSA admissions guidelines varied somewhat during the period under review. During earlier years, applicants with the same or similar scores based on high school grade point average, quality of the high school, strength of the school's curriculum, etc. were treated differently based on their racial or ethnic status. Beginning in 1998, a new "selection index" was employed under which each applicant was assigned points for a variety of factors considered pertinent, such as GPA, in-state residency, personal achievement, etc. An applicant who was a member of an "underrepresented racial or ethnic group" was automatically assigned 20 points. A new committee was established in 1999 to provide an additional level of consideration for those

applicant files that had been "flagged" by admissions counselors based on an applicant's possession of some quality deemed important to the class, including not only high class rank, unusual life experiences, special talents, etc. but also "underrepresented race, ethnicity, or geography."

Similarly to the plaintiffs in *Grutter*, the plaintiffs here asserted that UM was using race in admissions in violation of the Equal Protection clause and federal statutes. The district court agreed with respect to the operation of the earlier undergraduate admissions program, but it found the admissions standards utilized from 1999 forward to be lawful. Both parties appealed to the Sixth Circuit Court of Appeals, but before the appellate court could render a ruling (a bitter internal feud having reportedly developed over the case) the Supreme Court, in a somewhat unusual action, accepted the case for review along with *Grutter*.

As it had observed in *Grutter*, the Court first repeated the "well established" rule that any racial classification challenged under the Equal Protection clause may be upheld only if it satisfies review under "strict scrutiny" requirements, adding that this standard of review applies irrespective of the race of the individuals benefitted or burdened by the classification. Then, citing its opinion in *Grutter*, the Court summarily disposed of the plaintiffs' contention that "diversity" (of the UM freshman class) did not qualify as a compelling government interest, as required under strict scrutiny. However, the Court found more merit in the plaintiffs' next claim that, even if diversity is a compelling government interest in these circumstances, the LSA admissions standards failed the "narrowly tailored" part of the strict scrutiny analysis.

In the Court's view, the automatic assignment of points for minority racial/ethnic status was fatal to the LSA admissions program:

> We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that [University officials] claim justifies their program.

Clearly, race was a decisive factor in admission to the UM undergraduate student body. While other diversity factors were recognized, the LSA selection index assigned such factors predetermined, lower points than minority status. The admissions process lacked the necessary individualized kind of review of an applicant's file that would allow an assessment of each applicant's potential contribution to diversity in other ways, such as through his/her individual background, experiences, and characteristics. The "flagged file" system did not remedy the constitutional flaw, because this second level of review took place only after automatic assignment of the minority status points had occurred. Moreover, even with this component, the great majority of admissions decisions were based on the point system, not on an individualized evaluation of each applicant.

IV. Pre- and Post-*Grutter/Gratz*

Whether these cases break new ground is debatable. In many respects, the cases represent an extension of the 1978 *Bakke* decision. *Bakke* involved a review of the affirmative action admissions policies of the University of California at Davis ("UCD") Medical School. UCD maintained a dual track admissions program under which 16 places in the 100 member entering class were reserved for minority students. The Supreme Court split in its opinion about this practice, four justices concluding that it was unlawful while four others concluded that race-based criteria, including use of quotas, constituted permissible means of remedying general, societal discrimination. Justice Lewis Powell cast the deciding vote, siding with the former group in holding that race-conscious quotas and set-asides were illegal. However, he stated in his concurring opinion (not completely endorsed by any other justice) that a university may indeed consider race in admissions decisions in the interest of promoting one interest (only), that of achieving diversity in its student body. He further stated that diversity must be viewed as encompassing a number of educationally relevant factors beyond simple racial or ethnic characteristics and that race/ethnicity, when considered along with these other factors, is entitled only to some (*i.e.*, not dispositive) weight in making the admissions decision.

The years following the *Bakke* decision saw a lack of judicial consensus regarding its import. Two federal circuit courts of appeal struck down affirmative action admissions programs, one at the University of Texas Law School (*Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied 116 S.Ct. 2581 (1996)) and one at the University of Georgia (*Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001)), while another federal appellate court refused to sustain a challenge to the admissions policy at the University of Washington Law School (*Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) cert. denied 532 U.S. 1051 (2001)). In these and related decisions a primary question was whether Justice Powell's Bakke opinion represented the view of other justices and constituted authoritative precedent.

The divergence of views about the role that race/ethnicity may play in university admissions decisions has continued to the present, even in the Supreme Court. There were six opinions in *Grutter* and only five justices endorsed the majority opinion in its entirety, while *Gratz* produced seven opinions and a majority opinion in which, again, only five justices joined (with a sixth justice concurring in the actual holding but not the majority opinion). Interestingly, only Justice O'Conner subscribed fully to the majority rationale in both cases (she wrote the majority opinion in *Grutter*). Both proponents and critics of affirmative action claimed the Court's rulings provided some validation for their respective positions, though the latter were more reserved in viewing the decisions in a positive way. Most higher education associations welcomed the rulings, a large number having filed "friend of the court" briefs supporting the University of Michigan's efforts to attract and admit greater numbers of minority students.

Notwithstanding the "mixed" outcome and the division of the Court in the two cases, the rulings have brought an end to the debate about the extent to which Justice Powell's *Bakke* opinion reflects the position of the Court. The majority in both *Grutter* and *Gratz* relied heavily on and, in effect, adopted Justice Powell's analysis. In addition, the decisions are helpful in providing some clarification concerning what affirmative action measures may and may not be employed in the university admissions process. Bonus-point systems where racial minority status

is heavily weighted in favor of acceptance, separate admission tracks with class seats reserved for minorities, and race-normed admission grids are not permissible. On the other hand, it is clear now that minority status may be identified as one among a number of educationally relevant diversity factors to be given a positive value in carrying out a "holistic," individualized, and nonmechanical assessment of each applicant.

Not every issue in this area has been resolved, however. Is it necessary that race-neutral alternatives to increase minority student enrollment be considered and be found wanting by a university before race-conscious measures are implemented? If affirmative action admissions measures are legally justifiable only for a limited time, as the Court stated, what criteria will be used to determine when the need for such measures no longer exists? If the answer relates to the attainment of a "critical mass" of minority students, how is "critical mass" to be defined? What impact will these rulings have on race-conscious scholarships? Are there implications for affirmative action faculty hiring? It is evident that discussion and debate on these and other issues relating to race, the nation's campuses, and the law will extend beyond the Supreme Court's latest pronouncements. *Grutter* and *Gratz* may mark a turning point, but they will not be the last word.