Discussion of the Holdings in the Cases Grutter v. Bollinger and Gratz v. Bollinger

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In Gratz v. Bollinger, the Plaintiffs, who are Caucasians and were denied undergraduate admission to the University of Michigan, filed a class action against the University, alleging that the University violated Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the federal civil rights statute, 42 U.S.C. § 1981, by considering race as a factor in undergraduate admissions decisions. Similarly, in Grutter v. Bollinger, an applicant denied admission to the University of Michigan's Law School challenged the Law School's admissions policy that considers race as a "plus" factor.

The Supreme Court last tackled the issue of race-based applicant admissions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a case that may have raised more questions than it answered. In Bakke, the Court addressed whether it is constitutionally permissible for a university to consider race to achieve a diverse student body. Bakke held that the University of California's medical school admissions policy with a separate program for minority and non-minority applicants requiring minorities to fill 16 of the 100 available seats, was invalid. Through a separate majority opinion, however, the Court preserved the availability of race as a factor in admissions decisions, but left unstated how it may be used. Since Bakke, the debate has been whether race may be used as a factor in admissions to achieve a diverse student body (Justice Powell's lone opinion) or only as a remedial measure to address the effects of past discrimination.

In Grutter, the Law School's admissions policy evaluated an applicant's LSAT standardized testing scores and undergraduate grade point average in determining which students to admit. In addition to these objective factors, the Law School also considered "soft" variables such as letters of recommendation, admissions essays, and difficulty of undergraduate programs. Even after taking these soft variables into account, however, the Law School still admits some students with relatively low scores to help achieve the Law School's goal of having a diverse student body. Although the Law School did not set aside a specific number of seats for minority students, it did seek to admit a "critical mass" of minority students; enough minority students so that minority students do not feel isolated or compelled to act as "spokespersons" for their race. The district court held that the law school's admissions policy was unconstitutional and, on appeal, the Sixth Circuit reversed.

Upon appeal from the Sixth Circuit, the Supreme Court adopted Justice Powell's view in Bakke that "student body diversity is a compelling state interest that can justify the use of race in university admissions," and affirmed the Sixth Circuit's decision. The Court reaffirmed that, under the Equal Protection Clause, all governmental racial classifications are subject to the "strict scrutiny" standard. To withstand "strict scrutiny," the University was required to demonstrate that the use of race in its admissions program employed "narrowly tailored measures" that furthered "compelling governmental interests." The Court rejected the notion that race can only be given positive weight when necessary to remedy past discrimination. Instead, the Court deferred to the Law School's informed judgment that diversity is essential to its educational mission and held that race may be considered to achieve that compelling state interest.

The Law School's admissions program was ruled to be narrowly tailored to achieving a diverse student body because it was flexible enough to provide each applicant the "individualized consideration" necessary to withstand constitutional challenge. Reaffirming that universities may not use quotas, the Court found that the Law School's goal of attaining a "critical mass" of minority students did not transform the program into a quota because it was based on "individualized inquiry" without any preset numerical goals.
The Court in *Grutter* further found that to be “narrowly tailored,” the program must not “unduly burden” individuals who are not part of the favored racial groups. Because the Law School considers all elements of diversity (not just race), and non-minorities are not foreclosed from admission, the policy does not unduly burden non-minorities, the Court held. Finally, the Court noted that race-conscious admissions policies must be limited in time and periodically reviewed to determine whether racial preferences are still necessary to achieve a diverse student body. The Court stated that in 25 years, it expected the use of racial preferences would no longer be necessary.

Interestingly, Justice O’Connor, who wrote the opinion in *Grutter*, recently authored a book where, *inter alia*, she described the difficulties she faced as the sole woman on the Court, a predicament that was alleviated by Justice Ginsberg’s elevation to the Court. In other words, once a “critical mass” of women was attained on the bench, she was relieved of the obligation of being the spokesperson for all women, and was free to express her own opinion.

In *Gratz*, it was undisputed that the undergraduate admissions program used race as a factor to achieve its goal of diversity. Commencing in 1998, the University utilized a 150 point system in evaluating candidates for admission. Depending on where a candidate fell on the scale, they were automatically slotted as “admit”, “admit or postpone”, “postpone or admit”, “delay or postpone” or “delay or reject”. Pursuant to this system, underrepresented minorities automatically received an additional 20 points. Further, prior to 1999, non-minority applicants whose scores fell below a certain level were automatically excluded, whereas minority applicants were never automatically excluded. In 1999, the University stopped automatically rejecting “unqualified” non-minorities and began to credit certain applicants who possessed “important” qualities or characteristics, such as minority status, “unique life experiences,” “interests or talents,” socioeconomic disadvantage, and geography. However, the University continued to use the 150 point system. The automatic 20 point preference accorded to minimally qualified minority applicants essentially had a dispositive effect in ensuring their admission to the University. The district court in *Gratz* upheld the University’s admissions program from 1999 to the present as constitutional and the case was appealed to the Sixth Circuit. However, before the Sixth Circuit issued an opinion, the Supreme Court granted certiorari.

The Supreme Court in *Gratz* reversed the district court’s ruling. Although the Court noted that educational diversity is a compelling state interest under its decision in *Grutter*, the Court held that the University’s policy of automatically distributing 20 points (one-fifth of the points needed to guarantee admission) to every underrepresented minority solely because of his or her race is not narrowly tailored to achieve educational diversity. The Court found that the “individualized consideration” required by *Bakke* was lacking in the University’s admissions program because characteristics such as “extraordinary artistic talent” invariably received far fewer points than the huge bonus for minority status. This 20 point minority bonus “made race a decisive factor for virtually every minimally qualified underrepresented minority applicant.” By so insulating minority applicants from competition with non-minorities, the University created a “separate admissions track”, which was tantamount to an unconstitutional quota system.

The Court also rejected the University’s argument that the high volume of applications (13,500 in 1997, from which approximately 4,000 are selected) made it impractical to make an individualized inquiry, holding that “administrative challenges” do not render constitutional an otherwise problematic system. The undergraduate school’s admissions program was doomed by its reliance on automatic and mechanical features to ensure diversity. The likely impact of these Supreme Court decisions is that smaller educational institutions, such as elite liberal arts colleges and graduate schools, will have the capacity to individually assess candidates, while larger institutions, such as public universities, will be challenged to do so.

In light of these landmark Supreme Court decisions, it is critical for employers to review existing diversity initiatives, affirmative action programs and other preferential selection systems. By not undertaking such a review, an organization may face significant legal risks. For information about how to conduct a vulnerability audit of potential liability stemming from diversity initiatives and similar programs, please contact *contact* the firm’s *Affirmative Action* and Diversity Practice Group.

*View Grutter v. Bollinger decision* (.PDF file/964 KB/35 pgs.)

*View Gratz v. Bollinger decision* (.PDF file/886 KB/68 pgs.)

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