

RESEARCH MATTERS

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Factoring in Race: A Divided United States Supreme Court Rules on Two Affirmative Action Programs at the University of Michigan

On June 23, 2003, a divided United States Supreme Court issued two opinions regarding affirmative action admissions programs at the University of Michigan (UM). Both decisions are based on University of California Regents v. Bakke, 438 U.S. 265 (1978), in which the supreme court invalidated a program that reserved a set portion of first-year admissions to the University of California at Davis medical school for disadvantaged minority students. The medical school asserted that the program was necessary, in part, to obtain the educational benefits that flow from an ethnically diverse student body.

"More important, for the reasons set out below, today we endorse 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, Grutter v. Bollinger, et al.

The Fourteenth Amendment to the United States Constitution bars the states from denying any citizen equal treatment under the law (known as the Equal Protection Clause). The supreme court has long held that, under the Equal Protection Clause, any use of racial categories by governmental entities is inherently suspect and may be sustained only if the categorization passes "strict scrutiny." Under this test, the action must be necessary to further a compelling governmental interest and narrowly tailored to further that interest. To be narrowly tailored, the government action must be limited both in scope and in duration. Although a majority in Bakke agreed to invalidate the program, there was no majority agreement as to the rationale for doing so. Justice Powell, writing for a divided court, ruled that the program violated the Equal Protection Clause. However, Justice Powell concluded that the state had a substantial interest in educational diversity and that this interest could be legitimately served by a properly devised competitive admissions program that considered race and ethnicity as a factor, but not as the determinative factor, in making admissions decisions.

The Michigan cases follow Justice Powell's opinion, confirming that there is a compelling governmental interest in achieving student diversity and that race can be one of many factors, but cannot be the sole determining factor, considered in an admission program.

In Grutter v. Bollinger, et al., the supreme court, with a five-to-four majority, declared that UM's law school had a compelling governmental interest in creating a diverse student body and that its admission program, which sought to achieve a diverse student body and admit a "critical mass" of minority students, was constitutional. "Critical mass" was defined as meaningful numbers or representation that would encourage certain minority students to participate in the classroom and not feel isolated, but use of the concept of critical mass did not require the school to admit a particular percentage or number of minority students. The school's admissions policy focused on academic ability coupled with a flexible assessment of each applicant's talents, experiences, and potential. Each applicant was individually considered on the basis of all the information available in the applicant's file, including the student's grade point average (GPA) and Law School Admission Test (LSAT) score, letters of recommendation, and an essay describing how the applicant will contribute to the life and diversity of the law school.

The review also included “soft variables” such as the enthusiasm of recommendations, the quality of the undergraduate institution, and the areas and difficulty of undergraduate course selection. Although the policy considered many possible bases for diversity admissions, it sought to enroll a critical mass of minority students, especially African-Americans, Hispanics, and Native Americans. The extent to which race was considered varied from one applicant to another, but the school asserted that, overall, race was not the predominant or determining factor in the admissions process.

In Grutter, the majority held that:

- Racial distinctions may be used in an admissions program to serve the compelling state interest in student diversity, but the use of race must be narrowly tailored to accomplish this purpose. Universities cannot establish racial quotas, maintain separate admissions tracks for members of certain racial or ethnic minorities, or insulate such applicants from competition for admission. A university may consider race or ethnicity only as a “plus” in a particular applicant’s file, in the context of individualized consideration of each applicant. When using race as a factor, an admissions program must be flexible, must ensure that each applicant is evaluated as an individual, must consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and cannot make an applicant’s race or ethnicity the defining feature of his or her application.
- A race-conscious admissions program cannot unduly burden individuals who are not members of the favored racial and ethnic groups. Such a program must consider all pertinent elements of diversity and must not foreclose an applicant from consideration simply because of the applicant’s race or ethnic group. Under the law school’s admissions policy, there are a broad range of qualities and experiences that may be considered valuable contributions to student body diversity, and the school gives substantial weight to diversity factors besides race.
- A narrowly tailored program must be limited in duration. In race-conscious admissions policies, this requirement can be met by sunset provisions, periodic reviews to determine whether racial preferences are still necessary to achieve diversity, and the inclusion of race-neutral alternatives as they develop.

- Although narrow tailoring requires serious, good-faith consideration of workable race-neutral alternatives that will achieve student diversity, it does not require exhaustion of every conceivable race-neutral alternative. The majority briefly touched on “percentage plans” adopted by public undergraduate institutions in Texas, Florida, and California, which guarantee admission to all state high school students above a certain class rank. Such plans had been suggested as a race-neutral alternative. The majority stated it was not clear how such plans could work for graduate and professional schools and, even assuming that such plans are race-neutral, they may preclude the school from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse but diverse in all the qualities valued by the school.

In Grantz, et al v. Bollinger, et al, the supreme court, with a five-to-four majority, ruled that UM’s undergraduate admissions policy is unconstitutional. The admissions program created a “selection index” on which an applicant could score a maximum of 150 points. Each application received points based on several factors, including high school GPA, standardized test scores, and personal achievement or leadership. Under a “miscellaneous” category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group.

Citing Bakke, the majority in Grantz stated that an admissions program that made race a determinative factor would not pass the strict scrutiny test. In Bakke, Justice Powell emphasized the importance of considering each particular applicant as an individual, assessing all of the individual’s qualities and ability to contribute. The current admissions program, declared the majority, fails to provide such individualized consideration by automatically distributing 20 points to applicants from certain minority groups. This automatic distribution of points, stated the majority, has the effect of making race a decisive factor in admissions, and this automatic awarding of points based solely on an applicant’s race or ethnicity is not narrowly tailored to serve the school’s compelling interest in achieving a diverse student body.

--by Sharon Hope Weintraub