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TOPIC:

U.S. SUPREME COURT DECISIONS IN UNIVERSITY OF MICHIGAN ADMISSIONS CASES

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(Note: On Thursday, July 24, 11:30 am - 1:30 pm EDT, Michael Madden, along with NACUA members Marvin Krislov and Jonathan Alger of the University of Michigan, and Elizabeth Meers of Hogan and Hartson, will be a panelist on NACUA's Virtual Seminar "Affirmative Action in College and University Admissions: The Landscape After the University of Michigan Cases". Click [here](#) for detailed information about the program.)

DISCUSSION:

On Monday, June 23, 2003, the United States Supreme Court issued its decisions in [Grutter v. Bollinger](#) (No. 02-241) and [Gratz v. Bollinger](#) (No. 02-516), which involve constitutional challenges to the consideration of race in the University of Michigan's law school and undergraduate admissions programs. The Court held that consideration of race as a positive factor in the admissions process is permissible as a part of a narrowly tailored program designed to foster educational diversity and that Michigan's law school program comports with this standard. It also held that Michigan's undergraduate program fails the Court's narrow tailoring requirement insofar as it inflexibly awards 20 out of 150 points on an admissions index to underrepresented minority students. Rather, the Court said, that race may be considered in furtherance of diversity in the context of an "individualized, holistic review of each applicant's file." These decisions are applicable not only to public colleges and universities, but also to private schools that are subject to Title VI, 42 U.S.C. § 2000d, because they receive federal funds.

Background

Since the mid-1990's, colleges' and universities' reliance on Justice Powell's opinion in [Regents of the University of California v. Bakke](#) 438 U.S. 265 (1978) has come under attack in a series of lawsuits challenging race-conscious admissions programs designed to increase student body diversity. Lower federal courts have split over the vitality of Justice Powell's diversity rationale, and have also disagreed as to how, if at all, schools can use race in ways that comport with current Equal Protection standards. Until this past year, the Supreme Court has declined to become involved in this debate.

The disagreement between lower federal courts was particularly evident in the Michigan cases. In the law school case, the district court found against Michigan, but was reversed by the en banc Sixth Circuit, in a fractious 5-4 decision. In the undergraduate case, the district

court upheld the current Michigan system. However, the Sixth Circuit was apparently unable to reach a decision in that case, and the Supreme Court took the unusual step of granting certiorari without a court of appeals decision [1].

In its decisions last week, a majority of the Court generally adopted the principles and standards set forth in Justice Powell's *Bakke* opinion. In addition, the Court gives additional guidance, based on review of actual admissions systems, regarding ways in which federal law permits consideration of race in admissions.

Key Holdings

The Court's majority generally adopted the rationale articulated by Justice Powell in *Bakke*, while adding specificity as to how it will apply strict scrutiny to race-conscious measures.

1. Educational Diversity Is a Compelling Interest: In *Grutter*, Justice O'Connor, joined by Justices Ginsburg, Breyer, Stevens and Souter, stated:

Today we hold that the Law School has a compelling interest in attaining a diverse student body. ... The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.

Although he would have found the law school's practices unconstitutional on narrow tailoring grounds, Justice Kennedy agreed with the majority's holding that race may be considered in furtherance of educational diversity, "when supported by empirical evidence." Chief Justice Rehnquist did not directly express a view on the question, stating only that he agreed with the majority that there were "limited circumstances when drawing racial distinctions is permissible." Only Justices Thomas and Scalia expressly rejected diversity as a compelling interest, stating their view that race-based measures are permissible only in cases of "pressing public necessity" (citing *Korematsu v. United States*, 323 U.S. 214 (1944)) or to remedy past discrimination. Thus, the Court overwhelmingly rejected plaintiffs' argument that race conscious measures are permissible only to remedy the present effects of discrimination by a governmental actor or recipient of federal funds.

The Court based its diversity holding on its conclusions that a racially diverse education "promotes cross racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." It also noted that a diverse school is important because "classroom discussion is livelier, more spirited, and simply more enlightening." "By virtue of our Nation's struggle with racial inequality [underrepresented minority students] are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."

The majority was also influenced by the submissions of various *amici* from industry and the military, who argued that a racially diverse educational environment is essential to prepare students to function in an increasingly diverse workforce, military and society at large. The majority opinion is also laced with statements indicating the Court's intense awareness of the importance of opening channels for persons of color to participate in the leadership of the Nation: e.g.,

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all

members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Court's treatment of the diversity issue allays concerns that the price of maintaining and defending race conscious programs may be too high for many schools. Michigan spent millions in developing an extensive and unrebutted evidentiary record on the benefits of diversity [2]. University administrators and their counsel have worried that costs and burdens of making such a showing in every case would be prohibitive, particularly if benefits must be established at the individual school whose practices are being challenged. Justice O'Connor's opinion, consistent with school integration cases, treated the value of diversity as something other than a mere evidentiary proposition. Many of her conclusions regarding the benefits of diversity are based on amicus submissions, as well as the Court's prior holdings. Moreover, the Court indicated that it was deferring to the educational judgment of the university as to the value of diversity. Accordingly, it is fair to conclude that, under Justice O'Connor's approach, the benefits of diversity need not be proven through submission of evidence specific to the school in question [3]. Nevertheless, schools would be well-advised to review the existing literature and evidence regarding the benefits of diversity, perhaps conduct surveys of their own students and faculty, and document their considered judgment on the question.

Moreover, despite the Court's focus on increasing minority access to higher education, it reiterated the fundamental principle of Justice Powell's *Bakke* opinion: race may be considered in furtherance of educational diversity only so long as the school "sufficiently takes into account, in practice as well as theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body." In other words, schools that employ race conscious policies must not "limit in any way the broad range of qualities and experiences that be considered valuable contributions to student body diversity." Applicants must have the opportunity to "highlight their own potential diversity contributions" and schools must "actually give substantial weight to diversity factors besides race."

2. Elements of a Narrowly Tailored Race Conscious Program: Because the Michigan cases allowed the Court to apply strict scrutiny to two real admissions systems, its holdings are far more specific than the earlier guidance in *Bakke*.

a. Policy of Individualized Comparison. In the law school case, the Court identified several "hallmarks" of a narrowly tailored race conscious program. Relying principally on Justice Powell's *Bakke* opinion, Justice O'Connor wrote that in order to comport with the requirement that no individual be insulated from comparison with others on the basis of race, "truly individualized consideration demands that race be used in a flexible, nonmechanical way." Later in her opinion, Justice O'Connor explained that, while race may be considered as a "plus" factor in the admissions calculus, that plus should be identified and weighed in the context of "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." Quoting *Bakke*, the Court emphasized that a narrowly tailored admissions program "must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, to place them on the same footing for consideration, although not necessarily according them the same weight."

When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

The Court readily concluded that the law school's program comported with these requirements, because it:

- does not guarantee admission based on scores alone;

- does not restrict the types of diversity factors eligible for positive consideration;
- does not have a policy, either *de jure* or *de facto*, of admitting or rejecting based on any single “soft” variable;
- provides an opportunity, through consideration of personal statements, recommendations and essays, for all applicants to demonstrate their potential contributions to diversity;
- actually gives substantial weight to non-racial diversity factors, as demonstrated through actual admissions decisions.

Importantly, the majority rejected arguments that the law school gave too much weight to race because, within a given range of grades and test scores, it admitted almost all underrepresented minorities while rejecting almost all whites. The *Grutter* Court found no problem with the admission rate disparities within the same score ranges, which are common to most race-conscious plans, noting that all admitted minorities were qualified to attend the law school, and stating that “[b]y virtue of our Nation’s struggle with racial inequality, such students are...less likely to be admitted in meaningful number on criteria that ignore these experiences.” Note, however, Chief Justice Rehnquist’s comment in the undergraduate case that “the University admits virtually every qualified applicant from these [underrepresented] groups:” A clear implication of this statement is that there will be a problem if schools give so much weight to race that all “qualified” minority applicants are admitted, while the vast majority of other “qualified” applicants are rejected, regardless of whether the weight accorded to minority status is determined formalistically or more subjectively.

b. No Mechanistic Formulas. As resounding as the law school’s victory was, the undergraduate case quickly provides a reminder of how difficult it can be to apply *Bakkean* concepts when a school must review many thousands of freshman applicants. As the Court said, “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.”

Michigan used a 150 point admissions index to sort out the thousands of freshman applications that it receives each year. In the years in question, students who amassed 100 points were admitted. Aside from grades and test scores, points could be awarded based on Michigan residency status, leadership and service, personal achievement, geographic diversity, socioeconomic disadvantage, attendance at a predominantly minority high school, underrepresentation in the unit to which the student was applying (e.g. men in nursing), and legacy or scholarship athlete status. Underrepresented minorities were automatically awarded 20 points.

At least six Justices agreed that it was unconstitutional to automatically distribute one fifth of the points necessary for admission based only on the race of the applicant. There are arguably two bases for this holding. First, and most clearly, automatic points for racial status is inconsistent with the policy of individualized comparison so essential to the holding in the law school case: “The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.” Second, the weight which was accorded to race in undergraduate admission was simply too great for the *Gratz* majority: “the LSA’s automatic distribution of 20 points has the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant.”

The majority rejected an argument that the effect of underrepresented minority status was counterbalanced by the plus awarded to other candidates whose files were “flagged” for consideration by the University’s Admissions Review Committee (“ARC”). Although this rejection was based in part on the absence of evidence in the record as to the effect of ARC review on the weight accorded to non-racial diversity, the *Gratz* majority indicated skepticism that ARC review, coming after minorities have been considered, serves to put all applicants on the same footing.

c. Concept of Critical Mass/No Undue Harm. Justice O'Connor's opinion also rejected several other key challenges to the law school's program. First, plaintiffs argued that the fact the law school's goal of seeking to admit a "critical mass" of underrepresented ethnicities amounted to an impermissible quota. The Court said that it was permissible for admissions officials to seek to admit enough minorities so as to prevent isolation and allow their voices to be heard, so long as no set number of seats was reserved for minorities and the policy of individual comparison described earlier was adhered to. Chief Justice Rehnquist and Justice Kennedy argued that the evidence, when viewed through the lens of strict scrutiny, showed that the law school consciously tried to admit and enroll classes consisting of 13-15% underrepresented minorities and that was the functional equivalent of a quota. Justice O'Connor's majority opinion took a different view of the evidence, accepting the testimony of admissions officials that they did not change their evaluation of candidates based on the numbers of minorities previously admitted and pointed out differences in minority admission rates from year to year and group to group.

In *Grutter*, the Court also indicated that race conscious programs must not unduly harm members of non-preferred groups. Statistically, the level of preference given to minority candidates at Michigan only slightly altered other candidates' chances of admission. The Court was seemingly comfortable with this level of burden, emphasizing that the loss of chance was not solely due to race.

d. Race Neutral Alternatives. The *Grutter* majority also rejected claims made by plaintiffs and the Bush administration, as *amicus*, that Michigan could not meet narrow tailoring requirements because it had not sufficiently considered race-neutral means of attaining diversity; e.g. percentage plans or lotteries. The Court held that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative." Rather, schools are required to consider only "workable" options. In this regard, it rejected plaintiffs' argument that universities should be made to choose between maintaining "elite" status and attaining racial diversity, stating that narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." Justice O'Connor agreed with Michigan that there were no workable alternatives that would not "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."

As with the question of "critical mass," the *Grutter* Court's resolution of this issue turned on differences between Justice O'Connor's version of strict scrutiny, which she has previously described as designed to determine what classifications are "benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." The purpose of strict scrutiny, she said, was to "smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool." Reminding us that "strict scrutiny is not strict in theory, but fatal in fact," Justice O'Connor went on to state that "context matters" in the application of strict scrutiny. Courts have traditionally been deferential to legitimate academic judgments in the context of higher education, and Justice O'Connor's opinion continued that approach, much to the consternation of the dissenters in *Grutter*, who argued for a more skeptical, less deferential review. In light of the tone of Chief Justice Rehnquist's majority opinion in *Gratz*, it remains to be seen which version of strict scrutiny the Court will apply in the future.

e. Time Limits. Although the Court accepted Michigan's judgment that there currently are no workable alternatives to its race-conscious plan, it also said that narrow tailoring requires a time limit in order to comply with narrow tailoring. The Court said, based on time elapsed since *Bakke*, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." It specifically noted that universities in California, Washington and Florida, where measures like Michigan's are prohibited by state law, "are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other states can and should draw on the most promising of these race-neutral approaches as they develop." Accordingly, as a part of the process of establishing and maintaining race conscious programs, it has now become incumbent on schools to stay current with and give serious consideration to the efforts of other institutions to achieve diversity through race neutral means.

CONCLUSION:

The Court's decisions in the Michigan cases have decisively settled the question of whether colleges and universities may consider race to achieve diversity. Nevertheless, the *Gratz* and *Grutter* opinions impose obligations on schools that use race to insure that their programs are narrowly tailored to achieve educational diversity, which may prove particularly challenging for large institutions. Institutions which currently use race as a factor in admissions should carefully review their procedures to ensure they comply with the court's rulings in the University of Michigan cases. In addition, the decisions raise, but do not resolve, additional questions about their application to financial aid, employment and other educational decisions which contribute to a diverse educational environment.

FOOTNOTES

RESOURCES for COUNSEL:

Constitution and Statutes:

- [Equal Protection Clause of the U.S. Constitution](#)
- [42 U.S.C. 2000d](#)
- [42 U.S.C. 1981](#)

Cases:

- [University of California Regents v. Bakke](#)
- [Hopwood v. Texas](#)
- [Smith et al. v. University of Washington](#)
- [Johnson et al. v. Board of Regents of the University of Georgia](#)

- [University of Michigan Admissions Lawsuits Resources Page](#)

Link to web page maintained by the University of Michigan with extensive background information on the lawsuits challenging its admission procedures, including all court filings, briefs and lower court opinions.

NACUA Annual Conference / CLE Workshop Outlines:

- [Alger & Madden, Affirmative Action in Admissions: From Texas to Washington to Michigan and Back Again](#) (June, 2003)
- [Thro, Affirmative Action and Discrimination in College and University Admissions and Financial Aid](#) (March, 2003)
- [Drier, Update on Affirmative Action Litigation](#) (June, 2002)
- [Alger, Update on Affirmative Action Litigation](#) (June, 2002)
- [Barry, Affirmative Action in Admissions](#) (June, 2001)
- [Barry, Recent Legal Developments in Affirmative Action](#) (Sept, 2000)

Journal of College and University Law Articles:

- [Rosenblum, Surveying the Current Legal Landscape for Affirmative Action in Admissions](#), 27:709 (Winter 2001)
- [Leonardi, Race-Conscious Admissions in Higher Education](#), 28:153 (2001)

Additional Resources:

■ ["The Uncertain Future of Race-Sensitive Admissions"](#) prepared by **Derek Bok**, former President of Harvard University and former Dean of Harvard Law School.

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