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AFFIRMATIVE ACTION IN HIGHER EDUCATION: BAKKE HAS BEEN AFFIRMED

ROY CARLETON HOWELL*

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I. INTRODUCTION

*Grutter v. Bollinger*¹ and *Gratz v. Bollinger*² demonstrate the appropriate legal consequences when a state university protects the Fourteenth Amendment rights of individual applicants while recognizing its inferred First Amendment right of a diverse student body. In *Grutter*, the University of Michigan Law School (hereafter Michigan Law) complied with the Supreme Court's *Regents of the University of California v. Bakke* decision, which held that a state may consider the race of any applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin.³ Michigan Law scores and considers citizens of every race and ethnic background for admissions to its program, and it considers the qualifications, both quantitative and extracurricular, as well as every candidate's potential for contribution to educational diversity. In *Sweezy v. New Hampshire*, the Supreme Court held that a public university's implied First Amendment right of academic freedom includes the right, among other things, to admit.⁴

* Filed an *Amicus Curiae* Brief in support of the Respondents (i.e., University of Michigan) in the United States Supreme Court. See, *Amicus Curiae* Brief of Hayden Family, www.umich.edu/%7Eurel/admissions/legal

1. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

3. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1979).

4. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

Michigan Law's admission program was narrowly tailored to serve its compelling interest in achieving a heterogeneous student population. Therefore, Michigan Law's consideration of race and ethnicity in its law school admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment,⁵ or Title VI of the Civil Rights Act.⁶ However, in *Gratz* the United States Supreme Court struck down Michigan's undergraduate admission point system, which assigned twenty points as consideration for being a member of a minority group, as violative of the Equal Protection Clause.

II. ANALYSIS OF *GRUTTER v. BOLLINGER*

In *Grutter v. Bollinger*, the United States Supreme Court held that Michigan Law narrowly tailored the use of race in law school admissions to further a compelling state interest to obtain educational benefits by forming a diverse student body. Therefore, Michigan Law's actions regarding admissions complied with the Equal Protection Clause, and with Title VI and 42 U.S.C. § 1981.⁷

Michigan Law has no quota system. High grades and standardized test scores increase an applicant's chance for admission.⁸ Michigan Law considers the rigors of an applicant's undergraduate courses, recommendations, and personal essays. For Michigan Law, "it is true that black applicants were admitted at much higher rates than white applicants with similar grades and test scores. But, that fact does not prove that affirmative action imposes a substantial disadvantage on white applicants."⁹ The objective statistics "show that rejected white applicants have every reason not to blame their misfortune on affirmative action.

In selective admissions, the competition is so intense that even without affirmative action, the overwhelming majority of rejected white applicants still wouldn't get in."¹⁰ Therefore, the admission formula for the law school is absolutely not a quota.

The Law School drafted its admissions policy to comply with the Supreme Court's opinion in *Bakke*. Adopted by the full faculty in 1992, the policy states that the Law School's "goal is 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."¹¹

5. U.S. CONST. amend. XIV.

6. 42 U.S.C. §§ 2000d to 2000d-7 (2000).

7. *Grutter*, 539 U.S. 306.

8. *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002).

9. *Grutter*, 288 F.3d at 767 (Clay, J. concurring).

10. *Id.* at 768.

11. *Id.* at 735-36.

Race and ethnicity can be a reasonable factor in Michigan Law's legitimate efforts to secure a diverse student body. Moreover, in the case at bar it was not the only factor. What other protocols and or factors did the admissions policy consider?

It further provides that the Law School "seeks a mix of students with varying backgrounds and experiences who will respect and learn from each other." As part of the Law School's policy of evaluating each applicant individually, its officials read each application and factor all of the accompanying information into their decision.¹²

Michigan Law protects the individual Fourteenth Amendment rights of applicants, while achieving its inferred First Amendment right of a diverse student body, and its policy complies with the precedent set by the Supreme Court's holding in *University of California Regents v. Bakke*.¹³ Pursuant to the doctrine of *stare decisis*, the United States Supreme Court took judicial notice of the well-reasoned precedent of *Bakke*. In *Bakke*, Justice Powell, writing for the majority, concluded that a state may consider the race of an applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin.¹⁴

Michigan Law's admissions program legitimately serves the State by the proper consideration of race and ethnic origin within the State's substantial interest. Michigan Law's admissions program is the ideal system that Justice Powell envisioned. Citizens of every race and ethnic background are scored and considered for all available seats for admission to Michigan Law. The admissions office at Michigan Law considers qualifications, both quantitative and extracurricular, as well as each candidate's potential for contribution to educational diversity. Justice Powell provided clear guidance by articulating the following analysis:

. . . race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership poten-

12. *Id.* at 736.

13. *See Bakke*, 438 U.S. 265.

14. Justice Powell wrote the following:

. . . the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed. *Bakke*, 438 U.S. at 320.

tial, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.¹⁵

Michigan Law's admissions policies fell within Justice Powell's legal analysis of appropriate consideration of race, while protecting individual freedoms from state infringement.¹⁶ To overturn Michigan Law's admissions program is to set aside a quarter century of law established by the Court's *Bakke* decision.¹⁷ Perhaps 25 years from now race-neutral admissions formulas will enable schools to terminate the practical use of racial preferences, but in today's American culture the Court's *Bakke* and *Grutter* decisions are necessary and proper.

III. ANALYSIS OF *GRATZ V. BOLLINGER*

In *Gratz*, the United States Supreme Court held that the University of Michigan's use of race in its freshman admissions program was not narrowly tailored to achieve a compelling state interest of a diverse student body and that Michigan's actions regarding freshman admissions violated the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981.¹⁸

Michigan's undergraduate admission plan rated applicants on a 150-point scale, with as many as 110 points earned for academic standards, and a total maximum of 40 points for other factors. The academic considerations were grade point average, high school attended, curriculum, and ACT/SAT score. The non-academic factors were geography, alumni relationship, essay, personal achievement, leadership and service, socioeconomic disadvantage, underrepresented racial/ethnic minority, men in nursing, scholarship athlete, and provost's discretion.

The juxtaposition of *Grutter* to *Gratz* illustrates a profound factual difference in the pursuit of a racially and culturally diverse student body. In the latter case, all minority applicants to Michigan's undergraduate program were immediately assigned 20 points toward admission merely because of their race. It was irrelevant whether a minority applicant was wealthy, or from an affluent background. In *Gratz*, the University of Michigan carte blanche gave all minority ap-

15. *Bakke*, 438 U.S. at 317.

16. *Bakke*, 438 U.S. at 314. "Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."

17. *See Bakke*, 438 U.S. 265.

18. *Gratz*, 539 U.S. 244.

plicants 20 points. It was essentially a 20-point birth right toward a ticket for admission to Michigan's undergraduate program.

The following chart articulates Michigan's scoring program for undergraduate admissions. The chart bifurcates the two categories, academic and non-academic, and assigns the scoring points which Michigan employs:

SCORING ADMISSIONS

The University of Michigan's admissions plan rates undergraduate applicants on a 150-point scale, with as many as 110 points earned through academic factors

Academic factors	Points
GPA	40 to 80
School	0 to 10
Curriculum	-4 to 8
ACT/SAT score	0 to 12
Sub group 1	(Total maximum 110 points)
Other factors	Points
Geography	2 to 16
Alumni	1 to 4
Essay	1 to 3
Personal achievement	1 to 5
Miscellaneous (one of the following):	
Socioeconomic disadvantage	20
Underrepresented racial/ethnic minority	20
Men in nursing	5
Scholarship athlete	20
Provost's discretion	20
Sub group 2	(Total maximum points 40 points)
Sub group 1 score + Sub group 2 score = Selection Index	(Total maximum points 150 points)¹⁹

The assignment of twenty points (or one-fifth of the point total needed to guarantee admission) to every underrepresented minority applicant solely because of race was determined impermissible as a matter of law.²⁰ Therefore, the United States Supreme Court held in its *Gratz* opinion that Michigan's undergraduate admission program was not narrowly tailored to achieve educational diversity.²¹

19. Barbara Kantrowitz and Pat Wingert, *What's At Stake*, NEWSWEEK, January 27, 2003, at 34.

20. *Gratz*, 539 U.S. 244.

21. *Id.*

IV. THE STANDARD FOR AFFIRMATIVE ACTION IN HIGHER EDUCATION

What is the standard for affirmative action in higher education as a result of *Grutter* and *Gratz*? As a general rule, if a university admissions program is narrowly tailored to meet a compelling government interest for student diversity, it is deemed constitutionally permissible. This standard is commonly known as strict scrutiny.

Supreme Court decisions have suggested consideration of race-neutral means as a necessary way to satisfy the narrowly tailored component of strict scrutiny.²² "In determining whether race-conscious remedies are appropriate, [the Court] look[s] to several factors, including . . . the efficacy of alternative remedies."²³ However, there is a difference between government contracts in *Croson*²⁴ and university admissions in *Bakke* with regard to consideration of both race and ethnicity. Education is unique from employment, minority business contracts and re-districting. As held in *Grutter*, "[t]his unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re-districting context; it comprises only the public education context and implicates the uneasy marriage of the First and Fourteenth Amendments."²⁵

Michigan Law's admissions program is narrowly tailored to meet a compelling government interest, as discussed in *Bakke*. *Bakke* held that, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."²⁶

In *Bakke*, Justice Powell held that the University of California's admissions program was quota-based, and therefore violative of individual protections. A quarter century later it was held that Michigan Law's admissions policy protected individual rights while furthering a compelling state interest to achieve a heterogeneous student population by considering a broad array of qualifications and characteristics of which both race and ethnic origin are but single factors. Justice Powell articulated the importance of ethnic diversity while protecting individual constitutional rights:

22. See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 507 (1989).

23. *United States v. Paradise*, 480 U.S. 149, 170 (1987).

24. *Croson*, 488 U.S. at 507.

25. *Grutter*, 288 F.3d at 749-50 (quoting *Hopwood v. State of Texas*, 78 F.3d 932, 965 (5th Cir. 1996)).

26. *Bakke*, 438 U.S. at 315.

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.²⁷

In *Grutter*, the Court held that Michigan Law's goal of attaining a heterogeneous student body while protecting individual constitutional rights was constitutional in that it advanced the ideals of academic freedom.²⁸ Academic freedom is implied within the First Amendment.²⁹ A university has the freedom to make its own judgments with regard to the education of its students, which includes the selection of its students. It is the business of the university to create an appropriate environment conducive to learning in the best way that it sees fit.

In *Sweezy*, Justice Frankfurter articulated four essential aspects of academic freedom in his concurring opinion.³⁰ The four essential freedoms are: (1) who may teach; (2) what may be taught; (3) how it shall be taught; and (4) who may be admitted to study.³¹ A state university has a First Amendment right to achieve student diversity so long as the individual constitutional rights of applicants are protected.³² As a matter of law, if a state has protected individual constitutional rights the state must in turn be accorded the First Amendment right to select those students that it believes will contribute to a diverse student body.³³

V. THE JUXTAPOSITION OF JUSTICE POWELL'S OPINION IN BAKKE TO JUSTICE O'CONNOR'S DISSENT IN METRO BROADCASTING, INC. v. FCC

Polarization between the four liberal justices and the four conservative justices of the Rehnquist Court placed Justice Sandra Day O'Connor as the deciding vote on the issue of affirmative action. Because Justice O'Connor has shown a frequent willingness to break rank with the Court's conservative wing, the Bush Administration and other conservative *amici curiae* cited cases in their briefs in which Justice O'Connor ruled against affirmative action. The Bush Administra-

27. *Bakke*, 438 U.S. at 314.

28. See *Grutter*, 539 U.S. 306.

29. *Bakke*, 438 U.S. at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.")

30. *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring).

31. *Id.*

32. *Bakke*, 438 U.S. at 312.

33. *Id.* at 313.

tion and the conservative *amici curiae* were hoping their pressure would lead Justice O'Connor to side with the conservative wing of the court so that *Bakke* would be overruled in a 5-4 decision.³⁴

In *Metro Broadcasting, Inc. v. F.C.C.*, the Court was concerned with minority ownership programs of the Federal Communications Commission (FCC), not only as remedies for victims of discrimination, but also to promote programming diversity as mandated by Congress.³⁵ Justice O'Connor's dissent in *Metro* is not in conflict with the majority opinion in *Bakke*.³⁶ In *Metro*, Justice O'Connor's dissent was based on the fact that the FCC had ability to develop programming that reflects underrepresented minority interests via race-neutral means. Justice O'Connor's dissent concluded that the FCC programs of minority interests consideration "cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available."³⁷

On the other hand, Justice Powell's majority opinion in *Bakke* reasoned that a state university admissions program that protected individual rights while furthering a compelling state interest to achieve a heterogeneous student population by an array of qualifications is constitutional.³⁸ Therefore, FCC regulation of the finite electromagnetic spectrum is distinguished factually from a university's legitimate efforts to realize a diverse student body.

The juxtaposition of Justice O'Connor's dissent in *Metro* to Justice Powell's majority opinion in *Bakke* is easily reconciled. It is one thing for the government to provide consideration of race for FCC license and diversity, and quite another for consideration for admission into a public university. There is a difference in government contracts in *Croson* and university admissions in *Bakke* relative to consideration of race.

Justice Powell reasoned that student diversity that furthers a compelling state interest encompasses many factors, of which race is but a single factor.³⁹ State universities have an implied First Amendment right as to whom they admit in order to achieve a diverse student body.⁴⁰ Therefore, a state has an implied First Amendment right to achieve student diversity in the legitimate interests of educational ad-

34. Charles Lane, *Briefs Appear Tailored to the Justice in the Middle*, THE WASHINGTON POST, January 18, 2003, at A10.

35. *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990).

36. Lane, *supra* note 34, at A10.

37. *Metro Broad.*, 497 U.S. at 622.

38. *Bakke*, 438 U.S. at 315.

39. *Id.*

40. *Sweezy*, 354 U.S. at 263.

vancement so long as an applicant's individual constitutional rights are protected.⁴¹

VI. CONCLUSION

Why are racial and cultural diversity important for American universities and society in the twenty-first century? One important reason is American business. If American business is to survive it will have to contend with the global economy⁴² and the increasing ethnic diversity of the United States population.⁴³ International corporate mergers and multi-racial work forces are an everyday phenomenon in the global market place of the twenty-first century. The internet and satellite telecommunications have created an interlinked world economy. In the twenty-first century, American business has a vast financial stake in the world economy due to substantial investments abroad.⁴⁴ Therefore, a well educated and diverse labor force sensitive to cultural difference will keep America a superpower in a competitive world economy.

In *Bakke*, Justice Powell understood the importance of cross-cultural experiences that a student acquires in a racially and culturally diverse learning environment.⁴⁵ The Court held in *Bakke* that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."⁴⁶ Consequently, every state has a compelling interest to achieve diversity in higher education for the benefit of its educational system, and states may narrowly tailor admission standards to consider race in order to achieve this diversity. Furthermore, the Court has held that such a narrow consideration of race and ethnicity in admissions decisions is constitutional.

41. See *Bakke*, 438 U.S. at 312.

42. See, e.g., T.K. Bikson and S.A. Law, *Rand Report On Global Preparedness And Human Resources: College And Corporate Perspectives* (1994).

43. See, e.g., Minority Business Development Agency, U.S. Dep't Of Commerce, *Dynamic Diversity: Projected Changes In U.S. Race And Ethnic Composition 1995 to 2050* (1999), available at http://www.mbda.gov/templates/inside.php?content_id=607&title=&site_id=1 (last modified December 1999).

44. See, e.g., Bikson and Law, *supra* note 42.

45. *Bakke*, 438 U.S. at 313.

46. *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).