Dimensions of Diversity:
Legal Lessons From The United States Supreme Court's University of Michigan Decisions

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Race and ethnicity matter. Educational judgments merit deference. And diversity counts. Affirming these fundamental principles as a matter of federal law, the United States Supreme Court in *Gratz v. Bollinger*[i] and *Grutter v. Bollinger*[ii] ruled that colleges and universities have the authority to consider race or ethnicity[iii] as one factor among many in admissions decisions to further their *compelling* interest in promoting the educational benefits of diversity. The Court also held that when institutions pursue this interest, only admissions programs that ensure individualized consideration of applicants can be sufficiently *narrowly tailored* to meet legal requirements. Thus, the Court upheld the University of Michigan Law School's admissions policy (in *Grutter*), which included an individualized, full-file review of all applications, but struck down the University of Michigan's undergraduate admissions policy (in *Gratz*), which assigned preset points to applicants based on certain admissions criteria, including race and ethnicity.

These decisions affirm—and build upon—Justice Powell's 1978 opinion in *Regents of the University of California v. Bakke* regarding the educational benefits of diversity in higher education.[iv] They also expand on the existing federal "strict scrutiny" framework in important ways that can help guide colleges and universities as they review and consider the use of race-conscious policies in admissions, financial aid, recruitment, and employment practices.

The Dimensions of Diversity in Higher Education

The Court in *Grutter* described at length the educational benefits of diversity that constitute a compelling interest that can justify the use of race in college and university admissions. These benefits emanate from higher education's overarching mission—to prepare students for "work and citizenship" and to sustain "our political and cultural heritage"— and from the indisputable fact that "race unfortunately still matters" in our society. In this context, the Court found that diverse learning environments can enhance "cross-racial understanding," "break down racial stereotypes," improve learning outcomes, and better prepare students for a diverse workforce and society. In short, the Court concluded that the university's educational judgment that diversity is essential to its mission is entitled to a degree of deference and that the compelling nature of diversity in higher education is supported by a wide array of evidence.

In addition, the Court recognized the importance of "openness and integrity" in higher education institutions and stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. In the specific case of *Grutter*, the Court recognized that law schools are "the training ground for a large number of our Nation's leaders," and the Court concluded, "[I]n 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."

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Practical Lessons from the Court Decisions

The Court's central rulings provide important information that should help higher education leaders evaluate and refine race-conscious policies. The following questions (and answers) emanate from the Court's decisions:

1. **What foundations should support the pursuit and design of race-conscious admissions programs?**

Premised upon long-standing constitutional principles affirming the academic freedom of higher education institutions, the Court provided deference to the University's "educational judgment" that diversity was "essential to its educational mission." The Court then reviewed the evidence regarding the "substantial" benefits of diversity—ranging from University-specific evidence to evidence provided by other parties filing briefs in the case, notably including expert reports and opinions from business and military leaders. With these foundations, the Court concluded that diversity is a "compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."

The Court also explained that colleges and universities may seek to promote diversity through the enrollment of a "critical mass" of students from different racial and ethnic groups, so long as the critical mass is "defined by reference to the educational benefits that diversity is designed to produce;" and the goal is not "some specified percentage of a particular group merely because of its race or ethnic origin." The Court admonished that "outright racial balancing…is patently unconstitutional."

Finally, when examining the design of the challenged admissions practices, the Court emphasized the need for individualized judgments regarding the University's applicants: "In other words, an admissions program must be '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.'"

The Court's opinions suggest, therefore, that higher education institutions seeking to justify race-conscious practices based on diversity interests should ensure the following:

- Mission-specific educational goals include diversity-related interests that can support race-conscious policies;
- Specific race-conscious policies do materially advance diversity-related goals, consistent with relevant evidence (which may include general as well as institution-specific evidence and research); and
- Policy and program designs are precisely tailored to meet institutional diversity interests, including with respect to admissions an individualized review of applicants.

2. **What race-neutral alternatives must institutions with race-conscious programs consider?**

When addressing the legal requirement that higher education institutions consider and try, as appropriate, race-neutral alternatives to their race-conscious programs, the Court first clarified that the need to examine those alternatives "does not require exhaustion of every conceivable race-neutral alternative." The Court stated: "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." The Court also emphasized that race-neutral alternatives should be evaluated in the overall context of an institution's diversity and other mission-driven goals. More specifically, the Court held that colleges and universities need not

"choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." Thus, a college or university is not required to deemphasize academic factors to promote diversity before using race.

3. **What impact will the Court's decisions regarding admissions policies at the University of Michigan have on higher education policies in the areas of financial aid, recruitment, and employment?**

Although the Court was silent on applicability of its admissions rulings to other higher education practices, it affirmed a relevant principle of federal law: "context matters." In other words, while strict scrutiny standards apply to all race-conscious practices, those standards may apply in different ways to different programs. Thus, the degree to which a college or university may rely on the Court's determination that the educational benefits of diversity are compelling as a matter of law to support its race-conscious policies will depend on an institutional evaluation that addresses several questions. First, does the race-conscious policy or program advance the goal of achieving the educational benefits of diversity, which is at the core of the institution's mission? If the answer to that question is "yes," does the policy or program also reinforce individualized diversity by using race in the most limited way, consistent with institutional goals?[v] While the Court's rulings should undoubtedly inform this evaluation, it is especially important to evaluate the Court's fact-intensive analysis—most visibly regarding the design and operation of the two admissions policies—with sensitivity to the context that shaped its conclusions.[vi]

Conclusion

The Court in *Grutter* observed that "race-conscious admissions policies must be limited in time." More concretely, it communicated the "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today." This admonition highlights the need for all institutions employing race-conscious programs to periodically review and refine their programs to ensure that their use of race is limited to advance diversity related educational goals.

ENDNOTES

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[i] *Gratz et al. v. Bollinger et al.*, No. 02-516, 539 U.S. __ (June 23, 2003).
[ii] *Grutter v. Bollinger et al.*, No. 02-241, 539 U.S. __ (June 23, 2003).
[iii] In this article, the term "race" or "ethnicity" stands for both race and ethnicity, such as with regard to "race-conscious" actions.
[iv] *University of California v. Bakke*, 438 U.S. 265 (1978).
[v] See generally *Diversity in Higher Education: A Strategic Planning and Policy Manual (The College Board, 2001)* (including a detailed, action-oriented series of relevant policy questions to address in the context of federal non-discrimination standards).
[vi] See generally *Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964*, 59 Fed. Reg. 8756 (February 23, 1994) (noting important and material differences between admissions and financial aid practices in the context of a strict scrutiny analysis).