

*Grutter and Gratz Synopsis on Affirmative Action*  
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In June 2003, the United States Supreme Court issued the most important decisions on affirmative action in higher education in a generation. For the first time since *Regents of University of California v. Bakke*, in 1978, the U.S. Supreme Court considered a constitutional challenge to race-conscious admissions policies at institutions of higher education. In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court reaffirmed the constitutionality of the consideration of race and ethnicity in university and law school admissions decisions. *Grutter v. Bollinger* and *Gratz v. Bollinger* were class action lawsuits in which White applicants claimed they were denied admission to the University of Michigan Law School and undergraduate program, respectively, because the University unconstitutionally used race as a predominant factor in admissions decisions. The claimants alleged violations under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Court rejected the argument that consideration of race in the admission decision was unconstitutional. Instead, the Court adopted Justice Powell's pivotal plurality opinion in *Bakke*, in which diversity in higher education was found to constitute a compelling state interest. Writing for the Court's 5-4 majority in *Grutter*, Justice Sandra Day O'Connor stated that "student body diversity is a compelling state interest that can justify the use of race in university admissions."

The University of Michigan defended its admissions policies by arguing the importance of racial and ethnic diversity in higher education and society at large, and the university's unique role and responsibility in educating and preparing citizens for leadership and civic engagement in a democratic society that is increasingly diverse. As Justice O'Connor stated in *Grutter*, "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." Thus, the university designed admissions policies that considered academic ability, race and ethnicity, and other salient factors in order to achieve a diverse entering class of students to maximize the individual and collective educational experience.

Policies in both programs considered race among the criteria for student admission, in an effort to achieve a diverse class that includes a critical mass of members of underrepresented minorities, namely African Americans, Latinas/os, and Native Americans. The law school policy employed race in a nuanced, holistic manner, in which the qualifications and talents of each applicant are compared against those of other individual applicants. The Court affirmed the law school policy by a 5-4 margin in *Grutter*, noting with approval the consideration of race as a "plus factor," but not the decisive factor in the admission decision. By contrast, the Court struck down the policy in *Gratz*, in which the undergraduate program used a 150-point scale that assigned 20 points to minority applicants, as not narrowly tailored in violation of the Equal Protection Clause. According to the 6-3 majority opinion by Chief Justice William Rehnquist, the undergraduate program placed too much emphasis on race in an inflexible, determinative way.

It is ironic that the Court rejected the point system in the undergraduate policy, as the system contained an objective scale along the lines that Justice Powell approved in *Bakke*. By assigning a range of point values to several criteria, including academic scores, writing ability, leadership qualities, unique talents and skills, and racial and ethnic backgrounds, individual assessments of candidates were conducted and admission was not reflexively determined on the basis of race. Thus, the basis for the opposite outcomes in *Grutter* and *Gratz* are noteworthy. Five members of the Court found that race and ethnic diversity could form a compelling governmental interest in university admissions. Only Justices Scalia and Thomas found that diversity could not constitute a compelling governmental interest. Pursuant to *Bakke*, Justice Kennedy found that a university could determine that racial diversity in the student body would further its educational task; however, he concluded that the Court had not applied strict scrutiny review in deferring to the university's judgment. Chief Justice Rehnquist, who wrote the majority opinion in *Gratz* and a dissenting opinion in *Grutter*, agreed that racial and ethnic diversity could be a compelling governmental interest, but that neither policy should have survived strict scrutiny review as being narrowly tailored to achieve the stated goals.

By focusing on the diversity rationale for race-conscious admissions policies, explicit recognition of ongoing racial and ethnic inequity and injustice in American society was largely absent from the Court's doctrinal analysis in both cases. The Court's scant attention to persistent social inequality between students of color and White students perpetuates the misguided notion that race is equally salient to other factors that add diversity in the student population, such as socioeconomic class, geography, unique talents, or work experience. Yet, racial segregation is greater in many U.S. communities than during the era of *Brown v. Board of Education* over 50 years ago. Further, racial discrimination and disparity continue in employment, income, housing, health care, education, and other areas in American society. Misplaced reliance on standardized tests such as the LSAT, with their proven cultural, gender, and economic biases, have disparate impact on minority students' admission to university and law school programs. As Justice Ginsburg recognized in her dissent in *Gratz*, these disparities demonstrate the ways that structural barriers continue to disadvantage people of color in access to opportunities and societal resources, such as higher education. Ignoring these realities will only further entrench the underlying racism and systemic discrimination that makes affirmative action necessary in the first place to bring opportunity, social justice, and parity in American society.

The Supreme Court decisions in *Grutter* and *Gratz* provide the constitutional imprimatur for law schools and universities to implement admissions policies that increase racial and ethnic diversity in student body populations. The Court upheld the admissions policy at the University of Michigan Law School, which seeks to increase the presence of historically underrepresented racial and ethnic minorities within classes that are both diverse and academically outstanding, and whose students will continue the tradition of contributing to the legal profession. The Court has prescribed the ways in which higher education institutions can constitutionally consider race and ethnicity in admissions determinations. Accordingly, narrowly tailored race-conscious admissions policies will adhere to the following basic principles:

- 1) A race-conscious admissions program may achieve a “critical mass” of underrepresented students of color, as distinguished from a fixed numerical target of admitted minority students.
- 2) There must be individualized consideration of each applicant’s portfolio such that race and ethnicity are considered flexibly, but not dispositively in the admissions decision. Hence, race can be considered as a “plus factor,” while ensuring that each candidate competes with all other applicants within a holistic review of each person’s application.
- 3) Schools must make serious, good faith consideration of other, race-neutral alternatives, to achieve the diversity the university seeks. However, the Court notes that “narrow-tailoring does not require exhaustion of every conceivable race-neutral alternative.”
- 4) Admissions officials must consider the effect of the policy on individuals who are not members of the favored racial and ethnic groups, so that they are not unduly burdened. In *Grutter*, the Court found that because the Law School employed a holistic, individualized review of each applicant’s file, members of other groups were not unduly burdened by a policy designed to increase racial and ethnic diversity.
- 5) Institutions must periodically review admissions policies to determine the continued need for race-conscious policies.

In contravention of the Court's decisions in *Grutter* and *Gratz*, many law schools continue to base admissions decisions strictly on numerical scales of standardized tests, rather than the holistic portfolio review that the Supreme Court approved. Failure to conduct such comprehensive portfolio review for all candidates for admissions violates the letter and spirit of *Grutter* and *Gratz*.

Flexibility is the hallmark of a constitutionally permissible race-conscious admissions policy. Hence, flexibility is required toward all information in the applicant’s file, including previous academic performance, racial and ethnic background, letters of recommendation, and personal statements describing the ways in which the applicant will contribute to the education life and experience at the institution. As Justice O’Connor noted in *Grutter*, the law school admission policy makes clear that while LSAT and GPA scores are important, “[e]ven the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond the grades and test scores to other criteria that are important to the Law School’s educational objectives.” The Court further recognized, “The freedom of a university to make its own judgments as to education includes the selection of its student body.”

*Grutter* and *Gratz* reaffirm the compelling governmental interest in racial and ethnic diversity throughout American society, including in institutions of higher education. While the decisions have instilled limits on the use of race in admissions, the Supreme Court has clearly upheld the constitutionality of race-conscious admissions policies. Justice O’Connor expressed hope that 25 years from now, affirmative action would no

longer be necessary to achieve an educationally diverse student body. Perversely, however, several studies document the reduction in racial and ethnic diversity in law schools and universities since the Michigan cases were decided. SALT therefore calls on law schools, universities, and other higher education programs to assertively apply race in the constitutionally permissible ways that the Court has outlined, in order to increase racial and ethnic diversity in higher education institutions. For institutions to do anything less is a betrayal of the public trust and an abdication of their obligation to educate and train lawyers and civic leaders to operate knowledgeably and effectively in national and global arenas.