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Diversity Yes, Quotas No

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The Supreme Court on Monday, June 23, 2003 issued a pair of opinions addressing the use of race as a factor in admissions decisions at the University of Michigan. In combination, these cases allow universities to weigh the race of applicants when making acceptance decisions without going so far as to implement race-based quotas. Though dealing directly with affirmative action at public universities, these decisions will affect aspects of society beyond higher education, including the business practices of private sector employers.



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In both cases the Court applied an analysis of “strict scrutiny,” which requires that classifications such as those used by the University (i.e. racial classifications) be “narrowly tailored to further compelling government interests.” In the first case, *Grutter v. Bollinger*, the Court relied on its 1978 *Bakke* decision to find that student body diversity is a compelling state interest. It then found, in a 5 – 4 opinion authored by Justice O’Connor, that the admissions procedure used by the University’s law school, which considers an applicant’s race as part of an individual evaluation of each file, was “narrowly tailored” to meet this government interest. However, the University’s undergraduate admissions policy was struck down in *Gratz v. Bollinger* because it effectively made race a decisive factor by automatically awarding 20 points out of 150 in a formula in which 100 points guaranteed admission, to members of certain minority groups.

In that 6 - 3 opinion authored by Chief Justice Rhenquist, the court faulted the process for not allowing for individual consideration of applicants. In this regard, it should be noted that Michigan’s undergraduate school annually receives approximately 25,000 applications and the law school 3,500, so the cost savings of a more computerized and less subjective system are obvious. It is estimated the undergraduate school will now have to hire several admissions personnel in order to give the required individual analysis.

Notable quotes that provide the essence of the court's ruling and guidance for employers are as follows:

"Studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce in society, and better prepares them as professionals".

"... as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints". (Citing the "friend of the court" brief for General Motors, one of numerous major corporations that filed briefs in support of the school, as well as the United States military.)

"To be narrowly tailored, a race-conscious admissions program cannot use a quota system ... instead, a university may consider race or ethnicity only as a 'plus' in a particular applicant's file without insulating the individual from comparison with all other candidates for the available seats ... 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".

"Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota".

The court further noted its disapproval of diversity or affirmative action plans that award "mechanical, predetermined diversity bonuses based on race or ethnicity". Also of interest is the Court's discussion regarding the lifespan of policies that take race into consideration. Suggesting that universities employ "sunset provisions" or conduct "periodic reviews" of their programs, the Court writes that it "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Comically, in Justice Thomas' vigorous dissent in *Grutter*, he notes that the United States Constitution will be no different in 300 months than it is now.

Although the two cases involved admissions policies at a public institution of higher learning and not private sector employers, there is much to be gleaned from the cases and it should be noted that one of the statutes under which the cases were brought, 42 USC §1981, also applies to the private sector. In no particular order, the following should be considered as a result of the *Grutter* and *Gratz* cases:

- Reverse discrimination – there is ample language in both cases that one could use to support a reverse discrimination case, particularly if a company employed a rigid, inflexible quota system. Employers continue to

walk a fine line when considering race as a factor in employment decisions;

- Companies should review their diversity policies, affirmative action plans, and any compensation system under which bonuses or incentives are given for “diversity success”, to ensure that the internal systems are not too mechanical and allow for consideration of several factors;
- Preference programs that steer contracts to women and minority owned businesses will come under increased attack if they reach too far, to the detriment of non-minority contractors;
- Preference programs on account of race with regard to scholarship, mentoring and internship programs could similarly come under attack;
- Any and all company communications such as handbooks, websites, vendor materials, promotion materials, etc. should be examined to identify language that could suggest fixed, rigid quotas or that diversity is carried to the extreme, i.e., to discriminate against non-minorities.
- Oral communications or speeches about diversity should be carefully prepared and the speaker should stick to the text in the event someone in the audience takes issue with the message or seeks to use it in a suit against the company.

The bottom line is that the 5 – 4 decision in *Grutter* is a very narrow victory for affirmative action advocates, which could easily be changed with one resignation/nomination at the Supreme Court. The justices who dissented were quite vocal in their feelings that race preferences are racial discrimination.

Further, with regard to Justice O’Connor’s statement in *Grutter* that in 25 years affirmative action will be illegal, it should be noted that national columnist George Will, on June 26, 2003, opined that both the *Grutter* and the *Gratz* opinions will become moot primarily because of changing demographics, i.e., because of increased immigration and mixed marriages. Will states, “Demographics, not constitutional litigation, are determining the destiny of a post-racial America.”

Only time will tell whether diversity or demographics or both effectively change the makeup of corporate America. In the meantime, under *Grutter* and *Gratz*, advocates of diversity can continue to move forward, but it is a minefield in which they are walking.

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