September 4, 2003

Dear Colleague:

In June, the United States Supreme Court issued its first decisions in 25 years on affirmative action in higher education admissions. In the most important rulings for colleges and universities in recent memory, the Court upheld the University of Michigan law school admissions policy but struck down the university's undergraduate admissions policy. While much has been written and said about the cases, there is a need for clear explication and analysis for college and university administrators.

The enclosed ACE White Paper, "Affirmative Action in Higher Education After *Grutter v. Bollinger* and *Gratz v. Bollinger*," discusses the Michigan cases and addresses their implications for race- and ethnicity-conscious admissions and other programs in higher education. I hope that it will be useful to you and your institution as you review affirmative action on your campus at this critical time.

Sincerely,

David Ward
President

DW/cms

Enclosure

American Council on Education

Affirmative Action in Higher Education After *Grutter v. Bollinger* and *Gratz v. Bollinger*

Prepared for the American Council on Education by Hogan & Hartson L.L.P., September 2003.

The Supreme Court on June 23 issued two landmark decisions that address race- and ethnicity-conscious admissions at the University of Michigan. The Court held student body diversity to be a compelling governmental interest that colleges and universities may pursue by considering race and ethnicity in admissions to some extent. The Court found the University of Michigan law school admissions policy to be lawfully designed to achieve that interest (*Grutter v. Bollinger*), but struck down the university's undergraduate admissions policy, finding it was not "narrowly tailored" (*Gratz v. Bollinger*). This paper discusses the Michigan decisions and some of their implications for colleges and universities. **It is not legal advice.** Administrators should consult the institution's counsel on the decisions' import for their institution.

AFFIRMATIVE ACTION IN ADMISSIONS—FROM *BAKKE* TO MICHIGAN

The Supreme Court directly addressed for the first time affirmative action in higher education admissions in its seminal 1978 *Regents of the University of California v. Bakke* decision. A deeply divided Court declared unlawful the University of California at Davis medical school admissions policy, which set aside 16 places for minority students, but Justice Lewis Powell's lead opinion for the Court held affirmative action in higher education admissions to be permissible. Justice Powell wrote that courts should subject racial classifications by government to "strict scrutiny," requiring that the policies be "narrowly tailored to achieve a compelling state interest." Student body diversity, he said, is such a "compelling state interest," and admissions policies—notably the Harvard College policy he attached to his opinion—that do not use quotas or separate admissions tracks for minorities (or otherwise insulate minorities from competition with nonminorities) can be narrowly tailored.

After *Bakke*, many selective colleges and universities took race and ethnicity increasingly into account in admissions, to achieve student body diversity. Although the Supreme Court did not address the legality of race- and ethnicity-conscious admissions again until the University of Michigan decisions, its pronouncements on affirmative action in contracting (for example, *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Pena* (1995)), demonstrated a deep skepticism about race- and ethnicity-consciousness in government decision-making. In recent years, lower federal courts divided on the legality of race-conscious admissions. Federal appeals courts invalidated admissions policies at the University of Texas law school (*Hopwood v. Texas* (5th Cir. 1996)) and the University of Georgia (*Johnson v. Board of Regents of the University of Georgia* (11th Cir. 2001)), but another federal appeals court upheld the policy at the University of Washington Law School (*Smith v. University of Washington Law School* (9th Cir. 2000)). The courts disagreed about the continuing vitality of Justice Powell's *Bakke* opinion, sewing doubt for many colleges and universities about the legal standards applicable to their admissions policies.

In 1997, white students denied admission to the University of Michigan filed lawsuits in the U.S. District Court for the Eastern District of Michigan, alleging that the university's law school and undergraduate admissions policies violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and two federal civil rights statutes (Title VI of the Civil Rights Act of 1964 and 42 U.S.C.

§ 1981). Two district court judges reached differing conclusions in the cases: in *Gratz*, the undergraduate policy was upheld; in *Grutter*, the law school policy was struck down. On appeal, the Sixth Circuit reversed the lower court *Grutter* ruling and upheld the law school policy, in an extensively contentious 5-4 decision. Before the Sixth Circuit ruled in *Gratz*, the Supreme Court agreed to review both cases.

THE SUPREME COURT DECISIONS IN GRUTTER AND GRATZ

Supreme Court review of the Michigan cases generated intense public interest. More than 60 "friend-of-the-court" ("*amicus curiae*") briefs were filed, representing hundreds of higher education institutions, associations, and other education groups; business, civil rights, and labor groups; politicians, States, military leaders, and others; the great majority of them in support of the university. A divided Supreme Court issued separate decisions with different results in the two cases. In *Grutter*, the Court upheld, 5-4, the law school admissions policy. In *Gratz*, six Justices held the undergraduate policy unlawful, finding it not narrowly tailored.

DIVERSITY AS A COMPELLING INTEREST

Justice Sandra Day O'Connor's majority opinion in *Grutter* (joined by Justices Breyer, Ginsburg, Souter, and Stevens) confirmed that judges should apply "strict scrutiny" to race-conscious decisions by government. But, Justice O'Connor explained, how that standard applies should depend on "context." "Not every decision influenced by race is equally objectionable," the Court said.
The Court agreed with Justice Powell's *Bakke* opinion "that student body diversity is a compelling state interest that can justify the use of race in university admissions." Justice O'Connor cited universities' reliance for 25 years on the Powell opinion, and rejected the contention that the Supreme Court had ruled out diversity as a compelling interest in later cases. The Court's decisions addressing affirmative action in government contracting, she reasoned, had left open the possibility that the educational benefits of diversity might justify race-consciousness.

The majority in *Grutter* found that diversity in higher education has "substantial" benefits, citing evidence the university and *amici curiae* presented that diversity breaks down stereotypes, invigorates classroom discussion, and helps prepare students to work in a diverse economy. Justice O'Connor emphasized that although a person's race does not predict his or her viewpoint, it is "likely to affect an individual's views." Keeping higher education opportunity open to all races, she wrote, enables "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation" and permits universities to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."

One aspect of the Court's *Grutter* opinion—the deference it gave to the law school's judgment that diversity is essential to its educational mission—has implications for cases beyond the area of race-conscious decision-making. Educators' judgment, the Court said, has "a constitutional dimension, grounded in the First Amendment, of educational autonomy." The Court's endorsement of higher education institutions' considerable authority in the academic sphere may be useful to colleges and universities in a range of future cases that involve the degree of deference courts should give to educators' judgments.

NARROW TAILORING

The majority in *Grutter* next confirmed that institutions that seek student diversity must do so in a "narrowly tailored" manner. This part of the analysis led the Court to different conclusions in the two cases: the law school admissions policy in *Grutter* was held lawful because it was narrowly tailored; the undergraduate admissions policy in *Gratz* was held not to be.

How the Law School Policy Operated. Under the law school policy the Court reviewed, admissions officials assigned each applicant an index score based on undergraduate grade-point average and LSAT score, but the school also considered such "soft" variables as the enthusiasm of recommenders, quality of undergraduate institution, quality of applicant's essay, and areas and difficulty of undergraduate courses.

Reviewers were given discretion to admit an applicant with relatively low index scores, including African American, Mexican American, Native American, and Puerto Rican applicants thought to help the law school achieve educational benefits of diversity.

The law school admissions policy sought to "achieve that diversity which has the potential to enrich everyone's education." The school aimed to achieve a "critical mass" of minority students in each class to "ensure their ability to make unique contributions to the character of the law school." The school did not specify how many students constitute "critical mass," but officials estimated that it ranged from 10 to 17 percent of the class. During the admissions season, the dean and director of admissions reviewed "daily reports" on the racial and ethnic composition of the incoming class to ensure enrollment of a "critical mass" of students from underrepresented minority groups, although these officials testified that they did not change the way admissions decisions were made based on the daily reports.

Quotas prohibited. Justice O'Connor's opinion in *Grutter* confirmed that "outright racial balancing . . . is patently unconstitutional," and that a university admissions system may not use quotas, have "separate admissions tracks" for minority students, or insulate minority group members from "competition for admission." The law school, her opinion said, did not violate these precepts; setting a goal of a "critical mass" and paying "some attention to numbers" did not constitute a quota. Minority enrollment over the years varied between 13.5 and 20.1 percent, "a range inconsistent with a quota."

Individualized consideration. Institutions, the Court in *Grutter* held, may "consider race or ethnicity more flexibly as a 'plus' factor in the context of an individualized consideration of each and every applicant," and the law school gave applicants such "individualized consideration." It did not assign minority students "mechanical, predetermined diversity 'bonuses' " or automatically admit them or disqualify non-minorities. It gave non-racial diversity factors substantial weight. These could "make a real and dispositive difference for nonminority applicants as well" as minorities. In this way, the policy did not "unduly harm" nonminorities, because the law school also evaluated their potential contribution to diversity.

Duration. The Court also confirmed that "use of race must have a logical end point," but held that a higher education admissions policy could meet that requirement by having "sunset provisions" and through "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." Justice O'Connor wrote, in her opinion, the legal impact of which is somewhat unclear, that she "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Race-neutral alternatives. The Court held that the law school had fulfilled its obligation to engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." A requirement articulated in earlier cases did not mean that an institution must consider "every conceivable race-neutral alternative." The law school was not required, for example, to lower academic standards, or to adopt a race-neutral system that would depart from its individualized review of applicants. The Court noted that the race-neutral "percentage plans" adopted in Texas, California, and Florida, which admit the top students in each public high school in the state, do not appear to be an effective mechanism for graduate or professional school admissions and may not be consistent with the individualized review needed to attain broad diversity. However, Justice O'Connor said that institutions "can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop."

How the Undergraduate Policy Operated. In *Gratz*, Chief Justice William Rehnquist's opinion for the Court concluded that the undergraduate policy was unlawful because it was not narrowly tailored. The policy ranked applicants on a 150-point scale, based on academic achievement and other factors. Members of underrepresented minority groups received an additional 20 points. Applicants also could receive 20 points for socioeconomic status or participation in intercollegiate athletics, and smaller numbers of points for geographic factors, alumni relationships, outstanding essays, and leadership and service skills. One hundred points guaranteed admission. If the applicant was academically prepared to succeed at the university, admissions counselors could flag for further consideration those with desired

attributes, such as high class rank, "unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity or geography."

The Court held that whereas Justice Powell "emphasized the importance of considering each particular applicant as an individual," the undergraduate policy "does not provide such individualized consideration." Assignment of 20 points to all minority applicants made race a "decisive" factor for "virtually every minimally qualified underrepresented minority applicant." This, the Court held, distinguished the Michigan undergraduate policy from the Harvard admissions policy Justice Powell approved in *Bakke*. The fact that admissions officers could flag non-minority as well as minority applications for individualized review, the Court said, did not make the policy narrowly tailored, because almost all qualified minorities were admitted without such review.

DISSENTING OPINIONS

The two Michigan cases produced 13 separate opinions. In his dissenting opinion in *Grutter*, Chief Justice Rehnquist criticized the majority for departing, in his view, from the "strict scrutiny" standard. He contended that the law school in fact applied a quota; statistics showed, he said, that year after year the percentage of applicants admitted from each minority group closely tracked the percentage of applicants from the group.

Justice Antonin Scalia's dissenting opinion in *Grutter* predicted that the Court's decisions in the Michigan cases would "prolong the controversy and the litigation" concerning race-conscious admissions. Future lawsuits, he predicted, may focus on: whether an admissions policy "contains enough evaluation of the applicant 'as an individual' . . . and sufficiently avoids 'separate admissions tracks' "; whether an admissions office goes "below or above" critical mass or pursues it "so zealously . . . as to make it a *de facto* quota system"; whether in a particular setting "any educational benefits flow from racial diversity" (an issue Justice Scalia said was not contested in *Grutter*); or whether an "institution's expressed commitment to the educational benefits of diversity" are "bona fide." Lawsuits, he said, may be brought also "on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass.' "

IMPLICATIONS FOR HIGHER EDUCATION

Many college and university presidents are likely to take some measure of comfort from the *Grutter* decision. Five Members of the Court held that student body diversity is a compelling interest. A sixth, Justice Anthony Kennedy, dissented from the judgment but agreed that diversity may be compelling. A seventh, Chief Justice Rehnquist, argued in dissent that the law school policy was not narrowly tailored, but he did not address whether diversity is compelling. Only the Court's two most conservative members, Justice Scalia and Justice Clarence Thomas, contended that there is no compelling interest in student diversity. In light of that array, many students of the Court believe that changes in the Court's membership in the next years will not cause a reversal of its holding that pursuit of student diversity in higher education justifies some limited consideration of race and ethnicity.

On the other hand, the decisions confirm what earlier Supreme Court rulings involving affirmative action in other contexts suggested—that affirmative action must be reserved for a relatively narrow set of circumstances. In *Bakke* four Justices would have held that societal discrimination justifies affirmative action favoring members of underrepresented minority groups. But the Justices' opinions in *Grutter* and *Gratz,* which focused on whether student diversity entails compelling educational benefits, demonstrated scant if any support for the view that societal discrimination justifies affirmative action in admissions. As a barometer of the shift in the Court on this issue, even Justice Stephen Breyer, who is usually associated with the Court's liberal wing, voted with the majority in *Gratz* to invalidate the undergraduate policy.

As illustrated below, much can be learned from close review of the Michigan decisions. Yet the decisions leave considerable uncertainty about the lawfulness of some admissions policies and some other race-conscious programs. Under the divided decisions in *Grutter* and *Gratz*, whether a policy is lawful depends on its particulars and how it is applied. Assessment of whether an admissions policy or other race-conscious program is lawful will depend heavily on the specific facts and particular context.

assess the level of legal risk that may attach to institutional race- and ethnicity-conscious policies in light of the judicial and policy climate in their state and their federal judicial circuit.

Effect on the law of various jurisdictions. Before the Supreme Court decided *Grutter* and *Gratz*, lower courts reached differing results in challenges to race- and ethnicity-conscious admissions policies, and some states enacted laws that address such policies. The Michigan cases affect those developments in a range of ways. For example, *Grutter* overrules the 1996 *Hopwood v. Texas* holding of the Fifth Circuit (which includes Louisiana, Mississippi and Texas) that diversity is not a compelling interest. After *Hopwood*, many institutions in those states suspended consideration of race and ethnicity in admissions decisions. Some of those institutions have announced that they will begin to consider race and ethnicity in the admissions process again. On the other hand, state laws and regulations in California, Florida, and Washington State that restrict race- and ethnicity-conscious decisionmaking by government, including by public universities, remain in effect.

Action by affirmative action opponents. After the Michigan decisions, some affirmative action opponents vowed to bring additional lawsuits based on the facts of particular admissions policies. Some activists have contacted a substantial number of prominent institutions and threatened to file complaints with the U.S. Department of Education Office for Civil Rights (OCR) concerning race-conscious financial aid and other programs. A ballot initiative banning governmental consideration of race is underway in Michigan, and similar initiatives have been or may be proposed in other states, such as Arizona, Colorado, Missouri, North Dakota, Oregon, South Dakota, and Utah, as well as in several localities. Californians will vote in the Fall of 2003 on an initiative that generally would bar the State and local governments there from collecting or using information on citizens' race or ethnicity.

POSSIBLE APPLICABILITY BEYOND ADMISSIONS

Financial aid. Although the Michigan decisions directly address only admissions decisions, many observers believe that the decisions have implications for administration of race- and ethnicity-conscious student financial aid. OCR issued policy guidance in 1994 ("OCR policy guidance") that generally permits race and ethnicity to be considered to some effect in award of financial aid to foster diversity, but that places a more difficult burden on institutions to defend race- and ethnicity-exclusive aid. A court or OCR, in applying the *Grutter* and *Gratz* analysis to financial aid, might infer from those decisions an emphasis on non-exclusivity of race or ethnicity as a factor in award; consideration of race- and ethnicity-neutral alternatives; and periodic review of the continuing need for race-and ethnicity-consciousness. Some courts and OCR can thus be expected to take a more skeptical view of, for example, race- or ethnicity-exclusive aid or group-targeted aid not needed to achieve diversity.

The OCR policy guidance also permits consideration of race and ethnicity in financial aid to remedy past discrimination by the institution. In a leading case (*Podberesky v. Kirwan* (4th Cir. 1994)), the Fourth Circuit held that the University of Maryland did not demonstrate that its race-specific Banneker Scholarships were necessary to remedy present effects of past discrimination, and ruled the scholarships unlawful. The Michigan decisions do not directly address the permissibility of race-consciousness to remedy past discrimination.

Other race- and ethnicity-conscious programs and activities. Some observers also see in the Michigan decisions reason to review with counsel various activities in which race or ethnicity figure, such as recruitment, pre-enrollment enrichment programs, and retention programs; race-oriented student groups, clubs, and sororities; and minority-associated dormitories and mentoring programs. Title VI of the Civil Rights Act of 1964 generally prohibits colleges and universities from excluding students from programs based on race, ethnicity, and national origin, but there is little legal precedent applying Title VI in the context of recruitment, enrichment, retention or other such campus programs or student groups and activities. In each of those areas, institutions are encouraged to review with counsel the relevance to particular programs of *Grutter*, *Gratz*, and other legal developments. Application of the analysis in *Grutter* and *Gratz* to such programs may, for example, cause a court to ask whether the particular program furthers a compelling interest in diversity, whether students are given individualized consideration, whether race-neutral alternatives were considered, whether the institution periodically reassesses the need for the program, and whether nonminorities are unduly harmed.

Employment. The Michigan decisions do not directly address affirmative action in employment, including hiring and promotion of faculty and staff. In cases in the 1970s and 1980s, the Supreme Court upheld employers' remedial affirmative action programs aimed at increasing the number of minorities in job categories in which they were underrepresented relative to the qualified applicant pool. Although the Supreme Court in *Grutter* and *Gratz* addressed only student admissions, its endorsement in *Grutter* of the educational benefits that flow from student diversity may suggest that the Court has not foreclosed the possibility that some affirmative action to foster the educational benefits of faculty diversity can be lawful. But the outcome of cases that include such arguments cannot be confidently predicted. In an earlier case, the Court rejected the argument that there is a compelling interest in taking faculty members' race into account to give minority students role models. Some lower courts have concluded that only remedying past discrimination, not promotion of diversity, could justify employers' affirmative action programs under Title VII of the Civil Rights Act of 1964.

CONCLUSION

The Supreme Court decisions in the Michigan cases help to answer some, but far from all, of the questions colleges and universities face regarding the legal standards applicable to affirmative action. Affirmative action opponents can be expected to continue to challenge race- and ethnicity-conscious programs. College and university administrators should carefully review with counsel the design and administration of affirmative action policies.