



ON THE LEGAL FRONT

More Excerpts From the *Gratz* and *Grutter* Briefs

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In the last issue of *TIP*, this column examined President Bush's position on *Gratz v. Bollinger* (2000) and *Grutter v. Bollinger* (2002). The University of Michigan's admission policy for the College of Literature, Science and Art (undergraduate) was upheld by the District Court in Eastern Michigan in *Gratz* and its Law School admissions policy was upheld by the 6th Circuit Court in *Grutter*. Both admissions policies employed minority preference in one form or another. Nevertheless, both policies were judged to satisfy 14th Amendment strict scrutiny as outlined by Justice Powell in *Regents v. Bakke* (1978). More specifically, both courts ruled that (a) diversity is a compelling government interest and that (b) the admissions policies under review are narrowly tailored to that interest.

In the administration briefs in *Gratz* and *Grutter*, Theodore Olson, the solicitor general, argued that (a) the Supreme Court need *not* decide if *Bakke* is still good law, but only, (b) that the admission policies under review are not narrowly tailored, since race-neutral methods for achieving diversity were eschewed. This author argued that the lower courts need resolution on *Bakke*, meaning the Supreme Court needs to decide if (a) diversity is a compelling government interest before addressing whether (b) the challenged policies are narrowly tailored.

As you read this column, the Supreme Court ruling is known (scheduled for June, 2003). Nevertheless, issues raised in various other briefs are worth noting, since they are likely to remain focal points for future discussion regardless of how *Gratz* and *Grutter* were decided. As the deadline for submission of amicus briefs approached (February 18, 2003), there were more than 20 briefs for the petitioners (Plaintiffs *Gratz* & *Grutter*) and more than 50 briefs for the respondents (the University of Michigan). The discussion below samples four briefs for each side.¹

¹ To locate all briefs written associated with *Gratz* and *Grutter*, the reader should go to http://supreme.lp.findlaw.com/supreme_court/resources.html. Then, on the Docket page, click April 2003.

For Petitioners Gratz and Grutter

The briefs selected for this group include two by the National Association of Scholars (NAS), one on *Grutter* and one on *Gratz*, and briefs supporting both *Gratz* and *Grutter* by Ward Connerly and Florida Governor Jeb Bush.

National Association of Scholars² for Gratz

This brief addresses a single issue—a study by University of Michigan psychology professor Patricia Gurin cited prominently by the district court in its ruling favoring the University of Michigan in the *Gratz* case. Based on the Gurin report, the district court concluded that:

Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.

Among the various criticisms raised by the NAS, four stand out. First, the NAS contends that Gurin did not properly define diversity. Stated differently, she asked 10 questions regarding attendance in classes, workshops, or dialogue groups, and cultural activities or multiethnic events, which, according to the NAS, “do not require the presence on campus of *any* students of another race” [italics by NAS].

Second, the NAS contends that Gurin relied too heavily on self-report measures, eschewing objective measures such as grades, standardized test scores, and graduate school enrollment and that at least one researcher (Alexander Astin of the UCLA Higher Education Research Institute) found no relationships between measures of diversity and such objective measures.

Third, the NAS contends that, at best, Gurin’s data shows “tiny differences” between attitudes of students with and without diversity experiences. The arguments here reduce to reliance on small statistical *r*-square values of less than 1% and use of liberal alpha levels (alpha = 0.10 as opposed to alpha = 0.050).

Finally, the NAS contends that Gurin never investigated rival hypotheses, including the possibility that “racial preferences produce negative educational effects.” According to the NAS, there are studies in the literature showing that “racial preferences in admissions may have negative effects on students and that these negative effects may outweigh any purported benefits.”

National Association of Scholars for Grutter

This brief focused on two major claims made by the University of Michigan: (a) that a “national consensus” of faculty and students supports diversi-

² The NAS advertises itself as a constituency of 4,300 members who are “professors, graduate students, administrators, and trustees” at accredited institutions of higher education in the United States.

ty and (b) that the law school needs to achieve a “critical mass” of “under-represented minority racial and ethnic groups” because “students from groups which have been historically discriminated against have experiences that are integral to the Law School’s Mission.”

Regarding “national consensus,” the NAS cites surveys of faculty, students, and minorities in which each of these constituencies *oppose* preferences in admissions. Accordingly, the NAS concludes:

In sum, there is no consensus in favor of the type of racial preferences the Law School seeks to defend in this case. The cited studies indicate that most faculty members, most students, and most African-Americans and Hispanic-Americans oppose an admissions policy that awards preferences to members of minority groups.

The NAS then cites legal reasons for opposing the benefits of the “critical mass,” the strongest of those being (a) that theories of “group identity” are “antithetical” to the 14th Amendment’s guarantee of *individual rights* and (b) that Justice Powell’s *Bakke* ruling, which the university relies on, is fragmented,³ and has never been adopted in subsequent Supreme Court rulings. Indeed, in so-called “reverse discrimination” rulings since *Bakke*, the Supreme Court has permitted preference for minorities *only* as a remedy for identifiable acts of discrimination against identifiable victims. Another legal argument cited by the NAS is that policies based on diversity have no stopping point, a core requirement for affirmative action remedies discussed by the Supreme Court in both *City of Richmond v. Croson (1989)* and *Adarand v. Peña (1995)*.

The NAS then challenges the “critical mass” rationale on theoretical grounds that racial preferences foster “group over individual identity” which, in turn, leads to “racial balkanization” on college campuses. To illustrate its point, the NAS cites the following excerpt from a statement by the New York Civil Rights Coalition:

[T]he same schools that use race as a factor to achieve inclusionary admissions will also permit its use as a factor in the selection of roommates and preferences for living quarters in campus housing, for scholarships, and even for the remediation and counseling of “at risk” students.

Finally, the NAS argues that reliance on “group identity” occurs at the expense of “individual expression.” The NAS claims that universities now articulate “acceptable” and “unacceptable” viewpoints on controversial racial

³ In the April 2003 column I cited the Supreme Court’s ruling in *Marks v. United States (1978)*, which states the following with respect to *fragmented* rulings: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”

issues, and cites the example of Reynolds Farley, a sociology professor at the University of Michigan who, allegedly, was “attacked and stigmatized” by the university community for presenting criticisms in class of African American leaders such as Malcolm X and Marcus Garvey.

Ward Connerly (for Gratz & Grutter)

Ward Connerly, himself a black male, has been an ardent and high profile opponent of affirmative action in any form for well over a decade. He derives his fame from two sources: (a) he is a long-time member of the University of California Board of Regents and (b) he led the successful drive in 1996 (as chairman of the “Yes-on-209” campaign) to gain voter approval for eliminating preferences for minorities and women in state education, employment, and contracting. His brief makes five major points that, collectively, are designed to counter Justice Powell’s ruling in *Bakke*.

Two of the five points are essentially corollaries of each other, namely (a) that except for the *Bakke* case law over the last 105 years shows convincingly that the Equal Protection Clause of the 14th Amendment prohibits *both* race-based preferences and discrimination and (b) that “race and ethnic preferences based on diversity and equal treatment for every person are two incompatible principles.” His other arguments are that (c) preferences impose a “stigma of inferiority” on blacks and Hispanics, (d) that one cannot grant preferences to some groups without discriminating against other groups, and (e) that the concept of diversity is itself “incoherent and illegitimate” and is nothing more than an excuse to reinforce rigid and fixed racial quotes. Connerly also repeats a major argument made in the NAS brief for Grutter, namely:

Once they achieve their “critical mass” or as the university put it “meaningful” numbers of “minority” students, universities create campus institutions and events that are designed to keep students separate on the basis of race...[including]...race-based freshmen orientations, race-based dormitories, race-based curriculum, even race-based graduation ceremonies.

John Ellis (JEB) Bush (for Gratz & Grutter)

This brief, written for Governor Jeb Bush by Florida State Attorney General Charlie Crist, is entirely consistent with the briefs written for President George W. Bush by Solicitor General Theodore Olson. Unlike the NAS briefs and the Connerly brief, which attack the value of diversity, the Crist brief, like the Olson briefs, speaks to its “paramount” importance.⁴ Further, like the Olson briefs, the Crist brief focuses on why race-neutral admissions procedures are narrowly tailored, whereas race-based admissions procedures are not. Or as stated in the Crist brief:

⁴ In the April, 2003 column I neglected to mention that the phrase “paramount importance” was initially used as a descriptor for diversity by Justice Powell in his *Bakke* ruling.

Florida is committed to the paramount value of maintaining diverse institutions of higher learning. The issue, of course, is how best to attain that diversity. Our Constitution demands that the government treat each individual with equal dignity and respect regardless of his or her race or ethnicity....Florida's experience under Governor Jeb Bush's One Florida initiative demonstrates that diversity can be attained through race-neutral means.

Like the Olson briefs, the Crist brief argues that selection of the top graduates from all Florida high schools results in diversity statistics similar to those obtained with prior race-based selection procedures. However, the Crist brief goes further and details several methods of "empowerment" designed to raise the level of achievement for all disadvantaged students, regardless of race. For example, the College Reach Out Program (or CROP): "[I]dentifies disadvantaged students, of whatever race, and strives to prepare them for college through an increased number of tutors, homework clubs, and after-school and in-school academic enhancement strategies."

According to the Crist brief, approximately 75% of the CROP students are African-American and 9% are Hispanic. The Crist brief also outlines other state funded programs, including (a) accountability programs for under-achieving schools (as measured by standardized test results), (b) mentoring programs, (c) the "Florida Virtual School" for online advanced placement courses for students who do not have access to advanced placement courses at their schools, and (d) "Postsecondary Opportunity Alliances" to promote partnerships between colleges and universities with elementary schools, middle schools, and high schools in high poverty areas.

In short, the argument in the Crist brief, as in the Olson briefs, is that race-based programs are not narrowly tailored because the race-neutral programs in Florida have worked to achieve the goal of diversity in higher education.

For Respondent Bollinger

The briefs selected in this group address both *Gratz* and *Grutter* and are written by 65 leading American businesses, 37 private colleges and universities, Senators Daschle, Kennedy (and 10 others), and the American Psychological Association (APA).

65 Leading American Businesses

This brief is written on behalf of 67 of the Fortune 500 companies who have "annual revenues well over a trillion dollars and hire thousands of graduates of the University of Michigan and other major public universities." It outlines four major reasons why students from diverse educational environments "will help produce the most talented workforce." Accordingly:

First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals who have been educated in a diverse setting are likely to contribute to a positive work environment by decreasing incidents of discrimination and stereotyping.

The brief also cites changing demographics, noting that at the time of the *Bakke* ruling, minorities (African Americans, Native Americans, Asian Americans & Hispanic Americans) constituted only 20% of the nation's population, a number that has grown to 28% by 1999 and is likely to grow to 47% by 2050. Therefore, it is argued that:

The rich variety of ideas, perspectives and experiences to which both nonminority and minority students are exposed in a diverse university setting, and the cross-cultural interactions they experience, are essential to the students' ability to function and contribute to this increasingly diverse community.

Interestingly, however, although the brief extols the virtues of Justice Powell's *Bakke* ruling in several places, it espouses no particular opinion regarding the issue of narrow tailoring. Accordingly:

There is not, and cannot be, serious debate about the importance of maintaining racial and ethnic diversity in our nation's leading colleges and universities. Whatever methodology is employed to select those who will be afforded the opportunity to obtain the best education and training available in America today, that methodology must operate in such a way that students of all races, cultures and ethnic backgrounds are in fact meaningfully included.

37 Private Colleges and Universities

Among all the briefs favoring the respondents, this one, in the author's opinion, does the most thorough job of addressing *both* compelling interest and narrow tailoring. It also throws in an academic freedom argument.

On the issue of compelling interest, it not only lauds Justice Powell's ruling on racial diversity as a compelling interest, it also points to the impact of *Bakke* on ensuing amendments to the Title VI regulations, and how, over the last 25 years, Title VI itself has "[o]pened the door to higher education for many qualified students, and Amici have relied on its regulatory framework

and funding to ensure their campuses are open to qualified students of diverse races and backgrounds.”

It is further argued that the interest in racial diversity does *not* imply a belief that minority group members all possess the same point of view, but rather, that race is “one of the innumerable factors that ineluctably affect and mold a student’s perspective and individuality.” The brief also cites Justice O’Connor’s quote from *Wygant v. Jackson* (1986), where she stated:⁵ “[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.”

On narrow tailoring, the brief argues that programs such as that described above for the state of Florida are not “race-neutral,” but rather, they “depend entirely upon continued segregation among the states’ high schools” and further:

Such programs cut across a state’s graduating high school class with the refinement of a meat ax: they exclude well qualified minority students who attended competitive secondary schools, while including lesser qualified minority students from lower performing schools. They may also reward students for taking “easy” classes or remaining at inferior high schools to maintain high grade point averages, while punishing students who accept the challenge of advanced classes or highly competitive schools.

The brief also argues that low income or social disadvantage are poor proxies for race because it is rare to find “minority high school graduates with family incomes below \$20,000 and test scores in the top 10 percent.”

Finally, the brief argues for the academic freedom to “evaluate every candidate for admission as an individual,” taking into account an “array of factors,” including race as one of many other factors, without endorsing racial quotas.

Senators Daschle, Kennedy (and 10 Others)

Although this brief cites research (including the Gurin report) extolling the virtues of diversity, and it also criticizes race-neutral programs such as in Florida for reasons virtually identical to those cited above in the brief for the 37 private colleges and universities, its main thrust is that Justice Powell’s *Bakke* ruling was constitutionally sound and that subsequent actions by all three federal branches have treated this ruling as law and have built upon it.

Regarding the Supreme Court, the brief argues that Justice Powell’s opinion on the application of strict scrutiny to affirmative action rulings was codified in both *Croson* and *Adarand*⁶ and, in *Johnson v. Transportation* (1987), “the [Supreme] Court upheld a public employer’s use of gender as a ‘plus’ in

⁵ In the April, 2003 column I noted that Justice O’Connor made this statement in the context of a 5–4 ruling she joined striking down a union agreement on racial preference in termination.

⁶ Actually, the first time a majority of the Supreme Court endorsed strict scrutiny in an race-based affirmative action case was in *Wygant v. Jackson* (1986).

making a promotion decision.” In addition, the brief argues that in *Regents of University of Michigan v. Ewing* (1985), the Supreme Court supported “restrained judicial review of academic decisions” and in *Miller v. Johnson* (1995), the Supreme Court, citing *Bakke*, supported concepts “such as academic freedom and self-government.”

Regarding Congress, the brief argues that the “question that divided the Court in *Bakke* was a statutory one” and that Congress has had ample opportunity to overturn the ruling, but has supported it instead. Included among those opportunities are (a) two amendments to Title VI, both signed by President Reagan, “without seeking to overturn the ‘diversity’ holding;” (b) the Riggs Amendment to the Higher Education Act of 1985, which sought to repeal *Bakke* and was defeated; (c) the Emergency School Aid Act of 1978 (ESAA) which declared that “racially integrated education improves the quality of education for all children;” (d) the Magnet Schools Assistance Program of 1978 (MSAP) which “continued provision of federal financial assistance to local educational agencies for the purpose of eliminating racial isolation;” and, most recently (e) apportionment of funds by Congress to agencies such as the National Science Foundation giving “priority consideration to increasing the participation of women and minority students;” and (f) the Minority Foreign Service Professional Development Program to “significantly increase the number of African American and other underrepresented minorities in the international service.”

Regarding the executive branch, the brief cites President Nixon’s observations relating to the ESAA, which reads:

The Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today’s world.

The brief also notes that on January 8, 2002 that “the president signed into law legislation on the finding that [i]t is in the best interests of the United States to continue the federal government’s support of...local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds.”

American Psychological Association

In its introduction, this brief notes that “two of APA’s divisions” are “particularly focused on areas relevant to the issues before the Court,” including Division 9 (Society for the Psychological Study of Social Issues) and Divi-

sion 45 (Society for the Psychological Study of Ethnic Minority Issues).⁷ Beyond that, the brief is extremely light on legal issues and extremely heavy on psychological research and methodology. By its own statement, “This brief makes three points.”

Point 1 is that discrimination and prejudice still exist in the form of “unconscious stereotyping and biased behavior.” As noted in the brief, there are “implicit” or “automatic” prejudices that:

[play] an important role in producing discriminatory behavior and judgments and that measures of implicit prejudice are significant predictors of the level of discriminatory behaviors and judgments. For example, people high in implicit prejudice are unfriendly towards African American interaction partners, and form negative and stereotypical impressions of minorities.

The thrust of the argument is that research with one widely used method (the Implicit Association Test, or IAT), which assesses differences in reaction time in milliseconds, reveals the aforementioned biases and, as important, such biases are reduced when there is “face to face interaction” among members of different racial and ethnic groups.

Point 2 is that Gurin’s study was inappropriately criticized by the NAS. The brief cites five reasons for this assertion, including (a) that her research was wrongly criticized for not focusing on “structural diversity,” (b) that the small effects reported are typical of studies which disaggregate data, (c) that Dr. Gurin did use appropriate alpha levels to report her statistical findings, (d) that self-report data is appropriate for extremely large databases, whereas the objective measures provide an “unrealistically narrow view of academic achievement,” and (e) that it is obvious there can be no benefits of diversity training for White students without “presence on campus of *any* students of another race” [italics by the APA].

Point 3 relates to the growing minority population (estimated at 47 to 50% by 2050) and the consequential need for psychologists (and other health professionals) to understand multicultural issues. The term used by the Department of Health and Human Services (HHS) for this understanding is “cultural competence.” As articulated by the HHS:

[Underlying cultural competence is the conviction that services tailored to culture would be more inviting, would encourage minorities to get treatment, and would improve their outcome once in treatment. Cultural competence represents a fundamental shift in ethnic and race relations. ...the term competence places the responsibility on mental health services organizations and practitioners—most of whom are White...and challenges them to deliver culturally appropriate services.

⁷ I believe SIOF (Division 14) also has a major interest, particularly as relates to issues raised by the 67 Leading American Businesses, but my own informal and unscientific poll of SIOF members suggests that there may not be consensus on this issue.

The APA argues that diversity in higher education is a prerequisite for psychologists (and others) to obtain cultural competence. Further, the APA itself has instituted two initiatives in this domain, including (a) encouragement to incorporate cultural competence issues in the 1990 *APA Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations* as well as in the (b) 2002 *Guidelines on Multieducational Training, Research, Practice, and Organizational Change*.

Conclusions

There you have it. The author believes the briefs cited above are representative of the major issues favoring or opposing the petitioners and respondent in the *Gratz* and *Grutter* cases. Unlike the column written in the last issue of *TIP*, where the Olson briefs for President Bush were diced, sliced, and redigested (on legal grounds), the author has attempted to present the above briefs without comment or criticism so as to allow the reader to absorb issues that will likely be with us, both in education and employment, for years to come, regardless of how the Supreme Court decided *Gratz* and *Grutter*. If that's not enough, consider also the brief written by the Massachusetts School of Law (MSL), which addresses *Grutter* and supports *neither* party. The MSL argues that it does not need racial preference to achieve diversity. At the same time, it argues it does not need standardized tests to determine entry into law school. Politics are involved in this one because the MSL is not accredited by the American Bar Association (ABA) for the precise reason that it does *not* use standardized testing in admissions. So, issues surrounding adverse impact will likely extend beyond employment testing.

Case Law Citations

- Adarand Constructors, Inc. v. Peña (1995) 515 US 200.
- City of Richmond v. J. A. Croson Co. (1989) 488 US 469.
- Gratz v. Bollinger (E.D. Mich. 2000) 122 F.Supp. 811.
- Grutter v. Bollinger (CA6 2002) 288 F.3d 732.
- Johnson v. Transportation Agency, Santa Clara County (1987) 480 US 616.
- Marks v. United States (1978) 430 US 188.
- Miller v. Johnson (1995) 515 US 900.
- Regents of Univ. of California v. Bakke (1978) 438 US 265.
- Regents of Univ. of Michigan v. Ewing (1985) 474 US 214.
- Wygant v. Jackson Board of Education (1986) 476 US 267.