The Administration’s Position on *Gratz* and *Grutter*:
Too Many Inconsistencies

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The Supreme Court is set to rule on the University of Michigan’s admissions policies for its undergraduate College of Literature, Science and Art (*Gratz v. Bollinger*) and its law school (*Grutter v. Bollinger*). On January 15, 2003 President Bush conducted a press conference on these policies, stating, among other things: “I strongly support diversity of all kinds, including racial diversity in higher education. But the method used by the University of Michigan to achieve this important goal is fundamentally flawed.” Shortly thereafter, Theodore Olson, the Solicitor General, issued Amicus Curiae briefs for both *Gratz* and *Grutter* articulating the administration’s position. Excerpts from these briefs are presented by Sharf elsewhere in this issue of TIP.

The key issue in both cases is whether the admissions policies, which grant special considerations for race and other factors, can pass the *strict scrutiny* analysis. To do so, the university will have to prove two things: (a) that racial diversity serves a *compelling governmental interest*, and (b) that the admission policies at issue are *narrowly tailored* to that interest.

The key Supreme Court ruling on racial diversity remains *Regents v. Bakke* (1978). In recent years, several lower court judges have ruled that *Bakke* is not good law (see for example *Hopwood v. Texas*, 1996). In the October, 2002 issue of *TIP*, I suggested that the *Grutter* case compels a Supreme Court ruling on the status of *Bakke*. However, the administration’s argument is (a) leave *Bakke* alone, (b) do not rule on racial diversity as a compelling interest, (c) reject both admissions policies because they are flawed, and (d) keep racial diversity as an important goal to be accomplished via *race neutral* methods. This is a cop-out. For reasons to be discussed below, regardless of whether the Michigan policies are supported or struck down, the

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1 Oral arguments were scheduled for April 1, 2003 (as this issue of *TIP* was in press) and a ruling is likely in mid-June. Also, additional briefs are likely to be filed on or before February 18, 2003.

2 To locate all briefs and the respective lower court rulings in *Gratz* and *Grutter*, go to http://supreme.lp.findlaw.com/supreme_court/resources.html. Then, on the Docket page, click April 2003.
Supreme Court needs to clarify the status of Bakke, and it needs to provide guidance once and for all on whether racial diversity is a compelling interest within the meaning of the 5th and 14th Amendments.


Bakke is the poster child for what is commonly referred to as a “fractured” or “fragmented” ruling. Prior to the Bakke ruling, the Supreme Court issued the following guidance for fragmented rulings in Marks v. U.S. (1977):

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.

Interestingly, Justice Powell wrote both the Marks and Bakke rulings.

Allen Bakke sued the University of California at Davis under Title VI and the 14th Amendment. He challenged the medical school’s admission policy (the so-called “Davis Plan”) because it reserved 16 of 100 seats for minorities. In other words, minorities were eligible for any of 100 seats, whereas Alan Bakke was eligible for any of only 84 seats. Four justices viewed the Davis Plan as an illegal quota under Title VI and saw no reason to decide the 14th Amendment issue (Stevens speaking for Burger, Rehnquist, & Stewart). Four others viewed the Davis Plan as legal under 14th Amendment moderate scrutiny rules (Brennan speaking for Blackmun, Marshall, & White). Justice Powell borrowed from each plurality and issued a 14th Amendment strict scrutiny ruling.

Borrowing from the Stevens plurality opinion, Powell ruled that the Davis Plan was an illegal racial quota. However, borrowing from the Brennan plurality opinion, Powell also ruled that race may be considered as one of several factors in the selection process, using the so-called “Harvard Plan” to illustrate his point (i.e., a “flexible” plan which treats race as one of many factors, or “plusses”).

It is absolutely clear that Powell himself endorsed racial diversity as a compelling interest and viewed the Harvard Plan as narrowly tailored to that interest. What is not clear is how Powell’s opinion fares in a Marks challenge. Or as framed by the 11th Circuit in Johnson v. Board of Regents (2001):

Justice Powell clearly identified diversity as a compelling interest that may be asserted by a university in defense of an admissions program that flexibly considers race as one of several factors in making admissions decisions. No other Justice, however, expressly endorsed that view.

Interestingly, the 11th Circuit combined the Powell ruling with the Brennan plurality opinion to arrive at a compromise position that racial diversity is “important,” but not “compelling.” Other courts, including the district court
in *Gratz* and the 6th Circuit in *Grutter* concluded that racial diversity is a compelling interest.

The administration’s position is presented in Footnote 4 on pages 16–17 of the *Grutter* brief. According to Solicitor General Olson:

> The courts of appeals disagree as to whether any of the opinions in *Bakke* represents binding precedent under *Marks v. United States*… The Court need not undertake the *Marks* analysis in this case and should instead directly resolve the constitutionality of race-based admissions standards by focusing on the availability of race-neutral alternatives.

Olson also states that “in the final analysis, this case does not require this Court to break any new ground to hold that respondents’ race-based admissions policy is unconstitutional.”

In short, even though the lower courts are hopelessly conflicted on *Bakke*, the administration would have the Supreme Court back off from a *Marks* ruling, even though such a ruling would clarify once in for all what *Bakke* means.

### How Important IS Racial Diversity?

This is an intriguing part of both the president’s statement and the solicitor general’s briefs. The president states he “strongly supports” all types of diversity, including “racial diversity” and that “we should not be satisfied with the current number of minorities on American college campuses.” In the *Grutter* brief, Olson states that “including people of all races and ethnicities represents a paramount government objective.” So is racial diversity important enough to constitute a *compelling interest* within the meaning of the 5th and 14th Amendments?

If faced with the question in a press conference, the administration would be hard pressed for political reasons to answer in the negative. To do so would be to state that racial diversity is of “paramount importance” but not important enough to trigger a strict scrutiny analysis. Try explaining that to the American people. So, avoiding a *Marks* ruling in *Gratz* and *Grutter* means the administration can duck the legal issue of compelling interest and, at the same time, “strongly support” racial diversity.

There is also a legal reason for avoiding the issue of diversity as a compelling interest. It is true that the Supreme Court has mandated race-neutral solutions for remedial racial needs (see for example *City of Richmond v. Croson*, 1989 & *Adarand v. Pena*, 1995). However, the basis for the Michigan policies is operational needs, not remedial needs. Furthermore, even in the Supreme Court rulings based on remedial needs, it is implied that race-based solutions are narrowly tailored if race-neutral solutions are tried and they fail (see for example *Cone v. Hillsborough County*, 1991). Race neutrality will be discussed in greater detail below.
Are the Michigan Programs Fundamentally Flawed?

The administration contends the at-issue admissions policies are, in effect, quotas. Or in the words of President Bush:

At their core, the Michigan Policies amount to a quota system that unfairly rewards or penalizes perspective students, based solely on their race. So, tomorrow my administration will file a brief with the court arguing that the University of Michigan’s admissions policies, which award students a significant number of extra points [italics added] based solely on their race, and establishes numerical targets [italics added] for incoming minority students, are unconstitutional.

There are two charges here. The first (significant number of extra points) applies more so to the undergraduate policy, and the second (numerical targets) applies more so to the law school policy. On its face, the undergraduate policy is on shakier grounds than the law school policy.

In 1998, the undergraduate program began using a “selection index,” ranking applicants on a 150 point scale. In this scale, up to 12 points are awarded for ACT or SAT scores, up to 98 points for GPA, category of school attended, and strength or weakness of the curriculum, and up to 40 points for “other factors.” Among these “other factors,” up to 20 points are awarded for geographical location, alumni relations, outstanding essay, personal achievement, or leadership and service activity. The remaining 20 points are in the “miscellaneous” category, including socioeconomic disadvantage, underrepresented racial/ethnic minority, athletic scholarship, or discretionary selection by the Provost.

The university maintains that this policy is within the meaning of Powell’s Bakke ruling, since it treats race as one of many plus factors in the selection process. However, Solicitor General Olson counters that more points are generally awarded for race (20 points) in comparison to other factors, including being from an underrepresented Michigan county (6 points), being from an underrepresented state (2 points), personal achievement (5 points), leadership and service (5 points), and outstanding essay (1 point). In Justice Powell’s ruling, the plusses were equal. Therefore, if the solicitor general’s arguments are credited, it is unlikely that the undergraduate admissions policy can be construed as being narrowly tailored, even under Bakke rules.

The law school policy combines objective variables (GPA & LSAT) with “soft” variables, including recommendation letters, quality of undergraduate school, leadership and work experience, unique talents, and overcoming social and/or economic disadvantage. The law school also seeks a “critical

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3 The undergraduate procedures used prior to 1998 applied different selection criteria to minorities and nonminorities that were deemed illegal.
mass of underrepresented minority students.” The university maintains its policy ensures a given class “is stronger than the sum of its parts,” that minority students should not feel “isolated or like spokespersons for their race,” and that minority students should not feel “uncomfortable discussing issues freely based on their personal experiences.” The university contends there is no hard and fast objective rule for admissions into the law school and no fixed percentage goal for the “critical mass” of minority students.

Five of nine 6th Circuit judges (sitting en banc) ruled that the law school plan was narrowly tailored because it is “virtually identical” to the Harvard Plan. Unlike the Davis Plan, which treated race as a quota, these judges ruled that race was a “plus factor.” In contrast, the four dissenting judges argued that the law school used a “disguised quota,” producing a tight range of minorities (i.e., 44 to 47) from year to year that, in effect, is a rigid quota. Solicitor General Olson echoed the dissenting argument, stating:

This Court has repeatedly condemned quotas as unconstitutional, and respondents cannot escape the reach of those cases by pursuing a purportedly flexible, slightly amorphous “critical mass” in lieu of the kind of rigid numerical quotas struck down by this Court in Bakke. In practice, respondents’ pursuit of a “critical mass” operates no differently than more rigid quotas.

Thus, the solicitor general would have the Supreme Court ignore the question of whether Bakke is good law yet, at the same time, use one half of Powell’s opinion in Bakke to attack the notion of “critical mass.”

The university contends that there are no points added and there is no indication of disproportionate treatment of race, and makes the following argument:

Seventy-one white applicants were admitted in 2000 with grades and test scores the same or worse than minority applicants who were rejected. These observations do not suggest that race does not matter in the admissions process. The grids do demonstrate, however, that the Law School is considering race (as its admissions policy states) only in the context of a highly individualized review that gives serious consideration to many different factors, including nonnumerical “diversity” factors that obviously make a significant difference for many white applicants as well.

Putting this all together, the administration uses one-half of Powell’s Bakke ruling as a basis for why the law school policy is illegal, and the university uses the other half of that ruling as a basis for why the policy is legal. Something has to give.
What About Race-Neutral Solutions?

The strongest part of the administration’s argument is that race-based solutions cannot be narrowly tailored when race-neutral solutions can achieve the same goals. According to Solicitor General Olson, race-neutral methods are equally as likely to result in a “more diverse student body,” and include:

[A] history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays.

The other side of this argument, of course, is that if race-neutral solutions are tried and they fail, race-based solutions that fit other (additional) parameters may be deemed narrowly tailored, as long as the interest in question is compelling.

These other parameters follow from Supreme Court precedents in *Croson* and *Adarand*, and include (a) duration of the policy; (b) relationship between numerical goals and percentage of minorities in the relevant population; (c) flexibility (i.e., waivers when goals are not met); and (d) burden on innocent third parties. Among these, the solicitor general focuses primarily on duration (that the Michigan policies have “no logical stopping point”), flexibility (that race is the “decisive factor”), and burden (“unreasonable obstacles to advancement on the basis of merit”).

The other side of this argument is twofold. First, the University of Michigan contends that its programs are flexible. Second, although factors such as race neutrality, duration, and burden clearly do apply to government set-asides (as in *Croson* & *Adarand*), they were not features of the *Bakke* ruling, which focused on diversity as an operational need, not as a remedial need.

The most intriguing part of the solicitor general’s argument is that eliminating affirmative action policies and replacing them with race-neutral policies has resulted in racial diversity in Texas, California, and Florida. In general, the focus of these programs for undergraduate admissions is on accepting the top performers from all state high schools. Some of the data presented by Olson are reconstructed in Table 1. These data show that the post-elimination percentages and the pre-elimination percentages for minorities are similar and amount to proof that race-neutral methods are as successful in achieving racial diversity as are race-based methods.
This sounds good, but there are four obvious counter-arguments. The first and most logical of these is that if both race-based and race-neutral methods of selection achieve the same goals and, in the process, mirror the percentages of minorities in the applicant pool, why the furor over how these percentages are obtained?

Second, does selection of the top percentage performers from each high school in a state yield the most qualified students for any target group, non-minorities included? For example, California chooses the top 4% from each high school. Isn’t it possible, if not probable, that students who are below the top 4% in one school have better credentials than students in the top 4% of other schools, irrespective of race?

Third, is the primary method used for undergraduate enrollment in California, Florida, and Texas truly devoid of “undue burdens” on third parties? It is quite possible that such programs, in effect, exchange adverse impact for race-based selection. For example, many universities give preference to children of alumni and/or children of major contributors. Doesn’t such a preference disproportionately benefit nonminorities and adversely impact minorities? Analogously, by selecting the top percentage per school, doesn’t such a preference disproportionately benefit minorities in some schools, thereby adversely impacting white students in other schools?

Fourth, the methods used in California, Florida, and Texas, though perhaps suitable for undergraduate enrollment, are probably not suitable for graduate enrollment for the simple reason that most graduate programs fish in out-of-state and out-of-country waters. This raises a more general question. If, for whatever reason, race-neutral methods fail to achieve racial diversity for a given program, is it then legitimate to use race-based solutions?

Other Inconsistencies

The arguments above are primarily legal, not personal. Indeed, recall that in the October, 2002 issue of TIP, I endorsed Malos’s (1996) viewpoint favor-
ing economic and social disadvantage over race-based selection procedures when raced-based procedures result in overinclusion (i.e., inclusion of minorities who are not disadvantaged) and underinclusion (i.e., exclusion of nonminorities who are disadvantaged). Furthermore, some of the factors advocated by Malos are also advocated by the solicitor general (e.g., history of overcoming disadvantage, socioeconomic status, and challenging living or family situations). However, given the slew of preferences that currently exist in higher education, it seems inconsistent that some nonacademic preferences are OK and perhaps even decisive, but others are not even allowed for consideration.

There are other inconsistencies. On January 20, 2003, the Associated Press (or AP) reported that Secretary of State Colin Powell told a national audience on Face the Nation that he disagrees with the president’s position on affirmative action. The AP also included a quote from Powell’s address to the 2000 GOP National Convention in which he stated:

> We must understand the cynicism that exists in the black community. The kind of cynicism that is created when, for example, some in our party miss no opportunity to roundly and loudly condemn affirmative action that helped a few thousand black kids get an education, but you hardly heard a whimper from them over affirmative action for lobbyists who load our federal tax codes with preferences for special interests.

The AP also reported that, National Security Advisor Condoleezza Rice told a Meet the Press audience that she has “problems” with the University of Michigan’s methods but that “it is important to take race into consideration … if race-neutral means do not work.” She also noted that she was a beneficiary of affirmative action at Stanford University. The AP reported further that President Bush, later that night (on January 19) proposed a 5% increase in federal funding for grants to historically Black and Hispanic higher education institutions. The AP noted that a White House spokesman declined to comment on “why the Black and Hispanic grant programs are acceptable, when the University of Michigan admission system is not.”

Finally, in the 2 weeks that followed these interviews of Powell and Rice, several news broadcasts reported that between 30 to 50 of the Fortune 500 companies oppose the administration’s position. Led by General Motors and Microsoft, these companies are preparing a brief to argue that affirmative action is necessary because it affords a steady pool of minority talent needed to help large companies understand and market to diverse cultural and ethnic

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4 The AP article may be located at http://news.findlaw.com/politics/s/20030120/bushcourtracedc.html

5 The present column was in press on January 31, 2003. To track this brief, the interested reader should stay tuned to the docket information provided in Footnote 2 above.
populations. They will also argue that racial and cultural diversity are needed to compete in a global economy.

**Conclusions**

From a purely legal perspective, the key issue in *Gratz* and *Grutter* is not whether the University of Michigan wins or loses, but rather, how the case is decided. For example, the Supreme Court could strike down both policies while, at the same time, endorsing Justice Powell’s interpretation in *Bakke*. This would define diversity as a compelling interest but also confirm that either or both of the Michigan policies are *not* faithful to Powell’s prescription for narrow tailoring (i.e., the Harvard Plan). Of course, the Supreme Court could also strike down *Bakke*, thus dealing a deathblow to race-based admissions based on diversity as an operational need. Obviously, the Court can also uphold *Bakke* and endorse either or both of the admissions programs, although the law school seems to be on firmer footing than the undergraduate school.

In the final analysis, the Supreme Court will decide, not the president, the solicitor general, the AP, or any of us. Furthermore, it doesn’t take a rocket scientist to figure out that the lineup here will likely mirror the lineup in *Adarand*. That is, the foursome of Kennedy, Rehnquist, Scalia, and Thomas will probably oppose racial diversity and the foursome of Breyer, Ginsburg, Stevens, and Sutter will probably favor it, leaving Justice O’Connor as the decision maker (as she was in *Adarand*). However, unlike *Adarand*, where O’Connor sided with the Kennedy-Rehnquist-Scalia-Thomas foursome, this one is hardly a “no-brainer.”

Indeed, Justice O’Connor supported the *Bakke* ruling in *Wygant v. Jackson* (1986), where she joined the 5–4 ruling striking down a union agreement on racial preference in termination (with Powell, Burger, Rehnquist, and White). The Jackson school board, fearing community disturbances, amended a prior union agreement to keep the percentage of minority teachers unchanged in the event of a layoff. Subsequently, two tenured White teachers were terminated and two untenured Black teachers were retained. The Supreme Court majority ruled that the amended agreement did not pass strict scrutiny. However, writing separately, O’Connor made two important statements. First, citing *Bakke*, she stated: “Although 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 use of racial considerations to further that interest.” Second, O’Connor agreed with the four dissenting justices that “a plan need not be limited to remedying specific instances of identified discrimination” to pass the strict scrutiny test (agreeing with Marshall, Blackmun, Brennan, and Stevens).

In short, the stakes are heavy, there are intriguing arguments pro and con, and the Supreme Court has several options available. It should be an inter-
esting ruling regardless of how it is framed, and suspenseful as well, since the ruling will likely come out on the very last day of the Supreme Court calendar in June 2003.

References


Case Law Citations

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