

January 12, 2003

**A PREVIEW OF THE U.S. SUPREME COURT'S  
DECISION TO REVIEW THE USE OF AFFIRMATIVE  
ACTION IN UNIVERSITY ADMISSIONS**

**A SUMMARY OF THE TWO CASES**

By July 2003, colleges and universities all across the nation will likely know where the United States Supreme Court stands on the use of race as a factor in an institution's admissions process. By then, the Supreme Court will have decided the fate of the University of Michigan's law school and undergraduate admissions policies, in the *Grutter v. Bollinger* and *Gratz v. Bollinger* cases respectively. The following is a preview of the two cases now pending before the Court.

***Grutter v. Bollinger: The Law  
School Case***

*Grutter v. Bollinger* involves a challenge to the University of Michigan's ("Michigan") law school admissions process. The process relies on, among other things, a combination of an applicant's Law School Admissions Test (LSAT) score and undergraduate grade point average, and also admits students who provide "diversity which has the potential to enrich everyone's education." The emphasis on diversity included "historically discriminated" groups, like African-Americans, Latinos and Native Americans. Barbara Grutter and the other plaintiffs denied admission to Michigan's law school challenged this policy as violative of the 14th Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964. A federal court judge found the policy to be unconstitutional. A federal appeals court, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), reversed the trial court's decision and upheld the policy. The *Grutter* plaintiffs appealed that ruling to the Supreme Court, which agreed to review the case on December 2, 2002.

***Gratz v. Bollinger: The  
Undergraduate Case***

*Gratz v. Bollinger* involves a challenge to Michigan's undergraduate admissions policy. This policy evaluates approximately 25,000 applications according to a selection index system. Applicants are awarded points based on high school grade point average and ACT or SAT scores and School, Curriculum, Unusual Circumstances, Geography and Alumni Relationship factors ("SCUGA"). The "unusual circumstances" factor includes socio-economic disadvantage,

underrepresented racial and ethnic minority status or attendance at a school predominantly composed of underrepresented minority students. Jennifer Gratz and other plaintiffs denied admission to Michigan's undergraduate program challenged this program on the same grounds as the *Grutter* plaintiffs. A different federal court judge, however, found this program to be lawful. The Sixth Circuit, although it heard the *Gratz* case at the same time as it heard the *Grutter* case, failed to issue a decision in *Gratz*. The *Gratz* plaintiffs nevertheless asked the Supreme Court to review the *Gratz* decision along with the *Grutter* decision. On December 2nd, the Supreme Court agreed to hear the *Gratz* case as well.

### A SUMMARY OF THE ISSUES

#### Is *Bakke* good law?

These cases will likely involve a review of the 1978 Supreme Court decision, *Regents of the University of California v. Bakke*. In *Bakke*, the Supreme Court struck down an admissions program that relied on a quota system to admit students of color. This decision is commonly understood as holding that, while racial quotas could not be upheld, if race was used as but one of many factors, the admissions program could survive legal scrutiny. There is a serious debate, however – one that will be renewed with vigor in the upcoming Supreme Court proceedings – as to whether this aspect of the Court's ruling in *Bakke* obtained the five votes necessary to create binding precedent. The answer to this question really boils down to how one counts to five.

The *Bakke* decision, in fact, consists of a series of opinions. Justice Powell announced the opinion for the Court. He and four other justices, (Justices William Brennan, Byron White, Thurgood Marshall and Harry Blackmun), rejected the notion that colleges and universities may never use race as a factor in deciding who to admit. In addition, Powell and a different set of four justices (Chief Justice Burger and Justices William Rehnquist, John Paul Stevens, and Potter Stewart), deemed strict racial quotas impermissible as a means of deciding how to admit students to a college or university. None of these eight justices, however, signed on to the section of Powell's opinion explaining why and how it was permissible to use race as a factor in college and university admissions. It is in this section that Powell recognizes that, under the principle of academic freedom protected by the First Amendment, colleges and universities have a legitimate interest in using race as one of many factors in order to achieve a diverse student body.

That is the source of the math controversy. Is it fair to say that the four justices who agreed with Justice Powell that race can be used as a factor in deciding who to admit also agreed that, at a minimum, Powell's diversity rationale is an acceptable one? In *Marks v. United States*, the Supreme Court adopted a standard for determining the precedential value of a decision where there are many sharply divided opinions. In that case, the Court essentially adopted a lowest common denominator test, fashioning precedent out of the narrowest possible ruling issued by the Court. A majority of the Sixth Circuit in the *Grutter* case decided that Justice Powell's diversity rationale was *Bakke's* narrowest rationale and therefore constituted binding precedent. The dissenting judges in *Grutter* argued that this aspect of the Powell opinion is not precedent at all, making the *Marks* "lowest common denominator" analysis inapplicable.

Thus, although many colleges and universities have presumed that using race as just one factor necessary to achieving a diverse student body was lawful, the Supreme Court's decision in the *Grutter* and *Gratz* cases may conclude that this rationale has never been legally valid.

**Will any consideration of race be permitted in the admission process?**

The *Grutter* and *Gratz* plaintiffs will urge the Supreme Court to ban the use of race as a factor in college and university admissions. They argue that the consideration of race at Michigan has resulted in discrimination against white applicants. In support of this claim, they rely on statistical evidence showing that some minority applicants were admitted to the University of Michigan with a lower grade point average and standardized test scores than the white plaintiffs. The issue, however, is not that straightforward. In the *Gratz* case, for example, the University of Michigan in its undergraduate program also admitted a large number of white applicants who had a grade point average and standardized test scores *lower* than the white plaintiffs. This evidence strongly suggests that factors other than race explain admissions decisions at Michigan.

Nevertheless, if the Supreme Court adopts a rule banning any consideration of race, then colleges and universities could be sued for discrimination when clearly other factors – indeed, numerous other factors – rightly explain the decision not to admit an applicant. Will courts now be in the business of second-guessing admissions decisions based on the selective use of statistical evidence regarding the admissions process? In another case, that ironically also involved Michigan, *Regents of the Univ. of Michigan v. Ewing*, the Supreme Court unanimously held that courts are not equipped "to evaluate the

substance of the multitude of academic decisions that are made daily by faculty members of public education institutions – decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision-making.” Will the Supreme Court in the *Grutter* and *Gratz* cases now abandon this rule?

If so, how will courts determine what and how admissions standards should be applied by the various colleges and universities throughout the nation? Each individual decision to admit or deny an applicant requires careful consideration of both the mission of a particular institution as well as the individual applicant vis-à-vis the applicant pool as a whole. It is a decision subject to change as the needs of an institution as well as its applicant pool change.

## CONCLUSION

The plaintiffs in the *Grutter* and *Gratz* cases must file their briefs first, by January 16. Michigan as well as a group of students and other groups who have intervened in both cases must file their briefs by February 18th. The Court will hear arguments in the two cases sometime in the spring and is expected to issue an opinion by July 2003.

If the Supreme Court reverses the Sixth Circuit’s decision in *Grutter* and the lower court ruling in *Gratz*, the principle of academic freedom could be severely undermined and colleges and universities could be subject to litigation every year. After all, colleges and universities make decisions to deny admission to students every year, thereby creating that possibility that some applicant’s disappointment will prompt litigation.

*This document is not intended to constitute legal advice. If you would like more information or have any questions about this issue, please contact your regular Wiggin & Dana attorney or Victor A. Bolden at (203) 498-4400.*