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THE SIXTH CIRCUIT HOLDS THAT  
DIVERSITY IN HIGHER EDUCATION IS A  
COMPELLING STATE INTEREST AND THAT  
THE ADMISSIONS PROGRAM AT THE  
UNIVERSITY OF MICHIGAN LAW SCHOOL  
IS NARROWLY TAILORED TO FURTHER  
THAT INTEREST—  
*GRUTTER V. BOLLINGER*

Ryan C. Idzior\*

THE Sixth Circuit's recent decision in *Grutter v. Bollinger*<sup>1</sup> has set a dangerous precedent for university admissions programs across the country. In *Grutter*, the race-conscious admissions system used by the University of Michigan Law School ("Law School") was challenged on equal protection grounds.<sup>2</sup> The court adhered to Justice Powell's opinion in *Regents of the University of California v. Bakke*<sup>3</sup> in holding that the goal of enrolling a diverse student body<sup>4</sup> is a compelling state interest. However, the *Grutter* court misconstrued Powell's opinion when it found that the Law School's admissions program was narrowly tailored to serve that interest.<sup>5</sup> The Law School's admissions system focuses largely on obtaining racial diversity while granting little considera-

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1. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

2. *Id.*

3. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Supreme Court, in a 5-4 decision, struck down The University of California-Davis Medical School's admissions system that specifically reserved sixteen seats for minority applicants. Four members of the Court held that race could never be used in the admissions process. Four others found that race could be used as a factor subject to intermediate scrutiny review. Justice Powell determined that the Medical School's program was unconstitutional but agreed that race could be a factor in admissions subject to strict scrutiny review. *Id.* at 290-91. Because Powell agreed with the majority holding on the narrowest grounds, he wrote the opinion of the Court.

4. Justice Powell determined that diversity in higher education was a compelling state interest as required under strict scrutiny. *Id.* at 311-15. None of the other Justices joined in that part of his plurality opinion.

5. Justice Powell determined that quota-based affirmative action admissions policies were unconstitutional but described certain methods that may be used to enroll a diverse student body. *See id.* at 315-19.

tion to other unique student characteristics.<sup>6</sup> Consequently, the Sixth Circuit has endorsed an admissions program that violates students' equal protection rights and impedes the realization of true diversity.

The Law School seeks to admit a mixed group of students from various backgrounds that are among the most capable students applying to law school in a given year.<sup>7</sup> To achieve this objective, the Law School drafted its official admissions policy to comply with Justice Powell's opinion in *Bakke*.<sup>8</sup> The policy explains that the Law School uses race as a "plus" in making its admissions decisions, but that it does not reserve a fixed number of seats for underrepresented minorities.<sup>9</sup> The Law School initially evaluates a composite of the applicants' Law School Admission Test ("LSAT") scores and undergraduate grade-point average.<sup>10</sup> This composite can be visualized as a grid with LSAT scores on the horizontal axis and grade-point averages on the vertical axis, where higher combinations of scores are located in the grid's upper right-hand corner. Next, "soft" variables such as undergraduate institution, demonstrated leadership, and work experience are taken into account.<sup>11</sup> After these qualities are assessed, some students with relatively low index scores may be admitted to further the Law School's goal of enrolling a meaningful number or "critical mass" of underrepresented minority students.<sup>12</sup>

In 2001, the court for the Eastern District of Michigan struck down the Law School's admissions policy.<sup>13</sup> The district court determined that the equal protection rights of Barbara Grutter and other unsuccessful applicants had been violated.<sup>14</sup> The court was convinced that Justice Powell spoke for himself in *Bakke* when he identified diversity as a compelling state interest because no other justices joined that part of his opinion.<sup>15</sup> The court further held that even if diversity was a compelling state interest, the Law School's use of race was not narrowly tailored as required under strict scrutiny.<sup>16</sup> On appeal, the Sixth Circuit overruled the district court's conclusions.<sup>17</sup> In a 5-4 decision, the appellate court held that Powell's opinion did govern the issue and determined that the Law School's admissions policy was narrowly tailored to achieve its enrollment objectives.<sup>18</sup>

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6. Powell believed that other elements of diversity, such as leadership ability, personal talents, and unique work experience, could also be useful in contributing to a diverse learning environment. See *id.*

7. *Grutter*, 288 F.3d at 735-36.

8. *Id.* at 735.

9. *Id.* at 736.

10. *Id.*

11. *Id.*

12. *Id.* at 737.

13. See *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002).

14. *Id.*

15. *Id.* at 876.

16. *Id.* at 877.

17. See *Grutter*, 288 F.3d at 735.

18. *Id.*

In ruling that diversity is a compelling government interest, the *Grutter* court followed the Ninth Circuit approach<sup>19</sup> by applying the Supreme Court plurality test established in *Marks v. United States*:<sup>20</sup> “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.”<sup>21</sup> The *Grutter* court concluded that, because Justice Powell preferred a more strict level of scrutiny in determining the constitutionality of admissions programs than did the other four Justices, his opinion, including his view that diversity constituted a compelling interest, was the “narrowest grounds” on which the *Bakke* judgment rested.<sup>22</sup>

In determining that the Law School’s admissions program was narrowly tailored, the *Grutter* court again relied on Powell’s opinion in *Bakke*.<sup>23</sup> The court summarized his views on permissible admissions systems with two general guidelines: (1) segregated, dual-track admissions systems utilizing quotas for under-represented minorities are unconstitutional; and (2) admissions policies where race and ethnicity are considered a “plus” do not offend the Equal Protection Clause.<sup>24</sup>

According to the court, the Law School’s admissions program complied with the first guideline because it did not explicitly reserve a fixed number of seats for underrepresented minorities.<sup>25</sup> The court explained that the admissions policy also conformed to the second guideline because the Law School considered all factors of diversity (not just race) and allowed all students to compete for every seat in each class.<sup>26</sup> Holding that diversity in higher education is a compelling state interest and finding the admissions policy to be narrowly tailored, the *Grutter* court upheld the constitutionality of the Law School’s admissions system.

Although the *Grutter* court’s determination that diversity in higher education is a compelling state interest agrees with the rationale used in *Smith*, the issue is far from settled. In *Hopwood v. Texas*,<sup>27</sup> the Fifth Circuit ruled that the test utilized in *Marks* did not apply to Powell’s opinion in *Bakke*<sup>28</sup> and held that diversity in higher education was not a compel-

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19. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000). In determining the constitutionality of The University of Washington Law School’s affirmative action admissions process, the *Smith* court found that Powell’s opinion in *Bakke* was binding and applied the *Marks* test to support its holding. Nevertheless, that court did not consider whether the school’s policy was narrowly tailored. A state law had already prohibited racial classifications.

20. *Marks v. United States*, 430 U.S. 188, 193 (1977).

21. *Id.*

22. *See Grutter*, 288 F.3d at 741.

23. *Id.* at 744-47.

24. *Id.* at 745-46.

25. *Id.* at 746.

26. *Id.* at 746-47.

27. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000).

28. The *Hopwood* court did not see *Marks* as an invitation for lower courts to read fragmented opinions while attempting to ascertain how Justices “would have” held. Con-

ling state interest.<sup>29</sup> Recognizing the ambiguity surrounding the issue, several appellate courts have chosen not to answer the question and have left the matter for the Supreme Court.<sup>30</sup> Nevertheless, the Supreme Court has not affirmed or rejected Powell's views in the twenty-two years following the *Bakke* decision.<sup>31</sup>

While the *Grutter* court's decision to comply with Powell's entire *Bakke* opinion is debatable, its determination that the Law School's admissions policy was narrowly tailored is clearly mistaken. The *Grutter* dissent criticized the decision with four main points: (1) the magnitude of the school's racial preference is too large to be considered constitutional, (2) the "critical mass" of minority students the Law School strives to admit is almost indistinguishable from a racial quota, (3) the benefits of diversity are highly questionable, and (4) the failure of the Law School to consider race-neutral means of achieving their goal.<sup>32</sup> However, the strongest arguments against the majority's conclusions can be found within the words of Powell's opinion in *Bakke*.

The *Grutter* court's approval of the Law School's use of race as a "plus" is inconsistent with Powell's opinion. Powell wrote that when a large middle group of students are evaluated, "the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases."<sup>33</sup> The Law School's admissions figures indicate that race alone is worth approximately an entire grade-point in its criteria.<sup>34</sup> For example, a black applicant with a "B" grade-point average has the same chance for admission as a white applicant with the same LSAT score and an "A" grade-point average. Similarly, race is worth approximately eleven points, or a 20-percent boost on the LSAT.<sup>35</sup> The Law School is not simply using racial preferences as a way to tip the balance in an applicant's favor as Powell intended. Recognizing this disparity, the *Grutter* court explained that Powell's "tip the balance" language was not meant as a limit on the amount of racial preference.<sup>36</sup> However, this reasoning is flawed because an unlimited amount of preference toward minorities would inevitably insulate these applicants from competition for available seats and violate equal protection.<sup>37</sup>

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sequently, the court read *Bakke* as neither requiring nor foreclosing the acceptance of diversity as a compelling state interest. *Id.* at 275 n.66.

29. *Id.*

30. See, e.g., *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 747-49 (2d Cir. 2000); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 795, 800 (1st Cir. 1998); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998); *McNamara v. Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998).

31. Last year the Supreme Court granted cert in the *Grutter* case, *Grutter v. Bollinger*, 123 S. Ct. 617 (2002), indicating that the Court is ready to resolve this ambiguity.

32. *Grutter*, 288 F.3d at 796-808.

33. *Bakke*, 438 U.S. at 316.

34. *Grutter*, 288 F.3d at 796.

35. *Id.*

36. *Id.* at 748-49.

37. See *Bakke*, 438 U.S. at 318. Powell thought that a "plus" system would be permissible as long as race did not become the decisive factor in the decision process when com-

Not only does the Law School give too much preference to race, it also does not give fair consideration to other unique student attributes. Powell believed that diversity includes a broad array of characteristics that should be weighed along with race.<sup>38</sup> Admissions data for the Law School's first-year class in 2000 is an example of the Law School's failure to correctly interpret Powell's views.<sup>39</sup> This data is illustrated in the grid below. Applicants with composite grade-point average and LSAT scores in the lower-left section of the admissions grid represent the students with the lowest objective qualifications. Applicants with grade-point averages ranging from 3.0 to 3.74 and LSAT scores from 148 to 154 represent a square area in the lower-left corner of the grid. In 2000, twenty-eight minority applicants were admitted with composite scores in this range.<sup>40</sup> However, the Law School admitted no white applicants within this range, despite receiving more applications from white students.<sup>41</sup>

### 2000—Final LSAT & GPA Admission Grid

#### Selected Minorities (African Americans, Native Americans, Mexican Americans)

	148-150 Apps Admits	151-153 Apps Admits	154-155 Apps Admits	156-158 Apps Admits	159-160 Apps Admits	161-163 Apps Admits	164-166 Apps Admits	167-169 Apps Admits	170-above Apps Admits	Total Apps Admits
3.75 & above	1 0	2 1	2 1	3 2	3 3	8 7	2 2	2 2	1 1	30 19
3.50- 3.74	5 1	12 5	3 2	12 10	4 2	8 8	7 7	5 5	0 0	71 40
3.25- 3.49	10 2	15 6	5 4	14 10	11 5	6 3	7 7	4 4	3 3	91 44
3.00- 3.24	13 1	8 2	9 5	10 10	4 3	4 2	4 3	1 1	0 0	70 28

#### Caucasian Americans

3.75 & above	8 0	21 2	23 1	37 2	40 3	107 31	138 95	85 85	92 91	561 311
3.50- 3.74	10 0	22 0	28 0	59 0	42 3	135 17	164 90	102 99	76 74	650 284
3.25- 3.49	8 0	15 0	20 0	49 2	34 1	77 6	77 24	54 46	34 34	385 114
3.00- 3.24	11 0	5 0	10 0	21 0	14 0	43 0	31 3	23 10	24 21	189 34

If appropriate consideration were given to other factors of diversity, it is reasonable to assume that at least a few white applicants would have been admitted from this group. Instead, it appears that the Law School's

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pared with other potentially beneficial student attributes. *Id.* at 317. In his vision of a permissible system, an "applicant who loses out on the last available seat to another candidate receiving a (plus) on the basis of ethnic background will not have been foreclosed from all consideration . . . simply because he was not the right color or had the wrong surname." *Id.* at 318.

38. *Id.* at 315.

39. See Appellee's Final Br. at 14, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (Nos. 01-1447, 01-1516).

40. *Id.*

41. *Id.*

notion of diversity is only skin-deep. When addressing this issue, the *Grutter* court ignored the Law School's admissions figures. The court relied on testimony from the Law School staff and the text of the admissions policy to conclude that all elements of diversity were weighed fairly.<sup>42</sup>

The strong racial preference and exclusion of non-minorities from the last seats in each class has resulted in the functional equivalent of a quota system. This conclusion is strongly supported by the Law School's steady minority enrollment percentage. From 1995 to 1998, minority enrollment ranged from 13.5 to 13.7 percent of the class enrolled.<sup>43</sup> The *Grutter* court noted that in other years, minority enrollment deviated from this range.<sup>44</sup> Nevertheless, these staggering figures demonstrate how the "plus" system allows the Law School to admit a desired percentage of minorities each year.

The Law School's official admissions policy closely tracks Powell's views but the policy is vaguely construed when admissions decisions are ultimately made. As drafted, there is nothing in the Law School's admissions policy that contradicts Powell's views. On the other hand, there is nothing written in the policy that places a ceiling on the amount of a "plus" that may be used or a floor on the weight that must be given to other diverse student attributes. Powell believed that a "plus" system could be constitutional as long as elements of diversity other than race were considered. However, it would be ridiculous to assume that Powell believed that a university could give a virtually unlimited preference to minorities as long as some minute amount of consideration were given to other characteristics. Nevertheless, the Law School has been able to operate a race-balancing admissions system under the cover of Powell's guidelines.

The *Grutter* court correctly argued that, under *Bakke*, "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."<sup>45</sup> However, under *Bakke*, good faith is only presumed in absence of a showing to the contrary.<sup>46</sup> The admissions data show that the Law School gave virtually unlimited preference to minorities in order to reserve the last seats in each class, thus making sure that a certain percentage are enrolled. Consequently, the overwhelming evidence confirms that good faith cannot be presumed in this case. The *Grutter* court's determination that the Law School's admissions system is permissible under *Bakke* is erroneous.

The *Grutter* court's holding is particularly significant because the circuit courts remain in dispute over the pursuit of diversity as a compelling state

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42. *Grutter*, 288 F.3d at 771.

43. *Id.* at 801.

44. *Id.* at 748.

45. *Bakke*, 438 U.S. at 318.

46. *Id.* at 318-19.

interest in higher education. Although the *Marks* test has been applied to *Bakke* in previous decisions, the *Grutter* court's holding marks the first time that a race-conscious admissions program modeled after *Bakke* has been deemed narrowly tailored at the appellate court level. Accordingly, in December of 2002, the Supreme Court granted certiorari to *Grutter*.<sup>47</sup> The Supreme Court will finally decide whether diversity is a compelling state interest. If it is determined that the pursuit of diversity is compelling, the Court will also be given the opportunity to define specific guidelines for constitutionally permissible race-conscious admissions systems. In the absence of Supreme Court clarification, The University of Michigan Law School's race-balancing admission system looms as the only model for the nation's institutions of higher learning to follow.

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47. *Grutter v. Bollinger*, 123 S. Ct. 617 (2002). Along with *Grutter*, the Supreme Court will review *Gratz v. Bollinger*, a similar case that involves The University of Michigan's undergraduate admissions system even though the appellate court has yet to rule on the case. See William Mears, *Affirmative Action Case Awaits Supreme Court Review*, CNN.com, Dec. 3, 2002, at <http://www.cnn.com/2002/LAW/12/02/scotus.affirmative.action> (last visited Feb. 5, 2003).



