An Examination of the Effect of the University of Michigan Cases on the Complexion of Higher Education

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Abstract

Some of the nation's most prominent colleges and universities have abandoned their affirmative action-based admission policies and adopted race-neutral affirmative action as a result of two lawsuits against the University of Michigan, which threaten the availability of undergraduate and graduate program access to applicants of color. In this article, an overview *Grutter v. Bollinger* and *Gratz v. Bollinger* is provided. Futhermore, the authors identify how *Grutter v. Bollinger* has specifically impacted other institutions.

Keywords: affirmative action, admissions policy, equity, equality, higher education

In 1996, Barbara Grutter, a Caucasian Michigan resident with a 161 LSAT score and 3.8 GPA, was denied admission to the University of Michigan's (U of M) Law School. Grutter argued her denial was the result of affirmative action based on an admissions criteria favoring minority applicants, and in response, she filed a lawsuit against the University, the Regents of the University of Michigan, and U of M leaders in position at the time of her rejection: Lee Bollinger, the University president; Jeffrey Lehman, the dean of the law school; and Dennis Shields, the director of admissions. *Grutter v. Bollinger* (539 U.S. 306 (2003) was filed on the grounds of race discrimination in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.

At the District level, the Court determined the U of M's Law School use of race for admission was unlawful. The District Court decision was subsequently overturned by the Sixth Circuit Court basing their decision on *Regents of the University of California v. Bakke* (1998) and considered the topic of race classification in assisting minorities in university admission. The Supreme Court affirmed the Sixth Circuit Court's reversal, thereby endorsing the University's admission policy.

To many, this was the beginning of the end of affirmative action. Affirmative action originated with an Executive Order signed by President John F. Kennedy in 1961; these policies were established to increase racial diversity and reduce instances of discrimination, in general, and to explicitly encourage colleges and universities to use an applicant's race as a factor for admissions. Though once understood as a necessity to promote racial diversity on campus, affirmative action is currently perpetuated as an unpopular policy facing increasing enmity in courts of law.

In its place, courts and commentators have been promoting an alternative form of affirmative action that is commonly called "race-neutral affirmative action." The race-neutral affirmative action seeks to change the racial composition of those who benefit from education, by not granting preferences based on race, but by allowing preferences based on characteristics that are correlated with race (Fitzpatrick, 2014). In Florida and Texas, for example, the flagship universities admit any in-state applicant who graduates in the top ten percent of their class (Fitzpatrick, 2014).

Moreover, the Trump Administration has recently launched a project to identify and pursue litigation against universities with affirmative action policies that are perceived to be discriminatory against Whites, in both undergraduate and graduate admissions (Savage, 2017). Thus, the outlook does not appear particularly bright for affirmative action programs in the United States, that grant preferences based on race to blacks, African Americans, Hispanics, in regards to university admissions (Fitzpatrick, 2014).

The Problem

Although students of color have made significant college completion gains from the 1980s to 1990s (Knight, Davenport, Green-Powell, & Hinton, 2014), African-American, American Indians, and Hispanic students continue to be less likely to complete college than white and Asian-American students (Tate, 2017). The variation in college graduation rates is reflected in Figure 1.

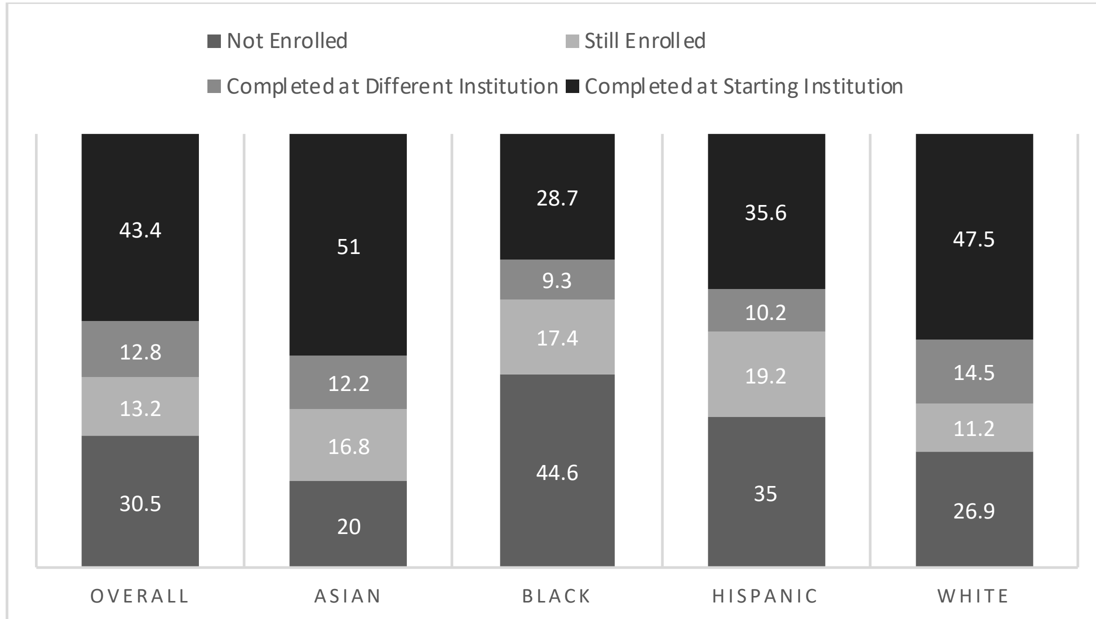

Figure 1. College Graduation Rates by Race
Note. Reprint from *Graduation Rates and Race.* Retrieved from https://www.insidehighered.com/news/2017/04/26/college-completion-rates-vary-race-and-ethnicity-report-finds Copyright 2017 by E. Tate.

Chief Justice John G. Roberts Jr. says that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race "(Turner, 2015). However, any threat to affirmative action policies promotes a more significant potential for continued college graduation disparity between Whites, Asians, and most people of color. Further, Justice Sonia Sotomayor in her dissent in *Schuette* states:

> Race matters. Race matters in part because of the long history of racial minorities being denied access to the political process. ... Race also matters because of persistent racial inequality in society — inequality that cannot be ignored and that has produced stark socioeconomic disparities…."And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you really from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here. (Lithwick D. 2014)

The Michigan Cases Discussed

In this article, we continue our focus on *Grutter v. Bollinger,* as well as an examination of *Gratz v. Bollinger,* another University of Michigan affirmative action case. In *Gratz*, the

university's undergraduate admissions program, which awarded underrepresented minorities bonus points on an admissions scale, was struck down as unconstitutional. In *Grutter*, a policy of conferring a favor on individual minority applicants to the university's law school was upheld.

Grutter v. Bollinger

The affirmative action admissions policy of the University of Michigan Law School was the subject of the United State Supreme Court case of *Grutter v. Bollinger* (539 U.S. 306, (2003). At the heart of this case, was the Law School's admission criteria to enhance the diversity of its student body. The goal of this criteria was to attain a "critical mass" of underrepresented minority students by utilizing race as a "plus factor" in admission. The potential rulings on this matter threaten to reverse the forty-year-old Supreme Court's decision *in Regents of the University of California v. Bakke* (1978). Because of the aforementioned case, most colleges and universities continued to follow its guidelines, arguing that student body diversity is a critical element in achieving the institution's mission and that the consideration of race/ethnicity in admissions is needed to achieve that diversity. In the *Grutter* decision, the United States Supreme Court found that the Michigan law school's admission policy fulfilled the requirements of the Equal Protection Clause. On June 23, 2003, the United States Supreme Court declared in a 5-4, a decision that the University of Michigan' racial preferences were legal. Thus, the Grutter decision underscored the importance and legal viability of the diversity rationale for affirmative action in college and university admission. (Boykin & Palmer, 2016)

The *Grutter* majority held that "the Law School had a compelling interest in attaining a diverse student body" and that the Law School's plan was closely tailored to that end, but that the Law School's program had to have a "logical endpoint," probably in about 25 years (539 U.S. 306 (2003). In November of 2006, however, succeeding the *Grutter* decision, a majority of voting Michiganders (58%), apparently disagreeing with the Court majority, passed a referendum prohibiting state-education affirmative action, essentially nullifying the consequence of *Grutter* in Michigan (*Schuette v. Coalition to Defend Affirmative Action*, 2014).

Gratz v. Bollinger

The Court on that same day reversed another U of M policy decision. This case concerned the admission policy for undergraduates. Specifically, in 1998, the University of Michigan Office of Undergraduate Admissions enacted a point-based system admissions policy (*Gratz v. Bollinger,* 2003). Students who earned 100 out of 150 possible points were awarded admission. The criteria used to evaluate student applicants so that can thereby gain points consist of such things as (a) high school grades, (b) standardized test scores, (c) high school quality, (d) the strength of high school curriculum, (d) in-state residency, (e) alumni relationships, (f) a personal essay, (g) personal achievement or leadership, and (h) membership in an "underrepresented" racial or ethnic minority group. In this system, underrepresented groups, such as African Americans, Hispanics and Native Americans received an automatic 20 points towards the 100 points needed for undergraduate admission purposes based upon their race.

In both the fall of 1995 and 1997, two white applicants who were declined admission to the college (*Gratz v. Bollinger*, 2003). In October 1997, the two applicants responded by filing a cause of action for discrimination by the University in the United States District Court for the Eastern District of Michigan. They requested a class action suit against the university, the college,

and each of the people who served as president of the University when one of the applicants sought admission. The lawsuit alleged that the University's utilization of racial partiality violated the Equal Protection Clause of the Federal Constitution's Fourteenth Amendment. The case also claimed that this was a violation of federal statutes including a provision of Title VI of the Civil Rights Act of 1964 (42 [***258] USCS §2000d) and 42 USCS § 1981. Also, their proposed resolution included declaratory and injunctive relief, compensatory and punitive damages, and an order instructing the college to admit the later applicant as a transfer student. The District Court (1) permitted the applicants' class certification, (2) formulated the class, and (3) bifurcated the proceedings into a liability phase and a damages phase (*Gratz v. Bollinger,* 2003).

The liability phase took place first. The District Court resolved that the current admission policy was strictly customized to create a diverse student body, as well as, a racially and ethnically diverse community and granted the defendants' summary judgment. The District Court found that the University of Michigan policy, from 1995 through 1998, worked as the functional equivalent of a quota system and granted the plaintiffs summary judgment as to those years (122 F Supp 2d 811). The interlocutory appeals in the case at hand were undecided in the United States Court of Appeals for the Sixth Circuit. The Court of Appeals in *Grutter v Bollinger* (1) supported the race-conscious admissions policy for the University of Michigan's Law School (288 F3d 732), and (2) the United States Supreme Court granted certiorari in both the *Grutter* and present case. Therefore, in *Gratz v. Bollinger* and *Grutter v. Bollinger*, the U.S. Supreme Court, affirmed that race-based affirmative action policies were not a violation of the Equal Protection Clause of the Fourteenth Amendment and that such policies survive strict scrutiny because obtaining a diverse student body is a compelling purpose for establishing such policy.

Higher Education Impact

The significance of *Grutter v. Bollinger* on higher education has been extensive. While some universities have disregarded the "U.S. Supreme Court's reprimand to contemplate other alternatives before utilizing race-conscious admissions policies seriously" (Schmidt, 2008, p. A15), others have persisted in using race in admissions policies (Lyn, 2008). The importance of the case has been researched widely with some research proposing that *Grutter v. Bollinger* has led to a reduction in diversity in graduate programs (Schmidta, 2010). Other research notes that the significance of a varied student body has a very limited impact long-term on student learning (Schmidtb 2010). Research indicates that some universities have been resourceful in preserving or proliferating diversity in their educational programs (Kahlenberg, 2010). While there are varied viewpoints on the impact *of Grutter v. Bollinger*, the importance of *Grutter v. Bollinger* on higher education can be found in the changes, policies, and responses of many institutions of higher education. Some institutions have reacted to the *Gutter v. Bollinger* ruling with more diversification of initiatives, and others have responded by eliminating race-based admissions policies. The following is an analysis of a sampling of the responses to *Grutter v. Bollinger* from the academic, the public, and state legislatures.

Pennsylvania State University

Penn State established its responsibility to diversity utilizing the *Grutter v. Bollinger* case as a declaration of its policies associated with diversity. As noted by President Spanier in the institution's 2004 – 2009 Framework to Foster Diversity plan, "The Supreme Court has recognized

(in *Grutter v. Bollinger*) that racial diversity is a captivating educational purpose…The Supreme Court rulings in the Michigan cases guarantee Penn State's strategy of inclusiveness" (University, 2004, Introduction). In the framework, the institution conveyed its intentions to enhance diversity in the areas of 1) Campus Climate and Intergroup Relations, 2) Access and Success, 3) Education and Scholarship, and 4) Institutional Viability and Vitality (Pennsylvania State University, 2004). In feedback to *Grutter v. Bollinger*, Penn State answered that as the University wanted to "expand their attentiveness in not only enlisting and preserving a diverse student body but also in improving a supportive and inclusive climate" (Pennsylvania University, 2004, p.1, Introduction).

University of Maryland

Long before the *Grutter v. Bollinger* adjudication, the University of Maryland had to handle resistance to its race-based policies associated with admissions and financial aid. In 1991, a pupil at the University of Maryland registered a discrimination lawsuit expressing that the University's Banneker Scholarship (granted only to African American pupils) was discriminatory and illegal (Alger, 2003). The Court decided that the University's Banneker Scholarship was "not closely customized to remediate the problems distinguished by the University" (Alger, 2003). The University revamped its policy, and the prevailing Banneker Scholarship is available to all freshman entering the Honors College at the University (Maryland, 2011). After *Grutter v. Bollinger*, the institution could have disputed the earlier judgment, but to date, the Banneker Scholarship remains available to all students instead of just African American students as the scholarship was initially intended (Maryland, 2011).

University of Georgia

The University of Georgia responded to *Grutter v. Bollinger* by remedying a campus-wide inquiry of its policies associated with admissions and race. In doing so, the institution outlined a diversity statement, which contains language citing the utilization of race as a non-primary disadvantage in admissions (Lyn, 2008). When the institution made its intentions known to the Georgia Attorney General's Office, the Attorney General answered with a memorandum describing the consequences of the University's conclusion along with a recommendation to progress with discretion (Lyn, 2008). As the University was constructing in answer to the Attorney General's considerations, the President of the University decided to terminate the policy of accommodating race in the admissions process (Lyn, 2008). President Adams noted that the cost to guard against lawsuits removed resources from the same students that they were attempting to assist.

Other Reactions

According to the Pew Research Center, eight states have banned affirmative action in college admissions: Arizona, California, Colorado, Florida, Michigan, Nebraska, New Hampshire, and Oklahoma (see Figure 2). In Florida, the consideration of race is banned in admissions at public universities and in state employment. However, Florida has also enacted a law requiring the development of affirmative action plans by state agencies (Ballotpedia, 2017) Also, 28 states require affirmative action plans in either public employment or apprenticeships. Affirmative action programs that grant racial preferences have come under scrutiny in the courts for potentially

violating the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act. Institutions in those states have tried to increase diversity by examining applicants' socioeconomic class, accepting more community college transfer students and offering more financial aid (DeSilver, 2014).

YEAR	STATE	METHOD
2012	**Oklahoma**	Legislatively referred constitutional amendment
2011	**New Hampshire**	Statute
2010	**Arizona**	Initiative constitutional amendment
2008	**Colorado**	*Failed initiative constitutional amendment*
2008	**Nebraska**	Initiative constitutional amendment
2006	**Michigan**	Initiative constitutional amendment
1999	**Florida**	Executive order by governor
1998	**Washington**	Initiative statute
1996	**California**	Initiative constitutional amendment

Figure 2. Affirmative Action Bans in the U.S

Note. Reprint from *Supreme Court says states can ban affirmative action; 8 already have* Retrieved from http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/ Copyright 2014 by Pew Center in an article by Drew Desilver.

In Texas, California, and Florida, percentage plans, admitting a certain percent of the highest performing graduates of each high school to state public universities, emerged in response to lawsuits, legislation, and public opinion against race-conscious affirmative action (Knight et al., 2014). However, eliminating race-preference affirmative action programs in higher education, and adopting these plans has had a negative impact on the previous population that affirmative action served--African American, Hispanic, and Native American enrollment in three of this nation's most populous states. For example, in Texas, although minority admission rates have increased at some schools, they have declined overall at the top tier Texas law and medical schools (Knight et al., 2014). California in 1998, banned Affirmative Action in higher education and when it did, African American and Hispanic enrollment at the University of California, Berkeley fell from 24% to just 13%. Today, over half of college-age Californians are black or, but only 15% of Berkeley's freshmen belong to either race (Chalabi, (2017).

The Michigan Civil Rights Initiative (MCRI), or Proposal 2, a ballot initiative in Michigan passed into constitutional law by a 58% to 42% margin on November 7, 2006, dimming the prospects of the diversity of higher education in Michigan, as well as across the country (Lewin, 2006). Although three Michigan universities and an advocacy group legally opposed Proposition 2, the Proposal became law on December 22, 2006. In 2014, The U.S. Supreme Court upheld Michigan's controversial ban on affirmative action in public college admissions (*Schuette v. Coalition to Defend Affirmative Action*, 2014).

Conclusion

According to a *New York Times* analysis after decades of affirmative action, African American and Hispanic students are less likely to attend this nation's top colleges and universities than they were 35 years ago (Ashkenas, Park, Pearce, 2017). In fact, the share of African American first-year students at elite schools is virtually unchanged since 1980. African American students are just 6 percent of freshmen, but 15 percent of college-age Americans. Currently, more Hispanics are attending elite schools, but the increase has not kept up with the growth of young Hispanics in the United States.

The data from the Perspectives on Diversity survey collected at the University of Michigan Law School in *Gutter* and expanded by several empirical research studies at other law schools indicate the need of—and current lack of—diversity discussions in the university setting (Deo, 2011). Many believe that the lack of diversity on top trier campuses has resulted in increased racial incidents across America. For example, according to *Atlantic* magazine, in 2015 at The University of Virginia in Charlottesville, the state's premier institution of higher education (Voght, 2017) African American picketed to call attention to racism and the challenges of black student life. In that same year, The University of Missouri, the president, and chancellor resigned amid protests over the school's handling of racism on campus. Students also marched at the University of California, Los Angeles campus, because, at a Kayne West theme fraternity party, white fraternity members wore blackface. Across town at the University of Southern California, student leaders were demanding action after the undergraduate Indian-American student body president, was accosted with a racial slur by another student who threw a drink at her. Most recently, Iowa's black college students were the subject of a study where they stated they did not feel welcome on their campuses and in which racial hostility was confirmed.

In any event, diversity is a source of opportunity. In a community where people are unified on the basis of shared values and meanings, there is a propensity to develop a commitment to receptive attention and a willingness to respond to the legitimate needs all its members. They (members of the community) draw on a collective to do what they cannot do alone. Diversity within the university community is a valuable educational goal for all campuses and all students. However, the fate of Affirmative Action is now in the hands of the Trump Administration and its Supreme Court nominee.

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