

Impact of Grutter/Gatz on Affirmative Action Programs

Impact of Grutter/Gatz on Affirmative Action Programs	1
Conclusion	1
Aff action has primarily decreased as a result – colleges fear legal challenges	2
Minority-oriented programs declining to avoid legal battles	3
Decisions forced more nuanced affirmative action	3
Ford Foundation fellows broadened to include non-minority students	3
SCOTUS decisions cited as reasons for changes	4
Decisions caused witch hunts against affirmative action – similar to backlash against Brown v. BOE	4
Mischaracterizations of Gratz by the USFG have increased fear of legal challenges against aff action.....	4
Impact of the decisions is unclear: clarification is needed.....	5
Implementation of Michigan decisions will be complex	5
Federal politics oppose aff action	5
Michigan cases won't end aff action.....	6
Steps to take for compliance with Grutter/Gratz.....	6
Need to examine impact in other areas	6
No SCOTUS action on Grutter or Gratz soon.....	6

Conclusion

The impact of Grutter/Gratz on affirmative action programs in the area of collegiate admissions. I focused mostly on literature from 2005 and 2006 to examine the actual impact of Gratz rather than predictions made soon after the decision about how it would affect admissions. My general conclusion is that the impact has been a scaling back in race-preferential affirmative action policies due to a fear of legal challenges from groups working against affirmative action, but there has not been a complete swing to one side or another.

Three potential areas that emerged from this research:

1. Broaden affirmative action: overturn the restrictions on race-based points, etc programs but uphold the interest that the state/university has in promoting diversity in education.
2. Narrow affirmative action: overturn the state/university interest in promoting diversity in education, thus ending most affirmative action policies such as minority scholarships.
3. Extend Grutter/Gratz to other areas such as “race-conscious financial aid, mentoring programs, and faculty hiring” (Michaelson 2005).

Included below are cards supporting this conclusion. Please let me know if you have any questions/need more work in this area.

Brad Hall
Wake Forest
bradhall@alumni.wfu.edu

Aff action has primarily decreased as a result – colleges fear legal challenges

New York Times, March 14, 2006, “Colleges Open Minority Aid To All Comers,” p. Lexis

Facing threats of litigation and pressure from Washington, colleges and universities nationwide are opening to white students hundreds of thousands of dollars in fellowships, scholarships and other programs previously created for minorities. Southern Illinois University reached a consent decree last month with the Justice Department to allow nonminorities and men access to graduate fellowships originally created for minorities and women. In January, the State University of New York made white students eligible for \$6.8 million of aid in two scholarship programs also previously available just for minorities. Pepperdine University is negotiating with the Education Department over its use of race as a criterion in its programs. “They’re all trying to minimize their legal exposure,” Susan Sturm, a law professor at Columbia University, said about colleges and universities. “The question is how are they doing that, and are they doing that in a way that’s going to shut down any effort or any successful effort to diversify the student body?” The institutions are reacting to two 2003 Supreme Court cases on using race in admissions at the University of Michigan. Although the cases did not ban using race in admissions to higher education, they did leave the state of the law unclear, and with the changing composition of the court, some university and college officials fear legal challenges. The affected areas include programs for high schools and graduate fellowships. It is far too early to determine the effects of the changes on the presence of minorities in higher education and how far the pool of money for scholarships and similar programs will stretch. Firm data on how many institutions have modified their policies is elusive because colleges and institutions are not eager to trumpet the changes. At least a handful are seeking to put more money into the programs as they expand the possible pool of applicants. Some white students are qualifying for the aid. Last year, in response to a legal threat from the Education Department, Washington University in St. Louis modified the standards for an undergraduate scholarship that had been open just to minorities and was named for the first African-American dean at the university. This year, the first since the change, 12 of the 42 first-year recipients are white. Officials at conservative groups that are pushing for the changes see the shift as a sign of success in eliminating race as a factor in decision making in higher education. “Our concern is that the law be followed and that nobody be denied participation in a program on account of skin color or what country their ancestors came from,” said Roger Clegg, president and general counsel of the Center for Equal Opportunity, which has been pressing institutions on the issue. “We’re not looking at achieving a particular racial outcome,” Mr. Clegg added. “And it’s unfortunate that some organizations seem to view the success or failure of the program based simply on what percentage of students of this color or that color can participate.” Advocates of focused scholarships programs like Theodore M. Shaw, president of the NAACP Legal Defense and Educational Fund Inc., challenge the notion that programs for minority students hurt whites. “How is it that they conclude that the great evil in this country is discrimination against white people?” Mr. Shaw asked. “Can I put that question any more pointedly? I struggle to find the words to do it because it’s so stunning.” Mr. Shaw said protecting scholarships and other programs for minorities was “at the top of our agenda.” Travis Reindl, director of state policy analysis at the American Association of State Colleges and Universities, said hundreds, if not thousands, of scholarship and fellowship programs historically used race as a criterion. Mr. Reindl estimated that as many as half of the four-year colleges in the United States had reviewed or modified such programs. Neither the Justice Department nor Education Department, nor organizations on all sides of the discussions over affirmative action, have gathered statistics tracking the trend. In January, The Chronicle of Higher Education named more than 12 institutions that had made the changes. Mr. Clegg said that since 2003 his center had sent 200 challenges to colleges and universities over race-based scholarships and other programs, warning of legal action if changes were not made. He said more than 150 institutions had broadened their programs in response. The two Supreme Court affirmative action decisions that are worrying the institutions involved the University of Michigan. In Grutter v. Bollinger, the court upheld the use of race in admissions decisions at the law school. It found that there had been a “highly individualized, holistic review of each applicant’s file” in which race could be properly considered. In Gratz v. Bollinger, the court struck down the use of race in undergraduate admissions, finding that those applications used a scoring system that should not have awarded points based on race. “When the Gratz and Grutter decisions came down, that was really kind of a mixed bag,” Mr. Reindl said. “It’s still a very murky

environment, and it's also a very contentious environment.” The effects of the decisions, in June 2003, were almost immediate. After the summer of 2003, Princeton closed a seven-week program for minority high school juniors. Begun in 1985, it focused on strengthening skills in economics, statistics and other areas. Princeton restarted the program, the Woodrow Wilson School Junior Summer Institute, last summer. Now it is open to all students showing an interest in public service and commitment to “cross-cultural issues.” Changes have also come at institutions like St. Louis University, which widened a scholarship program for blacks in 2004 to include all students and named it after the Rev. Dr. Martin Luther King Jr. Three years ago, Williams College opened a graduate fellowship and a prefreshman program to all races. Officials at several institutions and scholars emphasized that scholarships and fellowships open to all students could, if thoughtfully created, still achieve diversity in classrooms and on faculties.

Minority-oriented programs declining to avoid legal battles

Ronald **Roach**, July 14, **2005**, Black Issues in Higher Education, Vol. 22, No. 11, “Affirmative Action Fallout; Graduate-Level Programs Once Aimed at Minorities Now Opening Up To All Students in Efforts To Avoid Legal Challenges,” p. Lexis

Race-conscious affirmative action in higher education survived a close challenge in 2003 when the U.S. Supreme Court ruled that race was a valid academic admission criteria in the Grutter v. Bollinger case. Two years later, a number of “pipeline” programs to help under-represented minorities gain admission to and complete graduate school have modified their eligibility requirements, opening their participation to all students in an effort to avoid legal challenges. Civil rights activists have used the two-year anniversary of the court’s landmark decision as a launching point to criticize the U.S. Department of Education’s Office of Civil Rights. During the Bush administration, the office has prompted many colleges and universities to change or drop race- and ethnic-specific academic enrichment and scholarship programs. The NAACP’s Legal Defense and Educational Fund made its dissatisfaction with the Education Department known in a June 23 letter to Margaret Spellings, the U.S. Secretary of Education. “As we mark the second anniversary of the Supreme Court’s decisions in Grutter v. Bollinger and Gratz v. Bollinger, we have a grave concern that the Department of Education is undermining these decisions. ... Presumably with the backing of your office, groups opposed to affirmative action have sent out similarly worded letters to colleges and universities across the nation threatening to file complaints to OCR if any and all race-conscious measures are not eliminated.”

Decisions forced more nuanced affirmative action

Ronald **Roach**, July 14, **2005**, Black Issues in Higher Education, Vol. 22, No. 11, “Affirmative Action Fallout; Graduate-Level Programs Once Aimed at Minorities Now Opening Up To All Students in Efforts To Avoid Legal Challenges,” p. Lexis

“(The decisions) helped clarify that schools must give ‘individualized consideration’ in selecting students, and thus have forced some schools to open programs to all disadvantaged or diversity-adding students, of all races and ethnicities. In my view, those reforms have strengthened these programs, making them fairer and less divisive, and providing help to a wider variety of deserving students,” says Roger Clegg, the general counsel at the Center for Equal Opportunity in Sterling, Va. Over the past several years, the center, a staunch opponent of race-conscious affirmative action, has led the charge against diversity programs at colleges and universities. By threatening to file a complaint, or actually filing one with OCR in some cases, the center has succeeded in forcing many institutions to either adopt race-neutral policies or drop their special programs altogether.

Ford Foundation fellows broadened to include non-minority students

Ronald **Roach**, July 14, **2005**, Black Issues in Higher Education, Vol. 22, No. 11, “Affirmative Action Fallout; Graduate-Level Programs Once Aimed at Minorities Now Opening Up To All Students in Efforts To Avoid Legal Challenges,” p. Lexis

A number of participants in the long-running Ford Foundation Fellowship programs say they were dismayed to learn last year that the foundation had altered the eligibility and name of the nation’s largest Ph.D.-support program for underrepresented minorities. Since 1979 the program has provided fellowship funding for nearly

2,300 African-American, American Indian and Hispanic doctoral recipients. Renamed the Ford Foundation Diversity Fellows program in 2004, the modified program has recently accepted its first cohort of students which includes non-under-represented minorities. The new mix of program participants will be funded for the 2005-2006 academic year, according to Foundation officials. Dr. Yvette Maria Huet-Hudson, a biology professor at the University of North Carolina-Charlotte and former Ford fellow, says it was disappointing that the foundation made changes in the absence of a direct challenge to the program. "I would have preferred for the Ford Foundation to just wait and see the program challenged before taking action," says Huet-Hudson, who volunteers as a regional coordinator in North Carolina to mentor current fellows.

SCOTUS decisions cited as reasons for changes

Ronald **Roach**, July 14, **2005**, Black Issues in Higher Education, Vol. 22, No. 11, "Affirmative Action Fallout; Graduate-Level Programs Once Aimed at Minorities Now Opening Up To All Students in Efforts To Avoid Legal Challenges," p. Lexis

Dr. Janice Petrovich, the director of education, sexuality and religion programs at the Ford Foundation, said the Supreme Court decisions spurred the foundation to revamp the fellows program--which has been around in some form for 40 years--"to broaden the goals" of the long-term initiative. "We needed more champions," she says, adding that the inclusion of non-under-represented minorities should strengthen overall diversity in the academy. Petrovich adds that Ford has invested \$175 million in the fellowship program over four decades.

Decisions caused witch hunts against affirmative action – similar to backlash against Brown v. BOE

Elise **Boddie**, July 1, **2005**, The Chronicle of Higher Education, "An Insidious Attack on Affirmative Action," p. Lexis

That insidious project, it is worth remembering, has a historical precedent. Following the Supreme Court's landmark 1954 decision in Brown v. Board of Education, Southern states launched a campaign of massive resistance to its mandate to strike down racial segregation in public education. Across the South, government officials tried to accomplish, through fear and intimidation, what they did not achieve before the court: state-sanctioned denial of equal opportunity to African-Americans. George C. Wallace, the governor of Alabama, came to symbolize that entrenchment when he vowed in his 1963 inauguration speech to uphold "segregation forever" under the auspice of states' rights; five months later he stood in the door of Foster Auditorium at the University of Alabama to block black students from registering. Today the heirs of Governor Wallace are conducting a more subtle, but no less nefarious, campaign, organized around the Supreme Court's companion decision to Grutter, that of Gratz v. Bollinger. The Gratz ruling struck down an undergraduate-admissions process at Michigan that allocated points to minority applicants on the basis of race. Seizing upon that opinion, an aggressive anti-affirmative-action lobby has subjected public universities to fishing expeditions for information that race is being improperly used in admissions or otherwise. The result is a climate of suspicion and fear at those institutions surrounding any use of race in their programs. Unlike the 1950s, when the federal government threw its power behind desegregation, the government today seems to be closely aligned with those who would block minority access to college. A recent study by two Princeton University sociologists suggests that doing away with affirmative-action programs would erode the numbers of African-American and Hispanic students in college. Yet the Education Department's Office for Civil Rights has been using time-consuming and expensive investigations, and the threat of litigation, to pressure higher-education institutions to drop scholarships and other programs designed to help students of color overcome inequality. Sadly, the very agency charged with protecting civil rights may be twisting Grutter's victory into defeat.

Mischaracterizations of Gratz by the USFG have increased fear of legal challenges against aff action

Elise **Boddie**, July 1, **2005**, The Chronicle of Higher Education, "An Insidious Attack on Affirmative Action," p. Lexis

Foes of affirmative action are promoting the notion that the court's decision in Gratz bars all race-exclusive measures. That is false. Gratz did not address programs outside admissions. Therefore, as many observers have pointed out, the court's directive in Gratz -- that universities cannot rely solely on race when reviewing

applicants -- may provide some guidance, but it does not doom all race-exclusive programs in other contexts. For example, a university may need to rely on race-exclusive recruitment and retention programs to attract diverse students to apply, to enroll, and then to stay once admitted. Without race-targeted measures, campuses that are in rural and racially isolated locations, have student bodies that are overwhelmingly white, or are otherwise perceived as being unwelcome environments for members of minority groups may have a difficult time achieving diversity. However, many colleges, intimidated by threats and saber rattling from anti-affirmative-action forces and the Office for Civil Rights, have summarily dropped or minimized the use of race in advising, scholarship, retention, and other programs outside of admissions. We have also witnessed a domino effect: When larger, more prestigious universities eliminate race-based programs aimed at diversity, smaller institutions, frequently without justification, follow suit. Colleges and universities that consider race are well advised to re-examine their policies to ensure they reflect a clearly articulated interest in diversity and an educational mission that is tied to that interest; and they should refine such programs if they do not demonstrably satisfy those objectives. But as the Education Department's own 1994 guidance on financial aid indicates, that does not mean that race-targeted programs outside admissions -- in recruitment, advising, scholarship, and retention -- are necessarily unlawful if they are part of a broader university effort to facilitate student diversity. By reflexively abandoning such programs, they may be sacrificing important tools for enrolling and retaining critical numbers of minority students. Indeed, such programs may be crucial to realizing the very diversity that the court sanctioned in its broad opinion in Grutter.

Impact of the decisions is unclear: clarification is needed

Andre **Bell et al**, vice president of College and University Enrollment Solutions at the College Board, May 27, **2005**, *The Chronicle of Higher Education*, "Race and Diversity Practices for the Post-' Grutter' Era," p. Lexis Still, the Michigan decisions left as many questions as answers. Limited to admissions issues, they did not address financial-aid and scholarship programs, or recruitment, outreach, and retention practices -- all of which can involve the consideration of race or ethnicity. That limitation is important because (in the court's words) "context matters" when evaluating any race- and ethnicity-conscious policies under federal law.

Implementation of Michigan decisions will be complex

Martin **Michaelson**, partner in the Washington law firm of Hogan & Hartson, February 11, **2005**, *The Chronicle of Higher Education*, "Affirmative Action Has a Future," p. Lexis

Another misconception is that the legal situation is simple. Some supporters hold that the Michigan decisions validated an exceedingly broad range of diversity-enhancing practices and basically endorsed the status quo. Many opponents, by contrast, hold that diversity may now be lawfully administered only in a severely cramped way that few institutions will find feasible or acceptable. The reality is otherwise. At the root of those misunderstandings is the question, Just what do the Michigan rulings signify? Application of the principles that the Supreme Court announced requires judgment. Hundreds of higher-education lawyers and administrators are engaged in making those judgments. Unquestionably the most crucial element of the Supreme Court's rulings was its declaration that the government's interest in student diversity is compelling and can warrant taking race and ethnicity into account in admissions. Never before in our time has the court unambiguously permitted consciousness of race and ethnicity, in decisions in which the government has an interest, where there was no government finding of specific discrimination. Although the Court's ruling on the point was nominally 5-4, two dissenting justices did not demur on that ground. Thus, seven of the nine justices, on a Supreme Court more conservative than any since the Truman administration, did not oppose the proposition.

Federal politics oppose aff action

Martin **Michaelson**, partner in the Washington law firm of Hogan & Hartson, February 11, **2005**, *The Chronicle of Higher Education*, "Affirmative Action Has a Future," p. Lexis

It is true, as affirmative-action opponents relish pointing out, that the political climate in Washington is now generally cold to expansive affirmative action. The Department of Education's Office for Civil Rights can be expected to enforce more energetically Title VI of the Civil Rights Act of 1964 -- which bars racial discrimination by institutions that receive federal aid -- when people not in minority groups claim

discrimination. And it is true that the federal judiciary is leaning increasingly to the right.

Michigan cases won't end aff action

Martin **Michaelson**, partner in the Washington law firm of Hogan & Hartson, February 11, **2005**, The Chronicle of Higher Education, "Affirmative Action Has a Future," p. Lexis

But the Michigan doctrine is at no imminent risk of reversal, Congress is unlikely to weigh in decisively on this issue, and, notwithstanding their rhetoric, many public-opinion leaders who are skeptical of affirmative action do not actually want to see diversity end. Yes, many colleges and universities will continue to revise their affirmative-action practices. Some outcomes will displease opponents, and some will displease proponents, of affirmative action. But the rule of law will prevail, as will student diversity, and with effort and patience they can be reconciled.

Steps to take for compliance with Grutter/Gratz

Andre **Bell et al**, vice president of College and University Enrollment Solutions at the College Board, May 27, **2005**, The Chronicle of Higher Education, "Race and Diversity Practices for the Post-' Grutter' Era," p. Lexis

As the College Board's Access and Diversity Collaborative has met since the fall of 2004 to focus on diversity issues in the wake of the Michigan decisions, it has become clear that a major principle emerges from one of the court's points of emphasis: Process matters. Given what the court has said about the need for periodic review and evaluation of race- and ethnicity-conscious admissions practices, it is clear that, in all their diversity programs, higher-education officials should:

- * Define their diversity goals and exhibit a demonstrable commitment to them, with support from the highest levels of the institution. If, in legal terms, such goals are to be "compelling," they had better reflect the institution's overall mission and be put into effect through sound strategies.

- * Establish a process of review that involves varied perspectives and considers all practices designed to achieve diversity in light of relevant research and experience. In short, it is not likely to be sufficient to evaluate any one program in a vacuum. For example, to determine if consideration of race in a scholarship program is necessary to achieve particular diversity objectives, viable race-neutral alternatives must be evaluated and, where appropriate, pursued. Such alternatives could involve a range of programs, like recruitment and outreach efforts. An evaluation of a financial-aid program must include a review of other kinds of programs that might further the diversity objectives associated with the financial-aid program.

- * Set benchmarks of success, with a basis for meaningfully evaluating, over time, whether diversity programs reach those benchmarks. Although attempting to measure success with respect to diversity can be challenging, the University of Michigan at Ann Arbor succeeded in doing so. Its law-school admissions policy supported the goal of achieving a critical mass of underrepresented minority students -- a goal that was not a quota, on the one hand, or amorphous and incapable of definition, on the other.

Ultimately, the University of Michigan's success in defending its law-school admissions policy resulted from its emphasis on educational benefits associated with a diverse student body, coupled with a demonstration of a clear institutional commitment, process, and method of determining what made good educational sense in light of institution-specific goals. That lesson, perhaps more than any other, should be the one that institutions contemplate as they endeavor to design diversity policies and programs that will satisfy applicable federal legal standards.

Need to examine impact in other areas

Martin **Michaelson**, partner in the Washington law firm of Hogan & Hartson, February 11, **2005**, The Chronicle of Higher Education, "Affirmative Action Has a Future," p. Lexis

Because the Michigan decisions involved admissions, their potential applicability to other areas entails reasoning by analogy. Thus, for example, the extent to which the decisions affect race-conscious financial aid, mentoring programs, and faculty hiring requires analysis.

No SCOTUS action on Grutter or Gratz soon

Detroit Free Press, August 3, **2005**, "A fifth vote against U-M?" p. Lexis

With each passing day, we're learning a little more about the man President George W. Bush has nominated

to replace Supreme Court Justice Sandra Day O'Connor. We now know, for instance, that as a young lawyer in former President Ronald Reagan's Justice Department, John G. Roberts betrayed an abiding skepticism about affirmative action -- a posture that strikes one constitutional scholar, Cornell's Gary Simson, as strikingly similar to Robert Bork's Bork's Supreme Court dreams ran aground on his own candor. But so far nothing has emerged to upset the conventional wisdom that Roberts will win confirmation by a comfortable majority in the U.S. Senate. Which begs a question: If Roberts is confirmed, will all the skirmishing over efforts to put an anti-affirmative action initiative before Michigan voters next year prove to have been beside the point? The whole idea behind the Michigan Civil Rights Initiative, after all, is to nullify the 5-4 Supreme Court decision upholding race-conscious admissions at the University of Michigan and its law school. If O'Connor is replaced by someone more hostile to affirmative action, why shouldn't opponents of that policy sit tight and wait for the reconstituted court to reverse course? History on its side Most speculation about the impact of Roberts' elevation has centered on the possibility he might provide a fifth vote to reverse Roe v. Wade, the landmark 1973 decision that struck down state laws prohibiting abortion. The U-M decisions were handed down much more recently. In some minds, that makes them likelier candidates for reversal than Roe, whose fundamental principles have endured three decades of sustained legal assault. But there are a few problems with that analysis. The decisions in the U-M admissions cases -- Grutter v. Bollinger and Gratz v. Bollinger -- were handed down just two summers ago, but the rationale the court embraced in those cases dates to Justice Lewis Powell's 1978 opinion in Regents of the University of California v. Bakke. Although only a bare majority of five sanctioned the admissions process U-M's law school used to enroll a diverse freshman class, seven justices, including William Rehnquist and Anthony Kennedy, endorsed Powell's view that the pursuit of diversity was sufficient reason for universities to consider an applicant's race. Lasting impact "When U-M says it won the Grutter case, they're talking about the diversity rationale, not their specific admissions procedures," explains attorney Terry Pell, whose Center for Individual Rights represented Barbara Grutter and Jennifer Gratz in their challenge to U-M. "And as long as there are six or seven votes for diversity, the addition of one justice isn't going to make much difference." Pell predicts that, whatever personnel changes the court experiences, at least 15 years will pass before justices revisit the issues raised by Grutter and Gratz. So what Michigan voters do in 2006 will likely matter a great deal -- and for a long while.