17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 13: Affirmative Action; "Storming the Court"

Discussion of Gratz v. Bollinger, 2003:
Background:
This case deals with the University of Michigan College of Literature, Sciences, & Arts' undergraduate admissions policy of automatically awarding 20 points to students of a minority race, which the Court found would entail admission of qualified minority students over qualified non-minority students.

The college saves room in its rolling admissions for some special groups such as top athletes, foreign students, under-represented minorities, and ROTC candidates.

What are issues involved in weighing race as a factor in admissions?

- Fraud
  - Race can be indeterminate. Recall Plessy v. Ferguson, where Plessy was 1/8 African American, but could not be distinguished as such.
  - Forcing someone to provide a photo could also raise issues under the equal protection clause.
  - Possibility that persons could claim minority status in order to gain advantage in process?
- Race may only be a proxy for other characteristics sought by schools such as ability to overcome hardship and breaking socio-economic barriers
- How do you consider people of mixed race?

Justice Souter says that awarding points is not any worse than any other affirmative action method:
"The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." Ante*, at 23. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.*

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," Grutter*,* post*, at 25; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.*

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U. S., at 319, n. 53 (opinion of Powell, J.)."*

Comments:
The objective of using race to earn points is to achieve diversity of experience and perspective. Therefore, the selection criteria should not exclusively be a matter of race. There are two ways of looking at the race issue and its effect on potential applicants: internal and external factors. Should admissions officers award race-based points based on how racial minorities are treated by the outside world and assume that they had to overcome hardships because of their race? Or should they look at the experience of each individual, an experience in which race might play a part? Should a rich minority student who graduated from a prestigious prep school be awarded extra points? Might he have a diverse perspective merely because he was a Black student raised in primarily white surroundings? Or is he likely to have assimilated to his surroundings?

Is there a kind of discrimination going on within the minority pools that is itself inconsistent with equal protection? For example, often Asian Americans are not given preference because they are already represented in proportionate amounts. This raises additional equal protection concerns if not all minorities are protected equally.

Decision:
In a 6-3 decision, the Court strikes down the admissions policy because it is not narrowly tailored to advance the state's compelling interest in providing a diverse learning experience for all students.

"Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in Grutter *v.* Bollinger*,* post*, at 15-21, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve educational diversity." (Decision in Gratz v. Bollinger, Findlaw.com)*

Discussion of Grutter v. Bollinger, 2003
This case deals with the University of Michigan Law School admissions policy, which takes race into account, but does not give a fixed number of points. The Law School reviews each application and looks at all the attributes of the applicant. Race is one factor that can give a person a boost.

Decision:
The Court upholds the law school's program as a narrowly tailored procedure for advancing the compelling state interest of having a diverse student body representing different political, economic, and cultural viewpoints.

Discussion:
The school keeps demographic statistics as the admission process goes on, trying to ensure there is some racial balance. There is no quota of students per se, but the admissions council attempts to ensure that there are a wide body of cultural backgrounds representing different perspectives to ensure that the students do not feel intimidated in speaking out.

The dissenting opinions of Kennedy and Rehnquist argue that the admissions figures appear to be consistent with a quota. Does this mean there is a quota?

The decision to admit more students of a specific race might be reflected the same way in the numbers. Effectively though, the admissions process deemed legitimate by the Bakke decision may just be inconsistent because the procedure used by the law school, as represented in Rehnquist and Kennedy's dissent, amounts to racial balancing effectively implementing a quota.

Another issue at play is what affirmative action alternatives would be available to schools if the law school's program is not legitimate. One possibility is that a school would not ask about race, but then students might be compelled to drop hints in their applications to allow admissions officers to infer their race. Justice Ginsberg says that if affirmative action is going to be used, it should be transparent about how it operates:

Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, e.g., *Steinberg, Using Synonyms for Race, College Strives for Diversity, N. Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as* Amicus Curiae *14-15 (suggesting institutions could consider,* inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises. (Gratz v. Bollinger)*

Rehnquist and the other dissenters take the view that the use of race in admissions has no place in society. They argue the university must give everyone an equal chance to prove that he or she is worthy in academic terms of getting into the law school.

Contrary to this view, educational institutions frequently consider other non-merit factors such as family legacy that conflict with the notion of a complete educational meritocracy.

Another distinction to be made in the affirmative action debate is the difference between racial preferences motivated by exclusion and those motivated by inclusion. Arguably the 14th Amendment was intended to prevent use of racial preference for the purposes of exclusion, and Justice O'Connor emphasizes that use of racial preferences for the purpose of inclusion should be and is legitimate under the 14th Amendment.

"Context matters when reviewing race-based governmental action under the Equal Protection Clause. See Gomillion *v.* Lightfoot*, 364 U. S. 339, 343-344 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In* Adarand Constructors, Inc. *v.* Peña, *we made clear that strict scrutiny must take " 'relevant differences' into account." 515 U. S., at 228. Indeed, as we explained, that is its "fundamental purpose."* Ibid*. Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." (O'Connor, Grutter v. Bollinger)*

Bakke v. University of California Regents, 1978
In this fractured decision, the Court struck down the University of California-Davis Medical School's system of admissions quotas. The critical Powell opinion stated that the only legitimate government purpose in having an affirmative action policy was to achieve educational diversity.

The court delivered three separate opinions. There was essentially a 4-4 tie on the major issue, with Powell delivering the tie-breaking opinion, which allowed use of racial preference, but only in a very narrow sense. When a decision is split as such (4-1-4), the opinion ruling on the narrowest possible grounds is conventionally deemed to provide the binding precedent. Consequently, Powell's opinion is regarded as the important opinion in the Bakke case.

The three major opinions in the case can be summarized as follows:

- Justice Powell says that quotas are not okay, but race can be used to achieve the state's compelling interest in providing an educational setting that has diverse viewpoints. He says that affirmative action may not be used to remedy past injustices.

- Chief Justice Stewart, Stevens, and Rehnquist say that use of racial preferences violates the Constitution and federal statutes (Title VI).

- The four liberal justices (Brennan, Blackmun, White, and Marshall) say that you can use race to rectify past injustices.

Discussion of "Storming the Court," by Brandt Goldstein:

Haiti Background:

Aristide was overthrown in 1991 by a military coup led by Raoul Cedras shortly after being elected, and was given exile in the US (Source: "Crisis in Haiti." 3/3/2004, BBC News, http://news.bbc.co.uk/2/hi/americas/3378671.stm).

Many women were abused, raped, and assaulted by the military government. Many refugees were captured by the US Coast Guard and brought to the US military base on Guantanamo Bay.

The situation was brought to the attention of Yale law students. They discovered that as a result of hearings held at Guantanamo many Haitians at risk of retaliation or persecution were being sent back to Port-au-Prince. The students and their supervisory lawyers sought a preliminary injunction barring the Government's ability to conduct screening interviews of Haitians without the presence of counsel, in order to prevent the repatriation of the refugees.

The point of a preliminary injunction is to provide a remedy in an urgent situation that might no longer be effective by the time the case reaches trial.

Forum shopping: attempting to get the right judge to decide the case. As described in Goldstein, this sometimes involves filing in different districts, adjusting the timing to ensure the court you want is available, or filing a specific category of suit that you know will have better chances of reaching a certain judge.

Temporary Restraining Order (TRO): in the district in which the case was brought, all cases in a given month were reviewed by the same judge and at the time the Yale law students knew who the TRO judge was.

TRO vs. preliminary injunction: both are devices for getting a remedy prior to trial. There is a minor difference between the two, but both require that there be circumstances such that there will be no effective remedy available if all remediation must await resolution at trial.

Legal issues:

- Right to counsel: 6th amendment right to a fair trial
- Right to due process in the screening process: restrictions on the government's ability to hold people indefinitely
- Right to trial: Constitution guarantees right to fair trial in US courts

The lawsuit's strategy is to start with the limited, broadly appealing claim that the Haitians are being denied the right to counsel, then to build more ambitious claims on top of the original claim.