2003

# A Comment on *Grutter* and *Gratz v. Bollinger*

Lee C. Bollinger
*Columbia Law School*

# A COMMENT ON *GRUTTER* AND *GRATZ v. BOLLINGER*

*Lee C. Bollinger**

Now that the Supreme Court has definitively resolved (at least for a generation) the issue of the constitutionality of affirmative action in American higher education, thereby continuing without major adjustment what has been the practice in our selective colleges and universities for more or less the last thirty years, it is easy to forget how different the United States would have looked in the years ahead if only one vote had shifted to the dissenting side. Just how precipitous and long-lasting the decline in racial and ethnic diversity would have been is a complicated matter, but that it would have been significant is, I think, indisputable. Even the most commonly offered alternative to affirmative action—the so-called percent admissions plans—threatened to diminish over time the quality of our great public universities by forcing them to revert, essentially, to a policy of open admissions (while doing nothing for diversity at our great national private universities, which by virtue of congressional mandate in Title VI must also abide by the Fourteenth Amendment[1]). Under the very best of these plans, such as that of the University of Texas, which guarantee admission to the top 10% of each high school in the state, diversity could be achieved but only at the undergraduate level (not for law, medical, or other graduate schools), and only in uniquely situated institutions that might draw their students from an underlying de facto segregated system of high schools. Ultimately, even this kind of affirmative action substitute probably would have been held unconstitutional under the interpretation of the Constitution sought by the plaintiffs in the Michigan litigation, since the programs' central public purpose (to achieve racial and ethnic diversity) keeps race as a factor in public decisionmaking. Thus, without any viable alternative available, the change of course in American higher education would have been stunning.

But the true meaning of a different result in the Supreme Court would have been, in my judgment, of even far broader import. It would have constituted a decisive shift away from the half century of historic and sweeping transformation in our national sensibilities initiated by the Supreme Court's decision fifty years ago in *Brown v. Board of Education*.[2] The ensuing civil rights era augmented this transformation with the emergence of not only affirmative action in higher education, but a host of policies and practices across society, private and public, all intended to speed the day when we can honestly say we live in an integrated society freed of the scourges of slavery and discrimination.

---

* President, Columbia University; former President, University of Michigan.

1. Title VI of the Civil Rights Act of 1964 § 606, 42 U.S.C. § 2000d-4a (2000).

2. 347 U.S. 483 (1954).

I had just become President of the University of Michigan when the lawsuits were filed challenging the admissions policies at the undergraduate level and at the Law School (where I had also been Dean, in the early 1990s, when we reviewed and reformulated the admissions policy with respect to diversity). The suits, initiated by the national organization leading the fight against affirmative action (the Center for Individual Rights), named me as an individual defendant (along with others) as well as the University. From the outset, it was clear to me that these cases had to be treated as part of a national debate transcending race and ethnicity in higher education and striking at the core of our understandings about race and ethnicity in America. That meant that the litigation could not be approached in the usual ways. Settlement, for example, was neither possible nor desirable, since a deep principle was at issue. Moreover, the anti-affirmative action movement had been gathering momentum and, as it landed on the doorstep of the University of Michigan, it seemed to be on a course of sweeping the country. The movement had achieved startling success with the lawsuit against the affirmative action policy at the University of Texas Law School, resulting in the Fifth Circuit's declaration that, in light of subsequent Court decisions, *Bakke*, which suggested affirmative action in some forms might be acceptable,[3] was no longer good law.[4] That decision was followed by the perhaps even more dramatic victory in California of the referendum known as Proposition 209, which amended the state constitution to prohibit considerations of race in public decisionmaking, including public higher education.[5] The outcome reflected the ascendancy of the perspective that the society had now done enough to correct for its past sins of slavery and discrimination, and, with the playing field now basically level, it was time to move on and to let the chips fall where they may in the meritocracy of college admissions and beyond. This, then, was the context in which the anti-affirmative action movement now focused its hopes for a national sea change on the cases filed against the University and its leaders. The aim was nothing less than a Supreme Court decision declaring this perspective to be a fundamental principle of constitutional law.

The problems facing the University of Michigan and really all of higher education (for all intents and purposes, Michigan was simply representative of selective colleges and universities) in defending these lawsuits were many. First, there was the fact that Justice Powell's decisive opinion in *Bakke*, which had laid the foundation for affirmative action policies in higher education since 1979, specifically precluded any justification of using race and ethnicity as factors in admissions as a "remedy" for past societal discrimination.[6] The only justification Powell allowed

3. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 267 (1978).

4. Hopwood v. Texas, 78 F.3d 932, 944–45 (5th Cir. 1996).

5. Cal. Const. art. I, § 31.

6. *Bakke*, 438 U.S. at 307–10. Later decisions seem to permit affirmative action as a method of correction for an institution's own past discrimination. See Adarand

was that of achieving diversity for educational purposes, because of an educational judgment that bringing people together from different backgrounds and life experiences would enhance the learning environment for all students.[7] The "diversity" rationale was thus the critical element in any constitutional defense of affirmative action in higher education, unless one were prepared to abandon Powell's opinion and seek an alternative new basis altogether.

The difficulty this posed for higher education was essentially that no one really believed that the past could or should be ignored or that the present society is by any means free of discrimination. Race and ethnicity in American life, past and present, were and continue to be defining forces of who we are and what we need to do, including how we compose the student populations at our leading educational institutions. How, then, could we explain what we were doing without putting it in a social context that gave it life and meaning? The answer may seem obvious now, but it was not so clear or free of risk in the years we lived with the fragile reed of Powell's lone, but determining, voice on the constitutionality of affirmative action. You cannot separate social reality from educational benefits. A primary reason why colleges and universities have embraced the educational policy of racial and ethnic diversity—the reason why it works educationally—is that society has been and is still segregated, with all the attendant perceptions and confusions that arise from that painful social condition. A fundamental goal of education, whether a liberal education or graduate or professional education, is to help students expand their capacities to imagine other ways of experiencing life and of seeing the world. For various reasons, this is extraordinarily hard to do, and we are never fully successful at doing it. Literature and law (and other fields of knowledge) share this mental prerequisite. And being around people who are in some ways different from you, or whom you perceive to be different, is one of many ways of developing this mentality. To say this is not to ignore the social good of a more integrated society that may flow from a more integrated system of higher education. Indeed, improving society should be a legitimate educational purpose, just as it has long been accepted as a proper aim of higher education to create a more cohesive national community by taking into account geographical diversity in admissions. The key point is that the diversity-seeking admissions policy is not a simple form of social engineering detached

---

Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (finding "when race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491–92 (1989) (holding that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion) (stating that "the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination").

7. *Bakke*, 438 U.S. at 311–15.

from basic educational purposes but rather is rooted in the traditional educational mission.

The second reason why the lawsuits posed special problems arises from their broader social purpose and meaning. In the most concrete terms, these issues were legislative as well as constitutional matters, and, as I indicated earlier, they really went to our core understandings about race and ethnicity, the public trust, and roles of our colleges and universities. The usual response when being sued is to say that you will address the issues only in the context of the litigation. There is always an enormous fear that your opponents will use your public statements against you in the litigation. But it was my judgment from the beginning that the risks of silence were greater. The rising national controversy about affirmative action transcended the litigation, and public understanding of the issues involved was of paramount importance. It would, moreover, be naïve to think that a constitutional issue of this magnitude would be decided in isolation from the surrounding national debate and understandings prevalent at this moment in our history. Consequently, the more publicly responsible choice and the more effective legal defense, at least in my view, were the same: to discuss this issue in all its dimensions fully and frankly in public as well as in the courtroom. Hence, I and others made countless visits to editorial boards, met with leaders across the spectrum of American life, gave public speeches, and wrote extensively on the subject.

But there was more here that pushed in the direction of public engagement with the issues. For complicated reasons, up to the point of this litigation, we in higher education had not been very open about the ways in which admissions work and the purposes served by our choices, including consideration of race and ethnicity. There was a strange, almost embarrassed, silence about these policies. It is certainly understandable that higher education has been reluctant to release data about academic credentials of groups, just as it has been about individuals. The wish to preserve privacy and to give everyone the opportunity to excel over our past performances, whether in courses or in standardized tests, without having to overcome the wary eye of those who think they really have a fix on our abilities, is reasonable and understandable. But the upshot was also a general public understanding about admissions that was extremely thin and even misinformed. Indeed, one of the more interesting features of the six or seven years over which this litigation and public debate played out was to observe the gradual illumination of the admissions process in the public mind, as people came to see, with some surprise, all the elements that go into selecting which applicants get admitted to our selective colleges and universities. In order, therefore, to counter the opponents' claim that affirmative action uniquely carved out a portion of admissions otherwise based exclusively on traditional academic criteria of grade point averages and standardized test scores, it was necessary to go to the public with a full explanation.

It was also critically important to help make more apparent to everyone concerned just how separate our society remains to this day, some fifty years after *Brown*, and how important our colleges and universities are as a point of integration. Few people might know that the majority of students who come to many of our nation's schools, such as Michigan, come from high schools that are virtually all white or all black (or minority students). That metropolitan Detroit is more segregated today than in 1960 is not a pleasant reality to face, and many of us don't. Again, then, the importance for our society—given the ideals of *Brown*—of what our higher-education system has tried to do, and has done with some success, was not fully understood by the public, and that needed to be faced.

Finally, and perhaps most important of all, the effort to engage in public discussion and debate about this issue was extraordinarily important because of a failure to realize that this was not just a University of Michigan issue nor just a state university issue, but a higher education issue; and not even just a higher education issue, but a set of policies, practices, attitudes, and sensibilities (as I said at the outset) that, since *Brown*, had become intertwined with every sector of American society. And the risk was that, by unraveling this one piece, you would eventually unravel the whole. This had to be made apparent in order for all those affected to feel the need to step forward, both in public debate and in the litigation itself.

The story of how this last effort unfolded is intriguing and intricate. I quickly learned that most people do not readily embrace the idea of joining hands with you as a defendant in a lawsuit. The natural response, even for your most natural friends and allies, is to establish distance between you and them. Becoming a defendant in a lawsuit, certainly in America, is one of the more daunting and unpleasant of fates, and perhaps it is the normal instinct to want to disclaim association with anyone unlucky enough to become one.

This is all the more normal if, as I've indicated was true about so much of the affirmative action policies in higher education, you have little sense of what is going on and what is at stake. In the political environment in which these lawsuits began, with the one-sided perspective of the anti-affirmative action movement and the longstanding silence on the other side, many supporters or would-be supporters of the policy of considering race and ethnicity as factors in admissions for the purpose of achieving a diverse student body were simply unwilling to get involved in the battle. They preferred to take a wait-and-see posture or were convinced, in understandable ignorance not of their own making, that surely imaginative professors and university administrators could come up with other, equally effective ways of getting to the same end. In this atmosphere, and recognizing that the cost of defending against those lawsuits was many millions of dollars and years of human effort, even many colleges and universities were inclined to shy away from controversy.

At the end of the day, it took a few extraordinary individuals willing to put themselves on the line for a principle, on a very complicated issue, for which there was a significant risk not only of losing but also of being associated with a position ultimately declared wrong, or even discriminatory. Outside of the many presidents, administrators, faculty, and students within higher education who stepped forward to help, I would name several individuals. Former President Gerald Ford was among the first. After listening to our case and reviewing the documents, he wrote an exceptionally powerful Op-Ed in the *New York Times* in which he recounted how a black teammate on the Michigan football team had withdrawn from a game when the opposing coach said the team would not play if he were on the field.[8] President Ford spoke of the lesson he learned about the inhumanity of discrimination and of the need remaining today to free society of its curse. The admissions policies at universities like Michigan, he said, should be regarded as constitutional. This Op-Ed was important for its content, but also because it exposed two misconceptions—that this was just a higher-education issue and that this was an issue of political affiliation. And, above all, his voice established the policy of affirmative action as mainstream America's.

Harry Pearce, Vice Chair of General Motors, was the next individual to speak out. He agreed that General Motors would file an amicus brief in support of the University, which would argue that higher-education policies since *Bakke* were important to building a diverse workforce, which in turn is important for success in business. Jim Hackett, CEO of Steelcase, another leader in the effort, worked to expand this support by calling on many other major American corporations. The barrier between higher education and the business sector was thus broken.

Finally, I would mention—in this less than comprehensive account of the project to broaden the base of allies—the origins of the idea and the efforts to enlist the military in the defense of affirmative action. James Cannon, who served in the Ford White House, raised the idea with me over lunch early in the litigation. Having served as the Chair of the Board of Visitors of the Naval Academy, he was aware of the efforts the military had undertaken to create opportunities for a diverse officer corps as a necessary condition of building an effective military and national defense. Analogizing to the military was obviously a brilliant possibility, not only because of the respect accorded the military in society, but also, and in my judgment more importantly, because it emphatically reinforced the theme of the pervasiveness of affirmative action in society and the risk of it all coming undone after so much effort and so much success. The question became this: Who, after all was said and done, would want to go back to where we had been before these massive societal efforts to achieve the ideals of *Brown*?

---

8. Gerald R. Ford, Editorial, Inclusive America, Under Attack, N.Y. Times, Aug. 8, 1999, § 4 (Week in Review), at 15.

Many, many things, of course, too numerous to tell here, had to fall into place for the litigation to take a successful course. Oddly, I think the decisive moment—when the defense litigation strategy and the public education efforts fell into place—was in the week or two following President Bush's statement that the federal government would oppose the University because, he said, these policies amounted to "quotas."[9] (The Clinton Administration had filed briefs in the lower courts in support of our legal position.) That presidential declaration simultaneously raised the profile of the issues at stake and, in the ensuing discussion, brought an exceptional level of clarity to the issues—about college and university admissions polices, about the educational benefits of diversity (whether geographical, international, or racial), about the state of the matter of race and ethnicity in the country, about the links with *Brown* and the progress that had been made, about the distance still to go, about the costs or ineffectiveness of alternatives to traditional affirmative action, and about the degree to which higher education was just one of many sectors of society that was doing its part to pursue aims the Court had eloquently laid down some half century before. Personally, I felt that, even after six years of defending against these lawsuits, there was little more that needed at that point to be added to the public debate.

As an educator, there are many lessons I have taken from this experience. Probably the most important is just how great our responsibility is, in a very practical way, to convey to each new generation the ideas—the sensibilities—that informed and created the choices of preceding generations. Of course, just knowing why choices were made does not in any sense confer on them legitimacy. But one cannot really accord them legitimacy, or reject them, unless one knows the reasons for them, not in some abstract sense but with a rich awareness of the feelings that generated them in the first place. My view is that we almost lost what *Brown* had inspired because we did not adequately continue to teach the inspiration. Now the question is the next twenty-five years.

---

9. Bush's Remarks on Michigan Admissions Policies, N.Y. Times, Jan. 16, 2003, at A26.