

# **THE LEGAL BASIS FOR DIVERSITY IN HIGHER EDUCATION**

Prepared for UNCW Chairs'  
Meeting (September 5, 2007)

# LEGAL FRAMEWORK

14<sup>TH</sup> AMENDMENT OF THE U.S. CONSTITUTION  
("No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protections of the law")

# JUDICIAL REVIEW STANDARD

FOR RACE BASED PROGRAMS OR POLICIES TO BE CONSTITUTIONAL, THEY MUST PASS “STRICT SCRUTINY”:

1. The program must serve a **compelling state interest; and**
2. The program must be **narrowly tailored** to further that compelling interest

# Judicially Recognized “Compelling State Interests”

- Remediating the present effects of past discrimination
- Diversity in student body admissions – prior to 2003, Justice Powell’s decision in Regents of University of California v. Bakke (1978) was the only Supreme Court opinion in recognition.

# JUSTICE POWELL'S OPINION

- The attainment of a diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education
- A public university has the right to select those students who will contribute the most to the “**robust exchange of ideas**”
- Race may be considered only for one interest: “**the attainment of a diverse student body**”
- Race is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.
- A broad array of qualifications and characteristics of which race or ethnic origin is but a single though important element.

# COURTS HAVE REJECTED THE FOLLOWING AS COMPELLING STATE INTERESTS

- Racial balancing or quotas
- Remediating past societal discrimination
- Minority role model theory
- Educating minorities to serve in a disadvantaged area or to serve deprived citizens
- Honoring the terms of a consent decree

# THE SUPREME COURT SPEAKS IN THE EDUCATIONAL ARENA

- Grutter v. Bollinger (Mich. law school case 2003)
- Gratz v. Bollinger (Mich. undergrad case 2003)

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- Parents Involved in Community Schools v. Seattle School District (secondary school case 2007)
- Meredith v. Jefferson County Bd. Of Ed. (secondary school case 2007)

# GRUTTER

“Today we hold that the law school has a compelling interest in attaining a diverse student body .... The law school’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The law school’s assessment that diversity will, in fact, yield **educational benefits** is substantiated by respondents and their amici.”

# THE EMPIRICAL EVIDENCE OF THE SUBSTANTIAL EDUCATIONAL BENEFITS OF RACIAL AND ETHNIC DIVERSITY

- PROMOTES CROSS CULTURAL RACIAL UNDERSTANDING
- BREAKS DOWN RACIAL STEREOTYPES
- CLASSROOM DISCUSSION IS LIVILIER
- BETTER PREPARES STUDENTS FOR A DIVERSE WORKFORCE AND SOCIETY & FOR LEADERSHIP ROLES

<http://www.umich.edu/~urel/admissions/>

# Fortune 500 Amici Briefs

“These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

# NARROW TAILORING ELEMENTS

(the second prong of strict scrutiny)

1. The program or policy must further the compelling state interest;
2. It must not unduly burden non-minorities;
3. Must be flexible enough to consider workable race neutral alternatives, but not required to consider every alternative; and
4. Must be time limited (25 years)

# Race Neutral Alternatives (ex.)

- Socio-economic status
- First generation college
- Overcoming adversity and family hardship
- Overcoming educational disadvantage
- Leadership potential
- Geographic location (e.g. urban, rural, foreign)
- Exceptional record of extensive community service
- Fluent in several languages or ESL
- Percentage plans (e.g. Florida, Texas, California)
- Recruitment and outreach programs

# WHAT WAS RIGHT ABOUT THE LAW SCHOOL'S POLICY IN GRUTTER?

- INDIVIDUAL CONSIDERATION
- RACE WAS USED IN A FLEXIBLE WAY
- RACE WAS NOT USED AS THE DEFINING FEATURE OF AN APPLICANT
- COMPETITIVE
- HOLISTIC REVIEW
- CRITICAL MASS
- SUBSTANTIAL WEIGHT GIVEN TO NON-RACIAL DIVERSITY FACTORS AS EVIDENCED BY ACTUAL ADMISSION'S DECISIONS

# WHAT WAS WRONG WITH THE UNDERGRADUATE POLICY IN GRATZ?

- POINT SYSTEM
- 20 POINTS AUTOMATICALLY GIVEN TO MINORITIES
- 5 POINTS GIVEN FOR ARTISTIC GENIUS
- ALMOST ALL MINIMALLY QUALIFIED MINORITIES WERE ADMITTED
- NO INDIVIDUAL REVIEW

(Student A, B, C)

# Other Areas Besides Admissions?

“Context matters when reviewing race-based governmental action under the Equal Protection Clause.” **Grutter**

- Financial aid and scholarships
- Employment
- Programs, opportunities, benefits

# BLUEPRINT BASED ON GRUTTER

- ❑ Diversity established as a UNCW core value and strategic goal
- ❑ Diversity defined in broad terms and a broad variety of characteristics (13)
- ❑ Consider race neutral alternatives (12)
- ❑ Identify the objectives and articulate the educational benefits of diversity to a particular program or school – what are the diversity/cultural competencies of a particular discipline or program? (10)

# BLUEPRINT BASED ON GRUTTER

- ❑ Collect empirical evidence that diversity brings educational benefits to all students, both minority and non-minority (9)
- ❑ Develop strategies to achieve the objectives (11)
- ❑ Inventory policies, programs, and practices
- ❑ Assess and review periodically to assure alignment with goals and objectives

(Modeled after the College Board's Access & Diversity Collaborative)