

# Affirmative Action in the University Context: Another View

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*Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)

- The University of Michigan Law School adopted an affirmative action program that sought to achieve a “critical mass” of students from each racial and ethnic group.
- According to the law school, no fixed percentage equaled a critical mass, and each applicant was given individual consideration based on the totality of the applicant’s file. Being from an underrepresented race or ethnic group was a “plus” factor.
- The Supreme Court approved the use of race in this manner, holding that the educational benefits flowing from a diverse student body were compelling.

Year	Number of law school applicants	Number of African-American applicants	% of applicants who were African-American	Number of applicants admitted by the law school	Number of African-American applicants admitted	% of admitted applicants who were African-American
1995	4147	404	<b>9.7%</b>	1130	106	<b>9.4%</b>
1996	3677	342	<b>9.3%</b>	1170	108	<b>9.2%</b>
1997	3429	320	<b>9.3%</b>	1218	101	<b>8.3%</b>
1998	3537	304	<b>8.6%</b>	1310	103	<b>7.9%</b>
1999	3400	247	<b>7.3%</b>	1280	91	<b>7.1%</b>
2000	3432	259	<b>7.5%</b>	1249	91	<b>7.3%</b>

*Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

- The University of Michigan Undergraduate School assigned a numerical point value to each applicant on the basis of the applicant's grades, SAT scores and other factors.
- Applicants from underrepresented races were given a twenty point addition.
- The Supreme Court struck down the program as not narrowly tailored, because it did not give individualized consideration to each student, but rather made the factor of race decisive for nearly every applicant from an underrepresented race or ethnic group.

- Before its decision in *Grutter*, the Court had found only two interests compelling enough to justify the use of race: national security during war-time, and remedying the effects of *de jure* segregation.
- How does the *Grutter* interest compare?
- “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”  
*Grutter*, 539 U.S. at 343.

## The “evidence” cited by the Court in *Grutter*

- Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 143 (Gary Orfield & Michal Kurlaender eds. 2001).
- Two law school professors surveyed the student bodies at the law schools at Harvard and the University of Michigan.
- Most students reported that diversity lead to “an enhancement of their thinking about problems and solutions in their classes.”

- David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395 (2000).
- The authors surveyed 2000 alumni of the Michigan Law School.
- Some alumni reported that diversity made a considerable contribution to their classroom experiences in law school.

- Richard A. White, Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community (May 2000).
- The author surveyed law school faculty members.
- The faculty members reported that classroom discussions benefited from diversity.

- The alumni survey referenced above found that less than 25% of white males who graduated in the 1970s and 1980s believed that diversity was a considerable contributor to their law school experience.
- A much higher percentage of alumni who graduated in the 1990s believed that diversity considerably contributed to their law school experience.

## Post-Grutter cases

*Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

- Seattle adopted an “open-choice” plan that allows students to select which high school they will attend. More desirable schools are oversubscribed.
- Seattle uses a “racial tiebreaker” to achieve desired percentages of “whites” and “non-whites” in its oversubscribed high-schools.

- The Court of Appeals for the Ninth Circuit “read Grutter . . . to recognize that racial diversity, not some proxy for it, is valuable in and of itself,” *Id.* at 1177, and blessed the racial tiebreaker.
- Can that position be reconciled with the Supreme Court’s statement that “outright racial balancing . . . is patently unconstitutional?” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).
- What about the Supreme Court’s “emphasi[s of] the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education?” *Gratz v. Bollinger*, 539 U.S. 244, 271 (2005) (quoting *Bakke*).

*Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

- Lynn School District set up a magnet school program that allows students to transfer from their neighborhood schools.
- Lynn classified all of its schools as “racially isolated,” (*i.e.*, having few “nonwhite” students), “racially balanced,” or “racially imbalanced,” (*i.e.*, having a large number of “nonwhite” students) based on the percentage of white students in the school.
- Students are not allowed to transfer if, because of their race, they would contribute to a school being “racially imbalanced” or “racially isolated.” Transfers between balanced schools are automatically approved.

- The Court of Appeals for the First Circuit concluded that there was a compelling governmental interest in achieving the benefits that accrue from “racial diversity” and did not require consideration of students as individuals.
- Again, this rationale is difficult to square with the language of *Grutter* and the holding of *Gratz*.

*McFarland v. Jefferson County Public Schs.*, 330 F. Supp. 2d 834  
(W.D. Ky. 2004).

- Jefferson County Schools adopts a plan that aims to maintain a specified percentage of “black” students in every school in the district.
- The complicated plan involves a combination of school clustering and student choice. Approval or denial of transfer requests is based on racial makeup of the desired school.

- The United States District Court for the Western District of Kentucky held that the plan was, in most respects, narrowly tailored to achieve the compelling benefits that accrue from racial diversity. The court struck down the admissions policy for the “traditional” magnet schools, which placed black students on a separate admissions “track” from other students. The Court of Appeals for the Sixth Circuit adopted the district court’s opinion. *Mcfarland v. Jefferson County Public Schs.*, 416 F.3d 513 (6th Cir. 2005)
- The educational benefits identified by the court were not evaluated by reference to traditional measures of student achievement (e.g., improved standardized test scores or graduation rates.). Rather, the Court accepted expert testimony that “intergroup contact” improved race relations.

## Evidence from the K-12 Context

“After controlling for [the] initial ability difference, there was virtually no difference in the achievement of students in desegregated schools, suburban schools, racially isolated schools, or magnet schools.”

Robert W. Lissitz, *Assessment of Student Performance and Attitude*, Report Submitted to the Voluntary Interdistrict Coordinating Council (1994) (reporting the results of a comprehensive study of the St. Louis, Missouri, school system).

“Whether one examines data from historical studies, more recent national studies, or district-level case studies, it is quite clear that the racial composition of student bodies, by itself, has no significant effect on black achievement, nor has it reduced the black-white [achievement] gap to a significant degree.”

David Armor, *Desegregation and Academic Achievement*, in *School Desegregation in the 21st Century* 183 (Rossell, et al., eds., 2002) (reviewing three decades worth of studies).

- After reviewing numerous studies of the effects of racial balancing on students, Dr. Walter Stephan concluded that the studies showed at best mixed results.
- White attitudes toward blacks improved in 16% of the schools studied, failed to change in 36% of the schools, and deteriorated in 48%.
- Black attitudes toward whites showed 38% improvement, 38% no difference, and 24% deterioration.

Walter G. Stephan, *Improving Intergroup Relations in the Schools*, in *School Desegregation in the 21st Century* 267, 269