Constitutional Law
Affirmative Action in Higher Education Mr. Faulhaber
***University of California v. Bakke***

In the early 1970s, the medical school of the University of California at Davis devised a dual admissions program to increase representation of "disadvantaged" students. Under the regular admissions procedure, a screening process was used to evaluate candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were automatically rejected. Of the remaining candidates, some were selected for interviews. Following an interview, the admissions committee rated candidates who survived the screening process on a scale of 1 to 100. The rating considered the interviewer's evaluation, the candidate's overall and science grade point averages, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. The ratings were added together to arrive at each candidate's "benchmark score."

On the application form, candidates could indicate that they were members of a "minority group," which the medical school designated as "Blacks," "Chicanos," "American Indians," or "Asians." Candidates could also choose to be considered "economically and/or educationally disadvantaged." The applications of those who did so were sent to the special admissions committee, where applications were screened to determine whether the candidate met the criteria established for disadvantaged and minority groups. These applicants did not have to meet the 2.5 grade point average cut off used in the regular program, nor were the candidates in the special admissions program compared to the candidates in the regular admissions program. Of the 100 spots in the medical school, 16 spaces were set aside for this program.

From 1971 to 1974 the special program resulted in the admission of 21 black students, 30 Mexican Americans, and 12 Asians, for a total of 63 minority students.\* During the same period, the regular admissions program admitted 1 black student, 6 Mexican Americans, and 37 Asians, for a total of 44 minority students. No disadvantaged white candidates received admission through the special program.

Allan Bakke was a white male who applied to and was rejected from the regular admissions program in 1973 and 1974. During those same years, minority applicants with lower grade point averages, MCAT scores, and benchmark scores were admitted to the medical school under the special program.

After his second rejection, Bakke filed suit in the Superior Court of Yolo County, California. He sought to compel the University of California at Davis to admit him to the medical school. He also alleged that the special admissions program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the *Civil Rights Act of 1964* because it excluded him on the basis of race.

The university argued that their system of admission preferences served several important purposes. It helped counter the effects of discrimination in society. Since historically, minors were discriminated against in medical school admissions and in the medical profession, their special admission program could help reverse that. The university also said that the special program increased the number of physicians who practice in underserved communities. Finally, the university reasoned that there are educational benefits to all students when the student body is ethnically and racially diverse.

1. How did the University of California special admissions system work? What Constitutional issues did Alan Bakke have with this program?

2. What three important purposes did the University of California say considering race as a factor in the admissions process served? Which, if any, do you find compelling? Explain.

**IDentification:** Read through each argument and decide which side it supports. Write UC for the argument supports the University of California's and AB for the argument supports Bakke's side. ½ Point Each

3. UC/AB The Equal Protection Clause of the Fourteenth Amendment of the Constitution states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

4. UC/AB The Fourteenth Amendment states that people should be treated equally; it does not state that people should be treated the same. Treating people equally means giving them what they need.

5. UC/AB "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

6. UC/AB The Fourteenth Amendment gives the right to equal protection to individuals, not groups.

7. UC/AB "It is unnecessary in twentieth-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."

8. UC/AB Though there were white applicants who asked to be considered disadvantaged, none were actually admitted through the special admissions program.

# **Go to** “**Regents of the University of California v. Bakke | BRI's Homework Help Series”: https://www.youtube.com/watch?v=X4b77yvDzlw**

9. Notes

10. Summarize in 2+ Sentences the decision of the Court, the rationale, and the precedent it served.

The Court revisits Bakke 25 Years Later: The Michigan Affirmative Action Cases
Gratz v. Bollinger

Jennifer Gratz, a white resident of Michigan, applied to the University of Michigan as a high school senior in 1995. Her standardized test score (25) on the ACT placed her in the top quarter of applicants, and she had a GPA of 3.8. In addition, Gratz participated in student council and various other extra-curricular activities. Nevertheless, the university denied Gratz admission. The University of Michigan’s admissions guidelines in effect in 1995 called for the acceptance of all underrepresented minority applicants with academic credentials similar to Gratz’s. Both parties agree that Gratz would have been admitted to the university had she been a minority applicant.

From 1995 through 1997 the university admissions officers used guideline tables or grids that reflected a combination of the applicant’s adjusted high school GPA and ACT or SAT score. To promote diversity, the university utilized different grids and admissions criteria for applicants who were members of preferred minority groups as compared to other candidates. Michigan also set aside a prescribed number of seats in the entering class for minorities in order to meet its numerical target.

In 1998, the university dropped its admissions grid system and replaced it with a 150-point “selection index.” Admissions officers assign applicants points based on various factors, including test scores, “legacy” status, geographic origin, athletic ability, socioeconomic level, and race/ethnicity. The more points an applicant accumulates, the higher the chance of admission. Applicants from "underrepresented" racial and ethnic groups (African Americans, Latinos, and Native Americans) are assigned 20 points. Scholarship athletes and students who are economically disadvantaged also receive an automatic 20-point bonus. Geographic origin could earn 6 points, the child of an alumnus 4 points, and an “outstanding” admissions essay 3 points.

Gratz, and another unsuccessful white applicant, Patrick Hamacher, brought suit challenging the legality of the University of Michigan’s admission’s policy. The federal district court ruled that the school’s undergraduate admissions policy in place before 1999, which maintained a set-aside for minorities, violated the Fourteenth Amendment, but the court upheld the current system, which does not use quotas and utilizes race as a “plus.”

#### Grutter v. Bollinger

In 1997, Barbara Grutter, a resident of Michigan, applied for admission to the University of Michigan law school. Grutter, who is white, had a 3.8 undergraduate GPA and scored 161 on the LSAT. She was denied admission and subsequently filed suit, claiming that her rights to equal protection under the Fourteenth Amendment had been violated.

At the time, the law school had an admissions policy that used race as a factor in the admissions process. In selecting students, the law school considered the applicant's academic ability, including undergraduate GPA, LSAT scores, the applicant's personal statement, and letters of recommendation. The school also considered factors such as the applicant's experience, the quality of the undergraduate institution he/she had attended, and the degree to which the applicant would contribute to law school life and the diversity of the community. The admissions policy did not define the types of diversity that would receive special consideration, but did make reference to the inclusion of African-American, Hispanic, and Native-American students, who might otherwise be under-represented.

The school thought this policy complied with Bakke, on the grounds that it served a "compelling interest in achieving diversity among its student body." The District Court ruled that the goal of achieving a diverse student body was not a compelling one. In reversing this decision, the Court of Appeals said that Justice Powell's opinion in Regents of the University of California v. Bakke, constituted a binding precedent establishing diversity as a compelling governmental interest sufficient under strict scrutiny review to justify the use of racial preferences in admissions. Furthermore, the attempt to enroll a "critical mass" of minorities was not comparable to a quota system.

### The Two Cases Decided

Because the issues of diversity and affirmative action in higher education are so important and because federal courts of appeal had issued conflicting decisions, the Supreme Court granted certiorari and agreed to hear both Michigan cases in 2003. In analyzing both cases, a majority of the justices agreed that racial discrimination was involved and that the Court had to apply strict judicial scrutiny. This meant that the state had to show a compelling state interest in support of the use of race and that race could only be used to further that interest if it did not unduly burden disfavored groups. For example, a race-conscious admission program cannot use a quota system which sets aside a certain number of places in the entering class for members of selected minority groups, although race or ethnicity could be considered a "plus" in a particular applicant's file.

A majority of the justices agreed that student body diversity is a compelling state interest that can justify using race in university admissions. In a 5-to-4 opinion, the Court found that Michigan's law school admission policy did not violate Barbara Grutter's rights. Having a critical mass (essential number) of students from underrepresented groups can enrich classroom discussion, produce cross-racial understanding, and break down racial stereotypes.

Rather than emphasizing diversity as justified by past or present discrimination, the Court's opinion in the law school case looked to the future and related diversity to the challenges the nation faces: ".because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity." The Court also noted that "the Law School engaged in highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."

Four justices dissented in the law school case, believing that the "critical mass" notion was simply a disguise for an illegal quota. To the dissenters, the Constitution's prohibition against racial discrimination protects whites as well as minorities. They also believed there were nondiscriminatory ways to achieve diversity.

In contrast, Michigan's undergraduate admissions policy was found unconstitutional by a vote of 6 to 3. The majority objected to the program's failure to consider applicants on an individual basis as required by the Court's decision in the Bakke case. While the undergraduate admissions program could use race-conscious affirmative action, it had to be in a form that was individualized and not mechanical.

The dissenters in the undergraduate case would have allowed the use of automatic points to achieve diversity because it was an honest, open approach to the role race plays in the admissions process.

11. Which admissions program was ruled unconstitutional? Why did the Court rule the program unconstitutional?

12. Which admissions program was ruled constitutional? Why did the Court rule the program constitutional?

13. Does the Court see affirmative action programs continuing in perpetuity? Explain?

14. What precedent or guidance does the Court seem to send on how to decide whether race can/cannot be used as a factor in a school’s admission’s policy?

# **Go to** “Grutter v. Bollinger | BRI's Homework Help Series**”: https://www.youtube.com/watch?v=cEzSvagZ\_60**

15. Notes

16. Discuss what is meant by a “Critical Mass” and how it relates to affirmative action and precedent.



College acceptance is often not based solely on merit-grades, extracurricular activities, and ACT scores. There are many preferences given to some applicants that others do not receive including each of the above.

17. Is the cartoonist right that we ignore those other preferences and only seemingly care about racial preferences? Are affirmative action programs a reasonable distinction-similar to the other distinctions in the cartoon- between classes of citizens that serve a legitimate governmental purpose?
 **18. Assume that African Americans, Hispanics, and Native Americans make up 30% of the high school students in a state but only 12% of the undergraduates enrolled in that state’s public universities. Is that state violating the Fourteenth Amendment’s equal protection rights of those minorities?**

19. In a Supreme Court Opinion, a justice once wrote that classifications based on race carry a danger of “stigmatic harm,” meaning that the group benefitting by the affirmative action program might be harmed in the long run because society might believe that this groupcannot succeed without special protection. Do you agree or disagree with this notion? Give your reasons.
 **20. How do we make the system “Fair” and provide “opportunity” to those disadvantaged and not just those that are privileged to achieve the “American Dream? What does “Equality” mean? Read each of the following and choose which best represents your view on the appropriate governmental course of action and explain your decision.**

Choice #1: Prohibiting Discrimination, Enforcing the Laws. Our public commitment is to uphold the principle of equality under the law, for people of ALL races. The government’s obligation is to make sure the rules of the game are the same for everyone. BUT equality of opportunity does not necessarily lead to equal results.

Choice #2: Affirmative Action Strategy: Taking Race into Consideration. Equal opportunity is not enough. Government must take measures to ensure equal RESULTS, even if affirmative action benefits minority groups at the expense of others. Racial equality can be achieved ONLY by allowing preferences for groups that have suffered from discrimination.

Choice #3: Ladder Out of Poverty: Helping the Poor, Closing the racial Gap. Because the obstacles to equality today are chiefly economic, race-specific remedies are no longer the most promising. Poverty MUST be attacked at its roots with aggressive social welfare programs that will help ALL low-income people, even if such programs are costly.

Choice #4: Ensuring Equality Regardless of Place: Because roughly 50% of education funding is based on local taxes (mostly property taxes), there are great disparities in educational funding (based on the taxable value of property). Those that live in low value areas (regardless of socioeconomic or racial makeup) are at a disadvantage. Inequalities are based on place not race and/socioeconomics (poor or wealthy, white or minority in Sidney versus Detroit) and can only be fixed by ensuring the same equitable educational funding creating a level playing field.