

Introduction

A momentous day for the future of education in America was June 23, 2003. On that day, the United States Supreme Court sanctioned what has been known for decades in higher education admissions offices, in corporate board rooms, and even in military service academies: in this country, diversity can be an essential component of excellence in education. Granting constitutional legitimacy to educational policy makers' pursuit of this ideal is not only respectable as a matter of equity under the law, but is actually *essential*. Changing demographic patterns and national priorities demand that America fully utilize its greatest resource—its citizenry. Educational policy makers get it. And finally, the U.S. Supreme Court does, too.

Though many in the higher education community lauded the announcement of the *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*² decisions as a victory for diversity and academic freedom, in the aftermath of the decisions, the persistent ambiguity that has plagued this area of the law has begun again to rear its ugly head. What do the Supreme Court decisions mean for institutions that use race-conscious decision-making in financial aid assessments and outreach efforts in their pursuit of a diverse class? What do they mean for institutions sponsoring minority-exclusive activities, such as recruitment overnights or academic enrichment programs? Perhaps the most urgent question is: what do these decisions mean for institutions outside of the higher education community, including K-12 public and private schools, charter schools, non-

profits, and even business and industry. In other words, what do the decisions *really* mean?

Historically, the federal government (most often the Justice Department) has assisted institutions seeking to wade through the legal morass created by significant, but confusing landmark cases.³ For example, after the 1978 *Bakke*⁴ decision, the Department of Health, Education and Welfare took the lead in presenting the Administration's interpretation of the decision, and clearly setting forth guidelines regarding the permissibility of affirmative action activities.⁵ Similarly, after *Adarand v. Peña*,⁶ the Justice Department issued swift policy guidance about the permissibility of affirmative action components of federal programs, created an interagency working group, and directed the general counsels of all federal agencies to review their programs for compliance.⁷ In the civil rights arena, the Department of Education's Office of Civil Rights (OCR), as part of its stated mission, is charged with ensuring equal access to education throughout the nation through vigorous enforcement of civil rights laws. As part of this mission, OCR regularly provides technical assistance to help institutions achieve voluntary compliance with these laws. Indeed, knowing that affirmative action law is often murky, OCR issued in 1994 policy guidance discussing the applicability of Title VI's nondiscrimination requirements to programs awarding financial aid on the basis of race (in whole or in part).⁸ Yet it has been over a year since the Michigan cases, and even OCR remains silent, with one repeated

exception: race-neutral alternatives.

University counsels, who in the past have commonly sought federal guidance, are now coming up short. “So far the Bush Administration has had very little to say about the Michigan decision and there is no indication that the Administration has undertaken a review of policy.”⁹ Accordingly, various nongovernmental groups—both opponents and proponents of affirmative action—are poised to fill this void.¹⁰

Among those groups are the American Association for the Advancement of Science (AAAS), whose mission is to advance science and innovation, in part, by fostering education in science and technology for everyone, and the National Action Council for Minorities in Engineering (NACME), whose mission is to support the national effort to increase the representation of successful African American, Indian, and Latino women and men in engineering and technology, math and science-based careers. In fact, because of their particular missions, AAAS and NACME are especially well situated to clarify for a national audience the heightened importance of diversity to science and engineering related fields. AAAS and NACME have long recognized that the affirmative action and human resource development needs of our nation are magnified in the specific context of education in science, technology, engineering and mathematics (STEM).

The case for diversity in STEM fields has been well articulated in the last several years. Leading economists have identified scientific and technological progress as the single most important determining factor in U.S. economic growth, accounting for as much as half of the Nation’s long-term growth over the past 50 years.¹¹ The Science and Engineering Equal Opportunity Act of 1980, signed by President Carter in December 1980, recognized the need for the development of more domestic talent in STEM fields over twenty years ago. That law states, “it is in the national interest to promote the full use of human resources in science and engineering and to insure the full development and use of the scientific and engineering talents and skills of men and women, equally, of all ethnic, racial, and economic backgrounds.”¹² This act gives the National Science Foundation a congressional mandate to pursue diversity in STEM fields.

In the mid-1990s, the Hart-Rudman Commission—with Newt Gingrich as its predominant spokesman—found that the number-two threat to American national security is the failure to invest adequately in science and to ensure that science and math education produces enough young Americans to actually do the science that is needed.¹³ The shortage of American talent in STEM fields was also cited by the Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development (CAWMSET), headed by former Republican Congresswoman Constance Morella, in its September 2000 report, *Land of Plenty: Diversity as America’s Competitive Edge in Science, Engineering and Technology*. The report intoned that “if women, underrepresented minorities, and persons with disabilities were represented in the U.S. science, engineering, and technology workforce in parity with their percentages in the total workforce population, this shortage [of skilled American workers] could largely be ameliorated.”

Arguments about shortages aside, as we experience wide-ranging changes in demographic patterns in this country, the imperative to include more *diversity* in our STEM workforce becomes even more immediate. Recent articles and special issues in the popular media, from *Business Week* to *Congressional Quarterly*, have revved up the discourse on the importance of STEM to our national economic growth and the need to ensure a scientifically and technologically savvy workforce. Department of Defense (DOD) spokesperson Ronald Sega, in a speech before the Congressional Black Caucus, also outlined the fact that DOD can neither rely on foreign workers nor outsource its STEM needs to foreign countries. So there are major sectors of our government and industry whose only options are to utilize our own STEM talent. If we don’t act now to incorporate marginalized groups into a dynamic STEM workforce, we risk endangering our economic and national security well into the future.

On January 15–16, 2004, AAAS and NACME hosted a conference and work sessions to consider the effect of the *Grutter* and *Gratz* opinions on STEM education and outreach programs. Researchers and program implementers leading efforts to increase

participation of women, minorities and persons with disabilities within science, engineering, mathematics, technology and health fields met to discuss their current initiatives to encourage access and inclusion, to reaffirm the value of diversity in education, and to design strategies for incorporating diversity into the missions of their respective universities and organizations. Over 180 members of the STEM education community, government agencies, and private industry attended. The workshop proved to be a timely opportunity for exchanging valuable information, and planning new actions.

This document is, in part, a report of the proceedings of this important conference. However, because the conference revealed a great deal of uncertainty in the STEM community on achieving diversity in a constitutionally permissible manner, the document also attempts to formulate the workshop findings in a “guidebook” format that is both comprehensive and useful for STEM diversity practitioners. While this document does not offer legal advice, it does provide data on opportunities and constraints, insight into possible strategies, and guidance and inspiration for program implementers as they work with their legal counsels to apply the *Grutter* and *Gratz* rulings to their ongoing activities.

ENDNOTES

1. *Grutter v. Bollinger*, 539 U.S. 306 (2003)
2. *Gratz v. Bollinger*, 539 U.S. 244 (2003)
3. “The Bush Administration v. Affirmative Action: Justice Department Drags Feet on Upholding Court Ruling,” Report of the Citizens’ Commission on Civil Rights, pp. 1 & 3. December 2003.
4. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
5. Report of Citizens’ Commission on Civil Rights at 4.
6. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
7. Report of Citizens’ Commission on Civil Rights at 4-5.
8. Notice of Policy Guidance, Federal Register, Vol. 59 No. 36 / Wednesday, February 23, 1994. This policy guidance is perhaps the single most important recitation of nondiscrimination law and its intersection with race-based affirmative action in providing financial aid. It remains in effect today.
9. Report of Citizens’ Commission on Civil Rights at 5.
10. Compare the website of the Center for Equal Opportunity, <http://www.ceousa.org/>, (detailing this anti-affirmative action organization’s strategy of filing OCR complaints against various universities over their affirmative action policies) with the website of the College Board, <http://www.collegeboard.com/highered/ad/ad.html>, (offering a “Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid and Outreach” prepared by education law experts for administrators to utilize toward “achieving diversity in higher education.”)
11. Robert Solow, *Growth Theory: An Exposition* (New York: Oxford University Press, 1987); and Alan Greenspan, “Technology and the economy,” Remarks to the Economic Club of New York, Jan. 13, 2000.
12. Science and Engineering Equal Opportunities Act of 1980.
13. As stated in the Phase III Report of the U.S. Commission on National Security/21st Century, *Road Map for National Security: Imperative for Change*, Feb. 15, 2001, “we can think of nothing more dangerous than a failure to manage properly science, technology, and education for the common good over the next quarter century” (p.30).

