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From *Bakke* to *Gratz*: The Importance of Numerical Goals in Affirmative Action

Norma Riccucci
Rutgers University-Newark

In 2003, the U.S. Supreme Court issued two landmark affirmative action decisions. In one case, Grutter v. Bollinger, the Court upheld the affirmative action program at the University of Michigan's Law School. In the other case, Gratz v. Bollinger, the Court struck down the use of affirmative action in admissions to the University of Michigan's undergraduate program. The Gratz decision turned on the use of a numerical point system, which the Court would not accept.

Through a systematic analysis of case law, this article argues that the use of numerical goals is a critical component of affirmative action plans. It begins by illustrating that the U.S. Supreme Court erred in its Bakke holding that the UC Davis Medical School was employing "quotas," and in so doing, perpetuated spurious stereotypes around the use of goals in human resources planning. The article shows that even the use of point systems is not inappropriate in an organization's efforts to meet its goals, particularly around diversity.

In 2003, marking the 25th anniversary of the *Bakke* decision, the U.S. Supreme Court issued two rulings on the use of affirmative action in admissions decisions at the University of Michigan. One case, *Grutter v. Bollinger*, involved the constitutionality of an affirmative action program at the University of Michigan's Law School. In a 5-4 ruling, the Court majority opined that the racial diversity of a student body can be a sufficiently compelling interest on the part of a state university to warrant its consideration of race in its admissions decisions. The Court ruled that the Equal Protection Clause allows for the "Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" (*Grutter v. Bollinger* 2003, 307).

In the second case, *Gratz v. Bollinger* (2003), the Supreme Court, in a 6-3 decision, struck down the use of affirmative action in admissions decisions at the University of Michigan's undergraduate programs in the College of Literature, Sciences, and Art. This program awarded 20 points on a scale of 150 for membership in an "underrepresented minority group"—African Americans, Latinos and American Indians—with 100 points guaranteeing admission. In ruling that the program violated the Equal Protection Clause of the Fourteenth Amendment, the Court argued that the

program was "not narrowly tailored to achieve respondents' asserted compelling interest in diversity …[and] the policy does not provide…individualized consideration" of each characteristic of a particular applicant (*Gratz v. Bollinger* 2003, 246). In short, the Court would not accept an affirmative action program in the form of numerical ratings.

Through a systematic analysis of case law, this article argues that the use of numerical goals is a critical component of affirmative action plans. It begins by illustrating that the U.S. Supreme Court erred in its *Bakke* holding that the UC Davis Medical School was employing "quotas." Not only did the Court misrepresent UC Davis's use of goals, but it perpetuated spurious stereotypes around the use of goals in human resources planning. It goes on to show that even the use of point systems is not inappropriate in an organization's efforts to meet its goals, particularly around diversity; and that, indeed, the Supreme Court has determined that numerical point systems may be justified in certain situations.

The *Bakke* Decision

The U.S. Supreme Court's first substantive ruling on affirmative action was *Regents of the University of California (UC) v. Bakke* (1978).[1] In this case, the UC Davis Medical School reserved 16 admissions slots out of 100 for students of color. The program was intended to ensure the representation of students of color, particularly African Americans, Latinos and American Indians, who were not represented at all in the medical school. Alan Bakke, who was rejected for admission over a two-year period, argued that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court agreed, but in a lengthy, arcane decision, upheld the principle of affirmative action. The Court's main objection to the medical school's affirmative action program was that it relied on "quotas."[2] In announcing the judgment of the Court,[3] Justice Powell stated that "[w]hile the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal, and therefore invalid under the Equal Protection Clause" (*Bakke* 1978, 267).

The Court went on to compare the medical school's affirmative action program to that which was operated by Harvard. It stated that the "experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program" (*Bakke* 1978, 316). The *Bakke* Court stated that in

[1] The U.S. Supreme Court addressed affirmative action in its *DeFunis v. Odegaard* (1974) decision, but it did not issue a substantive ruling.

[2] The *Bakke* case also popularized the term "reverse discrimination," a topic which will not be addressed nor recognized here.

[3] Although the *Bakke* case was decided in favor of Alan Bakke in a close 5-4 decision, there was no agreement by a majority of the Justices on a number of matters (e.g., the use of numerical set asides—erroneously referred to as "quotas."

> Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that, if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1, 100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves, and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted (Bakke 1978, 323).

There are a few interesting aspects to this ruling. First, the Court places a good deal of attention on the medical school's use of "quotas," when, in fact, the program relied on goals. Quotas are fixed numbers which must be met; if they are not met sanctions are imposed. For example, it was common in the 1970s and early 1980s for federal courts to set quotas for state or local public safety departments to hire or promote women or men of color.[4] After a finding of discrimination the courts would order that a police department's next round of hires include, for example, five percent women. If the police department failed to do so, it could be sanctioned, in the form of a fine. Interestingly enough, even then, quotas were rarely enforced by the courts. If a public safety department could demonstrate a good faith effort in terms of hiring women or men of color, the presiding court would not impose a sanction.

In the UC Davis medical school case, a goal of diversifying the student body was set—a target or benchmark of 16 students was specified. If 16 students were not admitted, the school did not impose a sanction upon itself. Indeed, in 1973, the first year in which Alan Bakke was rejected from medical school, four special admission slots were not filled. Hence, even under the medical school's admission program there was no strict "quota" in operation, but rather a goal.

Another important point here is that at least four Supreme Court Justices in concurring with the *Bakke* opinion written by Justice Powell, accepted the use of numerical goals as a legitimate component to affirmative action programs. Justices Brennan, White, Marshall, and Blackmun expressed the view that

> the University's program was valid and could not be said to violate the Constitution simply because it set aside a predetermined number of

[4] Set-aside programs have also been viewed as a form of "quota," in that a certain percentage of contracting dollars is earmarked for businesses owned by women or people of color. If a contractor or subcontractor does not meet the set-aside rate (e.g., 15 percent), contracting dollars could be withheld. In practice, however, sanctions are rarely applied (see, for example, Riccucci, 2005).

> places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants--there being no difference between the two approaches for purposes of constitutional adjudication, since there was no distinction between adding a set number of points to the admissions rating of disadvantaged minority applicants, with the expectation that it would result in the admission of an approximately-determined number of qualified minority applicants, and setting a fixed number of places for such applicants, as was done in the case at bar (*Bakke* 1978, 378).

This case was ultimately decided in favor of Alan Bakke in a close 5-4 decision, but there was no agreement by a majority of the Justices on such matters at whether numerical set asides based on race violated the constitution. The *Bakke* decision, to be sure, energized the debate on the use of affirmative action programs and moreover, set in motion a line of specious reasoning around the use of "quotas."

The *Paradise* Decision

In *U.S. v. Paradise* (1987), the U.S. Supreme Court was called upon to judge the constitutionality of a consent decree between a federal district court and the Alabama Department of Public Safety to promote African Americans to higher ranks on the state police force. The program specifically involved a numerical goal of promoting one African American for every white, or as the Court maintained, "a one-black-for-one-white promotion requirement." The case first began in 1972, when the National Association for the Advancement of Colored People (NAACP) challenged the Department's longstanding practice of excluding African Americans from employment. Importantly, despite its ruling in *Bakke* on the use of a numerical rating system, the *Paradise* Court upheld the affirmative action program under the Equal Protection Clause of the Fourteenth Amendment.

The Court again referred to the affirmative action goals as a "quota" system. But, it stated that it would uphold the system in this case because a finding of prior discrimination against African Americans had been demonstrated. Interestingly enough, however, discrimination *had not* been demonstrated in promotions, but only in hiring. Parenthetically, the author here is not disputing whether discrimination occurred in promotions at Alabama's Public Safety Department; it no doubt did. Rather, the point here is that the Court is inconsistent in its demand for absolute proof of discriminatory practices and subsequently takes contradictory positions on the use of numerical goals.

The petitioner in this case, the U.S. Government, which did not support the use of affirmative action at the time, argued that promotion relief in the public safety department was unjustified because the department had been found to have committed only hiring discrimination (see *Paradise* 1987, 150). In rejecting the petitioner's claim, the Court ruled that the department's "intentional hiring discrimination had a profound effect on the force's upper ranks by precluding blacks from competing for promotions. Moreover, the record amply demonstrates that the Department's promotional procedure is itself discriminatory, resulting in an upper rank structure that totally excludes blacks" (see *Paradise* 1987, 150). Thus, the Court *inferred* discrimination in promotions and went on to uphold the numerical "one-black-for-one-white promotion requirement."

Presumably, then, the inference of discrimination justifies an organization's use of numerical goals, notwithstanding the fact that the Court in a number of previous cases demanded actual proof of discriminatory practices (see, for example, *Wygant v. Jackson Board of Education* 1986).

The *Gratz* Decision

In one of its most recent decisions to date, *Gratz v. Bollinger* (2003), the U.S. Supreme Court would not support a numerical point system for the purposes of diversifying an undergraduate program at the University of Michigan. The point system was likened to—even by the district court—a quota system. The *Gratz* Court differentiated between the point system and the affirmative action plan it upheld in *Grutter v. Bollinger* (2003), arguing that the latter, operated by Michigan's Law School, did not assign a specific number of points, but rather considered many characteristics of each applicant individually. Interestingly enough, however, the point system operated by the undergraduate program at Michigan's College of Literature, Sciences, and Art, also considered a variety of characteristics of an applicant; the only difference is that it assigned points for the various factors. As seen in Table 1, 20 points were awarded for members of an underrepresented racial or ethnic group.

Table 1. Sample of Criteria Used for Admissions in *Gratz v. Bollinger*.

Geography:	
10 points -	Michigan resident
6 points -	Underrepresented Michigan county
2 points -	Underrepresented state
Alumni:	
4 points -	"Legacy" (parents, step-parents)
1 point -	Other (grandparents, siblings, spouses)
Essay:	
1 point -	Outstanding essay (since 1999, 3 points)
Personal achievement:	
1 point -	State
3 points -	Regional
5 points -	National
Leadership and service:	
1 point -	State
3 points -	Regional
5 points -	National
Miscellaneous:	
20 points -	Socio-economic disadvantage
20 points -	Underrepresented racial/ethnic group
5 points -	Men in nursing
20 points -	Scholarship athlete
20 points -	Provost's discretion

Source: University of Michigan, http://www.umich.edu/~mrev/archives/1998/4-1-98/pg1.htm (date accessed, March 3, 2005).

But, the assignment of 20 points for race is no different from awarding points for other "nonacademic" criteria, such as those enumerated in Table 1. Universities have historically afforded favoritism, for example, to scions and legacies, and even "star" athletes. A university, like any other organization, is awarding points for factors that it *values* as an organization; the characteristics which it values can vary, and are completely unrelated to skills or abilities, as with the case of residency or provost's discretion. The point here is that the awarding of 20 points for race, particularly when factored in with all the other criteria, will not provide students of color with a "competitive" edge in the admissions process.

It is also worth noting that two Justices in the *Gratz* decision, found the numerical point system acceptable. Justice Souter in his dissenting opinion wrote that

> [t]he plan here….lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay….A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus (*Gratz* 2003, 293-294).

Concurring with Justice Souter on the use of numerical point systems, Justice Ginsburg writes that

> [t]he racial and ethnic groups to which the College accords special consideration (African Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day….There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group…. Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race (*Gratz*, 2003: 303).

In sum, a majority of the U.S. Supreme Court continues to misinterpret and hence misrepresent the use of affirmative action goals by labeling them "quotas." This ultimately discourages organizations from relying on numeric goals in their affirmative action programs. In addition, the Court has not set consistent standards for when it will accept the use of "quotas" (e.g., must absolute proof of prior discrimination be demonstrated or can it be inferred?).

Discussion

It is axiomatic that organizations of any size or type will set goals, benchmarks and targets for itself in order to achieve various purposes. Numerical goals are set for revenues, expenditures, gains, losses, profits and so forth. As noted, when an organization sets values around particular factors, common sense dictates that numeric

targets will be set. If an organization recognizes the importance of diversifying its workplace or educational environment, benchmarks will be set. Likewise, if an organization or university desires a discrimination-free environment, it will set goals for itself, which may include statistical indicators. Even the Supreme Court has recognized the importance of numerical goals, not only in the *Paradise* decision discussed above, but in other instances as well. For example, in 1979, a year after the *Bakke* ruling, the U.S. Supreme Court surprised policy makers, human resources administrators and legal scholars when it upheld a numerically-based affirmative action program voluntarily developed between a union and a chemical plant. In *United Steelworkers v. Weber* (1979), the Court was asked to review the legality of a collectively negotiated affirmative action plan that was designed to eliminate racial imbalances in the Kaiser Aluminum Chemical Corporation, which at the time was an exclusively white craft work force. The program reserved for African American employees, 50% of the openings in an in-house craft training programs until the percentage of African American craft workers in any given plant was commensurate with the percentage of African Americans in the local labor force where the plant was located. At the time, only 1.83% of the skilled craft workers were African American, even though the local workforce was comprised of approximately 39% African Americans.

During the plan's first year of operation, seven African American and six white craft trainees were selected from the production workforce, with the most senior African American trainee having less seniority than several white production workers whose bids for admission were rejected. Weber, one of those rejected, filed a class-action suit, alleging that the affirmative action program discriminated against white employees in violation of Title VII of the Civil Rights Act of 1964. Without a good deal of fanfare, the U.S. Supreme Court ruled that "Title VII's prohibition….against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans" (*Weber* 1979, 194).

The Court's 5-2 decision seemed to turn on the fact that the case was brought not under the U.S. Constitution, but Title VII, and that *private* employers are expected to develop numerical goals even quotas in order to rectify the egregious patterns of racial discrimination they engaged in historically. The Court argued that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII was with the plight of the Negro [sic] in our economy, and the prohibition against racial discrimination in employment was primarily addressed to the problem of opening opportunities for Negroes [sic] in occupations which have been traditionally closed to them" (*Weber*, 1979: 194). It goes on to say that "the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by *private* parties to eliminate traditional patterns of racial segregation (*Weber* 1979, 201, emphasis added).

With respect to the numerical aspects of the plan, the Court emphatically stated that "the plan does not unnecessarily trammel the interests of white employees, neither requiring the discharge of white workers and their replacement with new black hirees, nor creating an absolute bar to the advancement of white employees, since half of those trained in the program will be white" (*Weber* 1979, 195). Thus, an affirmative action plan with numerical goals can be voluntarily developed by private parties to eradicate their pattern and practice of past discrimination against people of color. Importantly, this type of numerical goal is no different from that which was relied upon in the *Bakke* or

Paradise plans, which also set benchmarks for achieving diversity, and for eradicating past discrimination.

It should further be noted that even though the *Weber* case involved a Title VII challenge, the rule of law established under the Civil Rights Act—which, with its previous incarnations (i.e., the Civil Rights Acts of 1886 and 1871) was designed to enact the spirit of the constitutional mandate of Equal Protection—provides an equally compelling basis for judging the legality of affirmative action programs.

The Supreme Court in 1987 again upheld the use of an affirmative action program involving statistical goals; in this case, a *public* rather than a private sector employer was involved, and the case was brought under Title VII. In *Johnson v. Santa Clara County Transportation Agency*, the county voluntarily developed an affirmative action plan for hiring and promoting women and people of color in traditionally segregated job classifications. The goal was to achieve statistical balance in these jobs. In particular, women had been significantly underrepresented in road dispatcher jobs, and so the county considered as one factor the gender of a qualified applicant. The affirmative action plan explicitly sought to "achieve a *statistically measurable yearly improvement* in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a workforce whose composition reflects the proportion of minorities and women in the area labor force….[the plan] requires that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions" (*Johnson* 1987, 616, emphasis added).

In upholding the affirmative action plan, the Court ruled that the "[p]lan represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's workforce, and is fully consistent with Title VII" (*Johnson* 1987, 616-617). Referring to its decision in *Weber*, the Court went on to say that

> [a]ssessment of the legality of the Agency's Plan must be guided by the decision in *Weber*. An employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but need point only to a conspicuous imbalance in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts (*Johnson* 1987, 617).

The *Johnson* Court concluded that "[c]onsideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories" (*Johnson* 1987, 617). In effect, the county was seeking to achieve gender representation, which encompasses, indeed, embodies numeric goals and targets.

In sum, given the Supreme Court's ambivalence around the use of numeric goals or "quotas" as it continues to misguidedly call them, the Court should first accept their importance and use in today's society and, second, remove the term "quota" from its lexicon.

Conclusion

Successful, competitive organizations set goals and benchmarks to not only achieve their objectives, but to create environmental properties and amenities which facilitate the attainment of those objectives. The goals are invariably expressed numerically as benchmarks or targets. They are not quotas, and no sanctions are implied. Moreover, refuting the use of goals as a function of affirmative action programs is inapposite at this point in our history of race and gender relations. The Supreme Court recognized this in its *Weber* (1979) and *Johnson* (1987) decisions. It is now the 21st century: will the High Court apply the same standards it relied upon in *Weber* and *Johnson* more generally and universally at this point in time?

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