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The University of Michigan Affirmative Action Cases: Racial Diversity in Higher Education

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Abstract. On April 1, 2003, the U.S. Supreme Court heard oral arguments in the University of Michigan affirmative action cases, Grutter v. Bollinger and Gratz v. Bollinger. Constitutionally speaking, the central question presented is whether Michigans admissions policies pass strict judicial scrutiny, as demanded by the Supreme Court when evaluating any race-based governmental action under the Equal Protection Clause.

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Summary

The United States Supreme Court concluded its 2002-03 term with a pair of much anticipated rulings in the University of Michigan affirmative action cases. In *Grutter v. Bollinger* a 5 to 4 majority of the Justices held that the University Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its race-based efforts to construct a "critical mass" of "underrepresented" minority students. But in a companion decision, *Gratz v. Bollinger*, six Justices decided that the University's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny. The Michigan cases revisited constitutional terrain first surveyed by the High Court a quarter century ago in *University of California Regents v. Bakke*. Unfortunately, the inability of the *Bakke* Justices to achieve any sort of consensus led in the intervening period to a circuit conflict over the constitutionality of policies to achieve racial and ethnic diversity in higher education. It remained for the Court in Michigan cases to resolve the doctrinal muddle left in *Bakke*'s wake.

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The United States Supreme Court concluded its 2002-03 term with a pair of much anticipated rulings in the University of Michigan affirmative action cases. In *Grutter v. Bollinger*[1] a 5 to 4 majority of the Justices held that the University Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students. But in a companion decision, *Gratz v. Bollinger*,[2] six Justices decided that the University's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny. The Michigan cases revisited constitutional terrain surveyed by the High Court a quarter century ago in *University of California Regents v. Bakke*.[3] Unfortunately, the inability of the *Bakke* Justices to achieve any sort of consensus led many years later to a circuit conflict over the constitutionality of policies to achieve racial and ethnic diversity in higher education. It thus remained for the Court in the Michigan cases to resolve the doctrinal muddle left in *Bakke*'s wake.

Constitutionally speaking, the central question was whether Michigan's admissions policies pass "strict" judicial scrutiny, as demanded by the Supreme Court when evaluating any race-based governmental action under the Equal Protection Clause. Strict scrutiny requires that any state classification of persons by race or ethnicity be "narrowly tailored" to serve a "compelling" governmental interest. The Court has long recognized the government's compelling interest in remedying its own past discrimination. The Michigan cases pressed the constitutional debate a step further. Absent a history of past discrimination, they asked first, whether the university has a "compelling" interest in any educational benefits that may flow from a racially diverse student body. And second, were the means adopted by the university "narrowly tailored" — or no more than necessary — to achieve that objective.

The Legacy of Bakke

Seeds of the present controversy are traceable to Justice Powell's opinion in *Bakke*. *Bakke* involved a "dual track" admissions process to the University of

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[1]123 S.Ct 2325 (2003).

[2]123 S.Ct 2411 (2003).

[3]438 U.S. 265 (1978).

California at Davis medical school, which set aside 16 of 100 places in each incoming class for minority students. Qualifications of minorities accepted under the special admissions program were never directly compared with the general applicant pool for the other 84 places. A classic two track system, only minorities were considered for 16 reserved seats: different criteria, cutoff scores, and no direct competition between minority and white applicants. Bakke, a white male, was twice rejected while minorities with lesser academic qualifications were admitted.

Justice Powell split the difference between two four-Justice pluralities in *Bakke*. One camp, led by Justice Stevens, struck down the admissions quota on statutory civil rights grounds. Another led by Justice Brennan would have upheld the medical school's policy as a remedy for societal discrimination. Justice Powell held the "dual admissions" procedure to be unconstitutional, and ordered Bakke's admission. But, he concluded, the state's interest in educational diversity could justify consideration of students' race in certain circumstances. For Justice Powell, a diverse student body fostered the "robust" exchange of ideas and academic freedom deserving of constitutional protection.

Justice Powell's theory of diversity as a compelling governmental interest did not turn on race alone. He pointed with approval to the "Harvard Plan," which defined diversity in terms of a broad array of factors and characteristics. Thus, an applicant's race could be deemed a "plus" factor. It was considered on a par with personal talents, leadership qualities, family background, or any other factor contributing to a diverse student body. However, the race of a candidate could not be the "sole" or "determinative" factor. No other Justice joined in the Powell opinion.

For nearly two decades, colleges and universities relied on the Powell opinion in *Bakke* to support race-conscious student diversity policies. Consideration of race in admissions, which took various forms, stood pretty much unchallenged until *Hopwood v. State of Texas.*[4] A panel of the Fifth Circuit repudiated the Powell diversity rationale when it voided a special admission program of the University of Texas law school. Unlike *Bakke*, the Texas program entailed no explicit racial quota. But, in other respects, it was a classic dual track system: one standard for blacks and Hispanics, another for everyone else, and cutoff scores for minorities were lower. The Powell opinion was not binding precedent, the *Hopwood* panel ruled, since it was not joined by any other justice. Thus, race could be considered in admissions only to remedy past discrimination by the law school itself, which was not shown in *Hopwood*.

Two other federal circuit courts, besides the Sixth Circuit in the Michigan case, had looked at race-based college admissions since *Bakke.* *Johnson v. Board of Regents*[5] struck down the award of "racial bonus" points to minority students as one of 12 factors — academic and nonacademic — considered for freshman admissions to the University of Georgia. The Eleventh Circuit majority was skeptical of the Powell opinion but did not take a stand on the diversity issue. Instead, the program

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[4]95 F.3d 53 (5th Cir.), cert. denied No. 95-1773, 116 S. Ct. 2581 (1996).

[5]263 F.3d 1234 (11th Cir. 2001).

failed the second requirement of strict scrutiny. It was not "narrowly tailored." That is, it "mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process." At the same time, the policy arbitrarily limited the number of nonracial factors that could be considered, all at the expense of white applicants, even those whose social or economic background and personal traits would promote "experiential" diversity. On the other hand, the Ninth Circuit upheld the minority law school admissions program at the University of Washington on the basis of *Bakke*. The appeals court in *Smith v. University of Washington Law School*[6] concluded that the four Brennan Justices who approved of the racial quota in *Bakke* "would have embraced [the diversity rationale] if need be." Justice Powell's opinion thus became the "narrowest footing" for approval of race in admission and was the "holding" of *Bakke*.

The University of Michigan Admissions Policy.

The judicial divide over the student diversity policies deepened with the Michigan case. That case is really two cases. One federal district court in *Grutter* originally struck down the student diversity policy of the University of Michigan Law School. Another judge upheld a procedure awarding points to "underrepresented minority" applicants to the undergraduate school.[7] Based on *Bakke*, the Sixth Circuit reversed *Grutter* and permitted the Law School to consider race in admissions.[8] The Supreme Court granted *certiorari* in *Grutter* and agreed to review *Gratz* prior to judgment by the Sixth Circuit.

Undergraduate admission to the University of Michigan had been based on a point system or "student selection index." A total possible 150 points could be awarded for factors, academic and otherwise, that made up the selection index. Academic factors accounted for up to 110 points, including 12 for standardized test performance. By comparison, 20 points could be awarded for one, but only one, of the following: membership in an underrepresented minority group, socioeconomic disadvantage, or athletics. Applicants could receive one to four points for "legacy" or alumni relationships, three points for personal essay, and five points for community leadership and service, six points for in-state residency, etc. In practice, students at the extremes of academic performance were typically admitted or rejected on that basis alone. But for the middle range of qualified applicants, these other factors were often determinative. Finally, counselors could "flag" applications for review by the Admissions Review Committee, where any factor important to the freshman class composition — race included — was not adequately reflected in the selection index score.

In upholding this policy, the district court in *Gratz* found that *Bakke* and the University's own evidence demonstrating the educational benefits of racial and ethnic diversity established a compelling state interest. And the award of 20 points for minority status was not a "quota" or "dual track" system, as in *Bakke*, but only a

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[6]233 F.3d 1188 (9th Cir. 2000).

[7]Gratz v. Bollinger, 122 F. Supp. 811 (E.D. Mich. 2000).

[8]Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

"plus factor," to be weighed against others in the selection process. Thus, the constitutional demand for "narrow tailoring" was satisfied. The *Gratz* district court also concluded that "vigorous minority recruitment" and other race-neutral alternatives to the current policy would not yield a "sufficiently diverse student body."

Generally setting the bar for admission to the Michigan Law School was a "selection index" based on applicants' composite LSAT score and undergraduate GPA. A 1992 policy statement, however, made an explicit commitment to "racial and ethnic diversity," seeking to enroll a "critical mass" of black, Mexican-American, and Native American students. The objective was to enroll minority students in sufficient numbers to enable their participation in classroom discussions without feeling "isolated or like spokesmen for their race." To foster, "distinctive perspectives and experiences," admission officers consider a range of "soft variables" — e.g. talents, interests, experiences, and "underrepresented minority" status — in their admissions decisions. In the course of each year's admissions process, the record showed, minority admission rates were regularly reported to track "the racial composition of the developing class." The 1992 policy replaced an earlier "special admissions program," which set a written goal of 10-12% minority enrollment and lower academic requirements for those groups. The district court in *Grutter* made several key findings: there is a "heavy emphasis" on race in the law school admissions process; that over a period of time (1992- 1998) minorities ranged from 11% to17% of each incoming class; and that large numbers of minority students were admitted with index scores the same as or lower than unsuccessful white applicants.

Writing for the Sixth Circuit majority, Judge Martin adopted the Powell position in *Bakke* to find that the law school had a compelling interest in achieving a racially diverse student body, and that its admission's policy was "narrowly tailored" to that end. "Soft variables" were found to treat each applicant as an individual and to be "virtually indistinguishable" from "plus factors" and the Harvard Plan approved by Justice Powell in *Bakke*. The law school's policy "did not set-aside or reserve" seats on the basis of race. Rather, in pursuit of a "critical mass," the policy was designed to ensure that a "meaningful number" of minority students were able "to contribute to classroom dialogue without feeling isolated." The majority opinion further emphasized that the admissions program was "flexible," with no "fixed goal or target;" that it did not use "separate tracks" for minority and nonminority candidates; and did not function as a "quota system."

The Supreme Court Rulings

The Supreme Court handed down its rulings in the Michigan cases on June 23, 2003. Writing for the majority in *Grutter* was Justice O'Connor, who was joined by Justices Stevens, Souter, Ginsburg, and Breyer in upholding the Law School admissions policy. Chief Justice Rehnquist authored an opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined, striking down the University's undergraduate racial admissions program. Justice Breyer added a sixth vote to invalidate the racial bonus system in *Gratz,* but declined to join the majority opinion.

A remarkable aspect of the *Grutter* majority opinion was the degree to which it echoed the Powell rationale from *Bakke.* Settling, for the present, the doctrinal

imbroglio that had consumed so much recent lower court attention, Justice O'Connor quoted extensively from Justice Powell's opinion, finding it to be the "touchstone for constitutional analysis of race-conscious admissions policies." But her opinion was not without its own possible doctrinal innovations. Overarching much of her reasoning were two paramount themes, that drew considerable criticism from Justice Thomas and his fellow dissenters. First, in applying "strict scrutiny" to the racial aspects of the Law School admissions program, Justice O'Connor stressed the situational nature of constitutional interpretation, taking "relevant differences into account." Thus, the majority opines, "[c]ontext matters when reviewing race-based governmental action" for equal protection purposes and "[n]ot every decision influenced by race is equally objectionable," but may depend upon "the importance and the sincerity of the reasons advanced by the governmental decisionmaker" for that particular use of race. Second, and equally significant, was the deference accorded to the judgment of educational decisionmakers in defining the scope of their academic mission, even in regard to matters of racial and ethnic diversity. "[U]niversities occupy a special niche in our constitutional tradition," Justice O'Connor states, such that "[t]he Law School's educational judgment . . .that diversity is essential to its educational mission is one to which we defer." Institutional "good faith" would be "presumed" in the absence of contrary evidence. Justice Thomas' dissent, joined by Justice Scalia, took particular exception to what he viewed as "the fundamentally flawed proposition that racial discrimination can be contextualized" — deemed "compelling" for one purpose but not another — or that strict scrutiny permits "any sort of deference" to "the Law School's conclusion that its racial experimentation leads to educational benefits." Indeed, the dissenters found such deference to be "antithetical" to the level of searching review demanded by strict scrutiny.

Satisfied that the Law School had "compelling" reasons for pursuing a racially diverse student body, the Court moved to the second phase of strict scrutiny analysis. "Narrow tailoring," as noted, requires a close fit between "means" and "end" when the state draws any distinction based on race. In *Grutter*, the concept of "critical mass," so troubling to several Justices at oral argument, won the majority's approval as "necessary to further its compelling interest in securing the educational benefits of a diverse student body." In this portion of her opinion, Justice O'Connor draws chapter and verse from the standards articulated by Justice Powell in *Bakke.*

> We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

Justice O'Connor drew a key distinction between forbidden "quotas" and permitted "goals," exonerating the Law School's admission program from constitutional jeopardy. She observes that both approaches pay "some attention to numbers." But while the former are "fixed" and "reserved exclusively for certain minority groups," the opinion continues, the Law School's "goal of attaining a critical mass" of

minority students required only a "good faith effort" by the institution. In addition, Justice O'Connor notes, minority Law School enrollment between 1993 and 2000 varied from 13.5 to 20.1 percent, "a range inconsistent with a quota." Responding, in his separate dissent, the Chief Justice objected that the notion of a "critical mass" was a "sham," or subterfuge for "racial balancing," since it did not explain disparities in the proportion of the three minority groups admitted under its auspices.

Other factors further persuaded the Court that the Law School admissions process was narrowly tailored. By avoiding racial or ethnic "bonuses," the policy permitted consideration of "all pertinent elements of diversity," racial and nonracial, in "a highly individualized, holistic review of each applicant's file." Justice O'Connor also found that "race neutral alternatives" had been "sufficiently considered" by the Law School, although few specific examples are provided. Importantly, however, the opinion makes plain that "exhaustion" of "every conceivable alternative" is not constitutionally required, only a "serious good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Consequently, the Law School was not required to consider a lottery or lowering of traditional academic benchmarks — GPA and LSAT scores — for all applicants since "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." And, because the admissions program was based on individual assessment of all pertinent elements of diversity, it did not "unduly burden" non-minority applicants. Nonetheless, as she had during oral argument, Justice O'Connor emphasized the need for "reasonable durational provisions," and "periodic reviews" by institutions conducting such programs. To drive home the point, the majority concludes with a general admonition. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Besides Justices Thomas and Scalia, and the Chief Justice, another dissenting opinion was filed by Justice Kennedy, who agreed with his brethren that the "constancy" of minority admissions over a period of years "raised a suspicion" of racial balancing that the Law School was required by the rigors of strict scrutiny to rebut. Arguing from different statistics than the majority, he found "little deviation among admitted minority students from 1995 to 1998," which "fluctuated only by 0.3% from 13.5% to 13.8" and "at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range." In addition, he contended, the use of daily reports on minority admissions near the end of the process shifted the focus from individualized review of each applicant to institutional concerns for the numerical objective defined by a "critical mass." For these reasons, he agreed with his fellow dissenters that deference to the Law School in this situation was "antithetical to strict scrutiny, not consistent with it."

The four *Grutter* dissenters were joined by Justices O'Conner and Breyer in striking down the racial bonus system for undergraduate admissions in *Gratz*. Basically, the same factors that saved the Law School policy, by their absence, conspired to condemn the undergraduate program, in the eyes of the majority. Since the university's "compelling" interest in racial student diversity was settled in *Grutter*, the companion case focused on the reasons why the automatic award of 20 admission points to minority applicants failed the narrow tailoring aspect of strict scrutiny analysis. Relying, again, on the Powell rationale in *Bakke*, the policy was

deemed more than a "plus" factor, as it denied each applicant "individualized consideration" by making race "decisive" for "virtually every minimally qualified underrepresented minority applicant." Nor did the procedure for "flagging" individual applications for additional review rescue the policy since "such consideration is the exception and not the rule," occurring — if at all — only after the "bulk of admission decisions" are made based on the point system. The opinion of the Chief Justice rejected the University's argument based on "administrative convenience," that the volume of freshman applications makes it "impractical" to apply a more individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Finally, the majority makes plain that its constitutional holding in *Gratz* is fully applicable to private colleges and universities pursuant to the federal civil rights laws. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the 1964 Civil Rights Act]."

Justice O'Connor, concurring in *Gratz*, emphasized the "mechanical" and "automatic" nature of the selection index scoring, which distinguished it from the Law School program, and made impossible any "nuanced judgments" concerning "the particular background, experiences, or qualities of each particular candidate." She agreed that the Admissions Review Committee was only an "exception," and "kind of an afterthought," particularly since the record was barren of evidence concerning its methods of operation and "how the decisions are actually made."

Dissenting opinions were filed jointly, by Justices Stevens and Souter, and separately by Justice Ginsburg. The former argued on technical grounds that since the named petitioners had already enrolled in other schools, and were not presently seeking freshman admission at the university, they lacked standing to seek prospective relief and the appeal should be dismissed. But Justice Souter argued separately on the merits that the Michigan undergraduate admission program was sufficiently different from the racial quota in *Bakke* to be constitutionally acceptable. At the very least, he felt, a more appropriate course would be to remand the case for further development of the record to determine whether the entire "admissions process, including review by the [Admissions Review Committee], results in individualized review sufficient to meet the Court's standards." Justice Ginsburg found "no constitutional infirmity" in the Michigan program since only "qualified" applicants are admitted, the current policy is not intended "to limit or decrease" admissions of any racial or ethnic group, and admissions of nonminority groups is not "unduly restricted." More broadly, she opined that government decisionmakers may properly distinguish between policies of inclusion and exclusion, because the former are more likely to comport with constitutional imperatives of individual equality.

Conclusion

The Michigan cases resolved an issue that had vexed the lower federal courts for a quarter century. Historically, judicial insistence on strict scrutiny has largely condemned governmental distinctions based on race except in the most narrowly circumscribed remedial or national security circumstances. To the short list of

governmental interests sufficiently "compelling" to warrant race-based decisionmaking a majority of the Court has now added the pursuit of diversity in higher education. But this expansion is not without qualification and may require further judicial elaboration before its implications are fully known. Significant here is Justice O'Connor's emphasis upon contextualism when applying strict judicial review and deference to the judgment of educators in the formulation of diversity policies. Any such policy, it now seems, must be sufficiently flexible to permit individualized assessment of each applicant on a range of factors — academic and nonacademic — which may include, but not be dominated by, race or ethnicity. Affording greater latitude, however, the good faith of the institution is "presumed," absent sufficient contrary evidence.

But the seeds of future controversy may lie in questions arguably raised but not fully addressed by the latest rulings. As outlined by Justice Scalia in his *Grutter* dissent:

> Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant 'as an individual,' . . . and sufficiently avoids "separate admission tracks" . . . Some will focus on whether a university has gone beyond the bounds of a "good faith effort" and has so zealously pursued its 'critical mass' as to make it an unconstitutional *de facto* quota system, rather than merely 'a permissible goal.' . . .And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*- approved 'critical mass.'

Beyond education, issues may inevitably arise concerning the implications of *Grutter* on efforts to achieve racial diversity in other social and economic spheres. Justice O'Connor's opinion noted the "special niche" occupied by universities, in matters of educational policy, particularly when preparing students for military service or to compete in a multicultural and global economy. As *amicus* briefs in the Michigan cases attest, corporate America's interest in developing a racially diverse workforce may be no less keen. But current standards under the federal civil rights laws generally allow for consideration of race in hiring and promotion decisions only in response to demonstrable evidence of past discrimination by the employer. No rule of deference like that extended to educational institutions has been recognized for employers, nor is one necessarily implied by the Michigan cases.

Finally, a note on race-neutral alternatives, and the position taken by the United States in *Grutter*. Siding with the petitioners, as *amicus curiae*, the Justice Department noted the importance of diversity in education, but refrained from supporting or opposing *Bakke*. Instead, the Administration argued that the admissions policies are not narrowly tailored because the University ignores race-neutral alternatives. Specifically, the brief pointed to socioeconomic status and "percentage plans" in Texas, Florida, and California that guarantee admission to top graduates from every state high school, regardless of race. The University, however, replied that such programs are counterproductive and would not work in Michigan. Justice O'Connor, in *Grutter*, generally agreed, for several reasons. First, in her view, percentage plans depend upon and would actually perpetuate racial segregation to operate effectively; in this sense, they are not race-neutral at all. Second, they would encourage minority students to stay in inferior schools rather

than seek better education in more competitive environments. Third, she found, such plans would not work at all in the law school or at the graduate level. And, by basing admission solely on academic standing, these plans conflict with the "holistic" approach endorsed by the majority, which individually considers each student.