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GRATZ V. BOLLINGER, 123 S. CT. 2411 (2003)

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FACTS

Jennifer Gratz, a white female, applied for admission to the University of Michigan's College of Literature, Science, and the Arts for the fall of 1995.[1] In January of that year, the University notified Gratz that it had delayed a final decision regarding her admission.[2] The school later notified her that it was unable to offer her admission.[3] Gratz thereafter enrolled in the University of Michigan at Dearborn, from which she graduated in 1999.[4] Patrick Hamacher, a white male, applied for admission to the University of Michigan's College of Literature, Science, and the Arts for the fall of 1997.[5] The University delayed and then denied his application.[6] He subsequently enrolled at Michigan State University.[7]

The University of Michigan's Office of Undergraduate Admissions changed its admissions guidelines several times between 1995 and 1999.[8] In 1995 and 1996, admissions counselors evaluated applications according to grade point average (GPA) combined with other factors such as quality of an applicant's high school, the rigor of an applicant's high school curriculum, geographical residence, and an applicant's unusual circumstances.[9] Those scores were combined to produce an applicant's "GPA 2" score.[10] Counselors cross-referenced applicants' GPA 2 scores with their scores on the American College Test (ACT) and the Scholastic Aptitude Test before deciding how to act on the applications.[11] Applicants with the same GPA 2 score and standardized test score were subject to different admissions outcomes based on race and ethnicity.[12] "For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application," whereas an in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.[13]

In 1997, the University modified its admissions procedure by allowing applicants to receive points for underrepresented minority status,

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1 Gratz v. Bollinger, 123 S. Ct. 2411, 2417 (2003).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 2418.
9 *Id.* at 2419.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*

socioeconomic disadvantage, attendance at a high school with a predominantly underrepresented minority population, and underrepresentation in the units to which the students applied.[14] In 1998, the office adopted a selection index on which applicants could score a maximum of 150 points.[15] Each application received points based on grades, test scores, residency, personal essay, and leadership, among other factors.[16] An applicant was entitled to twenty points based upon membership in an underrepresented racial or ethnic minority group.[17] The University established an Admissions Review Committee in 1999 and empowered admissions counselors to "flag" an application for review by the Committee, which then determined whether to admit, defer, or deny each flagged applicant.[18]

In October 1997, Gratz and Hamacher filed a class-action lawsuit in the United States District Court for the Eastern District of Michigan against the University of Michigan, the College of Literature, Science, and the Arts, and two former presidents of the University of Michigan.[19] Gratz and Hamacher claimed that the University of Michigan's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964,[20] and 42 U.S.C. § 1981.[21] The court granted summary judgment for the petitioners on the University's admissions guidelines used between 1995 and 1998 but granted summary judgment for the respondents on the guidelines used since 1999.[22] Both parties appealed to the United States Court of Appeals for the Sixth Circuit and then made a special appeal to the United States Supreme Court before the Sixth Circuit reached a decision.[23] The Supreme Court granted certiorari.[24]

HOLDING

The Supreme Court held that the petitioners had standing and that the University of Michigan's undergraduate admissions procedures violated the Equal Protection Clause of the Fourteenth Amendment because they

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14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 2417–18.
20 42 U.S.C. § 2000d (2003).
21 Gratz v. Bollinger, 123 S. Ct. 2411, 2418 (2003).
22 *Id.* at 2422.
23 *Id.*
24 *Id.*

were not narrowly tailored to achieve the University's interest in a diverse student body.[25] The Court also held that the procedures violated Title VI and 42 U.S.C. § 1981.[26]

ANALYSIS

The Court began its analysis by addressing Justice Stevens's dissenting argument that the petitioners lacked standing to seek injunctive relief.[27] The Court found that Hamacher had standing because he alleged that he intended to transfer to the University of Michigan when defendants ceased the use of race as admission preference.[28] The Court said that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification of the class, provided a sufficient basis for standing to maintain the class-action challenge to the University's use of race in undergraduate admissions.[29] The Court stated that the differences between the University's use of race in considering freshman and transfer applicants had no effect upon the petitioners' standing.[30]

Turning to the merits, the Court applied a strict scrutiny standard of review of the University's admissions policies.[31] Under the strict scrutiny standard, the Court examined whether the University's use of race in its admissions program employed narrowly tailored measures that furthered compelling government interests.[32] The petitioners argued that the use of race may only be used to remedy identified discrimination.[33] They further argued that diversity is "'too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.'"[34] Finally, even if the University's interest in diversity could support a compelling government interest, the University did not narrowly tailor its use of race to achieve such an interest.[35] The respondents argued in response that the University's 1999 admissions program was narrowly tailored because it resembled the Harvard College admissions program

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25 *Id.* at 2430.
26 *Id.*
27 *Id.* at 2422.
28 *Id.* at 2422–23.
29 *Id.* at 2426.
30 *Id.* at 2425.
31 *Id.* at 2427.
32 *Id.*
33 *Id.* at 2426.
34 *Id.* (citation omitted).
35 *Id.* at 2427.

endorsed by Justice Powell in his *Regents of University of California v. Bakke*[36] opinion.[37]

In deciding that the University's use of race did not employ narrowly tailored measures that furthered compelling government interests, the Court observed that Justice Powell's opinion in *Bakke* did not contemplate that any single characteristic would automatically ensure a specific and identifiable contribution to a university's diversity.[38] That opinion, as well as *Grutter v. Bollinger*,[39] envisioned that institutions would consider an applicant's entire application.[40] By automatically awarding twenty points to applicants solely on the basis of race, the University's system had the effect of making race decisive for "virtually every minimally qualified underrepresented minority applicant."[41] This went against *Bakke*'s emphasis on the importance of considering each applicant as an individual and assessing all of the qualities that individual possesses.[42]

The respondents argued that the University's admissions program included individual consideration of applications with the creation of the Admissions Review Committee.[43] The Court responded that although the record did not reveal how many applications the Committee flagged for individualized consideration, such consideration was clearly the exception and not the rule.[44] Moreover, the individualized review occurred only after admissions counselors automatically distributed the automatic twenty points to every minority applicant, thereby making race a decisive factor.[45] The respondents also argued that the volume of applications and the presentation of applicant information would make individualized consideration of each

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[36] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding University of California Medical School's admissions plan unconstitutional). In *Bakke*, the Supreme Court stated that diversity was a constitutionally permissible goal for an institution of higher education. *Id.* at 311–12. The Court struck down the school's admissions policy because it set aside seats specifically for minority students and failed to evaluate each applicant as an individual. *Id.* at 319–20. The Court endorsed programs that consider an applicant's race as a positive factor, without it being decisive. *Id.* at 317.

[37] Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003).

[38] *Id.* at 2428.

[39] Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (holding University of Michigan School of Law's admissions plan constitutional). In *Grutter*, the Supreme Court held that student body diversity is a compelling government interest that may justify the use of race in admissions policies. *Id.* at 2329. The Court cited evidence that diversity helps to break down stereotypes, improves classroom discussion, prepares students for the workforce and citizenship, and permits universities to cultivate leaders. *Id.* The Court upheld the admissions policy used by the University of Michigan Law School as a narrowly tailored means to achieve diversity because it did not use a quota system, it gave individualized consideration to applicants, it did not unduly harm non-minorities, and it facilitated periodic review to determine whether racial preferences are still necessary to achieve diversity. *Id.* at 2330.

[40] *Gratz*, 123 S. Ct. at 2428.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 2429.

[44] *Id.*

[45] *Id.* at 2430.

applicant impractical.[46] The Court responded that administrative inconvenience could not render constitutional an otherwise problematic system.[47]

CONCURRING OPINIONS

Justice O'Connor, with whom Justice Breyer joined in part, concurred.[48] Justice O'Connor stated that the University's admission procedures did not provide for a meaningful individualized review of applicants.[49] The selection index precluded admissions counselors from considering each applicant's individual qualifications, including the contribution each individual's racial or ethnic identity would make to the diversity of the student body.[50] Furthermore, the addition of the Admissions Review Committee did not provide a realistic source of individualized consideration of applicants because the Committee reviewed only a portion of all applications and executed the bulk of admissions decisions based on the selection index score parameters.[51]

Justice Thomas concurred.[52] Justice Thomas would have held that the Equal Protection Clause categorically prohibited a state's use of racial discrimination in higher education.[53] The admissions policy employed by the University of Michigan suffered not because it allowed racial discrimination among minority groups, but because it did not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants.[54] Justice Breyer concurred in the judgment, but not in the opinion.[55] Instead, Justice Breyer joined Justice O'Connor's concurrence in part and Justice Ginsburg's dissent in part.[56]

DISSENTING OPINIONS

Justice Stevens, with whom Justice Souter joined, dissented.[57] Justice Stevens stated that neither petitioner had standing to seek prospective relief because both had enrolled at other schools before they filed this lawsuit

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46 *Id.*
47 *Id.*
48 *Id.* at 2431.
49 *Id.*
50 *Id.*
51 *Id.* at 2432–33.
52 *Id.* at 2433.
53 *Id.*
54 *Id.*
55 *Id.* at 2434.
56 *Id.*
57 *Id.*

and neither had reapplied to the University through the freshman admissions process.[58] Both petitioners had standing to seek damages as compensation for the alleged wrongful denial of their respective applications.[59] However, because the petitioners faced no imminent threat of future injury, they lacked standing to obtain injunctive relief to protect third persons from similar harms.[60] Justice Stevens noted that the petitioners could not base standing upon Hamacher's claim that he intended to transfer to the University because the transfer policy was not at issue and criteria used to evaluate transfer applications at the University differed significantly from the criteria used to evaluate freshman undergraduate applications.[61] Thus, Justice Stevens stated that Hamacher's claim of future injury was at best "conjectural or hypothetical" and would have dismissed the writ for lack of jurisdiction.[62]

Justice Souter, with whom Justice Ginsburg joined in part, dissented.[63] Justice Souter stated that Hamacher had no standing to seek declaratory or injunctive relief against the University of Michigan.[64] The question of whether the freshman admission policy was narrowly tailored to achieve a diverse student body "should await a plaintiff who is actually hurt by it."[65]

Regardless of standing, Justice Souter believed that the Court should have upheld the policy on the merits because it did not describe a quota system similar to the one struck down in *Bakke*, "which 'insulate[d]' all nonminority candidates from competition for certain seats."[66] The University's policy allowed applicants to compete for all seats and valued an applicant's admission for all seats not only based on race, but on grades, test scores, leadership, personal character, socioeconomic disadvantage, and athletic ability, among other grounds.[67] Justice Souter noted that "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" and compared the points allocated for race to similar uncontested allowances for athletic ability or socioeconomic disadvantage.[68] Finally, Justice Souter stated that the Court did not have sufficient information about the operation of the Admissions Review Committee to

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58 *Id.*
59 *Id.* at 2435.
60 *Id.*
61 *Id.* at 2436.
62 *Id.* at 2438.
63 *Id.*
64 *Id.*
65 *Id.* at 2439.
66 *Id.* at 2440 (alteration in original).
67 *Id.*
68 *Id.* at 2440–41.

assume that review by the Committee would not result in individualized assessment of an applicant's contribution sufficient to meet the Court's standards.[69]

Justice Ginsburg, with whom Justice Souter joined, dissented.[70] Justice Ginsburg stated that the University's policy suffered from no constitutional infirmity.[71] Because the University had more qualified applicants for admission than it could accommodate, every admitted applicant was qualified to attend the University.[72] The discrimination and social and legal disadvantages historically faced by racial and ethnic minorities justified special consideration by the University.[73] Because the University had no intentions of limiting or decreasing enrollment by any particular racial or ethnic group, did not reserve seats based on race, and did not unduly constrict admissions opportunities for nonminorities, the policy was not unconstitutional.[74] Finally, Justice Ginsburg stated that in light of the historical racial oppression in our society and the resulting economic and social disparities, it is better to allow colleges and universities to maintain their enrollment through open and honest policies like the one employed by the University of Michigan.[75]

CONCLUSION

The Court's ruling leaves room for the use of racial preferences in undergraduate admissions, subject, as always, to strict judicial scrutiny.[76] In order for admissions policies that use racial preferences to pass muster, they must be narrowly tailored to further compelling government interests.[77] A university's desire for a diverse student body may constitute a sufficiently compelling interest to employ racial preferences, so long as the policy instituted allows for meaningful individualized review of applicants, and consideration of the contribution each individual's race or ethnic identity will make to the diversity of the student body.

These requirements make use of racial preferences by large state institutions difficult given the arduous nature of individually assessing large numbers of applications. The Court's refusal to recognize the administrative difficulties inherent in providing individualized consideration presents a

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69 *Id.* at 2442.
70 *Id.*
71 *Id.* at 2445.
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.* at 2446.
76 *Id.* at 2427.
77 *Id.*

significant challenge to large colleges and universities. If such institutions want to use racial preferences as a way of creating diverse student bodies, they must observe the rules established in *Bakke* and recently re-emphasized in *Grutter*. In *Bakke*, Justice Powell stated that "[p]referring members of any group for no reason other than race or ethnic origin is discrimination for its own sake."[78] An institution may deem race or ethnic background a "plus" in an applicant's file, so long as it examines the applicant's potential contribution to diversity without race being decisive.[79] Justice Powell emphasized the importance of considering each applicant as an individual and all of the qualities that applicant possesses.[80] No single characteristic may be decisive in the admissions process, including race.[81] Therefore, large institutions will have to be creative in ensuring their admissions policies are consistent with the Court's interpretation of *Bakke*.

Perhaps most significantly, the Court did not strike down affirmative action in *Gratz*. To some, affirmative action is a mechanism for remedying the residual effects of slavery and the Jim Crow era. The Court found that affirmative action may create classroom diversity, which in turn promotes a superior academic experience for all students. Rather than eliminating affirmative action, *Gratz* merely endorsed the ground rules established by Justice Powell in *Bakke* for how an institution may apply affirmative action in a higher education context.

Gratz, like *Grutter*, demonstrates that the Court recognizes the role that race plays in diversity. The Court expressly admitted that though race and ethnicity do not determine what individuals think, race and ethnicity often influence individuals' thoughts. Therefore, racial and ethnic diversity can be an important tool in creating a student body filled with an array of ideas, perspectives, and experiences that can enhance the learning of all students. Educational institutions clearly have an interest in obtaining diversity of thought, and the use of race and ethnicity in admissions provides a resource for achieving it.

Supporters of affirmative action will not likely celebrate the Court's ruling in *Gratz*. While the decision leaves affirmative action intact, it shows a lack of understanding by the Court of the strength of the correlation between race and thought, and insensitivity to the administrative difficulties inherent in providing individualized consideration to each and every applicant. The opinion also reveals the Court's lack of trust of colleges and universities in implementing policies of inclusion and exclusion that achieve

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78 *Id.* at 2428 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

79 *Id.*

80 *Id.*

81 *Id.*

their educational objectives. The Court has not provided great flexibility to institutions in fashioning student bodies that they must ultimately educate.

The case also illustrates the philosophical tension between individual rights and the common good. The petitioners' rights to be treated fairly and equally in the admissions process was balanced against the campus-wide benefits of a racially and ethnically diverse student body that stemmed from the University's admissions policies. In *Gratz*, the Court tipped the scales in favor of individual rights. Perhaps it is best to view the decision as a check on majority rule in favor of minority rights.

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