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GRUTTER V. BOLLINGER, 123 S. CT. 2325 (2003)

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FACTS

The University of Michigan School of Law (Law School) receives approximately 3500 applications for 350 available seats each year.[1] The Law School seeks to admit the most capable group of students for each first year class.[2] To achieve this goal, the Law School ensures that enrollment includes students with diverse backgrounds and experiences.[3] In 1992, the Law School unanimously adopted an official admissions policy that reflected these goals.[4] The Law School had found that an applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score alone were unreliable predictors of success in Law School.[5] To correct this flaw, admissions officials further ranked an applicant according to all the information contained in his or her file.[6] For the typical applicant, this included a personal statement, letters of recommendation, and a detailed essay on projected contribution to diversity. The Law School also considered "soft variables" such as enthusiasm of recommenders, quality of undergraduate institution, quality of the written essay, degree of difficulty of undergraduate course selection, and potential contribution to the communal and scholarly aspects of the Law School.[7]

To attain a diverse student body, the Law School considered these elements in conjunction with an applicant's race.[8] The Law School sought to ensure the enrollment of a "critical mass" of minority students, rather than a specific number or percentage.[9] Thus, the Law School aimed to enroll an amount of minority students sufficient to preclude the possibility of these students feeling isolated among their non-minority peers.[10] The Law School also believed that inclusion of African-Americans, Hispanics, and Native-Americans in the class would accentuate educational benefits of diversity, such as enhanced class participation and discussion, experiences in and out of the classroom, and a breakdown of racial stereotypes.[11]

Subsequent to the adoption of the new admissions policy, Barbara Grutter, a Caucasian Michigan resident, with an undergraduate GPA of 3.8

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1 Grutter v. Bollinger, 123 S. Ct. 2325, 2331 (2003).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.* at 2332.
6 *Id.* at 2331.
7 *Id.* at 2331–32.
8 *Id.* at 2332.
9 *Id.*
10 *Id.*
11 *Id.* at 2332–34.

(out of a possible 4.0) and LSAT score of 161 (out of a possible 180), applied for admission to the Law School.[12] The Law School wait-listed and ultimately denied Grutter's application for admission.[13] Grutter then filed suit against the Law School in the United States District Court for the Eastern District of Michigan,[14] alleging that the Law School discriminated against her on the basis of her race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.[15] The district court found in Grutter's favor and the Law School appealed.[16] The United States Court of Appeals for the Sixth Circuit reversed the judgment and the United States Supreme Court granted certiorari.[17]

HOLDING

The United States Supreme Court affirmed the judgment for the defendant and held that the Law School's admissions policy did not violate the Equal Protection Clause because it was narrowly tailored to further a compelling state interest in obtaining a diverse student body.[18]

ANALYSIS

The Supreme Court began its analysis with a discussion of *Regents of University of California v. Bakke*,[19] in which the Court held unconstitutional a medical school's racial set-aside program.[20] The Court noted that although *Bakke* produced six separate opinions and no majority opinion, courts have regarded Justice Powell's opinion as the holding of the case.[21] In *Bakke*, Justice Powell stated that a state's compelling interest in the promotion of diversity could constitutionally support a race-conscious

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12 *Id.* at 2332.

13 *Id.*

14 *Id.*

15 *Id.* at 2332.

16 *Id.* at 2335.

17 *Id.*

18 *Id.* at 2347.

19 *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 sixteen out of one hundred 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.

20 Grutter v. Bollinger, 123 S. Ct. 2325, 2335 (2003) (citing Regents of Univ. of Cal v. Bakke, 438 U.S. 265 (1978)).

21 *Id.*

admissions program.[22] Justice Powell had stated that the state's interest in diversity is rooted in the academic freedom inherent in the First Amendment of the constitution and that the nation's future is greatly dependent upon students' exposure to a diverse educational environment.[23]

Under Justice Powell's analysis, race or ethnicity alone could not determine diversity.[24] Thus, the Law School could attain its goal of diversity by using race in conjunction with other characteristics to obtain a diverse student body.[25] The Court noted that because race is a group classification, the Courts would conduct an extremely detailed determination to ensure that the Law School did not violate individual rights within this group.[26] Thus, strict scrutiny was appropriate;[27] if the Law School had narrowly tailored its use of racial classifications to further a compelling governmental interest, the Court would uphold the policy.[28]

The Law School argued that its strong interest in the educational benefits of a diverse student body compelled its use of race as a factor.[29] The Law School further contended that this interest was essential to its educational mission.[30] The Court agreed, noting that *Bakke* had recognized a compelling interest in promoting diversity in the context of higher education.[31] The Court stated that the tradition of according a degree of deference to a university's academic decisions is inherent in the notion of "educational autonomy."[32] As *Bakke* recognized, courts accord universities deference due to both the important purpose of public education and the promotion of freedom of speech and thought within the university environment.[33] However, such autonomy has constitutionally prescribed limitations.[34] The Court stated that a university must make a good faith effort to confirm that diversity is central to its educational mission.[35]

The Law School argued that it had to enroll a "critical mass" of minority students to further its educational mission.[36] The Court responded that racial classifications must be narrowly tailored to eliminate unconstitutional practices based on racial prejudice or racial stereotyping that

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22 *Id.*
23 *Id.*
24 *Id.* at 2337.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 2338.
29 *Id.* at 2338.
30 *Id.* at 2339.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*

do not further the compelling interest in diversity.[37] The Court explained that quota systems are not narrowly tailored.[38] By removing a certain category of applicants from competition for admission, they fail to be a good faith means of achieving diversity.[39]

The Court found that the means the Law School employed were flexible.[40] The Law School considered a variety of factors for admission and used race only as a plus factor in the context of each individualized applicant's file.[41] The Law School did not remove an applicant from competition for admission with the remainder of the applicant pool.[42] The Law School thus evidenced a good faith effort in attempting to attain a critical mass of underrepresented minorities.[43] Therefore, the Court concluded, such a critical mass did not amount to a quota system.[44]

The Court explained that a school's program must be flexible enough to review each application on an individual basis.[45] In programs that make race a plus factor, individualized attention is necessary to preclude the possibility of racial prejudice.[46] The Court noted that the Law School's program was highly individualized because it employed a holistic review that considers a multitude of characteristics and allows a potential student to contribute to the diversity of the student body.[47]

According to the Court, the Law School had never limited the list of characteristics that promote diversity.[48] Rather, the program's flexible approach considered a wide variety of characteristics besides race and ethnicity, such as travel abroad, foreign language fluency, personal adversity, community service, success in careers in other fields, unusual intellectual achievement, employment experience, nonacademic performance, and personal background.[49] Consequently, the Law School accepted non-minorities with lower grade and score credentials while denying admission to similarly situated minorities.[50]

The Court explained that schools must seek race-neutral alternatives in their effort to obtain the educational benefits of student body diversity,

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37 *Id.* at 2339.
38 *Id.* at 2342.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.* at 2343.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* at 2343–44.
49 *Id.* at 2344.
50 *Id.*

although they need not use every available alternative.[51] Grutter argued that the Law School had not considered neutral undergraduate "percentage plans," which guarantee admission to all students above a certain class rank threshold in every high school in the state.[52] The Court rejected this argument because Grutter failed to show the plan's feasibility with regard to graduate and professional institutions.[53] The Court also noted that such a plan might fail to provide the necessary individualized consideration by automatically admitting certain students.[54]

The Court also stated that a program must not unduly harm non-members of the preferred racial or ethnic group.[55] A program must try to inflict the least harm possible to other innocent applicants competing for the program's benefit.[56] In order to prevent harm to the majority, a program should use race only as a plus factor in the context of individualized consideration and not bar an applicant from consideration just because he or she is not a member of the preferred racial group.[57] Here, the Law School considered all characteristics of diversity and often chose non-minority applicants over underrepresented minority applicants who could have contributed to the overall diversity of the student body.[58] By doing so, the Law School effectively reduced the potential burden or harm to non-minorities.[59] Thus, the Court concluded that Grutter had no valid claim of unequal treatment under the Fourteenth Amendment.[60]

The Court commented that Grutter might have a basis for a claim of unequal treatment under the Fourteenth Amendment in the future.[61] The Court explained that because the core purpose of the Fourteenth Amendment is to do away with all governmental discrimination based solely on race, a race-conscious policy should be temporary.[62] Racial classifications are appropriate only as long as a compelling governmental interest requires them.[63] Noting that twenty-five years had passed since *Bakke*, the Court suggested that affirmative action policies might not be appropriate in another twenty-five years.[64]

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51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 2346–47.

CONCURRING OPINION

Justice Ginsburg, with whom Justice Breyer joined, began her concurrence by analyzing the Court's suggestion that affirmative action should have a durational limit.[65] According to Justice Ginsburg, a durational limit may be correct in theory but inapplicable in reality.[66] This is because numerous courts continued to bar the application of affirmative action programs and policies after *Bakke* due to the lack of clarity in its fragmented decision.[67] Justice Ginsburg also pointed out that public school statistics showed that segregation in the school system is still a reality.[68] Thus, she cautioned, it may not be appropriate to firmly dictate the abolishment of affirmative action within the next twenty-five years.[69]

DISSENTING OPINIONS

Justice Scalia argued that the Law School's critical mass reference was merely a plot to hide an admissions policy based on racial quotas.[70] He rejected the Law School's argument that it had a compelling interest in the educational benefit of diversity, stating that Law Schools do not test students for their ability to understand various cultures.[71] He further argued that the Law School's true interest was to retain its prestigious reputation and asserted that the majority's ambiguous holding would open the floodgates of litigation.[72] Finally, Justice Scalia argued that the Constitution bars all government discrimination based on race and that an interest in diversity in education does not overcome that bar.[73]

Justice Thomas asserted that African-Americans could succeed in society without the admissions office's unconstitutional helping hand.[74] He stated that the Constitution bars racial discrimination as well as the majority's wide degree of deference to the Law School.[75] Justice Thomas contended that the Law School's rigorous admissions standards excluded the vast majority of minority applicants.[76] Therefore, he argued, the Court could

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65 *Id.* at 2347.
66 *Id.*
67 *Id.*
68 *Id.* at 2348.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 2348–50.
73 *Id.* at 2349.
74 *Id.* at 2350.
75 *Id.*
76 *Id.*

not give deference to an institution that had only itself to blame for the need of a race-based policy to correct such exclusion.[77]

Justice Thomas likened a compelling governmental interest to a pressing public necessity.[78] He cautioned that the Law School's refusal to employ race-neutral alternatives reflected a broader interest in achieving racial balancing.[79] This absence of race-neutral alternatives revealed the Law School's desire to improve its education without sacrificing its elitist reputation, and such an interest could not be a pressing public necessity.[80] Finally, Justice Thomas expressed his opinion that race-based admission policies would be just as unconstitutional in twenty-five years as they are now.[81] He concluded that the academic credentials of minorities would remain stagnant compared to those of their non-minority counterparts because affirmative action holds minorities to lower standards.[82] Thus, affirmative action would fail to close the intellectual gap.[83]

Chief Justice Rehnquist stated that the Law School's admission policy was not narrowly tailored to further a compelling state interest.[84] According to Chief Justice Rehnquist, the Law School's "critical mass" terminology was just a term of art for quotas.[85] Pointing to admission statistics from 1995 through 2000, Chief Justice Rehnquist argued that the Law School's aim to admit the exact number of minority student applicants was the direct result of racial planning.[86] He further argued that the Constitution did not allow the Law School to admit certain racial groups to satisfy certain statistical representation.[87]

CONCLUSION

The Court expressed the opinion of this country's minority population with one exception. The Court acknowledged that not all individuals are similarly situated within the realm of higher education. While whites have enjoyed educational opportunities throughout the country's history, most minorities have not enjoyed such opportunities and are still afforded a sub-par education. Lacking sufficient political power to correct this discrepancy, they relied on the judicial system to protect their

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77 *Id.*
78 *Id.* at 2351.
79 *Id.* at 2352.
80 *See id.* at 2353–54.
81 *Id.* at 2364.
82 *See id.*
83 *Id.* at 2365.
84 *Id.*
85 *Id.* at 2367.
86 *Id.* at 2368–69.
87 *Id.*

concerns. The *Grutter* Court did not fail them. Recognizing its role as a protector of minorities, the Court stated that the Law School had a compelling state interest in furthering diversity in its student body.

Perhaps cognizant of the potential backlash of such a holding, however, the Court inserted a durational limit argument at the end of the opinion, stating that affirmative action will cease to operate within twenty-five years. This is because twenty-five years have passed since *Bakke* and, according to the Court, minorities have made great educational strides during that time. Following this logic, minorities should rise to equal footing with non-minorities within the next twenty-five years. This unnecessary attempt to pacify opponents of affirmative action might be fruitful if it did not contradict the Court's opening statements, in which it acknowledged that some courts have struck down constitutional programs since *Bakke*. It would therefore be inconsistent to attribute all educational advancement of minorities to *Bakke* because courts have not uniformly upheld affirmative action programs. Thus, the Court cannot now use this artificial twenty-five year period to claim that minorities will achieve the academic success of non-minorities within another twenty-five years.

A simple example demonstrates why the Court's argument fails. Instead of using *Bakke* as a reference point, African-Americans, and Native Americans as well, could just as easily calculate the appropriate duration of affirmative action by determining the number of years that they were denied equal educational opportunities, dating back to the pre-Civil War era. It would not be any less arbitrary to assert that affirmative action should be the prevailing doctrine for a span equal to the amount of time that elapsed between the first occurrence of racial atrocities in this country and *Bakke*. The most logical approach would therefore be to let the natural passage of time dictate when the affirmative action doctrine has outlived its purpose.

One could regard *Grutter*'s holding as a necessary evil. It is essential to afford minorities certain educational opportunities from which they have historically been excluded until the effects of slavery and other suppressive techniques are effaced throughout society. Inevitably, however, the illusion of favoring one group leads to discontent in the seemingly disfavored group. As a result, there is a wide-growing belief among non-minorities that achievements of minorities are due solely to affirmative action. Thus, affirmative action is a double-edged sword; while its implementation is necessary to erase the debilitating effects of slavery, racism, and inequality, it prevents minorities from ever proving themselves worthy of their ensuing progress.

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