GRUTTER v. BOLLINGER (2003)
GRATZ v. BOLLINGER (2003)

The most watched cases of the year were the challenges to the University of Michigan's law school and undergraduate admissions affirmative action programs, each of which took the race of an applicant into account as part of the admissions process. The law school program, which had been around in its current form since 1992, awarded a significant but undefined "plus" factor to certain African American, Latino, and Native American applicants. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). The undergraduate policy had been amended many times over the past decade, but in its current iteration it automatically conferred a substantial and fixed number of prescribed bonus points to each and every African American, Latino, and Native American applicant who applied for freshman admission.

In each of these cases, a white student applicant who had been turned down by the university for admission brought a class-action lawsuit alleging that the university's consideration of the race of an applicant violated the Equal Protection Clause of the Fourteenth Amendment and federal anti-discrimination statutes. The United States Court of Appeals for the Sixth Circuit, sitting *en banc*, upheld the law school's admission policy. The same *en banc* court had heard oral arguments in the undergraduate admissions case, but had not handed down a decision by the time the Supreme Court granted certiorari in the law school case. The undergraduate plaintiffs then asked the Court to grant certiorari in their case as well, "despite the fact that the Court of Appeals had not yet rendered a judgment, so that [the] Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." *Gratz v. Bollinger*, 123 S. Ct. 2411, 2422 (2003). The Court took the quite unusual step of granting certiorari without a court of appeals ruling.

These two cases attracted a lot of attention even before the Court handed down final rulings. The Court's April 1 oral argument, which lasted two hours, was the only domestic news story that shared *New York Times* prime headline space with the war on Iraq. And in these cases, for only the second time in history (the first being *Bush v. Gore*), the Supreme Court made audio versions of the oral arguments available to the public hours after the hearing.

The primary questions in both cases were (1) whether racial diversity among the student body is a compelling interest under Equal Protection Clause (and identical statutory) doctrine that can justify the narrowly tailored use of race in selecting applicants for admissions to public universities; and (2) if so, whether the two policies at the University of Michigan were narrowly tailored enough to survive equal protection (and identical statutory) review.

The Supreme Court answered the first question in the affirmative— educational diversity can be a compelling state interest for purposes of the so-called "strict scrutiny" review that applies under the Equal Protection Clause to all state governmental classifications that formally take the races of individuals into account in distributing benefits or burdens. But the Court answered the second question differently for each of the two challenged programs. In *Grutter*, the Court upheld the law school's program by a 5-4 vote, with Justice O'Connor writing for the

majority, which included Justices Stevens, Souter, Ginsburg, and Breyer. And in *Gratz*, the Court struck down the undergraduate admissions policy by a 6-3 vote, with the Chief Justice writing an opinion for the Court joined by Justices O'Connor, Kennedy, Scalia, and Thomas. Justice Breyer concurred in the judgment striking down the undergraduate program but, apparently put off by some of the language in the Chief Justice's opinions, did not join in that opinion.

GRUTTER UNDERSTOOD

The key to understanding *Grutter* is, of course, understanding Justice O'Connor, who provided the swing vote and wrote the majority opinion. The other justices' bottom-line votes breaking down 4-4 were almost completely predictable even before argument; the high drama of the *Grutter* case turned on the uncertainty of what O'Connor would say.

What she said— and she said it for the Court— is that she agrees with Justice Powell's opinion announcing the judgment of the Court 25 years ago in *Regents of the Univ. Of Calif. V. Bakke*, 438 U.S. 265 (1978). In that case, Justice Powell wrote an opinion, only parts of which were joined by other justices, in which he explained that assembling a student body that is diverse along many lines, including racial lines, can be a compelling interest for a public university (in Bakke's case, a public medical school). Drawing on an educational and legal tradition of academic freedom, Powell explained that the nation's future "depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation." 438 U.S. at 313. Assembling a diverse student body is a compelling interest so long as the diversity sought is not limited to race but rather "encompasses a far broader array of qualifications and characteristic of which racial or ethnic origin is but a single though important element." *Id.* At 315.

Quoting from and building upon these sentiments, Justice O'Connor's majority opinion in *Grutter* blessed diversity as a compelling interest that can justify race-consciousness. O'Connor's opinion pointed out that deference is appropriately owed to professional educators as they make what is essentially a pedagogical decision about what is necessary to accomplish the law school's mission of training lawyers and leaders.. The *Grutter* majority found that the law school's claimed need to assemble a "critical mass" of underrepresented African American, Latino, and Native American students— in order to stimulate lively classroom discussions, to break down racial and ethnic stereotypes that law students might come in with, and to serve increasingly ethnically diverse business, social, and governmental communities after graduation— was in good faith and amply supported by social science and anecdotal evidence. In the regard, O'Connor referred to *amicus* briefs filed by corporate American and military brass arguing that racial diversity in university education is essential to effective executive and officer corps performance down the road.

Interestingly, Justice O'Connor's majority opinion purported to sidestep the debate (waged in the Sixth Circuit below and in other circuits) over whether Justice Powell's opinion constitutes binding Supreme Court authority: "We do not find it necessary to decide [that question because] today we endorse Justice Powell's view that student body diversity is a compelling interest." *Grutter,* 123 S. Ct. At 2337.

Of course, it remained to ask whether the Michigan Law School's implementation of the diversity idea passes constitutional muster. On this point as well, the *Grutter* majority wrapped itself tightly in Justice Powell's writing in *Bakke*. According to Justice Powell, the diversity goal can be accomplished only through a fluid, person-specific assessment of the entirety of each applicant's candidacy. A multitude or pertinent aspects of the diversity that a particular applicant may bring— for example, his age, his background, his place of residence, etc. — must be weighed as the applicant's candidacy is assessed. An applicant's race thus may justify being given a "plus," but it cannot legally justify his being awarded a slot for which other, nonminority applicants are completely unable to compete. Two-track admissions processes (that is, those divided by race, so that minority applicants only compete against each other) and rigid quotas or set-asides (by which a certain number of seats in the class are "reserved" for minorities) are thus constitutionally impermissible.

Barbara Grutter, along with the United States as an *amicus* supporting her position, argued— as did the dissenters in *Grutter*— that the law school had attached so much significance to an applicant's race that race ceased to be just a "factor." Instead, she argued, it had been transformed into a "predominant" input that swamped all other criteria and turned the program into an impermissible, albeit disguised, "quota." The idea was that although the program was formally styled as a plus system, it walked, talked, and squawked like a quota system. To be sure, while the law school's admissions formula is complex and somewhat inscrutable, an applicant's minority status substantially improved his or her statistical chances for admission. For instance, in the year 1997, of the 22 minority applicants who had a college grade point average (GPA) of between 3.25 and 3.49 and who scored between 156 and 158 (about the 75th percentile nationally) on the Law School Admission Test (LSAT), 15 were accepted. Of the 45 white applicants in the same GPA and LSAT ranges, only three got in. (In the year 2000, for those same boxes, 10 out of 14 minority applicants were accepted, while only two out of 49 whites were.)

In addition, it is also true at the law school that the overall percentage of the minorities enrolled in some years is remarkable similar to other years. For instance, between 1995 and 1998 (admittedly a small sample of years), the number of African American, Native American, and Latino students actually enrolled fluctuated only between 44 and 47.

Nonetheless, the *Grutter* majority found the law school's racial diversity policy to be narrowly tailored. Crucial to its conclusion was the majority's belief that the law school engaged in a holistic and highly individualistic assessment of each candidate and the diversity that he or she might bring. Many candidates with doctoral degrees were given pluses, as were some people from certain geographic background, as were a few people who were fluent in particular exotic languages, as were some who had successful careers in other fields, and so on. Racial diversity, then, was just one kind of diversity the law school valued.

Moreover, even when it came to racial diversity, the law school did not, the majority concluded, use a rigid, mechanical, or mathematical approach. It did not award "predetermined diversity bonuses" based on race or ethnicity. It is for that reason that the law school could point to significant numbers of racial minorities who were denied admission in favor of white candidates who had LSAT scores and college grades below those of the rejected minorities.

What of the fact that racial-minority status substantially improved one's chances for admission, and the fact that the number of minorities enrolled from year to year were sometimes close? As Justice O'Connor explained in *Grutter*, there is certainly nothing in the language of Justice Powell's *Bakke* opinion that says a "plus" awarded for a candidate's race cannot be a significant boost. For example, nowhere does Powell suggest that race can be used only as a tiebreaker to resolve a decision between two otherwise precisely equally attractive candidates with, for instance, the same grades, test scores, and extracurricular activities. Pluses, even the kind Powell had in mind, can alter the results in many cases, not just in the unrealistic situation of a perfect tie between applicants who are identical in every aspect but race.

As for the lack of huge variation in minority enrollment from year to year, it bears repeating that if a school wants to ensure diversity through its affirmative action program, it needs to assemble a "critical mass" of students who differ along racial lines. A critical mass is necessary to ensure a broad range of viewpoints, as well as to avoid isolation and a sense of loneliness or tokenism on the part of minority individuals. Also, with a mere handful of minority students, many courses will predictably lack any minority student at all, with discussions predicably suffering as a result. The same phenomenon may happen in student organizations: If there are only 10 minority law students, and only 10 percent of students make law review, what if there is only a single minority student on law review? How much diversity can that lone person add? So, as Justice O'Connor points out, if a school is inclined and permitted to pursue a critical mass of minority students, its admissions committee *must* keep its eyes on the number of minorities who are admitted and planning to enroll during each year and also from year to year. That doesn't mean having a target in mind— a target the school might fall short of or exceed, but a target nonetheless. Without such targets, there is no way to ensure diversity's benefits. Thus, it is not surprising that there is nothing in Justice Powell's "factor" approach that says a university cannot adjust the size of the factor, within a year or between years, in order to make coming close to a numerical target more likely.

To put the point another way, just because a school cannot *guarantee* reaching an exact numerical target by using a quota does not mean that it needs to be oblivious about how its criteria are helping achieve its target *range*. A school with exactly 47 minority students in its class every year over a 10-year period probably has a quota. But a school with minority enrollment that always hovers in the 40s may have nothing to do with quotas at all in its admissions process and simply be using a plus system and a rough target instead.

GRATZ UNPACKED

Having fleshed out the contentions and arguments in *Grutter*, an analysis of *Gratz* should not take too long. Putting aside some significant but technical issues about standing and class actions, the primary question that needs answering is, why did Justice O'Connor and Justice Breyer switch sides and vote with four other justices to strike down a undergraduate admissions policy?

Again, as with *Grutter*, the key is *Bakke*— in particular, Justice Powell's writing there. Although the *Gratz* majority for whom the Chief Justice wrote accepted (as they had to) that diversity was a compelling interest, the Court found that the college admissions policy was simply not narrowly tailored. The key difference between the undergraduate admissions policy and the law school admissions policy was that the undergraduate system was far more mechanical and automatic and much less fluid and individualized.

In the undergraduate program, a person's African American, Latino, or Native American status automatically— without consideration of personal circumstances— enhanced his or her application index score by about the same amount as would a one-point increase in high school GPA (e.g., from 2.5 to 3.5). Overall, successful applicants needed an index score of around 100 points on the undergraduate index scale to ensure admission, and minority status necessarily conferred 20 points toward that end. By contrast, performance on the SAT or ACT could—even with a perfect score— confer a maximum of only 12 points. All of this, suggested the Court, could understandably lead a nonminority student to complain, what can I possibly do to overcome the racial diversity "plus" and effectively compete with a minority applicant who meets the minimum qualifications? Important to the majority's decision in *Gratz* was that all — or at least virtually all — minimally qualified candidates who received the automatic 20-point bonuses were admitted. As noted earlier, that was not true of all the minimally qualified minority applicants to the law school. *Gratz* will be an easy enough ruling for universities to follow simply by copying the Michigan Law School's flexible, inscrutable program. That kind of individualized admissions policy may be more labor-intensive and time-consuming to implement, but should not frustrate the ultimate objective of those who favor race-based affirmative action.

Although *Gratz* would have been an important case standing on its own, when it is combined with *Grutter*, it shrinks into the background, These two cases were not, as initially reported the press, a "split decision" by the Court. They were a clear victory for diversity based racial affirmative action, with a roadmap outlined in *Grutter* for how to take advantage of that victory. That leaves the interesting question: does it really make sense to distinguish between a flexible, inscrutable, individualized plan (like the law school's) and a mechanical, predictable, economical, and more overt plan like the undergraduate policy? In other words, even if the undergraduate Michigan policy were effectively a quota, why is a "quota" system worse than a "factor" or "plus" system? One short answer is that Justice Powell's opinion on the *Bakke* case said so, and *Bakke* seems to be doing the work for the justices in control of the Court's outcomes. When *Bakke* was itself decided, the constitutional difference between quota and factors was the subject of some debate. From a policy perspective, a flexible system— such as a

"plus" system that is not committed to reserving any specific number of seats for any group of applicants— certainly may make great sense. Reserving a set number of seats before one sees the depth, breadth, and strength of a given year's applicant pool seems unnecessarily confining. Since diversity is but one objective an admissions policy may have, looking to see how much other objectives have to be traded off in a given year to accomplish a particular level of diversity can be quite wise. Moreover, quota policies can seem too blunt and "in your face" for some tastes. Justice Powell, ever the Southern gentleman, would naturally be inclined toward a more genteel and subtle use or race that might rub fewer people the wrong way.

But there are, of course, differences among policy, courtesy, and constitutional law. Justice Brennan's writing in *Bakke* explained why he thought a quota was no worse than a plus. And in some ways, it might be preferable. Quotas are more open, more visible, and more subject to democratic accountability. Flexible, nuanced "pluses," by contrast, are harder to police, because people have such a hard time figuring out the size of the plus that is being given. If, in the end, those people who believe racial preferences for minorities in admission are constitutional do so in part because the political process already protects majorities against victimization, it would seem that transparency is a good, rather than a bad thing. The battle, however, seems long over. Quotas are out and unlikely to return any time soon.