Supplementary Material

Chapter 11: The Contemporary Era—Equality/Race/Affirmative Action

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Gratz v. Bollinger, 539 U.S. 244 (2003)

Jennifer Gratz in 1995 applied for admission into the University of Michigan.. Although the undergraduate College of Liberal Arts routinely accepted persons of color with Ms. Gratz's credentials (which included a 3.8 GPA and a 25 on the ACT), her application was rejected. Ms. Gratz filed a class action lawsuit claiming that the University of Michigan's policy for admitting students violated the equal protection clause of the Fourteenth Amendment. While the lawsuit was pending, Michigan changed admissions policies. By the time the federal district court reached a decision, the University was evaluating candidates on a 150-point scale. Up to 110 points could be gained through grades and test scores. Michigan also awarded students twenty points for being a member of a historically underrepresented group. Persons might receive twenty points for athletic skills or sociological disadvantage, but such characteristics as leadership skills or demonstrated artistic talent were given far fewer points. The federal district court sustained the bulk of the admissions system Gratz appealed to the Supreme Court of the United States.

The Supreme Court by a 6-3 vote declared unconstitutional the undergraduate admissions process at the University of Michigan. Chief Justice Rehnquist's majority opinion held that Michigan had adopted a constitutionally impermissible quota system. On what basis did the majority and concurring opinions distinguish Gratz *from* Grutter v. Bollinger *(2003), the case that sustained the use of race in the admissions process used by the University of Michigan School of Law? Do you find that distinction constitutionally sound? The dissenting opinions suggested that no practical difference exists between the policy at issue in* Gratz *and policies adopted in Texas and other states that guarantee undergraduate admissions to the top students at state high schools. Why did Justice Souter see no distinction? Was he correct? Imagine you wished to increase the number of students of color at your institution. What, after* Gratz *and* Grutter *would be the most race-conscious policy likely to survive constitutional scrutiny?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc.* v. *Peña* (1995). This "'standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.'" . . .

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs "narrowly tailored measures that further compelling governmental interests." . . . Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," . . . our review of whether such requirements have been met must entail "'a most searching examination.'" . . . We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

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Justice Powell's opinion in *Regents of the University of California v. Bakke* (1978) emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. . . .

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive . . ., the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant. . . .

. . . Even if [a student's] "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. . . . At the same time, every single underrepresented minority applicant . . . would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants [an] individualized selection process. . . .

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Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter v. Bollinger* (2003). . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. . . . Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

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JUSTICE O'CONNOR, concurring.

Unlike the law school admissions policy the Court upholds today in *Grutter* v. *Bollinger* (2003) . . ., the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. . . . The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. . . . By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. . . .

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Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course . . ., a university need not "necessarily accor[d]" all diversity factors "the same weight," . . . and the "weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class." . . . But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. . . .

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. . . .

JUSTICE THOMAS, concurring.

. . . I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

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JUSTICE BREYER, concurring in the judgment.

I concur in the judgment of the Court though I do not join its opinion. I join Justice O'Connor's opinion except insofar as it joins that of the Court. I join Part I of Justice Ginsburg's dissenting opinion, but I do not dissent from the Court's reversal of the District Court's decision. I agree with Justice Ginsburg that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, . . . for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally. . . .[1]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

[Justice Stevens claimed that Jennifer Gratz did not have the necessary standing to file her lawsuit.]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins . . . , dissenting.

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The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter v. Bollinger* (2003) reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke* (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

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The 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. . . .

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. . . [The] assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

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[1] (footnote by editors) We defy you or your professor to explain what this concurrence means.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," . . . the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system. . . . But petitioners do not have a convincing argument that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified under-represented minority applicant," . . . may reflect nothing more than the likelihood that very few [un]qualified minority applicants apply . . . as well as the possibility that self-selection results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

. . . In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. . . .

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

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JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

. . . [T]he Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. . . . This insistence on "consistency" . . . would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. . . But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

In the wake "of a system of racial caste only recently ended," . . . large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. "Bias both conscious and unconscious, reflecting traditional and unexamined

habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." . . .

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." . . . In implementing this equality instruction, . . . government decisionmakers may properly distinguish between policies of exclusion and inclusion. . . . Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. . . .

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." . . . But where race is considered "for the purpose of achieving equality," . . . no automatic proscription is in order. For, as insightfully explained, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color-blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." . . .

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Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College) . . . . I see no constitutional infirmity. . . . The 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, and no seats are reserved on the basis of race. . . . 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. . . .

The stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. . . . If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.