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# Why the University of Michigan Should Win in Grutter and Gratz

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# Why the University of Michigan Should Win in *Grutter* and *Gratz*[*]

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## MAY IT PLEASE THE COURT . . .

We have demonstrated that the University of Michigan, both at its undergraduate institution and its law school, can operate flexible admissions programs, consistent with the Equal Protection Clause of the Fourteenth Amendment, that competitively weigh each applicant's academic background, life experiences, and personal characteristics, including race. By constitutional standards, their purpose of promoting a diverse student body is a compelling interest, and by considering a candidate's race along with other personal characteristics, the programs are appropriately tailored. Both as to purpose and scope, the University has satisfied its equal-protection obligation.

## THE UNIVERSITY'S ADMISSIONS PROGRAMS

Each year the University's undergraduate and law schools receive hundreds of applications from qualified students that exceed the number of available admission slots. After the University ranks each candidate's standardized test score and grade-point average, some applicants advance their standing based upon geographic origin, residency status, leadership skills, work experience, relationship to alumni, and other attributes. It is undisputed that such factors disproportionately increase admission rates for white students at the expense of minority students, even though some of these factors reveal nothing about a candidate's merit or potential.

To level the playing field, the University also considers an applicant's race, along with the other factors, as a means of increasing student diversity, without relying on quotas, set-asides, or separate

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admission tracks. This comprehensive approach promotes enrollment of students with all types of backgrounds, including students from racial groups noticeably underrepresented on campus.

STUDENT DIVERSITY IS A COMPELLING INTEREST

We remind your Honors that this Court is not facing a novel question. In 1978, it was decided in *Regents of the University of California v. Bakke*[1] that a university can properly integrate its student body by considering an applicant's racial background among a multitude of other factors when making admission decisions. At issue in *Bakke* was the admissions program at the medical school of the University of California at Davis that reserved 16 out of 100 entering seats exclusively for qualified minority applicants. Writing for a divided court, Justice Lewis F. Powell, Jr. concluded that the program operated as an impermissible two-track system because nonminorities could not compete for the reserved seats.[2]

But while rejecting Davis's unyielding emphasis on race, Justice Powell endorsed the flexible use of race alongside other factors to further the "compelling state interest" of student diversity. As a case in point, Justice Powell pointed to the policy at Harvard College which, unlike Davis, considered race "a 'plus' in a particular applicant's file," yet did not "insulate the individual from comparison with all other candidates for the available seats."[3] Under this plan, race might "tip the balance" in one applicant's favor, just as other variables tip the balance for a competing candidate.[4] In this case, the University of Michigan takes the same approach.

For Justice Powell, Davis's plan was deficient by its means, not in its purpose. As he explained, the First Amendment embraced the underlying goal of racial diversity. Justice Powell, quoting a reference by Justice Felix Frankfurter in *Sweezy v. New Hampshire*, reasoned that the freedoms expressed in our Constitution have significant value to educational institutions—which, unlike profit-driven businesses, are authorized to promote an environment "conducive to speculation, experiment and creation."[5] In addition, when sufficiently integrated, such an environment enables students to develop the cultural and interpersonal skills necessary to succeed

1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).
2. *Id.* at 315, 98 S. Ct. at 2761.
3. *Id.* at 317, 98 S. Ct. at 2762.
4. *Id.* at 316, 98 S. Ct. at 2761.
5. *Id.* at 312, 98 S. Ct. at 2759 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957) (Frankfurter, J., concurring in result).

in a shrinking global community. Such reasoning persauded Justice Powell that racial diversity is "of paramount importance" in the fulfillment of a university's educational mission.[6]

## BAKKE'S PRECEDENTIAL VALUE

That a majority of justices joined only part of Justice Powell's decision does not undermine the value of *Bakke's* reasoning. We remind your Honors that four Justices in *Bakke* would have upheld the Davis program, albeit under different standards of review. Furthermore, Justice Sandra Day O'Connor confirmed the significance of *Bakke* when she explained in *Wygant v. Jackson Board of Education*[7] that a "state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[8] To ignore *Bakke* at this late juncture not only risks resegregating America's colleges and universities, but conflicts with this court's own commitment to stare decisis.

Indeed, like many educational institutions across the country, the University understands that diversity is most effectively achieved when admissions criteria include race.[9] In that respect, *Bakke* falls within the line of cases that remain controlling in part because they provide a source of reference. In *Allied-Bruce Terminix Companies, Incorporated v. Dobson*[10] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[11] this court declined to invalidate previous decisions—*Southland Corporation v. Keating*[12] and *Roe v. Wade*,[13] respectively—because they so profoundly influenced institutional and individual decision makers. *Bakke* has engendered the same reliance from individuals, educational institutions, and government entities. Regulations promulgated by the U.S. Department of Education take full account of *Bakke* and its endorsement of racial diversity.

Only when a recent precedent departs from well-established principles has this Court taken the extraordinary step of overruling itself to restore a prior line of jurisprudence.[14] Here, the Court faces

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6. *Bakke*, 438 U.S. at 313, 98 S. Ct. at 2760.
7. 476 U.S. 267, 286, 106 S. Ct. 1842, 1853 (1986).
8. (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311–15, 98 S. Ct. at 2759–61).
9. *See* Grutter v. Bollinger, 288 F.3d 732, 735 (6th Cir. 2002).
10. 53 U.S. 265, 115 S. Ct. 834 (1995).
11. 505 U.S. 833, 112 S. Ct. 2791 (1992).
12. 465 U.S. 1, 104 S. Ct. 852 (1984).
13. 410 U.S. 113, 93 S. Ct. 705 (1973).
14. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233–34, 115 S. Ct. 2097, 2115–16 (1995) (overruling Metro Broadcasting, Inc. v. F.C.C., 497 U.S.

no such conflict. First, *Bakke* itself established the controlling precedent on diversity so there is no *prior* precedent to *re*-establish. In addition, 25 years after Justice Powell announced the compelling nature of diversity, and 17 years after Justice O'Connor reaffirmed that rule, *Bakke* continues to influence admissions policies nationwide. Borrowing the rationale in *Casey*, *Bakke* cannot be overruled "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it."[15] The U.S. Court of Appeals for the Sixth Circuit has already upheld the law school's plan based in part on this reasoning.

Moreover, this Court has never rejected diversity as a compelling interest nor suggested that only programs designed to remedy discrimination are compelling enough to satisfy constitutional standards. *Wygant*,[16] *Fullilove v. Klutznick*,[17] *City of Richmond v. J.A. Croson Company*[18] and *Adarand*,[19] each dealt with varying types of race-based remedies for discrimination, but not one articulated the radical notion that race was relevant to remedial interests, but no other.

## NARROW TAILORING AND DIVERSITY

The petitioners in the University of Michigan cases, Jennifer Gratz and Barbara Grutter, argue that even if diversity constitutes a compelling interest, the admissions programs nonetheless fail because they are not "narrowly tailored." We submit that a narrow-tailoring requirement is inappropriate in this case.

Narrow tailoring makes sense where race-based remedies are concerned because it provides compensation to actual victims of racial discrimination without risking a windfall to undeserving non-victims. That is why this Court rejected a remedial construction set-aside program in *Croson* that reserved a percentage of public works contracts for minority-owned businesses, but gave a competitive advantage to minority business owners who had never been denied a government contract on account of their race.[20]

By definition, a diversity-based program cannot be overbroad. Its goal is not meant to provide proportional compensation for prior wrongs. As implied in *Bakke*, student body diversity is, by its nature, somewhat mathematically imprecise because it stems from a desire

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547, 110 S. Ct. 2997 (1990)).

15. *Casey*, 505 U.S. at 855, 112 S. Ct. at 2809.
16. 476 U.S. 267, 106 S. Ct. 1842 (1986).
17. 448 U.S. 448, 100 S. Ct. 2758 (1980).
18. 488 U.S. 469, 109 S. Ct. 706 (1989).
19. 515 U.S. 200, 115 S. Ct. 2097 (1995).
20. *Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989).

to advance the educational mission. Unlike remedies for discrimination, diversity does not require proportionality.

Even applying narrow tailoring, the University's admissions programs meet that standard. Narrow tailoring requires an assessment of whether the "plus" factor is "too big." The size of the plus factor, whether for race, geography, or alumni relationship, reflects the institution's commitment to qualified applicants with a particular characteristic. The very reason that racial quotas are problematic is because it is difficult to select the "right" number with mathematical precision. Instead, this Court must respect both the judgment and experience of University officials in evaluating whether, in comparison to other factors, race is over emphasized. Under the University's admissions programs, the race factor is hardly excessive. At the undergraduate level, the University assigns the same number of points to applicants from underrepresented minority groups as it does to socially and economically disadvantaged applicants, athletes, and any other applicant for any reason at the Provost's discretion. The law school, without relying on a point system, weighs race fairly by placing it on an equal footing with other potential student contributions.

In that respect, the University's plan disproves the petitioners' argument that the program gives advantages disproportionately to minority students. On the contrary, although the University's flexible consideration of race contributes to a diverse student body, it did not unfavorably disadvantage either the undergraduate or law school petitioners because they would not have been admitted even under a race-blind policy. On the whole, the University was less impressed with the petitioners' credentials than those of applicants who received admission offers, including dozens of white applicants who had lower GPA's and standardized test scores than the petitioners. Furthermore, the racial diversity the university seeks is well defined when compared to the types of diversity in other contexts that some members of this court have labeled "too amorphous, too insubstantial and too unrelated" to any legitimate basis for employing racial classifications. For example, in *Metro Broadcasting, Incorporated v. F.C.C.*,[21] several Justices chided the Federal Communications Commission for attempting to broaden the scope of viewpoints expressed during broadcast programming by increasing minority broadcast licensing. Those Justices declined to assume a correlation between the number of minority license holders and broadcast diversity. To do so, Justice O'Connor explained, equates "race with belief and behavior" and overlooks the range of ideologies that exist among individuals of the same race.[22]

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21. 497 U.S. 547, 110 S. Ct. 2997 (1990).
22. *Id.* at 618, 110 S. Ct. at 3037 (O'Connor, J., dissenting).

Contrary to the FCC, the University values intra-racial as well as inter-racial diversity and understands that underrepresented minority students bring to campus a range of experiences, values, and ideologies, not only in comparison to non-minority students, but also in comparison to each other. In an environment that promotes this type of diversity, some minority students might find more in common with their non-minority classmates than members of their own race. The University operates from a premise that there is no such thing as a "Black mindset" or "Hispanic mindset," and seeks to inculcate this understanding among its students by fostering the admission of underrepresented applicants.

Moreover, just as *Bakke* encouraged universities around the Nation to pursue diversity, Justice Powell's comparison between the programs at Harvard and Davis instructed them on how to undertake that pursuit within the strictures of the Constitution. This Court should not forget how minority enrollment in California, Washington, and Texas universities plummeted following court imposed or legislatively mandated race-blind admissions. *Bakke* has instructed universities on how to maintain a meaningful minority presence with little, or in this case, no consequence to Petitioners.

Finally, even if the "plus" factor is not too big and the negative impact on those not covered by the affirmative action program is minimal, the petitioners argue that narrow tailoring requires proof that the compelling objective cannot be achieved through less burdensome alternatives than the consideration of race. Petitioners point to the implementation of race-neutral programs in Texas and Florida that guarantee university admissions at highly selective campuses to the top students from each high school in the state. However, race-neutral affirmative action programs, such as those based solely on socio-economic standards, are ineffective because they prevent universities from achieving the critical mass necessary for a racially-diverse student body. Since whites tend to outnumber minorities qualifying for such programs, overall minority enrollment is reduced by such race-neutral methods. Moreover, a percentage program would be unworkable at the law school level.

## JUDICIAL DEFERENCE IN EDUCATION

This Court has repeatedly acknowledged the unique and important influence of education in American society.[23] As a way of safeguarding that role, as well as upholding federalist principles, the court has granted wide deference to educational institutions and the

23. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 74 S. Ct. 686 (1954); Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382 (1982).

state governments that control them. As a result, colleges and universities enjoy broad powers to carry out their educational missions.[24] Allowing the University flexibility in promoting racial diversity recognizes that valuable role.

## CONCLUSION

Justice Powell concluded in *Bakke* that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . . .'"[25] The University has created a diverse student body that allows for just such discovery which in turn enhances the learning environment of the entire student body. The means by which the University has chosen to achieve this goal is consistent with the letter and spirit of this Court's prior decisions and the guarantees of the Equal Protection Clause of the Fourteenth Amendment. We trust that the Court will not prevent the University from continuing this indispensable service.

24. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 91 S. Ct. 1267, 1276 (1971).

25. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2760 (1978) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).