***GRATZ v. BOLLINGER* (2003)**

UM UNDERGRADUATE ADMISSIONS PROGRAM 1998

Selection Index

Maximum of 150 points with points for:

Academic Factors (high school GPA, ACT/SAT scores, academic quality of applicant's high school, strength of applicant's high school curriculum)
In-State Residency: 10 points
Residence in underrepresented Michigan county: 6 points
Alumni Relationship
Personal Essay
Personal Achievement or leadership: up to 5 points
Miscellaneous
Underrepresented Minority: 20 points
Talent (e.g., art): maximum of 5 points

"Protected Categories" in Rolling Admissions System

Athletes
Foreign Students
ROTC Candidates
Underrepresented Minorities

UM UNDERGRADUATE ADMISSIONS PROGRAM 1999-2003

Addition of an Admissions Review Committee (ARC), to provide an additional level of consideration for academically prepared applicants with a minimum Selection Index score who possess a quality important to the composition of the freshman class (such as high class rank, unique life experiences, talents, socioeconomic disadvantage, geography, and underrepresented minority status).

GRATZ'S AND HAMACHER'S COMPLAINTS

Jennifer Gratz, a white female, applied to UM in 1994, but was denied admission after a decision regarding admission was delayed from January to April 1995.

Patrick Hamacher, a white male, applied to UM in 1996, but was denied admission after a decision regarding admission was delayed from January to April 1997.

In 1997, Gratz and Hamacher filed suit in District Court alleging that UM's use of race violated their rights under the EP Clause (and other statutes having the same import as the EP Clause).

THE DECISION

The Supreme Court, in a 6-3 decision written by Rehnquist, struck down UM's use of race in the context of its undergraduate admissions policy from 1998 to 2000.

Standard: Strict Scrutiny (see *Grutter*)

Even if UM's end of achieving (the educational benefits of) student body diversity is compelling (see *Grutter*), UM's use of race in undergraduate admissions (1998-2000) is NOT NARROWLY TAILORED to achieve this end. Thus, UM's use of race in undergraduate admissions fails the Strict Scrutiny test, and hence runs afoul of the EP Clause.

REHNQUIST ON THE MEANS

Rehnquist argued that, although UM's use of race is not a strict quota system, it does unduly harm nonminority applicants in not allowing for "individualized consideration" of undergraduate applications.

Race as a Decisive Factor: The automatic distribution of 20 points (out of a maximum of 150) to every applicant from an underrepresented minority group "has the effect of making the factor of race 'decisive' for virtually every minimally qualified underrepresented minority applicant".

Rigidity of the Selection Index: The fact that the possession of extraordinary artistic talent could add no more than 5 points to an applicant's Selection Index, while membership in an underrepresented minority group counts for 20 points, reveals lack of individualized consideration.

Irrelevance of ARC: The existence of a further level of review through ARC affects "only a portion of all of the applications", and occurs only after the awarding of 20 points for underrepresented minority status.

To the objection that the implementation of a program providing individualized consideration would be impractical, Rehnquist replied that equal protection of the laws should not be held hostage to "administrative convenience".

SOUTER'S DISSENT

For Souter, the relevant question is whether UM's use of race in undergraduate admissions "is closer to what *Grutter* approves [namely, a holistic system of review that allows for individualized consideration of all applicants] than to what *Bakke* condemns [namely a *de jure* set-aside or quota system]".

Souter argues, as against Rehnquist, that UM's use of race does allow for "individualized consideration" of undergraduate applications:

<u>Race is Not a Decisive Factor</u> (in the relevant sense): The relevant question is not whether the awarding of 20 points for race is sufficient to guarantee admission for every virtually every qualified underrepresented minority applicant. For this fact "may reflect nothing more than the likelihood that very few qualified minority applicants apply,…as well as the possibility that self-selection results in a strong minority applicant pool". The relevant question is whether the awarding of 20 points for race operates as a "*de facto* set-aside" or quota system, and it is clear that it doesn't. This is because "nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race".

<u>The Selection Index is no more Rigid</u> than the Law School Admissions Plan that *Grutter* found constitutionally acceptable: "The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'".

<u>Possible Relevance of ARC</u>: There isn't enough in the record to suggest that the addition of ARC doesn't sufficiently mitigate the supposed rigidity of the selection index point system to guarantee "individualized review sufficient to meet the Court's standards".

GINSBURG'S DISSENT

Ginsburg suggests that Strict Scrutiny may not be the proper standard of review for race-based classifications when the reason for the classifications is to counter "the effects of centuries of law-sanctioned inequality" on grounds of race.

Ginsburg argues that, in reviewing governmental classifications based on race for allegedly benign ends, the Court should uphold the relevant policy unless:

> The classification is in reality malign, though it masquerades as benign
> The classification trammels unduly upon the opportunities of others

UM's use of race passes the relevant test

> UM's use of race is clearly designed to benefit members of underrepresented minority groups, rather than to harm members of well represented plurality or majority groups.

UM's use of race does not trammel unduly upon the opportunities of others: "In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants".

BACK TO *BROWN*: EQUALITY OF OPPORTUNITY

The fundamental premise in the argument of Brown outlawing *de jure* educational segregation was that equal protection of the laws requires protection of the right to equality of opportunity. The problem is this:

On the one hand, members of certain minority groups continue to face both conscious and unconscious racial discrimination at many social levels (e.g., job applications, real estate markets, consumer transactions, and so on), as well as "the vestiges of rank discrimination long reinforced by law".

On the other hand, many of those who do not belong to these groups are not responsible for current or past discrimination, and thus count as innocent beneficiaries of discrimination by others.

The Problem: Equality of opportunity requires us to adjust for the relevant loss by awarding preferences to minorities such that all parties now have the opportunities they would have had if there had been no past or present law-sanctioned discrimination. But the complexity of the social situation makes it impossible to measure the loss of opportunity suffered by minorities (and the corresponding opportunity gain to nonminorities) represented by past and present law-sanctioned invidious discrimination against minorities.