

O'CONNOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE O'CONNOR, concurring.*

I

Unlike the law school admissions policy the Court upholds today in *Grutter v. Bollinger*, *post*, p. 1, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter v. Bollinger*, *post*, at 24. 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. Cf. *ante*, at 23, 25. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter*, *supra*, at 25, requires: consid-

*JUSTICE BREYER joins this opinion, except for the last sentence.

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eration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante*, at 24 (citing *Bakke, supra*, at 324)).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F. Supp. 2d 811, 827 (ED Mich. 2001). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a–118a. When the university receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points—a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as “admit or postpone”; applicants with 90–94 points are postponed or admitted; applicants with 75–89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic “[m]ass [a]ction[s].” App. 256.

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up

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to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading

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the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

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, as Justice Powell made clear in *Bakke*, a university need not “necessarily accor[d]” all diversity factors “the same weight,” 438 U. S., at 317, 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,” *id.*, at 317–318. 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. See *Grutter v. Bollinger*, *post*, at 22 (“[T]he Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions”).

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

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evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the “[committee] reviews only a portion of all the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].” *Ante*, at 26 (quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions’ general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions’ general practices.

For these reasons, the record before us does not support the conclusion that the University of Michigan’s admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. *Cf. Grutter v. Bollinger, post*, p. 1. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court’s opinion reversing the decision of the District Court.