

LOOKING AHEAD: THE FUTURE OF AFFIRMATIVE ACTION

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Fifty years after *Brown v. Board of Education*,¹ race is still a serious issue in this country. Fortunately, we no longer debate whether it is legal for the government to operate segregated schools or to treat blacks as second-class citizens. We finally answered that question correctly—it is unconstitutional for the law to segregate and to treat blacks worse than whites.²

Today, we face the more difficult question of ascertaining the constitutionality of “affirmative action” or “benign discrimination” programs.³ The Supreme Court first addressed this issue in 1978 in

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1. 347 U.S. 483 (1954).

2. *See, e.g., id.* (holding that segregation in public schools is a violation of the equal protection of the laws under the Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in the District of Columbia’s public schools is a denial of the due process of law guaranteed by the Fifth Amendment); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (vacating a judgment requiring segregated facilities at state parks and remanding for reconsideration in light of the *Brown* decision); *Gayle v. Browder*, 352 U.S. 903 (1956) (affirming the judgment of the district court, which held that statutes and ordinances requiring segregation on buses violated both due process and equal protection under the Fourteenth Amendment); *Pennsylvania v. Bd. of Dirs.*, 353 U.S. 230 (1957) (holding that the refusal by a state agency, acting as trustee, to admit black students to a college created by a private trust violated the Fourteenth Amendment); *Cooper v. Aaron*, 358 U.S. 1 (1958) (striking down an attempt by Arkansas to delay the desegregation of public schools as mandated by *Brown*).

3. The term “affirmative action” was first used by President John F. Kennedy when he created the Equal Employment Opportunity Commission in 1961. The phrase, as used by Kennedy, simply required that projects receiving federal funds take “affirmative action” to ensure that employment decisions are free from racial discrimination. *See* Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961). Slowly, the idea of affirmative action evolved to encompass programs that actively sought to increase the participation of racial minorities. For example, in 1965, pursuant to the authorization of Executive Order No. 11246, the Department of Labor established the Office of Federal Contract Compliance, which required contractors to

the landmark case *Regents of the University of California v. Bakke*.⁴ In a confusing set of six opinions, four Justices concluded that the program was constitutional,⁵ while four others held that it violated federal law.⁶ Justice Powell alone stated that the consideration of race was not necessarily unconstitutional, but that the use of quotas was.⁷ As a result, with Justice Powell's vote controlling, there were five Justices who said race could be considered in school admissions, but also five Justices who struck down the particular program at issue.⁸

demonstrate proactive plans to ensure the inclusion of minorities in their workforce before government contracts would be awarded. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965). In 1970, the Labor Department required employers with fifty or more employees and \$50,000 in government business to develop "specific goals and timetables" to correct for the underutilization of minority workers. For a history of these efforts, see ALBERT G. MOSLEY & NICHOLAS CAPALDI, *AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE* (1996).

4. See 438 U.S. 265, 281 (1978) (challenging the admission policy of reserving sixteen of its 100 seats for minority students at the University of California at Davis's Medical School). Prior to *Bakke*, the Court seemed to let the issue percolate among the lower courts. See, e.g., *Johnson v. Comm. on Examinations*, 407 U.S. 915 (1972) (per curiam) (denying certiorari for a case challenging the Arizona State Bar's reconsideration and admission of failing minority applicants to the bar while denying admission to white applicants with higher scores). Even if the Court heard such a case, it often dismissed it without a decision on the merits. For example, in *DeFunis v. Odegaard* the Supreme Court granted certiorari but then dismissed as moot a case challenging the constitutionality of the University of Washington Law School's admissions program on the grounds that it favored minority applicants. 416 U.S. 312 (1974). The case was dismissed as moot because, by the date of oral argument, the plaintiff was in his final quarter of law school, having been admitted pursuant to a court order, and the school conceded that he would be permitted to finish that quarter regardless of the Court's ruling. *Id.* at 317.

5. See *Bakke*, 438 U.S. at 325-26 (Brennan, J., concurring in part and dissenting in part) (concluding that race may be used as a factor in admissions decisions and that overcoming substantial chronic minority under-representation in the medical profession is an acceptable justification for such preferences). Justices Marshall, White and Blackmun joined in this opinion. *Id.*

6. See *id.* at 411-12, 421 (Stevens, J., concurring in part and dissenting in part) (stating that it was not necessary to decide, in this case, whether race could ever constitutionally be a factor in admissions decisions because the admissions policy at issue violated federal anti-discrimination law). Chief Justice Burger and Justices Stewart and Rehnquist joined in this opinion. *Id.*

7. *Id.* at 319-20.

8. Justice Powell announced the opinion of the court with the following introduction:

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent to be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers the Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist, and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portions of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.

For the next seventeen years, the Court debated the appropriate standard by which to assess the constitutionality of these affirmative action programs.⁹ Finally, in 1995, the Court held in *Adarand Constructors, Inc. v. Peña*,¹⁰ a five-to-four decision, that strict scrutiny was the appropriate standard for all governmental programs based on race, including those designed to help underrepresented minorities.¹¹ Under strict scrutiny, those defending a program against an equal protection challenge must show that the program is narrowly tailored to serve a compelling governmental interest.¹²

Until 2003, the Court did not have an opportunity to define strict scrutiny in the context of affirmative action.¹³ Would it be as strict as the scrutiny utilized to judge programs that disadvantage minorities, so that, in the words of the late Gerald Gunther, it would be “strict in theory but fatal in fact?”¹⁴ Or would the standard applied to these “benign discrimination” programs be less strict? In Justice O’Connor’s concurrence in *Adarand*, she specifically noted that in the context of affirmative action, strict scrutiny would not necessarily be fatal:

[W]e wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.¹⁵

Affirmed in part and reversed in part.
Id. at 271.

9. The Court held in *City of Richmond v. J.A. Croson Co.* that affirmative action programs adopted by state and local governments should be judged by a strict scrutiny standard. 488 U.S. 469, 490-91 (1989). However, in *Metro Broadcasting, Inc. v. FCC*, the Court distinguished federal programs from state and local programs and held that federal programs should be judged according to the more lenient standard of intermediate scrutiny. 497 U.S. 547, 564-65 (1990).

10. 515 U.S. 200 (1995).

11. *Id.* at 227.

12. *Id.* In *Adarand*, the Court overruled the aspect of *Metro Broadcasting* that distinguished between federal and state programs, and held that all government programs, including those adopted by the federal government, should be judged by strict scrutiny. *Id.*

13. The *Adarand* case went up and down the federal judiciary several times, receiving Supreme Court scrutiny twice more, but the Court never reached the issue on the merits. See *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (reversing the Tenth Circuit’s decision that *Adarand*’s appeal was moot and remanding the case for consideration on the merits); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (dismissing the writ of certiorari as improvidently granted).

14. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotations omitted).

15. *Adarand*, 515 U.S. at 237 (internal citation omitted).

Finally in 2003, the Supreme Court had the opportunity to tell us more in the cases challenging the University of Michigan's affirmative action programs.¹⁶ But before discussing the Michigan cases, I will set the stage by giving the views of the man who brought us *Brown v. Board of Education*, Thurgood Marshall.

Justice Marshall started with the premise that the ultimate goal for our country is to be a "colorblind" society in which race is irrelevant.¹⁷ However, Marshall pointed out that this commonly accepted goal has led to two very different conclusions. Some people conclude that, because what is ultimately desired is a colorblind society, race-conscious remedies *should not* and *cannot* be used to eliminate the effects of past discrimination.¹⁸ Others, however, believe that the vestiges of racial bias in America are, in Marshall's words, "so pernicious and difficult to remove that we *must* take advantage of all the remedial measures at our disposal."¹⁹ Which of these conclusions one adopts, said Marshall, depends on how close one believes this country is to the desired colorblind society.²⁰

In Marshall's view, "we still have a very long way to go."²¹ Therefore, he believed that every possible remedial measure should be considered. In a speech at the Judicial Conference of the Second Circuit in 1986, Marshall urged Americans to:

[F]ace the simple fact that there are groups in every community which are daily paying the cost of the history of American injustice. The argument against affirmative action is . . . an argument in favor of leaving that cost to lie where it falls. Our fundamental sense of fairness, particularly as it is embodied in the guarantee of equal protection under the law, requires us to make an effort to see that those costs are shared equitably while we continue to work for the eradication of the consequences of discrimination. Otherwise, we must admit to ourselves that so long as the lingering effects of inequality are with us, the burden will be borne by those who are least able to pay.²²

Significantly, the Justice who now sits in Marshall's Supreme Court seat, Clarence Thomas, could not disagree more. While not addressing Marshall's question of how far our society has come in its

16. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

17. Annual Judicial Conference Second Judicial Circuit of the United States, 115 F.R.D. 349, 351 (1986).

18. *Id.* at 351-52 (emphasis added).

19. *Id.* at 352 (emphasis added).

20. *Id.*

21. *Id.*

22. *Id.* at 352-53.

quest for colorblindness, Thomas believes that all racial classifications, no matter how generous their motivation, are unconstitutional. In his separate concurrence in *Adarand*, Thomas argued that there is a “moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality. Government *cannot make* us equal; it can only recognize, respect, and protect us as equal before the law.”²³ In Thomas’ view, the government *cannot* make distinctions on the basis of race, no matter how benign the motivation. He believes that affirmative action programs embody and foster a paternalism that is at war with the principle of equality and that can be “just as poisonous and pernicious as any other form of discrimination.”²⁴ Thomas concluded his separate *Adarand* concurrence with vehemence: “Government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”²⁵

This was the scene when the affirmative action cases from the University of Michigan arrived, presenting the Court with its first opportunity to address the constitutionality of affirmative action programs in higher education since *Bakke*, as well as the first opportunity to apply the strict scrutiny test mandated by *Adarand*. There were in fact two different University of Michigan programs under attack: *Grutter v. Bollinger* challenged the law school’s admissions program,²⁶ and *Gratz v. Bollinger* challenged the undergraduate school’s admissions program.²⁷ The University

23. *Adarand*, 515 U.S. at 240 (J. Thomas, concurring in part and in the judgment) (emphasis added).

24. *Id.*

25. *Id.* at 241.

26. 123 S. Ct. 2325. *See also* *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (ruling in favor of petitioners and holding that the law school’s consideration of race and ethnicity in its admissions decisions violated both the Equal Protection Clause of the Fourteenth Amendment and federal anti-discrimination statutory law because the goal of achieving student diversity was not a compelling governmental interest and that, in any event, the law school’s policy was not narrowly tailored to further such an objective), *rev’d*, 288 F.3d 732 (6th Cir. 2002) (holding the law school’s admission policy valid because it was narrowly tailored to serve a compelling interest in achieving a diverse student body).

27. 123 S. Ct. 2411. After Jennifer Gratz and Patrick Hamacher filed their suit against Lee Bollinger for alleged discrimination in the undergraduate admissions program and the University sought to justify its program as an effort to obtain a diverse student body, the district court denied the motion of a group of prospective minority applicants who sought to intervene in order to justify the program as one to remedy past discrimination. *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998). The court denied the motion because proposed intervenors lacked a substantial legal interest in the suit and failed to show inadequate representation by the University.

defended both programs by arguing that they were designed to achieve a diverse student body comprised of students from a wide

Id. On consolidated appeal with the law school case, the Sixth Circuit reversed and remanded to the district court, holding that the proposed intervenors: (1) had a sufficient substantial legal interest to support intervention as of right; (2) had made sufficient showing that impairment of their substantial legal interest was possible if intervention was denied; and (3) had established the possibility that the University would not adequately represent their interest in the underlying actions. *Grutter v. Bollinger*, 188 F.3d 394, 398-401 (6th Cir. 1999).

After this preliminary skirmishing, both parties moved for summary judgment. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 826 (E.D. Mich. 2000). The District Court held that the University could consider race as a factor in student selection in order to further the objective of obtaining diversity in the student body. *Id.* at 826. While the University's past practice, used from 1995-1998, of reserving some seats for minorities and using separate scoring grids for white and minority applicants was an unconstitutional quota and violated the equal protection rights of the white applicants, its revised program that began in 1999 was sufficiently narrowly tailored to be constitutional. *Id.* at 827-28. Thus, the Court granted plaintiffs' motion for summary judgment with respect to the admissions programs in existence from 1995 through 1998, and granted University-defendants' motion for summary judgment with respect to the admissions programs for 1999 and 2000. *Id.* at 831-33.

Thereafter, in *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001), the court considered defendant-intervenors' argument that the admissions programs passed constitutional muster as a narrowly tailored means of remedying past and current discrimination by the University. Although the University-defendants never claimed that the admissions programs were implemented to remedy past discrimination, the Sixth Circuit, in allowing defendant-intervenors to join this action, found it persuasive "that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Id.* at 794 (internal quotations omitted). The District Court interpreted this statement to require that the defendant-intervenors be given the opportunity to prove that remedying discrimination was the "actual" purpose behind the admissions programs. *Id.* at 795. The District Court then found that the defendant-intervenors failed to present sufficient evidence to create a genuine issue of material fact in support of their claim and granted summary judgment to the plaintiffs. *Id.* at 802.

The Sixth Circuit consolidated the appeals for both the law school and the undergraduate cases involving both the original defendants and the intervening defendants and held a hearing *en banc* on December 6, 2001. *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001). On May 14, 2002, the Sixth Circuit issued an opinion in the law school case, *Grutter v. Bollinger*, 288 F.3d 732, but never issued a decision on the merits in *Gratz*. On December 2, 2002, the Supreme Court granted certiorari in the law school case as well as the undergraduate case. *Gratz v. Bollinger*, 123 S. Ct. 602 (2002). The Court heard arguments in both cases on April 1, 2003 and decided both on June 23, 2003.

variety of social, ethnic, and racial backgrounds.²⁸ The opponents argued that this was not a compelling interest.²⁹

The Court, in an opinion by Justice O'Connor, made the very significant decision that the University's desire to achieve diversity in its student body was in fact a compelling governmental interest, relying heavily on the reasoning of Justice Powell's lone opinion in *Bakke*.³⁰ The Court then went on to find, in a five-to-four decision, that the law school's nuanced, holistic consideration of race was sufficiently narrowly tailored to be constitutional.³¹ The Court noted that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups."³² The Court rejected the Bush Administration's argument that the law school's desire to achieve a "critical mass" of minority students was "a disguised quota."³³ Thus,

28. See Brief for Respondents at 2, *Grutter*, 123 S. Ct. 2325 (2003) (No. 02-0241) ("The Law School has determined that effective pursuit of its mission requires . . . integrated classes comprising a mix of students with varying backgrounds and experiences . . . , each of whom is among the most capable students applying to American law schools in a given year.") (internal quotations omitted); Brief for Respondents at 2, *Gratz*, 123 S. Ct. 2411 (2003) (No. 02-516) ("The University considers a broadly diverse student body an integral component of its mission because such diversity increases the intellectual vitality of its education, scholarship, service, and communal life.") (internal quotations omitted).

29. *Grutter*, 123 S. Ct. at 2333.

30. *Id.* at 2337. The Court found it unnecessary to decide whether Justice Powell's opinion was binding under the rationale of *Marks v. United States*, 430 U.S. 188, 193-94 (1977), noting that the *Marks* inquiry had "baffled and divided the lower courts that have considered it," and that the majority here independently concluded that diversity was in fact a compelling governmental interest. 123 S. Ct. at 2337 (internal citations omitted).

31. *Grutter*, 123 S. Ct. at 2342 (recognizing that the law school's plan does not operate as a quota).

32. *Id.* at 2344. In the opinions of Justices Scalia and Thomas, writing in dissent, the University should be forced to choose between being committed to excellence and seeking a diverse student body. *Infra* notes 49-60 and accompanying text.

33. *Grutter*, 123 S. Ct. at 2343. The amicus brief filed by the United States included the following argument:

Not only does the Equal Protection Clause require the government to consider and employ efficacious race-neutral alternatives, but it also demands that any use of race be otherwise carefully calibrated and narrowly tailored. Efforts to use quotas to achieve predetermined levels of racial participation are the very antithesis of such narrow tailoring. However, respondents' admissions policy uses disguised quotas to ensure that each entering class includes a predetermined "critical mass" of certain racial minorities. This Court has repeatedly condemned quotas as unconstitutional, and respondents cannot escape the reach of those cases by pursuing a purportedly flexible, slightly amorphous "critical mass" in lieu of the kind of rigid numerical quotas struck down by the Court in *Bakke*. In practice, respondents' pursuit of a "critical mass" operates no differently than more rigid quotas. Any variations in results from year to year owe more

the Court concluded that the law school program is constitutional.³⁴ Voting with Justice O'Connor were Justices Ginsburg, Souter, Breyer, and Stevens.³⁵ Dissenting were Chief Justice Rehnquist, and Justices Thomas, Kennedy, and Scalia.³⁶

However, in the undergraduate case, the Court decided six to three, in an opinion by Chief Justice Rehnquist, that the undergraduate system was not sufficiently narrowly tailored.³⁷ The Court objected to the point system, which, on a scale of between one to 150 points, gave twenty points to an applicant if he or she was a member of an underrepresented race—specifically African American, Hispanic, or Native American—and automatically admitted anyone with 100 or more points.³⁸ The problem with the point system, in the view of the six in the majority, was that it was not narrowly tailored—it was too formulaic and failed to make the individualized assessments the law school made.³⁹ The six in the majority were Chief Justice

to respondents' inability to predict acceptance rates and total admissions with unfailing accuracy than to any inherent flexibility in the quotas. Brief for the United States as Amicus Curiae Supporting Petitioner at 11-12, *Grutter*, 123 S. Ct. 2325 (2003) (No. 02-516).

34. *Grutter*, 123 S. Ct. at 2347.

35. *Id.* at 2330.

36. *Id.* at 2330-31.

37. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2430 (2003).

38. Under the Michigan undergraduate admissions program, an applicant can score a maximum of 150 points. *Id.* at 2419. Each application receives points based on high school grade point average, standardized test scores, the academic quality of an applicant's high school, the strength or weakness of an applicant's high school curriculum, in-state residency, alumni relationship, a personal essay, and personal achievement or leadership. *Id.* A maximum of 110 points can be assigned for academic performance, while other, nonacademic factors can merit up to forty points. *Id.* at 2431 (O'Connor, J., concurring). For example, Michigan residents receive ten points, and children of alumni receive four points. *Id.* Admissions counselors can assign up to three points for an outstanding essay and up to five points for an applicant's leadership, personal achievement, or public service. *Id.* An automatic twenty-point bonus is awarded to an applicant if he or she possesses any one of the following factors: membership in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics. *Id.* at 2431-32. However, only one such twenty-point bonus may be given per applicant. *Id.* An application decision will be based upon the resulting number: an applicant with a score of 100 to 150 will generally be admitted to the university; an applicant with ninety to ninety-nine points will either be admitted or a decision will be postponed; a decision for an applicant with seventy-five to eighty-nine points will either be delayed pending additional information or postponed, and an applicant with fewer than seventy-five points will either be rejected or the decision will be delayed pending additional information. *Id.* at 2419.

39. *See id.* at 2427-28

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.

Id.

Rehnquist, Justices Kennedy, Scalia, Thomas, O'Connor, and Breyer.⁴⁰ Dissenting were Justices Ginsburg, Souter, and Stevens.⁴¹ In light of this result, the University has revised its undergraduate program to make it a more individualized assessment—not an easy task given that it receives more than 25,000 applications for 5,000 spots.⁴²

I was not surprised by the decision. In fact, I had predicted it. I said at this Symposium in March 2003, I thought that Justice O'Connor would want to find one of the two programs constitutional. As noted, Justice O'Connor had said earlier in *Adarand* that strict scrutiny, applied to affirmative action programs, need not necessarily be fatal.⁴³ The Michigan cases gave her a chance to find one that could survive. Of the two programs, the law school program was the better crafted—after all, it was designed by law professors who were well aware of Supreme Court precedent. I did wonder if the Court might find that the idea of “critical mass” was too close to a quota, but, as noted, it did not. And I wondered if the lack of a termination date would be a problem. But Justice O'Connor simply introduced her own idea that she expected that these programs will no longer be necessary in twenty-five years.⁴⁴ As she expressed it:

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of higher education. Since that time, the number of

40. Justice Breyer only concurred in the judgment and did not join the majority opinion. *Id.* at 2433.

41. *Id.* at 2434.

42. In an interview with University of Michigan President Mary Sue Coleman, CNN Anchor Judy Woodroof asked Coleman what effect she thought the Supreme Court's ruling would have on Michigan's undergraduate admissions policy. Coleman responded:

Well, what we may do is to fashion our undergraduate policy along the lines of the law school policy, which the Court said is fine and said that the law school policy is constitutional. And what that means is, it's a more individualized attention to every single application [W]e believe that we can do this in a way that the Court has found constitutional. And our other policy, the earlier one that the Court struck down, was a screening device, because we get so many applications. So what we may have to do is to have more admissions counselors, hire more people for the undergraduate admissions, do more intensive work And I want to let students know that now we'll be looking, using a slightly different policy, but we're going to give every application a fair look.

Michigan President Happy with Rulings, CNN ACCESS, June 23, 2003, available at <http://edition.cnn.com/2003/LAW/06/23/cna.coleman/>.

43. See *supra* text accompanying note 15.

44. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003).

minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁴⁵

One of the striking features of these two Michigan cases is that they generated a total of thirteen opinions—six opinions in the law school case and seven in the undergraduate case. Each of the nine justices wrote his or her own opinion in at least one of the cases. It was almost like the early days of seriatim opinions from the high Court.

Chief Justice Rehnquist wrote the principal dissenting opinion in the law school case, joined by all the dissenters—Justices Kennedy, Scalia, and Thomas.⁴⁶ He accused the majority of improperly applying the strict scrutiny test and showing too much deference to the University's decisions: "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."⁴⁷ Justice Kennedy agreed, calling the law school's use of "critical mass" a disguised quota.⁴⁸

Justice Thomas wrote an impassioned dissent in the law school case, in which Justice Scalia joined.⁴⁹ His opinion was thirty-one pages long, almost as long as Justice O'Connor's majority opinion. After quoting Frederick Douglass and accusing the majority of responding to "a faddish slogan of the cognoscenti"⁵⁰ in order to achieve what he derisively called "racial aesthetics,"⁵¹ Thomas concluded that Michigan has shown "no compelling interest in having a law school at all, much less an *elite* one."⁵² Thomas opined that, because many graduates leave the state, the "Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan."⁵³ Thomas thereby dismissed the judgment of the state's elected officials over all these years. He also rejected racial preferences as destructive⁵⁴ and stigmatizing.⁵⁵ In his view, such preferences are

45. *Id.* at 2346-47 (internal citations omitted).

46. *Id.* at 2366 (Rehnquist, C.J., dissenting).

47. *Id.*

48. *Id.* at 2371 (Kennedy, J., dissenting) ("The dissenting opinion by the Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.").

49. *Id.* at 2350 (Thomas, J., dissenting).

50. *Id.*

51. *Id.* at 2357.

52. *Id.* at 2353.

53. *Id.* at 2355.

54. *See id.* at 2352 ("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such

unconstitutional now and will still be unconstitutional in twenty-five years.⁵⁶ In fact, he put his own “spin” on Justice O’Connor’s twenty-five-year statement, saying that the majority was giving universities a “25-year license to violate the Constitution”⁵⁷ and that he “agree[d] with the Court’s holding that racial discrimination in higher education will be illegal in 25 years,”⁵⁸ not exactly what the Court said, as Justice Ginsburg pointed out in her concurrence.⁵⁹

Justice Scalia also wrote his own dissent in the law school case, in which Justice Thomas joined. He agreed with Justice Thomas that Michigan did not have a compelling interest in using racial preferences to seek diversity. In his view, if Michigan would simply stop being an elite institution that emphasized grades and high LSATs, it could have a more diverse class without preferences.⁶⁰ Scalia also predicted that these two cases would generate considerable future litigation, with the courts asked to decide whether a particular program was more like the constitutionally acceptable law school program or like the unconstitutional undergraduate program.⁶¹

Justice Ginsburg wrote both a concurring opinion in the law school case and a dissent in the undergraduate case. In the law school case, her concurrence, joined by Justice Breyer, clarified the fact that, in her view, Justice O’Connor’s proposed twenty-five year sunset idea

classifications ultimately have a destructive impact on the individual and our society.”) (quoting *Adarand Construction, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Rehnquist, C.J., concurring)).

55. *Id.* at 2262

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

Id.

56. *Id.* at 2361.

57. *Id.*

58. *Id.* at 2364.

59. *Id.* At 2348 (Ginsburg, J., concurring).

60. *Id.* at 2348-49 (Scalia, J., concurring in part and dissenting in part).

I find particularly unanswerable [Justice Thomas’s] central point: that the allegedly ‘compelling state interest’ at issue here is not the incremental ‘educational benefit’ that emanates from the fabled ‘critical mass’ of minority students, but rather Michigan’s interest in maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

Id.

61. *Id.* at 2349-50.

was based on a “hope, but not [a firm] forecast,”⁶² that such preferences will no longer be needed in twenty-five years. In Justice Ginsburg’s dissent in the undergraduate case, in which she was joined by Justice Souter, she said she would have upheld the number-based program because it was open and honest, a system she preferred over one operated with “winks, nods, and disguises.”⁶³

Justice Stevens, joined by Justice Souter, would have found that the named plaintiffs in the undergraduate case had no standing to challenge the undergraduate program.⁶⁴ Obviously, the majority disagreed and reached the merits.⁶⁵

The Michigan cases are significant for several reasons. First, they will affect all public higher education in the country. Second, because of federal statutes, they will also impact all private institutions that receive federal funding.⁶⁶ Third, they will affect the military

62. *Id.* at 2348 (Ginsburg, J., concurring).

63. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2446 (2002) (Ginsburg, J., dissenting).

64. Justice Stevens argued that neither of the two named petitioners had standing in this suit. After being denied admission to the Undergraduate School of the University of Michigan, both Gratz and Hamacher enrolled in, and have since graduated from, other universities. *Id.* at 2434. Stevens agreed the plaintiffs could receive damages for having been denied admission under the now discarded admissions program, but said they did not have standing to seek injunctive relief against the current program. *Id.* In his complaint, Hamacher alleged that he intended to apply to transfer to the University of Michigan if and when the discriminatory admissions program was eliminated. *Id.* But Hamacher never did apply so Stevens concluded that his claim of future injury was at best “conjectural or hypothetical” rather than “real and immediate.” *Id.* at 2436. Moreover, Stevens said there was no evidence about how the transfer program worked and how it compared to the freshman admissions program. *Id.*

65. The majority rejected Justice Stevens’ contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim was conjectural or hypothetical rather than real and immediate. *Id.* at 2423. The majority said that the “injury in fact” necessary to establish standing in this type of case is the denial of equal treatment resulting from the obstacle, not the ultimate inability to obtain the benefit. *Id.* In such a case, the majority indicated that to establish standing, a party need only demonstrate that he or she is able and ready to perform and that a discriminatory policy prevents him or her from doing so on an equal basis. *Id.* Because Hamacher demonstrated that he was “able and ready” to apply as a transfer student should the University cease to use race in undergraduate admissions, he therefore had standing to seek prospective relief with respect to the University’s continued use of race in undergraduate admissions. *Id.*

The majority also rejected Justice Stevens’ contention that use of race in undergraduate *transfer* admissions differed from the University’s use of race in undergraduate *freshman* admissions and that Hamacher lacked standing to represent absent class members challenging the latter. *Id.* It noted that the criteria used to determine whether a transfer applicant will contribute to diversity are identical to those used to evaluate freshman applicants. *Id.* at 2424-25. Because of this, Hamacher’s personal involvement in the case, in light of both his past injury and the potential injury that still existed at the time of class certification, led the Court to conclude that he could maintain the action. *Id.* at 2426.

66. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs and activities that receive federal financial assistance. 42 U.S.C. § 2000d (2000). Because most private universities

academies.⁶⁷ Fourth, the decision will affect private corporations that want a diverse workforce.⁶⁸ Indeed, Justice O'Connor's majority opinion in *Grutter* was notable in its reliance on and quotations from the many amicus briefs filed in the case, especially those from the Fortune 500 companies and the retired military officials.⁶⁹

Finally, in addition to influencing all the admission policies of all institutions of higher education, the decisions are likely to have a significant impact on the appointment of any new Justice to the Supreme Court. Determining a nominee's views on affirmative action will now be at least as important as ascertaining his or her views on abortion. The appointment process will be particularly intense if the vacancy is Justice O'Connor's seat, because she has been the key vote on both the affirmative action and the abortion cases.

Fifty years after *Brown v. Board of Education*, our country is still struggling to deal with the aftermath of years of slavery and segregation. Fortunately, in 2003, the Supreme Court in the Michigan cases has approved the constitutionality of some enlightened methods devised to diversify higher education and to mitigate the ill effects generated by years of racial discrimination. How long the country can continue to utilize such methods will likely

receive federal financial aid, they are subject to the terms of Title VI.

As Justice O'Connor specifically noted in her majority opinion in *Grutter*, not only did the law school program satisfy the Equal Protection Clause challenge, it also survived the challenges under Title VI of the Civil Rights Act of 1965 and 42 U.S.C. § 1981, because the prohibitions in both of these statutes are co-extensive with the Equal Protection Clause. 123 S. Ct. at 2347. Conversely, in the undergraduate case, the Court held that because the program violated the Equal Protection Clause, it also violated Title VI and 42 U.S.C. § 1981. *Gratz*, 123 S. Ct. at 2430.

67. The Court was clearly impressed by the amicus brief of many former military leaders who argued that it was "essential" to have affirmative action in both the military academies and the best schools' ROTC programs so as to get a sufficient number of well-educated minority officers in the military. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. (Nos. 02-241, 02-516).

68. A number of Fortune 500 companies filed amicus briefs supporting the University. See, e.g., Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents (Nos. 02-241, 02-516); Brief of General Motors Corporation as Amicus Curiae in Support of Respondents (Nos. 02-241, 02-516); Brief of 3M, et al. as Amicus Curiae in Support of Respondents at 5 (Nos. 02-241, 02-516).

69. See, e.g., 123 S. Ct. at 2340 ("[T]he military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.") (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, et al. at 5 (Nos. 02-241, 02-516)) (emphasis in original); *id.* ("These benefits [of affirmative action] are not theoretical, but real, as major businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.") (citing Brief of 3M, et al. as Amicus Curiae in Support of Respondents at 5 (Nos. 02-241, 02-516); Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 3-4 (Nos. 02-241, 02-516)).

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depend significantly on future Supreme Court appointments. Stay tuned.