

# The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From *Bakke* to *Grutter* and Beyond

by RONALD TURNER\*

## I. THE INTRUDERS

At various points in time, in various spaces and places, certain individuals and entities have looked at a university, an employer, or a government contracting program and observed the presence of a certain number of African-Americans, Latino/as, and other people of color who, in the view of the observers, should not have been in those places and spaces. Some filed lawsuits alleging that private or governmental actors had deprived them of something to which they were purportedly entitled, and had done so in implementing affirmative action plans and by providing “preferential treatment” to minorities. Allan Bakke, Brian Weber, the J.A. Croson Company, Adarand Constructors, Inc., Cheryl Hopwood, and others have asked courts to invalidate affirmative action measures and to grant them what they deemed to be rightfully theirs – admission to a medical or law school or college or job training program, or the award of a state or federal contract. Most recently, Barbara Grutter, Jennifer Gratz, and Patrick Hamacher pursued anti-affirmative-action lawsuits challenging the University of Michigan’s law school and undergraduate affirmative action admissions policies, but only to the extent that those policies considered the race (and not other characteristics) of applicants.

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\* George Butler Research Professor and Professor of Law, The University of Houston Law Center, rturner@central.uh.edu. J.D., 1984, The University of Pennsylvania Law School; B.A., 1980, *magna cum laude*, Wilberforce University. The author acknowledges and is thankful for the research support provided by Dean Nancy Rapoport and the George Butler Research Fund.

In challenging affirmative action, various litigants have invoked the United States Constitution and federal antidiscrimination laws and have relied on doctrinal, precedential, and policy-based arguments. Affirmative action is unlawful and should be abolished, they argue, because it is inconsistent with a colorblind Constitution,<sup>1</sup> balkanizes the nation,<sup>2</sup> is an unwarranted departure from “merit,”<sup>3</sup> victimizes innocent whites,<sup>4</sup> stigmatizes its recipients and beneficiaries,<sup>5</sup> and seeks ends which can better or best be accomplished through a class-conscious, rather than a race-conscious, approach.<sup>6</sup> College admissions, jobs, and government contracts

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1. See, e.g., TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992); Robert J. Corry, *Affirmative Action: An Innocent Generation's Equality Sacrificed*, 22 OHIO N.U. L. REV. 1177 (1996).

2. See *Shaw v. Reno*, 509 U.S. 630, 657 (1993); Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J.L. & POL. 411 (1996).

3. See ROBERT KLITGAARD, *MERIT AT THE RIGHT TAIL: EDUCATION AND ELITE LAW SCHOOL ADMISSIONS CHOOSING ELITES* (1985); Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995). It has been argued that “merit” is a canard in that

American education is not meritocratic, and it never has been. Merit, defined as quantifiable aptitude and achievement, is just one of the variables that decide educational outcomes. Success in college admissions, as in almost every sphere in life, is a function of some combination of ability, connections, persistence, wealth, and special markers—that is, attributes valued for the difference they make to “the mix.”

Louis Menand, *The Thin Envelope*, THE NEW YORKER, Apr. 7, 2003, at 89. See also RUTH COLKER, *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE* 35 (1998) (“There is no uniformly applied merit principle operating in American society. Instead, a merit myth is invoked when the color of the beneficiary group starts to darken.”); Leon Botstein, *The Merit Myth*, N.Y. TIMES, Jan. 14, 2003, at A31 (National Edition) (“universities have for too long maintained a lie about how subjective and imprecise the assessment of merit actually is;” “[m]otivation, ambition, curiosity, originality and the capacity to endure risk and think independently are essential components of merit”).

4. See FREDERICK R. LYNCH, *INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION* (1991). See also Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

5. See STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 899 (1998); Lackland H. Bloom, Jr., *Hopwood, Bakke, and the Future of the Diversity Justification*, 29 TEX. TECH. L. REV. 1, 48 (1998); Christopher T. Wonnell, *Circumventing Racism: Confronting the Problem of Affirmative Action Ideology*, 1989 BYU L. REV. 95. But see JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 101 (1995) (“Overall, 55 percent of well-off blacks think affirmative action programs help recipients, and only 4 percent think such programs hurt recipients.”).

6. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); R. Richard Banks, *Meritocratic Values and Racial*

should go to the deserving “best,” it has been urged, to those who have the highest grade point averages and Medical College Admissions Test (MCAT) or Law School Admissions Test (LSAT) scores,<sup>7</sup> or to those who are the most qualified applicants and employees, or who have submitted the lowest bid for contracting opportunities. For some opponents of affirmative action, governmental programs and policies favoring minorities but not whites are contrary to the posited narrative of individuals “making it on their own.”<sup>8</sup>

Lying beneath the surface and within the body of the anti-affirmative-action position is the notion that something is out of place and is not as it should be. More specifically, and frankly, in certain instances affirmative action challenges have rested on and reflected the views that: (1) there are too many minorities in a school or contracting program or job classification; and (2) the presence of minority beneficiaries of affirmative action is *the* reason that nonminorities did not receive (in their view, were improperly denied) a position or contract. The first (and historically reoccurring) view,<sup>9</sup> which I call the “too-many-minorities dimension,” rests on and is grounded in the concern that some number of people of color have

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*Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001).

7. Test scores and grades are seemingly objective measures of merit in the minds of a public that has long prided itself on the belief that hard work and determination should be rewarded. There is a disquieting incongruity to distributing scarce resources of educational opportunity to some who, by those objective standards, appear to be less deserving.

Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate about Merit, Academic Standards, and Affirmative Action*, 6 PSYCHOL. PUB. POL'Y & L. 90, 96 (2000).

8. Of course, whites have historically benefited from affirmative action and preferential treatment. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 143 (2000). “Slavery and legal segregation created preferences for whites in access to jobs, education, politics, and housing. The long-term impact of such preferences for ordinary whites accounts for a substantial proportion of the income and wealth differential between black and white Americans today.” *Id.* at 180.

9. “[I]n 1876 . . . whites began to fear that newly freed blacks were getting more than a token share of societal power and benefits under Reconstruction-era civil rights laws and constitutional amendments.” Tanya E. Coke, Note, *Lady Justice May Be Blind, But is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 373 (1994). Coke argues that the “constriction of affirmative action programs . . . parallels a similar phenomenon that occurred exactly a century ago during the waning years of Reconstruction.” *Id.* See also ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 107 (1998) (noting that reconstruction era laws and constitutional amendments aroused bitter opposition); *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (noting that “there must be some stage in the progress” of an African-American’s “elevation when he . . . ceases to be the special favorite of the laws”).

been illegitimately afforded opportunities and have been unfairly if not illegally admitted to college or medical or law school while more deserving and intelligent white applicants were rejected.<sup>10</sup> Subscribers to this position also believe that certain employment opportunities were “given” to minorities, or minority businesses received contracts that should have been awarded to nonminority businesses. In all of these settings the presence of “too many” minorities is a “problem,” the negative manifestations of which assertedly serve to pollute and weaken institutions and programs.<sup>11</sup>

An example of the too-many-minorities view is found in Richard Posner’s claim that the use of the Socratic method “is in decline in many law schools . . . due in part to affirmative action, which, virtually by definition, entails the admission of minority students less qualified on average than the law school’s nonminority students, hence more likely to be embarrassed by the ‘cold call’ method of Socratic teaching.”<sup>12</sup> Robert Bork contends that

[a]ffirmative action is being pressed into areas where it will prove positively dangerous. “The application of the principles of affirmative action to medical education is significant, implying, as it does, that their proponents’ ideological

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10. [T]he plain fact is that access to elite higher education dramatically enhances one’s chances to acquire influence in our putatively meritocratic society. Competition for a relatively few seats at the table of power is keen, and many chafe at the idea of their child’s place being taken by someone “undeserving.”

GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 131-32 (2002). Richard Herrnstein and Charles Murray, discussing “racial clashes” on college campuses, have posited that

a plausible explanation is that whites resent blacks, who are in fact getting a large edge in the admissions process and often in scholarship assistance and many of whom, as whites look around their own campus and others, “don’t belong there” academically. Some whites begin to act out these resentments. Blacks perceive the same disproportions and resentments, then conclude that the college environment is hostile to them.

RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 472-73 (1994).

11. See DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 322 (1995) (“[T]he institutionalization of racial preferences in college admissions . . . and job hiring virtually guarantees that . . . the average black will not be as well qualified as the average white.”); DAVID DUKE, *MY AWAKENING* 167 (2002) (“affirmative action programs ruined schools . . .”).

12. Richard A. Posner, *Legal Scholarship Today*, 45 *STAN. L. REV.* 1647, 1647 (1993). See also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 293 (1990) (arguing that “[t]he best first-year legal education today is probably better than it was in the 1950s,” and that “[t]his is true even though some inroads into quality have been made by affirmative action at both the student and faculty levels . . .”).

commitment makes them willing to risk the graduation of incompetent physicians.” The desire to graduate as many minority students as possible, who are often admitted with inadequate qualifications, creates a strong motivation for the administration to lower standards.<sup>13</sup>

For Professor Lino Graglia, the problem is the overrepresentation (too many), and not the underrepresentation, of (in his view) African-Americans with lower IQ’s<sup>14</sup> in institutions of higher education.<sup>15</sup>

The second and related dynamic, that affirmative action results in the displacement of whites<sup>16</sup> and is *the* reason whites did not receive certain positions or contracts, is what I call “racegoating.” Consider, in this regard, the following statement by a white male interviewed as

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13. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 234 (1996) (footnote omitted) (quoting Albert S. Braverman & Brian Anziska, *Challenges to Science and Authority in Contemporary Medical Education*, *ACADEMIC QUESTIONS* (Summer 1994) at 14).

14. In the early 1900s German psychologist William Stern “coined the term *intelligence quotient*,” a number arrived at by “dividing the intelligence age by the chronological age to create a ratio.” EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 82 (2003). For an account of the history of the development of intelligence tests and the relationship of such tests to eugenics, see *id.* at 76-85.

15. See Lino Graglia, *The “Affirmative Action” Fraud*, 54 *WASH. U. J. URB. & CONTEMP. L.* 31, 33 (1998); Lino Graglia, *“Hate Speech” Codes and “Political Correctness”: Fruit of “Affirmative Action,”* 23 *N. KY. L. REV.* 505, 511-12 (1996). Graglia has cited *The Bell Curve* in support of his too-many-blacks argument. See Lino Graglia, *“Affirmative Action,” Past, Present, and Future*, 22 *OHIO N. U. L. REV.* 1207, 1213-14 (1996); HERRNSTEIN & MURRAY, *supra* note 10. According to *The Bell Curve*, the black mean in IQ test scores (85) is lower than the white mean score (100) by one standard deviation. *Id.* at 276. And, the authors of *The Bell Curve* claimed, the mean IQ of “East Asians” (Japanese, Chinese, and “perhaps also Koreans”) is higher than that of white Americans by a range of a few points to a maximum of ten points. *Id.* at 269, 272-73. For discussion and criticism of *The Bell Curve*, see *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995).

16. On this point, a recent study focusing on matriculants at five selective institutions of higher education posited that, “if affirmative action is not used, the overall white probability of admission would rise by only one and one-half percentage points: from 25 percent to roughly 26.5 percent.” WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 36 (1998). One analyst has written that “this finding should not appear so shocking, as the reason for the limited increase in admissions probability is that the number of students admitted through preferences is relatively small, while the number of currently rejected white (and black) students is very high indeed.” Michael Selmi, *The Facts of Affirmative Action*, 85 *VA. L. REV.* 697, 708 (1999). See also Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 *MICH. L. REV.* 1045, 1093 (2002) (1.5 percent of white applicants are actually displaced by the beneficiaries of affirmative action).

part of a study of the racial views of upper-income white men:

I feel that I am definitely becoming discriminated against because I am white. For me, I mean, all the affirmative action things that go on make it harder for me to get a job in a governmental agency than for a Latino or African American or any other ethnic. It's harder for me than any other group . . . . Quite a few years ago . . . when I was applying to colleges, if a kid was black, he didn't have to get as good grades as I did because the colleges were just trying to fill the gap, so they had to fill the minority gaps. So it definitely hurt me there . . . . If you just watch the news, half of the news anchors, everybody, is represented . . . . Just look at the news anchors themselves. They always try to have a woman, a black, a Latino, Asians. They never have white males.<sup>17</sup>

Going beyond notice of and concern about too many minorities, racegoating provides a more specific explanation/excuse for those who believe that they lost out to undeserving minorities and are the "victims" of affirmative action.<sup>18</sup> One thus hears the claim that whites have unfairly lost jobs and university admissions and scholarships to unqualified minorities.<sup>19</sup> A prominent example of this dynamic is the

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17. JOE FEAGIN & EILEEN O'BRIEN, *WHITE MEN ON RACE: POWER, PRIVILEGE, AND THE SHAPING OF CULTURAL CONSCIOUSNESS* 85 (2003) (ellipses in original).

18. Opposition to affirmative action, "in the form of white applicants . . . who argue that their rightful places at the top schools are being given to black and Hispanic students of lesser ability, has been gaining momentum once again." Jacques Steinberg, *Affirmative Action Faces a New Wave of Anger*, N.Y. TIMES, Jan. 5, 2003, at 3 (National Edition).

19. See D'SOUZA, *supra* note 11, at 10 (quoting anonymous flier at the University of California at Berkeley: "When I see you in class it bugs the hell out of me because you're taking the seat of someone qualified."); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 267-68 (2002) (noting that persons not admitted to public universities "conclude that unqualified black and brown students are taking the place of more qualified white applicants"); HERRNSTEIN & MURRAY, *supra* note 10, at 470 ("some number of white students are denied places at universities they could otherwise have won, because of affirmative action"); MANNING MARABLE, *THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE* 126 (2002) (recounting that after author gave speech on racial issues a "white student launched into an attack on affirmative action" and "insisted that both he and many of his friends had lost scholarships and jobs to unqualified minorities").

My colleague, Sidney Buchanan, has pointed out the red herring of the unqualified minority. "No responsible person argues that affirmative action should be used to accept applicants who are not qualified for the positions they seek," and "an argument against affirmative action that is based on the fear of a flood of incompetent or marginally competent applicants should be rejected as a red herring that obscures debate on the serious and legitimate issues truly generated by the operation of affirmative action plans in their modern form." Sidney Buchanan, *Affirmative Action: The Many Shades of*

“white hands commercial” run by North Carolina Senator Jesse Helms in his United States Senate campaign against challenger Harvey Gantt (who happens to be an African-American). As a pair of white hands crumple a rejection letter from an employer, a voice says, “You needed that job and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is.”<sup>20</sup>

This criticism of affirmative action as unfair to whites is a prominent one.<sup>21</sup> In the words of David Duke, affirmative action is “grossly unfair to millions of Whites, who are denied jobs, promotions, scholarships, [and] college and graduate admissions” and “has a nefarious impact on society as a whole.”<sup>22</sup>

The too-many-minorities and racegoating dynamics of the anti-affirmative-action position are the foci of this article. The discussion proceeds as follows. Part II examines two seminal decisions by the United States Supreme Court – *Regents of the University of California v. Bakke*<sup>23</sup> and *United Steelworkers v. Weber*<sup>24</sup> – each validating certain consideration and uses of race in higher education and employment. Part III turns to subsequent Supreme Court and court of appeals cases wherein constitutional challenges to affirmative action measures were successful, and sets the stage for the discussion in Part IV – the

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*Justice*, 39 HOUS. L. REV. 149, 151 (2002).

20. Ed Timms & Doug J. Swanson, *Racial Politics Surging as Economy Declines*, DALLAS MORNING NEWS, Dec. 2, 1990, at 1A (quoting commercial). In a recent column one commentator argued that the Helms commercial “encouraged white constituents who had experienced job loss or professional disappointment to blame affirmative action. The message was that antiwhite discrimination was the only possible explanation when a black applicant was chosen over a white person.” Brent Staples, *Americans Have a Cool Debate About a Hot-Button Topic*, N.Y. TIMES, Mar. 2, 2003, Weekly at 12 (National Edition).

21. See Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 111, 112 (Robert Post & Michael Rogin eds., 1998) (“the trump card in the deck, the perfect squelch, and the most effective and frequently cited attack [on affirmative action] revolves around the idea of *fairness*—and most particularly, around a specific rendition of fairness to the individual”). See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (“Fairness in individual competition for opportunities . . . is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.”). For additional discussion of affirmative action and the fairness issue, see RONALD DWORIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 409-26 (2000).

22. DUKE, *supra* note 11, at 164.

23. 438 U.S. 265 (1978).

24. 443 U.S. 193 (1979).

Supreme Court's 2003 decisions in *Grutter v. Bollinger*<sup>25</sup> and *Gratz v. Bollinger*<sup>26</sup> and the Court's validation and invalidation of the University of Michigan's law school and undergraduate admissions programs, respectively. Part V, noting that the too-many-minorities and racegoating dynamics discussed herein continue to exist notwithstanding the Court's decisions, looks to the next generation and phase of anti-affirmative-action efforts. Finally, this article concludes with closing comments on the persistence of the too-many-minorities and racegoating dynamics of the ongoing affirmative action debate.

## II. THE FOUNDATIONAL DECISIONS

### A. Bakke

The too-many-minorities and/or racegoating dynamics of the anti-affirmative-action position can be found in cases brought to and decided by the Supreme Court of the United States.<sup>27</sup> The seminal case involved Allan Bakke's efforts to gain admission to the University of California at Davis medical school. In 1973, Bakke, a white male,<sup>28</sup> applied for admission to the school. When his application was rejected, Bakke wrote a letter to the chair of the admissions committee and complained that the school's special admissions program, which reserved sixteen of one hundred seats for special admissions applicants, constituted a racial and ethnic quota.<sup>29</sup>

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25. 123 S. Ct. 2325 (2003).

26. 123 S. Ct. 2411 (2003).

27. This article does not focus on the affirmative action obligations mandated by the Voting Rights Act of 1965, 42 U.S.C. § 1973c. For a discussion of affirmative action in that area of the law, see GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 85-155 (2000).

28. "He stood just under six feet tall, with blond hair, blue eyes, and the 'Teutonic' appearance of his Norwegian ancestors." JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 455 (1994).

29. Under the medical school's general admissions program, applicants with overall grade point averages under 2.5 (on a 4.0 scale) were summarily rejected. One of six applicants received invitations for personal interviews and were rated on a scale of 1 to 100 by interviewers and four other members of the admissions committee. That rating took into account the interviewer's evaluations of the applicants, the applicant's overall GPA and specific GPA in science courses, MCAT scores, letters of recommendations, extracurricular activities, and other information. A benchmark score was reached by adding together the ratings, and the committee then reviewed the files and scores of applicants and extended admission offers on a rolling basis. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).



Applying again in 1974, Bakke was interviewed by the admissions committee chair (the same person who had received Bakke's 1973 letter of complaint). Subsequent to that interview the chair concluded that Bakke was "rather limited in his approach" to the medical profession's problems and "found disturbing Bakke's very definite opinions which were based more on his personal viewpoints than upon a study of the total problem."<sup>30</sup> Although he received 549 of a possible 600 points, Bakke's application was rejected<sup>31</sup> (as were his applications to twelve other medical schools, many concerned about his age, 33).<sup>32</sup> Some persons applying under the special admissions program in 1973 and 1974 "were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."<sup>33</sup> Approximately fifty white applicants with benchmark scores higher than Bakke's were not admitted, whites with lower scores were admitted, individuals with scores similar to Bakke's were admitted through the special admissions program,<sup>34</sup> and under the medical school dean's admissions program "white children of politically well-connected university supporters or substantial financial contributors were admitted in spite of being less qualified than other applicants."<sup>35</sup>

Contending that the special admissions program excluded him because of his race, and assisted by an admissions officer at the Davis medical school,<sup>36</sup> Bakke brought a lawsuit against the medical school.

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Under the special admissions program, applicable in 1973 to the "economically and/or educationally disadvantaged" and in 1974 to members of minority groups (persons who were Black, Chicano, Asian, and American Indian), the minimum 2.5 GPA requirement did not apply. One in five special admissions applicants were invited for interviews, benchmark scores were assigned, and the top choices of the special admissions committee were presented to the general committee. Special candidates were not compared with or against general candidates. *See id.* at 274-75.

30. *Id.* at 277.

31. *See id.*

32. JEFFRIES, *supra* note 28, at 455 (noting "[h]is age was a problem. At thirty-three, some thought him too old to begin the long course of study required to become a doctor."). *See also* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 413 (1997) (opining "age may have been Bakke's biggest handicap"); Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 *GEO. L.J.* 981, 985 (1999).

33. 438 U.S. at 277 (footnote omitted).

34. *See Selmi, supra* note 32, at 986.

35. CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 45 (1997) (footnote omitted).

36. The admissions officer was aware of Bakke's view that he had been adversely impacted by the special admissions program and provided Bakke with information and the

In *Regents of the University of California v. Bakke*<sup>37</sup> the United States Supreme Court addressed the question of whether the medical school's special admissions program discriminated on the basis of race.<sup>38</sup> Justice Powell concluded that the special admissions program was unlawful and that Bakke should be admitted. In Powell's words:

[I]t is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.<sup>40</sup>

To the extent that the medical school's

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name of a lawyer involved in an anti-affirmative-action suit against the City of San Francisco, California. See Selmi, *supra* note 32, at 986 (citing JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 22 (1979)).

Noting the issue of the assistance provided to affirmative action challengers by institutional representatives, Jennifer Hochschild has asked:

How many whites or men were told by admissions officers or personnel directors that they would have been admitted or hired were it not for affirmative action procedures? After all, that is an easy and mutually gratifying response from a gatekeeper to an angry or disappointed candidate—even to many such candidates in a row, so long as each is addressed in the absence of the others. To my knowledge, no one has conducted research to document the ways in which affirmative action is presented to nonminorities denied jobs or admission or promotion.

Jennifer Hochschild, *Affirmative Action as Culture War*, in *RACE AND REPRESENTATION*, *supra* note 21, at 348.

37. 438 U.S. 265 (1978).

38. This question was before the Court but was not answered in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam). There the Court agreed to review a judgment by the Washington Supreme Court holding that the University of Washington Law School could lawfully consider the racial and ethnic backgrounds of applicants in its selection of students. The United States Supreme Court subsequently decided that the case was moot because DeFunis would complete his law school studies regardless of the Court's decision. In dissent, Justice Douglas argued that "at least as respects Indians, blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences." *Id.* at 335 (Douglas, J., dissenting). On Justice Douglas's position in *DeFunis*, see BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 466-68 (2003).

40. 438 U.S. at 319-20.

purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.<sup>41</sup>

Given the school's concession that it could not prove that, but for the special admissions program, Bakke would never have been selected, the Court ordered his admission: "[T]here is no question as to the sole reason for [Bakke's] rejection – purposeful racial discrimination in the form of the special admissions program."<sup>42</sup>

In a separate judgment the Court held that race could be one of a number of factors considered in the admissions process. This judgment was set forth in Part V-C of Justice Powell's opinion, wherein he wrote that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."<sup>43</sup> Powell cited the Harvard College program as an "illuminating example" of an admissions program which properly took race into account. "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."<sup>44</sup> Race and other factors – "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important" – could be considered by a university in making its admissions determinations.<sup>45</sup> As Justice Brennan's separate opinion (joined by Justices White, Marshall, and Blackmun) made clear, Powell "agree[s] that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the university from establishing race-conscious programs in the future."<sup>46</sup>

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41. *Id.* at 307.

42. *Id.* at 320 n.54.

43. *Id.* at 320.

44. *Id.* at 317 (footnote omitted).

45. *Id.* See also *id.* at 321-24 (appendix setting forth the Harvard program).

46. *Id.* at 326 (footnote omitted) (Brennan, J., concurring in part and dissenting in

Writing only for himself in Part IV-D of his *Bakke* opinion, Justice Powell expressed his view that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”<sup>47</sup> Referring to the First Amendment and noting the importance of academic freedom, Powell wrote that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>48</sup> Diversity in medical education is important, Powell opined, since a qualified student “with a particular background . . . may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”<sup>49</sup> He cautioned, however, that ethnic diversity was only one of a “range of factors a university properly may consider in attaining the goal of a heterogeneous student body”<sup>50</sup> and that “constitutional limitations

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part).

47. *Id.* at 311-12 (opinion of Powell, J.). Powell “left incomplete what he meant by diversity and why he believed diversity was so important.” Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1150 (2003) (footnote omitted). Defining racial diversity conceptually, Carbado and Gulati have written that

racial diversity conveys the idea that a relationship exists between race and social experiences, on the one hand, and knowledge and practices, on the other. Central to racial diversity, then, is the notion that how we experience, think about, and conduct ourselves in society is shaped, though not determined, by our race.

*Id.* at 1153-54. Diversity also performs seven functions: inclusion, social meaning, citizenship, belonging, colorblindness, speech, and institutional culture. *See id.* at 1154-64. *See also* PETER H. SCHUCK, *DIVERSITY IN AMERICA* 7, 19-39 (2003) (defining diversity “as those differences in values, attributes, or activities among individuals or groups that a particular society deems salient to the social status or behavior of those individuals or groups” and discussing taxonomies, sources, and legal structures of diversity).

48. 438 U.S. at 312. In support of this point Justice Powell quoted from a 1957 concurring opinion by Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

It is the purpose of a university to provide an atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Id.* at 263.

49. 438 U.S. at 314 (footnote omitted).

50. *Id.* Scholars have agreed with Powell that “diversity extends well beyond race and encompasses differences in background, socioeconomic status, country or region of birth, point of view, and religion.” BOWEN & BOK, *supra* note 16, at 219 (footnote omitted). It has been noted, however, that college and university pursuit of diversity does not, as a practical matter, extend to all differences as “institutions are committed to diversity, but only to a certain degree and of a certain kind.” CASS R. SUNSTEIN, *WHY*

protecting individual rights may not be disregarded.”<sup>51</sup>

## B. Weber

In 1974, as Allan Bakke sought admission to medical school, Brian Weber sought admission to an in-plant training program run by his employer, Kaiser Aluminum & Chemical Corporation, and his union, the United Steelworkers of America. As provided in an affirmative action program contained in a collective bargaining agreement between Kaiser and the Steelworkers, African-American employees would receive fifty percent of training program openings until the percentage of black craftworkers in the employer's Gramercy, Louisiana facility (1.83 percent prior to 1974) was commensurate with the percentage of African-Americans in the local labor force (approximately 39 percent).<sup>52</sup> In 1974 thirteen employees, seven black and six white, were selected for the program; the most senior black worker selected had less seniority than several white workers who were denied admission. Weber, one of the rejected white workers, filed a class action against the employer and the union alleging that the affirmative action program preferred junior black workers to similarly situated white workers in violation of Title VII of the Civil Rights Act of 1964 (Title VII).<sup>53</sup>

By a vote of 5-2, the Supreme Court in *Steelworkers v. Weber*<sup>54</sup> held that the affirmative action plan did not violate Title VII. Justice Brennan's opinion for the Court noted that Weber's argument that the plan violated Sections 703(a) and 703(d) of Title VII<sup>55</sup> was “not

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SOCIETIES NEED DISSENT 195 (2003). “They do not make special efforts to include students who collect Elvis Presley memorabilia, eat mostly potato chips, despise America, smell bad, adore Westerns, or have low SATs.” *Id.*

51. 438 U.S. at 314.

52. *Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979).

53. See 42 U.S.C. § 2000e. Weber believed that the affirmative action program was “not only illegal, but unfair.” Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1200 (2000) (quoting *Speaking of Race*, TIMES-PICAYUNE, Nov. 16, 1993, at A7 (quoting Brian Weber)).

54. 443 U.S. 193 (1979). Justices Powell and Stevens did not participate in the consideration or decision of the case. Philip Frickey reports that “Justice Powell had been ill during the oral argument and chose not to participate” and that Justice Stevens recused himself “because he had represented Kaiser while he was a private attorney in Chicago.” Frickey, *supra* note 53, at 1175 (footnotes omitted).

55. Section 703(a) provides that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . .” 42 U.S.C. § 2000e-2(a). Section 703(d) provides that it is unlawful for an “employer, labor organization, or joint labor-management committee

without force.”<sup>56</sup> But, Brennan reasoned, Weber’s “reliance upon a literal construction” of Title VII was “misplaced” as it was a

“familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of the makers.” The prohibition against racial discrimination . . . must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.<sup>57</sup>

Turning to and relying on Title VII’s legislative history,<sup>58</sup> Brennan found that the purpose of the statute was “to open equal employment opportunities for Negroes in occupations which have been traditionally closed to them,”<sup>59</sup> and concluded that “an interpretation of the sections that forbade all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected.”<sup>60</sup> Brennan

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controlling . . . on-the-job programs to discriminate against any individual because of his race . . . .” *Id.* at Section 2000e-2(d).

56. 443 U.S. at 201.

57. *Id.* (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

58. Justice Rehnquist, in dissent, argued that the legislative history showed that affirmative action was not permitted by Title VII. *Id.* at 230-54 (Rehnquist, J., dissenting). For an analysis of Rehnquist’s argument, see Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1524 (2003).

One commentator has argued that legislative history did not support the majority or the dissent:

[W]hether or not the members of Congress thought of voluntary affirmative action, they did not discuss the issue. That being so, it is difficult for me to understand how either the majority or the dissent found much solace in the history. Justice Rehnquist stated, on the one hand, that Congress never thought about the matter; on the other hand, the justice was convinced the history rejected affirmative action . . . . I fail to see how the legislative history can lead someone to both of Rehnquist’s conclusions—that Congress did not deal with affirmative action and that the Congress clearly rejected it.

For the majority, Justice Brennan also overstates enormously the meaning of the legislative history. The truth is, Congress did not discuss or debate the issue . . . .

See George Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 66-67 (1980).

59. 443 U.S. at 203 (internal quotation marks omitted) (citing 10 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). That African-Americans had been excluded from craft jobs at Kaiser was not in dispute. “Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.” *Id.* at 198 n.1.

60. *Id.* at 202 (internal quotation marks and citations omitted).

continued:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>61</sup>

Justice Brennan also concluded that Section 703(j) of Title VII did not prohibit affirmative action.<sup>62</sup> Section 703(j)'s statement that employers are not required to engage in affirmative action "does *not* state that 'nothing in Title VII shall be interpreted to *permit*' voluntary affirmative action efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."<sup>63</sup> Had Congress chosen such action, Brennan wrote, it would have mandated that the statute "would not require or *permit* racially preferential integration efforts."<sup>64</sup> While the Court did not definitively define the line between permissible and unlawful affirmative action plans, it concluded that the Kaiser-Steelworkers plan did not violate Title VII<sup>65</sup> and validated the voluntary use of affirmative action in the

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61. *Id.* at 204 (internal quotation marks and citations omitted). Although he continues to believe that he should have prevailed in his lawsuit, Brian Weber is cognizant of the existence of racial exclusion and hierarchy. He has remarked that he learned "that there's this class of people—females and minorities—who haven't been given the same opportunity. Theoretically, I would like to see it where no one would be given preferences. But they didn't start from the same level playing field. And understanding that, I've become more supportive of affirmative action programs." Frickey, *supra* note 53, at 1201 (quoting *Speaking of Race*, TIMES-PICAYUNE, Nov. 16, 1993, at A7 (quoting Brian Weber)).

62. That section provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment" to any group "on account of an imbalance which may exist with respect to the . . . percentage of any race . . . employed by an employer . . . ." 42 U.S.C. § 2000e-2(j).

63. 443 U.S. at 206.

64. *Id.* at 205.

65. The Court held that, for three reasons, the plan was lawful. First, the "purposes of the plan mirror those of the statute" in that the plan was "designed to break down old patterns of racial segregation and hierarchy" and was "structured to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* at 208 (internal quotation marks and citation and footnote omitted). Second, "the plan does not unnecessarily trammel the interests of the white employees" as it did not require the firing of white employees who would be replaced by black workers and did not "create an absolute bar to the advancement of white employees" as half the program's trainees would be white. *Id.* Third, the plan was temporary, and was "not intended to maintain

workplace.<sup>66</sup>

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For subscribers to the anti-affirmative-action position, *Bakke* and *Weber* were significant defeats. Both rulings allowed decision-makers to consider race when choosing who would and who would not be admitted to a professional school or a job training program. Both rulings made it clear that certain forms of race-consciousness were not prohibited by law. Both rulings troubled those who were concerned that minorities were where they had no right to be and had snatched opportunity from and out of the hands of nonminorities. And both rulings were on the minds of-and provided prominent targets for-organized and committed individuals and groups who were not willing to accept the Court's decisions as the last words on the subject.<sup>67</sup>

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racial balance, but simply to eliminate a manifest racial imbalance," and would "end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* at 208-09 (citation omitted).

For an example of an employer's voluntary affirmative action plan failing to meet the *Weber* standards, see *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (noting that affirmative action plan adopted for purpose of promoting racial diversity and not to remedy past or present discrimination unnecessarily trammelled the interests of nonminorities and violated Title VII).

66. In a later ruling the Court reaffirmed *Weber* and rejected a male employee's claim that the promotion of a female employee over him pursuant to a voluntary affirmative action plan violated Title VII. See *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616 (1987). In a dissent calling for the overruling of *Weber*, Justice Scalia (joined by Chief Justice Rehnquist) argued that *Weber* disregarded and rewrote the text of Title VII. Concerned that affirmative action will lead to an influx of the less qualified and minimally qualified into the nation's workplaces, Scalia closed his dissent with the following observations:

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers . . . for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent . . . .

*Id.* at 677 (Scalia, J., dissenting).

67. See LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* (2003). Cokorinos identifies five organizations opposed to and actively working against affirmative action: the American Civil Rights Institute, the Center for Equal Opportunity, the Center for Individual Rights, the Institute for Justice, and the Civil Rights Practice Group of the Federalist Society. *Id.*



### III. THE ANTI-AFFIRMATIVE-ACTION DECISIONS

#### A. Croson

Opponents of affirmative action continued to press their case and ultimately achieved significant victories. *City of Richmond v. J.A. Croson Company*,<sup>68</sup> decided in 1989, held that the City of Richmond, Virginia's affirmative action program requiring contractors to subcontract at least thirty percent of construction contracts to minority business enterprises (MBEs)<sup>69</sup> violated the Equal Protection Clause of the Fourteenth Amendment.<sup>70</sup> Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, concluded that the program "denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race" and could not survive strict scrutiny review (a position also taken by Justice Scalia in his concurring opinion).<sup>71</sup> Thus, for the first time, a majority of the Court applied strict scrutiny in assessing the constitutionality of a voluntary affirmative action plan, and required that the plan be justified by a compelling governmental interest (the remediation of past discrimination) effectuated by narrowly tailored means.<sup>72</sup>

Strict scrutiny review was necessary, Justice O'Connor stated, because of the number of African-Americans in Richmond and on that city's council:

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at 13. He also notes that several foundations, including the Lynne and Harry Bradley Foundation and the John M. Olin Foundation, "carry on long-range planning and sustained campaigns on key issues" "essential to the opposition to diversity." *Id.* at 12.

68. 488 U.S. 469 (1989).

69. An MBE was defined as a "business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members," with those members defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 478. In promulgating and implementing the program, the city relied on a study showing that the population of Richmond was fifty percent African-American and that only .67 percent of the city's prime construction contracts had been awarded to MBEs in the period between 1978 and 1983. *Id.* at 479-80.

70. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

71. 488 U.S. at 493; *id.* at 520 (Scalia, J., concurring).

72. A plurality of the Court had applied strict scrutiny in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Holding that a collectively-bargained affirmative-action layoff provision was unconstitutional, the Court determined that the challenged provision could not withstand strict scrutiny review. In so holding, the plurality opined that while remedying particularized findings of discrimination would be a compelling governmental interest, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . ." *Id.* at 275.

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case . . . .<sup>73</sup>

This remarkable too-many-blacks observation<sup>74</sup> and the “facile nature of the majority’s assumption that elected officials’ voting decisions are based on the color of their skins”<sup>75</sup> was rejected by a dissenting Justice Marshall (lauded elsewhere by Justice O’Connor for bringing a special perspective to the Court).<sup>76</sup>

The majority’s view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation’s elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.<sup>77</sup>

Justice O’Connor determined that the Richmond set-aside plan was constitutionally deficient because the “30% quota cannot in any realistic sense be tied to any injury suffered by anyone.”<sup>78</sup> Acknowledging “that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs,” she concluded that that fact, “standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.”<sup>79</sup> Past societal discrimination as a basis for racial preferences was not enough, for it

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73. 488 U.S. at 495-96 (citation omitted).

74. “O’Connor seems to think that the Richmond set-aside program reflects nothing more than the use of political power by a black-majority city council to ‘disadvantage a minority’—yet she refuses to consider that the absence of contracts to blacks in the past may reflect the previous domination of city government by whites.” ERIC FONER, WHO OWNS HISTORY?: RETHINKING THE PAST IN A CHANGING WORLD 187 (2002).

75. 488 U.S. at 554 (Marshall, J., dissenting).

76. SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 132-38 (Craig Joyce ed., 2003).

77. 488 U.S. at 555 (Marshall, J., dissenting).

78. *Id.* at 499.

79. *Id.*

would

open the door to competing claims for “remedial relief” for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.<sup>80</sup>

Nor was the plan narrowly tailored, O’Connor continued, as it did not appear that Richmond considered race-neutral means to increase MBE participation in contracting with the city, and the thirty percent set-aside “cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.”<sup>81</sup>

In a concurring opinion, Justice Scalia argued that “there is only one circumstance in which the States may act *by race* to undo the effects of past discrimination: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.”<sup>82</sup> Individuals are harmed by benign racial quotas, he wrote, and have a constitutional right to consideration on the merits and in a racially neutral manner. In taking this position, Justice Scalia was not blind to the fact that African-Americans have experienced and suffered from discrimination:

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to “even the score” display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, “created equal,” who were

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80. *Id.* at 505-06.

81. *Id.* at 507 (internal quotation marks and citation omitted). As for race-neutral measures O’Connor advised that the city could simplify its bidding procedures, relax its bonding requirements, and provide training and financial assistance for entrepreneurs without regard to race. *Id.* at 509-10.

82. *Id.* at 524 (internal quotation marks omitted) (Scalia, J., concurring). Scalia would allow states and localities to only consider race in emergencies “rising to the level of imminent danger to life and limb” such as prison riots requiring the segregation of inmates. *Id.* at 521.

discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to “even the score” (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace . . . .<sup>83</sup>

## B. Adarand

Thereafter, in 1995, the Court issued its decision in *Adarand Constructors, Inc. v. Peña*. Adarand Constructors, Inc. was not chosen to perform the subcontract for construction work, a subcontract awarded instead to Gonzalez Construction Company, even though Adarand had submitted the low bid.<sup>84</sup> In response, Adarand challenged a federal statute requiring that “not less than ten percent” of United States Department of Transportation (DOT) appropriations “shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals;” such disadvantaged individuals were presumed to be African-American, Hispanic, Native-American, Asian-Pacific-American, or some other minority.<sup>85</sup> According to Adarand, this presumption constituted unlawful racial discrimination by the federal government in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>86</sup>

A closely divided Court held that the federal government’s program had to be analyzed under the strict scrutiny standard of review and remanded the case to the lower courts for further consideration. Writing for a five-justice majority, Justice O’Connor reviewed several Court decisions leading up to its decision in *Croson*<sup>87</sup> and gleaned three propositions from those cases: (1) skepticism,<sup>88</sup> (2) consistency,<sup>89</sup> and (3) congruence.<sup>90</sup> “Taken together, these three

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83. *Id.* at 527-28.

84. 515 U.S. 200 (1995).

85. *See id.* *See also* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987); 15 U.S.C. §§ 637(d)(2), (3).

86. *See* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property without due process of law”).

87. *See Adarand*, 515 U.S. at 218-22 (referring to and discussing *Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); and other decisions.)

88. “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.” *Id.* at 223 (internal quotation marks and citations omitted).

89. The “standard of review under the Equal Protection Clause is not dependent on

propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”<sup>91</sup> Accordingly, the Court held “that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>92</sup> Such scrutiny is not “strict in theory but fatal in fact,” O’Connor cautioned, because “government is not disqualified from acting in response to” racial discrimination.<sup>93</sup> Whether the program challenged by *Adarand* could withstand strict scrutiny was a question for the lower courts to address on remand.<sup>94</sup>

Justices Scalia and Thomas, both advocates of originalist and traditionalist constructions of the Constitution,<sup>95</sup> issued concurring

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the race of those burdened or benefited by a particular classification . . . *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.” *Id.* at 224 (internal quotation marks and citations omitted).

90. “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Id.* (internal quotation marks and citations omitted).

91. *Id.*

92. *Id.* at 227 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)). *Metro Broadcasting* held that benign racial classifications by federal government actors were subject to intermediate scrutiny and were permissible if they served important governmental objectives and were substantially related to the achievement of those objectives. *See* 497 U.S. at 564-65. The *Adarand* Court concluded that this intermediate scrutiny standard undermined the principles of skepticism, consistency, and congruence set out in the Court’s opinion. *See* 515 U.S. at 227.

93. *Id.* at 237 (citation omitted).

94. On remand the district court concluded that the DOT program could not survive strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). That judgment was vacated by the United States Court of Appeals for the Tenth Circuit on the ground that *Adarand* had been certified as a disadvantaged business enterprise. 169 F.3d 1292 (1999). The Tenth Circuit’s decision was reversed by the Supreme Court because of questions concerning the validity of that certification. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (per curiam). When the case came back again to the Court after another remand, all nine justices agreed that the Court would not consider the case because *Adarand* lacked standing to challenge the DOT program. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). Thus, after years of litigation, *Adarand* did not receive a final or favorable ruling on its claim.

95. Believing that “[a] provision of the Constitution . . . does not mean one thing at one time and an entirely different thing at another time,” *Home Building and Loan Ass’n v. Blaisdell*, 290 U.S. 398, 448-49 (1934) (Sutherland, J., dissenting), “[o]riginalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of the enactment.” Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998). Originalists

opinions in *Adarand* setting forth their anti-affirmative-action views.<sup>96</sup>

believe that “the meaning of the Constitution (or of its individual clauses) was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain that meaning and apply it to the issue at hand.” JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* xiii (1996). While noting “that in a crunch I may prove to be a faint-hearted originalist,” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989), Scalia has written that “the Great Divide with regard to constitutional interpretation is . . . that between *original* meaning (whether derived from Framers’ intent or not) and *current* meaning.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann, ed., 1997). An example of Justice Thomas’s originalism is found in his concurring opinion in *United States v. Lopez*, 514 U.S. 549, 586 (1995), wherein he argued that Congress did not have the authority to regulate agriculture or manufacturing because “[a]t the time the original Constitution was ratified . . . the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture.”

In addition to originalism, Justice Scalia has employed a traditionalist methodology in deciding constitutional issues. See e.g., *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (the Court should not invalidate a practice that “bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic.” (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J. dissenting))); *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (opinion of Scalia, J.) (in assessing constitutionality of state action the Court should “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”). For analysis of Scalia’s traditionalism, see Ronald Turner, *Were Separate-but-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to Brown and Loving*, 40 SAN DIEGO L. REV. 285 (2003).

Traditionalism should not be confused with originalism for, unlike traditionalism, originalism “draws its normative authority not from historical practice but from a social contract theory of precommitment by the American people.” John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998).

96. Conspicuously absent from Scalia’s and Thomas’ analysis is any recognition of and grappling with the fact that “before, during, and after the ratification of the Fourteenth Amendment” Congress “expressly refer[red] to color in the allotment of federal benefits.” Jeb Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997).

Eric Schnapper has written that “[f]rom the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.” Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985). Schnapper noted that the Freedmen’s Bureau Act of 1866 contained race-conscious provisions and “provided special aid and protection for blacks . . .” *Id.*, at 772-73. A July 1866 Congressional measure appropriated funds for “the relief of destitute colored women and children.” Act of July 28, 1866, ch. 296, 14 Stat. 310, 317. In March 1867, Congress appropriated funds “for the relief of freedmen or destitute colored people of the District of Columbia, the same to be expended under the direction of the commissioner of the bureau of freedmen and refugees.” S. Res. 4, 40th Cong., 15 Stat. 20 (1867). In addition, responding to fraudulent conduct by claims agents in obtaining bounties and payments owed to southern black soldiers, Congress passed a law requiring that the claims be paid to the commissioner of the Freedmen’s Bureau, with the commissioner supervising and then paying the claimants and their agents. See S. Res. 25, 40th Cong., 15 Stat. 26 (1867); Rubenfeld, *supra*, at 431-32.

Justice Scalia, writing that “under our Constitution there can be no such thing as either a creditor or debtor race,” argued that to

pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the ways of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.<sup>97</sup>

Justice Thomas argued that “laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality” are morally and constitutionally equivalent.<sup>98</sup> “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”<sup>99</sup> Thomas further declared that the “benign’ discrimination” of

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These race-conscious legislative acts must be reckoned with by those who argue that affirmative action violates the Equal Protection Clause. In the view of one scholar these Reconstruction-era statutes prove that “those who profess fealty to the ‘original understanding,’ who abhor judicial ‘activism,’ or who hold that the legal practices at the time of the enactment ‘say what they say’ and dictate future interpretation, cannot categorically condemn color-based distribution of governmental benefits as they do.” Rubinfeld, *supra*, at 431-32 (footnote omitted).

97. 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). In a 1979 law review commentary then-Professor Scalia discussed the notion of creditor and debtor races. See Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 152-53. His position on affirmative action was clearly and strongly stated: “I owe no man anything, nor he me, because of the blood that flows in our veins.” *Id.* at 153.

98. 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment). See also *id.* at 241 (“government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice”). Disagreeing with Justice Thomas, Justice Stevens argued that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.” *Id.* at 243 (Stevens, J., dissenting). Invidious discrimination oppresses and subjugates disfavored groups, he opined, while race-based remedial measures seek to foster social equality. See *id.* See also *id.* at 245 (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).

Readers interested in this debate are directed to Stanley Fish’s critique of “the idea that any action taken on the basis of a racial classification is equivalent to any other action taken on the basis of racial classification.” STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 42 (1999). On that view, “you can find quotas designed to exclude races from institutions of higher education no different from admissions procedures that take race into account as one of many factors . . . .” *Id.* at 42-43. Fish argues against “a forced inability to make distinctions that would be perfectly clear to any well-informed teenager—distinctions between lynchings and set-asides, between a Shakespeare sonnet and hardcore pornography, between (in Justice Stevens’ words) a welcome mat and a no-entry sign.” *Id.* at 43.

99. 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

affirmative action “teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without patronizing indulgence.”<sup>100</sup> Such programs are harmful, in his view, because they “engender attitudes of superiority,” “provoke resentment among those who believe that they have been wronged by the government’s use of race,” and “stamp minorities with a badge of inferiority and may cause them to develop tendencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>101</sup>

### C. Hopwood

Emboldened and invigorated by *Croson* and *Adarand*, individuals continued their assault on affirmative action measures.<sup>102</sup> In 1992, Cheryl Hopwood applied to the University of Texas Law School. Her admissions file contained no letters of recommendation or personal statement, and “her responses to the [application] questions [were] brief and d[id] not elaborate on her background and skill.”<sup>103</sup> Denied admission, Hopwood brought suit alleging that the law school’s consideration of race in its admissions program discriminated against whites and non-preferred minorities.<sup>104</sup> Three

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100. *Id.* at 241.

101. *Id.*

102. *See, e.g.,* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (holding that university scholarship program for African-American students unconstitutionally discriminated on the basis of race).

103. Hopwood v. Texas, 861 F. Supp. 551, 564 (W.D. Tex. 1994), *rev’d and remanded in part and appeal dismissed in part*, 78 F.3d 932 (5th Cir. 1996).

104. Under the admissions program in effect in 1992, applications and supporting materials were placed in color-coded files based on residency and race or ethnicity. Pursuant to a presumptive admissions line set by the chair of the admissions committee, applicants with a high Texas Index (TI) score (a composite number reflecting the applicant’s grade point average and LSAT score) were admitted. Applicants with TIs below another line set by the chair were presumptively denied admission. Those with a TI falling between the presumptive admit and the presumptive deny lines were placed in a discretionary category, along with applications with scores above the presumptive admit line which were questionable for other reasons, and applicants with presumptive deny scores which were pulled up into the discretionary category after review by admissions committee members. The discretionary category files of nonminority applicants were divided into stacks of thirty and each file was reviewed by a three-member subcommittee of the admissions committee. Applicants receiving two or three votes were offered admission, applicants receiving no votes were denied admission, and applicants receiving one vote were placed on a waiting list. *See* 861 F. Supp. at 560-62.

The applications of African-Americans and Mexican-Americans were reviewed by a three-member minority subcommittee, with the subcommittee reviewing each file as a group. That subcommittee then provided the full admissions committee with a summary of minority files and identified minority candidates who should be considered for admission, with “the minority subcommittee’s admissions decisions on individual



other unsuccessful applicants also sued. When one of them, Kenneth Elliott, was denied admission, his father wrote a letter to the law school dean stating that Elliot's "friends and family all feel that he was not accepted to U.T. because of limited openings at U.T. due to mandatory minority and women quotas which use a large percentage of the openings."<sup>105</sup> After receiving the letter, the law school placed Elliot on the waiting list and later admitted him (although he contended that he did not receive notice of admission).<sup>106</sup>

In *Hopwood v. Texas*<sup>107</sup> the United States Court of Appeals for the Fifth Circuit held that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment" and prohibited the use or consideration of race as a factor in admissions decisions.<sup>108</sup> While the use of race was proscribed, the court stated, universities could lawfully consider other factors in deciding who would be admitted to an incoming class:

A university may properly favor one applicant over another because of his ability to play cello, make a downfield tackle, or understand chaos theory. An admissions program may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.<sup>109</sup>

What a university may not do, the court held, is "use . . . race to achieve a diverse student body . . . ."<sup>110</sup>

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applicants . . . virtually final." *Id.* at 563 (footnote omitted). Separate waiting lists, divided by race and residence, were maintained by the law school. *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996).

The law school discontinued this admissions process in 1995. 861 F. Supp. at 582 n.87.

105. *Id.* at 565 (footnote omitted).

106. *Id.* at 565-66.

107. 78 F.3d 932 (5th Cir. 1996). For an excellent discussion and critique of this decision, see Victor V. Wright, Note, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Program*, 34 HOUS. L. REV. 871 (1997).

108. 78 F.3d at 944.

109. *Id.* at 946 (footnote omitted).

110. *Id.* at 948.

In explaining its decision, the court noted the Supreme Court's decisions in *Croson* and *Adarand* and reasoned that, in light of those cases, it was not bound by *Bakke*:

[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.<sup>111</sup>

On this view of the caselaw, the court determined that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge."<sup>112</sup> But, as Judge Wiener argued in his concurrence, "if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement."<sup>113</sup> Judge Wiener is surely correct; noting that lower courts are to apply existing authority and not predict what it will do, the Supreme Court has instructed that "[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>114</sup> Not agreeing with Judge Wiener's view and leading where the Supreme Court had not yet gone, the prognosticating Fifth Circuit forged ahead and struck down the law school's program.<sup>115</sup>

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111. *Id.* at 945.

112. *Id.* at 945-46.

113. *Id.* at 963 (Wiener, J., specially concurring). Judge Wiener did not:

read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest . . . .

*Id.* at 964. He thus "perceive[d] no 'compelling' reason to rush in where the Supreme Court fears—or at least declines—to tread." *Id.* at 965.

114. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). See also *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir. 1997) ("[W]e are timid about declaring decisions by the Supreme Court overruled when the Court has not said so"). On prediction theory and lower court decisions, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 226-28 (1990).

115. 78 F.3d 945-46. See also *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (holding that university's freshman admissions policy awarding diversity bonus to nonwhite applicants was not narrowly tailored to achieve diverse student body and therefore violated the Equal Protection Clause).

While the Fifth Circuit invalidated the law school's already discontinued admissions program, it is too often overlooked that the plaintiffs' argument - that they were the victims of racegoating - was ultimately rejected by the district court on remand after a four-day bench trial.<sup>116</sup> In 2000, the Fifth Circuit agreed with the district court.<sup>117</sup> Reviewing the record *de novo*, the appeals court concluded that the application files of each of the four plaintiffs "includes at least one significant weakness."<sup>118</sup> Hopwood "received her undergraduate degree from a relatively weak institution, had garnered at least 60 hours at a community college," and her "file contained no letters of recommendation or personal statements."<sup>119</sup> Douglas Carvell's LSAT score was in the 76<sup>th</sup> percentile, his grade point average was below the median of applicants admitted in 1992, and one of his undergraduate professors wrote that "he was 'disappointed' in Carvell's grades and that Carvell had a 'mediocre' and 'uneven' academic performance."<sup>120</sup> David Rogers had been dismissed from the University of Texas undergraduate honors program, graduated from what the law school deemed to be a relatively weak institution, and provided no letters of recommendation.<sup>121</sup> Interestingly, Rogers noted on his application that "as a white who attended an all-minority school for several years, and who was raised by a single mother, I have an unusual understanding of the challenges faced by women and minorities."<sup>122</sup> And Elliott (whose father contended that his son was not admitted because of quotas for minorities and women)<sup>123</sup> had a 2.98 grade point average, wrote in his personal statement that he was "an average student, studying when I needed to, partying more than I should, and not managing my time efficiently," and "candidly admitted that his undergraduate academic performance 'is not of the caliber expected by the University of Texas School of Law.'"<sup>124</sup> Based on its review of the record, the Fifth Circuit concluded that the district court's finding

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116. See *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998), *aff'd in part, rev'd and remanded in part*, 236 F.3d 256 (5th Cir. 2000).

117. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000).

118. *Id.* at 271.

119. *Id.*

120. *Id.*

121. See *id.* at 272.

122. See *Hopwood*, 861 F. Supp. at 567 (citation omitted).

123. See *supra* note 116 and accompanying text.

124. 236 F.3d at 272 (footnote omitted).

that the plaintiffs would not have been admitted under a race-blind admissions program “was not merely free of reversible error but was eminently correct.”<sup>125</sup> Thus, their racegoating did not succeed.

The United States Court of Appeals for the Ninth Circuit, in a subsequent decision, disagreed with the result in, and reasoning of, *Hopwood*. In *Smith v. University of Washington Law School*,<sup>126</sup> unsuccessful white applicants filed suit alleging that discrimination against whites and others on the basis of race resulted in the denial of their admission to the law school. The school considered race as one criterion under the pertinent admissions procedures in order to enroll a diverse student body. Divining the meaning of the several opinions and views expressed by the justices in *Bakke*,<sup>127</sup> the Ninth Circuit concluded that a majority of the *Bakke* Court “would have allowed for some race-based considerations in educational institutions. Thus, a race-based possibility must be taken to be the actual rationale adopted by the Court.”<sup>128</sup> *Adarand* and *Croson* did not call for a different outcome. Acknowledging that the Supreme Court “has not looked upon race-based factors with much favor,”<sup>129</sup> *Smith* noted that the Court had

not returned to the area of university admissions, and has not indicated that Justice Powell’s approach has lost its vitality in that unique niche of our society. As we see it, regardless of what we think the Supreme Court might do, we must let it decide whether the *Bakke* rationale . . . has become moribund . . . .<sup>130</sup>

Accordingly, the court concluded that “it ineluctably follows that the Fourteenth Amendment permits University admissions programs

125. *Id.* (footnote omitted).

126. 233 F.3d 1188 (9th Cir. 2000).

127. *See supra* notes 38-51 and accompanying text. In deciding the operational holding of *Bakke* the Ninth Circuit applied *Marks v. United States*, 430 U.S. 188 (1977). *See Smith*, 233 F.3d at 1199. For a discussion of *Marks*, see *infra* note 145 and accompanying text.

128. *Smith*, 233 F.3d at 1199. The court reasoned:

[I]f the various opinions in *Bakke* mixed so many different colors that the result became rather muddy, that result was still clear enough to permit educators to rely upon the [Brennan] opinion that gave the decision its life and meaning – the opinion that avoided both polar possibilities. More importantly, we are required so to do.

*Id.* at 1200.

129. *Id.* (citations omitted).

130. *Id.*

which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”<sup>131</sup> *Smith* thus provided an analytical counterpoint to, and created a circuit conflict with, *Hopwood*.

#### IV. THE COURT'S 2003 MICHIGAN DECISIONS

Opponents of affirmative action had to be overjoyed with the anti-affirmative-action trend found in *Croson*, *Adarand*, and *Hopwood* and with what appeared to be the upper hand and superior position in the battle over the issue of the legality of the consideration of race by governmental entities. Twenty five years after *Bakke* the Supreme Court returned to the question of the constitutionality of affirmative action in higher education in two cases involving admissions at the University of Michigan.

##### A. Grutter

At issue in *Grutter v. Bollinger*<sup>132</sup> was the constitutionality of the University of Michigan Law School's use of race as a factor in student admission decisions. Individual applicants to that institution were evaluated on the basis of information contained in their admissions file, including grade point average, LSAT score, a personal statement, letters of recommendation, and an essay setting forth applicants' view of the contributions they would make to the law school's life and diversity. The school's admissions policy provided that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems . . .”<sup>133</sup> The policy also required admissions officers to consider “soft variables,” such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection . . .”<sup>134</sup> Identifying “diversity” as an aspiration but not defining it “solely in terms of racial and ethnic status,”<sup>135</sup> the policy expressed the law school's “commitment to ‘one particular type of diversity,’ that is, ‘racial and

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131. *Id.* at 1200-01. Notwithstanding *Smith*, the law school's consideration of race was prohibited by Washington voters' passage of Initiative Measure 200. See *infra* note 245 and accompanying text.

132. 123 S. Ct. 2325 (2003).

133. *Id.* at 2332 (quoting law school policy).

134. *Id.*

135. *Id.*

ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native-Americans, who without this commitment might not be represented in our student body in meaningful numbers.”<sup>136</sup> According to the policy, the enrollment of a “critical mass” of minority students would “ensur[e] their ability to make unique contributions to the character of the Law School.”<sup>137</sup>

Barbara Grutter, a white resident of the state of Michigan, applied to the law school in 1996.<sup>138</sup> When her application was rejected, Grutter sued, alleging that she had been discriminated against on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (Title VI),<sup>139</sup> and 42 U.S.C. Section 1981 (Section 1981).<sup>140</sup> Grutter asserted that her application was rejected because race was a predominant factor in the admissions process, that certain minority group applicants had “a significantly greater chance of admission than students with similar credentials from disfavored racial groups,”<sup>141</sup> and that there was no compelling interest justifying the use of race in the admissions process.<sup>142</sup>

The Supreme Court, by a 5-4 vote, held that the law school’s admissions program did not violate the Equal Protection Clause.<sup>143</sup>

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136. *Id.*

137. *Id.* (quoting law school policy).

138. *See* 123 S. Ct. at 2332. For information on Grutter’s background and efforts to attend the law school, see June Kronholz, *Does a White Mom Add Diversity?*, WALL ST. J., June 25, 2003, at B3.

139. *See* 42 U.S.C. § 2000d (“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

140. That section provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981.

141. In testimony before the trial court Grutter’s expert witness stated that being a member of certain minority groups was “an extremely strong factor in the decision for acceptance for admission” but conceded that race was not a predominant factor in the law school’s admissions consideration. 123 S. Ct. at 2334. The law school’s expert concluded that only 10% of the 35% of admitted underrepresented minority applicants would have been admitted in 2000 if race were not considered. “Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.” *Id.* (citation omitted).

142. *See id.*

143. As the program was constitutional, it did not violate Title VI or Section 1981. *See id.* at 2347.

Writing for the Court, Justice O'Connor (joined by Justices Stevens, Souter, Ginsburg, and Breyer) noted that in the aftermath of *Bakke* "courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent"<sup>144</sup> under *Marks v. United States*.<sup>145</sup> Finding it unnecessary to decide whether Powell's opinion was binding under *Marks*, O'Connor "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>146</sup>

Applying strict scrutiny in the higher education context,<sup>147</sup> Justice O'Connor rejected the contention that the Court's post-*Bakke* affirmative-action decisions<sup>148</sup> foreclosed the law school's argument that it had a compelling state interest in the diversity of its student body:

It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action . . . . But we have never held that the only governmental

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144. *Id.* at 2337.

145. 430 U.S. 188 (1977). In *Marks* the Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (internal quotation marks and citation omitted).

In *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000), discussed *supra* notes 126-31 and accompanying text, the court applied the *Marks* analysis to the *Bakke* opinions of Justice Powell and Justice Brennan and concluded that "Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand." 233 F.3d at 1200. Disagreeing with that view in its 2000 *Hopwood* decision, the Fifth Circuit

[did] not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices "would have" held. Rather, in the absence of subsequent Supreme Court precedent squarely and unequivocally holding that diversity can never be a compelling state interest, we read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.

*Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000).

146. 123 S. Ct. at 2337.

147. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 2338 (citation omitted). "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.*

148. *See supra* Parts III-A and III-B.

use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.<sup>149</sup>

That the law school deemed diversity as essential to its mission was a judgment lying “primarily within the expertise of the university” to which the Court deferred.<sup>150</sup> “[U]niversities occupy a special niche in our constitutional tradition” and enjoy educational autonomy grounded in the First Amendment, and the interest in diversity “is at the heart of the Law School’s proper institutional mission, and . . . good faith on the part of a university is presumed absent a showing to the contrary.”<sup>151</sup> In furtherance of its efforts to admit a diverse student body the law school sought to promote “cross-racial understanding” and to enroll a “critical mass” of minority students “defined by reference to the educational benefits that diversity is designed to produce.”<sup>152</sup> The policy, Justice O’Connor continued,

promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races . . . . These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.<sup>153</sup>

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149. See 123 S. Ct. at 2338-39 (citations omitted).

150. *Id.* at 2339.

151. *Id.* (internal quotation marks and citation omitted). Dissenting on this point, Justice Thomas argued that the First Amendment did not allow a public university to engage in conduct violative of the Fourteenth Amendment. See *id.* at 2357 (Thomas, J., concurring in part and dissenting in part).

152. *Id.* at 2339. Criticizing this part of the Court’s opinion, Justice Scalia argued that the educational benefit the law school sought

is not, of course, an “educational benefit” on which students will be graded on their Law School transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson in life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be “taught” in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scouts to public-school kindergartens.

*Id.* at 2349 (Scalia, J., concurring in part and dissenting in part).

153. *Id.* at 2340 (citations omitted). See also *id.* at 2341 (the law school’s need for a critical mass of minority students was not premised on the belief that there was a minority viewpoint on an issue; “diminishing the force of such stereotypes is both a crucial part of



“These benefits are substantial” and real, Justice O’Connor determined, a conclusion she supported by references to academic studies and pro-diversity *amicus curiae* briefs submitted to the Court by General Motors Corporation, 3M Company, military leaders, and the Solicitor General of the United States.<sup>154</sup> Because education is critical to the preparation of students for work and citizenship, “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>155</sup> Universities and law schools are “the training ground[s] for a large number of our Nation’s leaders,” O’Connor continued, including governors, members of the United States Senate and House of Representatives, and federal judges.<sup>156</sup>

In order to cultivate a set of leaders with legitimacy, in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training . . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>157</sup>

Having concluded that diversity can be a compelling governmental interest, Justice O’Connor turned to the next part of the strict scrutiny analysis, asking and answering in the affirmative the question whether the law school’s admissions policy was narrowly tailored. Likening the policy to the Harvard plan described in Justice Powell’s *Bakke* opinion, she noted that between 1993 and 2000 the number of minority students in the law school’s incoming classes ranged from 13.5 percent to 20.1 percent; for the Justice, these numbers indicated that the admissions program did not operate as a quota and constitutionally considered race as a plus factor while insuring that every candidate competed with all qualified applicants.<sup>158</sup>

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the Law School’s mission, and one that it cannot accomplish with only token members of minority students”).

154. *See id.* at 2339.

155. *Id.* at 2340.

156. *Id.* at 2341.

157. *Id.*

158. *See id.* at 2343. A dissenting Justice Kennedy argued that, from 1995 to 1998, the

She acknowledged that there is “some relationship between numbers and achieving the benefits to be derived from diversity, and between numbers and providing a reasonable environment for those students admitted.”<sup>159</sup> But that “attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”<sup>160</sup>

Nor did the admissions policy make race or ethnicity the defining aspect of an individual’s application. The file of each applicant of any race was subjected to a “highly individualized, holistic review” considering all of the ways in which an applicant could contribute to diversity, and no “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity” were awarded.<sup>161</sup> All factors contributing to diversity were considered by the law school,<sup>162</sup> each applicant was given the opportunity to inform the institution of the ways in which his or her admission would contribute to diversity, and nonminorities were accepted who had grades and test scores lower than those of underrepresented minorities who were rejected.

Moreover, Justice O’Connor opined, the existence of race-neutral alternatives to achieve diversity did not mean that the program was not narrowly tailored. “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 or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>163</sup> What is required is “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>164</sup> Reasoning that the pursuit of a diverse student body via the individual assessment of applicants would be precluded by a lottery, the lowering of admissions standards for all students, or a percentage plan,<sup>165</sup> O’Connor was satisfied that the law school had sufficiently

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“percentage of enrolled minorities fluctuated by only 0.3% from 13.5% to 13.8%.” *Id.* at 2371 (Kennedy, J., dissenting). “The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict scrutiny requires the Law School to overcome the inference.” *Id.* at 2372.

159. *Id.* at 2343 (citation omitted) (quoting *Bakke*, 438 U.S. at 323).

160. *Id.* (internal quotation marks and citation omitted).

161. *Id.*

162. Diversity admittees “lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.” *Id.* at 2344.

163. *Id.* (citations omitted).

164. *Id.* at 2345 (citations omitted).

165. The law school sought a student body “diverse in ways broader than race.” *Id.*

considered alternatives “currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.”<sup>166</sup>

Finally, Justice O’Connor determined that the law school’s admissions program did not unduly burden persons who were not members of the favored racial and ethnic groups. “Because the Law School considers all pertinent elements of diversity, it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.”<sup>167</sup> This did not mean that race-conscious affirmative action has no temporal limitations. As “all governmental use of race must have a logical end point,”<sup>168</sup> O’Connor instructed that this “durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>169</sup> Accepting the law school’s statement that it would end its consideration of race in admissions “as soon as practicable,”<sup>170</sup> she opined:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the

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Justice O’Connor stated:

Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates “percentage plans,” recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State . . . . The United States does not, however, explain how such plans could work for graduate and professional schools . . . .

*Id.* (citation omitted). On percentage plans, see *infra* notes 265-89 and accompanying text.

166. 123 S. Ct. at 2345

167. *Id.* (citation omitted).

168. *Id.* at 2346. In a concurring opinion Justice Ginsburg, joined by Justice Breyer, argued that this observation “accords with the international understanding of the office of affirmative action.” See *id.* at 2347 (Ginsburg, J., concurring) (referring to and discussing the International Convention on the Elimination of All Forms of Racial Discrimination). Affirmative action and the International Convention are discussed in Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301, 330 (1999); Jordan J. Paust, *The Permissibility of Affirmative Action in Higher Education Under Human Rights Law*, 3 N.Y. CITY L. REV. 91 (1998).

169. 123 S. Ct. at 2346.

170. *Id.*

context of public higher education. Since that time, the number of 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.<sup>171</sup>

While the dissenting opinions in *Grutter* made a number of arguments in support of the view that the law school's admissions policy was unconstitutional, of particular relevance to this enterprise is the too-many-minorities and racegoating dynamics of their anti-affirmative-action position. Justice Scalia, in an opinion joined by Justice Thomas, provided a roadmap for the next generation of legal challenges to affirmative action. These challenges will focus on the following questions: (1) whether applicants were sufficiently evaluated as individuals and were not placed on separate admissions tracks, (2) whether a university "has so zealously pursued its 'critical mass' as to make it an unconstitutional *de facto* quota system," (3) "whether, in the particular setting at issue, any educational benefits flow from racial diversity," (4) whether an institution's commitment to diversity is *bona fide*, (5) whether "the institution's racial preferences have gone below or above the mysterious *Grutter*-approved 'critical mass,'" and (6) whether the rights of "minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass'" have been violated.<sup>172</sup> More than a roadmap, Scalia's questions provide an unmistakable signal that the too-many-minorities and racegoating concerns of affirmative action opponents live on post-*Grutter*, and that while an important battle may have been lost, the war has now entered a new phase.

Justice Thomas opened his separate opinion<sup>173</sup> with a partial

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171. *Id.* at 2346-47 (citation omitted). *See also id.* at 2348 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.").

Justice Thomas viewed Justice O'Connor's expectation that race-based affirmative action will not be needed in twenty-five years as a "holding that racial discrimination will be illegal in 25 years." *Id.* at 2350 (Thomas, J., dissenting); *id.* at 2364 (same). No such holding can be derived from a fair reading of Justice O'Connor's opinion. Indeed, and interestingly, Thomas joined in Chief Justice Rehnquist's dissent in which the Chief Justice stated that the Court "suggests a possible 25-year limitation on the Law School's current program." *Id.* at 2369 (Rehnquist, C.J., dissenting) (citation omitted). Rehnquist did not refer to Justice O'Connor's expectation as a holding of the Court.

172. *Id.* at 2349-50 (Scalia, J., concurring in part and dissenting in part).

173. For a discussion of Justice Thomas's opinion and views on affirmative action, see

quotation from a January 1865 speech by Frederick Douglass.<sup>174</sup> The following quotation is set forth in the Justice's opinion, with passages of Douglass' speech not quoted by Thomas contained in brackets:

[I think the American people are disposed often to be generous rather than just. I look over this country at the present time, and I see Educational Societies, Sanitary Commissions, Freedmen's Association, and the like—all very good; but] in regard to the colored people, there is always more that is benevolent, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. [Gen. Banks was distressed with solicitude as to what he should do with the negro. Everybody has asked the question, and they learned to ask it early of the abolitionists: "What shall we do with the negro?"] I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! [I am not for tying or fastening them on the tree in any way, except by nature's plan, and if they will not stay there let them fall.] And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! [If you see him on his way to school, let him alone,—don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him alone!—don't disturb him! If you see him going into a workshop, just let him alone,—] your interference is doing him positive injury.<sup>175</sup>

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Stanley Fish, *One Man's Opinion*, N.Y. TIMES, June 30, 2003, at A23 (National Edition). For an argument that the Thomas opinion "is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received," see Maureen Dowd, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at A27 (National Edition).

174. This was not the first time that a Thomas opinion opened with a Douglass quotation. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Interestingly, this resort to and invocation of Douglass, a towering figure in American and African-American history, is made by a justice who reportedly said the following to a young black man regarding Thomas's hiring of law clerks: "I look for the maths and the sciences, real classes, none of that Afro-American studies stuff. If they've taken that stuff as an undergraduate, I don't want them. You want to do that, do it in your spare time." RON SUSKIND, *A HOPE IN THE UNSEEN: AN AMERICAN ODYSSEY FROM THE INNER CITY TO THE IVY LEAGUE* 121 (1998).

175. Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865) in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blasingame & John R. McKivigan eds., 1991). In referring to General Nathaniel Banks, Douglass was criticizing a contract-labor system established and enforced by the general in Louisiana in which freed slaves were forced to work on plantations. See Gregory D. Stanford, *Thomas Shamelessly Hijacks Language of Cultural Icon*, MILWAUKEE J. &

The passages not quoted by Thomas are critical to an understanding of the full meaning and import of Douglass's speech. Douglass clearly states in an omitted phrase that the work of the Educational Societies, Sanitary Commissions, and the Freedmen's Association were "all very good . . ."<sup>176</sup> A reader of Justice Thomas's opinion who was unaware of this language would not know that Douglass had favorably mentioned those "religious, secular, and quasi-governmental agencies created during the Civil War to meet the spiritual, intellectual, and medical needs of both freedmen and Union soldiers."<sup>177</sup> The phrase "Let him alone!" did not refer to and was not concerned with those organizations and their efforts to assist African-Americans and others. Rather, "Let him alone!" was directed at those clearly identified in the Douglass speech but not quoted by Thomas, at those who obstructed and accosted African-Americans as they made their way to schools and to work or sought to eat in hotels or cast their ballots in elections. The "positive injury" to which Douglass referred is the injury caused by General Banks and others who interfered with the rights, interests, and lives of African-Americans.

Omitting key language from the quotation of the speech gives the wrong impression that Douglass was philosophically opposed to a contemporary concept of affirmative action. The real and intended targets of his plea for freedom from racist interference were those who would not give an African-American "a chance to stand on his own legs!"<sup>178</sup> And we know from history that his plea fell on the deaf ears of many, as evidenced by what occurred in this nation in and after 1865 and the destructive racial discrimination in education, employment, public accommodations, voting, and other areas which is an undeniable fact and part of this nation's past and present. To suggest, on the basis of selective quotation, that Douglass would oppose affirmative action in university admissions today – when "[t]he cruel legacy of 250 years of slavery has proved more stubborn than even . . . Douglass, a former slave and consummate realist, . . . imagined"<sup>179</sup> – is nothing more than rhetoric and cannot and should not be elevated to or confused with a definitive

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SENTINEL, June 29, 2003, at 4J.

176. 4 FREDERICK DOUGLASS PAPERS, *supra* note 175, at 68.

177. *Id.* at 68 n.12 (editors' note).

178. *Id.* at 68.

179. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 4 (2002).

declaration by Douglass on the issue before the Court in *Grutter*.

Having invoked Douglass, Justice Thomas wrote, "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."<sup>180</sup> (Query whether this resort to iconography adds anything of analytical significance to the question before the Court.)<sup>181</sup> Expressing his belief that the law school's consideration of race violated the Equal Protection Clause, Thomas argued that the law school's interest in "diversity" "is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue."<sup>182</sup> The law school's interest was in aesthetics, he argued, in "a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them."<sup>183</sup>

The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity" . . . .<sup>184</sup>

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180. 123 S. Ct. at 2350 (Thomas, J., concurring in part and dissenting in part). *See also id.* at 2365: "It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to '[d]o nothing with us!' and the Nation adopted the Fourteenth Amendment."

181. I have written elsewhere about the dangers of the misappropriation of the words and views of African-American icons by individuals opposed to affirmative action and color-conscious interpretation and application of the Constitution. *See* Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996). This danger and criticism applies as well to Justice Thomas's invocation of Frederick Douglass.

182. 123 S. Ct. at 2352 n.3 (Thomas, J., concurring in part and dissenting in part).

183. *Id.*

184. *Id.* at 2353 (citation omitted).

Recognizing that true meritocracy is not “the order of the day at the Nation’s universities,”<sup>185</sup> Justice Thomas turned his attention to African-Americans, not to other groups eligible for affirmative action consideration under the law school’s policy. “[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the” LSAT, yet

law schools continue to use the test and then attempt to “correct” for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court.<sup>186</sup>

Accusing the law school of not searching for students who will succeed in law school but of seeking “only a facade,”<sup>187</sup> Thomas opined that the law school “tantalizes unprepared students with the promise of a University of Michigan degree and all the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”<sup>188</sup> Affirmative action in admissions is followed by preferential treatment in selection for the law review, judicial clerkships, and jobs, Thomas continued, and he saw no evidence that minority law graduates “received a qualitatively better legal education (or become better lawyers) than if they had gone to a less ‘elite’ law school for which

185. Thomas wrote:

[T]here is much to be said for the view that the use of tests and other measures to “predict” academic performance is a poor substitute for a system that gives every applicant a chance to prove that he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to “merit.” For example . . . much has been made of the fact that elite institutions utilize a so-called “legacy” preference to give the children of alumni an advantage in admissions. This, and other exceptions to “true” meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation’s universities . . . .

*Id.* at 2359-60. However, Thomas noted, the Equal Protection Clause does not prohibit legacy preferences or other arbitrary admissions procedures. “So while legacy preferences can stand under the Constitution, racial discrimination cannot.” *Id.* at 2360 (footnote omitted). For more on legacy admissions, see *infra* notes 290-97, and accompanying text.

186. *Id.* at 2360-61 (Thomas, J., concurring in part and dissenting in part) (citation omitted).

187. “The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.” *Id.* at 2362.

188. 123 S. Ct. at 2362.



they were better prepared. And the aestheticists will never address the real problems facing ‘underrepresented minorities,’ instead continuing their social experiments on other people’s children.”<sup>189</sup>

Justice Thomas then expressed his concern that others would not be able to distinguish between the “handful of blacks who would be admitted in the absence of racial discrimination” and those African-Americans admitted through affirmative action. “Who can differentiate *between those who belong and those who do not?* The majority of blacks are admitted to the law school because of discrimination, and because of this policy all are *tarred* as undeserving.”<sup>190</sup> In his view, this stigma begets suspicion:

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 . . . .<sup>191</sup>

Rather than avoid the stigma of affirmative action, Thomas wrote, the Court placed its *imprimatur* on a practice that fails to adhere to the equality principle of the Declaration of Independence and the Equal Protection Clause and is contrary to the color-blind Constitution of which (the race-conscious) Justice Harlan spoke of in his dissent in *Plessy v. Ferguson*.<sup>192</sup>

189. *Id.* (footnote omitted).

190. *Id.* (emphasis added).

191. *Id.*

192. 163 U.S. 537 (1896). Harlan’s colorblindness is set out in his statement, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Id.* at 559 (Harlan, J., dissenting). Harlan’s race consciousness is revealed in another passage of his dissenting opinion:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

*Id.* As noted by one scholar, “For Harlan . . . social and economic inequality was simply part of the natural order of things, a result of the superiority of white civilization.” Molly Townes O’Brien, *Justice John Marshall Harlan as Prophet: The Plessy Dissenter’s Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 761 (1998). See also Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 172 (1996) (noting that while Harlan “believed the Fourteenth Amendment rendered African Americans ‘our equals before the law’ . . . [i]t is not so clear that Harlan thought African

The Thomas opinion presents several troubling views concerning the presence of African-American students at the Michigan law school (and, by extension, on the campuses of this nation's colleges and universities, "elite" or otherwise). He asserts that law students at the University of Michigan are unprepared and overmatched and cannot succeed, and that their life in and after law school is and will be one big affirmative action party in which doors will be thrown open for them. In Justice Thomas's view, most African-Americans at the law school are there, not because they are intelligent and hardworking and *qualified* students and future lawyers and members of the bar, but because they are the black subjects of social experimentation who were admitted by an institution interested not in them, but in racial aesthetics and the facade of diversity. On that view, the law school was not just arguably misguided or acting pursuant to what Justice Thomas believed to be a flawed interpretation of the Constitution; rather, the school knowingly put in place and was perpetuating an academic fraud, a facade, with no interest in, or concern for, students of color.

Such denigration of those with a different view of the law and the educational mission of the institution is troubling, especially when coming from a justice who decries the lack of civility in law and society.<sup>193</sup> It is all the more troubling given the findings and conclusion of a study (noted and discussed in several *amici* briefs submitted to the Court)<sup>194</sup> that African-American and other minority graduates of the Michigan law school have been as successful as their white counterparts as measured by income, satisfaction, and service contributions as a citizen/lawyer.<sup>195</sup>

For Justice Thomas, those black folks admitted to the law school ruined it for and (in an interesting choice of words) "tarred as undeserving" the "handful of blacks" who did not have to rely on discrimination in order to gain admission.<sup>196</sup> So tarred, the presence

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Americans were the moral equals of the majority race").

193. See William Raspberry, *Justice on the High Ground*, WASH. POST, Aug. 3, 1998, at A21.

194. See, e.g., Brief of Amici Curiae Michigan Black Law Alumni, *Grutter v. Bollinger*, 2003 WL 399060 (Feb. 14, 2003) (No. 02-241); Brief of Amici Curiae the Society of American Law Teachers, *Grutter v. Bollinger*, 2003 WL 537217 (Feb. 19, 2003) (No. 02-241).

195. See David L. Chambers, Richard O. Lempert, and Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

196. 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

of African-Americans “in the highest places”<sup>197</sup> triggers questions about their competence, questions posed by individuals who evidently assume that they stand in a superior position and have the right to judge all African-Americans and other people of color, and who apparently see and reflexively react to phenotype (so much for colorblindness). This account of the posited stigma of affirmative action, if true, means that “it is an open question today whether [the] skin color” of Secretary of State Colin Powell, National Security Adviser Condoleeza Rice, Representative Harold Ford of Tennessee (a 1996 Michigan law graduate),<sup>198</sup> American Express chief executive officer Kenneth Chenault, Harvard University professor William Julius Wilson, and other African-Americans in “high places” “played a part in their advancement”<sup>199</sup> and stigmatizes them.<sup>200</sup> In my view, such a question ignores the demonstrated abilities and accomplishments of these and other individuals of color<sup>201</sup> and warrants strict scrutiny of the inquisitor and not the subjects of the query.

Chief Justice Rehnquist’s separate dissent, joined by Justices Scalia, Kennedy, and Thomas, argued that the law school’s admissions policy was a “sham” and “a naked effort to achieve racial balancing,” that minorities who were less qualified than Barbara Grutter were admitted, and that not considering race would have resulted in the admission of a significantly smaller number of underrepresented minorities.<sup>202</sup> In other words, too many minorities

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197. *Id.* Whether African-Americans in “lower” places experience the same interrogation of their competence is not discussed by the Justice.

198. See James W. Brosnan, *Ford Optimistic on Court-Ruling—Program Helped Congressman*, COM. APPEAL (TN.), Apr. 2, 2003, at A2.

199. 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

200. Given his fear of stigma, is Justice Thomas on, or would he add himself to, that list? The question whether Justice Thomas was himself the beneficiary of affirmative action has been raised and answered in the affirmative by several commentators. See, e.g., Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 14 (2000); Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196, 201 (1999-2000). But see Jessica Alicia Brown, *Brock’s Word Against Hers*, 5 YALE J. L. & FEMIN. 253, 254 n.11 (1993) (author reports interview with then Yale Law School Dean Guido Calabresi in which Calabresi objected to “the statement that Clarence Thomas was admitted through affirmative action”).

201. For a listing of “a phalanx of black lawyers” who have “relied on their brilliant legal minds to win the battle for justice and economic parity in the courtroom and the boardroom,” see *America’s Top Black Lawyers*, BLACK ENTERPRISE, Nov. 2003, at 121-38.

202. 123 S. Ct. at 2365, 2367, 2369 (Rehnquist, C.J., dissenting).

were admitted by the law school. Moreover, Rehnquist wrote, “from 1995 through 2000 the percentage of admitted applicants who were members of . . . minority groups closely tracked the percentage of individuals in the school’s applicant pool who were from the same group.”<sup>203</sup> Thus, he concluded, the law school’s admissions policy was “a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.”<sup>204</sup> Again, the law school had too many minorities, and in Rehnquist’s view their presence was the reason that Grutter did not gain admission to the University of Michigan Law School.

### B. Gratz

Affirmative action in undergraduate admissions was at issue in *Gratz v. Bollinger*.<sup>205</sup> In 1995 and 1997, respectively, Jennifer Gratz and Patrick Hamacher, white residents of the state of Michigan, applied for admission to the University of Michigan’s College of Literature, Science, and the Arts (LSA). The procedure in place in 1995 evaluated applications according to a “GPA 2” score comprised of grade point average and “SCUGA” factors.<sup>206</sup> Counselors then referred to tables listing GPA 2 ranges and the applicant’s score on the American College Test (ACT) or Scholastic Aptitude Test (SAT) and decided what action would be taken (admit, reject, delay for more information, or postpone for reconsideration) with respect to the applicant. Because these tables called for different decisions based on the race or ethnicity of the applicant, Gratz’s GPA 2 and ACT score resulted in a postponed decision on her application (which was subsequently rejected).<sup>207</sup> Minority applicants with similar scores, however, would have been admitted.<sup>208</sup> Modified in 1997, the admissions procedure gave additional points for underrepresented minority status, socioeconomic disadvantage, or underrepresentation in the academic unit to which the applicant sought admission. Under that procedure a decision on Hamacher’s application was postponed

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203. *Id.* at 2368.

204. *Id.* at 2369.

205. 123 S. Ct. 2411 (2003).

206. As described by the Court, the SCUGA factors “included the quality of an applicant’s high school (S), the strength of an applicant’s high school curriculum (C), an applicant’s unusual circumstances (U), an applicant’s geographical residence (G), and an applicant’s alumni relationships (A).” *Id.* at 2419.

207. Gratz enrolled at, and in 1999 graduated from, the University of Michigan at Dearborn. *See id.* at 2417.

208. *See id.* at 2419.

and his application was later denied.<sup>209</sup> In turn, “[a]n underrepresented minority applicant [with a similar application] . . . would generally have been admitted.”<sup>210</sup>

In 1998, the university began to use a different admissions system based on a selection index (see the Appendix to this article). A maximum of 150 points was awarded to applicants on the basis of high school grade point average, standardized test scores, high school curriculum strength or weakness, Michigan residency, relationships with alumni, an essay, and achievement or leadership. Twenty points were awarded if an applicant was a member of an underrepresented racial or ethnic minority group, attended a predominantly minority or disadvantaged high school, or was a recruited athlete.<sup>211</sup> Applicants with 100-150 points were admitted; those with 95-99 points were admitted or a final disposition as to their application was postponed; scores of 90-94 resulted in postponements or admissions while those in the 75-89 range were delayed or postponed; and the applications of individuals receiving scores of 74 or below were delayed or rejected.<sup>212</sup> In addition, the university reserved “protected seats” for “protected categories” – athletes, foreign students, Reserved Officer Training Corps candidates, and underrepresented minorities – and opened those seats to all qualified candidates where seats were not filled near the end of the admissions cycle.<sup>213</sup> Beginning in 1999 admissions counselors were allowed to “flag” applications for review by an Admissions Review Committee (ARC),<sup>214</sup> with the ARC empowered to decide to admit, defer, or deny admissions to flagged applicants.

The district court, ruling on the parties’ cross-motions for summary judgment, held that the LSA’s 1995-1998 admissions program’s protection of seats for underrepresented minorities

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209. Hamacher enrolled at Michigan State University and graduated from that institution. *See id.* at 2417.

210. *Id.* at 2419.

211. *See id.* at 2419; *id.* at 2431-32 (O’Connor, J., concurring).

212. *See* 123 S. Ct. at 2419.

213. *See id.* at 2420.

214. As described by the Court:

[C]ounselors may, in their discretion, “flag” an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University’s composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography . . . .

*Id.* at 2420.

unlawfully prevented non-protected applicants from competing for the reserved slots and was the equivalent of a quota.<sup>215</sup> That court further held that the admissions program in place in 1999 and 2000 was narrowly tailored to achieve the educational benefits resulting from a racially and ethnically diverse student body, as rigid quotas were not utilized and the policy did not seek to admit a previously set number of minority students. In addition, the court concluded that the twenty points awarded to minority candidates did not insulate those candidates from review and that the program did not seek to achieve racial balancing.

Granting direct review of the district court's ruling,<sup>216</sup> the Supreme Court, in an opinion by Chief Justice Rehnquist, held that the university's then-current admissions policy was not narrowly tailored and was therefore unlawful.<sup>217</sup> Writing for himself and Justices O'Connor, Scalia, Kennedy, and Thomas, Chief Justice Rehnquist noted that while the use of race in admissions was permitted by *Grutter*, the undergraduate policy's particular use of race went too far. "[T]he 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 the university claimed justified its program.<sup>218</sup> Referring to Justice Powell's opinion in *Bakke*, Rehnquist noted that Powell "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity . . . . Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application."<sup>219</sup>

The admissions policy LSA began to use in 1998 did not provide the requisite individual evaluation of each applicant, Chief Justice Rehnquist stated, as the award of twenty points for minority status

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215. See *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 832 (E.D. Mich. 2000), *rev'd in part and remanded*, 123 S. Ct. 2411 (2003).

216. Although the case had been argued to the United States Court of Appeals for the Sixth Circuit, *Gratz* and *Hamacher* asked the Supreme Court "to grant certiorari . . . despite the fact the Court of Appeals had not yet rendered a judgment" and the Court granted that request. *Gratz*, 123 S. Ct. at 2422.

217. The Court also held that *Gratz* and *Hamacher* had standing to seek injunctive and declaratory relief, even though both had graduated from other universities. See *id.* This holding drew the dissent of Justice Stevens. *Id.* at 2435-38 (Stevens, J., dissenting).

218. *Id.* at 2427-28.

219. *Id.* at 2428 (citation omitted).

“has the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant.”<sup>220</sup> To illustrate this point he turned to an example contained in the Harvard College admissions program discussed by Justice Powell in *Bakke*. Three candidates were discussed therein: (1) “A, the child of a successful black physician in an academic community with promise of superior academic performance,” (2) “B, a black who grew up in an inner-city ghetto of semi-literate parents whose achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power,” and (3) “C, a white student with extraordinary artistic talent” whose “unique ability might give him an edge over both A and B.”<sup>221</sup> Under the Michigan system all underrepresented minority applicants would receive twenty points, Rehnquist noted, while student C would receive a maximum of five points for his artistic talent, even if that talent “rivalled that of Monet or Picasso.”<sup>222</sup>

Clearly, the LSA’s system does not offer applicants the individualized application process described in Harvard’s example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate they are African-American, and student C would receive up to 5 points for his “extraordinary talent.”<sup>223</sup>

The university’s flagging system did not provide the necessary individualized review, Rehnquist concluded. Referring again to the Harvard program example, he reasoned that applicants with the individual backgrounds and characteristics of applicants like student A would never be considered because student A would always be admitted and never flagged. While applicants B and C could be flagged and individually considered, “[t]he record does not reveal precisely how many applications are flagged for this individualized

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220. *Id.* (internal quotation marks, ellipsis and footnote omitted).

221. *Id.* at 2428-29 (quoting *Bakke*, 438 U.S. at 324).

222. *Id.* at 2429.

223. *Id.* (footnote omitted). Agreeing with the Court, Justice O’Connor concluded that the undergraduate admissions 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.” *Id.* at 2432 (O’Connor, J., concurring).

consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program."<sup>224</sup> To satisfy strict scrutiny, applicants must receive *Grutter*-type individualized consideration even where doing so can "present administrative challenges" arising from the volume of applications.<sup>225</sup> As the university's undergraduate admissions program did not meet this standard, Chief Justice Rehnquist concluded that the institution's use of race was not narrowly tailored to achieve the compelling interest of diversity and therefore violated the Equal Protection Clause, Title VI, and Section 1981.<sup>226</sup>

Justice Souter's dissent, joined by Justice Ginsburg, argued that the undergraduate program "is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record."<sup>227</sup> Unlike the admissions system struck down in *Bakke*, the Michigan undergraduate program

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 . . . .<sup>228</sup>

Justice Souter continued: "The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'" and the awarding of twenty points for minority status did not make race a deciding factor comparable to the setting aside of seats for minorities invalidated by *Bakke*.<sup>229</sup> Finding no constitutional problem with "the college's forthrightness in saying just what plus

224. *Id.* at 2429. Justice Souter would have remanded the case for the submission of evidence concerning the actual work, functions, and determinations of the ARC. *See id.* at 2442 (Souter, J., dissenting).

225. *Id.* at 2430.

226. *See id.* "[D]iscrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI," and "purposeful discrimination that violates the Equal Protection Clause . . . will also violate Section 1981." *Id.* at 2430 n.23 (citations omitted).

227. *Id.* at 2439 (Souter, J., dissenting).

228. *Id.* at 2440 (citations omitted).

229. *Id.* at 2441.



factor it gives for membership in an underrepresented minority,”<sup>230</sup> he preferred the candor of the LSA approach to the “deliberate obfuscation” of the systems guaranteeing admissions to a set percentage of top students from each high school used in California, Florida, and Texas.<sup>231</sup> Those percentage systems “are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without directly saying what they are doing or why they are doing it . . . . Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”<sup>232</sup>

In her separate dissent, Justice Ginsburg noted the current effects and manifestations of the nation’s history of racial discrimination and argued that the Constitution is both colorblind 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.” . . . Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality.<sup>233</sup>

Viewed in this light, Ginsburg opined, the undergraduate admissions program was not constitutionally infirm, as it did not reserve seats on the basis of race, there was no suggestion that it was adopted to limit or decrease the enrollment of any racial or ethnic group, and there was no showing that the admissions prospects of students who did not receive race-based consideration were unduly constricted.<sup>234</sup>

In an interesting passage, Justice Ginsburg explained why “Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through

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230. *Id.* at 2442.

231. Percentage plans are discussed *infra* at notes 265-89 and accompanying text.

232. 123 S. Ct. at 2442 (Souter, J., dissenting).

233. *Id.* at 2444-45 (Ginsburg, J., dissenting) (citations omitted) (quoting *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966) (opinion of Wisdom, J.)).

234. *See id.* at 2445.

winks, nods, and disguises.<sup>235</sup> She noted:

One can reasonably anticipate . . . 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 at issue here. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural tradition in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished . . . .<sup>236</sup>

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*Grutter* has settled the important question of whether race-based diversity can be considered in deciding who will be admitted to the nation's institutions of higher education. Those who have been concerned about too many minorities and who have claimed that they were victims who were unlawfully denied and deprived of admissions that went to people of color can no longer validly assert that an institution's consideration of and desire for racial diversity, standing alone, is an unconstitutional act. Exactly how institutions can consider race was also settled, as a general matter, by *Grutter* and *Gratz*. Holistic review of individual applicants is permissible; an automatic awarding of specific points for membership in a particular racial group is not. Whether and how these general propositions will stand up to specific applications of *Grutter* and to the devil-in-the-details aspects of affirmative action as institutions promulgate and implement post-*Grutter* programs remains to be seen.

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235. *Id.* at 2446 (footnote omitted).

236. *Id.* (citations omitted). Concluding that Justice Ginsburg's views on the ways in which colleges and universities would continue to enroll minorities were "remarkable," the Court, per Chief Justice Rehnquist, wrote that Ginsburg's observations "suggest that universities . . . will pursue their affirmative-action programs whether or not they violate the United States Constitution," and that such violations "should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities." *Id.* at 2430 n.22.

## V. THE NEXT PHASE

While the legal debate over the question whether race can be considered in college and university admissions has been decided, the next battles over the *Bakke/Grutter* legal regime have just begun. Opponents of the use and consideration of race in college admissions and other areas will not end their campaign against affirmative action. The Supreme Court has spoken but much more remains to be said, as the too-many-minorities and racegoating dynamics and concerns animating those who oppose affirmative action still exist. Unable to convince the Court of the rightness of their position on race and the Constitution, the focus now shifts to reaction, reassessment, and resistance.

Recall, in this regard, Justice Scalia's catalogue of and roadmap for the next generation of post-*Grutter* issues.<sup>237</sup> Those who continue to hold the anti-affirmative-action position can surely take solace in Justice Scalia's dissenting opinion and will undoubtedly monitor the subjects he identified. Terence Pell, president of the Center for Individual Rights (CIR) (the organization that sponsored the *Grutter* and *Gratz* litigation) has let it be known that CIR will sue colleges and universities that improperly consider race, and that *Grutter* "increases considerably the odds that there's going to be additional litigation here."<sup>238</sup> "If the first 24 hours [after the Court's decision in *Grutter*] are any indication," Pell has stated, "I think some schools are determined to continue to take race into account, and it's business as usual for them."<sup>239</sup> When the President of Rice University commented in August 2003 that his institution would consider race as a criterion in admissions, the Center for Equal Opportunity (CEO) submitted a letter of complaint to the United States Department of Education's Office of Civil Rights. In that letter the CEO stated, "For [Rice] to use racial and ethnic preferences in spite of a lack of any need to do so violates" the law, and the organization requested that Rice be required "to re-embrace a non-preferential approach."<sup>240</sup>

Acting in the face of threatened litigation, institutions have

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237. See *supra* notes 171-72 and accompanying text.

238. Diana Jean Schemo, *Group Vows to Monitor Academia's Responses*, N.Y. TIMES, June 25, 2003, at A23; see also *Affirmative Action: Moving on, but very slowly*, THE ECONOMIST, Oct. 4-10, 2003, at 30 (noting that Center for Individual Rights "is compiling a list of wrongs to use in suits against other universities. Lawyers will be busy for years.").

239. Schemo, *supra* note 238, at A23 (bracketed material added).

240. Todd Ackerman, *Rice Under Fire on Racial Preference*, HOUS. CHRON., Aug. 19, 2003, at 15A.

begun to promulgate and implement post-*Grutter* admissions policies that consider race. For instance, the University of Michigan has announced that it will continue to consider race in undergraduate admissions, but will not award extra points to minority applicants and will no longer give points for alumni connections, extracurricular activities, and the like.<sup>241</sup> Moving to a system of holistic review of application files, Michigan will hire over twenty application counselors and readers under a new system that will increase the costs of its admissions process by \$1.5 to \$2 million.<sup>242</sup> Likewise, the Board of Regents of the University of Texas system has decided that race may be considered in admissions decisions and has called on all components of the system to submit for approval any plans for the use of race.<sup>243</sup>

In the wake of *Grutter*, it can also be anticipated that the anti-affirmative-action movement will increasingly turn to state initiatives like those already in place in California<sup>244</sup> and Washington<sup>245</sup> which prohibit public institutions from considering race in public employment, education, or contracting. Indeed, in the weeks following the Court's decisions in the Michigan cases, anti-affirmative-action advocates in Arizona, Colorado, Michigan, and Utah began to consider plans for referenda and initiatives barring race-conscious affirmative action.<sup>246</sup> Participating in that planning is

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241. See Greg Winter, *U. of Michigan Alters Policy On Using Race in Admissions*, N.Y. TIMES, Aug. 29, 2003, at A11 (National Edition).

242. See *id.*

243. See Press Release, Univ. of Texas, University's Admission Policy to Include Consideration of Race (Aug. 28, 2003), available at [http://www.utexas.edu/opa/news/03newsreleases/nr\\_200308/nr\\_admission030828.html](http://www.utexas.edu/opa/news/03newsreleases/nr_200308/nr_admission030828.html) (last visited Feb. 1, 2004). Although the University of Texas hoped to implement the race-conscious policy for the fall semester of 2004, implementation of the policy could be delayed until September 2005 as the result of a state statute requiring the posting of changes in admissions policies one year in advance of the change. See Press Release, Univ. of Texas, Statement on Reinstatement of Affirmative Action in Admission (Sep. 10, 2003), available at [http://www.utexas.edu/opa/news/03newsreleases/nr\\_200309/nr\\_affirmative030910.html](http://www.utexas.edu/opa/news/03newsreleases/nr_200309/nr_affirmative030910.html) (last visited Feb. 1, 2004). Texas A&M University has announced that race will not be considered as a factor in admissions. See Todd Ackerman, *Texas at Center of Debate Over Race, Admissions*, HOUS. CHRON., Dec. 14, 2003, at 43A.

244. See *infra* notes 247-58 and accompanying text.

245. In November 1998, voters in the state of Washington passed Initiative Measure 200. That measure provides, among other things, that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See WASH. REV. CODE ANN. § 49.60.400(1) (West 2002).

246. See Andrew Hacker, *Saved?*, N.Y. REV. OF BOOKS, Aug. 14, 2003, at 22; Steve

Ward Connerly<sup>247</sup> (“who is himself black”),<sup>248</sup> one of the architects of Proposition 209, the California Civil Rights Initiative, which provides that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>249</sup>

Proponents of Proposition 209 were not bashful in expressing their concerns and reasons for that initiative. The state ballot pamphlet published before the vote on the measure stated: “A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.”<sup>250</sup> The proponents of the measure further argued that:

[T]wo wrongs don’t make a right! Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some “goal” or “timetable.” Contracts are awarded to high bidders because they are of the preferred RACE. That’s just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge people equally, without discrimination! . . .<sup>251</sup>

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Miller, *Connerly Expands Fight Against Race Preferences*, WASH. TIMES, Jul. 10, 2003, at A7.

247. See Miller, *supra* note 246. For discussion of Connerly’s efforts to secure the passage of Proposition 209, an anti-affirmative-action initiative in California, see WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* 168-202 (2000).

248. Patricia J. Williams, *Send in the Clowns*, NATION, Sep. 29, 2003, at 9. Noting that Connerly’s “name is almost invariably followed in news accounts by the phrase ‘who is himself black,’” Williams writes that “[t]his is usually followed by a short quote from Connerly proclaiming that he’s not *only* black, but also white, French, Irish and Native American.” *Id.* This is “paradoxical: Connerly’s blackness is almost always mentioned as a kind of rhetorical nod to his ‘authenticity’ in proclaiming the stigma thereof . . .” *Id.*

249. CAL. CONST. art. 1, § 31(a).

250. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) (quoting ballot pamphlet).

251. *Id.* at 697 (quoting pamphlet). Opponents of the proposition responded to these arguments:

California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help achieve equal opportunity for women and minorities in public employment, education and contracting. Instead of reforming affirmative action to make it

In 1996, fifty-four percent of California voters who cast ballots voted for Proposition 209 and made that initiative part of the state constitution.<sup>252</sup>

To the extent that state initiatives like Proposition 209 and Washington's Initiative 200<sup>253</sup> stand up to constitutional challenges,<sup>254</sup> proponents of affirmative action will see further trouble on the legal horizon. For instance, after the vote on Proposition 209 a number of groups and individuals filed a lawsuit contending that the proposition denied racial minorities and women the equal protection of the laws and, because it conflicted with Title VII and other federal statutes, was void under the Supremacy Clause of the United States Constitution.<sup>255</sup> In *Coalition for Economic Equity v. Wilson*<sup>256</sup> the United States Court of Appeals for the Ninth Circuit, applying what it called "conventional" equal protection analysis, concluded that "there is simply no doubt that Proposition 209 is constitutional."<sup>257</sup> The Ninth Circuit stated:

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fair for everyone, Proposition 209 makes the current problem worse . . . .

*Id.* (quoting ballot pamphlet).

252. *See id.*; CAL. CONST. art. 1, § 31(a).

253. *See supra* note 245 and accompanying text.

254. Discussing the constitutionality of Proposition 209, one scholar posited:

The Constitution permits affirmative action because affirmative action does not force a second-class status or citizenship on anyone. But abolishing affirmative action does not thrust a second-class status or citizenship on anyone either. In other words, foes of affirmative action should stop calling on courts to engage in an activism that they supposedly deplore. Instead they should throw their energies behind their Civil Rights Initiatives, the constitutionality of which turns out to go hand in hand with that of affirmative action itself.

Rubinfeld, *supra* note 96, at 470-71. For scholarly analyses of Proposition 209, see Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447 (1997); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

255. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of any State to the Contrary notwithstanding.").

256. 122 F.3d 692 (9th Cir. 1997).

257. *Id.* at 701. The court stated that conventional equal protection analysis "looks to the substance of the law at issue . . ." *Id.* Under that analysis laws classifying persons by race are subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest, while laws classifying individuals by sex are subject to heightened scrutiny and must be substantially related to an important governmental interest. *See id.* at 702 (citing, among other cases, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and *United States v. Virginia*, 518 U.S. 515 (1996)).

Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.<sup>258</sup>

"Impediments to preferential treatment do not deny equal protection," the court concluded, and "[t]hat the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether."<sup>259</sup>

As for the argument that Proposition 209 conflicted with and was therefore preempted by Title VII, the court noted the statute's express preemption provision.<sup>260</sup> The proposition "does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII"<sup>261</sup> since the statute provides that nothing in that legislation "shall be interpreted to require" an employer "to grant preferential treatment to any individual" on account of race or sex.<sup>262</sup> While the court is correct that the text of Title VII does not require preferential treatment, the court failed to ask whether Title VII, as construed and applied by the Supreme Court, allows employers (including state employers) the discretion to promulgate and implement voluntary affirmative action plans. As we

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258. *Id.* The court noted but did not decide the question whether "a statewide ballot initiative [can] deny equal protection to members of a group that constitutes a majority of the electorate that enacted it . . . Is it possible for a majority of voters impermissibly to stack the political deck against itself?" *Id.* at 704. Noting that the Supreme Court has held unconstitutional political structures denying racial minorities the right to vote on an equal basis with others, the Ninth Circuit opined that "[w]hen the electorate votes up or down on a referendum alleged to burden a majority of the voters" (in this case a majority comprised of women and minorities) "it is hard to conceive how members of the majority have been denied the right to vote." *Id.*

259. *Id.* at 707-08. *See also id.* at 708 ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.").

260. *See* 42 U.S.C. § 2000e-7:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

*See also* 42 U.S.C. § 2000h-4 (providing that state laws inconsistent with the purpose and any provision of the Civil Rights Act of 1964 are preempted).

261. *Coalition for Econ. Equal.*, 122 F.3d at 710.

262. 42 U.S.C. § 2000e-2(j).

know, the Supreme Court answered “yes” to that query in both 1979 and 1987.<sup>263</sup> The Ninth Circuit’s approach thus ignored the Supreme Court’s settled interpretation of Title VII and rejected the contrary view that “Congress intended to protect employers’ discretion to utilize race-conscious and gender-conscious affirmative action as a method of complying with their obligations under Title VII. Proposition 209, by eliminating the discretion . . . contravenes this Congressional purpose.”<sup>264</sup> Advocates of affirmative action will face a great if not insurmountable political and legal challenge if other courts follow the lead of the Ninth Circuit when deciding the constitutionality of other initiatives like or modeled on Proposition 209.

What, if anything, would or will satisfy those who wish to inter race-conscious affirmative action measures? One alternative, proposed by the United States in its *Grutter amicus* brief, is a percentage admissions plan like those in use in Texas, California, and Florida.<sup>265</sup> The Texas plan, advocated by African-American and Latino legislators with the assistance of rural white conservative lawmakers,<sup>266</sup> was signed into law in 1997 by then-Governor George W. Bush.<sup>267</sup> The plan<sup>268</sup> provides that state residents graduating in the

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263. See *supra* notes 54 & 66 and accompanying text.

264. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1517 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997).

265. See Brief for the United States as Amicus Curiae, *Grutter v. Bollinger*, 2003 WL 176635 at 14-18, (No. 02-241) (Jan. 17, 2003). For a description of these percentage plans, see Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1737-46 (2001).

266. See Lani Guinier, Comment: *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 162-63 (2003); Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1602 (2003).

267. See TEX. EDUC. CODE ANN. § 51.803 (West 2001):

Each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission and the applicant graduated from a public or private high school in this state accredited by a generally recognized accrediting organization or from a high school operated by the United States Department of Defense . . . .

Institutions admitting applicants pursuant to this law must “determine whether the applicant may require additional preparation for college-level work or would benefit from inclusion in a retention program.” *Id.* at § 51.803(a)&(b).

268. For a criticism of the Texas plan, see Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2517-38 (2003) (book review).



top ten percent of their high school class gain automatic admission to any Texas state university, including the flagship University of Texas at Austin.<sup>269</sup> “Given the racial and economic segregation in the state’s high schools, the assumption was that blacks and Hispanics would be given a fairer chance to enroll, without having to compete directly with whites who lived in richer districts.”<sup>270</sup> In California the top four percent of high school graduates with the requisite grades in mandated courses are automatically admitted, with applicants continuing to compete for admission to the University of California at Berkeley.<sup>271</sup> And Floridians graduating in the top twenty percent of their high school class are automatically admitted to a state-run institution of higher education, but not necessarily the one they

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269. See Robert Tomsho, *Texas’s Race-Neutral Diversity Plan May Face Overhaul*, WALL ST. J., June 20, 2003, at B1. For a discussion of the Texas 10 Percent Plan, see GUINIER & TORRES, *supra* note 19, at 72-74. Guinier and Torres write that the Texas plan “was consistent . . . with the idea that hard work ought to count for a lot and that hard-working students should not be punished for the failure of politicians to meet their state’s constitutional requirement to provide equal educational opportunity within high schools throughout the state.” *Id.* at 72. Interestingly, “[m]any conservative rural white legislators, recognizing that the systematic class bias in the traditional admissions procedure has harmed their white constituents, joined in to support this populist measure.” *Id.* Moreover, the plan

promised to reintegrate Texas higher education and make the university more economically diverse. With a more diverse undergraduate body to draw on, the graduate schools would become more diverse as well. It also promised to begin a debate about how to measure the quality of public secondary education in order to preserve the high quality of Texas higher education. It acknowledged the importance of drawing future leaders from all sectors of the population, not just the affluent or well-endowed. It provided access to the flagship schools to citizens throughout the state and not just those from the resource-rich suburbs of Dallas, Austin, and Houston. And finally, it recognized the valuable role that the flagship schools play in creating a network of public citizens who will serve the state and its taxpayers and whose tax dollars provide the public subsidy that makes the state university affordable.

*Id.* at 72-73.

270. Jacques Steinberg, *The New Calculus Of Diversity on Campus*, N.Y. TIMES, Feb. 2, 2003, at Week 3 (National Edition). See also Adams, *supra* note 265, at 1746-58 (discussing role of racial segregation in achieving diversity under percentage plans). Testifying on the percentage plan legislation at a hearing before the Texas House Committee on Higher Education, Professor Michael Olivas stated:

The 10% rank is going to be particularly efficacious in the state of Texas ironically as a result of the extreme racial isolation of its high schools. Because of that racial isolation, many rural and urban minority schools will have a number of minority students in the top 10% of their class who, I believe, will have an opportunity to be considered for admissions at flagship institutions where they are not presently able to do so because of the lower test scores these groups tend to present.

Adams, *supra* note 265, at 1739-40 (footnote omitted) (quoting Olivas testimony).

271. See Tomsho, *supra* note 269, at B1.

want.<sup>272</sup>

As noted by the authors of the Texas ten percent plan (one of whom is my colleague, Professor Michael Olivas), percentage plans in Texas and California have not resulted in a rise in the admission rates of African-Americans and Latinos<sup>273</sup> (even though the plans have benefited Asian-Americans).<sup>274</sup> Undergraduate racial and ethnic diversity at the University of Texas has returned to pre-*Hopwood* levels, the current enrollment of first-time minority freshmen is higher than pre-*Hopwood* numbers, and “[w]hile the percentage of African-American and Latino/Hispanic students remain slightly lower than pre-*Hopwood* levels, these numbers still represent an improvement over the low point post-*Hopwood*.”<sup>275</sup> Furthermore, and notably, the college grades of students admitted through the ten percent plan are higher than the grades of “non-top-ten percenters” and ten percenters “are now performing as well in college as their non-top-ten percent counterparts who scored 200-300 points higher on the SAT.”<sup>276</sup>

Some have complained that percentage-plan admissions unfairly foreclose admissions to students from largely white and affluent suburbs, and that “minority students who would have been admitted under affirmative action and who, based on past experience would have succeeded” are also being rejected.<sup>277</sup> Percentage plans “have their own kinds of unfairness and arbitrariness,” one scholar has argued.<sup>278</sup>

In fact, they discriminate in their own way. A student who was in the top 20 percent of an extremely demanding high school might well have worked much harder and be much better prepared than a student who is in the top 10 percent of an extremely weak high school. Why should admissions offices blind themselves to differences among high schools? Why should students be punished for being in tough schools? Why

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272. *Id.*

273. See Brief of Amici Curiae of the Authors of the Texas Ten Percent Plan, *Gratz v. Bollinger*, 2003 WL 402142, at \*3 (Feb. 18, 2003) (No. 02-516).

274. See Tomsho, *supra* note 269, at B1; Steinberg, *supra* note 270, at 3. On Asian-Americans and affirmative action, see FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 131-41 (2002).

275. Torres, *supra* note 266, at 1600, 1602 (footnote omitted).

276. *Id.* at 1604 (footnote omitted).

277. Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, *CHRON. HIGHER EDUC.*, Aug. 4, 2000, at A48.

278. SUNSTEIN, *supra* note 50, at 202.

should they benefit from being in easy ones? . . . Students from academically strong schools often have a tremendous amount to offer, even if they did not end up in the top 10 percent. Universities should be allowed to take this point into account. A top 10 percent policy can be deeply unfair to applicants and universities alike.<sup>279</sup>

Some parents in Texas, concerned that their children will not graduate in the top ten percent of their class, have embarked on a “new white flight” and enroll their sons and daughters at schools where finishing at or above the magical ten percent line is more certain, even though three in four applicants in the next decile are admitted to the University of Texas at Austin or Texas A&M.<sup>280</sup>

At the University of Texas at Austin sixty-nine percent of the 2003 incoming freshman class was comprised of persons admitted under the ten percent plan.<sup>281</sup> “University officials have put special caps in place to prevent 10 percenters from taking up all available openings in the business and communications schools.”<sup>282</sup> According to one Texas parent, the plan “has hurt some kids who are more qualified than the ones getting in,”<sup>283</sup> a complaint that was heard by politicians who introduced a filibustered bill in the Texas legislature limiting automatic admissions to students who took and completed a state-recommended college-preparatory curriculum.<sup>284</sup> As can be seen, many are not and will never be convinced that diversity sought through and achieved by percentage plans (which are incoherently championed by opponents of affirmative action)<sup>285</sup> or other devices<sup>286</sup>

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279. *Id.* See also Guinier, *supra* note 266, at 167 (stating that “an automatic admissions system based on high school grades may appear both arbitrary and backward-looking,” arbitrary “because it uses a single criterion without investigating how that criterion applies to individual students or is influenced by local norms, funding, and teacher qualifications,” and “backward-looking because it chooses students based on what they did in the past: they performed well in high school”); *id.* at 167 n.216 (“using grades alone disadvantages those who attend a more competitive high school or undertake a more difficult curriculum”).

280. See Rick Casey, *White Flight in Age of 10 Percent*, HOUS. CHRON., Sep. 5, 2003, at 25A; Marta Tienda & Sunny Niu, *Flagships, Feeders, and the Texas’ Top 10% Plan*, available at <http://www.texastop10.princeton.edu/> (last visited Jan. 26, 2004).

281. See Tomsho, *supra*, note 269 at B4.

282. *Id.*

283. *Id.* (quoting parent).

284. See *id.*

285. Arguments for percentage plans by opponents of affirmative action are puzzling. As Professor Cass Sunstein has noted: “A top 10 percent policy, or any other policy specifically designed to promote racial diversity, should itself be unconstitutional, at least if race-conscious policies are unconstitutional too.” SUNSTEIN, *supra* note 50, at 203. “It

are “fair” and recognize and reward “merit” (with “merit” defined as and limited to grade point average and standardized test scores).<sup>287</sup>

Thus, the too-many-minorities and racegoating dynamics will continue to be a significant part of the text and the subtext of the ongoing affirmative action debate. The concern some have that affirmative action results in the admission of undeserving and unqualified or underqualified minorities is often based on the argument that colleges and universities have improperly departed from the notion of “merit” noted in the preceding paragraph. One would think that those who are troubled by this departure would also be troubled by other admissions decisions based on or influenced by factors other than test scores and GPAs, such as athletic prowess,<sup>288</sup> but, as Professor Ruth Colker has pointed out, “Americans . . .

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is incoherent to contend that because race-neutral methods might promote racial diversity, race-conscious affirmative action programs are unacceptable.” *Id.*

286. In 2001 the University of California at Los Angeles School of Law established a Critical Race Studies program. According to a newspaper account, applicants expressing an interest in the program enjoyed a preference in admissions, and the program “has helped the law school increase its enrollment of black first-year students to 13 in 2002 from five in 2000—out of a class of 305 each year. Black enrollment is still less than in 1996, the last year affirmative action was allowed in California.” Further, twelve of twenty-three students receiving programmatic admissions in 2002 were African-American, Hispanic, or Native-American. Daniel Golden, *Schools Find Ways To Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1. One UCLA Law School professor has described the Critical Race Studies program as “very unhealthy” and “legally suspect” and does “not believe the solution is to find ways to rig the application process so that very small numbers of underrepresented minorities with weak academic qualifications are admitted through the back door.” *Id.* at A5.

287. Not all agree with this definition of merit. “Test scores and grades are useful measures of the ability to do good work, but they are no more than that. They are far from infallible indicators of other qualities some might regard as intrinsic, such as a deep love of learning or a capacity for high academic achievement.” BOWEN & BOK, *supra* note 16, at 277. Interestingly, “Martin Luther King, Jr., now regarded as one of the greatest orators of this century, scored in the bottom half of all test-takers on the verbal GRE . . .” *Id.* at 277 n.1 (citation omitted).

288. As one editorial put it:

[I]f affirmative action, quotas, and racial preferences are wrong, then so are scholarships awarded to athletes whose grades and SAT scores would not otherwise qualify them for admission. The NCAA’s minimums usually fall far below the academic requirements for regular students—particularly at schools that brag about their reputations for integrity and excellence.

*Punt*, Editorial, RICHMOND TIMES-DISPATCH, Oct. 6, 2002, at F2. “We wonder—how many of affirmative action’s loudest critics would support the end of preferences if that meant the disbanding of a bowl-bound football team?” *Id.* See also Karen W. Arenson, *Study of Elite Colleges Find Athletes Are Isolated From Classmates*, N.Y. TIMES, Sep. 15, 2003, at A12 (National Edition) (athletes recruited to elite colleges and universities “were admitted with significantly lower grades and College Board scores and then performed more poorly than would be expected for students with those grades and scores”).

believe that racial minorities were the only group sometimes to gain admissions without meeting such objective criteria.”<sup>289</sup>

In worrying about too many minorities and searching for racegoats, some opponents of affirmative action have not expressed similar concern or outrage over legacy preferences afforded relatives of alumni,<sup>290</sup> including the children of Supreme Court Justices<sup>291</sup> and the son of a President of the United States (who also became President).<sup>292</sup> Legacy preferences overwhelmingly favor whites<sup>293</sup> and can make a significant difference for applicants. For example, Harvard admits forty percent of its legacy applicants (the general acceptance rate is eleven percent), Princeton’s legacy admission rate is thirty-five percent (eleven percent for all other applicants), and forty-one percent of legacy applicants to the University of Pennsylvania are admitted as compared with a twenty-one percent rate for non-legacy applicants.<sup>294</sup> Professor Jody Armour has written

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289. COLKER, *supra* note 3, at 34.

290. “While tirades against affirmative action regularly fill the pages of magazines and newspapers, the most disturbing form of affirmative action—preference given to children of alumni, known as ‘legacies’ – is usually ignored by critics.” *Id.* (footnote omitted). It should be noted that Justice Thomas did refer to this practice in his dissent in *Grutter*. See *supra* note 151 and accompanying text. See also LAWRENCE & MATSUDA, *supra* note 35, at 128 (discussing legacy preferences).

It should be noted that Texas A&M University, subsequent to its decision to not consider race in admissions, see *supra* note 243, abolished its preferential admissions policy for legacies. See John Brittain, Michael Olivas & State Sen. Rodney Ellis, *Now Aggies need to take the next step*, HOUS. CHRON., Jan. 11, 2004, at 1C; Greg Winter, *Texas A&M Ban on “Legacies” Fuels Debate on Admissions*, N.Y. TIMES, Jan. 13, 2004, at A16 (National Edition).

291. Justice Breyer’s father attended Stanford University, as did Breyer and his son. Justice Kennedy, two of his sons, and one daughter attended Stanford, as did Justice O’Connor and two of her children. Justice Stevens, like his father, attended the University of Chicago and Northwestern Law School, with four of his nephews and nieces attending Chicago. And Justice Ginsburg and her daughter attended Harvard Law School. See Daniel Golden, *For Supreme Court, Affirmative Action Isn’t Just Academic*, WALL ST. J., May 14, 2003, at A1.

292. See Maureen Dowd, *The Class President*, N.Y. TIMES, Jan. 22, 2003, at A23 (National Edition) (noting that President George W. Bush was admitted to Yale as a legacy).

293. See Buchanan, *supra* note 19, at 164 (“Past societal discrimination . . . causes alumni and family connection criteria to work presently to the advantage of white applicants.”). “At the University of Virginia, 91% of legacy applicants accepted on an early-decision basis for next fall are white; 1.6% are black, 0.5% are Hispanic, and 1.6% are Asian. Among applicants with no alumni parents, the pool of those accepted is more diverse: 73% white, 5.6% black, 9.3% Asian and 3.5% Hispanic.” Daniel Golden, *Preference for Alumni Children In College Admission Draws Fire*, WALL ST. J., Jan. 15, 2003, at A2.

294. Golden, *supra* note 293, at A1. A Harvard admissions officer has stated that the

about the legacy applicant to Amherst who was deemed to be “a dull kid” but was considered because she was an “a.d.,” an “alumni daughter.”<sup>295</sup> Even though legacy admissions constitute a form of racial and ethnic nepotism,<sup>296</sup> many do not see it that way, for “the public perception of admissions policies is filtered through a racist lens. When the group that is targeted for assistance shifts from a predominantly white male economic elite to an African-American subclass, the public takes notice and complains about the derogation of the merit principle.”<sup>297</sup> In other words, some members of the public see and will continue to see too many minorities and will question whether those persons of color are entitled to, and should be in, certain spaces and places.

## VI. CONCLUSION

As I was redrafting and finalizing this article, I read with great interest a newspaper account of a bake sale held by a conservative student group at Southern Methodist University protesting the consideration of race and gender in college admissions. Cookies could be purchased by white males for one dollar; by white women for seventy five cents; by Hispanics for fifty cents; and by African-Americans for twenty-five cents.<sup>298</sup> Contending that the sale could have created an unsafe situation, the university shut it down, with the

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average SAT score of its admitted legacy applicants is two points below the overall average of admittees, with legacy status used to break ties between comparable applicants. *Id.* at A2. One admitted legacy applicant at Harvard had SAT scores lower than the scores of approximately seventy-five percent of her classmates. *Id.* at A1.

295. Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1197-98 (1997).

296. Nepotism “can conflict with the principles of equal opportunity . . . .” STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 246 (2002). “To African Americans, nepotism is tantamount to racism, since favoritism toward whites—whether related to oneself or not—is morally no different from discrimination against blacks. That is why proponents of affirmative action often say that whites hypocritically deny to blacks what they practice themselves as a matter of course.” ADAM BELLOW, *IN PRAISE OF NEPOTISM: A NATURAL HISTORY* 13 (2003). “[A]ffirmative action . . . pit[s] ethnic identity groups against one another, suggesting that even in America the claims of ethnic nepotism have yet to be transcended . . . .” *Id.* at 18; *see also* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 56 (1992) (“terms like ‘merit’ and ‘best qualified’ are infinitely manipulable if and when whites must explain why they reject blacks to hire ‘relatives’—even when the only relationship is that of race”).

297. COLKER, *supra* note 3, at 35.

298. *See* Linda K. Wertheimer, *Dallas University Halts Race-Based Bake Sale*, DALLAS MORNING NEWS, Sep. 25, 2003, available at 2003 WL73116441.

group recording only \$1.50 in sales.<sup>299</sup> Of the many interesting aspects of the sale and the university's actions in stopping it, a statement made by the executive director and former chapter officer of the protesting group caught my eye; as they stated in an op-ed piece, "affirmative action creates a hostile environment wherever it is used. The hostility is often latent, but it is never far from the surface . . . ."<sup>300</sup> That statement confirms, illustrates and illuminates, perhaps better than pages of legal analysis and commentary ever could, the resentment and angst felt by many opponents of affirmative action when they observe minority students or employees or government contractors. These feelings and dynamics of the anti-affirmative-action position will continue to be a significant part of the legal and public policy debate in the wake of *Grutter*.

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299. See *Bake Sale Targets Affirmative Action*, CHI. TRIB., Sep. 26, 2003, at 43; *SMU Bake Sale Offends Some*, HOUS. CHRON., Sep. 26, 2003, at 27.

300. Matthew J. Griffing & Beth Henary, Editorial, *Shutdown of Bake Sale at SMU Half-baked*, HOUS. CHRON., Sep. 29, 2003, at 19A.

## APPENDIX

The following point system used to rate applicants for undergraduate admissions to the University of Michigan was invalidated by the Supreme Court in *Gratz*:<sup>301</sup>

### GPA

Score	Points
2.0	40
2.1	42
2.2	44
2.3	46
2.4	48
2.5	50
2.6	52
2.7	54
2.8	56
2.9	58
3.0	60
3.1	62
3.2	64
3.3	66
3.4	68
3.5	70
3.6	72
3.7	74
3.8	76
3.9	78
4.0	80

### HIGH SCHOOL QUALITY

Score	Points
0	0
1	2
2	4
3	6
4	8
5	10

### DIFFICULTY OF CURRICULUM

Score	Points
-2	-4
-1	-2
0	0
1	2
2	4
3	6
4	8

ACT	SAT1	Points
1-19	400-920	0
20-21	930-1000	6
22-26	1010-1190	10
27-30	1200-1350	11
31-36	1360-1600	12

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301. See Barbara Kantrowitz & Pat Wingert, *What's at Stake*, NEWSWEEK, Jan. 27, 2003, at 34.



**POINTS (MAXIMUM OF 40)****GEOGRAPHY**

Michigan Resident	10
Underrepresented Michigan County	6
Underrepresented State	2

**ALUMNI**

Legacy (parents, stepparents)	4
Other (grandparents, siblings)	1

**ESSAY**

Very Good	1
Excellent	2
Outstanding	3

**PERSONAL ACHIEVEMENT**

State	1
Regional	3
National	5

**LEADERSHIP AND SERVICE TEST SCORES**

State	1
Regional	2
National	5

**MISCELLANEOUS (SELECT 1)**

Socioeconomic disadvantage	20
Underrepresented racial/ethnic Identification or education	20
Men in nursing	5
Scholarship athlete	20
Provost's discretion	20

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