

RECENT DEVELOPMENTS IN THE USA

American update: the Supreme Court and affirmative action

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Introduction

Affirmative action has long been a source of contention in the United States, especially in matters affecting schools. In companion cases from the University of Michigan, the Supreme Court reflected its own ambivalence in this regard, upholding the use of race-conscious affirmative action admissions policies in its law school in *Grutter v. Bollinger (Grutter)*,¹ but striking down its application in its undergraduate programs in *Gratz v. Bollinger (Gratz)*.²

Even though *Grutter* and *Gratz* left a variety of questions unanswered, they are likely to impact on all levels of education in the United States. As such, this article is divided into three major sections. The first part reviews the judicial history of affirmative action, paying particular attention to Supreme Court cases. The second section examines the background and opinions in *Gratz* and *Grutter*, in which each of the nine Justices authored at least one opinion. The final section reflects on the potential ramifications of *Gratz* and *Grutter* for educators.

The judiciary and affirmative action

The Supreme Court and affirmative action

Affirmative action entered the American legal and educational consciousness in *Regents of University of California v. Bakke (Bakke)*,³ a dispute over the constitutionality of a medical school's race based admissions policy. In *Bakke*, the Supreme Court considered a challenge to a medical school program filed by a white applicant who was denied admission under an affirmative action program which set aside 16

seats out of 100 openings for specified minority groups, defined as African, Mexican, Asian, and Native-Americans. The white male was initially excluded, and later ordered admitted by the Supreme Court of California, even though his qualifications were substantially equivalent to those who were admitted in his place. In a plurality opinion, the Court held that while the program was illegal and the white student should have been admitted, the consideration of race *per se* was not constitutionally forbidden in admissions decisions.

The plurality in *Bakke*, which included two current members of the Court, Chief Justice Rehnquist and Justice Stevens, found that the white applicant was unlawfully excluded in violation of Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits recipients of federal funding from discriminating based on race, color, or national origin.⁴ The plurality did not review, and did not think that it should have considered the white applicant's right to Equal Protection under the Fourteenth Amendment since it was able to resolve the dispute on the basis of Title VI.⁵ Justice Powell, who agreed with the plurality in agreeing that the plaintiff should have been admitted to the medical school, rejected the argument that the admissions plan was unconstitutional since members of the minority groups covered by it could compete for the entire 100 seats even though white students could only compete for 84 openings.

Powell's concerns about the program as a whole aside, he contended that taking race or ethnic origin into consideration was not unconstitutional since it was only one of several factors in admissions since the university's quest for a diverse student body was of paramount importance. On this point, the plurality agreed with Powell that the university's plan passed constitutional muster. Yet, the plurality did not address race as a factor, thereby setting the stage for future litigation.

After *Bakke*, the Court reviewed affirmative action programs in a variety of settings. In *Fullilove v. Klutznik*,⁶ another plurality, the Court upheld a statute authorizing federal public works projects that gave preferences to businesses owned by members of racial minorities. None of the Court's five opinions which considered the constitutionality of racial set asides could garner any more than three Justices. The only two current members of the Court, Chief Justice Rehnquist and Justice Stevens, dissented.

In *Richmond v. J.A. Crosson, Co.* (1989),⁷ the Court struck down a federal law that would have increased the number of minority-owned businesses that were awarded construction contracts. Writing for the Court, Justice O'Connor, was joined in parts and in the judgment by four current members of the bench: Chief Justice Rehnquist and Justices Stevens, Kennedy, and Scalia. All three of the dissenters have since retired. A year later, the Court upheld a preference policy with regard to minority ownership of new radio or television stations in *Metro Broadcasting v. Federal Communications Commission*⁸ since it believed that it had a substantial relationship to an important Congressional interest, in a five to four vote. From the majority, only Justice Stevens remains on the bench; the four dissenters, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy are still on the Court. Five years later the Court overruled this judgment in *Adarand Constructors Inc. v. Peña (Adarand)*.⁹

A closely divided Court, in *Adarand*, in an opinion by Justice O'Connor, and

joined by Chief Justice Rehnquist, Justices Kennedy, Scalia (in part), and Thomas (in part), reasoned that a program that would have given granted preferences to minority contractors in building projects could not be upheld unless it could pass the so-called strict scrutiny test. The Court applies strict scrutiny under the Equal Protection Clause when a governmental action seeks to classify individuals based on a suspect classification such as race or national origin or attempts to limit a fundamental constitutional right such as freedom of religion or speech. When the Court employs strict scrutiny, the government seldom manages to meet the requirement of proving that an action is as narrowly tailored as possible to meet a compelling governmental interest. In *Adarand* the Court examined the Equal Protection Clause under the Fifth Amendment because the actions of the federal government were at issue. Justice O'Connor, joined only by Justice Kennedy, both of whom figure to be key players in *Gratz* and *Grutter*, agreed that it was possible that such a program could pass constitutional muster in the future. In three separate dissents, Justices Stevens, Souter, and Ginsburg disagreed with the majority, most notably on whether strict scrutiny should have been applied and Congressional authority to enact such a statute.

The Court has also been less than enthusiastic about race as a factor in creating legislative districts. In a case that predated *Bakke*, *United Jewish Organizations v. Carey*,¹⁰ a plurality upheld a plan authorized by a New York statute that created districts in which minority voters were in the majority. The only two current members of the Court who participated in the case, Chief Justice Rehnquist and Justice Stevens, were part of the plurality. However, in *Shaw v. Reno I*,¹¹ the Court indicated that where the legislature in North Carolina took race into consideration in creating Congressional districts wherein minorities constituted a majority of voters, it was subject to strict scrutiny. Justice O'Connor's majority opinion was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Among the dissenters, Justices Stevens and Souter remain on the Court.

Two years later, in *Miller v. Johnson (Miller)*,¹² in an opinion by Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, the Court, with dissents by Justices Stevens, Souter, Ginsburg and Breyer, struck down a legislative plan from Georgia. The majority rejected the plan, which would have created a congressional district based on race absent proof that the scheme, in pointing out that it was not narrowly tailored to achieve a compelling governmental interest. Subsequently, in *Shaw v. Reno II*,¹³ the Court, in an opinion by Chief Justice Rehnquist, with all of the remaining votes cast exactly as they were in *Miller*, was of the view that since the plaintiffs proved that race was the predominant reason for creating the districts, the statute was subject to strict scrutiny. The Court thus invalidated the plan because it was not sufficiently narrowly tailored to correct past instances of governmental discrimination against minorities. Finally, *Bush v. Vera*,¹⁴ another plurality, authored by Justice O'Connor, and joined fully only by Chief Justice Rehnquist and Justice Kennedy, vitiated the creation of three Congressional districts in Texas where race was a key factor. Justices Scalia and Thomas concurred in the judgment but not Justice O'Connor's rationale; the four-bloc dissent was again the same as in *Miller*.

The Court's only other case on education, *Wygant v. Jackson Board of Education*¹⁵ concerned a school board's attempt to maintain a racially integrated faculty during a reduction-in-force. The Court expressed its discomfort with using race as a factor in evaluating who could be retained, writing that a layoff of non-minority teachers based solely on race violated equal protection. Among active members of the Court, Chief Justice Rehnquist and Justice O'Connor voted with the majority while Justice Stevens joined the dissent.¹⁶

Another case involving school employment, *Taxman v. Board of Education of the Township of Piscataway*,¹⁷ almost made its way to the Supreme Court. At issue was a dispute from New Jersey wherein a school board, erroneously thinking that its affirmative action plan required it to terminate the contract of a white, rather than an African-American teacher, based solely on race, dismissed the white woman even though the two had virtually identical credentials. An en banc Third Circuit affirmed that since the board's reduction-in-force plan (a system whereby school boards excess personnel due to financial exigencies or a lack of students), which was adopted for the purpose of promoting racial diversity rather than remedying discrimination or the effects of past discrimination, trammelled the rights of non-minorities, it was unconstitutional. The case was days from oral argument before the Supreme Court when the parties reached a settlement, thereby leaving the status of affirmative action further in doubt.

Lower federal court cases

Following the lead of the Supreme Court, the lower federal courts have generally mixed results over the use of affirmative action plans in education. In cases involving K-12 education, the First and Fourth Circuits have struck down the use of race but the Ninth Circuit has permitted it to be used as a criteria in admissions decisions.

The First Circuit, in *Wessman v. Gittens*,¹⁸ struck down an admissions policy that took race and ethnicity into consideration at the Boston Latin School. In explaining that the policy could not be justified on the basis of past discrimination, the court added that since diversity was not a compelling interest educational officials had violated a white student's right to equal protection, it ordered her admitted into the school. Similarly, in *Eisenberg v. Montgomery County Public Schools*,¹⁹ the Fourth Circuit ruled in favor of parents of a first-grade student in Maryland who challenged a policy at a magnet school that used race and ethnicity as a factor in considering whether a student could transfer into the program. The court directed the school board to admit the child to the magnet school when it found that using race as a factor in the transfer policy violated the Equal Protection because its action was insufficiently narrowly tailored to achieve the goal of a diversified student body.

On the other hand, in *Hunter ex rel. Brandt v. Regents of the University of California (Hunter)*,²⁰ the Ninth Circuit upheld a policy that included race and ethnicity as criteria in admitting students to a university's laboratory school. The court affirmed an earlier judgment that since the state had a compelling interest in providing effective education in urban schools, the use of race was narrowly tailored

to achieve this goal. While school officials in Boston did not seek further review, the Supreme Court refused to hear appeals from the latter two cases.

Turning to higher education, the Fourth, Fifth, and Eleventh Circuits vitiated affirmative action plans while the Sixth and Ninth Circuits rejected such challenges. The Fourth Circuit, in *Podberesky v. Kirwan*,²¹ struck down a scholarship program at the University of Maryland that was open only to African-American students as violating the Equal Protection Clause. The court reasoned that the goals of the race-conscious scholarship program could not be used to lower effective minimum acceptance criteria in creating an applicant pool since this was insufficiently narrowly tailored to meet the university's goal absent evidence that officials tried, without success, to use a race-neutral solution.

In *Hopwood v. Texas*²² the Fifth Circuit invalidated an admissions plan at the University of Texas School of Law which granted substantial preferences to racial minorities. The court held that a preference system based on race did not survive strict scrutiny under equal protection. On remand, a federal trial court decided that evidence in the record was sufficient to warrant the finding that the plaintiffs who challenged the program would not have had a reasonable chance of acceptance even under a system that did not employ racial preferences.

In *Johnson v. Board of Regents of the University of Georgia*,²³ the Eleventh Circuit upheld that a state university's admissions policy was unconstitutional. The court affirmed that the plan, which awarded an arbitrary, but fixed, numerical diversity bonus to non-white applicants at a decisive stage in the admissions process, failed the strict scrutiny test.

Conversely, the Ninth Circuit, consistent with its judgment in *Hunter*, rejected a challenge from unsuccessful white applicants who charged that a state law school engaged in racially discriminatory admissions practices in *Smith v. University of Washington Law School*.²⁴ The court affirmed that the plaintiffs' class action suit was properly decertified, essentially ending their claim, when a state initiative was passed which prohibited the state from offering preferential treatment to any individual or group based on race, sex, color, ethnicity, or national origin. In dicta, the court asserted that a properly designed and operated race-conscious admissions program would not have violated either equal protection or Title VI. The Supreme Court refused to hear appeals in all four of the preceding cases from higher education.

Affirmative action at the University of Michigan

Background

As noted, both *Grutter v. Bollinger* and *Gratz v. Bollinger* originated at the University of Michigan. *Gruter* was filed by an unsuccessful 43-year-old white female applicant with a 3.8 (on a scale of 4.0) undergraduate Grade Point Average (GPA) and a Law School Admission Test score that put her in the 86th percentile nationally who challenged the Law School's use of race as a factor in admissions decisions. During the course of the litigation, school officials conceded that the plaintiff probably would have been admitted had she been a member of one of the

underrepresented minority groups, defined as African-Americans, Hispanics, and Native Americans.

A federal trial court in Michigan entered an injunction in *Gruter* which temporarily prevented university officials from applying their policy on the basis that it violated both equal protection and Title VI insofar as it was insufficiently tailored to further its stated goal of achieving diversity. On appeal, the Sixth Circuit vacated the injunction and reinstated the policy since it was maintained that it was narrowly tailored to achieving the law school's stated goal of a diverse student body.

Gratz was filed by two unsuccessful white applicants, one female and the other male, to undergraduate programs at the University of Michigan's College of Literature, Science, and the Arts. The students claimed that the use of race as a factor applied a more stringent standard to non-minorities. During the year that the female sought admission, university officials accepted all 46 applicants from the preferred minority group with the same adjusted grade point average and test scores as non-preferred candidates, of whom only 121 of 378 were selected.²⁵ The policy also gave the same minority groups as in *Grutter* a bonus of 20 points on a 150-point admissions scale, an amount roughly equivalent to one full grade on a four-point GPA.²⁶ The same scale awarded only 12 points for a perfect score of 1600 on the Scholastic Aptitude Test.²⁷

A federal trial court in *Gratz* struck down the university's admissions policy on the basis that the race-conscious admissions policy was unconstitutional insofar as it was not a sufficiently narrowly tailored means of achieving the governmental interest in remedying the current effects of past discrimination or the discriminatory impact of its other admissions criteria. The university sought further review from the Sixth Circuit, which did not render a judgment. The Supreme Court agreed to hear an appeal which considered both cases.

At the Supreme Court

To the extent that members of the Supreme Court hold true to their consistently expressed views, there were few surprises from individual Justices in *Gratz* and *Grutter*. As expected,²⁸ Chief Justice Rehnquist, joined by Justices Scalia and Thomas, opposed the affirmative action policies in both *Grutter* and *Gratz*. On the other hand, Justices Stevens, Souter, and Ginsburg supported the affirmative action plans in both cases. Given her role as swing voter, there were no major surprises in Justice O'Connor's joining the majority in *Grutter*, thereby upholding the policy in the law school while joining the dissent from that case in forming a different majority in *Gratz*, striking down the undergraduate admissions policy; it was a bit of a surprise that Justice Breyer joined Justice O'Connor in *Gratz* since he was expected to support affirmative action in both cases. Although his position was not entirely clear, since Justice Kennedy is also a swing vote, his having opposed affirmative action in both cases was not surprising.

Grutter v. Bollinger. The Court's opinion in *Gruter* was authored by Justice O'Connor and joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice

Ginsburg wrote a separate concurrence that was joined by Justice Breyer. Justice Scalia, joined by Justice Thomas, concurred in part, and dissented in part, agreeing on those points that were in line with their dissenting opinions.

Writing for the five-member majority, Justice O'Connor believed it unnecessary to consider whether diversity is a compelling state interest since she endorsed Justice Powell's concurrence in *Bakke* which established this premise. Accordingly, she decreed that since diversity was a compelling state interest, and officials at the University of Michigan's Law School narrowly tailored their plans to achieve a 'critical mass'²⁹ of underrepresented racial and ethnic minorities in the student body, they could employ race as a 'plus' factor in admissions decisions. O'Connor also wrote that diversity could be used as a factor as long as university officials did not apply a quota system and since all candidates were subject to 'a highly individualized, holistic review of each applicant's file'.³⁰ Yet, she never adequately explained how the admissions policy satisfied the Court's traditional strict scrutiny test, under which a plan which groups individuals based on a so-called suspect classification such as race must employ a means that is narrowly tailored to achieve its goal since, as applied, it appeared to offer the greatest benefit to African-American applicants. At the same time, she paid scant attention to data suggesting that the admissions policy had many of the earmarks of a quota system. In rounding out her opinion by adding that she hoped that racial preferences will no longer be necessary in 25 years to further the government's interest in diversity, Justice O'Connor, unfortunately, never addressed under what circumstances such set aides should end or when the goal will have been achieved, thereby opening the door to future litigation.

In a brief concurrence that was joined by Justice Breyer, Justice Ginsburg relied on the United Nations Convention on the Elimination of All Forms of Racial Discrimination in lending her support to the university's affirmative action admissions policy.

Justice Scalia's partial dissent from the judgment of the Court included a limited concurrence to the extent that it supported his rationale, which was joined by Justice Thomas. In criticizing the law school's 'mystical "critical mass" justification for its discrimination by race [that] challenges even the most gullible mind',³¹ Justice Scalia feared that permitting racial preferences that impermissibly discriminate against non-favored groups will lead to further, unwelcomed, litigation.

Justice Thomas's dissent, which would have struck the race-conscious policy down, was joined in part by Justice Scalia, and began with a reference to Frederick Douglass in agreeing with the great abolitionist that 'blacks can achieve in every avenue of American life without the meddling of university administrators'.³² He also questioned why the Court granted such deference to university officials as they sought to assert their autonomy to make policies that ignored applicable legal standards such as equal protection under the law.

Chief Justice Rehnquist's dissent, which was joined by Justices Kennedy, Scalia, and Thomas, maintained that the majority essentially overruled *Bakke* in its cursory analysis of the strict scrutiny test since Justice O'Connor failed to articulate a compelling reason for her analysis other than her mere reliance on Justice Powell's plurality opinion in *Bakke*. He also noted that admissions data from Michigan for

the years 1995–2000 demonstrated that the university operated on what appears to be a quota system since the percentages of minorities who were accepted into the law school was, at most, off by a percentage point from their representation in the applicant pool. In the final dissent, Justice Kennedy voiced his concerns over the majority's misapplication of the use of race in reviewing the university's admissions program.

Gratz v. Bollinger. Writing for the six-member majority in *Gratz*, and consistent with his dissent in *Grutter*, Chief Justice Rehnquist's majority opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas; surprisingly, Justice Breyer authored a separate concurrence and partly joined Justice O'Connor's concurrence. After recognizing that the Court rejected the notion that diversity cannot constitute a compelling state interest, Rehnquist struck down the undergraduate admissions policy at the University of Michigan. He vitiated the admissions policy on the basis that it was not sufficiently narrowly tailored to achieve the state's compelling interest in achieving a diverse student body because it did not provide the individualized consideration that Justice O'Connor described in *Grutter* or that Justice Powell called for in *Bakke*. If anything, he reasoned that adding 20 points to an applicant's score based solely on race 'ha[d] the effect of making "the factor of race ... decisive for virtually every minimally qualified underrepresented applicant"'.³³ Further, in responding to Justice Ginsburg's dissent that Michigan's 'fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises',³⁴ he sardonically concluded that such a course of events was one that would have played out 'not by requiring universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities'.³⁵

Justice Thomas, Justice Breyer and Justice O'Connor, who was joined in part by Justice Breyer, each authored separate concurrences in which they set out their reasons for agreeing that the undergraduate admissions program failed to satisfy constitutional muster.

The three dissenters, Justices Stevens, Souter and Ginsburg, all authored, and in varying parts, joined each other's opinions, in expressing their support for the admissions policy's use of racial preferences.

Discussion

The Supreme Court's uncertainty with regard to affirmative action can be seen in the fact that all nine of the Justices wrote at least one opinion. Even so, perhaps the most interesting development in *Gruter* and *Gratz* is that Justices on both sides of the issue agreed that diversity is a compelling state interest, thereby opening a door to issues in public education with regard to such issues as balancing the composition of student bodies and staffs. While it could have been anticipated that the supporters of affirmative action would have accepted diversity as a compelling state interest, it is surprising that the other justices did not disagree more strenuously, especially absent statistical, or empirical, support.

Gruter and *Gratz* certainly have the potential to influence admissions and hiring

decisions in educational institutions on all levels even as unanswered questions remain about the meaning, and application, of diversity. In their quest to achieve diversity, educational leaders may wish to consider race-neutral goals as reflected by programs in Florida and, most notably Texas, which automatically admit the top 10% of any high school class to a state university.³⁶ Yet, while such an approach may appear to be attractive, it may be open to question of fairness. That is, it remains to be seen whether students who attend schools with more rigorous academic standards and finish, for example, in the top 15% but are better qualified than peers who finished in the top 10% in a school system with less stringent requirements are well served by such an approach. The result, as well-intentioned as it may be, runs the risk of creating a different kind of inequity as better qualified students from schools with more stringent standards may be excluded from programs at the expense of arguably lesser qualified students.

A related question is what the Court means by 'diversity', let alone the notion of a 'critical mass' of underrepresented racial and ethnic minorities, and how these will play out in practice. In seeking to apply Justice O'Connor's amorphous concepts, it is unclear whether diversity is limited to race or can be applied to other factors such as socio-economic status for poor inner city or Appalachian type students and ethnicity (perhaps better stated as nation origin) other than for students of color, regardless of their levels of schooling. Admissions aside, equally unclear is whether diversity can be employed to assist in ensuring a multiplicity of perspectives not only in a student body but also, and perhaps especially, among faculty, especially in institutions of higher learning, as they seek to bring individuals with a wider range of perspectives into their learning communities.

In light of demographic data in Chief Justice Rehnquist's dissent that Justice O'Connor apparently chose to ignore, it seems that diversity may still be restricted to African-Americans as a form of quotas. Put another way, even though the percentages of minority students who were admitted to the law school at the University of Michigan tracked almost identically to the percentages of those who applied, closer examination reveals that a different standard applied even within the minority pool of applicants. Rehnquist noted that although officials at the law school rejected 67, rather than the 69 that they claimed, minority applicants between 1995 and 2000 whose records were roughly comparable to the plaintiff Barbara Grutter, the statistics were misleading. To this end, he observed that of the 67 rejected applicants, 56 were Hispanic, six were African-American, and five were Native American.

Following *Gruter* and *Gratz*, the future of affirmative action in higher education remains in some doubt. In other words, in *Gruter*, the Court treated race in a way consistent with *Bakke* in reiterating that race can be a factor, but not the determinative element, in admissions decisions. The net result is that race may wind up playing a smaller, rather than a greater, role in admissions processes such as in the undergraduate program at issue in *Gratz* unless officials can demonstrate not only a compelling interest to achieve diversity but also avoid quota systems in creating narrowly tailored admissions policies. Critics of affirmative action may well rely on *Gratz* for the proposition that numerical designations such as scores cannot be

employed in admissions decisions. Either way, more litigation on the future of affirmative action is likely.

Another interesting aspect of *Gruter* and *Gratz* relates to Justice O'Connor's role as a key swing vote who is often regarded as a centrist for her positions in so many of the Court's controversial rulings. Her shifting sides in so many important cases, regardless of whether they involve schools, has added to the confusion since she often winds up placing disputes in the situation whereby there are no clear guidelines for parties to follow, thereby resulting in subsequent litigation. In the debate over whether the constitution should be interpreted more narrowly by trying to discern the intent of the Founding Fathers or as a 'living document', open to interpretation in light of evolving societal and jurisprudential standards, Justice O'Connor's frequently joining the more liberal end of the Bench runs the risk of the constitution's being subjected to situational decision-making that creates more problems than it solves.

In light of the history of educational inequity in many places throughout the United States, there can be no doubt that a diverse work force or student body is a worthy outcome. The difficulty is whether the goal of diversity justifies the use of policies that grant preferences based on race or ethnicity, especially where programs seem to demonstrate preferences not only for non-whites over whites, but where specified groups of underrepresented minority students are preferred to others, based on race, in, for example, what appears to be a quota system with regard to admissions to the University of Michigan's Law School. As such, one can ask whether persons with certain racial or ethnic characteristics need to be part of a program that is pregnant with assumptions that are unfairly, or even invidiously, stereotypical. Further, one can inquire whether there is a need to assume that persons with a particular racial or ethnic characteristic need to be included because such individuals with these characteristic will present a predetermined point of view. Even if this were the case, it is uncertain whether one can fairly assume that only persons with those characteristics would be able to present a particular point of view. Or, more invidiously, one wonders if it is necessary to assume that persons will only adopt perspectives that advance and favor their own ethnic or racial categories. To press this point even further, one can hope that such an approach does not lead to the assumption that persons who are not of a particular race or ethnicity will adopt positions toward other races and/or ethnic groups that are unsupportive and even harmful.

A final concern is whether the most invidious assumption of all regarding affirmative action policies is that persons in specified racial or ethnic categories cannot succeed without preferences and, if so, whether this kind of assumption perpetuates stereotypes about ability and performance. In addition to Justice Thomas's comments in this regard, Stephen L. Carter, the first tenured African American Professor at Yale University School of Law eloquently made this point in his *Reflections of an Affirmative Action Baby*.³⁷ Writing about his life and career, Carter mused whether affirmative action programs stigmatize minorities by rendering their achievements suspect. Carter raised thought-provoking questions about the burden that may confront qualified minorities as they respond to observers who may

ask whether they were hired, or accepted to programs, based on their qualifications or simply because they fit predetermined demographic niches. If anything, as Justice Thomas reflected in *Grutter*, race-conscious programs, as well-intentioned as they may be, may ‘stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled to preferences”’.³⁸ For qualified individuals of any race, this is a Kafkaesque spectre that none should have to endure.

Conclusion

It may be that the best that can be said about *Grutter* and *Gratz* is that they have caused educators and attorneys to further confront the role, if any, that race should play in education. Perhaps the most certain aspect of these cases is that they are likely to engender future litigation on affirmative action in American education.

Notes

- [1] *Grutter v. Bollinger*, 137 F Suppl. 2d 821 (ED Mich. 2001), stay denied, 137 F Suppl. 2d 874 (ED Mich. 2001), hearing en banc ordered, 277 F 3d 803 (6th Circuit 2001), reversed, 288 F 3d 732 (6th Circuit 2002), opinion after hearing en banc, 309 F 3d 329 (6th Circuit 2002), cert. granted, 123 S Ct 617 (2002), 123 S Ct 2325 (2003).
- [2] *Gratz v. Bollinger*, 135 F Suppl. 2d 790 (ED Mich. 2001), 123 S Ct 2411 (2003).
- [3] 438 US 265 (1978).
- [4] According to Title VI, ‘[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’, 42 USCA S2000d.
- [5] According to the Equal Protection Clause of the Fourteenth Amendment, ‘No state shall ... deny to any person within its jurisdiction the equal protection of the law.’ The same clause in the Fifth Amendment applies to the federal government.
- [6] 448 US 448 (1980).
- [7] 488 US 469 (1989).
- [8] 497 US 547 (1990), rehearing denied, 497 US 1050 (1990).
- [9] 515 US 200 (1995).
- [10] 430 US 144 (1977).
- [11] 509 US 630 (1993), on remand, 861 F Suppl. 408 (EDNC 1994).
- [12] 515 US 900 (1995).
- [13] 517 US 899 (1996).
- [14] 517 US 952 (1996).
- [15] 476 US 267 (1989).
- [16] But see *Jacobson v. Cincinnati Bd. of Educ.*, 961 F 2d 100 (6th Circuit 1992), cert. denied, 506 US 830 (1992) (permitting race to be a factor in faculty assignments).
- [17] 91 F 3d 1547 1547 (3rd Circuit 1996), cert. granted, 521 US 1117 (1997), cert. dismissed, 522 US 1010 (1997).
- [18] 160 F 3d 790 (1st Circuit 1998).
- [19] 197 F 3d 123 (4th Circuit 1999), cert. denied, 529 US 1019 (2000).
- [20] 190 F 3d 1061 (9th Circuit 1999), cert. denied, 531 US 877 (2000).
- [21] 38 F 3d 147 (4th Circuit 1994), rehearing denied, 46 F 3d 5 (4th Circuit 1994); cert. denied, 514 US 1128 (1995).
- [22] 78 F 3d 932 (5th Circuit 1996), rehearing and suggestion for rehearing denied, 84 F 3d 720 (5th

Circuit 1996), cert. denied sub nom. *Thurgood Marshall Legal Soc'y v. Hopwood*, 518 US 1033 (1996); appeal on remand, 95 F 3d 53 (5th Circuit 1996), on remand, 78 F Suppl. 2d 932 (WD Tex. 1998).

[23] 263 F 3d 1234 (11th Circuit 2001)

[24] 233 F 3d 1188 (9th Circuit 2000), cert. denied, 532 US 1051 (2001).

[25] United States Supreme Court Amicus Brief, *Gratz v. Bollinger*, 2003 WL 151258 *21 (2003).

[26] *Idem.* at *10.

[27] *Idem.*, 2003, p. *10.

[28] Charles J. Russo & Ralph D. Mawdsley (2003) The Supreme Court and affirmative action: is change in the offing?, *School Business Affairs*, 69(4), pp. 35–39. Portions of this analysis are adapted from this article.

[29] *Grutter*, *supra* note 1 at 2332.

[30] *Idem.* at 2343.

[31] *Idem.* at 2348, Scalia, J, dissenting.

[32] *Idem.* at 2350, Thomas, J, dissenting.

[33] *Gratz*, *supra* note 2, at 2428.

[34] *Idem.* at 2446.

[35] *Idem.* at 2431, note 22.

[36] United States Supreme Court Amicus Brief, *Grutter v. Bollinger*, 2003 WL 176635, 2003.

[37] Stephen L. Carter, S.L. (1991) *Reflections of an Affirmative Action Baby* (New York, Basic Books).

[38] *Grutter*, *supra* note 1 at 2362.

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