The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases

Philip C. Aka

Follow this and additional works at: https://digitalcommons.law.byu.edu/elj

Part of the Civil Rights and Discrimination Commons, Courts Commons, and the Education Law Commons

Recommended Citation


Available at: https://digitalcommons.law.byu.edu/elj/vol2006/iss1/2

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Education and Law Journal by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
THE SUPREME COURT AND AFFIRMATIVE ACTION IN PUBLIC EDUCATION, WITH SPECIAL REFERENCE TO THE MICHIGAN CASES

Philip C. Aka

TABLE OF CONTENTS

I. Introduction ...................................................................................................... 2
II. From Civil Rights to Affirmative Action: The Role of the Supreme Court in the Development of Affirmative Action Policies in America ................... 13
   A. The Supreme Court as a Policymaking Institution .................................. 14
   B. The Supreme Court and the Zig-Zags of African American Civil Rights from Dred Scott to Brown v. Board of Education …………………… 16
      1. Constitutional Servitude: “All Men are Created Equal, Except Negroes” ……………………………………………………………………………… 17
      2. Progress Toward a Condition of Constitutional Equality .................... 20
      3. Reversion to Inequality: “The Strange Career of Jim Crow” ............... 22
   C. The Supreme Court and Affirmative Action from DeFunis to the Michigan Cases with Special Reference to Public Education ………………… 34
      1. The Supreme Court and Affirmative Action Up to Bakke ……………… 34
      2. The Supreme Court and Affirmative Action Since Bakke and Before the Michigan Cases ……………………………………………………………… 38
      3. The Michigan Cases .......................................................................... 46
III. Analyzing the Michigan Decisions: Nine Indicators of Hostility against Affirmative Action by the Rehnquist Court ……………………………… 68
   A. The Narrow Margin of Victory in Grutter ............................................. 68

* Professor of Political Science, Chicago State University; Vice Chair, American Bar Association Committee on International Human Rights; Member of the Illinois Bar. J.D., Temple University School of Law; LL.M. Candidate in International Human Rights Law, Indiana University School of Law, Indianapolis; Ph.D., Howard University. This Article combines papers presented in two conferences at Chicago State University, namely: the Fifth Annual Turning of the Centuries Conference on the theme of “Politics of Inclusion,” held March 31 to April 1, 2004; and a panel discussion on affirmative action in commemoration of Black History month, held February 28, 2005. Dr. Aka has studied and published extensively on issues relating to Africans in Africa and the Diaspora. His latest publication is entitled Prospects for Igbo Human Rights in Nigeria in the New Century. 48 How. L.J. 165 (2004). The author gratefully acknowledges Emma O. Iheukwumere who stoked his interest in the subject of affirmative action and with whom he co-authored a piece on the topic published in 2001.
I. INTRODUCTION

Restrictions on affirmative action by the United States Supreme Court\(^1\) and the ban of the policy by some states\(^2\) created anxiety among affirmative action proponents that the high court would use the opportunity afforded by the challenges to the University of Michigan's affirmative action programs to declare affirmative action unconstitutional.\(^3\) This anxiety explains the acclaim with which these

---


2. See id. at 79–80 (discussing the rash of anti-affirmative action voter referenda, both ongoing and concluded, in many states). At the time the Michigan cases were decided in the summer of 2003, four states—California, Florida, Texas, and Washington—all adopted initiatives or voter referenda banning the use of race in public education, public employment, and government contracting. For example, the California Civil Rights Initiative (CCRI), passed in 1996, ended thirty years of affirmative action practice in that state.

3. This is *not* the first time proponents of race-conscious programs felt apprehensive that the Supreme Court might seize an appropriate opportunity to invalidate affirmative action. In 1997, black leaders paid over $400,000 to a white woman, Sharon Taxman, to prevent her case from reaching the Supreme Court. Taxman, a teacher, sued the Board of Education in Piscataway Township, N.J., alleging that she was laid off because of her race, while another teacher of similar qualifications hired on the same day as herself, who was black, was retained. Taxman was rehired by the time the case reached the Supreme Court but had to be paid $433,500 in back pay and legal fees to drop the case, a bill African American leaders were all too glad to foot. See Hanes Walton Jr. & Robert C. Smith, *American Politics and the African American Quest for Universal Freedom* 219 (2d ed., Longman 2003) (discussing *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117 (1997), *cert. denied*, 521 U.S. 1117 (1997)). A similar apprehensiveness occurred with respect to *Regents of U. of Cal. v. Bakke*, 438 U.S. 265 (1978). See Thomas R. Hensley et al., *The Changing Supreme Court: Constitutional Rights and Liberties* 713 (West Publg. 1997) (indicating that some groups advised the University of California at Davis not to appeal to the U.S. Supreme Court, after the University lost at the lower court level, on the ground that a negative U.S. Supreme Court decision would endanger affirmative action programs across the country).
cases, particularly the pro-affirmative action ruling in *Grutter v. Bollinger*, have been received in civil rights and educational quarters. For example, the National Association for the Advancement of Colored People (NAACP) stated that the decision has “provided the [N]ation with a road map on how to construct affirmative action programs in higher education.” Additionally, the Urban League applauded it as “an historic victory for America and a reaffirmation of the nation’s commitment to equality and diversity.” The American Bar Association welcomed it as a “victory for progress toward a legal profession that reflects the American society it serves.” And the Association of American Colleges and Universities (AACU) remarked, “The courts have recognized that racial inequality still disfigures our democracy and that higher education can and should play a crucial role in closing the opportunity gap.”

Notable individuals have hailed the *Grutter* decision in commentaries published in both popular and scholastic media. These individuals include Professor Lani Guinier of Harvard Law School, who called it “a slam-dunk for affirmative action”; the legal analyst Martin Michaelson, who assessed that not since *Brown v. Board of Education* in 1954 “has the [Supreme] Court spoken with one voice in a major ruling that affected race and education;” and the university

---


5. *The Thin Race Line*, Chi. Trib. Red Eye Ed. 10 (June 24, 2003) (quoting NAACP President Kweisi Mfume). The NAACP was founded in 1909, on the hundredth anniversary of the birth of President Abraham Lincoln, by upper-middle-class white Protestants and Jews as an interracial organization. Walton & Smith, *supra* n. 3, at 95. Until the 1960s, it remained the principal civil rights protest organization. *Id.* The organization has a membership of about 450,000 people in 1700 local chapters and an annual budget of about $11.9 million in 1995. *Id.* at 118.

6. *Urban League Applauds Court AA Ruling*, New Pitt. Courier A5 (July 2, 2003) (quoting Urban League President Marc Morial) [hereinafter *Urban League Applauds AA Ruling*]. The organization stated: “With this decision, the [C]ourt has made clear that diversity and excellence are not mutually exclusive.” *Id.* It took special care to distinguish *Grutter* from *Gratz v. Bollinger*, 539 U.S. 244 (2003). “It is extremely important that citizens realize that the [C]ourt did not reject affirmative action, it rejected Michigan’s specific scoring system.” *Id.* The Urban League is designed to promote African American economic advancement. Founded in 1910, the organization has about 118 local affiliates in 34 states and the District of Columbia, and boasts an annual budget estimated at about $24 million in 1995. *Id.; Walton & Smith, supra* n. 3, at 118.


administrator M. Lee Pelton, who praised the decision as a “summer blockbuster ruling” on affirmative action.\(^\text{12}\)

However, not all analysts who wrote commentaries on *Grutter* believed the decision marked an auspicious development in the Supreme Court’s jurisprudence on affirmative action. Critics of the decision can be divided into two categories: individuals who assessed it as going too far and those who viewed the decision as not going far enough. The first category includes Professor Shelby Steele and Ward Connerly. Steele, a black conservative, lambasted *Grutter* as “a victory for [white] guilt,” maintaining, “[w]e deserve justices who can feel certain about the capacity of [W]hites to be fair and the capacity of minorities to compete.”\(^\text{13}\) Connerly, a black reputed for his stout opposition to affirmative action, berated the *Grutter* ruling as a “cloudy vision of a race-free America.”\(^\text{14}\)

Commentators who viewed the decision as not going far enough include the distinguished educator and veteran commentator on African American affairs, Professor Ron Walters, and the newspaper writer Derrick Z. Jackson. Professor Walters assesses *Grutter* merely as “a stay of execution on affirmative action.”\(^\text{15}\) He would “hold [his] applause—or maybe applaud lightly” and view any victory dance as premature, given that “what the court did was to constitutionalize the concept of diversity as an appropriate basis for the practice of affirmative action.”\(^\text{16}\) He condemned the role of the Bush administration in the Michigan cases.\(^\text{17}\)

Similarly, Jackson opined that *Grutter* means simply that “affirmative

\(^{12}\) M. Lee Pelton, *After the Supreme Court Michigan Cases*, 6 Presidency 18 (Fall 2003) (Pelton is the President of Willamette University).


\(^{14}\) See Ward Connerly, *The Cloudy Vision of a Race-Free America*, Chron. Higher Educ. B12 (July 4, 2003). Connerly stated regretfully, “While 1 and many others viewed Michigan’s reasoning about diversity as the snow job of the century, the [C]ourt saw otherwise and elevated Justice Lewis Powell’s dictum in the *Bakke* case to the law of the land.” *Id.* Connerly serves on the governing board of the University of California and is one of the architects of the CCRI, which is a measure approved by voters of California in 1996, that forbids the use of race, gender, or ethnicity as criteria in state hiring and admission to public universities.


\(^{16}\) *Id.*

\(^{17}\) See generally Ron Walters, *The Michigan Affirmative Action Case and Black Patriotism*, 10 N.Y. Beacon 8 (May 21, 2003). He berates the “crowd in the [Bush] White House” as “especially callous.” *Id.* He points to the actions of the government as “one powerful reason why” blacks generally maintain a lukewarm attitude with respect to the war in Iraq, and because “[t]hey are not sure they are full Americans,” they “do not engage as much as Whites in flag-waving, decal-wearing and chest-thumping exercises of Americanism.” *Id.*
action survived, but in a form more limited than ever and with [Justice Sandra Day] O’Connor setting the nation’s timer to get rid of it by 2028.”

Affirmative action is a necessary tool of remediation. Affirmative action is the use of race or gender, consistent with the Equal Protection Clause of the U.S. Constitution, as a factor in decisions relating to

18. Derrick Z. Jackson, Taking on the Bonus Points for Whites, Chi. Trib. § 1 pg. 19 (June 30, 2003). Although this piece discussed Grutter, its main focus, as even the article’s very caption bears out, was on Gratz. Jackson contended: “Getting rid of a point system may sound fine to someone who refuses to open a history book.... The court took away bonus points for black, brown, and red people on behalf of angry white people. But the bonus points of white privilege are still in place, unchallenged and unrelenting, no matter how angry minorities get.” Id.

19. See Kanya Adam, The Politics of Redress: South African Style Affirmative Action, 35 J. Modern African Stud. 231, 240 (June 1997) (quoting former South African president, Nelson Mandela, “[Affirmative action is] corrective action to bring previously disadvantaged people to the same competitive levels as those who have been advantaged.”). See also William J. Clinton, Remarks on Affirmative Action at the National Archives and Records Administration, July 19, 1995, in Public Papers of the Presidents of the United States: William J. Clinton 1995 Book II 1108 (Nat'l. Archives & Rec. Admin. 1996) (indicating that affirmative action is a tool designed “to give our Nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race, from opportunities to develop, perform, achieve, and contribute”). As a presidential candidate, Clinton pledged, “I don’t think we’ve got a person to waste.” Charles R. Lawrence III & Mari J. Matsuda, We Won’t Go Back: Making the Case for Affirmative Action 176 (Houghton Mifflin Co. 1997). Then as President, he released an important statement on affirmative action preceded by a long study. The statement came one month following the handing down of Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), analyzed below in this Article, where the Supreme Court applied strict scrutiny, its highest standard of constitutional review, to all affirmative action programs. He said “While our Nation has made enormous strides toward eliminating inequality and barriers to opportunity, the job is not complete.” Clinton, supra n. 19, at 1113. He directed all federal agencies to comply with the decision. See id. at 1114 (citing Adarand v. Peña). Clinton pledged that “we will seek reasonable ways to achieve the objectives of inclusion and anti-[d]iscrimination without specific reliance on group membership.” Id. at 1114. And in complying with Adarand, his administration will “apply the four standards of fairness to all our affirmative action programs” that he articulated, namely: no quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as a program has succeeded, it must be retired. Any program, he said, that doesn’t meet these four principles must be eliminated or reformed to meet them. Id. Clinton pled with Americans by stating, “The job of ending discrimination in this country is not over.... We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don’t end it.” Id.

20. The portion of the U.S. Constitution that guarantees equal protection under state law is the Fourteenth Amendment, ratified in 1868, which provides that “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Challenges to affirmative action involving the federal government are decided under the Equal Protection Clause of the Fifth Amendment. Statutory provisions also implicated in challenges to affirmative action programs include Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981 (2000). Title VI, in relevant part, provides: “No 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 U.S.C. § 2000d (2000). Title VI applies to institutions receiving federal funds, including private colleges and universities. Section 1981(a) provides: “All persons within the jurisdiction of the
public contracting, public employment, and public education. 21 "[M]ere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women, and handicapped persons." 22 As President Johnson said, employing the metaphor of a footrace in which some runners are shackled while others make their way around the track, "Freedom is not enough. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe you have been completely fair." 23 Affirmative action programs are measures, voluntary or court-imposed, 24 "beyond simple

United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Rev. Stat. § 1777, as amended, 42 U.S.C. § 1981 (2000). Section 1981 applies to public and private contracts, such as the contract that is formed when a college or university admits a student. See Runyon v. McCrary, 427 U.S. 160, 172 (1976) (explaining that a contract for educational services qualifies as a "contract" for purposes of § 1981). It is inescapably odd for white litigants to be asking for protection and benefits "enjoyed by white citizens." Consequently, the Court has explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976). Under the Supreme Court's jurisprudence, all three provisions are coterminous: a use of race consistent with the Equal Protection Clause also withstands challenge under Title VI and § 1981. In contrast, a use of race found to violate the Equal Protection Clause is also a violation of Title VI and § 1981.

21. Many public higher educational institutions admit almost every student who applies and have little need for any affirmative action policy. Competition for places is fierce only for elite public institutions like the University of California at Davis, whose affirmative action program came under scrutiny in Bakke, and the University of Michigan, whose own programs came under review in Grutter and Gratz. For example, the University of Michigan Law School "receives more than 3,500 applications each year for a class of around 350 students." Grutter, 539 U.S. at 312-13. The Equal Protection Clause binds state-owned or public schools. Interestingly, the Harvard Plan, the affirmative action program Justice Powell held out as a model in Bakke, was designed not by a public school but rather by Harvard University, a private school. Note, however, that although equal protection binds only public schools, affirmative action also applies to private universities, since federal law forbids racial discrimination by institutions that receive federal funding, which most universities, public and private, do. Competition for scarce educational resources in elite higher educational institutions, public and private, is not limited to admission, but rather includes scholarship awards and opportunities, as well. The Supreme Court has yet to review a dispute involving affirmative action in primary and secondary educational institutions.


24. An example of a voluntary program is the Johnson case referred to in supra n. 22. Congressional legislation supports voluntary affirmative action measures designed to diversify the
termination of a discriminatory practice,” designed to redress the lingering effects of past discrimination against minority groups in society and to level the playing field for talented individuals who, in the past, have been systematically excluded for no reason other than their race or gender. Like many government laws and programs, affirmative action policies go beyond a strict interpretation of the Equal Protection Clause. In addition to being a remediation device, affirmative action is also an indispensable tool for inclusiveness of groups “regularly excluded from decision making in government, business, industry, the legal system, religious hierarchies, labor organizations, and political parties” because of their gender, race, or other immutable characteristics. Every responsible government has a constitutional obligation “to act affirmatively to achieve equal opportunity for all.”

In the past, the U.S. government sponsored certain relief programs for minority groups. These included measures unveiled, following the Civil War (1861–65), by the Bureau of Refugees, Freedmen, and Abandoned Lands, known as the Freedmen’s Bureau. They also

---

workforce. See 137 Cong. Rec. S7024 (daily ed. June 4, 1991) (providing that “Nothing in the amendments . . . shall be construed to affect . . . voluntary employer actions for workforce diversity, or affirmative action or conciliation agreements . . .”)


26. See the quote attributed to the former President Clinton, supra n. 19.

27. Steffen W. Schmidt et al., American Government & Politics Today 171 (2005-06 ed., Wadsworth/Thomson Learning 2005). As Justice Blackmun said in Bakke, to treat people equally, we are sometimes compelled, legitimately, to treat persons differently. Bakke, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part). And to get beyond racism and gender discrimination, we may, legitimately, have to take race and gender into account. See id. at 407 (referring only to racial discrimination). Justice Blackmun thinks it “somewhat ironic to have us so deeply disturbed” over interjecting race in decision making regarding distribution of educational resources, and yet quite oblivious to widespread special preferences in higher education based on athletic skills, legacy (benefits to children of alumni) and the like. Id. at 404. It is not clear whether the disturbed “us” in the sentence is the Supreme Court or society generally. His message resonates regardless. Justice Blackmun warned, “We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.” Id. at 407. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (holding, “[w]e have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account.”).

28. See Michael E. Milakovich & George J. Gordon, Public Administration in America 48 (8th ed., Wadsworth Publg. 2004). Affirmative action’s value as an inclusive tool was one reason why, despite the regressive rulings by the federal courts on affirmative action, Professor Riccucci still indicated “affirmative action may be around for a long time or at least until it is truly no longer needed, that is, when discriminatory practices cease to exist and when diverse workforces become the norm in this nation.” Riccucci, supra n. 1, at 81 (hence the “immortality” in the title of her piece).


30. Congress created this “first race bureaucracy” to provide education for the newly freed slaves. See Walton & Smith, supra n. 3, at 227, 229. In his opinion in Bakke, Justice Thurgood
included initiatives by various U.S. presidents from Roosevelt to Eisenhower, building on the Unemployment Relief Act of 1933. While some of these relief initiatives, without question, served as important prelude to present policies, affirmative action, in its present format, has a more recent history that parallels the civil rights movement. As both doctrine and policy, affirmative action was born during the Kennedy administration, received a strong shot in the arm during the Johnson administration, and I took something that would give a sense of positiveness to performance under that executive order, and I put the word ‘affirmative’ in there at that time,” Taylor said. Explaining why he chose that term, Taylor disclosed, “I was searching for a word that would give a sense of positiveness to performance under that executive order, and I was torn between the words ‘positive action’ and the words ‘affirmative action’...”

Marshall designated the Freedmen’s Bureau programs affirmative action, but, most informatively, with the two words secluded in quotes. Bakke, 438 U.S. at 402 (Marshall, J., concurring and dissenting). But for the reasons given below, these sporadic and short-lived remedial measures do not form proper policy; although, along with latter programs such as those unveiled starting from the 1930s (see infra n. 31 and corresponding text), they may have served as preludes for modern-day affirmative action programs.

31. This law incorporated the principle of equal employment opportunity for African Americans by outlawing discrimination in hiring based on race, color, or creed. In the aftermath of this law’s passage, President Franklin Roosevelt, in 1941, promulgated an executive order that established the first Fair Employment Practices Committee (FEPC). Following the FEPC, President Truman wrote an executive order creating the President’s Committee on Government Contract Compliance. President Eisenhower did something similar by creating the President’s Committee on Government Contracts. Emmanuel O. Ekehunwure & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 Temp. Pol. & Civ. Rights L. Rev. 1, 5 (2001).

32. It is difficult to draw a rigid line regarding the starting point in the evolution of modern affirmative action; accordingly, this Article does not contest Jones’s suggestion that the roots of modern affirmative action were tucked away in the policy statements of the initial order of President Franklin D. Roosevelt. See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 907 (1985).

33. See Cornel West, *Race Matters*, 63–64 (Beacon Press 1993) (portraying affirmative action as a distinctive outcome of a “protracted struggle” during the 1960s between “American progressives and liberals in the courts and in the streets.”). See also Schmidt et al., supra n. 27, at 159 (stating that equality before the law became an idea whose time had come “[a]s the civil rights movement mounted in intensity.”). The civil rights movement is a movement for African American equality that later broadened to include other minority groups, such as Hispanic Americans, and Native Americans, among others. See id. at 162.

34. In 1961, President Kennedy formed the President’s Committee on Equal Employment Opportunity. Next, he issued Executive Order 10,925, which forbade discrimination within the federal government based on race, religion, color, and national origin as well as mandated affirmative action in federal employment. The use of the term “affirmative action” in Executive Order 10,925 marked the first time such terminology appeared in an executive order. The term itself was coined by Hobart Taylor, an African American lawyer from Detroit, who, along with Arthur Goldberg and Abe Fortas, drafted Executive Order 10,925, signed by President Kennedy. The Order banned discriminatory hiring in federal contracting. “I put the word ‘affirmative’ in there at that time,” Taylor said. Explaining why he chose that term, Taylor disclosed, “I was searching for something that would give a sense of positiveness to performance under that executive order, and I was torn between the words ‘positive action’ and the words ‘affirmative action’...” See Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. Times Mag. 40 (June 11, 1995). Revealingly, Goldberg and Fortas went on to become U.S. Supreme Court Justices. They were both Caucasian. However, Taylor, an African American, was all but forgotten. Goldberg (1908–90) served on the Supreme Court from 1962–65; Fortas (1910–82), who replaced Goldberg, served on the Court from 1965–69. Both were Democrats appointed by Democratic Presidents, Goldberg by President Kennedy, and Fortas by President Johnson.
administration, and "effectively became the law of the land" under President Nixon.

35. The foundation for the strong rooting of affirmative action that took place during the Nixon administration was laid under President Johnson. Johnson complemented Kennedy's Executive Order 10,925 with his own order, Executive Order 11,246. Issued in 1965 and amended in 1967, this order (a) required contractors conducting business with the federal government to refrain from discrimination based on race, color, religion, and national origin; and (b) mandated them to take race and gender into account in recruitment and promotion. The Office of Federal Contract Compliance Programs (OFCCP) was also established during the period of the Johnson presidency. President Johnson's unflinching support for affirmative action was evidenced in the commencement speech he gave at Howard University in 1965 where he used the metaphor of a footrace in which one runner is shackled as the others make their way around the track. Just freeing the shackled runner and shouting "compete" without more to help the formerly shackled runner compete, he said, is unfair. See Johnson, supra n. 23 and corresponding text. Under President Johnson, government agencies at all levels—national, state and local—were required to implement affirmative action policies. So also were companies that sold goods or services to the federal government, institutions receiving federal funds, and employers under court order or order by the Equal Employment Opportunity Commission to maintain affirmative action programs because of evidence of past discrimination. Finally, labor unions who discriminated against women and other minorities were required to establish and comply with affirmative action plans. See Schmidt et al., supra n. 27, at 171.

36. Walton & Smith, supra n. 3, at 198. A monument of President Nixon's affirmative action initiative was his support for the Philadelphia Plan. The Plan was designed by Arthur Fletcher, an African American, who was the Assistant Secretary of Labor, with the assistance of another Nixon appointee, John Wilks, director of the Office of Federal Contract Compliance. It was a revived version of the Cleveland Plan that used Philadelphia as the model city. It required government contractors to set specific numerical goals for the employment of minority workers. The Cleveland Plan was designed to promote equal employment opportunity for blacks in the Cleveland, Ohio construction industry. Its architect and brainchild was Edward Sylvester, an African American and director of the OFCCP under President Johnson. The Sylvester plan required that construction companies awarded government contracts develop detailed plans specifying the precise number of blacks they planned to hire in all phases of their work. However, it drew strong opposition from labor unions, business groups, conservatives, and liberals who argued that it established racial hiring quotas and was dropped after the comptroller general (head of the General Accounting Office, the congressional watchdog agency) ruled it illegal, not because it imposed quotas, as its opponents argued, but because it violated standard contract bidding procedures. Id.

Unlike the Cleveland Plan, the Philadelphia Plan complied with standard contracting procedures. Yet, the comptroller general ruled it illegal, but this time on the ground that it used race as a factor in determining employment. President Nixon rejected the comptroller general's ruling, arguing that as president he had the inherent "executive power" to implement the Philadelphia Plan by executive order. The Senate passed an amendment upholding the comptroller general's decision. It took the rejection in 1971 of the Senate's amendment, by a vote of 208 to 156, following intense lobbying by President Nixon and Secretary of Labor George Shultz before, as Professors Walton and Smith said, "Affirmative action became the law of the land." Walton & Smith, supra n. 3, at 198. Prior to the Bakke case in 1978, the Philadelphia Plan was the model for affirmative action in the U.S. Id.

Other affirmative action achievements of President Nixon include the passages of § 718 of Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. § 2000e, et. seq. (2001), and the Equal Employment Opportunity Act of 1972. Also, Nixon took office following publication of the Report of the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, after Illinois governor Otto Kerner, who chaired the panel. President Johnson set up the Commission to investigate the causes of the rash of violent uprisings or rebellions in many urban areas that took place during the 1960s and recommend solutions. The Report concluded, darkly, that
Whether by fate or design, black political appointees have played an instrumental role in the design and implementation of these affirmative action policies.\textsuperscript{37} The instrumental role black federal appointees played in the design of affirmative action policies probably explains the support for the policies by later black officials, such as former Secretary of State General Colin Powell,\textsuperscript{38} and the impatience with which some African Americans view black federal personnel opposed to affirmative action, such as Justice Clarence Thomas.\textsuperscript{39}

While early challenges to affirmative action came from Caucasian males, recent challenges include Caucasian women. Almost from the very moment of its inception, affirmative action generated challenges from Caucasian males who viewed these programs as "reverse discrimination."\textsuperscript{40} One analyst speculates that increased competition for admission to schools coupled with "a political environment of backlash against" President Johnson's Great Society programs helped to galvanize these challenges to race-conscious programs.\textsuperscript{41} A significant recent development in the affirmative action debate is the growing number of Caucasian females who, secure in the gains preferential programs have brought white women,\textsuperscript{42} have no qualms pointing their finger at

\textsuperscript{37} See supra nn. 34 and 36 and accompanying text.
\textsuperscript{38} See Jheukwumere & Aka, supra n. 31, at 13.

\textsuperscript{39} See Vernon Jarrett, Thomas Stabs Douglass in Grave, Chi. Defender (June 28, 2003) (accusing Thomas of "stab[bing] Douglass in [the] grave" by comparing himself to Douglass); see also Thomas Shows His True Colors on Affirmative Action Ruling, Westside Gazette 3B (Ft. Lauderdale, Fla.) (July 9, 2003) (A commentary, as the title shows, berating Justice Thomas, while praising O'Connor as "an unabashed conservative" who "refuse[s] to be typecast by her ideological disposition.").

\textsuperscript{40} See e.g. DeFunis v. Odegaard, 416 U.S. 312 (1974), and the Bakke decisions, both of which were lawsuits brought by white men.

\textsuperscript{41} William C. Kidder, The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000, 19 Harv. Blackl. L.J. 1, 19 (2003) (drawing on the authority of James T. Patterson, Grand Expectations: The United States 1945–1974 676–77 (Oxford U. Press 1996)). The extent to which affirmative action divides America is reflected in the large number of "friend of the court" briefs filed before the Supreme Court in cases, such as DeFunis, 416 U.S. 312, Bakke, 438 U.S. 265, and the Michigan cases, Grutter, 539 U.S. 346, and Gratz, 539 U.S. 301. Regarding DeFunis, Professor Peltason noted, "By the time the case came before the Supreme Court it was the center of national attention. More amicus curia ... briefs were filed in this case than in any other case ever argued before the Supreme Court." J.W. Peltason, Corwin & Peltason's Understanding the Constitution 205 (7th ed., Dryden Press 1976). More than a hundred groups turned in briefs as friends of the court for or against affirmative action in the Michigan cases.

\textsuperscript{42} See Tracey Robinson-English, Minority Set-Aside Programs Help Women Get a Piece of Affirmative Action, N'Digo (Chicago) 7 (Mar. 24–30, 2005) (citing a recent study by Catalyst, a New York-based organization that promotes the interests of women in business, showing that "[o]verall, White women are the biggest winners of affirmative action programs, claiming more than
preferences based on race. Women were plaintiffs in *Grutter* and *Gratz v. Bollinger* as well as in the Fifth Circuit Court’s decision in *Hopwood v. Texas*, which struck down the University of Texas law school’s affirmative action program and called into question the weight of Justice Powell’s opinion in *Regents of the University of California v. Bakke* as precedent. In contrast, since *Johnson*, few, if any lawsuits, have been instituted contesting affirmative action programs based on gender.

The challenges, by Caucasian women, to programs that inject race into decisions relating to admissions into public institutions of higher learning are an ironic occurrence in the current affirmative action controversy in America. Could it be that white America is comfortable with preferential treatment based on gender or other factors but cannot stand to accept preferences based on race? If so, the controversy at the moment relating to affirmative action has much more to do with the state of race relations in America and the politics of race than with the programs themselves.

*Grutter* marks a crucial advance in the Supreme Court’s jurisprudence on affirmative action. Several factors make the case hugely significant. First is the fact that this momentous case, standing for maintenance of affirmative action, came out from the deeply conservative Rehnquist Court. Justice O’Connor’s lukewarm attitude toward race-conscious programs prior to *Grutter* was well-known.

Yet O’Connor wrote the opinion of the court in *Grutter* and provided the critical fifth vote upholding the affirmative action program under challenge. However, Professor Klarman persuasively explained this mystery: “Justice O’Connor’s conservative commitment to preserving the status quo trumped her ideological aversion to race-conscious

---

[forty] percent of all managerial or professional jobs in the late 1990s”). See also Andrew Hacker, *Two Nations: Black & White, Separate, Hostile, Unequal* 152 (Simon & Schuster 2003). The Hacker book takes its title from the conclusion of the Kerner Commission Report; see supra n. 36.

43. 539 U.S. 306.
44. 539 U.S. 244.
45. 78 F.3d 932 (5th Cir. 1996).
46. 438 U.S. 265.
47. See 480 U.S. 616.
48. Michael Klarman, *Are Landmark Court Decisions All That Important?*, Chron. Higher Educ. B10 (Aug. 8, 2003). Professor Klarman importantly points out that “[b]efore *Grutter*, [Justice O’Connor] had never voted to sustain a race-based affirmative-action plan, though she had explicitly noted that such policies might be acceptable under certain stringent conditions.” Id. “Based on her earlier opinions and votes,” Klarman said, “one might easily have predicted that O’Connor would invalidate the admissions policies of the University of Michigan on the grounds that they relied on the impermissible stereotype that race correlates with diversity of perspective and that they failed to adequately consider nonracial alternatives for securing a diverse student body.” Id. The fortunate thing about *Grutter*, for proponents of race-conscious programs, was that Justice O’Connor chose to uphold the program in question.
Years earlier, in *Bakke*, five Justices—Blackmun, Brennan, Marshall, Powell, and White—stood for the proposition that the use of race could serve a compelling government interest, whether based on diversity, as Powell posited, or on the rationale of remediation of past discrimination. When the Michigan cases were decided, the number had climbed to seven Justices—Breyer, Ginsburg, O’Connor, Souter, Stevens, plus former Chief Justice Rehnquist and Kennedy. The only two holdouts against the use of race were Justices Scalia and Thomas.

Second, the Court announced the *Grutter* decision while a Republican administration staunchly opposed to affirmative action was in office. When he ran for president, George Bush advocated “affirmative access” which he defined as increasing access for minorities without using quotas. The President also favored race-neutral alternatives to affirmative action such as the “percentage plans” he unveiled in Texas during his period as governor. Given this lack of

49. Id. As Hensley said of Justice Powell in their text on the Supreme Court, O’Connor may be seen as a conservative justice who favors conservative outcomes in most cases and seeks “to balance carefully the competing interests in cases presented to the Court,” as opposed to the class of conservative justices, like Rehnquist, Scalia and Thomas, who seek “to advance a particular ideology.” See Hensley et al., *supra* n. 3, at 67.

50. Recall that Justice Stevens was part of the Burger plurality that struck down the affirmative action plan in *Bakke*. The other members of that plurality were Chief Justice Burger, and Justices Rehnquist and Stewart. Stevens’s vote for affirmative action was an important development for this sometimes nondescript jurist. See Hensley et al., *supra* n. 3, at 67. Professor Baum, in his primer on the Supreme Court, calls Stevens the Court’s “most liberal justice.” Lawrence Baum, *The Supreme Court* 117 (6th ed., Cong. Q. Inc. 1998). What caused Justice Stevens’s turn in favor of affirmative action? Professor Baum provides a possible explanation: “When a justice’s position shifts relative to that of the Court as a whole, it is usually because new appointments have shifted the Court’s ideological center, while the justice has retained the same general views. This appears to be the case with John Paul Stevens, who moved to the liberal end of the Court as more liberal justices were replaced by conservatives.” *Id.* at 158.

51. *Gratz*, 539 U.S. at 257.

52. *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting) (despite his dissent based on the abandonment of a strict scrutiny review, Justice Kennedy wanted to “reiterate [his] approval of giving appropriate consideration to race in this one [student diversity] context.”).

53. *Id.* at 349 (Scalia, J., dissenting, joined by Thomas, J., concurring in part and dissenting in part) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”).

54. *Id.* at 349-78 (Thomas, J., dissenting, joined by Justice Scalia, concurring in part and dissenting in part); *Gratz*, 539 U.S. at 281 (Thomas, J., concurring) (stating “I would hold that a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause”).


56. These plans, adopted in public undergraduate institutions in states like California, Florida, Texas, and Washington, grant automatic admission to all students above a certain class-rank threshold, usually the top 10 or 20 percent, of the graduating class. However, as Justice Ginsburg
sympathy, it is unsurprising that the Bush Justice Department filed briefs in the Michigan cases urging the Supreme Court to strike down the programs on the ground that they represented "disguised quotas."\textsuperscript{57} Although the Michigan cases were important, they hardly signify a progressive turn of events in the Supreme Court's disposition toward affirmative action; substantial residues of hostility toward affirmative action remain in the high Court, and the Court continues to maintain an orientation of non-solicitude for minority rights.\textsuperscript{58}

This Article has two main parts, excluding the introduction and the conclusion. Part II analyzes the Supreme Court's role in the development of affirmative action policies. The discussion is divided into three sections, namely: 1) comment on the role of the Court in policymaking; 2) the Court's vacillating role in the African American civil rights movement; and 3) the role of the Court in affirmative action up to and including the Michigan cases, with special reference to public education. Part III isolates and discusses various key indicators drawn from the Michigan cases that testify of the Court's continuing hostility toward affirmative action and minority rights.

II. FROM CIVIL RIGHTS TO AFFIRMATIVE ACTION: THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF AFFIRMATIVE ACTION POLICIES IN AMERICA

This portion of the Article ties the Supreme Court's affirmative action jurisprudence to its earlier involvement in African American civil

\textsuperscript{57} Kemper, supra n. 55.

\textsuperscript{58} See generally Opoku Agyeman, The United States Supreme Court and the Enforcement of African-American Rights: Myth and Reality, 24 PS: Political Sci. & Pol. 679–84 (1991). The Supreme Court is viewed as a tribunal that, before 1938, failed to distinguish itself as a protector of minority rights but which, however, turned a "modern chapter" of better protectiveness, following a "doctrinal direction" beginning in 1938 resulting in "a more generous view of the rights of racial minorities and a more daring assessment of the Court's capacity to protect them." \textit{id.} at 682 (citing Robert G. McCloskey, \textit{The American Supreme Court} 208 (U. of Chi. Press 1960)). Professor Agyeman disputes this conventional wisdom and demonstrates the tenuousness of the Court's claim as guardian of minority interests, maintaining that its "more fundamental, enduring role" is "as the protector of property rights." \textit{id.} at 684.
rights; the two phenomena are intimately related. Affirmative action evolved as a remedy designed to eliminate the legacy of discrimination and exclusion of groups based on immutable characteristics such as their race, ethnicity, or gender, which the Supreme Court, wittingly or unwittingly, contributed to. Remedial measures became imperative because, as Justice Brennan and company pointed out in Bakke, the Equal Protection Clause "was early turned against those whom it was intended to set free, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal." Connecting civil rights and affirmative action, as this Article does, is sound in that it constitutes a richer approach that provides the important historical perspective and depth necessary for a proper understanding of contemporary affirmative action, both as doctrine and policy. Although cases dealing with affirmative action in public employment and public contracting are mentioned, the main emphasis here is on cases relating to affirmative action in education.

A. The Supreme Court as a Policymaking Institution

The judiciary has the "province" to say what the law is. This authority flows from the power of interpretation and judicial review. In his landmark work on American democracy, Alexis de Tocqueville commented: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Because


60. See Marbury v. Madison, 5 U.S. 137, 177 (1803) (ruling a particular provision of an act of Congress unconstitutional, and in the process, recognizing the power of judicial review for American courts).

61. In addition to the responsibility of statutory interpretation, U.S. courts are invested with the greatest of all interpretational responsibilities, namely, the power of judicial review. Statutory interpretation involves merely interpreting the laws or deciding what the legislature meant when it enacted a given piece of legislation; in contrast, judicial review is much more. It is the power of U.S. courts to scrutinize the legality of the laws and actions of the other branches of government and to declare unconstitutional (and therefore unenforceable) any initiatives of these branches that do not conform with the Constitution. There is no explicit provision for judicial review in the U.S. Constitution; instead, the judiciary claimed this power for itself in Marbury, 5 U.S. 137. On the legitimacy of judicial review, including the historical antecedents of this authority, see Gerald Gunther, Constitutional Law 13–20 (12th ed., Found. Press 1991). On the finality of the judiciary's interpretation of the Constitution, see id. at 21–28; see also Corwin & Peltason, supra n. 41, at 31 (pointing out that the president, congresspersons, and other public officials have a duty to act constitutionally and measure their actions against their own reading of the Constitution, but only when there is no relevant Supreme Court ruling, and they must abide by the Court's interpretation where such ruling exists).

62. Schmidt et al., supra n. 27, at 455 (quoting Alexis de Tocqueville, Democracy in America 248 (Harper & Row, Publishers 1966)).
of their power of interpretation and judicial review and given that the federal judiciary forms part of the U.S. political process, U.S. judges play a larger role in public policy-making than judges in most other countries in the world. Judges (and courts) make policy “whenever they interpret the law or the Constitution in a new way, extend the reach of existing laws to cover matters not previously thought to be covered, or design remedies for problems in ways that require [them] to act in administrative or legislative ways.” This role makes them political actors and “policymakers working within a political institution.”

As the tribunal at the apex of the judicial system and given its special status as the only federal Court created by the Constitution (the other federal courts were the more lowly handiwork of Congress), the Supreme Court is a “part of a policymaking system that includes lower courts” and other branches of government, it is also “[t]he most important political force within [the federal] judiciary.” Emphasis on the Court is something motivated by “[m]ore than pedagogical tradition,” but rather the reality that the over 500 volumes of reports the high Court has authored encompass “a remarkable range of constitutional questions” forming “the richest source of constitutional law.” Finally, it is also an acknowledgment of the fact that “[o]n those questions that do get to court, the Supreme Court’s last word makes it obviously the most important judicial voice.”

Accordingly, federal judges play a crucial role in (re)shaping “the
Attention to the ever-evolving and ever-changing attitude of the Supreme Court toward affirmative action and minority rights generally can shed much needed light on the politics of inclusion and exclusion in America. Few issues in American history "stand out more dramatically than the ebbing and flowing of our commitments to dealing with the injustices—and the potential richness—of racial differences." It is not just presidents who engage in the politics of affirmative action; judges, including Supreme Court justices, do the same, with serious ramifications on minority rights.

B. The Supreme Court and the Zig-Zags of African American Civil Rights from Dred Scott to Brown v. Board of Education

Emphasis here will be on African American civil rights, not because black civil rights exhaust the universe of minority rights in America, for they do not, but rather because African American experience with all forms of discrimination, including slavery, segregation, and racism, has been one of the most odious endured by any group in U.S. history. This Article characterizes and organizes the black struggle in terms of a fateful zig-zag journey—from (1)

73. Riccucci, supra n. 1, at 76, 79; see also id. at 74–75 (Table 6.1) (listing "the chronology of legal actions around affirmative action;" a chronology of legal activities without question evidencing the dominant role of the courts).
75. See supra n. 36 (discussing the role of President Nixon).
76. Civil rights is about equality and freedom from discrimination, specifically the rights of all Americans to equal treatment under the law, consistent with the Fourteenth Amendment. Schmidt et al., supra n. 27, at 151. “Essentially, the history of civil rights in America is the story of the struggle of various groups to be free from discriminatory treatment.” Id. Although similar, civil rights are distinguishable from civil liberties. Civil liberties are basically constitutional limitations that specify what the government cannot do, whereas civil rights specify things the government must do to ensure equal protection and freedom from discrimination. Id.
77. See also Schmidt et al., supra n. 27, at 151 (pointing out other groups besides African Americans, such as Hispanics, Native Americans, Asian Americans, Arab Americans, and persons from India also, like African Americans, have engaged or are still engaging in their own struggle for equality). See e.g. Frank Wu, Yellow: Race in American Beyond Black & White chapter 4 (Basic Books 2002). (analyzing affirmative action with respect to Asian Americans in a chapter titled "Neither Black Nor White").
78. E.g. Justice Marshall’s opinion in Bakke, 438 U.S. at 387–402, in which the distinguished jurist referred to the forms of discrimination blacks endured “during most of the past 200 years” as “the most ingenious and pervasive.” Id. at 308. Marshall said racism directed against blacks was so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.
Id. at 400–01 (Marshall, J., concurring and dissenting).
constitutonal servitude, to (2) progress toward a condition of constitutional equality, to (3) reversion to inequality marked by segregation, and, finally, to (4) progress toward equality. This Article highlights milestone occurrences that characterize each period or era, focusing on the role or contribution of the Supreme Court in each era or period.

1. Constitutional Servitude: "All Men are Created Equal, Except Negroes"

Constitutional servitude characterized the fate of African Americans during the antebellum period before 1861. The Declaration of Independence proclaimed a number of "self-evident Truths," including: "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." Yet, at the Constitutional Convention in Philadelphia in 1787, delegates failed to resolve the issue of slavery. Without mentioning the word slavery, the final document that emerged from the meeting was marred by several provisions bearing directly on racial matters, namely: the "Three-Fifths" Compromise, the Slave Commerce Clause, and the Fugitive Slave Clause. These provisions

79. Declaration of Independence [¶ 2] (1776). The original draft of the Declaration accused the King of England of waging a "cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." John H. Franklin & Alfred A. Moses Jr., From Slavery to Freedom: A History of African-Americans 71 (7th ed., Knopf 1997). John Adams called those charges the "vehement philippic against Negro slavery." The charges were unacceptable to Southern delegates at the Continental Congress and were stricken from the final document. Id.

80. U.S. Const. art. I, § 2, cl. 3 (providing, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons"). Like many things in the Constitution, this provision was a compromise between delegates from the Northern and the Southern states. The North wanted the slaves to count for taxation purposes, whereas the South wanted them to count for representation purposes. Franklin D. Gilliam Jr., Farther to Go: Readings and Cases in African-American Politics 3 (Harcourt Brace 2002).

81. U.S. Const. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to 1808, "but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). This was another one of those compromises, designed to accommodate delegates from Southern states, and delegates, like James Madison, opposed to slavery and the rest of the "impending abolitionist movement." See Gilliam, supra n. 80, at 3.

82. U.S. Const. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."). For slaves, as Professor Gilliam aptly observed, this clause
are emblematic of the hard-ball compromises leading up to the adoption of the Constitution. However, they also depict the delegates’ low perception of blacks as humans, and particularly of slaves as part-property and part-human. "The degradation of American [B]lacks was... woven into the very fabric of American government." The abolitionist and African American leader Frederick Douglass poignantly lamented, "Liberty and Slavery—opposite as Heaven and Hell—are both in the Constitution." It was an observation with which Abraham Lincoln appeared to concur when he sarcastically stated, "All men are created equal, except Negroes."

The Supreme Court first assumed a role in African American inequality when it decided *Dred Scott v. John F.A. Sanford* in 1857. Described by one political scientist as "perhaps the most important governmental act concerning race in the 19th century," this case lent constitutional imprimatur to slavery in America. Dr. John Emerson left Missouri and went to Illinois, where for four years he served as an Army surgeon. He took along with him Dred Scott, his slave. Although

Gilliam, *supra* n. 80, at 3.

83. See e.g. Wilson, *supra* n. 65, at 27 (commenting on the relationship between the Declaration of Independence and the Constitution, reasoning that the Framers "clearly postponed the issue of slavery in order to create a union strong enough to handle the issue when it could no longer be postponed").

84. Gilliam, *supra* n. 80, at 3.

85. *Id.*

86. Schmidt et al., *supra* n. 27, at 151.

87. *Id.* Two views have evolved regarding the "resolution" of the slavery issue in the U.S. Constitution. The first held by Professor Wilson, *supra* n. 65, and others, regards the maintenance of slavery in the original Constitution as simply part of the bargain to adopt the Constitution. The second view is held by analysts like the Swedish scholar Gunnar Myrdal, author of the seminal book, *An American Dilemma*, who attributed the failure to handle slavery well as an attempt to maintain domination over blacks. Although there were groups other than blacks denied basic rights in America, slavery was a brand of domination of "overwhelming proportions" in scope and extent, reserved especially for blacks. Gilliam, *supra* n. 80, at 5. Additionally, in the U.S. slavery was an institution with a special "racist caste." Denial of fundamental political and human rights to slaves relegated or condemned them to a subordinate position in the social, political, and economic hierarchy. Slaves had no rights to their bodies, their offspring, or their fate. The enforcement of restrictive laws or slave codes directed at blacks was achieved through several social control mechanisms, including slave patrols, whippings, imprisonment, and lynching. Southern defense of slavery was based on the view that blacks were not fully developed human beings and they needed protection, guidance, and discipline. The black condition and situation contrasted from that of white indentured servants, the majority of whom, by 1800, had bought their way out of servitude and were accorded rights of citizenship. So slavery was *not* something merely driven by economic changes and concerns brought about by the Industrial Revolution, as some writers argue. Rather, in addition to being critical to the stability of the Southern economy, control of the slave population was also critical to the very nature of Southern life. See *id.* See also Justice Marshall’s dissent in *supra* n. 78, which corroborates this account.

88. 60 U.S. 393 (1857).

89. Gilliam, *supra* n. 80, at 11.
Missouri was a slave state, under the Missouri Compromise of 1850. Congress had prohibited slavery in Illinois. Scott returned to Missouri and sued for his freedom on the grounds that his residence on free soil made him a free man. Scott won his suit in the lower court, but lost in the Missouri Supreme Court. The case was then tried in federal district court and appealed to the U.S. Supreme Court.

In *Dred Scott*, two issues were presented before the Court: (1) whether blacks were citizens of the U.S., and (2) the constitutionality of the Missouri Compromise. In a judgment for the Court written by Chief Justice Taney, the Court answered the first question in the negative. It held that the slavery commerce and the fugitive slave clauses "point directly and specifically to the Negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the government then formed." Taney reasoned blacks "had no rights which the white man was bound to respect." Turning to the second issue, the Court ruled that Congress overstepped its authority by prohibiting slavery in the territories covered under the Missouri Compromise. Therefore, the Court declared unconstitutional the very Compromise under which Scott brought his suit. *Dred Scott* embodied underlying differences between the North and South that foreshadowed the start of the Civil War. And far from settling the issue of slavery, which the Philadelphia Convention left unresolved, the *Dred Scott* ruling brought that issue to a head. *Dred Scott* is one of the most wrongly decided cases ever in the history of the U.S. Supreme Court.

---

90. The Missouri Compromise was an act of Congress that admitted Maine into the Union as a free state, admitted Missouri as a slave state, and banned slavery in all federal territories north of the 30° latitude (the southern border of Missouri). For an informative historical story on this factually-rich case, see Don E. Fehrenbacher, *The Dred Scott Case*, in *Quarrels That Have Shaped the Constitution* 87-99 (John A. Garraty ed., Harper & Row, Publishers 1987).

91. Roger B. Taney (1777-1864), a Democrat from Maryland, was appointed by President Jackson, a Democrat from Tennessee (1829-37) and served on the high court from 1836 until his death in 1864.


93. *Id.* at 407. Few cases in the history of Supreme Court jurisprudence match *Dred Scott* when it comes to deployment of a collection of opprobrious assertions designed to degrade a people. In addition to having no rights that were respected, Taney branded blacks an "article of property," who "might justly and lawfully be reduced to slavery for his benefit." *Id.* at 407-08. "They were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . ." *Id.* at 404-05

94. See Gilliam, *supra* n. 80, at 11-12. Some of the manifestations of these fundamental differences that the *Dred Scott* decision brought to a head were that Northern states sought to increase the number of free states admitted to the Union, while Southern states sought to extend slavery into the territories under the control of the federal government. *Id.*

95. *Id.* at 12.

96. See McCloskey, *supra* n. 58, at 94 (assessing the decision as "the most disastrous opinion the Supreme Court has ever issued"). Abraham Lincoln opposed the decision "in a certain way"
2. Progress Toward a Condition of Constitutional Equality

While the first period covers the era before the Civil War, the second period encompasses the era of Reconstruction, "[t]he period between the freeing of the slaves in 1863 and the return of Southern white supremacy after the presidential election of 1876." It took the pains of a tormenting civil war from 1861 to 1865 and numerous Reconstruction initiatives to correct the constitutional defects of the formative years and move African Americans to the condition of constitutional equality. These initiatives include President Lincoln's Emancipation Proclamation, the Civil War Amendments, and the Civil Rights Acts of 1865 to 1875, designed to enforce these amendments.

The Emancipation Proclamation of 1863 abolished slavery in the Confederate States, but protected it in the Union States. In practical terms, this presidential decree freed no slaves, even though it helped Lincoln politically by securing him black support for the federal side. The proclamation also had important symbolic value in that it set the ground for the movement toward constitutional equality that the Thirteenth Amendment and the other Civil War amendments solidified.

The Thirteenth, Fourteenth, and Fifteenth Amendments made further

during his campaign for the U.S. Senate in 1858. "We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject," he indicated. Gunther, supra n. 61, at 23. There were also white public officials at that time who viewed the decision with lividness. For example, Senator Seward of New York called upon the people of the United States to defy the unconstitutional and abhorrent principle, embedded in the decision, that one man can own another man. He stated that the "people of the United States never can, and they never will, accept principles so unconstitutional and so abhorrent. Never, never!" Cong. Globe, 35th Cong., 1st Sess. 943 (1858). He also threatened to help "reorganize the Court and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and the laws of nature." Id.

97. Gilliam, supra n. 80, at 24. The Reconstruction is so named because the central political question that characterized that period involved the conditions for the re-entry of the seceding Confederate States into the Union. Id. These conditions included "a clear directive to abolish slavery." Id.

98. Justice Thurgood Marshall, in a statement he released before the celebration of the Constitution's 200th anniversary in September 1987, indicated he was unimpressed by the Framers' wisdom and foresight. He would not credit to them the fact that the Constitution today no longer enslaves. Rather, he said, that credit belongs "to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them." Thurgood Marshall, Reflections on the Bicentennial of the United Constitution, 101 Harv. L. Rev. 1 (1987) (text of a speech given at a seminar in Maui, Hawaii). A recent echo of Justice Marshall's position was made by the Reverend Jesse Jackson who contends that the Founders' vision left many out. The constitutional republic the Founders gave us, the civil rights leader said, was a republic "designed to protect the rights of the few, particularly property holders and creditors, from the passions of the many, particularly working people and debtors." Accordingly, "[t]he America we celebrate today is not the America of the Founders. It is the America of Abraham Lincoln and Martin Luther King." Jesse Jackson, Founders' Vision Left Many Out, Chi. Sun-Times 37 (July 5, 2005).

99. Text of this document can be found in Gilliam, supra n. 80, at 21–22.
progress in correcting Constitutional inequalities. The Thirteenth Amendment not only abolished slavery throughout the United States, it also granted Congress the authority, through legislation, to enforce the Amendment. "[I]t represents the first national attempt at broad-scale racial reform." In one impressive swoop, the Fourteenth Amendment, ratified in 1868, accorded citizenship to "all persons born or naturalized in the United States," effectively overturning Dred Scott; struck down the "Three-Fifths" Compromise; and provided for privileges and immunities of citizenship, due process, and equal protection under the laws. Although the Fourteenth Amendment made blacks "whole" by striking "three-fifths," it was only for the purpose of calculating their numbers for representation in the House of Representatives; it did not give them the right to vote. The Fifteenth Amendment, ratified in 1870, granted that right, effectively extending the right to vote to black males.

100. The three amendments, collectively, are called the Civil Rights Amendment because "[t]hey were, so to speak, the victory terms dictated by the North to the South." Corwin & Peltason, supra n. 41, at 184. For example, the federal government conditioned the withdrawal of federal troops from Southern states and restoration of their right to full participation in Congress upon their ratification of the Fourteenth Amendment. Id. The federal troops which occupied Southern states during the Reconstruction era were withdrawn in 1877.

101. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction."). Some slaves had been freed during the Civil War. This Amendment freed the rest and abolished slavery. The Thirteenth Amendment takes its significance from the fact that it effectively eliminated all provisions in the Constitution that allowed slavery, such as the Slave Commerce Clause, id. at art. I, § 9, and the Fugitive Slave Clause, id. at art. IV, § 9. By also making illegal the notion that human beings could be held as private property, the Amendment completed and gave constitutional footing to prior initiatives like the Emancipation Proclamation.

102. Id. at amend. XIII, § 2. It is hard to minimize the huge irony the Thirteenth Amendment signified for Southern States who fought hard to maintain slavery. Before the war, a bedrock constitutional principle was that the national government should not interfere with slavery in the states. Schmidt et al., supra n. 27, at 93. In fact, Congress proposed an ill-fated Thirteenth Amendment, quickly ratified by Illinois, Maryland, and Ohio, and personally signed by President Lincoln, that prohibited any amendment to the Constitution granting Congress the power to interfere in any way with slavery in any state. See Walton & Smith, supra n. 3, at 189. However, the Thirteenth Amendment not only interfered with slavery, it abolished the institution altogether and in doing so, also effectively abolished the rule, later formally eliminated by the Fourteenth Amendment, discussed below, by which three-fifths of the slaves were counted when apportioning seats in the House of Representatives. Schmidt et al., supra n. 27, at 93.

103. Gilliam, supra n. 80, at 22
104. U.S. Const. amend. XIV, § 1.
105. Id. at amend. XIV, § 2.
106. Id. at amend. XIV, § 1.
107. Id. at amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
108. Notably, the right to suffrage did not include women, black or white. Only with the
As earlier indicated, the Civil Rights Acts, about eight in all, were meant to enforce the Civil War Amendments. Three of these were particularly important, namely: the Enforcement Act of 1870,\(^{109}\) which laid out specific criminal penalties for interfering with the right to vote as protected by the Fifteenth Amendment; the Civil Rights Act of 1872,\(^{110}\) otherwise known as the Anti-Ku Klux Klan Act, which made it a federal crime for anyone to use law or custom to deprive an individual of any right secured by the Constitution or federal law; and the Second Civil Rights Act of 1875,\(^{111}\) which made it a federal crime for an owner or operator of any public accommodation, including schools, churches, cemeteries, hotels, places of amusement, and common carriers, to deny any individual "the full enjoyment of the accommodations thereof" on ground of race or religion.\(^{112}\)

3. Reversion to Inequality: "The Strange Career of Jim Crow"

Southern states resisted the passage of the Thirteenth Amendment with the "black codes." These laws were ostensibly designed to govern "the status and conduct" of the newly freed slaves and, therefore, provide social and economic stability in these states. In actuality, these codes were restrictive and punitive measures that, in many ways, returned blacks to bondage-like conditions. Two infamous Supreme Court decisions, the Civil Rights Cases,\(^{113}\) and Plessy v. Ferguson,\(^{114}\) are more illustrative of this period than any other event.

In the Civil Rights Cases, the Court struck down the Second Civil Rights Act of 1875.\(^{115}\) Passage of the Nineteenth Amendment fifty years later, in 1920, did women win this right. Id. at amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). Although Mrs. Abigail Adams pled with her husband, John Adams "to remember the ladies," see Steffen W. Schmidt et al., American Government & Politics Today 163 (2003–04 ed., Wadsworth/Thomson Learning 2003) [hereinafter Schmidt et al. 2003–04 ed.] (quoting Letters of a Nation: A Collection of Extraordinary American Letters 60 (Andrew Carroll ed., Kodansha America, Inc. 1997), the Constitution that the Framers wrote did not give women the right to vote, but rather left the matter to the states who limited the franchise to adult white males who owned property. Nor did the limitation seem unusual to the Framers, given that the prevailing view then appears to have been that "the people who own the country ought to govern it," as John Jay said. Noam Chowsky, Profit Over People: Neoliberalism and Global Order 46 (Seven Stories Press 1999).

---

110. Ch. 99, 16 Stat. 433 (1871).
111. Ch.114, 18 Stat. 335 (1875).
113. 109 U.S. 3 (1883). The lawsuit consisted of five cases originating from California, Kansas, Missouri, New Jersey, and Tennessee, which were consolidated and decided together. At issue in the five cases was the constitutionality of the Civil Rights Act of 1875, hence the designation of the cases as the Civil Rights Cases.
114. 163 U.S. 537 (1896).
Rights Act of 1875, which made it a federal crime to deny blacks full enjoyment of public accommodation. It ruled that the Fourteenth Amendment only protected against discrimination by states, not discrimination by private individuals. Put differently, the Supreme Court regarded discrimination by white citizens against blacks as a private affair against which the law and Constitution provided no recourse. The Court also ruled that the Fourteenth Amendment "[did] not invest Congress with power to legislate upon subjects which are within the domain of state legislation."

Only one justice, Justice Harlan dissented from the judgment of the Court. He disagreed that the Fourteenth Amendment could not reach the discrimination complained of in the cases and found the rights involved to be legal rights, not social intercourse, as the Court claimed. He was also certain that the Thirteenth Amendment applied. He said that today it is "the colored race" whose rights are being violated "by corporations and individuals wielding public authority;" who knows which other race's turn it will be tomorrow?

The ruling in the Civil Rights Cases signified a major setback in African American civil rights. "Less than two decades after the Civil War, the Supreme Court had seriously weakened the Fourteenth Amendment and neutralized the efforts of Congress to pass civil rights laws to protect black citizens." These cases and their antecedents placed the civil rights of blacks "back in the hands of the States, their staunchest oppressors."

---

115. See text accompanying supra n. 112.
116. 109 U.S. at 3.
117. Id. at 11.
118. John Marshall Harlan (1833–1911), a Republican from Kentucky, was appointed by President Hayes, a Republican from Ohio and President from 1877 to 1881. He served on the high court from 1877 until his death in 1911.
120. Id. at 59.
121. See id. at 35 (contending that "since slavery . . . was the moving or principal cause of the adoption of that Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races."(emphasis added)). Id.
122. Id. at 62.
123. Agyeman, supra n. 58, at 682; see also Schmidt et al., supra n. 27, at 153 (stating that the other civil rights laws that the Court did not specifically invalidate became dead letters in the statute books, although they were never repealed by Congress).
124. J. Owens Smith et al., Blacks & American Government: Politics, Policy, & Social Change 65. (Kendall/Hunt Publg. Co. 1987). Those antecedents include The Slaughterhouse Cases, 83 U.S. 36 (1873) (ruling that state and national citizenships are distinct, applying the principle of duality of citizenship the Court established in Dred Scott); U.S. v. Cruikshank, 92 U.S. 542 (1876) (ruling that
Plessy v. Ferguson involved a challenge to an 1890 Louisiana law that mandated "equal but separate accommodations" for white and black passengers in railroad cars. Homer A. Plessy, reportedly one-eighth black, was arrested and convicted for sitting in a seat in a coach for whites rather than the one reserved for "Colored Only." Plessy appealed his arrest and conviction to the Supreme Court. He argued that the Louisiana statute violated his civil rights under the Thirteenth and Fourteenth Amendments. In an opinion for the Court by Justice Brown, the Court stated—just like it did in the Civil Rights Cases thirteen years before—that the law in question did not violate the Thirteenth Amendment because it did not "reestablish a state of involuntary servitude." Nor, it said, did the law violate the Fourteenth Amendment. True, the object of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law;" nonetheless, "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality." The Court maintained that racial segregation was not discriminatory and did not "necessarily imply the inferiority of either race to the other," but rather a reasonable exercise of the state police power "for the promotion of the public good, and not for the annoyance or oppression of a particular class." At any rate, "[i]f one race be inferior to the other socially, the Constitution of the U.S. cannot put them upon the same plane."

the rights of black litigants, including the right to peaceful assembly, infringed upon by a group of Louisiana whites, were not nationally protected rights that Congress could punish violation of); and U.S. v. Reese, 92 U.S. 214 (1876) (ruling that the Fifteenth Amendment did not guarantee all citizens the right to vote but rather simply listed grounds that could not be used to deny that right).

125. 163 U.S. 537, 540 (1896).

126. Id. at 543. Not until Jones v. Mayer, 392 U.S. 409, 441-43 (1968), involving a developer who refused to sell a home to a black couple, did the Supreme Court use the Thirteenth Amendment to reach discrimination perpetrated by private individuals. In that case, a majority of the Court, with only two justices dissenting, construed section 2 of the Thirteenth Amendment to bar private discrimination, stating that "[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." See Corwin & Peltason, supra n. 41, at 185-86.

127. Plessy, 163 U.S. at 544.

128. Id. at 550.

129. Id. at 552. In Cummings v. County Bd. of Educ., 175 U.S. 528 (1899), three years later, the Court extended the separate-but-equal doctrine to public schools. The separate-but-equal doctrine presumed that the constitutional requirement of equal protection was served so long as facilities were equal, even if they remained separate. The problem, however, was that under the doctrine, "[s]eparate" was indeed the rule, but 'equal' was never enforced, nor was it a reality." Schmidt et al., supra n. 27, at 154; see also Bakke, 438 U.S. at 326-27 (Brennan, White, Marshall, & Blackmun, JJ., dissenting in part and concurring in part) (describing separate but equal as "a status always separate but seldom equal"). Thus, in Mississippi, as late as 1950, black schools received $32.55 in educational funding per pupil, compared to $122.95 per pupil for white schools. See Hilary Herbold.
As in the *Civil Rights Cases* thirteen years before, once again, only one justice, John Marshall Harlan, dissented from the ruling of the Court. As in the *Civil Rights Cases*, Justice Harlan believed the discrimination involved in *Plessy* violated both the Thirteenth Amendment and the Fourteenth Amendment. He contended that the Louisiana law prescribing separate coaches for blacks and whites was designed to exclude blacks from coaches assigned to white persons; therefore, he said, it “interferes with the personal freedom of citizens.” In language that still resonates today, he wrote, the eye of the law and Constitution recognizes no caste. To the contrary, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” He darkly predicted that the Court had rendered a decision that would, in time, be as pernicious as *Dred Scott*, and stated, significantly, that “[t]he thin disguise of ‘equal’ accommodations ... will not mislead any one, nor atone for the wrong this day done.” After observing that the decision would defeat “the beneficent purposes” Congress and the people had in mind in adopting the Civil War Amendments, he advised that it served the collective interests of whites and blacks that “the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.” He added, “What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?” It is hard, he said, to reconcile the portraiture of America as a land of freedom “with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens.” Given the belief of Justice Harlan

in the "beneficent purposes" of the Civil War Amendments and the significance of the remedies those amendments envisage for the sin of slavery and exclusion of blacks, it is ironic that anti-affirmative action forces today should use his color-blind language to support their opposition to these remedial measures.

Less than twenty years after the Civil War, the white majority "was all too willing to forget about the Civil War Amendments and the civil rights legislation of the 1860s and 1870s." 143 Judges "generally tend to avoid issuing decisions that they know will be noticeably at odds with public opinion;" 144 in particular, the Supreme Court is ever apprehensive that it "may lose stature if it decides a case in a way that markedly diverges from public opinion." 145 So, it is of little surprise that at the time it was decided, the Civil Rights Cases reflected white public opinion. 146 But none of this, including the regain of governmental power by many former pro-slavery secessionists in the Southern states, 147 absolves the Court or minimizes the opprobriousness of this decision. Plessy provided "the judicial cornerstone" 148 of Jim Crow laws that prevailed all over the country, especially in the South. 149 These segregation laws, similar to the future policy of apartheid or separateness in South Africa, that provided for separate facilities for blacks and whites. These laws encompassed schools, playgrounds, swimming pools, beaches, parks, hotels, hospitals, libraries, restaurants, cemeteries, water fountains, toilets, buses and street cars, interracial sex, marriage, and love, 150 and numerous other aspects of American life. They were strictly enforced by both legal and extra-legal means, 151 and maintained by

143. Schmidt et al., supra n. 27, at 153.
144. Id. at 477.
145. Id.
146. See id. at 153.
147. See id. at 153, 154.
148. Id. at 155.
149. "Jim Crow" was a derogatory term for a black person.
150. See C. Vann Woodward, The Strange Career of Jim Crow (2d rev. ed., Oxford U. Press 1966). The "strange career of Jim Crow" that the Plessy decision legitimized, in some places bordered on the absurd. For example, Alabama prohibited blacks and whites from playing checkers together; in some states schoolchildren of different races could not use the same books; Louisiana established separate districts for black and white prostitutes; in Oklahoma, blacks and whites could not use the same public telephone; in North Carolina, young children could be arrested for interracial kissing; in Georgia and several other states, blacks were required to use separate polling places, separate courthouse doors, separate record rooms, separate record books, separate pens and ink, and separate color-coded tax receipts—white for white taxpayers and pink for black taxpayers. See Walton & Smith, supra n. 3, at 20 (citing Woodward, supra).
151. Lynching, sometimes preceded by torture, and riots were extra-legal measures of choice in many Southern states. See Schmidt et al., supra n. 27, at 155. Newspapers covered stories of lynchings like sporting events are covered today, and the practice itself was so widespread that in
custom, depending upon the region of the country in question. Well into
the first half of the twentieth century, "blacks were forced to receive food
from the back of restaurants, drink from separate water fountains, and
ride in the back of the bus," among numerous other degradations. 152
More seriously, especially in the South, blacks faced the constant threat
of death for perceived crimes like a black male looking a white woman
in the eye (known as "familiarity"), failing to yield the right of way to a
white pedestrian, or addressing a white person in an "impertinent" tone. 153
Avoiding the formal use of race, the South used many other measures, including white primaries, 154 the grandfather clause, 155 poll
taxes, 156 race riots designed to stamp out economic competition from
blacks, and literacy tests, 157 to disenfranchise blacks and reinforce acts
of separation. Thus, along with the Civil Rights Cases, Plessy "destroyed
the movement toward complete equality" that the Reconstruction
inaugurated. 158

1881, the Tuskegee Institute in Alabama (Tuskegee University today) began issuing annual reports
on the incidents of lynching. Not until 1952 did it report that there were no lynchings to document in
a given year. See Barker et al., supra n. 13, at 17. By 1914, more than 1,100 African Americans were
estimated to have been lynched, sometimes for crimes as minor as a black man looking a white
woman in the eyes in "familiarity," or "insulting" a white person. Franklin & Moss, supra n. 79, at
311-17. Although lynching was illegal in many states, Southern authorities rarely prosecuted these
cases, and white juries would not convict. Schmidt et al., supra n. 27, at 155. With about 200
descendants of lynching victims and a ninety-one-year-old man believed to be the only living
survivor of a lynching attempt listening from the visitors' gallery, the United States Senate, in June
2005, apologized for its role in blocking anti-lynching legislation. See Jim Abrams, Senate
Apologizes for Lynching-Ban Delays, Associated Press (June 13, 2005).

152. Gilliam, supra n. 80, at 41.
153. See also Schmidt et al., supra n. 27, at 154.
154. The Democratic Party used this device to keep black voters out of its primaries under the
guise that political parties were private organizations. The Supreme Court upheld the white primary
until 1944 when, in Smith v. Allwright, 321 U.S. 649, 666 (1944), it ruled that these primaries
violated the Fifteenth Amendment.
155. This clause restricted voting to those who could prove that their grandfathers had voted
before 1867. But few black grandfathers voted before 1867. In fact, the Fifteenth Amendment
extending the right to vote to black males was ratified only in 1870. So, this requirement effectively
nullified the voting rights of blacks.
156. Poll taxes require a voter—black or white—to pay a fee in order to vote. But fewer blacks
than whites had jobs and could afford to pay such taxes; so, the requirement effectively chilled black
voting. The Twenty-Fourth Amendment, ratified in 1964, abolished these taxes as a precondition for
voting. Also, in 1966, the Supreme Court declared poll taxes unconstitutional in all elections, Harper
157. These tests required potential voters to read, recite, or interpret complicated texts, such as
a section of the state constitution, to the satisfaction of local registrars in order for them to vote.
Many local registrars were never satisfied with the responses of African Americans and used those
as excuses to prevent them from voting.
158. Bakke, 438 U.S. at 402 (Marshall, J., concurring in part and dissenting in part). "Had the
Court been willing in 1896, in Plessy, to hold that equal protection forbids differences in treatment
based on race," Justice Marshall recounted ruefully in Bakke, "we would not be faced with this
4. Progress Toward Equality: \(^{159}\) "Separate Educational Facilities Are Inherently Unequal"

A landmark decision that marks and colossally dominates this era is \(\text{Brown v. Board of Education of Topeka.}\)\(^{160}\) Like the Civil Rights Cases more than seventy years earlier, \(\text{Brown}\) was a consolidated opinion, involving cases from the States of Delaware, Kansas, South Carolina, and Virginia, "premised on different facts and different local conditions," yet tied together by a common legal question justifying their consolidation.\(^{161}\) It was the last in a progression of cases that attacked separate but equal,\(^{162}\) yet contrasted from those cases that limited themselves to proving that separate but equal was all separate but not equal, in that it signified a frontal attack or "re-examin[ation]" of the doctrine itself, as Chief Justice Warren said in his opinion for the Court.\(^{163}\)

In \(\text{Brown},\) the plaintiffs contended that segregated public schools are not equal and cannot be made equal; accordingly, they maintained, their constitutional rights to equal protection under the laws, had been violated.\(^{164}\) The Supreme Court agreed, stating,

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others
similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.  

In other words, segregating children in public schools solely based on their race, even if the physical facilities and other "tangible" factors may be equal, deprive minority children of equal educational opportunities. The Court reached this verdict unanimously.

The Court's holding was preceded by extensive insightful analysis on "public education in the light of its full development and its present place in American life throughout the Nation." The Court first assessed that "[t]oday, education is perhaps the most important function of state and local governments," adding

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Given this importance, the Court said, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms."

Such considerations apply with added force to children in grade and

165. Id. at 495.
166. Id. at 493. Like in Brown, the Court ruled in the companion case, involving the District of Columbia, that "[s]egregation in public education is not reasonably related to any proper government objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." Bolling, 347 U.S. at 500.
167. As a law clerk for Robert Jackson, one of the justices who decided Brown, Chief Justice William Rehnquist wrote a memorandum regarding the pending case, in which he argued in favor of maintaining separate but equal schools. Confronted with this information during his Senate confirmation hearing, Rehnquist responded that these were not his views; rather, he said, he was following Jackson's instructions to prepare a memo arguing the segregationist position. See Hensley et al., supra n. 3, at 64. Jackson (1892–1954), a Democrat from New York and appointed by President Franklin Roosevelt, served on the Court from 1941 until his death in 1954.
169. Id. at 493 (ellipses added).
170. Id.
171. See id.
high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. 172

The Court cited approvingly a finding in one Kansas case regarding the devastating psychological effect of segregation on black children from a court, which, despite the profundity of that finding, “nevertheless felt compelled to rule against the Negro plaintiffs.”173

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. 174

Following the main case, Chief Justice Warren issued a second Brown decision, 175 focusing on implementation, in which the Court ordered district courts to ensure that African American children are admitted to schools on a nondiscriminatory basis with “all deliberate speed.” 176 They should consider devices in their desegregation orders that might include “the school transportation system, personnel, [and] revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis.” 177 It took fifteen long years for the Court to finally demand that the states desegregate the schools at once. 178

This circumspectness did not avert the fierce opposition from Southern states that Brown elicited. These states fought off desegregation and integration of African Americans into formerly segregated schools with all manners of tactics, which in states like Arkansas and Mississippi included violence. In order to quell the violence that attended the integration of Central High School in Little Rock in 1957, a reluctant President Eisenhower federalized the Arkansas National Guard and

172. Id. at 494.
173. Id.
174. Id. (quoting McLaurin, 347 U.S. 483 (1954)).
176. Id. at 301.
177. Id. at 300–01.
deployed the Army’s 101st Airborne Division. Mississippi was the epicenter of the fireball of violence in opposition to integration. There, the attempt of the African American student, James Meredith, in 1962, to enroll at the University of Mississippi led to violent riots by whites that resulted in two deaths and 375 military and civilian injuries, many from gunfire. Order was restored and the University of Mississippi in Oxford integrated after President John Kennedy sent in 30,000 federal combat troops, more force, reportedly, than the U.S. then had stationed in Korea.

179. See Schmidt et al., supra n. 27, at 155. In 1958, the Little Rock School Board applied to the U.S. District Court for a twenty-two year postponement of its desegregation plan. It contended that intense public hostility that would attend desegregation would prevent them from adequately ensuring public safety or providing public education. In Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court rejected the claim, stating that the conditions the School Board depicts “are directly traceable to the actions of legislators and executive officials of the state of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court’s decision in the Brown case.” Id. at 15. In other words, in rejecting the plaintiff’s claim to suspend the Little Rock desegregation plan, the Court saw the violence and disruption surrounding the integration of Central High as a direct result of state action.


181. Id. at 278. Because desegregation took place conterminously with the civil rights movement, it is difficult to segregate acts of violence isolable to desegregation and those that attended the peaceful protests of the civil rights movement. Besides the killings of Dr. Martin Luther King Jr. and Malcolm X, these would include the unleashing of police dogs and deployment of electric cattle prods against unarmed protesters in spring of 1963 involving Police Commissioner Eugene “Bull” Connor in Birmingham, Alabama; the murder of four little black girls inside the Sixteenth Street Baptist Church in, again, Birmingham, Alabama, on Sept. 15, 1963; and cold-blooded killings in Southern states of Caucasians perceived as sympathizing or working with blacks. In Alabama, “[h]ombings of homes and churches of black leaders were so common that Birmingham [was] nicknamed ‘Bombingham’ [and] [t]he city’s best black neighborhood was known as ‘Dynamite Hill.’” David B. Oppenheimer, Martin’s March, 80 ABA J. 54 (June 1994).

As for those whites who died because they tried to help blacks, championship of black freedom or equality, going back into the past, has, unfortunately, been nothing short of hazardous for courageous whites who thrust that challenge on their shoulders. This was the fate of Senator Charles Sumner who served in the U.S. Senate from 1852 until his death in 1874. A most outspoken champion of black freedom, Sumner gave a speech in 1856, one year before the issuance of Dred Scott, in which he bitterly attacked two of his colleagues for their support of slavery. Two days later, one Preston Brooks, a Congressman, entered the Senate chamber and nearly beat Sumner to death on the ground that his remarks libeled the South. It took three years before Sumner recovered and returned to the Senate to, incredibly, resume his struggle for black freedom. With another Congressman, Thaddeus Stevens, Sumner led the fight in Congress for civil rights legislation and passage of the Fourteenth and Fifteenth Amendments. The two were also responsible for the idea of “forty acres and a mule,” legislation designed to confiscate the slave-holders’ plantations, divide them up, and give them to the slaves as compensation or reparation, and punish the slave-holders for treason. At the time of his death, Sumner was fighting for a civil rights bill that would have banned discrimination and segregation in the use of public accommodations. On his deathbed, surrounded by the African American leader, Frederick Douglass, and other African American leaders, Sumner’s last words were reported to have been, “Take care of my civil rights bill—take care of it—you must do it.” Douglass most appropriately praised Sumner “as the greatest friend the Negro people ever
Today, integration devices, such as busing, which in the past enjoyed some measure of support among Americans as legitimate remedial measures, have been all but abandoned. The result has been a "resurgence of minority schools," and a growing fear that racial separation has become inevitable and legal. More than fifty years after Brown, the dream of "a common, universal school system for all Americans without regard to race" remains just a dream.

Several "beachhead" cases leading up to the frontal attack on segregation in Brown include Missouri ex rel. Gaines v. Canada, Sweatt v. Painter, and McLaurin v. Oklahoma State Regents. First, in Gaines, the Supreme Court ruled that equal protection under the Constitution required Missouri to provide separate but equal legal education facilities for blacks. Lloyd Gaines was a black applicant who was refused admission to the University of Missouri Law School because of his race. Since Missouri could not provide separate but equal facilities for him, it had to admit him to the law school. The Court found untenable Missouri's defense that it would pay Gaines's tuition in an out-of-state school, pending the establishment of a separate law school for blacks.

Next, in Sweatt, the University of Texas Law School (UTLS) denied admission to Marion Sweatt, a black applicant, on the ground that blacks had separate and equal legal educational opportunities in a hastily-

had in public life." See Walton & Smith, supra n. 3, at 178 (drawing on Frederick Blue, Charles Sumner & the Conscience of the North (Harlan Davidson 1994)).

182. See e.g. Belk v. Charlotte-Mecklenburg Bd. of Ed., 269 F.3d 305 (4th Cir. 2001) (holding that race-based admission quotas could no longer be imposed constitutionally).

183. Schmidt et al., supra n. 27, at 157 (pointing out that "[t]oday, one out of every three African American and Hispanic students goes to a school with more than [ninety] percent minority enrollment. In the largest U.S. cities, fifteen out of sixteen African American and Hispanic students go to schools with almost no non-Hispanic whites").


185. Walton & Smith, supra n. 3, at 215. See also Gloria J. Browne-Marshall, Crumbs from the Table of Plenty: A Commentary on Brown and the Ongoing Struggle for Educational Equity in American School, Paper Commemorating the 50th Anniversary of Brown (Word for Word Publg. Co. 2004) (giving an equally unoptimistic analysis of immense historical depth that assesses the race-conscious gains of Grutter as "crumbs from a table of plenty"). Cf. Schmidt et al., supra n. 27, at 157 (stating "[t]he goal of racially balanced schools envisioned in "Brown" is giving way to the goal of better education for children, even if that means educating them in schools in which students are of the same race or in which race is not considered").

186. 305 U.S. 337 (1938).


189. Gaines, 305 U.S. at 352.

190. Id. at 350.
constructed law school. In a unanimous opinion by Chief Justice Vinson, the Court found no "substantial equality in the educational opportunities" Texas offered to black law students, compared to the opportunities it provided to white law students and ruled that Sweatt be admitted into the UTLS. Besides listing the many tangible and intangible features which importantly distinguish the UTLS from the Houston-based law school hastily set up for blacks, the Court also stated that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts." It importantly observed that the newly established law school for blacks "excludes from its student body members of the racial groups which number [eighty-five] percent of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner would inevitably be dealing when he becomes a member of the Texas Bar."

In McLaurin, George W. McLaurin, a black student, was admitted to the University of Oklahoma Graduate School of Education but was required to sit in a roped-off section of the classroom away from white students and in a separate area of the library and cafeteria facilities. Chief Justice Vinson, writing for the Court, found that the restrictions impaired the student's "ability to study, to engage in discussions and exchange views with other students and, in general to learn his profession." These cases, along with Brown, formed part of a coordinated desegregation litigation plan of attack, by the NAACP Legal

191. Texas state law reserved the University of Texas for white students. See Sweatt, 339 U.S. at 631 n. 1.
192. Frederick M. Vinson (1890–1953) was Chief Justice of the United States until his death in 1953.
194. Id. ("In terms of number of faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities," not to mention key intangible qualities for greatness in a law school, like "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige," the University of Texas Law School is superior.). Id. at 634. Ridiculing the claim of the Texas government that the fly-by-night law school established for blacks has anything resembling substantial equality with the UTLS, Chief Justice Vinson stated that "[i]t is difficult to believe that one who had a free choice between these law schools would consider the question close." Id. at 633–34.
195. Id. at 634.
197. The University admitted McLaurin while his suit was still pending.
199. Id. at 641.
Defense Fund, against separate but equal, which began with showing that separate facilities for blacks provided by states were never equal with whites and ended in Brown with a frontal attack on the doctrine itself.200

C. The Supreme Court and Affirmative Action from DeFunis to the Michigan Cases with Special Reference to Public Education

1. The Supreme Court and Affirmative Action Up to Bakke

The first-ever affirmative action lawsuit to reach the U.S. Supreme Court was DeFunis v. Odegaard in 1974.201 The suit involved the University of Washington Law School. The law school had an affirmative action program that targeted and benefited minority applicants, including African Americans, Hispanic Americans, Native Americans, and Filipinos. Marcos DeFunis Jr., a Caucasian male, was denied admission to the school and blamed his rejection on the affirmative action program—something he alleged violated the Equal Protection Clause.202 The law school defended the program by pointing out that factors other than grades and test scores were taken into consideration in its admissions decisions and that the use of race was compellingly necessary to expand opportunities for minorities to enter the legal profession, given their lack of access in the past.203 A state trial court ruled in favor of DeFunis and ordered his admission to the law school in 1971.204 The state supreme court reversed that ruling, and

200. Two other cases identified as forerunners to Brown are Pearson v. Murray, 182 A. 590 (Md. 1936), and Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948). Of the two, only Sipuel is a Supreme Court decision, and a per curiam decision at that. In Pearson, the court ordered the admission of Pearson, a black, to the University of Maryland Law School. Given that "in Maryland now the equal treatment can be furnished only in the one existing law school," the court said, "the petitioner, in our opinion, must be admitted there." Pearson, 169 Md. at 594. In Sipuel, the Supreme Court ruled, per curiam, that the state of Oklahoma must provide legal education for the petitioner, Ada Louis Sipuel, a black woman, "in conformity with the Equal Protection Clause. . . and provide it as soon as it does for applicants of any other group." Sipuel, 332 U.S. at 632-33. Numerous studies chronicling the NAACP "fighting segregation through litigation" strategy include Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-61 (Oxford U. Press 1994); Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (Basic Books 1994); Mark Tushnet, The NAACP's Legal Strategy against Segregated Education, 1925-50 (U. of N.C. Press 1987); and Richard Kluger, Simple Justice: The History of Brown v. Board of Education (Alfred A. Knopf, Inc. 1977). Attack on Jim Crow schools was only one of many fronts in the NAACP's campaign against segregation. Other fronts, also entailing litigation, include white primaries, restrictive covenants impeding black access to housing, and Jim Crow transportation.


202. Id. at 314.

203. Id. at 346-47

204. Id. at 314-15.
DeFunis appealed to the U.S. Supreme Court, which granted review. DeFunis was allowed to remain in school, pending disposition of the appeal. By the time the Court considered the case in 1974, he was in his final year of law school and expected to graduate. Therefore, the Court, in an opinion by Chief Justice Burger, dismissed the suit on the grounds that the case had become moot.\(^\text{205}\)

Four justices, Brennan, Douglas, Marshall, and White, dissented from the judgment.\(^\text{206}\) They asserted that the Court should have given the case full consideration and warned that the controversy would inevitably wind its way back into the Court.\(^\text{207}\) Of the dissenters, Justice Douglas wrote a separate opinion in which he reached the merits.\(^\text{208}\) The opinion contained strong language opposing the use of race in admissions decisions. Justice Douglas believed ""[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation.""\(^\text{209}\) He contended that ""[t]he purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans... A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom....""\(^\text{210}\) He supported consideration of applications in a racially neutral way, which he believed the Law School Admission Test (LSAT) works against, in that it is racially biased in favor of white law applicants.\(^\text{211}\) He said abolition of the LSAT would be a good ""start"" in the design of such a racially neutral admission regime.\(^\text{212}\) Law schools ought to find other ways to ensure diversity without the LSAT.

The dissenters' prediction in *DeFunis* that the Court would inevitably rule on affirmative action came true four years later in *Bakke*.\(^\text{213}\) The decision is significant as the first Supreme Court decision to address the constitutionality of affirmative action. The case involved the University of California at Davis Medical School. Aiming to increase

\(^{205}\). *Id.* at 319–20.

\(^{206}\). *Id.* at 348–50 (Brennan, Douglas, Marshall, & White, JJ., dissenting).

\(^{207}\). *Id.*

\(^{208}\). *See* 416 U.S. at 321–45 (Douglas, J., dissenting). Douglas, a Democrat from Connecticut appointed by President Franklin D. Roosevelt (1933–45) and who sat on the Court for a record thirty-six years from 1939 to 1975, retired after this case and was replaced by Justice John Paul Stevens, who has been on the Court since 1975.

\(^{209}\). *Id.* at 342.

\(^{210}\). *Id.* at 342–43.

\(^{211}\). *Id.* at 334 (stating that ""minorities have cultural backgrounds that are vastly different from the dominant Caucasian"" and that they ""come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide off the mark for many minorities."").

\(^{212}\). *Id.* at 340.

its minority enrollment, the medical school set up a special admissions program, which reserved sixteen out of one hundred seats in the entering class for minorities.\textsuperscript{214} The school identified various purposes the affirmative action program was designed to serve, including (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (ii) countering the effects of societal discrimination, (iii) increasing the number of physicians who will practice in communities currently under-served, and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.\textsuperscript{215} In the case, Allan Bakke, a Caucasian male, was denied admission twice to the medical school and subsequently challenged the affirmative action program on the grounds that it violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and the California Constitution.\textsuperscript{216}

The trial court agreed with Bakke and ruled that the special admissions program was a racial quota, insofar as minority applicants were rated only against each other and sixteen out of one hundred seats were reserved for them.\textsuperscript{217} The California Supreme Court affirmed. While it found the goal of integrating the medical profession a compelling state interest, the court found that the means chosen to attain that goal were not narrowly tailored\textsuperscript{218} and race may not be a factor in the admissions decision.\textsuperscript{219} The Supreme Court granted certiorari to review the case.

The Court issued a complex five-to-four decision, with Justice Powell’s vote determining the outcome. Powell joined a plurality consisting of Chief Justice Burger, and Justices Rehnquist, Stevens, and Stewart (the Burger plurality) in holding the special admissions program was a quota and therefore invalid. However, Powell also agreed with the other plurality of Justices Blackmun, Brennan, Marshall, and White (the Blackmun plurality) that race or ethnicity could be a legitimate factor in admissions decisions. In other words, Justice Powell\textsuperscript{220} provided a fifth

\textsuperscript{214} Id. at 289.

\textsuperscript{215} Id. at 305–06.

\textsuperscript{216} Id. at 277–78. For a newspaper story on plaintiff Allan Bakke, see Robert Lindsey, \textit{White/Caucasian—and Rejected}, N.Y. Times Mag. 42–47 (Apr. 3, 1977). For case studies of the lawsuit that include oral presentation of counsels on both sides before the Supreme Court, see Hensley et al., \textit{supra} n. 3, at 712–14; \textit{see also May It Please the Court} (Peter Irons & Stephanie Guitton, eds., New Press 1993).

\textsuperscript{217} Id. at 278–79.

\textsuperscript{218} Id. at 279–80.

\textsuperscript{219} Id.

\textsuperscript{220} Lewis F. Powell Jr. (1907–98), Democrat from Virginia, appointed by President Richard Nixon, served on the high court from 1972 until his retirement in 1987. As a justice on the Burger Court (1969–86), he was a moderate with conservative leanings and a swing voter who cast the
vote both for invalidating the University's special admissions program and for taking race into account in admissions decisions for purposes of diversity in a public university's student body. Justice Powell stated that "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet this does not insulate the individual from comparison with all other candidates for the available seats." His main complaint with the Davis medical school program was that it "focused solely on ethnic diversity" and effectively indicated to non-minority applicants that "[n]o 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 [set-aside] special admissions seats."

One unmistakable feature of Bakke was the lack of agreement among the justices as to an appropriate standard of review for affirmative action cases. Justice Powell and the Blackmun plurality both decided the case on equal protection grounds, while the Burger plurality, avoiding the equal protection question altogether, decided the case on statutory grounds, holding that Title VI of the Civil Rights Act prohibits racial discrimination in programs receiving federal financial assistance. Additionally, Justice Powell applied strict scrutiny as the standard of review, while the Blackmun plurality viewed intermediate scrutiny as the appropriate and applicable standard.

Examining the various purposes the medical school listed for its affirmative action program and applying strict scrutiny, Justice Powell identified diversity, or "obtaining the educational benefit that flow from

decisive vote in a Court closely divided between liberals and conservatives. Hensley et al., supra n. 3, at 66. Although Powell tended to favor conservative outcomes in most cases, he differed from conservative justices such as Rehnquist and Scalia in the sense that he "sought to balance carefully the competing interests in cases presented to the Court rather than to advance a particular ideology." Id. at 67.

221. *Bakke*, 438 U.S. at 317. As Justice O'Connor clarifies for the record in *Grutter* a quarter century later, "The only holding for the Court in *Bakke* was that a 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." *Grutter*, 539 U.S. at 322–23 (internal quotes omitted).


223. Id. at 325 (Brennan, White, Marshall, & Blackmun, JJ., concurring in judgment in part and dissenting in part).

224. Id. at 408 (Stevens, J., joined by Burger, C.J., and Steward and Rehnquist, JJ., concurring in judgment in part and dissenting in part).

225. Id. at 299 (stating that when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

226. Id. (Brennan, White, Marshall, & Blackmun, JJ., concurring in judgment in part and dissenting in part).
an ethnically diverse student body," as the only purpose or interest, under the Constitution, that in a proper case could justify a race-conscious preference plan.\(^{227}\) He would also give deference to a university or professional school’s judgment that diversity is crucial to its educational mission. “The freedom of a university to make its own judgments as to education includes the selection of its student body.”\(^{228}\) Justice Powell grounded his analysis in the academic freedom that “long has been viewed as a special concern of the First Amendment.”\(^{229}\) The “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”\(^{230}\) And a university seeks “to achieve a goal that is of paramount importance in the fulfillment of its mission” when it seeks the “right to select those students who will contribute the most to the robust exchange of ideas.”\(^{231}\)

2. The Supreme Court and Affirmative Action Since Bakke and Before the Michigan Cases

The Court’s decision in Bakke provided helpful insight into the validity of affirmative action, but did not resolve the controversy over affirmative action as doctrine and program.\(^{232}\) What is more, in Bakke’s aftermath, the Supreme Court imposed severe limitations on affirmative action.\(^{233}\) Two cases which signified this trend—as well as the Court’s hostility toward affirmative action—were City of Richmond v. J.A. Croson Co.\(^{234}\) and Adarand Constructors, Inc. v. Peña.\(^{235}\) Croson marks

---

227. See id. at 306–10. Justice Powell views the first purpose, relating to the reduction of the historic deficit of minorities in medical schools and in the medical profession, as an unlawful interest in racial balancing. Id. at 306–07. He considered the second purpose, related to countering the effects of societal discrimination, as also an unlawful interest because it could lead to measures that could place burdens on innocent third parties “who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” Id. at 310. He also found the third purpose, related to the increase of the number of physicians who will practice in under-served communities, unacceptable and rejected it, indicating that even if an interest based on that policy could be compelling in some circumstances, the program under review was not “geared to promote that goal.” Id. at 306, 310.

228. Id. at 312.

229. Id. An important exception is that "constitutional limitations protecting individual rights may not be disregarded." Id. at 314.

230. Id. at 313 (internal quotes omitted).

231. Id. (internal quotes omitted).

232. Hensley et al., supra n. 3, at 714.

233. See Ricucci, supra n. 1 and corresponding text; see also Thomas Boston & Usha Nair-Reichert, Affirmative Action: Perspectives from the United States, India, and Brazil, 27 W. J. Black Stud. 3 (2003).


the first time that a majority of the Court subjected an affirmative action program to strict scrutiny, its highest standard of review for questions involving constitutional violations. Adarand is crucial because, here, the Court made the decision that it would henceforth apply strict scrutiny to every racial classification and affirmative action program, regardless of the intention underlying that classification, and regardless of what entity, federal, state or local, designed that program.\(^{236}\)

In Croson, the Richmond City Council adopted an affirmative action program known as the Minority Business Utilization Plan in 1983, after studies indicated that, although the city’s population was fifty percent African American, minority contractors received only .67 percent of the city’s major contracts.\(^{237}\) The Plan required major contractors, who were awarded city contracts, to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs), defined as businesses owned by African Americans, Hispanics, Asians, Native Americans, and Eskimos.\(^{238}\) It was patterned after the federal government program upheld by the Court in Fullilove v. Klutznick\(^{239}\) and, like the program in Fullilove, a contractor could receive a waiver if no qualified MBEs could be found.

In an opinion for the Court by Justice O'Connor, the plurality struck down the affirmative action plan as unconstitutional on the ground that it did not meet strict scrutiny—even though the Court said it had "no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs."\(^ {240}\) It said that, unlike Congress, which "has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment,"\(^ {241}\) a state or local government seeking to implement a remedial action to address discrimination "must identify that discrimination, public or private, with some specificity before they may use race-[-]conscious relief."\(^ {242}\) Richmond’s evidence lacks specificity, it said; also, the program was so "gross[ly] overinclusive[ ]" it "strongly

\(^{236}\) Id. at 227 (stating that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

\(^{237}\) 488 U.S. at 479 (plurality opinion).

\(^{238}\) Id. at 477.


\(^{240}\) Croson, 488 U.S. at 499 (plurality opinion).

\(^{241}\) Id. at 490.

\(^{242}\) Id. at 504.
impugn[ed] the city’s claim of remedial motivation.” Finally, the city’s thirty percent goal was a quota of the type outlawed in Bakke; but, the majority made it clear that what it did was kill the affirmative action program in question, not the principle of affirmative action.

Three Justices—Blackmun, Brennan, and Marshall—dissented from the judgment of the Court in a strongly reasoned opinion by Justice Marshall. Marshall accused the majority of “constitutionalizing its wishful thinking,” and he called their vision of equal protection “cramped.” He found the evidence Richmond provided adequate. Besides statistics showing that minority-owned businesses have received virtually no city contracting dollars and testimony that discrimination has been widespread in the local construction industry, Marshall said that the Richmond City Council also provided “the same . . . federal studies relied on in Fullilove.” Yet still, he pointed out, the affirmative action program the Court struck down “is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which the Court upheld in Fullilove.”

Marshall could not comprehend why the Court should apply strict scrutiny to race-conscious programs, like Richmond’s, designed to eliminate past discrimination, as distinguished from classifications that discriminate against minorities. He contended, “A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral government activity from perpetuating the effects of such racism.”

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and

243. Id. at 506.
244. Id. at 509 (“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.”).
245. Id. at 528–61 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting).
246. Id. at 552.
247. Id. at 561.
248. Id. at 529.
249. Id. at 528. Reinforcing Justice Marshall’s argument regarding the adequacy of evidence is that the affirmative action program upheld in Metro Broadcasting embodied a definition of minority similar to the one the Court considered grossly overinclusive in Croson. See Metro Broadcasting v. Fed. Commun. Commn., 497 U.S. 547, 565-66 (1997) (upholding the constitutionality, under the Fifth Amendment, of the F.C.C.’s set-aside policy with a history of long-standing support from Congress). The F.C.C. defined “minority” to include “those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.” Metro Broadcasting, 497 U.S. at 554 n. 1.
repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination largely as a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. Conversely, Justice O'Connor, in her opinion for the Court, asserted that even if the Court did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case require the Court to look upon the Richmond City Council's measure with the strictest scrutiny." Justice Marshall considered the assertion racist, and contended that "such insulting judgments have no place in constitutional jurisprudence." He said the sole such circumstance the majority pointed to was the fact that blacks in Richmond form a "dominant racial group" in the city. He said he agrees that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, but that the Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, the Court has identified other "traditional indicia of suspectness" such as whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Marshall believed whites (or non-minorities) in Richmond had no "history of purposeful unequal treatment." Additionally, they did not have "any of the disabilities that have characteristically afflicted the groups the Court had deemed suspect." Indeed, he said, the numerical and political dominance of non-minorities in Virginia and the Nation as a

251. id. at 552.
252. id. at 495.
253. id. at 554 ("The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of equal protection 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."). While Justice Marshall did not use the term racism, the word describes what he meant here. Racism is "the predication of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over it." See e.g. Walton & Smith, supra n. 3, at 6 (citation omitted). The set of ideas used in the U.S. to justify and maintain racism is the ideology of white supremacy or black inferiority. Id. For an exhaustive analysis on the nature of racism and white supremacy in America, consult Hacker, supra n. 42.
255. id. at 553 (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).
256. id. at 553.
257. id.
whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. 258 "If anything," he said, "the ‘circumstances of this case’ [the majority refers to] underscore the importance of not subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination." 259

Following _Croson_, _Adarand_ further exemplified the Court’s hostility toward affirmative action. _Adarand_ involved a federal affirmative action program in federal contracts for highway construction. The program provided monetary bonuses to prime contractors who subcontracted at least ten percent of the overall amount to "disadvantaged business enterprises" (DBE). 260 These DBEs were defined to include small businesses owned and operated by minority groups, such as African Americans, Hispanics, Asians, and Native Americans. Like in _Croson_, Justice O’Connor wrote the opinion of the Court. Also like in _Croson_, the Court acknowledged, "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." 261 Still, again like in _Croson_, it applied strict scrutiny, but here the case was decided under the Equal Protection Clause of the Fifth Amendment, since a federal program was involved. The Court overruled its previous decision in _Metro Broadcasting v. Federal Communications Commission_; 262 not only would all race-conscious preferential programs, regardless of which level of government that designed them, now be subject to strict scrutiny, Justice O’Connor said, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." 263 The Court remanded the case to the lower court for reexamination consistent with that review standard.

Besides joining the judgment of the Court, Justices Scalia and Thomas authored separate concurrences in which they contended that affirmative action programs are never permissible. 264 Justice Scalia stated that "government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination.

---

258. _Id._ at 554.
259. _Id._
261. _Id._ at 237.
263. _Adarand_, 515 U.S. at 222.
264. _See id._ at 239 (Scalia, J., concurring); _see also id._ at 240–41 (Thomas, J., concurring).
discrimination in the opposite direction.” 265 He said that “under our Constitution there can be no such thing as either a creditor or a debtor race.” 266 He maintained that pursuit of “the concept of racial entitlement . . . is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.” 267 He concluded, “In the eyes of government, we are just one race here. It is American.” 268 Justice Thomas denounced race-conscious preference programs as a “racial paternalism.” 269 He said preferences designed to help people are as noxious as preferences that oppress. 270 “In each instance, it is racial discrimination, plain and simple.” 271 Also, he said, affirmative action programs, such as the one here at issue, are “at war with the principle of inherent equality that underlies and infuses our Constitution,” 272 and that they “undermine the moral basis of the equal protection principle.” 273 What is more, he said, this “government-sponsored racial discrimination” suggests minorities cannot compete without help, 274 provokes resentment from people not favored, 275 stamps “a badge of inferiority” among beneficiaries, 276 and engenders dependency on government assistance, 277 among other ills. In a statement meant specifically to counteract language in Justice Stevens’s dissent, he wrote

I believe that there is a “moral [and] constitutional equivalence” between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

Four Justices, Breyer, Ginsburg, Souter, and Stevens, rejected the application of strict scrutiny to federal affirmative action programs. Ginsburg, Souter, and Stevens, each authored a separate dissent. 279 In

265. Id. at 239 (Scalia, J., concurring).
266. Id.
267. Id.
268. Id.
269. Adarand, 515 U.S. at 240 (Thomas, J., concurring).
270. Id. at 241.
271. Id.
272. Id. at 240.
273. Id.
274. Id. at 241.
275. Id.
276. Id.
277. Id.
278. Id. at 240.
279. See Adarand, 515 U.S. at 270–76 (Ginsburg, J., joined by Breyer, J., dissenting); id. at
her dissent, Justice Ginsburg noted that the Court itself acknowledged the unfortunate reality embodied in the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. 280 “Those effects, reflective of a system of racial caste only recently ended, are still evident in our workplaces, markets, and neighborhoods.” 281 Remedial programs like the affirmative action programs at issue, which the Court disapproved of, were adopted by Congress to respond to these unhappy effects 282 and to help finally realize the equal protection of the law that the Fourteenth Amendment had promised since 1868. 283 The effects remain because, for most of its history, the U.S. did not embrace the idea that “we are just one race.” 284 Instead, “[f]or generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other.” 285 She said barriers still exist, products of “traditional and unexamined habits of thoughts,” needing to be eradicated in order for “equal opportunity and nondiscrimination” to genuinely take root in this country. 286 She pled that the divisions in this case would “not obscure the Court’s recognition of the persistence of racial inequality” and the Court’s very own acknowledgment of Congress’s authority to act affirmatively to end racial discrimination and counteract its lingering effects. 287

In his dissent, Justice Souter indicated that an affirmative action plan may still be constitutionally permissible, though it may have a negative effect on innocent parties who bear no personal responsibility for the discriminatory conduct, if it is temporary. 288 “[I]f the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing.” 289

Finally, Justice Stevens, in his own dissent, complained that the Court “ignore[d] a difference, fundamental to our constitutional system, between the Federal Government and the States.” 290 And it also

264–70 (Souter, J., dissenting); id. at 242–64 (Stevens, J., dissenting).
280. Id. at 273 (Ginsburg, J., joined by Breyer, J., dissenting).
281. Id.
282. Id.
283. Id. at 274.
284. Id. at 275.
285. Id. at 272.
286. Id. at 274.
287. Id.
288. Adarand, 515 U.S. at 270 (Souter, J., joined by Breyer and Ginsburg, JJ, dissenting).
289. Id.
290. Id. at 264 (Stevens, J., joined by Ginsburg, J., dissenting).
“ignore[d] a difference, fundamental to the idea of equal protection, between oppression and assistance.” 291

He stated:

There 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. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.

Before Croson and Adarand, the Supreme Court applied intermediate scrutiny in evaluating challenges to affirmative action programs designed by Congress. Under this review standard, race-conscious measures, designed to remedy past discrimination, were considered constitutional if they “serve[d] important governmental interest and [were] substantially related to the achievement of those purposes.” 293 Unlike strict scrutiny, intermediate scrutiny does not require the entity setting up an affirmative action program to establish specific findings of discrimination. Such intermediate review was applied in Metro Broadcasting. 294 There, speaking for the Court, Justice Brennan ruled that “benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.” 295 Intermediate review was also the standard applied in Fullilove, where the Court ruled that Congress need not establish specific findings of discrimination because it has broad authority and an affirmative duty to react to and address discrimination as a matter of national concern. 296 There, too, the Court acknowledged that “Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems,” 297 and that no organ of government, whether state or federal, possesses a more comprehensive constitutional power, “competence and authority to enforce the equal protection guarantees.” 298

Perceptive legal scholars, such as Professor Wu and Professor Pillai, view Adarand negatively. Wu assessed that Adarand “render[ed]
affirmative action the constitutional equivalent of invidious racial discrimination.” Pillai argues that by its “shifting and unprincipled” interpretation in Adarand and other cases, the Supreme Court deprives Congress of its “significant remedial and enforcement power” under the Fourteenth Amendment. He warns that this “indiscriminate and unprincipled restructuring of the Fourteenth Amendment” risks “undermining the integrity of the constitutional process of adjudication.” Soon after Croson, a debate ensued over whether the ruling created insuperable obstacles to creation of affirmative action programs by state and local governments. It took reassurance embodied in a statement released by a group of leading constitutional scholars before state and local governments became encouraged to resume their affirmative action programs.

3. The Michigan Cases

Grutter and Gratz involved challenges to the affirmative action programs of the University of Michigan, a public educational institution owned and funded by the State of Michigan. The challenges came from both disgruntled Caucasian men and women, a departure from earlier challenges undertaken only by white males. The cases were sponsored by the Center for Individual Rights (CIR), a Washington D.C. public policy law firm and an organization that, before now, scouted for and sponsored plaintiffs in cases challenging affirmative action in Texas and Washington. Grutter involved the University of Michigan’s Law


301. Id. at 519 n. 430. Pillai recalled the wisdom of the legal philosopher Ronald Dworkin who advised the Court not “to nourish the cynical views ... that constitutional law is only a matter of which President appointed the last few justices.” Id. (quoting Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution 57 (Harv. U. Press 1996)).


303. See June Kronholz, Does A White Mom Add Diversity?, Wall St. J. B3 (June 25, 2003). Although it bears a deceptively liberal-sounding name, the CIR is a conservative advocacy organization which, along with other groups, had been conducting a nationwide campaign of lawsuits to dismantle race-conscious preferences. See Vernon Jarrett, Beware! Old Race War Still On!, Chi. Defender (May 10, 2003). The tactics, of these conservative advocacy groups, of using the courts reminds one of the NAACP’s own “fighting segregation through litigation” strategy, see supra n. 200. The main difference, however, is that the NAACP turned to the courts because its leaders felt relatively powerless in the ordinary politics of lobbying Congress and the President.
School affirmative action program. *Gratz* concerned the University’s undergraduate affirmative action plan, specifically that of the College of Literature, Science, and the Arts. Although they may look different, standing for two diametrically different outcomes, certain key factors link the cases. First, the Supreme Court “repudiated the argument in both cases that racial classifications are always odious” and “rejected the claim that race no longer matters.” 304 Instead, in *Grutter*, as well as in *Gratz*, the high court gave its “imprimatur to holistic considerations of race” by universities for purposes of realizing the benefits of diversity. 305 Second, the two decisions, between them, “reinforce the importance of employing flexible and individualized considerations of race in admissions.” 306 In both, as Professor Guinier points out, the Supreme Court drew a line between “considerations of race that are nuanced, on one hand, and ‘mechanistic,’ on the other. The former are permissible, the latter suspect.” 307

(i) *Grutter v. Bollinger*

The University of Michigan Law School maintained an admissions policy that sought to achieve student body diversity based on Justice Powell’s opinion in *Bakke*. 308 The policy emphasized applicants’ academic ability and a flexible assessment of their talents, experiences, and potentials. It required admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the

These right-wing groups, in contrast, are turning to the courts in their opposition to affirmative action, even though they have powerful friends in Congress and enjoy the advantage of being on the same emotional wavelength with the President. One scholar dubbed the tactics of these groups “legal guerilla warfare.” Boston & Nair-Reichert, *supra* n. 233, at 4. However, except for the circumspectness in their names, there is little that is subterranean or non-regular about the tactics and operations of these groups. The activities of these conservative advocacy groups cannot but call to mind the method of operation of so-called Redeemers who, hiding under the cover of their equally innocent-sounding name, worked hard during the Reconstruction to undo black civil rights. See Gilliam, *supra* n. 80, at 35.

304. Guinier, *supra* n. 9; see also *Gratz*, 539 U.S. at 298 (Ginsburg, J., joined by Souter, J., dissenting) (stating that the Court “acknowledges” that educational institutions “are not barred from any and all consideration of race when making admissions decisions”).

305. Guinier, *supra* n. 9.


307. Guinier, *supra* n. 9. As Professor Guinier elegantly puts it, “As long as the decision maker is ‘hand picking’ rather than machine sorting, the decision maker is free to consider race as one of many factors in order to realize the benefits of diversity.” Id.

308. See *Grutter*, 539 U.S. at 312–16, 318–20, for an encapsulation of the history and features of the policy in question.
applicant would contribute to law school life and diversity, and the applicant’s undergraduate grade point average (GPA) and law school admission test score (LSAT). The policy also required officials to look beyond grades and scores to so-called “soft variables,” such as recommenders’ enthusiasm, quality of undergraduate institution(s) attended, the applicant’s essay, and the areas and difficulty of undergraduate course selection.

The policy did not define diversity solely in terms of racial and ethnic status, and did not “restrict the types of diversity contributions eligible for substantial weight.” However, it reaffirmed the law school’s longstanding commitment to one particular type of diversity, namely, “racial and 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 the law school’s student body in a critical mass or meaningful number. In short, as part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the law school seeks to enroll a “critical mass” of under-represented minority students who will contribute to the law school’s character and to the legal profession.

In Grutter, the law school denied admission to Barbara Grutter, a white Michigan resident with a GPA of 3.8 and an LSAT score of 161. Ms. Grutter challenged the admissions policy, alleging that the law school discriminated against her based on her race, contrary to the U.S. Constitution and applicable federal laws. She contended that the law school’s use of race as a predominant factor gave minority applicants a significantly greater chance of admission than students with similar credentials from disfavored racial groups, and that the law school had no compelling interest to justify its use of race in making admissions decisions.

309. Id. at 336–39.
310. Id. at 316.
311. Id. at 313–16.
312. Id. at 316. “Critical mass” means that under-represented groups are enrolled at a variable or unspecified, meaningful number that promotes participation in the classroom by members of these groups without making them feel isolated or like spokespersons for their race. Id. at 318–19.
313. 539 U.S. at 316–17. For more information on this applicant, by the admissions officer of the law school at the time Ms. Grutter applied for admission and who reviewed her application, see Dennis J. Shields, A View from the Files: Law School Admissions and Affirmative Action, 51 Drake L. Rev. 731–52 (2003).
314. See supra n. 20 for a highlight of the constitutional and statutory provisions involved in this and other affirmative action challenges.
The United States District Court for the Eastern District of Michigan found the law school’s use of race as a factor in decision-making relating to admissions unlawful. The Sixth Circuit Court of Appeals, sitting en banc, reversed, holding that Justice Powell’s opinion in Bakke was binding precedent establishing diversity as a compelling state interest. It also ruled that the use of race by the law school was narrowly tailored, given that race was merely a “potential ‘plus’ factor” in admissions decision, and the affirmative action program under challenge was “virtually identical” to the Harvard admissions program that Justice Powell endorsed and appended to his opinion in Bakke. The petitioners requested Supreme Court review and the Court granted certiorari.

The Supreme Court affirmed the ruling of the Court of Appeals; Justice O’Connor authored the judgment of the Court. Two questions were presented before the Court. The first was whether diversity of a school’s student body was a compelling governmental interest that justified the use of race in admissions decisions. The second was whether the use of race was narrowly tailored to further the interest in diversity the law school sought to achieve. The Court answered these two questions in the affirmative, anchoring its holdings on Justice

---

316. Id. at 321. The district court did not consider the law school’s asserted interest in a diverse student body compelling because “the attainment of a racially diverse class . . . was not recognized as such by Bakke and it is not a remedy for past discrimination.” Id. at 321 (quoting the District Court). The court said, assuming diversity was a compelling use of race, it was not narrowly tailored to further that interest. For example, it took the law school to task for failing to consider race-neutral alternatives, such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.” Id. at 340.

317. Id. at 321.


319. Sandra Day O’Connor (1930–2006), the first woman to serve on the Supreme Court, is a Republican from Arizona appointed by President Ronald Reagan in 1981. Her appointment ended 191 years of male exclusivity on the high court. She replaced another Republican, Justice Potter Steward, appointed by President Dwight Eisenhower. Steward served on the Court from 1958 to 1981. True to the expectations of the Reagan administration, which appointed her, Justice O’Connor has maintained a generally conservative voting record on issues relating to civil rights and liberties. For one account on Justice O’Connor’s background, voting record before this case, and judicial philosophy, see Hensley et al., supra n. 3, at 69–71. After twenty-four years on the high court, Justice O’Connor retired on July 1, 2005, pledging in a letter to President George W. Bush announcing her decision, “I will leave [the court] with enormous respect for” its integrity “and its role under our constitutional structure.” Supreme Court Justice O’Connor Retiring, Associated Press (July 1, 2005) (available at http://www.msnbc.msn.com/id/8430976/page/2/print/1/displaymode/1098/)(accessed Oct. 7, 2005).

320. To get to the substantive issues, Justice O’Connor disposed a number of underbrush matters. There was first the matter of whether the petitioner had standing to sue. Yes, she said, citing the Supreme Court’s opinion in Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656 (1993). Jacksonville, discussed below, lowered the requirement for “injury in fact” in equal protection cases. Grutter, 539 U.S. at 317. Next was whether Justice
Powell’s opinion in Bakke.321 Like Justice Powell in Bakke, the Court gave deference to the law school’s judgment that attainment of a diverse student body is at the heart of its educational mission.322 The “important purpose of public education and the expansive freedoms of speech and thought associated with the university environment,”323 among other things, justified the deference.

The Court insisted that the benefits of diversity are real and substantial, not theoretical, pointing to the plentiful amicus curiae briefs that the case garnered in support of the law school.324 “[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”325 The Court referred back to its decision in Brown, in 1954, where it recognized that “education . . . is the very foundation of good citizenship.”326 Elite public educational institutions, like the University of Michigan, form “the training ground for a large number of our Nation’s leaders.”327 “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”328 “[T]o 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.”329 With particular reference to

Powell’s diversity rationale was binding precedent under Marks v. United States, 430 U.S. 188 (1977). Marks came up because of the fractured nature of the Court’s decision in Bakke. As Justice O’Connor stated, “in the wake of [the] fractured decision . . . [lower] 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 under Marks.” Grutter, 539 U.S. at 325. Marks stands for the proposition 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 judgments on the narrowest grounds.” Marks, 430 U.S. at 193 (internal quotation marks and citation omitted). But the test the Court set up in that case is more “easily stated than applied,” O’Connor conveyed, and it was not necessary for the resolution of the present case to decide whether Powell’s opinion was binding precedent under Marks. Grutter, 539 U.S. at 325.

322. Id. at 328–29.
323. Id. at 329.
324. Id. at 330–31.
325. Id. at 331. Amazingly, given its opposition to race-conscious programs, the United States agreed with this position. Its brief, quoted by the Court, stated that “ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” Id. at 331–32. Citing this statement, Justice O’Connor pulled through a clever masterstroke that reinforces her point.
326. Id. at 331 (quoting Brown, 347 U.S. at 493).
327. Id. at 332 (quoting Sweatt, 339 U.S. at 634).
328. Id.
329. Id.
affirmative action

law schools, access to legal education and the legal profession "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." 330

The Court ruled that the law school did not give too much weight to or make race too decisive in decision-making relating to student admissions. Instead, the Court held that the admissions program "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." 331 Put differently, the law school "seriously weighs many other diversity factors besides race that can make a real and dispositive difference for non-minority applicants as well." 332 The Court also said the law school's goal of enrolling a critical mass of under-represented minority is a concept "defined by reference to the educational benefits that diversity is designed to produce" 333 that does not, therefore, rise to unconstitutional racial balancing 334 or quota. 335 The connection between critical mass and educational benefits of diversity is borne out by the fact that when a critical mass of under-represented minority students is present, racial stereotypes lose their force because non-minority students learn there is no "minority viewpoint" but rather a variety of viewpoints among minority students. 336 Finally, the race-conscious program under challenge was a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." 337

In Bakke, Justice Powell said race could constitutionally be used to form a plus factor to promote diversity in a public university's student body, given a proper case. In Grutter, the Court found that proper case—an affirmative action plan narrowly tailored, without quotas, that used race as a plus factor in the context of individualized consideration, 338 possessed "a logical end point," 339 was attentive to race-neutral

330. Id. at 332–33.
331. Id. at 337.
332. Id. at 338.
333. Id. at 330.
334. Id. at 329–30; see also id. at 336 (rebutting Chief Justice Rehnquist's contention).
335. Id. at 335–36.
337. Id. at 337.
338. Id. at 341–42; see also id. at 337 (stating that the law school program is a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").
339. Id. at 342–43.
alternatives (which is not to suggest that every conceivable race-neutral alternative be exhausted), and was not unduly harmful to innocent parties. In addition to joining the majority opinion, Justices Ginsburg wrote a separate concurrence. She agreed with the Court that there must be a logical endpoint to preferential programs, something she said “accords with the international understanding of the office of affirmative action.” However, Justice Ginsburg did not agree with the application of strict scrutiny to inclusive affirmative action programs such as the one here at issue, but saw no basis for objection, given that the admissions policy under challenge withstood strict scrutiny. She also had a problem with the Court’s idea of a phase-out date for affirmative action. Regarding the Court’s observation that “[i]t has been twenty-five years since Justice Powell first approved the use of race to further an interest” in diversity in public higher education, she pointed out that the law was not settled during much of the period. As for the next twenty-five years, within which the Court speculated that affirmative action would not be necessary to further an interest in diversity, she said “well documented” evidence exists of discrimination and biases in many areas, including access to public education, that “impede[ ] realization of our highest values and ideals.” Accordingly, “[f]rom 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.” Four justices, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, each separately dissented from the judgment of the

340. Id. at 339.
341. Id. at 341.
342. Id. at 344-46 (Ginsburg, J., joined by Breyer, J., concurring).
343. The two global human rights treaties that Justice Ginsburg cited, id. at 344, are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The ICERD stipulates that preferential measures “shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.” The CEDAW stipulates that “temporary special measures aimed at accelerating de facto equality . . . shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.” The ICERD was ratified by the U.S. in 1994; the CEDAW in 1980. For texts of these documents, see 25+ Human Rights Documents (2001) at 37-44 (the ICERD) and 45-53 (the CEDAW). Following this concurrence and her dissent in Gratz, Justice Ginsburg wrote a piece published in a law review amplifying the value of a comparative perspective. See Ruth Bader Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective, 22 Yale L. & Policy Rev. 329 (2004).
344. Grutter, 539 U.S. at 346 (unnumbered footnote preceded only by asterisk).
345. Id. at 345-46.
346. Id. at 346.
In his dissent, Chief Justice Rehnquist complained that the Court’s strict scrutiny was not strict enough. Not only did the Court give “unprecedented” deference to the law school’s educational judgment as to the educational benefit of a diverse student body, it also “casually subverted” the duration of relief, an important component of strict scrutiny, by accepting the law school’s “vaguest of assurances” that its affirmative action program would not be permanent. The Chief Justice also opined that the law school discriminated against minorities (in favor of black applicants) under the guise or smokescreen of critical mass. Justice Kennedy, in his own dissent, echoed the views of the Chief Justice, maintaining that the Court’s deference to the law school’s educational judgment is of a magnitude so inconsistent with strict scrutiny that it works an “abandonment” of the review standard.

Justice Scalia mockingly questioned the educational benefit embedded in diversity—which he says “is a lesson of life rather than law” taught to children, such as Boy Scouts and kindergartners, as opposed to full-grown adults at law schools. He also poured scorn on concepts like critical mass which throughout his dissent he enclosed in quotes and alternately referred to as “mythical,” “fabled” (citing Justice Thomas approvingly), and “a sham to cover a scheme of racially proportionate admissions.” He believed the case raised

347. Id. at 378–87 (Rehnquist, C.J., joined by Kennedy, Scalia, & Thomas, J.J., dissenting); id. at 387–95 (Kennedy, J., dissenting); id. at 346–49 (Scalia, J., dissenting, joined by Thomas, J., concurring in part and dissenting in part); id. at 349–78 (Thomas, J., dissenting, joined by Scalia, J., concurring in part and dissenting in part).

348. See id. at 380 (Rehnquist, C.J., joined by Kennedy, Scalia, & Thomas, J.J., dissenting) (“Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”).

349. Id. at 386–87.

350. Id. at 379–86, including id. at 379, where the Chief Justice wrote, “stripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”

351. Id. at 394 (Kennedy, J. dissenting) (“Deference is antithetical to strict scrutiny, not consistent with it.”).

352. Id. Justice Kennedy does not think anything, including the Court stipulation of a possible phase-out date for race-conscious programs affirmative, mitigates any imaginary damage done to strict scrutiny. Id. (“[N]either petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century.”).

353. Id. at 347–48 (Scalia, J., dissenting, joined by Thomas, J., concurring in part and dissenting in part).

354. Id. at 346.

355. Id. at 347.

356. Id. During oral arguments in the case, Scalia characterized critical mass as a euphemism for quota. As he reportedly put it, “once you use the terms ‘critical mass,’ you’re in Quota Land.” (cited in Charles Lane, O’Connor Questions Foes of U-Michigan Policy, Wash. Post A01 (Apr. 2, 2003)). Scalia believed Michigan brought the problem upon itself by creating an elite law school.
numerous questions, relating to issues like critical mass and individualized consideration, among others, that would form the basis for future litigation. He concluded, "[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."

Justice Thomas's dissent was by far the most wordy of all the dissents, matching the judgment of the Court in length. Thomas began with a quote attributed to the black abolitionist, Frederick Douglass (1817–95), delivered in Boston in 1865, regarding "What the Black Man Wants." Douglass urged white people to "Do nothing" with blacks because their interference was doing blacks positive injury. Thomas said, "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators." He said Douglass's message was "lost on today's majority," whom he accused of "uphold[ing] the Law School's racial discrimination, not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti." Thomas had a problem not just with the majority but also with the Powell opinion in Bakke, upon which the majority based its judgment. "Both," he said, "rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal ... can be compelling in one context but not in another. This 'we know it when we see it' approach to evaluating state interests is not capable of judicial application." Thomas said there was no


357. Grutter, 539 U.S. at 348–49 (Scalia, J., dissenting, joined by Thomas, J., concurring in part and dissenting in part).

358. id. at 349.

359. His opinion was twenty-nine pages long, compared to the Court's little more than thirty-two-page opinion. Id.

360. Id. at 350 (Thomas, J., dissenting, joined by Scalia, J., concurring in part and dissenting in part). Some analysts have criticized Thomas for his reference to Douglass. Douglass, who worked for black equality, wanted whites to do nothing to keep blacks in bondage and would not mind preferential programs designed to achieve that purpose. In contrast, Thomas is no abolitionist in any sense and categorically opposes all kinds of preferential programs for blacks. See e.g. Jarrett, supra n. 39, who accused Thomas of "stab[bing] Douglass in [the] grave" by comparing himself to Douglass. See also Thomas Shows His True Colors on Affirmative Action Ruling, supra n. 39.

361. Grutter, 539 U.S. at 349 (Thomas, J., dissenting, joined by Scalia, J., concurring in part and dissenting in part).

362. Id. at 350.

363. Id. at 357.
"articulated legal principle" to support the holding in *Grutter*, other than "the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups... and that racial discrimination is necessary to remedy general societal ills."\(^{364}\) He was disappointed that "the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications."\(^{365}\)

Justice Thomas said the Constitution forbids racial classifications "not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."\(^{366}\) Thomas claimed darkly: "[c]ontained within today’s majority opinion is the seed of a new constitutional justification for... racial segregation."\(^{367}\) He said Michigan “tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."\(^{368}\) He claims “the majority of blacks” admitted to the law school based on affirmative action “all are tarred as undeserving,” adding:

This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination. When blacks take positions in the highest places of government, industry, or academic, it is an open question today whether their skin color played a part in their advancement.\(^{369}\)

The only portion of the majority opinion Thomas partially agreed with was the part about affirmative action not being necessary in twenty-five years. However, even here he could not completely agree with his colleagues: “I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.”\(^{370}\) He accused the Court of granting the law school “a [twenty-five]-year license to violate the Constitution.”\(^{371}\)

---

364. *Id.* at 371.
365. *Id.*
366. *Id.* at 353.
367. *Id.* at 365–66.
368. *Id.* at 372.
369. *Id.* at 373.
370. *Id.* at 351. See also *id.* at 375 (“While I agree that in [twenty-five] years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now.”).
371. *Id.* at 370.
Although his dissent tracks those of the other dissenters, he went far beyond them, and his criticism was more thorough and biting. Thomas believed the Court deferred too much to the law school’s educational judgment.\(^{372}\) He believed not just that strict scrutiny was compromised,\(^{373}\) but that the program under review could never withstand strict scrutiny since, according to him, the school’s claimed compelling government interest was a “fabricated” one, designed to maintain its own elite image and status.\(^{374}\) He questioned the interest in diversity and critical mass.\(^{375}\) He mocked diversity alternately as “aesthetic,”\(^{376}\) and “trivial.”\(^{377}\) Thomas called preferences not based on race, such as “legacy” preferences elite schools extend to the children of alumni, “unseemly”\(^{378}\) but said the Constitution does not forbid them.\(^{379}\) He claimed, however, that “[w]ere this court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular....”\(^{380}\) He opined that extension of special preferences for black students to law schools like Michigan gave them little incentive to prepare for and achieve high scores on the law school admissions test (LSAT).\(^{381}\) In sum, in *Grutter*, Justice Thomas elaborated, in many words, the declamation embodied in his concurrence in *Gratz* that the Constitution “categorically” forbids racial preferences.\(^{382}\)

(ii) *Gratz* v. *Bollinger*

In *Gratz*, the Supreme Court invalidated the University of Michigan
College of Literature, Science, and the Arts undergraduate admission system that awarded twenty points to under-represented minorities made up of African Americans, Hispanics, and Native Americans. Two Caucasian applicants, Jennifer Gratz, female, and Patrick Hamacher, male, were denied admission into the program and challenged this race- (or point-) conscious admissions system. As in Grutter, the petitioners alleged that the University’s use of race violated their rights to nondiscriminatory treatment under the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and Section 1981.\footnote{383}

The United States District Court for the Eastern District of Michigan granted the petitioners’ motion for a class-action lawsuit,\footnote{384} designating Hamacher as the class representative.\footnote{385} The district court ruled not only that the University could use race to diversify its student body, but that it also presented “solid evidence” that its use of race was designed to achieve a compelling governmental interest.\footnote{386} The court next turned to whether the use of race was narrowly tailored to achieve the interest the University sought to achieve. The University changed its admissions guidelines a number of times during the period relevant to the lawsuit.\footnote{387} The court found that the use of race embodied in the University’s admissions guidelines for the periods 1999-2000 were narrowly tailored\footnote{388} but those of 1995-1998 were not.\footnote{389} Regarding the years 1999-2000, the district court concluded that the award of twenty points to under-represented minorities was not a quota\footnote{390} and rejected the petitioners assertion that the program at issue operated like the two-track system Justice Powell found objectionable in Bakke.\footnote{391} It also rejected their assertion that the admissions system was a tool for achieving racial balancing.\footnote{392} The University did not seek to achieve a certain proportion of minority students, it said, “let alone a proportion that represents the community.”\footnote{393} What made the guidelines for 1995–1998 problematic, compared to those of 1999–2000, the district court said, related to the University’s prior practice of “protecting” or “reserving” seats for under-represented minorities, which effectively precluded non-protected

\footnote{383. See supra nn. 20, 314.}
\footnote{384. Gratz, 539 U.S. at 253.}
\footnote{385. Id. at 253–54.}
\footnote{386. Id. at 258.}
\footnote{387. Id. at 253–57.}
\footnote{388. Id. at 258.}
\footnote{389. Id. at 259.}
\footnote{390. Id. at 258.}
\footnote{391. Id.}
\footnote{392. Id.}
\footnote{393. Id. at 258–59.}
applicants from competing for those slots. This system, it said, operated as the functional equivalent of the kind of quota Justice Powell found constitutionally objectionable in *Bakke*.

Each side appealed its negative ruling to the Sixth Circuit Court of Appeals that heard the case *en banc* but had not yet issued its decision by the time the Supreme Court granted review. The petitioners argued that the University did not base its use of race in undergraduate admissions on remediation of identified discrimination but rather on diversity which, they maintained, "is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." But, they said, assuming the Court ruled the University's interest in diversity constitutes a compelling state interest, it did not narrowly tailor its use of race because its undergraduate admissions guidelines do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*." The University refuted this allegation, claiming that its program "hewed closely" to both the admissions program Justice Powell described in *Bakke* and the Harvard College admissions program that Powell endorsed.

Chief Justice Rehnquist authored the judgment of the Court. Allan Bakke, in the *Bakke* case, single-mindedly sought a medical education from the University of California at Davis, and Barbara Grutter, in the *Grutter* case, sought to attend the University of Michigan law school and no other. But the petitioners in *Gratz* enrolled at other schools before

---

394. *Id.* at 259.
395. *Id.*
398. *Id.* at 269.
399. *Id.*
400. Rehnquist (1924–2005), a Republican from Arizona, appointed by President Richard Nixon, joined the Court in 1971. He was promoted Chief Justice in 1986 by President Reagan. Many civil rights and liberties groups strongly opposed his confirmation by the Senate. See Hensley et al., *supra* n. 3, at 64. He eventually won confirmation by a vote of sixty-eight in favor and twenty-six against because of "his impressive academic credentials, his intellectual abilities, and his performance in the Justice Department" under Nixon. *Id.* As a young law clerk for Justice Robert Jackson in 1954, Rehnquist wanted to maintain the separate but equal doctrine of *Plessy v. Ferguson*. *Id.* Rehnquist's "conservative legal and political views were well known before he came to the Court." *Id.* at 63. His consistently conservative voting record in civil rights and liberties cases bore out the apprehension of civil rights groups that he would be anti-civil rights. *Id.* at 64; see also Baum, *supra* n. 50, at 149–50. Rehnquist had a judicial philosophy made up of a hierarchy of values, which ranks federalism as the highest value, followed by property rights in the second level, and individual rights occupying the lowest rung of his hierarchy. Hensley et al., *supra* n. 3, at 65. The Chief Justice was part of a solid "conservative voting bloc" on the Court that included Justices Scalia and Thomas. *Id.*
they filed their complaint. Gratz enrolled at the University of Michigan at Dearborn, where she graduated in 1999; Hamacher, who applied to the University as a transfer student rather than as a freshman, enrolled at Michigan State University, where he graduated in 2001. So, a preliminary issue important in every case, but more so here, was standing to sue, particularly for injunctive or prospective relief. The Court determined that such standing nevertheless existed, citing a series of cases that included *Northeastern Florida Chapter, Associated General Contractors of America v. Jacksonville*. There, the decision changed the requirement for "injury in fact" in equal protection cases. Under the standard established by that case, a party challenging a set-aside program need only prove that she was denied the opportunity to compete on an equal footing, rather than the ultimate inability to obtain the benefit or the loss of the contract.

Having thus found standing to seek relief under Article III, the Court moved to the merits of the case and addressed two issues. The first was whether the use of race violated the Fourteenth Amendment; the Court ruled that it did not, citing its opinion in the companion *Grutter* case for support. Finding that the Constitution does not categorically preclude the use of race, it next considered whether the University narrowly tailored its use of race to achieve the educational diversity it sought. The Court found that the use was "not narrowly tailored." Citing Justice Powell's opinion in *Bakke*, it said there was no "individualized consideration" of applicants. Instead, "[t]he only consideration that accompany[e]d" the award of twenty points to applicants from underrepresented minority groups was "a factual review of an application to determine whether an individual is a member of one of these minority

---

402. *Id.*
404. *Id.* at 666.
405. *Gratz*, 539 U.S. at 268; *see also id.* at 257.
406. *Gratz*, 539 U.S. at 270. The petitioners contested Michigan's argument that diversity rose to a compelling government interest warranting the use of race as a factor in admissions decisions. They said that the Court only sanctioned the use of race to remedy identified discrimination. *Id.* at 268. Diversity, they said, "is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest." *Id.* As indicated, the Court disagreed. With respect to the use of race as a remedy for identified discrimination, the Court simply stated that the University never relied on this as justification for its use of race. *Id.* It is amazing that the petitioners would point to past discrimination, given that the only interest warranting a constitutional use of race that Justice Powell approved in *Bakke* was diversity. *Bakke* 438 U.S. at 306–10; *see also Part II(C)(1), supra* (discussing the Supreme Court and affirmative action up to *Bakke*).
407. *Gratz*, 539 U.S. at 269–97 (discussing the Harvard College plan which Powell endorsed and attached to his opinion in *Bakke*).
groups." Also, the Court said the bonus points made race a "decisive" factor, rather than a plus factor, contrary to Justice Powell's prescription in *Bakke*.

The Court disagreed with the University that flagging certain applicants for review by an admissions review committee amounts to individualized consideration. It also disagreed with the University that the large volume of applications to the undergraduate school renders impractical an admissions system not based on points. Rather, it said, "The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." At any rate, "[n]othing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by" strict scrutiny.

Justice O'Connor wrote a concurring opinion wherein she maintained that the admissions policy in *Gratz* was "a non[-]individualized, mechanical one" that did "not provide for a meaningful individualized review of applicants." She distinguished the program in *Gratz* from the one the Court approved in *Grutter*. The plan in *Gratz* "ensures that the diversity contributions of applicants cannot be individually assessed." And it "stands in sharp contrast" to the program in *Grutter*, "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." She said, "The only potential source of individualized consideration appears to be the Admissions Review Committee." Unfortunately, available evidence

---

408. *Id.* at 271–72.
409. *Id.* at 272.
410. *Id.* at 256–57 (flagging system described).
411. For example, Rehnquist said, "The flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell," and what little individualized review does takes place occurs after the fact, after points have been distributed to benefited groups. *Id.* at 273.
412. *Id.* at 275.
413. *Id.*
414. *Id.* at 280 (O'Connor, J., concurring).
415. *Id.* at 276.
416. *Id.* at 276–77.
417. *Id.* at 273 n. 29. The Chief Justice, in his opinion for the Court, quoted this statement approvingly in rebutting Justice Souter's contention that "applicants to the undergraduate college are not denied individualized consideration."
418. *Id.* at 279.
419. *Id.*
"reveals very little about [how] the review committee actually functions. And what evidence there is indicated that the committee is a kind of after-thought, rather than an integral component of a system of individualized review."\textsuperscript{420} She said she shared the opinion of the Court that the committee "reviews only a portion of all the applications," leaving the majority of admissions decisions to be based on points.\textsuperscript{421} In short, she said, the flagging system did little "to offset the apparent absence of individualized consideration."\textsuperscript{422}

Justice Thomas, in his own concurring opinion, stated that the factoring of race in higher education admissions "is categorically prohibited by the Equal Protection Clause."\textsuperscript{423} He was also of the view that a constitutionally permissible affirmative action plan should "sufficiently allow for the consideration of non-racial distinctions among under[-]represented minority applicants," an ingredient, he said, the affirmative action plan under review lacked.\textsuperscript{424}

Justice Breyer joined in the judgment of the Court, but not its opinion.\textsuperscript{425} He joined Justice O'Connor's concurring opinion, except the part relating to the Court's opinion,\textsuperscript{426} and he agreed with the dissent of Justice Ginsburg to the effect that the Court should have properly distinguished between policies of inclusion, which should be acceptable under the Constitution, and policies of exclusion, which should be constitutionally impermissible.\textsuperscript{427}

Three Justices—Ginsburg, Souter, and Stevens—dissented from the Court's judgment.\textsuperscript{428} Justice Ginsburg complained that the Court applied strict scrutiny to all racial classifications, both classifications that exclude people, as well as those that include.\textsuperscript{429} She said the Court's insistence on one uniform standard of review for all classifications "would have been fitting were our Nation free of the vestiges of rank discrimination long reinforced by law,"\textsuperscript{430} which it was not. Instead, the "effects of centuries of law-sanctioned inequality . . . remain painfully evident in our

\textsuperscript{420.} Id. at 279–80.
\textsuperscript{421.} Id. at 280.
\textsuperscript{422.} Id.
\textsuperscript{423.} Id. at 281 (Thomas, J., concurring).
\textsuperscript{424.} Id.
\textsuperscript{425.} Id. at 281–82 (Breyer, J., concurring in the judgment).
\textsuperscript{426.} Id. at 282; see also id. at 276–80 (O'Connor, J., concurring).
\textsuperscript{427.} Id. at 282.
\textsuperscript{428.} Id. at 298–309 (Ginsburg, J., joined by Souter, J., dissenting); see also id. at 291–98 (Souter, J., joined by Ginsburg, J., dissenting); id. at 282–91 (Stevens, J., joined by Souter, J., dissenting).
\textsuperscript{429.} Id. at 298 (Ginsburg, J., joined by Souter, J., dissenting).
\textsuperscript{430.} Id.
communities and schools."431 These unwholesome effects are made evident in the large disparities between whites and minority groups that still exist in employment, wealth, access to health care, and education, among other sectors,432 "in the wake of a system of racial caste only recently ended."433 This is not to mention irrational prejudice, as well as conscious and unconscious biases, that must come down before equal opportunity and nondiscrimination take root in America.434 Justice Ginsburg counseled that "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."435 She explained that Supreme Court jurisprudence ranks race a suspect category "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality."436 But where race is considered to make people equal, "no automatic proscription is in order."437 In short, she said, the Constitution, is both color blind and color conscious—color blind in that, 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; color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.438 She argued that contemporary international human rights documents distinguish between policies of oppression and measures designed to accelerate de facto equality.439

Applying that distinction, Justice Ginsburg saw no constitutional infirmity in the program under review.440 The petitioners did not dispute that every applicant admitted under the current plan was qualified to attend the College, there was no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, there were no seats reserved based on race, and

431. Id.
432. See id. at 299.
433. Id. (internal quotes omitted).
434. See id. at 300–01.
435. Id. at 301.
436. Id.
437. Id.
438. Id. at 302. Justice Ginsburg contended that arguing for non-application of strict scrutiny for inclusive program does not mean insulation from careful judicial inspections. This is because close review is needed to fish out malign classifications masquerading as benign, and to ensure that preferences are not so large they unduly hurt innocent parties. Id.
439. Id. at 302 (citing the ICERD and the CEDAW). See also supra n. 343.
440. Gratz, 539 U.S. at 303.
there was no demonstration that the program in question unduly constricted admission opportunities for non-favored students. Ginsburg disputed the contention in the brief of the United States that "race-neutral alternatives" such as "percentage plans," which guarantee admission to state universities for a fixed percentage (usually the top ten to twenty percent) of students from the high school of an affected state, would result in the enrollment of a meaningful number of minority students. These plans, experimented with in states like California, Florida, Texas, and Washington, depend on continued racial segregation at the secondary school level for their effectiveness. And, since they were designed to increase minority representation in the public higher education system of the affected states, they were not race-neutral to begin with.

In removing "[t]he stain of generations of racial oppression" in our society, Justice Ginsburg observed that institutions of higher learning will seek to maintain their minority enrollment. The issue is whether they can do so in full candor through affirmative action programs such as the one at issue here. Otherwise, schools may resort to all kinds of camouflage designed to disguise their use of race in admissions. "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." Responding to Chief Justice Rehnquist's accusation that she suggests "changing the Constitution so that it conforms to the conduct of the universities," Ginsburg maintained that "the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race," and that, "[a]mong constitutionally permissible options, those that candidly disclose their consideration of race seem to [her] preferable to those that conceal it." Justice Ginsburg noted the Court's acknowledgment, in Gratz as well as in Grutter, that educational institutions "are not barred from any and all consideration of race when making admissions decisions."

Justice Souter, like Justice Stevens, raised a standing issue in his
dissent. He believed Patrick Hamacher, one of the petitioners, who applied to the University as a transfer student, had no standing to challenge the "freshman's admissions policy that [would] never cause him any harm." Like Justice Stevens, he viewed the two as different admissions policies. For example, the transfer policy used race, rather than a points system, in assessing an applicant's contribution to diversity. Such use of race, he said, permitted the inference that the University engaged in a "holistic review" of transfer applicants consistent with the program the Court upheld in Grutter. In short, he would vacate the judgment for lack of jurisdiction. Souter regarded the majority's theory on standing as "indulgent," but he contended that not even its "new gloss on the law of standing" should permit it to reach the issue it decided.

However, if a plaintiff with standing were to bring a similar case requiring him to reach the merits, Souter would have affirmed the judgment of the District Court and granted summary judgment to the University. The University's freshman admissions system, the focus of attention in the dispute, "is closer to what Grutter approves than to what Bakke condemns, and should not be held unconstitutional on the current record." Here, there was no quota in place; instead, the plan "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." This means that "[a] non[-]minority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the twenty-point bonus."

According to Souter, the university policy in Gratz was almost identical to the one envisioned by Powell in Bakke. Justice Powell's description of a constitutionally permissible admission process is one
which considers “all pertinent elements of diversity in light of the particular qualifications of each applicant” and places each element “on the same footing for consideration, although not necessarily according them the same weight.” The only sense in which the program under challenge departed from this description was that it assigned an extra twenty points to under-represented minorities. However, Justice Souter said this assignment did not set race apart from all other weighted consideration, given that non-minority students may receive twenty points for athletic ability, socioeconomic disadvantage, attendance at a socio-economically disadvantaged or predominantly minority high school, among other criteria.

Justice Souter contended that the Court’s objection to the program under challenge went to the use of points to quantify and compare characteristics or to the number of points awarded due to race. But on either reading, he said, the objection is mistaken. Concerning the use of race for quantification, college admission is not something left entirely to “inarticulate intuition,” so there was nothing inappropriate in assigning some stated value measured in numbers to a relevant characteristic, be it reasoning ability, writing style, running speed, or minority race. Justice Powell’s plus factors were something colleges could reduce into values in numbers; the college simply did by a numbered scale what the law school accomplishes by its holistic review. Numbers therefore do not and should not spell denial of individualized consideration.

Additionally, assigning twenty points to race did not convert race into an unconstitutional quota, but rather made it merely a plus factor. It is possible to conceive of a points system where the “plus” factor becomes so extreme it turns race into a decisive factor for minorities. But the petitioners could not prove the freshman admissions system operated this way. Rather, the record shows that non-minority applicants may achieve higher selection point totals than minority applicants due to characteristics other than race. Also, the petitioners’ contention in their brief that the University admitted “virtually every qualified under-represented minority applicant” is unavailing because the occurrence may reflect nothing more than the likelihood that very few qualified

460. Id. (quoting Bakke, 438 U.S. at 317).
461. Id.
462. Id. at 295.
463. Id.
464. Id.
465. See id.
466. Id. at 295–96.
467. Id. at 296.
minority applicants applied. In short, there are no set-aside seats of the kind the Court disallowed in Bakke, and “consideration of an applicant’s whole spectrum of ability is no more ruled out by giving twenty points for race than by giving the same points for athletic ability or socioeconomic disadvantage.”

Souter believed the use of race was narrowly tailored to achieve the interest in diversity the University aimed to achieve—even though the award of a plus factor of twenty points, compared to, for example, ten points, may make some observers suspicious. In the record, the absence of information about the actual working of the University’s admissions review committee charged with responsibility of conducting individualized reviews did not mean individualized consideration did not take place.

Without knowing more about how the admissions review board actually functions, Souter said, “it seems especially unfair to treat the candor of the admissions plan as an Achilles’ heel.” The University is “forthright in saying just what plus factor” it gives to race, compared to supposedly “race-neutral” alternatives like percentage plans, which guarantee admission to a fixed percentage of the top students from each high school. While constitutional, he said, these plans deliberately obfuscate and they might be pointless in a state like Michigan where minorities are a much smaller fraction of the population than they are in California, Florida, or Texas. At any rate, these plans are also just as race-conscious as the point scheme, only they get their racially diverse results without saying directly what they are doing or why they are doing it, compared to Michigan, which “states its purpose directly.” “Equal protection cannot become an exercise in which the winners are the ones who hide the ball,” so Michigan deserves a pat on the back, not a rebuke, for its frankness.

In his dissent, Justice Stevens said he would have dismissed the suit for lack of standing because, based on the Court’s standing precedents,

468. Id.
469. Id.
470. See id.
471. Id.
472. Id. at 297.
473. Id.
474. Id.
475. See id. at 297 n. 4.
476. Id. at 298.
477. Id.
478. Id. at 298. “[I]f this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness.” Id.
neither of the two petitioners had a personal stake in the outcome of the lawsuit. Jennifer Gratz and Patrick Hamacher, each attended and received their undergraduate degrees from other universities after Michigan failed to extend them offers of admission. 479 "Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since." 480 The decision of these two petitioners to obtain a college education elsewhere distinguished them from the petitioners in Grutter and Bakke, neither of whom attended any other school but the one whose affirmative action policies they challenged. 481 Justice Stevens examined in detail—and dismissed every aspect of—Hamacher's contention that his intention to apply to the University as a transfer student gave him personal stake to challenge the freshman admissions policy. 482

Like Justice Souter, Stevens considered the Court's theory of standing exceedingly indulgent. 483 He faulted the Court's contention that the petitioners' challenging "any use of race" in undergraduate admissions by Michigan, freshman and transfer alike, gave them a personal stake over the freshman admissions policy. 484 He likewise regarded as mistaken its assumption that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." 485 Justice Stevens said the fact that the action here is a class-action lawsuit does not change the fact that the petitioners lacked standing, 486 given that "neither [petitioner] has standing to seek prospective relief on behalf of unidentified class members who may or may not have standing to litigate on behalf of themselves." 487

In both Grutter and Gratz, the Supreme Court recognized the benefits of diversity and importance of a university’s ability to consider race in admissions decisions in order to achieve diversity. However, the Court held that this consideration of race must be individualized, flexible, and narrowly tailored to achieve diversity; and, universities may not use quotas.

479. *Id.* at 282–83 (Stevens, J., joined by Souter, J., dissenting).
480. *Id.* at 282.
481. *Id.* at 282 n. 1; and 284–85 n. 4.
482. *Id.* at 285–89.
483. See *id.* at 287 n. 6.
484. *Id.* at 287–88.
485. *Id.* at 288; see also *id.* at 265.
486. *Id.* at 289–90.
487. *Id.* at 290–91.
III. ANALYZING THE MICHIGAN DECISIONS: NINE INDICATORS OF HOSTILITY AGAINST AFFIRMATIVE ACTION BY THE REHNQUIST COURT

Although *Grutter* and its companion cases signify a major advancement in the Supreme Court’s affirmative action jurisprudence, the decisions also reveal substantial evidence of hostility against affirmative action by the Rehnquist Court, as doctrine and as governmental policy. This part of the Article articulates and analyzes, in turn, nine of these indices or indicators of hostility, namely: (a) the narrow margin of victory in *Grutter*, (b) the defeat of affirmative action in *Gratz*, (c) the subjection of the programs under review to strict scrutiny, (d) the insistence on individualized consideration, (e) the color-blind argument, (f) the anchor of *Grutter* on diversity, (g) the undependability of Justice Kennedy as a swing or middle justice, (h) the acerbic rhetoric of the conservative bloc, and (i) the tinkering with the “injury in fact” requirement for standing in equal protection. As the ensuing discussions make abundantly clear, although analytically separable, several of the indicators are closely interconnected rather than mutually exclusive.

A. The Narrow Margin of Victory in *Grutter*.

The narrow victory in *Grutter*, in the face of a wave of endorsements, indicates the Rehnquist Court’s hostility toward affirmative action. As stated earlier, only five of the Court’s nine justices stood up for affirmative action in *Grutter*. This endorsement was an improvement upon the plurality decision in *Bakke* twenty-five years before. However, the improvement on *Bakke* was built on one fragile vote; *Grutter* and affirmative action were only one vote away from defeat. This margin of “victory” came despite the enormous endorsement evident in the more than one hundred amicus briefs from a multiplicity of educational institutions, corporate businesses, and governmental agencies like the U.S. military, and other organizations, testifying to the substantial benefits of diversity and the necessity for maintenance of race-conscious programs.

Unsurprisingly, such testimony to the benefits of affirmative action was not presented during *Bakke* because there was not yet enough experience with the practice of affirmative action to draw on. These organizational endorsements of the University of Michigan Law School’s race-conscious program and support for affirmative action should have led to, but did not result in, a decisional margin better than the five-to-four achieved. Imagine just what the fate

---

of affirmative action would have been had it not been for the groundswell of support and the deluge of organizational endorsement.

B. The Defeat of Affirmative Action in Gratz

Another indicator, related to the narrow margin of victory in Grutter, is the defeat of the program in Gratz—and by a wider, more impressive, six-to-three majority. Gratz is unsettling for several important reasons. The Court’s misrepresentation of the facts and poor reasoning in Gratz indicate hostility toward the policy of affirmative action.

Justice Powell in his approach to inclusiveness draws the line at individual rights; for him “constitutional limitations protecting individual rights may not be disregarded,” even in an effort to include minorities. In Gratz, the program in controversy lacked any resemblance to the impermissible two-track or quota system that Powell, in Bakke, said “disregarded... individual rights as guaranteed by the Fourteenth Amendment.” The law on affirmative action, as laid down in Grutter, is that, to be constitutional, a race-conscious program must “give serious consideration to all the ways an applicant might contribute to a diverse educational environment.” In practical terms, this means such a race-conscious program must “adequately ensure that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions” and must also “seriously weigh many other diversity factors besides race that can make a real and dispositive difference for non-minority applicants as well.”

Instead of being a quota or making race the decisive factor, the undergraduate admissions system the Court struck down in Gratz considers all applicants for places based not only on race, but also on a multiplicity of other factors that include “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.” In more practical terms, this means that “[a] non-minority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the [twenty]-point bonus.” Put

490. Id. at 320.
491. Grutter, 539 U.S. at 337 (emphasis added).
492. Id.
493. Id. at 338.
495. Id. at 294. For accord, see Norma M. Riccucci, Affirmative Action in the Twenty-First Century, in Public Personnel Management: Current Concerns, Future Challenges 51, 53 (Norma M.
differently, the plan in *Gratz* simply does by a numbered scale what the law school program approved in *Grutter* accomplished by its “holistic review.” In short, as Justice Souter argued in his dissent, the point system does not operate as a *de facto* set-aside system if the greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court’s standards. In the final analysis, the undergraduate college lost because it chose to be forthright about just what plus factor it assigns to race in admission decisions when it could have chosen to make itself a winner by hiding the ball.

The decision in *Gratz* also contradicts the Court’s claim to conservatism and judicial restraint. “It is ironic indeed,” as the constitutional law expert Professor Sunstein contends, “that conservatives, who have been ... skeptical of judicial activism, now embrace an extreme form of judicial activism in their attack on affirmative action.” This is why Sunstein considers *Gratz* “a big mistake.”

The defeat of affirmative action in *Gratz* minimized the overall “sweetness” of the victory for race-based programs emanating from *Grutter*. The Court was so disturbed by its contradictory rulings in two admissions policies arising from the same University, neither of which involved a Bakke-type set-aside, that Justice O’Connor, whose “swing” or majority initiative gave birth to *Grutter*, felt impelled in *Gratz* to write an unpersuasive concurring opinion explaining the ways in which the program struck down in *Gratz* departed from the one approved by the

---

Ricucci ed., 4th ed., Longman 2006) (pointing out that the University awarded up to 20 points at the Provost’s discretion, and up to 10 points for Michigan residency, among other non-academic criteria).

496. Id. at 295.
497. Id. at 296–97.
498. See id. at 298 (stating that “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”).
499. Judicial restraint is a doctrine that teaches that “the courts should not thwart the implementation of legislative acts and agency rules unless they are clearly unconstitutional.” Schmidt et al., *supra* n. 27, at 471. The doctrine “rests on the assumption that the courts should defer to the decisions made by Congress, the President, and administrative agencies, because members of Congress and the President are elected by the people” (while federal judges are not) and administrative agencies have expertise. *Id.* Judicial restraintists are distinguishable from judicial activists who believe that judges should use their power of interpretation and judicial review to checkmate “the activities of Congress, state legislatures, and administrative agencies when those governmental bodies exceed their authority.” *Id.* Unlike the *Gratz* majority, conservatives tend to be judicial restraintists.

501. *Id.*
C. The Subjection of the Programs under Review to Strict Scrutiny

A third indicator of the Supreme Court’s hostility toward affirmative action is the subjection of the two Michigan programs under review to strict scrutiny. Of the three standards of Constitutional review, strict scrutiny is the most exacting, followed by intermediate scrutiny and the rational test. The race-conscious program in *Grutter* survived strict scrutiny, while the one in *Gratz* did not. Because programs subjected to strict scrutiny are most often struck down, some scholars appropriately consider the test “strict in theory, but fatal in fact.”503 The Court probably would have found the program in *Gratz* constitutional if it had been assessed under the less onerous stricture of intermediate scrutiny.

In past cases, the Court made a distinction between racial classifications that oppress (invidious) and those that are meant to assist minorities or promote *de facto* equality (benign).504 It also distinguished between programs approved by Congress and those designed by state and local governments.505 Race-conscious programs determined to be benign, as were affirmative action plans designed by Congress, received the more lenient intermediate scrutiny; all others were subjected to strict scrutiny.506 Programs assessed using strict scrutiny pass constitutional muster “only if they are narrowly-tailored measures that further compelling governmental interests.”507 For programs assessed under intermediate scrutiny, the constitutional test is met if the affected measures “serve important governmental objectives and are substantially related to achievement of those objectives.”508 Another important distinction is that race-conscious programs subjected to strict scrutiny require specific findings of discrimination, whereas programs assessed under the intermediate standard need no such specific findings. That was

504. See e.g. *Adarand*, 515 U.S. at 228–29.
505. *Id.* at 229.
506. *Id.* at 225 (citing *Metro Broadcasting*, 497 U.S. 547).
507. *Id.* at 227. In determining whether a program is narrowly tailored, courts use various measures or criteria that include (1) The necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties. *Engr. Contractors Assn. of S. Fla. v. Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).
the case, for example, in *Fullilove*, involving the challenge of an affirmative action program enacted by Congress. There, the Supreme Court ruled that there is no requirement to establish specific findings of discrimination because, more than any other organ of government, Congress is vested with the most comprehensive constitutional authority to enforce the equal protection guarantees, along with an "affirmative duty" to combat discrimination "as a matter of national concern." This dual system of review in equal protection cases prevailed until *Adarand* in 1995. Beginning with the *Adarand* case, the Court applied one uniform assessment standard, all in the name of consistency and congruence, to "all racial classifications," irrespective of the motivations underlying them and regardless of the governmental actor, federal, state, or local, that designed the classification.

Given that the standard applied has serious practical consequences for the programs under examination, debate on the proper standard—between intermediate or strict scrutiny—to apply in affirmative action and related equal protection cases has divided the Court. In *Bakke*, in 1978, Justice Powell applied strict scrutiny to the race-conscious program under review, whereas Justice Brennan argued that intermediate scrutiny was the appropriate approach. More than ten years later, Justice Marshall, in his dissent in *Croson*, lamented that: "[t]oday, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection review of race-conscious remedial measures." He adjudged the occurrence "unwelcome," reasoning that "[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral government activity from perpetuating the effects of such racism." For subjecting remedial classification to strict scrutiny, Marshall accused his colleagues of "regard[ing] racial discrimination as largely a phenomenon of the past," a position he vehemently disagreed with.

Then, years later Justice Stevens, in his dissent in *Adarand*, accused the majority of "ignor[ing] a difference, fundamental to our

---

509. *Id.* at 483. See also *Croson*, 488 U.S. at 490 (plurality opinion) (denoting that Congress "has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment").


512. See *supra* nn. 225–226 and corresponding text.


514. *Id.*

515. *Id.* at 551–52.

516. *Id.* at 552.
constitutional system, between the Federal Government and the States,517 and "ignoring a difference, fundamental to the idea of equal protection, between oppression and assistance."518 He posited, "There 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."519 Most recently, in Gratz, the very same line of argument has resurfaced. In her dissent, Justice Ginsburg stated that the Court should have "properly" and "sensibly" distinguished between policies that include and those that exclude,520 between policies that promote *de facto* equality and those that oppress.521 The former should be assessed under intermediate scrutiny, the latter under strict scrutiny.522 It was a position Justice Breyer also shared.523

In Adarand and Grutter, Justice O'Connor attempted to dispel the conventional notion regarding the fatalities caused by strict scrutiny,524 saying, "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."525 Narrowly tailored race-based action necessary to further a compelling governmental interest, she said, will pass strict scrutiny.526 Context matters. "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 decision-maker for the use of race in that particular context."527 For all the nerve-calming assurances, Grutter is one of those rare instances in the equal

518. Id.
519. Id. at 243.
520. *Gratz*, 539 U.S. at 301 (Ginsburg, J., joined by Souter, J., dissenting).
521. Id. at 301–02. Justice Ginsburg noted importantly, in distinguishing between policies that oppress and policies designed to promote *de facto* equality, that the centuries of struggle for the most basic of civil rights in America have been about freedom from racial oppression, instead of just merely freedom from racial categorization. See id. at 301 (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 Yale L.J. 420, 433–34 (1988)). She also instructively pointed out, citing her concurrence in Grutter, and the relevant multilateral human rights treaties designed to eliminate racial discrimination and discrimination against women, that contemporary human rights documents distinguish "between policies of oppression and measures designed to accelerate *de facto* equality." *Gratz*, 539 U.S. at 302.
522. Justice Ginsburg also had a problem with the Court's application of strict scrutiny in the program under review in Grutter but saw no need to pursue that argument since the program under examination survived the test. *Grutter*, 539 U.S. at 346 (Ginsburg, J., joined by Breyer, J., concurring) (asterisked footnote following last sentence in concurrence).
523. *Gratz*, 539 U.S. at 282 (Breyer, J., concurring in the judgment).
525. *Grutter*, 539 U.S. at 327.
526. Id.
527. Id.
D. The Insistence on Individualized Consideration

Another indicator of the abiding hostility of the Supreme Court toward affirmative action is the insistence on individualized consideration. The reason for this emphasis, the Court explains, is that the Equal Protection Clause of the Fourteenth Amendment requires the government to treat people as individuals rather than as groups. In Bakke, Justice Powell indicated "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."528 Powell disapproved the race-conscious program of the University of California at Davis Medical School under review, ruling it an unconstitutional set-aside, because, in his view, the plan disregarded individual rights guaranteed by the Fourteenth Amendment.529

In Grutter, the Supreme Court laid out the elements of a properly "individualized" race-conscious program that meets constitutional muster. Such a program must give "serious consideration to all the ways an applicant might contribute to a diverse educational environment,"530 it must adequately ensure "that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions,"531 and it must "seriously weigh many other diversity factors besides race that can make a real and dispositive difference for non[-]minority applicants as well."532 In short, as the Court explained, an affirmative action program "must be flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or application."533 Using this standard, the Court upheld the plan in Grutter because it found it sufficiently individualized, compared to the one in Gratz, which it adjudged insufficiently individualized, and, therefore, unconstitutional.534

528. Bakke, 438 U.S. at 289.
529. Id. at 320.
530. Grutter, 539 U.S. at 322.
531. Id. at 337.
532. Id. at 338.
533. Id. at 336–37.
534. Gratz, 539 U.S. at 271; Grutter, 539 U.S. at 334.
The insistence on individualized consideration would have been adequate if our society sufficiently treated and regarded people as individuals. Unfortunately, it does not; instead, group factors and considerations have played and continue to play a major role in the treatment and assessment of blacks and other minorities in this society. For several hundred years in this country, blacks were "discriminated against, not as individuals, but rather solely because of the color of their skins." And for sixty years, until Brown in 1954, the U.S. was a Nation where, by law, one group was singled out for inferior treatment while the other group was accorded special treatment, each based on their race. Insistence on individualized consideration in the Court's equal protection jurisprudence ignores these occurrences or realities. Such insistence also turns a deaf ear to the still lingering disparities between whites and minorities in numerous life measures, embedded in group consciousness. As Justice Ginsburg aptly observed in her dissent in Grutter, "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals." Independent study after study corroborates these findings. These include the Advisory Board on Race, set up by former President Clinton, which after a year-long investigation, found that at the end of the twentieth century, "the color of one's skin continues to affect an individual's opportunities to receive a good education, acquire the skills to get and maintain a good job, have access to adequate health care, and receive equal justice under the law." In sum:

Race consciousness continues to divide African Americans and white Americans. Whether we are talking about college attendance, media stereotyping, racial profiling, or academic achievement, the black experience is different from the white one. . . . African Americans view the [N]ation and many specific issues differently than their white counterparts do.

Evidence of widespread prevalence of group consciousness in American society today is a reason why many blacks view the stress on

536. See Bakke, 438 U.S. at 394 (Marshall, J., concurring in part and dissenting in part).
537. See Gratz, 539 U.S. at 298-301 (Ginsburg, J., joined by Souter, J., dissenting); Grutter, 539 U.S. at 344-45 (Ginsburg, J., joined by Breyer, J., concurring). See also Adams & Sanders, supra n. 535, at xiii (instructively describing the exclusion of African Americans as "continuing").
538. Grutter, 539 U.S. at 345 (Ginsburg, J., joined by Breyer, J., concurring).
540. Schmidt et al., supra n. 27, at 163.
individualized consideration as little more than another disingenuous device, no different from color-blindness, designed to prevent inclusiveness for blacks and other minorities. In *Bakke*, Justice Marshall was at a loss that anyone could ignore the fact that “for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.” And he considered it “more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.” Similarly, the African American literary giant, Richard Wright (1908–60), once rebuked U.S. conservatives whom, Wright said, seek “to smother the Negro problem as a whole” when they insist “upon regarding Negroes as individuals and making individual deals with individual Negroes, ignoring the inevitable race consciousness which three hundred years of Jim Crow living has burned into” the collective heart of American blacks.

Last but not least among critics of insistence on individual treatment when faced with overwhelming evidence of group consciousness is Professor Jeremiah Moses. Moses provides an interesting and eloquent understanding of the roots of black nationalism in America. He contends that in *Dred Scott*, Chief Justice Taney, ironically, presented an argument for black nationalism. Taney said the Constitution did not recognize African Americans as citizens, or even as individuals, but as a class of persons “whose ancestors were Negroes of the African race... [and] were not intended to be included, under the word ‘citizens’ in the Constitution.” The Chief Justice of the United States defined African Americans as a people both “subordinate and inferior,” proclaiming, in effect, that in the eyes of the founding fathers, a free black individual was an anomaly. To the Framers of the Constitution, Taney said, blacks were “a subject people, a nation in bondage, a class eternally

541. See *supra* Section E, dealing with the color-blind argument.
542. *Bakke*, 438 U.S. at 400 (Marshall, J., concurring in part and dissenting in part). Adams and Sanders also expressed a similar indignation when in the introduction to their book on the exclusion of African Americans in American life, stated that “[i]n our willingness to dismiss the manifold social disadvantages that most [B]lacks endure as simply the result of their own personal failures, we all share in the responsibility for America’s continuing exclusion of its black citizens.” Adams & Sanders, *supra* n. 535, at xv.
546. *Id.; see also Dred Scott*, 60 U.S. at 403–04.
547. Classical Black Nationalism, *supra* n. 545, at 25; see also *Dred Scott*, 60 U.S. at 404–05.
separate from the American people, and in a state of subordination to them." 548 Moses looked at both sides of the argument as to whether federal law dealt with African Americans as group rather than as individuals and concludes that, generally, American law dealt with African Americans as a “subordinate and inferior class,” rather than as equal individual citizens. 549

Recent occurrences in the aftermath of the Michigan cases serve, unfortunately and disconcertingly, to reinforce black apprehension and suspicion regarding individualized consideration. These occurrences revolve around some schools that are using the requirement of “individualized consideration” as a guise to scrap programs formerly reserved for minorities. 550 Individualized consideration prevented progress designed to remedy the effects of discrimination.

E. The Color-Blind Argument

Another indicator of the Supreme Court’s hostility to affirmative action is its support of the color-blind argument. The argument takes the form of claims that our laws must be “color-blind” or that data relating to race “is no longer relevant to public policy.” 551 Color-blindness traces its roots to the dissent of Justice Harlan in Plessy, in 1896, to the effect that the law recognizes no caste, but instead, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” 552 Professor Jan Pillai explains that “[e]ncoded in the principle of colorblindness is the concept of neutrality that mandates absolute government impartiality toward individuals and groups without regard to their race, color, ethnicity, gender or disabilities.” 553

The color-blind doctrine manifested itself in two important ways in the Michigan cases. The first is in the context of Justice O’Connor’s projection regarding a possible date for the sunset of race-conscious

548.  Classical Black Nationalism, supra n. 545, at 25.
549.  Id. at 25–26.
550.  See Minority Programs for All, Chi. Trib. Red Eye Ed. 6 (Sept. 29, 2004). This story embodies the views of Sharon Jones, President of the Black Women Lawyers’ Association of Greater Chicago, whose association was among the groups that submitted briefs to the Supreme Court supporting the University of Michigan. Ms. Jones believes universities are unnecessarily caving in to legal threats. “Nothing requires the schools to get rid of those programs,” she said. “However,” she also observed, “you have to be willing to be sued, litigate it and spend a lot of money to win. And a lot of institutions aren’t willing to.” Id.
551.  Bakke, 438 U.S. at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).
552.  Plessy, 163 U.S. at 559 (Harlan, J., dissenting).
programs. The second relates to so-called “race-neutral” alternatives to affirmative action such as percentage plans. This Article discusses race neutral alternatives here and saves O’Connor’s sunset date for the next section dealing with diversity, where the topic more properly belongs.

There were color-blind statements focused on race-neutral alternatives to affirmative action in the Michigan cases, all of them made in Gratz, where the Court disapproved the program under challenge. One of these statements was by Justice Ginsburg; the other by Justice Souter. Justice Ginsburg criticized the percentage plans the United States advocated in its amicus curiae brief to the Court on several grounds: the plans depend on continued racial segregation at the secondary school level for their effectiveness; they link college admission to a single criterion, namely high school class rank; they create perverse incentives; they encourage parents to keep their children in low-performing segregated schools and discourage students from taking challenging classes that might lower their grade point averages; and they have little relevance in graduate and professional schools. Most fundamentally for our purpose here, such programs are not race-neutral since “they unquestionably were adopted with the specific purpose of increasing representation of African Americans and Hispanics in the public higher education system.” Justice Souter expressed a similar view regarding the lack of race-neutrality, in addition to the “deliberate obfuscation,” of these programs, to name just these problems. Justice O’Connor, in her opinion for the Court in Grutter, also criticized these so-called race-neutral programs, stating they may work against individualized consideration and that they have little applicability in graduate and professional schools. Percentage plans were not the only “race-neutral” alternatives to race-conscious programs mentioned in the Michigan cases. Others include the use of a lottery system and decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores as suggested by the United States District Court for the Eastern District of Michigan in Grutter.

The ideal of a society where race has no bearing on decisions relating to hiring, promotion, school admission and distribution of other

554. Gratz, 539 U.S. at 303–04 n. 10 (Ginsburg, J., joined by Souter, J., dissenting).
555. Id.
556. Id.
557. Id. at 298 (Souter, J., joined by Ginsburg, J., dissenting).
558. See id. at 297.
560. Id. See also supra n. 356 for the suggestion by Justice Scalia, during oral argument in Grutter, on how the University of Michigan law school could achieve diversity by making itself less exclusive or elitist.
scarce societal resources, is a value no American quarrels with. However, we are not there yet. Color-blindness "must be seen as aspiration rather than as description of reality." As Justice Blackmun counseled in Bakke, "to get beyond racism, we must first take account of race." Hostility to affirmative action or the premature retirement of these programs will serve only to delay the date of our true evolution into a color- and gender-blind society. Headlong insistence on color-blindness glosses over the continuing cost of racism on blacks and other minorities. Moreover, like "individualized consideration," and related requirements like the insistence on "merit," color-blindness is a disingenuous tool that opponents of affirmative action use to maintain the status quo and prevent or contain demands from blacks and other minorities for inclusiveness. As one analyst, who goes as far as to label this orientation a modern-day Jim Crowism, points out, color-blindness calls to mind people in the Nineteenth century "who would do in the Negro [yet] were absolved from their heinous acts so long as they did not proclaim their intentions to the world in so many words." Not too long ago, color-blindness was an outlook the Rehnquist Court employed as a cover to ignore the Court's own precedents on affirmative action.

561. Bakke, 438 U.S. at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).
562. Id. at 407 (Blackmun J., concurring in part and dissenting in part).
563. See K. G. Jan Pillai, Affirmative Action: In Search of a National Policy, 2 Temp. Pol. & Civ. Rights L. Rev. 6 (1992) (stating "By helping to raise the disadvantaged to a position where they can compete on a level playing field with the rest of society, affirmative action clearly has a central role to play in society's progress toward the ultimate goal of a color-blind society where racism does not exist.").
564. One understanding of the proper meaning of merit is by Professor Frank Wu who points out that interjecting race as a factor in admissions decisions "compel[s] us to realize that merit comes in many forms, and the distribution of rewards can be made more just." Wu, supra n. 77, at 151. For accord, see the views of California Supreme Court justice Paul Turner who reportedly said, "If you decide you are going to have a merit-based selection system—if it's really going to be merit-based—it's going to be diverse." Greg Mitchell, No Place at the Table, Recorder (San Francisco) 12 (Sept. 18, 1998). Justice Turner was commenting on the hiring of law clerks.
565. See Molly Townes O'Brien, Justice John Marshall Harlan as Prophet: The Plessy Dissenter's Color-Blind Constitution, 6 Wm. & Mary Bill of Rights J. 754 (1998); Linda Greene, Jim Crowism in the Twenty-First Century, 27 Capital U. L. Rev. 51 (1998). See also David Kairys, Unexplainable on Grounds Other Than Race, Am. U. L. Rev. 748-49 (1996) (importantly portraying color-blindness as a "rationalization for halting and reversing the process of integration of African Americans into the economy and society," as well as a disguise for a "society in which people value only themselves and those close to or like them.").
566. Greene, supra n. 565, at 51.
“[T]he color of one’s skin continues to affect an individual’s opportunities to receive a good education, acquire the skills to get and maintain a good job, have access to adequate health care, and receive equal justice under the law.” 568 Accordingly, as Professor Pillai points out, color-blindness, with the neutrality it conjures, is “an amorphous concept in equal protection jurisprudence.” 569 From a practical point of view, “[e]nding affirmative action is not color-blind. It is blind to centuries of discrimination, blind to the racism that is still deeply embedded in our society, blind to the barriers that continue to confront generation upon generation of African Americans and other minorities.” 570

Putting all these factors together, as the House of Representatives stated, after defeating an attempt in 1998 to implement a proposal that would have banned public colleges and universities from using race or gender in admissions decisions, the notion that “we live in a color-blind society in which only merit counts . . . is a cruel hoax.” 571

The Supreme Court, unwittingly, does not dispute this conclusion regarding the still-pervasive influence of race in America matched against the din of advocacy for color-blindness. In Adarand, the Court called “the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country . . . an unfortunate reality,” yet imposed strict scrutiny of all race-conscious programs, including those designed by Congress. 572 Also, in Croson, the high court said it had “no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs,” 573 yet ruled the race-conscious program for minorities at issue in the case unconstitutional.

It is hard to reconcile the persistence of racism and insistence on retirement of remedial programs. The two simply do not go hand in hand. For as long as racism persists and group consciousness grips our society, color-blindness is an impulse that should never be interpreted to bar race-conscious measures. 574 In sum, the best answer yet to the color-blind

568. Franklin et al., supra n. 539, at 35.
569. Pillai, supra n. 553, at 89.
571. Id. (statement of Rep. William Clay (D-Mo)).
572. 515 U.S. at 237.
573. 488 U.S. at 499 (plurality opinion).
574. See Ronald Dworkin, Taking Rights Seriously 239 (Harv. U. Press 1977). Professor Dworkin counsels instructively that we must “take care not to use the Equal Protection Clause to cheat ourselves of equality.” Id.
AFFIRMATIVE ACTION

argument is the one Justice Ginsburg proffered when she said our Constitution is both color-blind and color conscious, elaborating: "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 also color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." 575

F. Grutter's Anchoring on Diversity

A sixth indicator of the Supreme Court's abiding hostility to affirmative action is the anchoring of the race-conscious program the Court approved in *Grutter* on diversity, rather than, for example, on the eradication of the lingering effects of past discrimination against blacks and other minorities. In his opinion in *Bakke*, Justice Powell examined various options before settling on diversity as a constitutionally permissible basis for a race-conscious program. In the same vein, the Supreme Court rationalized its judgment in *Grutter* on diversity, ruling that striving for diversity in the student body of a public institution rises to the level of a compelling government interest that survives strict scrutiny. The Court made abundantly clear that its decisions constitutionalizing affirmative action plans had no basis in the legacy of past discrimination. Justice O'Connor said, "[i]t is true that some language in" the Court's cases since *Bakke* "might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action." 576 She quoted *Croson*, where the Court stated that, unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 577 She then indicated,

But we have never held that the only governmental 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. 578

In *Gratz*, the Court responded to two arguments asserting the legacy of past discrimination as basis for affirmative action by saying that the University of Michigan did not found its program on that basis. The first

575. *Gratz*, 539 U.S. at 302 (Ginsburg, J., joined by Souter, J., dissenting) (citing Judge J. Wisdom in *U.S. v. Jefferson County Bd. of Ed.*, 372 F.2d 836, 876 (5th Cir. 1966)).
577. *Id.* (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).
578. *Id.*
argument asserted by parties intervening on the side of the University (respondent-intervenors) contended that the University had a compelling interest in remediying the University’s past and current discrimination against minorities. In a supplemental opinion and order, the United States District Court for the Eastern District of Michigan considered and rejected this argument, on the ground that respondent-intervenors “failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the [University’s] race-conscious admissions programs.” The Supreme Court, in agreement with the district court, and to the extent respondent-intervenors reasserted this justification which they had failed to introduce earlier in the litigation process, affirmed the district court’s decision. The other argument was offered by the petitioners who contended that the only ground for the use of race the Court permits is for the remedy of “identified discrimination,” not diversity, which they called “too open-ended, ill-defined, and indefinite.” The Court replied simply that the University “never relied” on identified discrimination as a rationale, and that it has approved diversity, which the University relied on in Grutter.

The interest in diversity the Supreme Court constitutionalized in Grutter is narrow indeed. Recall the Court’s concept of individualized consideration, based on its understanding of what Justice Powell said in Bakke regarding the use of race in attaining diversity, as Justice O’Connor painstakingly articulated in Grutter. Part of that what Powell said was that race “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” O’Connor explained that the use of race the Constitution permits is “not an interest in simple ethnic diversity, in which a specified percentage of the study body is in effect guaranteed to be members of selected ethnic groups.” “Simple ethnic diversity” means not only no

579. Gratz, 539 U.S. at 257.
580. Id. at 257 n. 9 (citing 135 F. Supp. 2d 790 (E.D. Mich. 2001)).
582. Id.
583. Id. at 268. It is not clear whether the “identified discrimination” the Gratz petitioners asserted here is the same as the legacy of past discrimination. If it is, this is disingenuous because societal discrimination was among the interests constituting a basis for an appropriate use of race that Justice Powell dismissed in Bakke, before settling down for the interest in diversity that the petitioners contend, obviously insincerely, to be amorphous.
584. Id.
585. See supra nn. 530533–534.
586. Grutter, 539 U.S. at 324.
587. Id.
quota, but also mandates that the percentage of minority students admitted from year to year vary. Phrased differently, "the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

Grutter singularly and palpably highlights Justice O'Connor's tremendous unease with race-conscious measures: there are serious problems of justice connected with the idea of preference itself, and race-based governmental action needs to be subjected to "continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." In short, the diversity the Court constitutionalized is so stringent it is a surprise that the affirmative action program under review in Grutter made it. It is simply amazing that the United States District Court for the Eastern District of Michigan would find the law school's use of race not narrowly tailored; things just do not get any more stringent than this. The same is true of the four judges who dissented in the Court of Appeals. The narrow constitutionalization of diversity accomplished in Grutter justifies Professor Klarman's characterization that "Justice O'Connor's conservative commitment to preserving the status quo trumped her ideological aversion to race-conscious governmental remedies," although Klarman also suggested the "entrench[ment of] the notion that all of our social, political, and economic institutions should 'look like America'" also shaped O'Connor's action.

Diversity necessarily became a basis for constitutionalization of affirmative action programs because these programs have become almost impossible to justify based on the legacy of past discrimination. The difficulty of justification is due to the Supreme Court's assessment of all race-conscious programs, discussed above, using strict scrutiny. However, the problem with constitutionalization of diversity as an anchor for a race-conscious program is that it "has very little in common with the original motives for affirmative action in the United States." Specifically, as Professor Walters puts it, a constitutionalization rooted in

---

588. Id. at 325 (quoting Justice Powell).
589. Id. at 341.
590. Id. at 321.
591. Id. at 321–22.
592. Klarman, supra n. 48.
593. Id. The attentiveness to societal realities serves to reinforce Justice O'Connor's credentials as a conservative justice, favoring conservative outcomes, who strives to balance competing interests in cases before her, rather than seek to promote a particular ideology. See supra n. 49.
diversity "does not value, when it should, the special history of blacks
who have experienced slavery and post-slavery racism to the extent that
in only a few places in the country are blacks enrolled in a white
institution of higher education in numbers proportional to their
percentage in the state population." 595

Analyzing the issue carried over from the discussion in the previous
section on color-blindness, there are two problems with Justice
O'Connor's pronouncement of a possible sunset date for affirmative
action. First, few dispute that affirmative action programs must have "a
logical end point." 596 However, this should not happen until "after the
objectives for which they were taken have been achieved;" 597 sunset of
race-conscious programs should be predicated upon "progress toward
nondiscrimination and genuinely equal opportunity," 598 that are still not
present in American society. Instead, large-scale "conscious and
unconscious race bias" along with "rank discrimination based on race"
remain alive, "impeding realization of our highest values and ideals," 599
and warranting the conclusion that "[f]rom today's vantage point, one
may hope, but not firmly forecast," retirement of race-conscious
programs. 600 Justice Ginsburg properly reminded her colleagues that for
part of the twenty-five years following Bakke in 1978, the law relating to
the practice of affirmative action was anything but settled. A second
problem with pronouncing a date when racial preferences will no longer
be necessary, is that affirmative action programs based on diversity,
compared to those focusing on remedying the legacy of past
discrimination, do not lend themselves to sunset dates. As one analyst
aptly puts it, "diversity is a continual compelling interest" that is not
time-sensitive. 601

As with individualized consideration analyzed before, "diversity"
could be used in an abusive manner that works against minority
inclusiveness. Part of the result of the new stress on diversity is that
programs formerly reserved for minorities are thrown to whites who are

595. Walters, supra n. 15.
596. Grutter, 539 U.S. at 342.
597. Grutter, 539 U.S. at 344 (Ginsburg, J., joined by Breyer, J., concurring) (citing the
International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the
U.S. in 1994).
598. Id. at 346.
599. Id. at 345–46.
600. Id. at 346.
601. Christopher J. Schmidt, Caught in a Paradox: Problems with Grutter's Expectation that
Race-Conscious Admissions Programs Will End in Twenty-Five Years, 24 N. Ill. U. L. Rev. 753,
Concluding the discussion on diversity as an indicator of hostility are two parenthetical observations. The first is that *Grutter* is not the first time the Supreme Court has talked about a possible sunset of affirmative action. In his opinion in *Bakke*, Justice Blackmun expressed an “earnest hope” that the day comes when the United States reaches “a stage of maturity” where affirmative action programs are unnecessary and “in truth, only a relic of the past.” Justice Blackmun hoped “that we could reach this stage within a decade at the most.” While both projections embody dates, Justice Blackmun’s was more tentative than Justice O’Connor’s. At any rate, as Justice Ginsburg said in her dissent, there is little basis to make firm insistence on what should remain only a hope or forecast. The second observation is that, in actuality, diversity and legacy of past discrimination are so intermingled that the line between them can be hard to pinpoint. The program upheld in *Grutter* was based on a policy that explicitly reaffirms the law school’s longstanding commitment to diversity with special reference to the inclusion of students from racial and ethnic groups that have been historically discriminated against, like African-Americans, Hispanics and Native Americans. Without this commitment, these students might not be enrolled in the law school in a critical mass or meaningful number; in other words, the law school’s affirmative action program inextricably intermingles diversity and the legacy of past discrimination. Also, critics of Michigan’s anchorage of its defense of its affirmative action program on diversity point out, not unpersuasively, that the University in the past discriminated against Blacks. This inter-linkage means that the hostility relating to diversity is as much about the narrow constitutionalization of the concept as it is about the anchor of affirmative action on diversity, in opposition to the legacy of past discrimination.

G. The Undependability of Justice Kennedy as a Swing or Middle Justice

A seventh indicator of the Supreme Court’s lingering hostility to

---

602. See Minority Programs for All, supra n. 550 (reporting on how undergraduate scholarships and programs once restricted to minority students “are offered to anyone who adds to ‘the overall excellence and diversity of the university community.’”).

603. *Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in part and dissenting in part).

604. *Id.*


affirmative action is Justice Kennedy's undependability as a swing justice. The Rehnquist Court was a tribunal defined by Justices Sandra Day O'Connor and Anthony Kennedy as "the two justices in the middle." Analysts predicted that the result of the Michigan cases would turn on the votes of these two middle justices. This is because before the cases, as Professor Klarman explains, the "justices' votes in affirmative-action cases have followed fairly predictable political lines." The three most conservative justices, namely Rehnquist, Scalia, and Thomas, "have insisted on a nearly absolute ban on government race-consciousness" and "have never voted to sustain an affirmative-action plan;" whereas the four most liberal justices, Breyer, Ginsburg, Souter, and Stevens, "have rarely (or never) voted to invalidate an affirmative-action plan." Kennedy's stature as a swing or middle justice derives partly from the fact that he replaced another swing justice, Lewis Powell, and "partly because he isn't as dug-in and as certain as some of his colleagues."

In the Michigan cases, Justice O'Connor lived up to her billing as a justice in the middle, voting to uphold the race-conscious program—and lending critical backing to affirmative action—in Grutter, but giving a thumbs-down to the program in Gratz. In fidelity to her role as a swing justice, O'Connor voted with the liberal wing of the Court in one case and with the conservative bloc in the other. To deflect a possible charge of inconsistency, she wrote a concurrence in Gratz, defensively explaining why her votes varied in the two cases.

In contrast, Justice Kennedy stood against affirmative action in both cases. Kennedy was part of the six-three majority that struck down the program in Gratz, and he filed a dissent in Gratz in which he complained that there was not enough scrutiny in the strict scrutiny standard the Court applied in its review. He accused the law school of "engag[ing] in racial balancing," and he lambasted the majority's review as "perfunctory" for deferring too easily to the law school's "assurances"
of the constitutionality of its own admissions policy.\textsuperscript{612} Justice Kennedy was not persuaded that the twenty-five years the Court projected for the sunset of affirmative action minimizes any imaginary damage that would attend what he regards as the Court's failure to give strict scrutiny full scope. "If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioners nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century."\textsuperscript{613}

In his dissent in \textit{Grutter}, Kennedy indicates that he would support a race-conscious program in the context of diversity, given a proper case,\textsuperscript{614} but the assertion can have value only as a face-saving statement given the narrowness, discussed already, of the diversity concept the Court constitutionalized in \textit{Grutter}. It will be hard to find a race-conscious program more narrowly tailored than the one in \textit{Grutter} that Kennedy can lend his support.

Despite his negative votes in the Michigan cases, Justice Kennedy is not anti-civil rights. To the contrary, Kennedy has authored decisions supporting gay rights\textsuperscript{615} and constitutional guarantees for juveniles in capital punishment.\textsuperscript{616} There is, therefore, nothing yet detracting from Kennedy's reputation as a swing or majority maker and his status as swing justice remains intact. It is just that Justice Kennedy draws the line in his pro-civil rights orientation at affirmative action. His antipathy to civil rights, to the extent that antipathy exists, is something limited to race-conscious programs. Judging by his record, Kennedy is a middle justice whose swing balance, compared to Justice O'Connor's, shifts little, if at all, when it comes to affirmative action. With swing friends like Kennedy, affirmative action needs no enemy. Kennedy's proven non-solicitude for affirmative action, coupled with Justice O'Connor's retirement from the Court, creates a dire need for a middle justice not opposed to affirmative action. Will Judge Samuel A. Alito Jr., who replaced O'Connor, be that will middle justice? Although Alito's conservative orientation, based on his records both as a judge on the U.S. Court of Appeals for the Third Circuit and as a lawyer for the Reagan

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{612} \textit{Grutter}, 539 U.S. at 388–89 (Kennedy, J., dissenting).
\item \textsuperscript{613} \textit{Id.} at 394.
\item \textsuperscript{614} \textit{See id.} at 395 (Kennedy, J., dissenting) ("reiterat[ing] my approval of giving appropriate consideration to race in this one [student diversity] context . . . .").
\item \textsuperscript{615} \textit{See Lawrence v. Texas}, 539 U.S. 558 (2003) (overruling \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), a challenge of a Georgia sodomy law, where the Supreme Court ruled that the right to privacy does not include the right of homosexuals to consensual sex).
\item \textsuperscript{616} \textit{See Brown v. Payton}, 125 S. Ct. 2248 (2005) (ruling unconstitutional the imposition of death sentences on juveniles under 18).
\end{itemize}
\end{footnotesize}
administration, leave little hope of solicitude for affirmative action, the jury is still out and it is much too early to tell.

H. The Acerbic Rhetoric of the Conservative Bloc

An eighth indicator of the Supreme Court's hostility to affirmative action is the acerbic rhetoric of the Court's conservative bloc, made up of Chief Justice Rehnquist and Justices Scalia and Thomas. Although Rehnquist portrayed the race-conscious program in \textit{Grutter} as an unconstitutional racial balancing in favor of African Americans, his commentary directed at affirmative action, when it comes to deployment of venomous language, is otherwise restrained. Therefore, the discussion is limited to the verbal attacks on affirmative action by Justices Scalia and Thomas.

Justice Scalia dismissed the law school program the Court approved in \textit{Grutter} as a “sham” and mockingly, yet severely, questioned the educational benefit of diversity, which he regards as something better left for public school kindergartners and children in the Boys Scouts. He equated the manner in which black students network among themselves on college campus to “tribalism.” Scalia has a reputation for “unrestrained sarcasm” on the Court, but some of these comments raise question of appropriate language and good taste in legal jurisprudence.

Thomas repeatedly referred to the affirmative action program the Court upheld in \textit{Grutter} as “racial discrimination,” and berated the \textit{Grutter} majority for upholding “the Law School’s racial discrimination . . . by responding to a faddish slogan of the cognoscenti.” He maintained that the school’s compelling governmental interest claim was a “fabricated” one designed to maintain its own elite image and

\begin{itemize}
  \item \textsuperscript{617} See e.g. Jesse J. Holland, \textit{Alito Appears Headed for Confirmation}, Associated Press (Jan. 12, 2006) (conveying, among other things, concern by Democratic legislators, during Senate confirmation hearings, that Alito's background and record are replete with opposition to women and minority rights).
  \item \textsuperscript{618} See \textit{Grutter}, 539 U.S. at 348-87 (Rehnquist, C.J., joined by Kennedy, Scalia, and Thomas, JJ., dissenting).
  \item \textsuperscript{619} 539 U.S. at 347 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part).
  \item \textsuperscript{620} Id. at 347-48.
  \item \textsuperscript{621} Id. at 349.
  \item \textsuperscript{622} Biskupic, \textit{supra} n. 610.
  \item \textsuperscript{623} 539 U.S. 350 (Thomas, J., joined by Scalia J., concurring in part and dissenting in part).
  \item \textsuperscript{624} Id.
  \item \textsuperscript{625} Id. at 375.
\end{itemize}
status. He also questioned its interest in diversity, as well as its concept of critical mass. He mocked diversity alternately as “aesthetic,” and “trivial.” And, he called the majority’s goal of ending affirmative action in twenty-five years “a [twenty-five]-year license to violate the Constitution.” Thomas claimed— with dark alarmism unrooted in reality—that “[c]ontained within today’s majority opinion is the seed of a new constitutional justification for . . . racial segregation.”

In their oppositions to affirmative action, no one can accuse Thomas and Scalia of inconsistency. Scalia’s approach to affirmative action and inclusiveness is rooted in his assertion that “[i]n the eyes of government, we are just one race here. It is American.” Operating from this belief, he has opined that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction,” that “under our Constitution there can be no such thing as either a creditor or a debtor race,” and that pursuit of “the concept of racial entitlement . . . is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred.” Justice Thomas’s own approach to affirmative action and inclusiveness is the expression that the Equal Protection Clause “categorically” prohibits application of race in decisions relating to admissions in higher education and distribution of other public rewards. Guided by this world view, he has denounced race-conscious preferential programs as “racial paternalism” and insisted that

626. See id. at 356.
627. Id. at 365–66, 374.
628. See id. at 355 n. 3 (indicating, “[t]hat is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them”); see also id. at 354 n. 3 (contending, “[t]he Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right”). He also posited that diversity “does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.” Id. at 355 n. 3.
629. Id. at 357.
630. Id. at 370.
631. Id. at 365–66.
632. Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).
633. Id.
634. Id.
635. Id.
636. See Gratz, 539 U.S. 281 (Thomas, J., concurring in part and concurring in the judgment) (“I would hold that a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.”).
637. Adarand, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).
preferences designed to help people are as obnoxious as preferences that oppress, on the ground that "[i]n each instance, it is racial discrimination, plain and simple." He has declared affirmative action as being "at war with the principle of inherent equality that underlies and infuses our Constitution" and asserted that race-conscious programs "undermine the moral basis of the equal protection principle."

Responding to Justice Steven's position in Adarand that "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste and one that seeks to eradicate racial subordination," Thomas contended, "I believe that there is a moral [and] constitutional equivalence" between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law. The only departure to this familiar approach for Thomas was his irreverent citation to Frederick Douglass, venerated among African Americans as a foremost freedom fighter and supporter of black causes, to support an argument against affirmative action, in Grutter, that many blacks regard as unprincipled, given the advantages he, along with others, received as an "affirmative action baby." Justice Thomas's conservatism on the court and his opposition to inclusive programs that seek to benefit

638. Id. at 241.
639. Id. at 240.
640. Id.
641. Id. at 243 (Stevens, J., joined by Ginsburg, J., dissenting).
642. Id. at 240 (Thomas, J., concurring in part and concurring in the judgment).
643. See Jarrett, supra n. 39, who accused Thomas of "stab[bing]" Douglass in [the] grave" by comparing himself to Douglass. See also Thomas Shows His True Colors on Affirmative Action Ruling, supra n. 39. The expression "affirmative action baby" comes from Stephen L. Carter, Reflections of an Affirmative Action Baby (Basic Books 1991). In his wordy dissent in Grutter, Thomas claimed that affirmative action so stigmatizes its beneficiaries that "[w]hen [B]lacks 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." Grutter, 539 U.S. at 373 (Thomas, J., dissenting, joined by Scalia, J., concurring in part and dissenting in part). Perhaps Justice Thomas is also referring to himself. As part of the investigation that precedes the confirmation by the Senate of a Supreme Court Justice, the American Bar Association (ABA), the premier national organization of lawyers that represents the interests of the legal profession, rates each nominee, based on his or her qualifications, as Highly Qualified (now called "Well Qualified"), Qualified, or Not Qualified. Thomas got only a Qualified rating (and before the charges of sexual harassment against him by law professor Anita Hill became public), with two members voting Not Qualified. See Karen O'Connor & Larry J. Sabato, American Government: Continuity and Change, 394 (1999 ed., Allyn & Bacon 1999). Of the twenty-two previous successful nominees rated by the ABA, Thomas was the first to receive less than a unanimous Qualified rating. Id. Thomas won confirmation "by the smallest margin in the twentieth century." Baum, supra n. 50, at 55. His confirmation was made possible by the effective support he received from the first Bush administration and because "many Democrats favored the continuation of black representation on the Court." Id. at 55–56.
minorities has led some to compare him, fairly or unfairly, in ideological pristineness to a Scalia—without the talent and intellectual endowment of the real Scalia. 644

Both Thomas and Scalia pride themselves as conservatives committed to “originalism” as a method of constitutional interpretation. Originalists base the meaning of the Constitution on what the document meant when it was originally ratified. To the credit of these justices, they usually practice the method that they preach. However, as Professor Sunstein points out, this is not the case for the justices when it comes to affirmative action. He cites correctly a great deal of historical work which suggests that affirmative action was accepted by those who ratified the Equal Protection Clause, stating that “in the aftermath of the Civil War, Congress engaged in numerous race-conscious efforts singling out African Americans for special help.” “Perhaps, the historical work is mistaken,” he said, but the two justices “have not even bothered to investigate it.” 645

Despite the death of Chief Justice Rehnquist, the conservative wing of the Supreme Court is still alive and well. The new jurist who replaced Rehnquist, former Judge John G. Roberts Jr. of the U.S. Circuit Court for the District of Columbia, is an individual noted for his conservative values and record, even if he lacks the ideological pristineness of Rehnquist. 646 This is not to mention to inclusion of Samuel Alito, Justice O’Connor replacement, whose appointment and confirmation to the

644. On Scalia’s intellect, see Baum, supra n. 50, at 64, 169. Senator Harry Reid (D-Nev.) recently dismissed the speculation that Thomas could be in line for Chief Justice of the United States following the expected departure, given the ill-health and increasing fragility of Chief Justice Rehnquist. Reid, who is white, reportedly stated that Thomas “has been an embarrassment to the Supreme Court. I think that his opinions are poorly written. . . . I just don’t think he’s done a good job as a Supreme Court justice.”). See Armstrong Williams, Racism Finds A Home in White Towers, USA Today 25A (Dec. 10, 2004). See also the previous footnote.

645. Sunstein, supra n. 500, at 80.

646. See Terrence Hunt, Court Recorder: Roberts Now Up for Top Job, Chic. Sun-Times 8 (Sept. 6, 2005) (stating that “I]ike Rehnquist, Robert is deeply conservative” and that he was nominated to succeed O’Connor because the latter’s “tie-breaking votes on contentious issues like abortion restrictions, campaign finance limits, discrimination laws, and religion” “angered conservatives.”). Nominated initially in July 2005 to replace O’Connor, Roberts was upgraded to the Chief Justice position following the death of Chief Justice Rehnquist on September 3, 2005. On possible reasons why the President did not choose Justice Scalia, said to be the favorite for the job among conservatives, see Robert Novak, Bush Secretly Decided Weeks Ago on Simplest Solution, Chic. Sun-Times 8 (Sept. 6, 2005). According to Novak, selecting Scalia would have meant a longer confirmation process given the associate justice’s “notoriety as a right-wing icon,” while conflicting with President’s Bush’s known knack for simplicity. Id. Regarding the latter point, “[p]romoting Scalia would have meant three confirmation processes at the same time: for Scalia as chief justice, for Roberts as associate justice and for somebody to replace Scalia as associate justice. To the strategists at the Bush White House, that looked like too many moving parts and the possibility of something going wrong.” Id.
Court some analysts predict could lead to "an ideological shift" on the Court, given his known conservative orientation.  

I. Tinkering with the "Injury in Fact" Requirement Necessary for Standing in Equal Protection Cases

The final indicator of Supreme Court hostility toward affirmative action analyzed here is its tinkering with the "injury in fact" requirement necessary for standing in equal protection cases. The Supreme Court's rulings have resulted in a relaxation of the requirement for standing. Before 1993, it was necessary for a petitioner to show that he would have received a benefit but for a preferential treatment against him. 648 From 1993, beginning with the Jacksonville case, 649 all that a petitioner had to establish to make a prima facie case of injury in fact was that it did not have equal opportunity to compete. Jacksonville involved the challenge of an ordinance that gave preferential treatment to certain minority-owned businesses in the award of city contracts by an association. The Court ruled that, to establish standing, the association did not need to show that one of its members would have received a contract absent the ordinance, loss of contract, or ultimate inability to obtain the benefit. Rather, the injury in fact that it needed to establish was "the inability to compete on an equal footing in the bidding process," 650 specifically that "it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." 651 This was a minimization of the injury in fact requirement in equal protection cases to a point that, for want of a better expression, effectively transformed the injury in fact requirement into an injury in theory requirement.

More recently, in Gratz, the Supreme Court used the Jacksonville line of reasoning to afford standing to a petitioner who sought prospective relief against the University of Michigan for allegedly using race in its admissions decisions. 652 Both Justices Souter and Stevens objected to the award of standing in the case as overly indulgent. 653 The Court rejected Justice Stevens's contention that, because the petitioner, Patrick Hamacher, did not actually apply for admission as a transfer

---

647. See Hunt, Court Reorder, supra n. 646.
649. Id.
650. Id. at 666.
651. Id.
652. See Gratz, 539 U.S. at 260–68.
653. See id. at 291–92 (Souter, J., joined by Ginsburg, J., dissenting); Id. at 287 n. 6 (Stevens, J., joined by Souter, J., dissenting).
student, his future injury claim is at best conjectural or hypothetical rather than real and immediate.\footnote{See id. at 262–68.} Citing \textit{Jacksonville}, Chief Justice Rehnquist ruled that the injury in fact necessary to establish standing is the denial of equal treatment.\footnote{Id. at 261–62.} Rehnquist's argument went as follows: in bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University denied him the opportunity to compete for admission on an equal basis.\footnote{Id. at 262.} When Hamacher applied to the University as a freshman applicant, he was denied admission even though an under-represented minority applicant with his qualifications would have been admitted.\footnote{Id.} After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions.\footnote{Id.} The Chief Justice also rejected Justice Stevens's contention that the use of race in undergraduate transfer student admissions differs from the use of race in undergraduate freshman admissions.\footnote{Id. at 264–66.} Justice O'Connor also cited \textit{Jacksonville} for authority in \textit{Grutter}, indicating that "Petitioner [meaning Ms. Grutter] clearly has standing to bring this lawsuit."\footnote{Id. at 317.}

This tinkering with the requirement for injury in fact in equal protection cases is part of a general pattern of chipping away at civil rights by the Rehnquist court. In \textit{Alexander v. Sandoval}\footnote{532 U.S. 275 (2001).} decided in 2001, the Court ruled that the Civil Rights Act of 1964 allowed individuals to sue only in disparate treatment cases, \textit{not} in disparate impact cases. The case dealt "a death blow to the right of individuals to challenge practices of institutional racism by states."\footnote{Walton & Smith, supra n. 3, at 221–22.} It also "overruled the decisions of nine of the twelve circuit courts that had ruled on the issue in more than two decades of litigation."\footnote{Id. at 222.} Disparate impact cases are cases related to institutional racism, that is, policies or programs that have a racially discriminatory impact or effect. By contrast, disparate treatment involves individual racism or intentional acts of discrimination. Since the adoption of the Civil Rights Act of 1964, individuals have had the right to sue states for both types of discrimination. But in this five-to-four decision, the Supreme Court took

\footnotesize

\begin{itemize}
  \item 654. See id. at 262–68.
  \item 655. Id. at 261–62.
  \item 656. Id. at 262.
  \item 657. Id.
  \item 658. Id.
  \item 659. Id. at 264–66.
  \item 660. Id. at 317.
  \item 661. 532 U.S. 275 (2001).
  \item 662. Walton & Smith, supra n. 3, at 221–22.
  \item 663. Id. at 222.
\end{itemize}
away the individual right to sue states practicing institutional racism. The case involved a challenge to an Alabama law requiring all applicants to take the state’s written driver’s license examination in English. The suit alleged that in its impact or effect the requirement discriminated on the basis of language or ethnic origin. The district court and the Eleventh Circuit agreed. The Supreme Court held that the Civil Rights Act allowed suit only in disparate treatment cases and did not reach the merits of the case as to whether the requirement was discriminatory. Justice Scalia, who is noted for his anti-civil rights orientation, wrote the opinion of the Court. Justice Stevens bitterly dissented from the judgment. He wrote that “it makes no sense” to distinguish between types of discrimination in terms of an individual’s right to sue. He condemned his colleagues for reaching out to take the case when there was no conflict between the circuits, and he was infuriated that the Court overturned two decades of precedent. What makes Sandoval potentially far-reaching is that disparate treatments, which require a plaintiff to prove discriminatory intent, are difficult to win, compared to disparate impact cases that require no such proof. Changes made by the Rehnquist Court relating to standing have allowed far-fetched assaults on affirmative action while depriving other potential litigants of an opportunity for adjudication.

IV. CONCLUSION

Affirmative action is the use of race or gender, particularly race, in decisions relating to distribution of scarce public resources, including education. The Michigan cases are momentous because they signify, without a shadow of doubt, that race will for a long time to come remain a factor in those decisions. Grutter, which upheld the Michigan Law School program, portrayed the kind of narrowly-tailored use of race that in the view of the Supreme Court could be used to promote a compelling governmental interest. Gratz, striking down the Michigan undergraduate school affirmative action program, in contrast, provided an example of a constitutionally impermissible use of race. These authoritative clarifications became necessary given the legal and constitutional

664. See generally Alexander, 532 U.S. 275.
665. Justice Stevens read parts of his dissent, something a justice does to underscore the momentousness of a decision. Alexander, 532 U.S. at 293–316.
666. Alexander, 532 U.S. at 310 (Stevens, J., joined by Souter, Ginsburg, and Breyer, dissenting).
667. Id. at 317.
668. Id. at 294.
fuzziness that characterized the practice of affirmative action in the post-
Bakke period before 2003. In the twenty-five years following Bakke, the
law on affirmative action remained unsettled, with race-conscious
policies under proscription in some regions of the country, like Texas.669

Yet, none of these marks of progress minimizes the considerable
hostility that still pervades the Supreme Court jurisprudence on
affirmative action. An important function of this Article was to draw
attention to that reality and to highlight the nature of that abiding
hostility by identifying and discussing nine interrelated indicators arising
from a careful reading of the Michigan cases. The Article also takes a
historical approach that ties affirmative action to minority, especially
black, civil rights in America. It is a refreshing perspective that sets this
work apart from previous studies on affirmative action or the Michigan
cases. As the legal and political tribunal charged with the “province” of
pronouncing what the law is, the Supreme Court has a leadership role in
the “job of ending discrimination”,670 and enthroning inclusiveness in
this country. Focusing on the role of the Supreme Court, this Article
shows how far we, as a society, have come in the politics of
inclusiveness without losing sight of unfinished business that also
portends how far we still have to go. The key to reconciling the tension
of progress on the one hand and the lingering problems on the other is to
keep in mind that the assault on affirmative action that preceded the
Michigan cases, which reached a peak in Adarand, will require much
more than just one Grutter case, however momentous, to repair. Its
province and duty under the Constitution dictate that the Supreme Court
should play a leadership role in that reparation. Will the Court, since
October 2005, under the leadership of John G. Roberts,671 live up to its
expectation in this role? To borrow the lyric of the Jamaican reggae
maestro, Bob Marley (1945–1981), only time will tell.

669. Grutter, 539 U.S. at 344–45 (Ginsburg, J., concurring).

670. See Clinton, supra n. 19, at 1113, whose actual words were “[t]he job of ending
discrimination in this country is not over.”

671. See e.g. David G. Savage, A Reading on Roberts: High Court’s Lineup May Be an Early