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DISCRIMINATION CASES OF THE 2002 TERM

*Eileen Kaufman*¹

Last term's discrimination cases include one Title VII employment discrimination case, one Americans with Disabilities Act case, and, of course, two of the most closely watched cases of the term — the two University of Michigan affirmative action decisions. We can dispose of the two statutory discrimination cases in fairly short order, not because they lack significance, but because they are rather straightforward.

STATUTORY DISCRIMINATION CASES

*Desert Palace v. Costa*² is a Title VII mixed motive case. Title VII prohibits discrimination in employment on the basis of an individual's race, color, religion, sex, or national origin.³ The

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² 539 U.S. 90 (2003).

³ Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (2003). Section 2000e-2(a) provides in pertinent part:

It shall be an unlawful employment practice for an employer:
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

question in a mixed motive case is whether Title VII is violated when the employer's action is based in part on a prohibited ground and in part on a legitimate ground. So, for example, is there a violation of Title VII when the employer refuses to promote someone because she is a woman but also because her attendance record is poor?

The 1991 amendment to Title VII answers that question by providing that Title VII is violated when the plaintiff establishes that the prohibited ground was a motivating factor in the employer's decision, even though other factors also motivated the decision.⁴ That amendment offers the employer a limited affirmative defense in such cases.⁵ In order to qualify for the affirmative defense, the employer must demonstrate that it would have taken the same action in the absence of the impermissible motivating factor.⁶ This defense does not absolve the employer

employment, because of such individual's race, color, religion, sex, or national origin. . . .

Id.

⁴ See *id.* at § 2000e-2(m) which provides in pertinent part: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though others factors also motivated the practice."

⁵ See *id.* at § 2000e-5(g)(2)(B) which provides in pertinent part:

On a claim in which an individual proves a violation under [42 U.S.C. § 2000e-2(m)], and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court — (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [42 U.S.C. § 2000e-2(m)]; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment. . . .

⁶ *Id.*

from liability, but it restricts the plaintiff's remedies to declaratory relief, certain types of injunctive relief, and attorney's fees and costs. In other words, where the affirmative defense applies, the plaintiff cannot recover compensatory or punitive damages.⁷

The issue in *Desert Palace* was whether a plaintiff must present direct evidence, as opposed to circumstantial evidence, in order to establish that the unlawful reason was a motivating factor.⁸ The answer, according to Justice Thomas, writing for a unanimous court, was no — direct evidence is not required.⁹ This decision resolves what had been termed a “jurisprudential quagmire”¹⁰ and resolves a split in the circuits,¹¹ making it far easier for a plaintiff to get her case to a jury in a mixed motive case, particularly in those four circuits that had required the introduction of direct evidence.¹²

Circumstantial evidence is vital in employment discrimination cases because it is the rare employer who openly states a discriminatory animus. Modern day employment

⁷ *Id.*

⁸ *Desert Palace*, 539 U.S. at 90.

⁹ *Id.* at 96.

¹⁰ See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 171 F.3d 1013, 1015 (5th Cir. 1999) (Jolly, J., dissenting).

¹¹ The Eighth, Eleventh, First, and Fourth Circuits required direct evidence to establish liability. See, e.g., *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Bd. of Trs. of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). The Ninth Circuit has held that either direct or circumstantial evidence can be used in a mixed motive case. See, e.g., *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002).

¹² *Desert Palace*, 539 U.S. at 91.

discrimination is likely to be far more subtle than in decades past and, therefore, demonstrable only by circumstantial evidence, not by the proverbial smoking gun. Employment discrimination attorneys agree that *Desert Palace v. Costa* will undoubtedly result in more mixed motive cases being brought and won by plaintiffs.

The Americans with Disabilities Act (ADA) case of the term is *Clackamas Gastroenterology Associates v. Wells*.¹³ That case addresses a definitional question of which employers are covered by anti-discrimination statutes. The ADA, like Title VII, applies to employers of fifteen or more employees.¹⁴ The question in the case is: Who counts as an employee? More specifically, should four physicians who were actively engaged in medical practice as shareholders and as directors of a professional corporation be counted as employees?¹⁵

The Ninth Circuit, following the approach of the Second Circuit, had concluded that the physicians did count and that the employer was, therefore, a covered employer for purposes of Title VII.¹⁶ Other circuits, including the Seventh Circuit, had applied an “economics reality” test to resolve this question.¹⁷ Resolving this conflict in the circuits, the Supreme Court, in a seven-to-two decision with Justice Stevens writing for the majority, concluded that who qualifies as an employee should be determined by using

¹³ 538 U.S. 440 (2003).

¹⁴ Americans With Disabilities Act, 42 U.S.C. §§ 12101, 12111(5) (2003).

¹⁵ *Clackamas*, 538 U.S. at 442.

¹⁶ *Id.*

¹⁷ *Id.*

common law agency principles, with control as the dominant consideration.¹⁸

AFFIRMATIVE ACTION

I would like now to turn to *Grutter v. Bollinger*¹⁹ and *Gratz v. Bollinger*,²⁰ the two affirmative action cases which, along with *Lawrence v. Texas*,²¹ were the blockbuster cases of the term. They provide the long awaited answer to the question of whether colleges and universities can take race into account in fashioning their admissions policies. In other words, does *Bakke*²² remain good law? The short answer to that question is yes; but as we will see, it is a nuanced yes. Let me try to set the constitutional stage.

The constitutional question is whether affirmative action programs violate the Equal Protection Clause.²³ Since the Supreme Court has stated that Title VI is to be interpreted consistently with the Equal Protection Clause,²⁴ our discussion applies not only to public universities, but to private institutions as well. Whenever an equal protection claim is based on race, in other words, whenever

¹⁸ *Id.* at 445.

¹⁹ 123 S. Ct. 2325 (2003).

²⁰ 123 S. Ct. 2411 (2003).

²¹ 123 S. Ct. 2472 (2003).

²² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (holding that race could be one of the factors considered in admissions in a competitive process).

²³ U.S. CONST. amend. XIV, sec. 1 provides in pertinent part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

²⁴ *Bakke*, 438 U.S. at 287 (“In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”).

government classifies on the basis of race and that classification is challenged, the courts employ the most rigorous level of review called strict scrutiny.²⁵

What is it about racial classifications that justifies such searching judicial scrutiny? When government classifies on the basis of race, we are suspicious — that is why we call racial classifications “suspect classifications.”²⁶ We are suspicious because of our nation’s history of systemic discrimination against racial minorities.²⁷ Given that history of oppression, we have called racial classifications “suspect” and subjected all racial classifications to strict scrutiny. The other indicia of suspectness include political powerlessness, discrete and insular minority, and immutable characteristics that bear no relationship to ability.

What does strict scrutiny require? It is a two-part test. First, there must be a compelling governmental interest, and, second, the policy must be narrowly tailored to achieve that interest.²⁸ That means that the policy must be necessary to accomplish the compelling governmental interest — that there are no race-neutral or less burdensome alternatives that could achieve that interest. Under this test, which some have called “strict in theory, but fatal in fact,”²⁹ racial classifications are virtually always

²⁵ *Id.* at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

²⁶ *Id.* at 290.

²⁷ *Id.* at 360 (Brennen, J., dissenting).

²⁸ *Grutter*, 123 S. Ct. at 2337-38.

²⁹ *Id.* at 2338.

going to be found unconstitutional under the Equal Protection Clause.

The thorny issue that has confounded our courts is whether to treat affirmative action programs — racial classifications defended in part on the ground that they benefit minorities — in the same category as racial classifications designed to oppress racial minorities. Should affirmative action programs trigger the same standard of review — strict scrutiny — as any other racial classification? Is there the same need to be suspicious when government acts to benefit racial minorities? Are we as suspicious when classifications favor rather than disfavor a historically despised group?

Although the courts struggled with this issue for some time, in 1995, in *Adarand Constructors v. Peña*,³⁰ a five-to-four majority of the Court held that all racial classifications, whether imposed by federal, state, or local government, whether designed to oppress or to help, are subject to strict scrutiny.³¹ In order to survive strict

³⁰ 515 U.S. 200 (1995).

³¹ *Id.* at 220. This ruling led Justice Stevens in dissent to note that the majority does not know the difference between a No Trespassing Sign and a welcome mat. The split in the Court reveals a profound difference of opinion on a very basic question — to get beyond racism, must we continue to take account of race (the view of Justice Blackmun), or by continuing to take account of race do we insure that we will never get past it. I suspect that which side of that question you are on depends largely on the extent to which you believe that racial discrimination is a thing of the past or whether you think that it is simply a case of constitutionalizing one's wishful thinking (the view of Justice Marshall). At the moment, the prevailing view is that when an affirmative action program is challenged, it will be reviewed in the same way, with as much suspicion as a law mandating separate drinking fountains for blacks and whites. In other words, it will be subject to the strict scrutiny test.

scrutiny, defenders of affirmative action programs have to demonstrate that the program is narrowly designed to achieve a compelling governmental interest.

The next obvious question is: What constitutes a compelling governmental interest? Here is where the plot thickens. Remedying the present effects of past discrimination is, theoretically, a compelling governmental interest, but only when there is very strong evidence that race-conscious measures are needed to remedy the past discrimination and its present effects, and only when the race-conscious measures are being used by the specific government actor who perpetrated the discrimination.³² In other words, remedying societal discrimination is not sufficient.

Is there any non-remedial interest that qualifies as a compelling interest? Justice Powell enters the picture in *Regents of University of California v. Bakke*, involving a challenge to the affirmative action program at UC Davis Medical School.³³ Justice Powell, casting the decisive vote for a badly split Court, held that diversity of the student body is a compelling interest.³⁴ Nonetheless, the Court struck down the UC Davis program, finding that it was not narrowly tailored to meet that objective because diversity could be achieved by considering factors other than race alone.³⁵ The Court distinguished UC Davis' program, which set aside sixteen seats in the entering class on the basis of

³² *Bakke*, 438 U.S. at 308.

³³ *Id.* at 269-70.

³⁴ *Id.* at 299.

³⁵ *Id.* at 318.

race, from Harvard's affirmative action program which considered a number of factors, including race. UC Davis' program operated as an unlawful quota, whereas Harvard's program did not utilize a separate admissions track nor specify a certain number of seats to be filled by minority applicants and was thus permissible.³⁶

The import of *Bakke* was that a majority of the Court concluded that schools can use a race-conscious admissions program — that race can be a factor used to achieve educational diversity.³⁷ Although that holding had never been overruled by the Supreme Court, the Fifth Circuit, in *Hopwood v. Texas*,³⁸ invalidated the affirmative action program at the University of Texas School of Law, finding that diversity was not a compelling governmental interest and that it — the Fifth Circuit — was not bound by *Bakke*.³⁹ Thus, under the Fifth Circuit view, race may not be used at all, not even as one of many factors.⁴⁰ The result of *Hopwood* was a dramatic decline in enrolment of African-Americans in the first three post-*Hopwood* classes. The

³⁶ *Bakke*, 438 U.S. at 311, 319.

³⁷ *Id.* at 323.

³⁸ 78 F.3d 932 (5th Cir. 1996).

³⁹ *Id.* at 962.

⁴⁰ *Id.* The only interest that would be sufficiently compelling to justify an affirmative action program, according to this view, is remedying the present effects of past discrimination — not in society as a whole, not in public education within the state, not even within the University of Texas, but at the UT Law School specifically. And on that issue, despite the fact that UT Law School was officially racially segregated until the Supreme Court ordered the school to accept blacks in 1950, and despite the under-representation of minorities at the school and the fact that it was perceived as a hostile environment for racial minorities, the Court did not find the affirmative action program justified as a remedial measure. *Id.*

classes of 1997 to 1999 had nineteen African-American students out of 1,387 JD students, which comes out to 1.4 percent of the student body.⁴¹ That is a smaller percentage than in the Fall of 1950, the first year after the Supreme Court declared the law school's policy of intentional segregation unconstitutional.⁴² A similar phenomenon occurred in California as a result of Proposition 209⁴³ and the Board of Regents' vote to ban race-conscious affirmative action.

The Eleventh Circuit followed the Fifth Circuit's Hopwood decision, but other circuits continued to treat *Bakke* as good law.⁴⁴ It was against this landscape of utter confusion and conflicting court decisions that the Supreme Court agreed to hear the University of Michigan cases.

There are few modern cases that have generated as much public interest and attention as the two Michigan cases. More amicus briefs were filed than in any case in Supreme Court

⁴¹ William C. Kidder, Comment. *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1099 (2001).

⁴² *Id.*

⁴³ 2002 Cal. Legis. Serv. 1165 (West 2002) (prohibits discrimination or preferential treatment based on race, ethnicity and gender in the operation of public employment, public education and public contracting).

⁴⁴ See, e.g., *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000) ("*Bakke* has not been overruled by the Supreme Court. Thus, at our level of the judicial system Justice Powell's opinion remains the law."); *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992) (holding that present effects of past discrimination must be specifically found to justify student's exclusion from a race-based scholarship).

history.⁴⁵ As was clear from the oral arguments and the actual decisions, those amicus briefs, particularly the military brief, turned out to play a pivotal role, a subject I will return to in a moment. All nine Justices wrote an opinion in one or both of the cases.

Rather than go through the thirteen opinions in these two cases, I will describe the holdings, the major principles of law that emerged, the basis upon which the decisions are subject to criticism, and then the future of affirmative action, with suggestions as to how affirmative action programs should be modeled in order to be constitutionally permissible.

HOLDINGS

As for the essential holdings, it was a “split doubleheader,” to borrow from Justice Scalia.⁴⁶ In *Grutter*, the Court upheld the law school’s affirmative action program which considered race as one factor among many.⁴⁷ In contrast, in *Gratz*, the Court struck down the undergraduate affirmative action program,⁴⁸ which was a far more elaborate system. The undergraduate admissions office utilized a point system, with points assigned for a variety of factors including standardized test score, grade point average, quality of

⁴⁵ See 2002 U.S. Briefs 241. Between these two Michigan cases there were 105 amicus briefs in total.

⁴⁶ *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part and dissenting in part).

⁴⁷ *Id.* at 2347.

⁴⁸ *Gratz*, 123 S. Ct. at 2430.

the high school attended, athletic ability, and legacy.⁴⁹ Twenty points were automatically assigned for minority status.⁵⁰

Before going through the central holdings of the two cases, I wanted to say a few words about the role of the amicus briefs in these cases. No one listening to the oral arguments could have missed the central importance of one amicus brief in particular, the brief submitted by former high-ranking officers and civilian leaders of the armed forces.⁵¹ Among the signatories of the so-called “military brief” was democratic presidential contender Wesley Clark.

The military brief tells the story of the racial segregation and eventual integration of the armed forces and of the military academies⁵² and forcefully explains why diversity is essential to the military’s mission to provide national security.⁵³ Indeed, a similar argument could be made with respect to the link between diversity within law schools and the justice system’s ability to maintain its legitimacy and command the confidence of the public.

⁴⁹ *Id.* at 2419.

⁵⁰ *Id.*

⁵¹ Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr., et al., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (Nos. 02-241, 02-516).

⁵² *Id.* at 5.

⁵³ *Id.* The brief explains that without racial minorities in command positions, African-American troops lost confidence in the military as an institution, where “[v]iolence and even death proved necessary to drive home the realization that . . . even commanding officers had only the faintest idea of what the black man and woman in the service was thinking.” *Id.* at 16. Affirmative action programs were adopted in ROTC programs and at the military academies which sought to identify those qualities suggesting ability to succeed in the officer corps and rejecting the so-called 10% plans because “[m]inority candidates are not fungible.” *Id.*

Justice O'Connor seemed to accept and embrace that rationale when she concluded on behalf of the majority in *Grutter* that, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁵⁴

It was not only the military brief that proved influential, but also the briefs submitted by Fortune 500 companies,⁵⁵ which convinced the Court that the "benefits from diversity are not theoretical, but real," because in order to compete in the global market, American businesses must have persons with skills that can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

These views lay the groundwork for diversity playing a role in other affirmative action programs, not just within universities, but also in the workplace. That will surely be the subject of future litigation.

PRINCIPLES

Looking at the two decisions, the central principles of law that emerge are, one, race remains a suspect classification triggering strict scrutiny regardless of whether the classification burdens or benefits racial minorities. Thus, the standard is the

⁵⁴ *Grutter*, 123 S. Ct. at 2341.

⁵⁵ Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents at 5, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (Nos. 02-241, 02-516).

same whether the classification is one of exclusion or inclusion and regardless of whether the classification serves to subordinate or elevate a racial minority. Two, although strict scrutiny is the governing test, the maxim that it is strict in theory, but fatal in fact, proves to be untrue. This is a point that Justice O'Connor made in 1995 in *Adarand* where she predicted that racial classification could withstand strict scrutiny,⁵⁶ a prediction confirmed by the result in *Grutter*. Three, diversity of a student body and the educational benefits that flow from diversity constitute compelling governmental objectives.⁵⁷ Four, an affirmative action plan that individually scrutinizes each applicant and considers race as one of many factors is narrowly tailored to achieve diversity. However, an affirmative action plan that operates as a quota, or sets up a separate admission track, or automatically assigns a set number of points for racial minority status, or operates to achieve racial balancing is not narrowly tailored to achieve diversity.⁵⁸

Given these holdings and principles, who is the winner and who the loser? Although there is something for everyone in these decisions, it seems quite clear that the proponents of affirmative action are the big winners in these cases. The re-affirmance of Justice Powell's opinion in *Bakke* is undoubtedly the single most significant part of these decisions. It is the long awaited answer to the question of whether Justice Powell's opinion in *Bakke*

⁵⁶ *Adarand*, 515 U.S. at 237.

⁵⁷ *Grutter*, 123 S. Ct. at 2339.

⁵⁸ *Id.* at 2342.

represents good law. *Grutter* makes clear that the Fifth Circuit had it wrong in predicting that Justice Powell's opinion would not command a majority of the Court today.⁵⁹ The fact that *Grutter* was a five-to-four decision, however, certainly increases the stakes with regard to the next Supreme Court vacancy, and much has already been written about the politics of judicial appointments set in motion by this decision.⁶⁰

CRITICISM

The decisions have been criticized by both the right and the left, and by both proponents and opponents of affirmative action. One of the chief criticisms of *Grutter* is the extent to which the Court seems to have diluted the strict scrutiny standard. Strict scrutiny has always signified the most searching judicial scrutiny, and searching judicial scrutiny is antithetical to deferential review. Yet, in *Grutter*, the Court exhibited unprecedented deference to the university with respect to finding diversity to be a compelling governmental interest and, more particularly, with respect to whether or not the program was narrowly tailored to achieve the governmental objective.

With respect to diversity, the Court explains its deference to the law school's judgment that diversity is essential to its

⁵⁹ *Id.* at 2351.

⁶⁰ See, e.g., Nick Anderson, *High Court's Term Ends; Politics in Play for a Seat Not Yet Vacant*, LA TIMES, June 27, 2003, at A32.

educational mission by pointing to the constitutional dimension, grounded in the First Amendment of education autonomy. “[U]niversities occupy a special niche in our constitutional tradition,” we are told, because of “the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment.”⁶¹ Thus, context played an explicit role in this decision. The fact that this was an affirmative action program in a university added a constitutional dimension, a First Amendment dimension that arguably would not be present in, for example, an employment based affirmative action program.

The Court’s deference is even more palpable with respect to the second prong of the strict scrutiny test — the narrow tailoring requirement. Narrow tailoring has always been understood to mean that the objective could not be achieved by a race-neutral approach.⁶² Yet, on that issue, the Court inexplicably states that, “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”⁶³ All it requires, apparently, is a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”⁶⁴ Without much elaboration, the Court rather casually concludes that

⁶¹ *Grutter*, 123 S. Ct. at 2339.

⁶² *See, e.g., City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509-10 (1989).

⁶³ *Grutter*, 123 S. Ct. at 2344.

⁶⁴ *Id.* at 2345.

the law school adequately considered race-neutral alternatives.⁶⁵ Professor Peter Schuck from Yale equates this kind of deference to “an indulgent mother who gives her affable son the keys to the family car without questioning him about his drinking. When the father warns that the youth has gotten drunk before and harmed some bystanders, she replies, ‘Oh, he’s a good boy, and, anyway, he says he’s only going to the library.’”⁶⁶

Another indication of the Court’s lack of rigor in using strict scrutiny relates to its requirement that race-conscious admissions programs must be temporary. Although the Court states that all such programs must “have a termination point,”⁶⁷ the fact that the University of Michigan Law School’s program did not does not affect the Court’s analysis. Rather, the Court shows extraordinary deference to the law school, saying it “takes the law school at its word that it ‘would like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”⁶⁸ The Court then notes that it has been twenty-five years since Justice Powell approved the use of further diversity in educational institutions, and, given the progress since that time the Court “expects that twenty-five years from now, the use of racial

⁶⁵ *Id.*

⁶⁶ Peter H. Schuck, *Reflections on Grutter*, JURIST LEGAL INTELLIGENCE (Sept. 5, 2003), available at <http://jurist.law.pitt.edu/forum/symposium-aa/schuck.php>.

⁶⁷ *Grutter*, 123 S. Ct. at 2346.

⁶⁸ *Id.*

preferences will no longer be necessary.”⁶⁹ That sounds far more like an expectation or a hope than a definitive termination point. In fact, the day after *Grutter* was announced, Justice O’Connor, in an interview with the *Chicago Tribune*, repeated her hope that racial preferences will no longer be necessary in twenty-five years, but again her explanation sounded far more like an expression of hope than an imposed sunset provision, with the Court relying on the university’s good faith to end the program when it deems it no longer necessary to further the school’s interest in diversity.⁷⁰

The Court’s willingness to defer to the University is not particularly troubling if one believes, as I do, that strict scrutiny is not the appropriate standard for evaluating affirmative action programs. There is a school of thought that argues that the Equal Protection Clause should be interpreted more as an anti-caste principle, a guarantee that government will not classify to perpetuate a kind of second class citizenship.⁷¹ When government acts to benefit a racial minority, there is no need to be suspicious and there are many reasons to defer to the political branches. However, that approach has most definitely not been adopted by the Supreme Court, which instead has adhered to the view that all racial classifications trigger strict scrutiny. With that as a given,

⁶⁹ *Id.* at 2347.

⁷⁰ Jan Crawford Greenburg, *Supreme Court Narrowly Upholds Affirmative Action; 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*, CHICAGO TRIBUNE, June 24, 2003, at 1.

⁷¹ See, e.g., Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311 (1999).

one cannot help but be struck by the lack of rigor in the Court's use of strict scrutiny in *Grutter*.

A completely separate basis for criticism of the decisions relates to the distinction drawn between the two programs. The law school's program is upheld because it is flexible and individualized,⁷² whereas the undergraduate program is struck down because it is mechanical and operates pursuant to an automatic point system.⁷³ Professor Derrick Bell refers to this difference as so slight as to require "a legal micrometer to measure."⁷⁴ The distinction drawn here harkens back to Justice Powell's opinion in *Bakke* where he distinguished the UC Davis program from the Harvard program. The UC Davis program was unconstitutional because it set sixteen seats aside and thus operated as an unlawful quota, whereas the Harvard program, which merely used race as one factor, was acceptable.

The question that one must ask is whether we are elevating form over substance in drawing these distinctions and, more importantly, whether we are, in effect, rewarding a lack of transparency in dealing with issues of race. Justice Souter, writing in dissent in *Gratz*, complains that it seems "especially unfair to treat the candor of the admissions plan as an Achilles' heel." Rather than penalize those universities that are forthright, he would

⁷² *Gratz*, 123 S. Ct. at 2439, 2441.

⁷³ See *supra* notes 48-50 and accompanying text.

⁷⁴ Derrick Bell, *Learning From Living: The University of Michigan Affirmative Action Cases*, JURIST (Sept. 5, 2003) at <http://jurist.law.pitt.edu/forum/symposium-aa/bell.php>.

give them an extra point for frankness.⁷⁵ “Equal protection,” he said, “cannot become an exercise in which the winners are the ones who hide the ball.”⁷⁶

The decision has also been criticized by some for its failure to sufficiently take account of the racial discrimination that persists in our country. In fact, the student interveners in the law school case based their argument on precisely that point, creating a record that included testimony of leading historians⁷⁷ and told the tale of continuing residential segregation in Michigan and discrimination in the public and private school systems within Michigan.⁷⁸ According to the Harvard Civil Rights Project, racial segregation in grades K through 12 is greater now than it was thirty years ago.⁷⁹

The student interveners’ case added a dimension that was not otherwise in the litigation. The university defended its affirmative action program on the ground of diversity, an argument that was the only one realistically available given Supreme Court precedent. The student interveners argued that there are other, more powerful defenses of affirmative action — defenses based on the continuing need to remedy discrimination, the need to address

⁷⁵ *Gratz*, 123 S. Ct. at 2442 (Souter, J., dissenting).

⁷⁶ *Id.*

⁷⁷ See Brief for Respondents Kimberly James, et al., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

⁷⁸ *Id.*

⁷⁹ Erica Frankenberg et al., *A Multiracial Society With Segregated Schools: Are We Losing the Dream?* Harvard Civil Rights Project, (Jan. 16, 2003), at <http://www.civilrightsproject.harvard.edu/research/reseg03/resegregation03.php>.

present discriminatory practices, and the need to reexamine existing notions of merit.⁸⁰

Justice Ginsburg's concurring opinion in *Grutter* takes note of the phenomenon of continued discrimination stating, "[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."⁸¹ She offers statistics that show that almost three-quarters of minorities attend segregated schools which lack the resources found in majority schools.⁸²

Similarly, in her dissenting opinion in *Gratz*, Justice Ginsburg continues this theme and refers to "the effects of centuries of law-sanctioned inequality [that] remain painfully evident in our communities and schools."⁸³ With detailed footnotes, she points to persistent disparities in unemployment, in poverty, in access to health care, in educational institutions, in earnings,⁸⁴ and to the irrational prejudice still encountered in real estate transactions and in job opportunities.⁸⁵ Thus, she concludes that it is folly to treat policies of exclusion the same as policies of inclusion.⁸⁶ Quoting Professor Stephen Carter, writing in the *Yale Law Journal*, Justice Ginsburg says:

⁸⁰ *Gratz*, 123 S. Ct. at 2443, 2444.

⁸¹ *Grutter*, 123 S. Ct. at 2347-48 (Ginsburg, J., concurring).

⁸² *Id.* at 2348.

⁸³ *Gratz*, 123 S. Ct. at 2443 (Ginsburg, J., dissenting).

⁸⁴ *Id.* at 2444-45 nn.1-9.

⁸⁵ *Id.* at 2443-44.

⁸⁶ *Id.*

To say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue in [*Bakke*] was the same as the issue in [*Brown*]⁸⁷ is to pretend that history never happened and that the present doesn't exist.⁸⁸

Thus, Justice Ginsburg agrees with the view that I described earlier that would distinguish racial classifications designed to burden groups "long denied full citizenship" from classifications designed to accelerate de facto equality. Interestingly, she draws support for this position from international human rights documents such as the Convention on the Elimination of All Forms of Racial Discrimination⁸⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁹⁰

Occupying the other end of the spectrum from Justice Ginsburg is Justice Thomas who writes passionately and at length

⁸⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸⁸ *Gratz*, 123 S. Ct. at 2444 (citing Steven Carter, Comment, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433-34 (1988)).

⁸⁹ *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring). The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, encourages special measures to develop and protect certain racial groups, guaranteeing them human rights and fundamental freedoms. G.A. Res. 2106, U.N. GAOR 20th Sess., Annex, Supp. No. 14, at 47, U.N. Doc. A/6014 (1965).

⁹⁰ *Grutter*, 123 S. Ct. at 2347. The Convention on the Elimination of All Forms of Discrimination Against Women urges special measures to achieve equality until the objectives of equal opportunity and treatment are achieved. G.A. Res. 180, U.N. GAOR 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/46 (1979).

about the evils of affirmative action. He draws upon his own personal experience, not to show the benefits of affirmative action, but rather the stigma that haunts the so-called “beneficiaries” of affirmative action. In a particularly acerbic opinion, he blasts the majority for accepting what he calls “a faddish slogan of the cognoscenti” and for deferring to the law school’s vision of a racially aesthetic student body.⁹¹ Justice Thomas repeatedly refers to that word “aesthetic,” describing the law school’s interest in diversity as an “aesthetic.” In other words, the law school wants a certain appearance — “from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”⁹²

THE FUTURE OF AFFIRMATIVE ACTION

Where do the decisions in *Grutter* and *Gratz* leave us? What types of affirmative action programs are permissible in the aftermath of *Grutter* and *Gratz*? Justice Scalia predicts that the opinions invite prolonged controversy and litigation,⁹³ and to some extent, I think that prediction is accurate. There is certain to be litigation regarding the application of the decisions to other contexts such as racially conscious scholarships and financial aid, and, most notably, to employers seeking to diversify their workplace.

⁹¹ *Grutter*, 123 S. Ct. at 2350 (Thomas, J., dissenting).

⁹² *Id.*

⁹³ *Id.* at 2349.

As to admissions programs within universities, the decisions offer considerable guidance. First, before adopting any affirmative action program, institutions must seriously explore their educational mission and tailor an admissions program to that mission. They have to explore in good faith whether race-neutral measures can accomplish the goal. If not, then they may take race into account, but only as a plus factor. Racial balancing may not be the goal. However, a university may seek a critical mass so long as that does not amount to a predetermined set number. A race-conscious program has to be individualized, holistic, and flexible; it cannot be mechanical and it cannot operate in an automatic fashion. How do you design a program that is flexible and holistic? You have to take into account a whole host of factors producing diversity (such as travel abroad, fluency in other languages, community service, overcoming personal adversity and family hardship, background in other fields, etc). Affirmative action programs cannot set quotas. They cannot reserve or set aside seats. They cannot utilize separate admissions criteria and they cannot automatically assign points for race. The program cannot unduly burden non-minority applicants, and the program has to be periodically assessed and reevaluated to determine whether it remains necessary to accomplish its objective.

There is a manual that has already been published that offers detailed advice as to how to craft an affirmative action program that meets the criteria established in *Grutter* and *Gratz*, entitled *Preserving Diversity in Higher Education: A Manual on*

*Admissions Policies and Procedures After the University of Michigan Decision.*⁹⁴ The manual is available on the Internet.

CONCLUSION

I would like to close with a reminder and a couple of political predictions. The reminder is that this decision is not limited to public universities. The Court explicitly stated that “discrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI.”⁹⁵ The first political prediction that seems likely is that affirmative action, and these two cases in particular, will figure prominently in the next round of judicial appointments, with a judge’s views on affirmative action becoming the same kind of litmus test that abortion has been. Second, there are probably going to be efforts to pass statewide initiatives to ban any consideration of race. Ward Connelly, who spearheaded the anti-affirmative action proposition in California, immediately promised to “present his case to voters across the nation.”⁹⁶ So the future of affirmative action is likely to continue to be played out in

⁹⁴ Bingham McCutchen LLP and Heller Ehrman White & McAuliffe LLP, *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions* (September 2003), available at <http://academic.udayton.edu/race/04needs/affirm.htm>.

⁹⁵ *Gratz*, 123 S. Ct. at 2431.

⁹⁶ Peter Schmidt, *Affirmative Action Fight is Renewed in the States*, CHRON. HIGHER EDUC., July 18, 2003, at A19.

the courts, but at the same time, I think we will see state and national political strategies playing a significant role as well.