

## Will Affirmative Action Survive?

*Grutter v. Bollinger* asks the Supreme Court.

BY KIM FORDE-MAZRUI

The last time the Supreme Court addressed whether schools of higher education may consider race in the admissions process, in *Regents of the University of California v. Bakke* (1978), the Court essentially said, “Sometimes, but not with quotas.” Most experts predict the Court will revisit the issue since the U.S. Court of Appeals for the 6th Circuit last month, in *Grutter v. Bollinger*, upheld Michigan Law School’s affirmative action policy.

With seven new justices on the Court since *Bakke*, and several decisions that reveal a Court increasingly hostile to affirmative action, *Grutter* may well end affirmative action in higher education. That would be a mistake. Centuries of slavery followed by another century of legalized oppression created an underclass recognizable by race, which America should not now abandon.

### LOOKING TO *BAKKE*

Barbara Grutter challenged the practice at the University of Michigan Law School of considering the race of minority applicants, which Michigan defended as necessary to assemble a student body with diverse experiences and perspectives. The District Court held Michigan’s policy unconstitutional. The 6th Circuit reversed, relying on *Bakke*.

Discerning the meaning of *Bakke* is complicated by its fractured nature. *Bakke* invalidated a state medical school’s policy of reserving a percentage of seats for racial minorities. Justice Lewis Powell Jr. concluded that the quota was unconstitutional, but that some attention to race was constitutional to achieve a diverse student body. Four justices joined Powell’s conclusion that the quota was invalid, while Justice William Brennan Jr., joined by three other justices, concurred with Powell that some attention to race was permissible.

Thus one majority voted to invalidate the quota, while another voted to permit race as one of several admissions criteria. Further, only Powell endorsed the use of race to achieve diversity, while the other four justices approving the use of race cited remedying past societal discrimination as the appropriate justification. The 6th Circuit concluded that Powell’s opinion was controlling, and that if more recent cases call *Bakke* into question, it is for the Supreme Court to clarify.

### DEVELOPING DOCTRINE

The Court left unresolved in *Bakke* the standard of judicial scrutiny applicable to racially preferential affirmative action. But in *City of Richmond v. J.A. Croson Co.* (1989), the Court decided that state-sponsored racial preferences are subject to “strict scrutiny,” which means that such policies will be upheld only if they are “necessary” or “narrowly tailored” to further a “compelling” interest. The following year, in *Metro Broadcasting Inc. v. Federal Communications Commission* (1990), the Court held the federal government to a more lenient standard. But it held in *Adarand Constructors v. Peña* (1995) that federal affirmative action is also subject to strict scrutiny.

As to what purposes are sufficiently “compelling” to justify racial preferences, the case law suggests there are at most two: remedying past discrimination and assembling a diverse group of people in certain contexts, such as educational settings. To remedy past discrimination, a state must identify with “particularity” the discrimination to be remedied, and design the preference to benefit only those persons who were discriminated against and only to the degree necessary to counteract the effect of the discrimination. The Court, since *Bakke*, has rejected preferences designed to compensate for the effects of unspecified historic or societal discrimination. Thus, in *Croson*, the Court held unconstitutional a city’s racial quota in awarding construc-

tion contracts because the policy failed to ensure adequately that the minority firms who benefited had been victims of identified discrimination in the local industry.

With respect to whether diversity is sufficiently compelling, the signs are unfavorable. In support of diversity is Powell's individual opinion in *Bakke*. What remains of his opinion will probably depend on Justice Sandra Day O'Connor, the swing vote in affirmative action cases. In *Wygant v. Jackson Board of Education* (1986), a case that preceded *Croson*, O'Connor cited with apparent approval Powell's diversity reasoning in *Bakke*. Subsequently in *Croson*, however, O'Connor said that racial preferences should be limited to remedying specific discrimination, suggesting that diversity is insufficient.

Also, although *Metro Broadcasting* upheld a racial diversity program, the four dissenting justices, including O'Connor, are now usually in the majority in affirmative action cases. O'Connor's dissent in *Metro Broadcasting* thus suggests how the conservative majority would rule today. O'Connor criticized as stereotypical the assumption that racial diversity would contribute to broadcast diversity, and also criticized broadcast diversity as too vague a rationale to justify racial preferences. Similarly, in two other lines of cases, the Court, with O'Connor's support, has rejected as stereotypical the assumption that race correlates with juror or voter perspective.

Michigan denied that its affirmative action policy was intended to remedy past discrimination—most likely because it would have been effectively impossible for the school to design an affirmative action program with that goal. The Court's requirement that past discrimination be identified with particularity would seem to require that a school identify the time, place and manner of past discrimination, and identify who, among its applicant pool, were victims of such discrimination, and how such discrimination impaired their ability to qualify for admission under race-neutral standards. Realistically, no school of higher education could meet this standard.

The only plausible basis on which to justify Michigan's policy is the one it relied on—to achieve a diverse student body. The problem the university faces is not whether intellectual diversity in an academic setting is important; the problem is in using racial diversity to achieve it. The Court's skepticism about using race to predict other traits suggests it would reject as "stereotypical" the assumption that racial diversity correlates with intellectual diversity. Furthermore, even were the Court to accept a correlation between race and student perspective, the Court's demand in other affirmative action cases for definite standards regarding the manner in which race is to be used suggests it would view diversity as unduly vague.

The implications of the Court's ultimate decision in *Grutter* are not limited to public colleges and universities. Private schools, which represent almost 60 percent of the four thousand institutions of higher education in the United States, may be just as legally vulnerable. Title VI of the Civil Rights Act of 1964 prohibits the same discrimination by all schools receiving federal funds as the Constitution prohibits by public schools. Accordingly, if the Court in *Grutter* holds unconstitutional Michigan's racial preferences, then such preferences would

also violate the Civil Rights Act when practiced by schools receiving federal funds. Since virtually all private schools depend on federal funding, *Grutter* could end racial preferences by all schools of higher education.

Seeing the writing on the wall, several public colleges have turned to "alternative action," policies designed to create racial diversity without racial preferences. Some, for example, are experimenting with "class-based" affirmative action in which weight is given to the socioeconomic background of applicants. Two difficulties face these efforts.

First, despite their use of race-neutral criteria, such programs may be constitutionally vulnerable because of the race-conscious purpose motivating them. Equally problematic, economic-based preferences are unlikely to admit meaningful numbers of minority students because whites overwhelmingly dominate the pool of economically disadvantaged applicants who are adequately prepared for higher education, especially for the more competitive schools. Indeed, Michigan considered race-neutral alternatives, and rejected them because of their ineffectiveness in achieving racial diversity.

### GETTING BEYOND RACE?

*Grutter* presents the Court with a choice: whether to mandate complete colorblindness or, alternatively, to preserve some discretion in schools to create educational environments as diverse as the society their graduates will serve. Racial preferences are certainly regrettable, and America's history demonstrates how race may be used to oppress. The tragic consequences of that history persist, however, in the stark disparities between racial groups.

The average black child born today is exceedingly more likely than the average white child to be raised in poverty, in a broken family, in a community marked by substance abuse, violent crime, and poor quality schools. Unless we assume that along with darker skin a child of color biologically inherits a propensity to fail, to commit crime, or to die a violent death, we should recognize that these conditions result from generations of injustice whose effects will take effort and time to overcome. To ignore racial differences in the name of colorblindness is to guarantee their perpetuation. The day when race no longer matters will not arrive until we take active measures—affirmative action—to provide opportunities for minorities to educate themselves.

If the Court decides to revisit *Bakke*, it would do well to recall the late Justice Harry Blackmun's admonition in that case: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

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