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The U.S. Supreme Court on Affirmative Action: Are Some of US More Equal than Others (With Some Comparisons' to Post-Good Friday Agreement Police Hiring in Northern Ireland.

Carol Daugherty Rasnic

ARTICLE

THE U.S. SUPREME COURT ON AFFIRMATIVE ACTION: ARE SOME OF US "MORE EQUAL" THAN OTHERS?[1] (WITH SOME COMPARISONS TO POST-GOOD FRIDAY AGREEMENT POLICE HIRING IN NORTHERN IRELAND)

CAROL DAUGHERTY RASNIC*

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

Martin Luther King, Jr.,
August 28, 1963

I. INTRODUCTION

On June 23, 2003, the United States Supreme Court decided *Grutter v. Bollinger,* a 5-4 vote approving the use of race in the University of Michigan Law School's admissions decisions.[2] The following week, syndicated columnist Daniel Henninger opened his column on *Grutter* with the

1. GEORGE ORWELL, ANIMAL FARM 133 (Penguin Books 1996) (1946) (using animals metaphorically in reference to people who received preferential treatment).
2. Grutter v. Bollinger, 539 U.S. 306 (2003).

above famous quote from Martin Luther King, Jr., summarizing his view of the decision with the first two words of his article: "Not yet."[3]

The express purpose of the law school's race-based admissions preference—to achieve diversity within the student body—was held by a majority of the Court as being a singular compelling state interest that justifies the use of affirmative action.[4] Interestingly, on the same day it decided *Grutter* the Court held 6-3 that the affirmative action admissions program used by one of the undergraduate colleges in the same university was an unconstitutional denial of Equal Protection under the Fourteenth Amendment.[5]

Grutter elicited an inordinate amount of editorial commentary, both supporting and denouncing the holding. The long-awaited decision has provided considerable fodder for law review articles. This is particularly so because the Court, in a same-day decision, found the other affirmative action program used by the University of Michigan to be unlawful. Both academics and practitioners sought distinctions between the two in an attempt to perceive some judicial precedent as to just when racial preferences meet constitutional standards.

This paper begins with a brief chronology of the Court's treatment of affirmative action pre-*Grutter*. Discussion of the *Grutter* opinions, including those from the trial and appellate courts as well as the Supreme Court's six different opinions (one concurrence, four dissents), constitutes the core theme. Finally, there is a brief analogy of the most recent American judicial stance with some of the affirmative action provisions of the Good Friday Agreement and supplementing Westminster legislation with regard to police hiring now applicable in Northern Ireland.

The bases for the granting of preferential treatment—race in the United States, and religion in Northern Ireland—are different, but both legalize a type of inequality between groups of persons for stated pragmatic purposes. Nonetheless, there are meaningful distinctions. The query the reader is asked to ponder is whether unequal treatment might be justified in one setting but not in the other.

II. PRE-*GRUTTER* SUPREME COURT AFFIRMATIVE ACTION DECISIONS

This section explains, in sequential order, fifteen affirmative action decisions, with the exception of two, all by the United Supreme Court. Often referred to as "reverse discrimination" claims, many of the plain-

3. Daniel Henninger, *Race Relations Now Turn on Data*, RICH. TIMES-DISPATCH, July 1, 2003, at A9.

4. *Grutter*, 539 U.S. at 308.

5. Gratz v. Bollinger, 539 U.S. 244 (2003).

tiffs challenged policies that employed a so-called "benign"[6] use of race to benefit minority groups at the expense of non-minorities on constitutional grounds, statutory grounds, or both. Traditionally, such affirmative action had the purpose of rectifying historical past abuses of blacks and other minority groups by the defendant.

Defunis v. Odegard[7]

Defunis was actually a non-decision by the Court. A white male applicant of the University of Washington Law School was denied admission, allegedly as a result of the university's affirmative action plan, which admitted other less-qualified minority students.[8] The law school admitted the white applicant pending the eventual final decision in the judicial process.[9] Thus, by the time the case reached the U.S. Supreme Court, the case was moot since the plaintiff was in his third and final year of law study and eligible to graduate. The U.S. Constitution requires that a cause be justiciable—*i.e.*, a "case" or "controversy" that is appropriate for court determination.[10] With regard to this plaintiff, the justiciable requirement was not present. Thus, the Court was thereby able to avert having to decide what would have been its first reverse discrimination case.

Regents of the University of California v. Bakke[11]

Legal scholars have wrestled with attempting to glean clear principles from the six rambling opinions in *Bakke* ever since it was decided by a fractured Court in 1978. One way or another, *Bakke* provided, to some degree, the basis for each decision in *Grutter*—from the federal district court, to the Circuit Court of Appeals, to the Supreme Court, and in both the majority and dissenting opinions. The differences in opinion were dictated on how each individual judge or justice interpreted what the Court actually held in *Bakke*.

Bakke involved a claim filed by a white male applicant against the University of California Davis Medical School after his application for admission was rejected.[12] Sixteen of the one hundred slots for each freshman class were reserved for applicants who were members of specified minor-

6. "Benign" was the term used by the late Justice Brennan. *See, e.g.*, United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 170 (1977).

7. Defunis v. Odegaard, 416 U.S. 312 (1974).

8. *Id.* at 314.

9. *Id.* at 314-15.

10. U.S. CONST. art. III, § 2, cl. 1.

11. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

12. *Id.* at 276-78.

ity groups.[13] The Court decided two issues: (i) was race *ever* a lawful consideration in such admissions decisions; and, if so, (ii) was it lawfully used in this instance? The Court answered these two questions, respectively, (i) yes (5-4) and (ii) no (5-4).

The plaintiff cited both the Equal Protection Clause of the Fourteenth Amendment[14] and Title VI of the 1964 Civil Rights Act,[15] which prohibited discrimination on the grounds of race in any program in receipt of federal funds. Justice Powell, the justice who split the Court, did so on both issues, being the only justice who decided with the majority on both. On the first issue, the four other justices of the majority decided that race is appropriate on the statutory ground.[16] Justice Powell was the only one who decided on the constitutional ground, and, being the sole member of the Court who voted in the majority on both issues, he was the one who appropriately could write the principal opinion. The breakdown of the Court was as follows[17]:

(i) Is race ever lawful?		(ii) If so, was it lawfully used in this case?	
Yes	No	Yes	No
Blackmun	Burger	Blackmun	Burger
Brennan	Rehnquist	Brennan	Rehnquist
Marshall	Stevens	Marshall	Stevens
White	Stewart	White	Stewart
POWELL			POWELL

Anyone who has found the several opinions in *Bakke* confusing is in impressive company. Justice Marshall was quoted as having said shortly after the decision was announced that he "ha(d) seen so many interpretations of our decision now that it is hard for me to distinguish what we actually wrote and what the press said we wrote."[18]

Moreover, the "pro" affirmative action group in *Bakke* (usually referred to as the "Brennan group") would apply the strict scrutiny standard only to race discrimination claims when the claimant or plaintiff was

13. *Id.* at 275-76.

14. U.S. CONST. amend XIV, § 2.

15. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2003).

16. *Bakke*, 438 U.S. at 267.

17. *Id.*

18. Associate Justice T. Thurgood Marshall, Address at Annual Judicial Conference Second Judicial Court of the United States (Sept. 8, 1978), 82 F.R.D. 221, 224 (1978).

a minority and the action was intended to unravel past discrimination.[19] For reverse discrimination claims as in *Bakke*, the Brennan group would apply "intermediate scrutiny," making it easier to justify the action under the law.[20] Moreover, the Brennan group would not impose the requirement that the actor had "narrowly tailored" the affirmative action so as to avoid racial preferences if at all possible.[21] The anti-affirmative action group—usually referred to as the "Stevens group"—would hold that the strict scrutiny standard is necessary for all racially based distinctions.[22]

With its six different opinions, *Bakke* was difficult to read. Additionally, it was nearly impossible to determine not only what the Court meant, but also what the actual holding was.

United Steelworkers of American v. Weber[23]

Weber was a Title VII[24] action by a white male worker who challenged a collective bargaining racial preference system in determining which employees would be admitted to a craft-training program.[25] "Craft" jobs, for which pay was considerably higher than non-skilled jobs, required the admittance in and completion of training programs that were very limited in number.[26] Employees were selected strictly on a seniority basis, but with the proviso that at least one-half of those admitted would be black until the percentage of blacks in the company's skilled workforce (then less than 2% of all employees) approximated the percentage of blacks in the total local workforce (about 40%).[27] Plaintiff Weber's application to the training program was denied, while less senior blacks were admitted.[28]

A 5-2 Court upheld the affirmative action measure.[29] Writing for the majority, Justice Brennan pointed to the express language used in Title VII, which read that nothing in the statute "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because

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19. *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

20. *Id.*

21. *Id.* at 325.

22. *Id.* at 408 (Stevens, Stewart, Rehnquisht, JJ., Burger, C.J., concurring in part and dissenting in part).

23. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

24. Title VII prohibits discrimination in employment on the basis of race, sex, national origin and religion. Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e (2003).

25. *Weber*, 443 U.S. at 193-94.

26. *See id.* at 198-99.

27. *Id.*

28. *Id.* at 199.

29. *Id.* at 195.

of . . . race. . . ."[30] According to the majority, Congress' use of the word "require" meant precisely what it said—*i.e.*, that Title VII was not an affirmative action mandate, but left the issue open for voluntary action.[31] Since the legislature had chosen not to use the word "permit," the Court viewed this as being beyond the scope of what was not "required."[32]

Instrumental in the Court's decision were three factors: (i) the plan was temporary, intended to be in force only until such time as the racial composure of the skilled workforce at the defendant's plant had approximate parity with the racial balance in the local workforce; (ii) it was voluntary (here, the majority seemed to applaud Kaiser Aluminum for having taken the lead in dismantling past racial practices, although the company had received reprimands from the Office of Federal Contract Compliance Programs for its racial disparity, a fact which somewhat detracts from any "voluntary" aspect); and (iii) no white employees actually lost their jobs as a result of the plan.[33]

The Title VI aspect of *Grutter* arguably might point to the same attributes, since rejected white applicants could always re-apply. Such re-applications arguably would be futile, however, so long as the racial preference plan was in effect.

Firefighters of Local Union No. 1784 v. Stotts[34]

The Title VII litigation in *Stotts* reflected the seriousness of the third principle in *Weber*. When the city of Memphis, Tennessee adopted a seniority-based system, which would be used in the event of necessary layoffs of city firefighters, black workers challenged it.[35] Most black firefighters had less seniority than whites.[36] An earlier consent order had assured blacks of certain employment rights, and the federal district faced with this prior order held the strict seniority basis invalid.[37]

The Supreme Court reversed and upheld the city's seniority layoff plan.[38] The Court found the lower court to have exceeded its powers in disrupting a bona fide seniority system, since none of the black workers who challenged the plan had demonstrated that they had ever personally been victims of actual race discrimination by the employer-city.[39]

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30. *Id.* at 195, 205-06 (emphasis added).
31. *Id.* at 205-07.
32. *Id.*
33. *Id.* at 208-09.
34. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).
35. *Id.* at 566-68.
36. *Id.* at 567.
37. *Id.*
38. *Id.* at 565.
39. *Id.* at 568-76.

Wygant v. Jackson Board of Education[40]

Wygant involved a provision in a collective bargaining agreement between a local public school board in Michigan and teachers.[41] Similar to the plan in *Stotts*, seniority would determine which teachers would be laid off in case staff had to be reduced.[42] The seniority-based determination, however, would be modified if necessary in order to assure that the then current percentage of minority (black) teachers would not be lowered.[43] In 1974, layoffs became necessary.[44] Despite the provision, the board used a strict seniority basis without the modifying provision to determine who would remain and who would leave.[45] Consequently, several senior non-minority teachers were retained, while less senior black teachers were laid off.[46] The union challenged this alteration of the agreement, alleging that it violated the Equal Protection Clause of the Fourteenth Amendment.[47]

The Supreme Court held that the black-retention exception to the seniority system violated both the Equal Protection Clause of the Fourteenth Amendment and Title VII.[48] Significant to the Court was the resulting loss of jobs, which the *Weber* Court found instrumental in its approval of a similar provision which would not result in layoffs.

United States v. Paradise[49]

Paradise is a public sector decision with facts similar to *Weber* in which a 5-4 Court approved an affirmative action mandate.[50] The federal district court had directed the state of Alabama to grant 50% of its promotions to the rank of corporal and higher to black troopers, provided there were a sufficient number of qualified blacks at the time of the promotions.[51]

As in *Weber*, no one lost his or her job, which was pointed out by Justice Brennan when he declared "[d]enial of future employment opportu-

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40. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
41. *Id.* at 270.
42. *Id.*
43. *Id.* at 270-71.
44. *Id.* at 271.
45. *Id.*
46. *Id.*
47. *Id.* This was a querulous position, since the preference of blacks would itself constitute unequal treatment.
48. *Id.* at 282-84.
49. United States v. Paradise, 480 U.S. 149 (1987).
50. *Id.* at 166.
51. *Id.* at 163-64.

nity [was] not as intrusive as loss of an existing job. . . ."[52] A major distinction in *Paradise* was that the method of determining which workers would be promoted was not one voluntarily assumed by the employer (the state), but rather one imposed by judicial fiat.[53] This Court's response to what it called the department's "pervasive, systematic, and obstinate discriminatory exclusion of blacks"[54] marked the only affirmative action ordered by a court against an employer that was ultimately approved by the Supreme Court.

Local 28 of the Sheet Metal Workers' International Association v. EEOC[55]

In this decision, the Court affirmed a lower court order against a union, directing it had to achieve a 29-plus black-membership percentage.[56] This percentage was in alignment with the percentage of blacks in the relevant labor pool.[57]

The Court here addressed what Congress had intended as appropriate remedies in Title VII.[58] The conclusion was that a court was not prohibited from ordering affirmative race-conscious relief to remedy actual past discrimination in "appropriate circumstances."[59] Characteristically, the Court neither elaborated upon nor defined what constituted such circumstances.

Local 93, International Association of Firefighters v. Cleveland[60]

Decided the same day as *Local 28 Sheet Metal Workers*, this decision approved the entry of a consent decree that benefited persons who were not victims of actual past discrimination.[61] *Local 93* is significant because the Court here approved a *consent order*, one that it conceded might in fact have exceeded the lower court's powers under the remedies section of Title VII.

Such benefits for non-victims were criticized as an unjustified windfall for those who had not personally suffered discrimination, and, conse-

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52. *See id.* at 183 (citing *Wygant*, 476 U.S. at 282-83).
53. *Paradise*, 480 U.S. at 154-56.
54. *Id.* at 150.
55. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).
56. *Id.* at 421.
57. *Id.*
58. *See id.* at 422-424 (indicating that Title VII provided courts with broad discretion to implement appropriate equitable relief, even in the form of an affirmative race-conscious program).
59. *Id.* at 444-45, 464-65, 482-83.
60. Local Number 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986).
61. *Id.* at 501.

quently, as an injustice upon innocent non-minorities. This was similar to the argument opposing retributions to descendants of slaves, and of Nazi victims during World War II, since those who actually suffered received no compensation, and those who paid these benefits committed no wrongs. It is worth noting that this was not a court-ordered remedy, but rather one to which the litigating parties had consented in the form of a court-approved settlement.[62]

Johnson v. Transportation Agency[63]

Johnson was unique in that it was the only challenged sex-based preference that had reached the Supreme Court. Although the setting was a public one (Santa Clara County, California was the defending employer), the plaintiff's case was based on Title VII.[64]

The city granted a preference to a woman employee, who applied for an upgraded position of road dispatcher, expressly because of her sex, even though the male employee-plaintiff outscored her on an assessment test.[65] The affirmative action written policy preferred women for promotions because of the undisputed significant under-representation found in the workforce.[66] Women constituted 36.4% of the area labor market, but only 22.4% of this county agency's employees.[67] Moreover, the overwhelming number (76%) of office and clerical workers were women.[68] The plan set aside no specific number of women dispatchers as a goal.[69]

The federal district court found that the plan violated Title VII because it did not meet the temporary requirement in *Weber*.[70] The Court of Appeals for the Ninth Circuit reversed, viewing the lack of an express termination point as not dispositive since the defendant county's plan repeatedly referred to its *objective*, rather than its *maintenance* of a workforce that reflected the overall labor force in the county.[71] Thus, the purpose was to *attain*, rather than to continue, such affirmative action measures.[72]

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62. *See Local Number 93*, 478 U.S. at 504-15. The parties were the city of Cleveland and minority non-employees challenging the city's hiring and promotion practices. *Id.*

63. Johnson v. Transp. Agency, 480 U.S. 616 (1987).

64. *Id.*

65. *Id.* at 623-25.

66. *Id.* at 621-22 (stating that the occupation was traditionally segregated by sex).

67. *Id.* at 621.

68. *Id.*

69. *Id.* at 622.

70. *Id.* at 625

71. *Id.* at 625-26.

72. *Id.* at 626.

The Court was divided (6-3), with Chief Justice Rehnquist and Justices Scalia and White dissenting.[73] Justice White wrote a short one-paragraph dissent, stating that he would now overrule *Weber* because of his view that the Court is now misconstruing that decision.[74] Accordingly, he would have reversed the Court of Appeals and held the county's plan unlawful.

Justice Scalia wrote that the majority had read Title VII so as to have imposed a lower restraint on discrimination than the constitutional rights protected under the Equal Protection Clause.[75] The decision, he added, had "convert[ed Title VII] from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*."[76]

Fullilove v. Klutznick[77]

There had been some legislatively mandated affirmative action. One such statute was the Public Works Employment Act of 1977 (PWEA),[78] which required that business-recipients of specified federal funds expend at least 10% of such funds to hire minority business enterprises (MBEs).[79]

The Supreme Court upheld this statute as a constitutionally permissible and proper exercise of Congress' Commerce Clause powers.[80] This provision, one of the eighteen Congressional powers listed in the Constitution, vests Congress with the power to regulate interstate commerce.[81]

City of Richmond v. J.A. Croson, Co.[82]

Following the decision in *Fullilove*, many city-governing bodies enacted ordinances with set-aside-for-minorities provisions similar to the one in the PWEA. Generally, these municipal laws required businesses that were awarded public contracts to reserve a specified amount of costs for minority sub-contractors. The city of Richmond, Virginia adopted one

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73. *Id.* at 618.

74. *Id.* at 657 (White, J., dissenting).

75. *Id.* at 664-65 (Scalia, J., dissenting).

76. *Id.* at 658 (emphasis added).

77. Fullilove v. Klutznick, 448 U.S. 448 (1980).

78. Public Works Employment Act (PWEA), 42 U.S.C. § 6701-6736 (2003).

79. 42 U.S.C. § 6705(f)(2) (identifying those minorities as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.").

80. *Fullilove*, 448 U.S. at 492.

81. U.S. CONST. art. I, § 8, cl. 3.

82. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

such local affirmative action mandate that specified 30% of city funding be spent for such purposes.[83]

The plaintiff in *Croson* was a white plumber who had placed a bid for the city's contract to install urinals and water closets in the jail building.[84] He failed to meet this 30% quota but argued that the only minority business who had indicated an interest would have charged $7,600 more than the figure he allocated to the fixtures.[85] Accordingly, he requested either a waiver of the MBE requirement from the city or an increase in his allotment for costs.[86] The city government refused to do either and decided to re-bid the contract.[87] The plaintiff challenged the validity of the ordinance on Equal Protection grounds.[88]

The Supreme Court held the ordinance unconstitutional, distinguishing it from the federal statute in *Fullilove*.[89] The Commerce Clause under which the PWEA was enacted is an empowerment for Congress. On the other hand, the *Croson* plaintiff's challenge was based upon the Equal Protection Clause.[90] The Fourteenth Amendment is a *limitation* upon the powers of Congress, rather than an express power.[91] Consequently, in order for the set-aside to be constitutional, the city had the burden of proving some prior discrimination *within* the city (not necessarily *by* the city, which would have been pursuant to state activity, since the municipality is a political subdivision of the state).[92] The Supreme Court held that there must have been some evidence of a statistical disparity between the *qualified* MBEs in the locality and the number of MBEs actually engaged in business within the city.[93] The relevant base, then, must be the *qualified* MBEs geographically within the city and not the percentage of minorities living in the city or working in the city or both, as the Court of Appeals for the Fourth Circuit had held.[94]

It could well have been that the relative extents of the percentages of the set-asides in *Fullilove* (only 10%) and *Croson* (a much-larger 30%) also played a role in the outcome. However, the primary significance of *Croson* was that a majority of the Court held for the first time that a strict

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83. *Id.* at 469, 477.
84. *Id.* at 481.
85. *Id.* at 482-83.
86. *Id.*
87. *Id.* at 483.
88. *Id.* at 469.
89. *See id.* at 507-11.
90. *Id.* at 496.
91. *Id.* at 490.
92. *See id.* at 505.
93. *See id.* at 500-04.
94. *Id.* at 484.

scrutiny analysis must apply to all race-based decision-making processes, including those that are of the so-called "benign" variety.[95]

Metro Broadcasting, Inc. v. FCC[96]

Subsequent to *Croson*, the Court handed down two affirmative action decisions and agreed to decide a third. The first was *Metro Broadcasting*, involving a federal statute that directed the Federal Communications Commission to give preferences to minority applicants when granting broadcasting licenses.[97] This law was upheld by a close (5-4) Court, which recognized diversity as a substantial governmental interest.[98] The Court retreated from its strict-scrutiny position in *Croson* and applied an "intermediate-scrutiny," an unexplained change.

Adarand Constructors v. Pena[99]

Metro Broadcasting was as short-lived as it was controversial. Only five years later, the Supreme Court overturned it in *Adarand*, another 5-4 decision.

The Small Business Act provided for rebates to general contractors of up to 1.5% of the original contract amount if they sub-contracted to "socially disadvantaged" businesses.[100] A non-minority contractor challenged the federal statute on Equal Protection grounds after a minority business received a contract on which he had submitted a lower bid.[101] The sharply divided Court held that *all* racial preferences (to which the Court deemed the "socially disadvantaged" language to have been directed) must be strictly scrutinized, summarily dispensing with the *Metro Broadcasting* Court's aberration into intermediate scrutiny.[102]

Taxman v. Board of Education of the Township of Piscataway[103]

Piscataway was never actually decided by the Supreme Court because of a last-minute settlement.[104] This was a case that many legal scholars anticipated would be the death knell of affirmative action. The litigation involved the layoff of a white teacher in a New Jersey public high school

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95. *Id.* at 494-96, 505-11.
96. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).
97. *Id.* at 556-58.
98. *See id.* at 548-49, 564-68.
99. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
100. Small Business Act, 15 U.S.C. § 637(d) (2003).
101. *Adarand*, 515 U.S. at 205-06.
102. *Id.* at 227-31.
103. Taxman v. Bd. of Educ., 91 F.3d 1547 (3rd Cir. 1996) (en banc).
104. Taxman v. Bd. of Educ., 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997).

when staff reductions became necessary.[105] Of the two faculty members who taught the same courses—the plaintiff and a black female colleague—one would be terminated.[106] The plaintiff was expressly told by the defendant-school board that she had been asked to leave because of the board's desire to retain minority faculty whenever possible.[107] She challenged the expressly race-based layoff under Title VII.[108]

The federal district court made the factual finding that the plaintiff and her black colleague had equal qualifications.[109] The United States government intervened on behalf of the plaintiff, and the trial court granted them partial summary judgment.[110] The trial was based solely on the issue of damages, since reinstatement was not an issue before the court. By the time the case was tried, the plaintiff had been re-hired by the defendant-school board.[111] The court decided upon an award in the amount of $134,014.62, representing back pay, pre-judgment interest, and fringe benefits.[112] The plaintiff also sued under the New Jersey Law Against Discrimination,[113] and the jury awarded her an additional $10,000 for emotional distress under that law.[114]

The black teacher, a party defendant, appealed with the board.[115] Sitting *en banc*, the Third Circuit Court of Appeals affirmed by a vote of 9-4.[116] The appellate court referred to *Weber* as having held that Title VII's prohibition against race discrimination is not violated by plans which both "have purposes that mirror those of the statute" and do not "unnecessarily trammel the interests of the [non-minority] employees."[117] The court held that the Piscataway plan failed to satisfy either of these prongs.[118]

First, it was non-remedial since there was no claim by the board of prior discrimination, a requisite the court read as necessary for affirmative action.[119] Black teachers were not under-represented on the faculty, and statistically, they actually exceeded the percentage of blacks in the

105. *Taxman*, 91 F.3d at 1551.
106. *Id.*
107. *Id.* at 1551-52.
108. *Id.* at 1552.
109. United States v. Bd. of Educ., 832 F. Supp. 836, 841 (D.N.J. 1993).
110. *Id.* at 838.
111. *Taxman*, 91 F.3d at 1552.
112. *Id.*
113. N.J. Stat. Ann. § 10:5-1 to 49 (West 2004) (prohibiting workplace discrimination).
114. *Taxman*, 91 F.3d at 1552.
115. *Id.* at 1547.
116. *Id.* at 1549.
117. *Id.* at 1550 (quoting *Weber*, 443 U.S. at 208).
118. *Taxman*, 91 F.3d at 1550.
119. *See id.* at 1557 (citing *Weber*, 443 U.S. at 202-04).

local workforce.[120] The court appeared to hold that the board's sole stated purpose—to achieve diversity, according to the testimony of the chair—did not justify an affirmative action program.[121] If diversity was the desired goal, the facts indicated that it already existed.

Referring again to *Weber*, the appellate court held that the plaintiff's loss of job was too severe a price to pay for an affirmative action plan to be lawful under Title VII.[122] The damages were also approved in the full amount of backpay, but the court denied the plaintiff's appeal that she should have been granted punitive damages under the state statute.[123]

The U.S. Supreme Court granted certiorari,[124] and the unofficial legal "odds makers" predicted the Court would put an end to affirmative action, making *Piscataway* the last reverse discrimination claim unless one hoped later to persuade the Court to overrule itself. Unfortunately, it will never be known whether this was a prescient group since the case was settled on the eve before oral arguments were scheduled. Several prominent national black groups, such as the National Association for the Advancement of Colored People (NAACP), Congress for Racial Equality (CORE), and the Reverend Jesse Jackson's Rainbow Coalition—offered the plaintiff an undisclosed sum to settle, and she accepted. However, *Piscataway* does not have the imprimatur of the Supreme Court.

Hopwood v. State of Texas[125]

In a case with facts quite similar to *Grutter*, the *Hopwood* litigation arose as a dispute with the affirmative action admissions program at the University of Texas Law School.[126] Like *Piscataway*, *Hopwood* did not reach the Supreme Court. Non-minority residents of Texas whose applications had been denied challenged the school's program on both Equal Protection and Title VI grounds.[127]

The law school processed approximately 4,000 applications each year, from which about 900 were offered admission.[128] Of these, usually 500 or

120. *Taxman*, 91 F.3d at 1551.

121. *See id.* at 1548, 1558-65. The Court here noted that there was "no congressional recognition of diversity as a Title VII objective requiring affirmative action." *Id.* at 1579. The Court's language was countered by Justice Brennan's distinction in *Weber* between the words "require" and "permit." *See supra* notes 30-32 and corresponding text.

122. *Taxman*, 91 F.3d at 1564 (citing *Weber*, 443 U.S. at 208).

123. *Id.* at 1565-67.

124. Taxman v. Bd. of Educ., 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997).

125. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

126. *Id.* at 934-38.

127. *Id.* at 938.

128. *Id.* at 935.

so accepted.[129] In determining which applicants would be offered admission, the law school divided all applicants into three categories: (i) those who would definitely be offered admission ("presumptively admit"); (ii) those who would not, based both upon their academic records and Law School Aptitude Test (LSAT) scores ("presumptively deny"), referred to here as the Texas Index (TI) number—a composite of both sets of numbers; and (iii) those in a so-called "discretionary" zone.[130] In deciding whether to place applicants in the "presumptively admit" category, the required minimum TI scores for Mexican-Americans and black applicants were lowered from the 199 composite score, by which white applicants were gauged, to a TI of only 189.[131] The "presumptive denial" figures for minority applicants were also determined by different numbers. For Mexican-American and black applicants, the score could not have fallen below 179 in order to be in the lowest category.[132] For non-minorities, all whose score was lower than 192 were placed in this lowest category.[133] Thus, this was a two-stage preferential treatment for minorities.

The mean undergraduate grade-point average (GPA) and the mean LSAT score for non-minority applicants was 3.53 (out of a possible 4.0) and 164. For minorities, these figures were, respectively, 3.27 and 158 for Mexican-Americans, and 3.25 and 157 for blacks.[134] The law school's stated purpose for such lowering of standards was to meet what was referred to as the "aspiration" to offer admission to a potential class with 10% Mexican-Americans and 5% blacks.[135]

The second part of the process that gave minorities a benefit was the segregation of completed application forms into three categories: (i) non-minorities; (ii) Mexican-Americans; and (iii) blacks.[136] Thereafter, the applicant was reviewed differently, according to his or her race.[137] Members of either of the two minority groups received a specialized review by a committee of three, whereas non-minorities' applications were reviewed in a more generalized, less individualized fashion.[138] Decisions of this special smaller committee were essentially final, but the group re-

129. *Id.*
130. *Id.*
131. *Id.* at 936-37.
132. *Id.* at 936.
133. *Id.* at 936-37.
134. *Id.* at 936.
135. *Id.* at 937.
136. *Id.*
137. *Id.*
138. *See id.* (illustrating disparaging treatment in the review of candidates that fall in the "discretionary" zone).

viewing non-minority applicants went through a separate re-screening before they were accepted.[139]

The federal district court held the affirmative action program unconstitutional,[140] although it did hold that the defendant-law school had shown both the benefits of diversity and the need to overcome past-discrimination.[141] It was only on the law school's failure to narrowly tailor the remedy aspect that the court held the plan unlawful.[142] The trial court approved the granting of additional points to minorities, but found the utilization of separate admissions committees based upon the applicants' race to be a violation of the Equal Protection Clause of the Fourteenth Amendment.[143]

The Fifth Circuit Court of Appeals affirmed the holding that the plan was unconstitutional, but reversed the trial court's approval of the first part of the plan that automatically lowered standards for minorities.[144] The appellate court applied *Croson* and *Wygant* as precedent for the proposition that affirmative action must be based upon remedying prior discrimination by the alleged actor.[145] Using *Croson* and *Bakke* as precedents for having refused to "tolerate" the use of racial preferences to create the elusive diversity, the appellate court reversed the trial court in part, holding that diversity is not a "compelling state interest."[146] Even if it had accepted the law school's position that the state does have such an interest in diversity, the court pointed to the plaintiff in *Hopwood* as precisely the type of student who would offer a diverse perspective that would augment the educational aspect of the study of law for other students.[147] A thirty-two-year-old Armed Forces wife stationed in San Antonio, she was the mother of a severely handicapped child whom she

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139. *Id.* at 937.

140. Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd in part and dismissed in part*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

141. *Hopwood*, 861 F. Supp. at 571-73.

142. *Id.* at 573-79.

143. *Id.* at 578-79.

144. *Hopwood*, 78 F.3d at 962.

145. *Id.* at 948-51, 953-54 (citing *Croson*, 488 U.S. at 500 quoting *Wygant*, 476 U.S at 277). The federal district court used the entire state of Texas as the measuring base, rather than the law school as a single unit. *See Hopwood*, 861 F. Supp. at 571. Though it was proven that the state had a blatant history of racial discrimination in public education, there was no such proof that the law school itself had ever practiced such discrimination. *See Hopwood*, 78 F.3d at 948-52.

146. *Id.* at 944-46.

147. *Id.* at 946.

was raising at home.[148] The court reminded that "'diversity' can take many forms."[149]

Interestingly, Justice O'Connor wrote the *Croson* opinion upon which the appellate court in *Hopwood* relied when the compelling state interest argument was negated.[150] She also was the author of the opinion in *Grutter* where the Court held the opposite.[151]

The Supreme Court denied certiorari in *Hopwood*,[152] a procedural move that usually leads the legal academic or lawyer to conclude that the Court tacitly approved of the lower decision. At the least, the required number of four justices for certiorari to be granted did not deem it sufficiently important to re-hear at the Supreme Court level.

California's Proposition 209

In 1996, voters in California approved a statewide referendum which, once enacted into state law pursuant to the legislative powers granted to California under the state constitution, would prohibit affirmative action.[153] The inevitable test case challenged the statute under the Equal Protection Clause. In *Coalition for Economic Equality v. Wilson*, the Ninth Circuit Court of Appeals upheld the statute.[154]

Opponents made the dire prediction that state institutions of higher education, especially prestigious ones such as University of California Berkeley, would suffer from having a meager number of minority students. The fact that there actually was a post-Proposition 209 *increase* in the number of minority students at the quite selective Boalt Hall Law School at Berkeley was later to be pointed out in Justice Thomas' dissent in *Grutter*.[155] Thomas was responding to the majority's holding that Michigan law school's desired "diversity" simply could not have been achieved without such racial preferences.[156]

What principles could have been gleaned from the Court's pre-*Grutter* series of affirmative action decisions? At least the following parameters as to the constitutionality and the legality of affirmative action plans had been established in an employment setting (principles which transferred into the subject area of education):

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148. *Id.*

149. *Id.* at 947.

150. *Croson*, 488 U.S. at 469.

151. *Grutter*, 539 U.S. at 325.

152. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

153. *See* CAL. CONST. art. I, § 31 (indicating preferential treatment should not be given to public employees because of race, nationality, ethnicity, sex or color).

154. Coalition for Economic Equality v. Wilson, 122 F.3d 692, 710-11 (9th Cir. 1999).

155. *Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part and dissenting in part).

156. *Id.* at 361-67.

1) no plan had been approved that would require the actual termination of non-minorities (*Piscataway*, *Wygant*);
2) voluntary efforts by employers or governmental entities seemed more likely to be accepted than were those required by statutes or ordinances (*Weber*, *Stotts*, *Local 93 of Firefighters*, *Croson*);
3) temporary plans probably would be viewed more favorably than those of apparently permanent duration (*Weber*, *Paradise*, *Johnson*);
4) the Court generally looked on encroachment of bona fide seniority systems negatively unless one redeeming feature of either the non-termination context or voluntariness was present (*Stotts*, *Wygant*); and
5) strict scrutiny would be the standard to be applied to *all* racial preferences (*Bakke*, *Adarand*).

To further clarify, some of the more significant characteristics of affirmative action plans approved by the Court prior to *Grutter* were:

1) programs that benefited non-victims, in addition to actual victims, were acceptable, *provided* there was evidence of actual past discrimination by the acting entity (*Local 93 of Firefighters*, *Fullilove*, *Hopwood*);
2) racial quotas *are* acceptable when the sole purpose is to correct a stark racial imbalance within the employment setting (*Weber*, *Paradise*, *Local 28 of Sheet Metal Workers*; but see *Bakke*, in which Justice Powell held to the contrary); and
3) affirmative action is an appropriate general remedy and is not limited to instances where an *individual* has presented proof of some need for make-whole relief (*Local 28 of Sheet Metal Wokers*).

Whether the attainment of diversity as the sole purpose of affirmative action was lawful prior to *Grutter* would depend entirely upon the assessor's view of the precedential value afforded Justice Powell's plurality opinion in *Bakke*.

A synthesis of the affirmative action employment and business sector decisions when the *Grutter* and *Gratz* cases reached the Supreme Court is indicated on the following chart:

Case	Plan Upheld Majority	Basis for Claim	Voluntary	Temporary	Layoffs	Hire or Promotion
1. *Bakke*	No (5-4, J. Powell)	(Title VI) 14th Amendment	Yes	No	N/A	N/A
2. *Weber*	No (5-2, J. Brennan)	Title VII (collective (promotion) bargaining agreement)	Yes	Yes	No	Yes
3. *Fullilove*	Yes (6-3, C.J. Burger)	14th Amendment Title VI (Preferential treatment Title VII required by 42 U.S.C. § 6701)	No	No	N/A	N/A
4. *Stotts*	No (6-3, J. White)	Title VII	No	Yes	Yes	No
5. *Wygant*	No (5-4, J. Brennan)	14th Amendment (collective bargaining agreement)	Yes	No	Yes	No
6. *Local 27*	Yes (5-4, J. Brennan)	Title VII (14th Amendment)	No	Yes	N/A	N/A
7. *Local 93*	Yes* (6-3, J. Brennan)	Title VII (consent decree)	Yes	No	No	No
8. *Paradise*	Yes (6-3, J. Brennan)	14th Amendment (promotion)	No	Yes	No	Yes
9. *Johnson*	Yes (6-3, J. Brennan)	Title VII (promotion)	Yes	No	No	Yes
10. *Croson*	No (6-3, J., O'Connor)	14th Amendment (required by city ordiance)	No	No	N/A	N/A
11. *Metro Broad.*	Yes (5-4, J. Brennan)	5th Amendment (federal statute required preferences for minority license applicants)	No	No	N/A	N/A
12. *Adarand*	No* (5-4, J. O'Connor)	5th Amendment (Small Business Act (non-minority provided monetary contractor not incentive to subcontract selected) minorities)	Yes/No	No	No	Yes
13. *Piscataway*	???	Title VII	Yes	N/A	Yes	No

* The Court actually remanded *Local 93* and *Adarand* rather than holding the plans to be valid, and invalid, respectively.

III. GRUTTER V. BOLLINGER

The facts in *Grutter* are reminiscent of those in other reverse discrimination litigation. Barbara Grutter, a white woman, applied to University of Michigan Law School in 1996.[157] After having been notified that she was on a waiting list for admission, the school finally informed her that she had been rejected.[158] Claiming that this had resulted from the law school's use of race as a predominant determining factor in the admissions decisions, she filed an action in a Michigan federal district court, alleging that the process violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.[159] The plaintiff sought a declaratory judgment that both her constitutional and statutory rights had been violated, injunctive relief prohibiting the law school from continuing its current practice, compensatory and punitive damages (in addition to costs and attorney's fees), and a mandatory injunction requiring the law school to admit her.[160]

Federal District Court

The law school operated pursuant to a written faculty policy adopted in 1992 that used the usual reliance of a combination of an applicant's undergraduate grade-point average (GPA, based on a possible four points) and his or her score on the Law School Aptitude test (LSAT).[161] When the differences in applicants' indexed numbers were slight, reviewers looked to other factors, such as the student's undergraduate major, quality of the required written essay on the application, and strength and enthusiasm of letters of recommendation.[162] Applicants were divided into three groups: (i) those with excellent academic records who were admitted strictly on the basis of these combined scores; (ii) those with lower, but acceptable scores, but whose "interesting qualities" (identified as non-academic achievements, employment experience, or other intellectual achievements) may boost their desirability as students; and (iii) so-called "special admissions," that is, minority candidates who did not fall into the first two categories.[163]

Superimposed on this process of selection was the law school's active endeavor to increase numbers of enrolled minority groups, specifically blacks, Hispanics, and Native Americans (hereinafter, American Indi-

157. *Grutter*, 539 U.S. at 316.
158. *Id.*
159. *Id.* at 316-17.
160. *Id.* at 317.
161. Grutter v. Bollinger, 137 F. Supp. 2d 821, 825-26 (E.D. Mich. 2001).
162. *Id.* at 826-27.
163. *Id.* at 830.

ans), whose combined scores alone would not be sufficient for an offer of admission.[164] The exclusion of Asians and Jews—also members of groups who had been victimized in the past—was explained by witnesses for the defending law school as unnecessary, since a sufficient number of both groups were admitted based upon their academic numbers.[165]

The goal was to achieve a "critical mass" of these minority students.[166] The Director of Admissions from 1979-1990 testified that this concept meant about 10-12% of each first-year class as the targeted goal.[167] The committee that had drafted the school's admissions policy in 1992 had understood such goal to be approximately 11-17%.[168]

The law school expressly recognized a "public interest" in increasing the Michigan bar membership of these three groups, since they were "significantly underrepresented in the legal profession."[169] The other stated reason for the law school's commitment to such a "critical mass" of minority students was to ensure the alleged educational benefits to all students of a "diverse" student body.[170]

Both sides produced expert statistical evidence at trial. The plaintiff's statistician testified that the relative odds for acceptance (as compared with white applicants) in the year 2000 were 16.99 times greater for Mexican-Americans, 24.61 times greater for American Indians, 28.63 times greater for Puerto Ricans, and 443.26 times greater for blacks.[171] Further, he testified that in 1995, an identical GPA and LSAT combined score that would have given a white applicant a 6-7% chance of admission, would have given a 93% chance to blacks.[172] Nevertheless, the defense denied that race was a predominant factor in decisions.[173] The trial court found that the law school placed a "very heavy emphasis" on race and that it clearly makes a difference in such decisions.[174]

As would the federal appellate court and Supreme Court later, the federal district court began its analysis with *Bakke*.[175] The court referred to the "Stevens group" (Justices Stevens, Burger, Stewart, and Rehnquist), which had viewed Title VI and the Equal Protection Clause as absolutely

164. *Id.* at 826-27.
165. *Id.* at 835 n.15.
166. *Id.* at 832.
167. *Id.* at 830-31.
168. *Id.* at 840.
169. *Id.* at 830.
170. *Id.* at 832.
171. *Id.* at 837 n.20.
172. *Id.*
173. *Id.* at 836.
174. *Id.* at 840-42.
175. *Id.* at 843.

prohibiting any consideration of race whatsoever in admissions decisions,[176] and to the "Brennan group," which read both Title VI and the Constitution as permitting race to be a factor to remedy past discrimination.[177]

The difficulty with *Bakke* was determining what might be gleaned from the several opinions, with Justice Powell writing for a plurality, but not a majority, of the Court. Only Justice Powell expressly wrote that diversity, standing alone, could justify racial preferences and that the state has a compelling interest in such diversity.[178] He was the sole justice from among the nine who so held. Not even those in the "Brennan group" agreed with this position. It was on the "narrowly tailored" issue that Justice Powell found the University of California's racial preference under the facts in *Bakke* to have violated the Equal Protection Clause.[179]

One problem faced by the *Grutter* court was how they were to grapple with such plurality decisions once it became necessary to derive an actual holding for purposes of precedent. The Supreme Court decision that addressed this dilemma was *Marks v. United States*.[180] In *Marks*, the Court wrote that when as many as five justices do not agree on a single rationale for the decision, the holding shall be deemed to be the position taken by those who agreed on the "narrowest grounds."[181] The federal district court reasoned that *Marks* was not applicable to *Bakke* when considering the issue of diversity as a compelling state interest.[182] In *Bakke*, the "Brennan group," while concurring that race can be a proper factor, did not agree on *narrower* grounds, but rather on *different* grounds.[183] A "narrow" ground could have been whether the decision should have been based on statutory law (Title VI) or the Constitution (Equal Protection Clause). The four justices in the Brennan group found race an appropriate factor on the "to remedy past discrimination" ground, while Justice Powell's reason was based on diversity.[184] That is, only one of the nine justices in *Bakke* viewed diversity as a lawful reason for racial preferences.

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176. *Id.* (citing *Bakke*, 438 U.S. at 412).

177. *Id.* at 843 (citing *Bakke*, 438 U.S. at 325) (announcing this holding to be the "central meaning of today's opinions").

178. *Id.* at 843-44 (citing *Bakke*, 438 U.S. at 320).

179. *Id.* at 844 n.29 (citing *Bakke*, 438 U.S. at 320).

180. Marks v. United States, 430 U.S. 188 (1977).

181. *Id.* at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.36 (1976)).

182. *Grutter*, 137 F. Supp. 2d at 847-48 (claiming fundamental differences in the concurring opinions).

183. *Id.*

184. *Id.*

In holding the University of Michigan Law School's program violated both the Equal Protection Claus and Title VI, the *Grutter* trial court listed five reasons for its conclusion: 1) the law school had not perspicuously defined what it meant by "critical mass";[185] 2) there was no apparent time limit to its consideration of race;[186] 3) the plan had all the characteristics of a quota, which the Supreme Court had consistently denounced;[187] 4) no logical basis had been explained for the law school's division of applicants into the separate specific minority groups;[188] and 5) the law school had not investigated alternate, race-neutral means to achieve the desired diversity.[189]

Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals reversed the trial court in a 5-4 *en banc* decision.[190] Holding *Marks* applicable, the appellate court adhered to Justice Powell's opinion in *Bakke* that diversity was a compelling state interest.[191] The court also disagreed with the federal district court's findings that the 10-12% and 11-17% stated goals and targets constituted an unlawful quota,[192] and that the law school plan had not been sufficiently narrowly tailored.[193]

With regard to the issue as to whether only actual prior discrimination committed by the acting body—in this case, the law school—would justify racial preferences, the appellate court again referred to *Bakke* as having held that such a showing is not the only constitutional justification.[194] The rationale was that, since *Bakke* was deemed by this court as binding precedent, the plan met constitutional muster by reason of its diversity purpose.[195]

Interestingly, in Judge Clay's concurring opinion, he viewed the law school's use of race as harmless to non-minorities, since it had not been proven that a majority of white applicants would have been accepted

185. *Id.* at 850-51.

186. *Id.* at 851 (citing *Croson*, 488 U.S. at 510 and *Wygant*, 476 U.S. at 275).

187. *Id.* at 851 (citing *Bakke*, 438 U.S. at 307, 315-19).

188. *Id.* at 851-52.

189. *Id.* at 852-53 (citing *Croson*, 488 U.S. at 507 and *Wygant*, 476 U.S. at 280). The Court opined that placing less emphasis on GPA and LSATs, increasing recruitment of minority students, or using a lottery system for all who qualified academically were all race-neutral alternatives. *Id.* at 853.

190. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc).

191. *Id.* at 743 (citing *Metro Broad.*, 497 U.S. at 568, *overruled on other grounds*, *Adarand*, 515 U.S. at 227).

192. *Id.* at 747-48.

193. *Id.* at 750.

194. *Id.* at 738-42.

195. *Id.* at 739

without racial preferences.[196] This was querulous, in light of the statistical evidence of skewed composite GPA and LSAT numbers that favored applicants of one of the three preferred races over white applicants.[197] The three specified groups were understandable in the Sixth Circuit's opinion, since these were the "underrepresented" races recognized by the Law School.[198]

The court also was persuaded by the defending university's statement that race-neutral means to achieve diversity "could not possibly achieve the same robust academic diversity" the law school desired.[199] Moreover, the court was convinced that the law school had sufficiently considered other alternatives, but the race factor was indispensable in achieving sufficient numbers to yield the goal of a "critical mass."[200]

Some mention should be made of the strident tone of the two concurring opinions (joined by two other judges). The first soundly chastised Judge Boggs' dissent on what he regarded as the court's aberration from following accepted procedures when agreeing to hear a case *en banc*.[201] Judge Moore statement that the dissenting opinion "mark[ed] a new low point in the history of the Sixth Circuit . . . [that will] irreparably damage the already strained working relationships among the judges. . . ."[202] The reader is left with the impression of a hostile working group, with relations that, if not already "strained," would surely be after the caustic concurring opinions.

A second concurring opinion, though in substantive agreement with the majority, also reprimanded the dissent as an "embarrassing and incomprehensible attack on the . . . Court as a whole" and an "unfortunate tactic that has no place in scholarly jurisprudence. . . ."[203] The inference

196. *See id.* at 766-68 (Clay, J., concurring) (referring to Goodwin Liu, *The Myth & Math of Affirmative Action*, WASH. POST, April 14, 2002, at B1) (explaining that the chance of being rejected is slightly reduced without affirmative action). It is noted however, that the Supreme Court in *Bakke* had reversed the Ninth Circuit's holding that the white plaintiff, who did not have access to university application materials, had the burden of proving that he would have been admitted but for the affirmative action plan. *Bakke*, 438 U.S. at 280. Rather, once the slim majority had struck down the plan, the medical school had the burden of proving that the plaintiff would not have been admitted, even without the quota. *Id.* at 320.

197. *See Grutter*, 137 F. Supp. 2d at 833 n.11 (listing the various scores needed by minority and non-minority students for admission).

198. *Grutter*, 288 F.3d at 751.

199. *Id.* at 750.

200. *Id.*

201. *Id.* at 752-58 (Moore, J., concurring).

202. *Id.* at 758.

203. *Id.* at 772 (Clay, J., concurring).

can clearly be drawn that the controversial constitutional sense of *Grutter* had been the cause that had provoked such personal invectives.

The dissent was resolute, reminding that the Fourteenth Amendment precludes courts from such "social engineering" by such explicit condoning of classifications by race.[204] He also queried the logic of the position that racial diversity is a compelling state interest as bolstered by Justice Powell in *Bakke*, a deference he insisted was not merited as a reliance on precedent.[205] Refusing to acknowledge any precedential value from *Bakke*, the dissent accused the majority of expanding the holding in that decision so as to revere without sound reason "every nuance" of Justice Powell's opinion.[206]

Further, the dissent insisted that "no matter what analytical artillery is applied to deconstruct the various *Bakke* opinions,"[207] it is not possible to perceive a holding any more specific than the University of California Davis' affirmative action plan, or any other plan "that absolutely reserve[d] a specific number of seats for the racially favored," as anything other than unconstitutional.[208] Regarding the quota question, the dissent agreed with the trial judge that the law school's plan was a *de facto* quota.[209]

The dissent continued with an analysis of *Marks*, agreeing with the federal district court's construction of the opinion that it was "merely a tool with which to determine the collective intent of a fractured court."[210] He added that intervening precedent[211] has displaced much of the *Marks* rationale.[212]

Referring to Justice Brennan's concurring opinion in *Bakke*, the dissent warned that several opinions in that case indicated no single justice was speaking for the Court.[213] In essence, the dissent in the Sixth Circuit and the federal district judge viewed *Marks* as having no value for the purpose of precedent and generating confusion.

A diversion into the litigation underlying *Marks* is instructive. The defendant in that case appealed a conviction of transporting obscene mate-

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204. *Id.* at 776 (Boggs, J., dissenting).

205. *Id.* at 778 (indicating how the majority, using the rule set by *Marks*, easily manipulated the holding of *Bakke*).

206. *Id.*

207. *Id.* at 777.

208. *Id.*

209. *Id.* at 800-02.

210. *Id.* at 780-81.

211. *See id.* at 785 (citing Nichols v. United States, 511 U.S. 738 (1994) and Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001)).

212. *Id.* at 783-85 (questioning whether *Marks* properly analyzes the rationales established in *Bakke*).

213. *Id.* at 785.

rial through interstate commerce.[214] The trial court had instructed the jury according to the definition of obscenity established by the Supreme Court in *Miller v. California*,[215] a definition that altered earlier standards set by the Court in *Roth v. United States*[216] and *Memoirs v. Massachusetts*.[217] Since the *Miller* decision was not announced until after the defendant's alleged illegal conduct, he challenged the trial judge's use of it rather than the *Memoirs* definition.[218]

Memoirs was the most recent pornography case prior to *Marks* to reach the Supreme Court. However, much like *Bakke*, *Memoirs* was a very fragmented decision. Therefore, it was difficult to discern the Court's actual definition of obscenity at the time of *Marks*. One justice would have limited obscenity to so-called "hard-core" pornography, two were of the opinion that all sexually explicit material should be under the protective freedom of speech umbrella of the First Amendment, and three would have placed the bar somewhere between these two standards.[219] A majority of the Court in *Memoirs* agreed that the material at issue was not unlawful obscenity, but the Court's rationales ranged from quite broad to relatively narrow.[220] This is the background for the Court's "narrowest ground" holding.[221] Strictly construed, *Marks* could be read to hold simply, as the dissent in *Grutter* argued, that a defendant in a criminal action must have sufficient notice that his conduct was unlawful before he might be convicted.[222]

When the Supreme Court granted certiorari in *Grutter*,[223] legal scholars eagerly awaited the outcome, especially since a different federal district court in Michigan had decided that one of the University of Michigan's undergraduate affirmative action plans was constitutional in *Gratz v. Bollinger*.[224] Because the Supreme Court agreed to hear *Grutter*, and the Sixth Circuit Court of Appeals had not yet heard the appeal in *Gratz*, the Court decided to bypass an appellate court decision in *Gratz* and to rehear both. The hope in the legal community was that the Court

214. *Marks*, 430 U.S. at 189.

215. Miller v. California, 413 U.S. 15 (1973).

216. Roth v. United States, 354 U.S. 476 (1957).

217. Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion).

218. *Marks*, 430 U.S. at 189-90 (arguing in support of retroactive violation of the Due Process Clause of the Fifth Amendment). The revised definition of obscenity in *Miller* made prosecution substantially easier, broadening what thereafter might be regarded as obscene. *Id.* at 191.

219. *Id.* at 193-94.

220. *Id.*

221. *See id.* at 193 (quoting *Gregg*, 428 U.S. at 169 n.15).

222. *See Grutter*, 288 F.3d at 779 (Boggs, J., dissenting).

223. Grutter v. Bollinger, 288 F.3d 732 (6th Cir.), *cert. granted*, 537 U.S. 1043 (2002).

224. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

would either completely dismantle affirmative action plans or, in the alternative, set clear parameters as to when they were constitutionally acceptable.

United States Supreme Court

The Court's same-day-but-different-results decisions in *Grutter* and *Gratz* created a classical confusion as to which side won. Affirmative action advocates praised *Grutter* and bemoaned *Gratz*, while opponents reacted conversely.[225] There were prescient "semi-neutrals" who saw some merit in affirmative action as opening the door of opportunity, especially in mainstream institutions of higher learning, while at the same time voiced concern over such efforts because of the patent discrimination against non-minorities. The hope of this camp was that the *Grutter-Grutz* decisions would finally define the extent that such preferences would be constitutionally permissible, if at all.

One who was in such a fence-riding position was economist-political columnist Robert Samuelson, who referred to affirmative action as "affirmative ambiguity".[226] Writing that most Americans deplored affirmative action, Samuelson added that these same folks do not want a "closed society," but that they understand the "heavy legacy" left in the aftermath of segregation.[227] He also expressed the frequently stated belief that all minorities—including those who have "made it" on their own merit—will bear a stigma resulting from affirmative action because of the benefits bestowed upon others.[228] On the eve of the announcement of the opinions, Samuelson described his wishful thought that the Court would "reconcile our principles with our pragmatism."[229] It was not to be.

A 5-4 Court held the law school program lawful.[230] Justice O'Connor's opinion for the slim majority placed her, one who had previously been regarded as among the more conservative justices, in company with her more liberally-minded brethren (Justices Breyer, Ginsburg, Souter and Stevens). Appointed in 1981 by President Ronald Reagan as the Court's first female justice, she has recently veered to the left on occasion. This position has led to the unofficial reference to her as the "swing vote."

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225. *See, e.g.*, Peter Hardin, *Some See Win; Others See War*, RICH. TIMES-DISPATCH, June 24, 2003, at A7.

226. Robert Samuelson, *Affirmative Action Issue Weighs Heavily on Supreme Court*, RICH. TIMES-DISPATCH, June 23, 2003, at A9.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Grutter*, 539 U.S. at 343-44.

Quixotically, the Court conceded that the Fourteenth Amendment protects individuals rather than groups,[231] but proceeded to employ the group-logic that is the essence of affirmative action. The majority acknowledged that *Marks* had "baffled and divided the lower courts,"[232] and then obliquely, although not expressly, applied that decision to extract from *Bakke* a holding that the attainment of diversity in the law-school setting is a compelling state interest.[233]

Regarding diversity as a compelling state interest was the linchpin in the majority's approval of the law school's affirmative action program.[234] Once the Court made this determination, the "narrowly tailored" requirement was a natural consequence. If racial diversity were innately a compelling state interest, then there was in fact no other way to attain this goal other than to take race into account in making admissions decisions. The Court found that the law school's method carried "the hallmarks of a narrowly tailored plan,"[235] again referring to Justice Powell's language in *Bakke* that admissions decisions must be made on an individualized basis that uses race in a "flexible, nonmechanical way."[236] The majority in *Grutter* found that the Michigan Law School plan was not a quota system that imposes a "fixed number or proportion of opportunities that are 'reserved exclusively for certain minority groups.'"[237] Justice O'Connor likened the law school's use of race to Harvard's, having given race more weight than other factors, but not in a rigid manner.[238]

It is somewhat of an enigma that Justice O'Connor referred to her own opinion in *Croson* regarding the necessity of applying the strict scrutiny test,[239] since *Croson* also held that societal discrimination, as opposed to actual prior discrimination, cannot justify affirmative action.[240] One acceptable justification sufficed. Since the Court had determined *Bakke* to permit racial preferences to achieve diversity, there was no need to find yet another ground to uphold the program. She clarified by reminding that the Court had never held that the "*only* governmental use of race

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231. *Id.* at 326 (quoting *Adarand*, 515 U.S. at 227).

232. *Grutter*, 539 U.S. at 325 (quoting *Nichols*, 511 U.S. at 745-46).

233. *Grutter*, 539 U.S. at 328. Justice O'Connor's opinion seemingly paid unequivocal deference to the late Justice Powell, regardless of the usual consensus that the *Bakke* Court was too fractured to have produced any real precedent as to the diversity issue.

234. *Id.* at 327-28.

235. *Id.* at 334.

236. *Id.* at 334 (citing *Bakke*, 438 U.S. at 315-16).

237. *Id.* at 335 (quoting *Croson*, 488 U.S. at 496).

238. *Id.* at 335-39. Note that Justice Powell had written commendably of the Harvard plan in his opinion distinguishing it from the University of California Davis' Medical School plan, the latter which he viewed to be a quota. *Bakke*, 438 U.S. at 316-24.

239. *Grutter*, 539 U.S. at 326 (citing *Croson*, 488 U.S. at 493).

240. *Croson*, 488 U.S. at 496-97.

that can survive strict scrutiny is remedying past discrimination."[241] Justice Ginsburg's concurring opinion emphasized this same position— *i.e.*, that *either* diversity attainment *or* past discrimination would justify affirmative action, factors which are to be viewed in the disjunctive rather than the conjunctive.[242] This view holds that the interest in diversity alone is sufficient to legitimate racial preferences, and remedy of prior discrimination might be yet another separate justification.[243]

Perhaps the most intriguing part of the majority opinion was the rationale of the benefits of diversity in the study of law. The Court referred to the trial court's concession that the law school's admissions policy promotes "'cross-racial understanding', helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races'. . ., benefits [which are] 'important and laudable,' because 'classroom discussion is livelier, more spirited. . .'"[244] This was actually an extract from the trial court's statement that reflected upon testimony at trial, not the direct opinion of the court. The federal district judge had then gone on to distinguish between "viewpoint diversity and racial diversity," stating that the "educational benefits of the former are clear, . . .[but] those of the latter are less so."[245]

Justice O'Connor lent much credence to *amici* briefs from large U.S. businesses in which the increase in globalization was cited as requiring exposure to "widely diverse people, cultures, ideas and viewpoints."[246] The majority viewed such diversity as necessary to prepare students for "work and citizenship" in that it allowed "participation by members of all racial and ethnic groups in the civic life of our Nation. . . ."[247] Her readiness to accept Justice Powell's viewpoint in *Bakke*, which cited the importance of racial diversity in the academic setting, appeared to this writer to be inductive rather than deductive reasoning, not usual in legal analysis. Moreover, Justice O'Connor's allegiance to Justice Powell seemed to have pre-ordained her conclusion such that her opinion was a discourse in justifying the outcome that would occur.

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241. *Grutter*, 539 U.S. at 328 (emphasis added).

242. *Id.* at 344-46 (Ginsburg, J., concurring).

243. *Id.*

244. *Id.* at 330 (quoting *Grutter*, 137 F. Supp. 2d at 850).

245. *Grutter*, 137 F. Supp. 2d at 849.

246. *Grutter*, 539 U.S. at 330-31 (citing Brief for 3M et al as Amicus Curiae, Grutter v. Bollinger, 539 U.S. 306 (2003) (No 02-241) and Brief for General Motors Corp. as Amicus Curiae).

247. *Id.* at 331-32.

The majority's reference to *Sweatt v. Painter*[248] to stress the significance of a black component in the law school setting was puzzling indeed. *Sweatt* had involved a public law school's expressed *exclusion* of blacks rather than the University of Michigan's method of *inclusion*.[249] The plaintiff in *Sweatt* was a black applicant who had been rejected by the law school because of the color of his skin.[250] The instant litigation, however, was a reverse-discrimination suit. Barbara Grutter was a white applicant who had been allegedly rejected because of the preference given to black applicants.

Justice O'Connor referred to the mystical qualities of diversity as "substantial."[251] Again, she cited Justice Powell in *Bakke* when he referred to racial diversity as a "contribut[ion to] the robust exchange of ideas."[252] Her holding, that a diverse student body is a compelling state interest,[253] failed to explain how an amalgam of students of different races might somehow produce a more intellectual or stimulating discussion of the law.

With regard to the loss visited upon Barbara Grutter and other non-minorities whom she represented, the Court termed this approval of consideration of race as only a temporary measure,[254] one that is approved until the amorphous goal of eliminating the need for such preferences—a circuitous explanation provided by the Court—has been achieved.[255] If a critical mass of blacks is significant, even central, to the law school's mission, would not an assurance be in order that such mass always be present in the student body? The closest Justice O'Connor came to predicting when these admissions policies would reap a benefit to all was her "expect[ation] that twenty-five years from now" racial preferences would no longer be necessary to attain the diversity desired.[256] Justice Ginsburg's concurring opinion, joined by Justice Breyer, reiterated this hope for a "logical end point,"[257] but did so without venturing to predict when that time might be.

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248. *Id.* at 332-33. Chief Justice Vinson retorted that law schools "cannot be effective in isolation from the individuals and institutions from which the law interacts." Sweatt v. Painter, 339 U.S. 629, 634 (1950).

249. *Sweatt*, 339 U.S. at 629.

250. *Id.*

251. *Grutter*, 539 U.S. at 324.

252. *Id.* at 329 (quoting *Bakke*, 438 U.S. at 313).

253. *Id.* at 325.

254. *See id.* at 343 (presuming good faith that university officials will terminate the admissions policies as soon as practicable).

255. *Id.* (citing Nathaniel L. Nathanson & Casimir J. Bartnik,, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. BAR REC. 282, 293 (May-June 1977).

256. *Id.* at 343.

257. *Id.* at 344 (Ginsburg, J., concurring).

Dissents

Though each of the four justices in the minority wrote a separate opinion, there was a clear parallel in their holdings. The crux of Chief Justice Rehnquist's dissent was his disagreement with the majority's decision to veer away from the traditionally approved strict scrutiny analysis for all racial classifications.[258] The majority's blanket approval of the attainment of student body diversity as the university's primary purpose was sharply castigated by the Chief Justice.[259] He declared that a comparison between the greater number of admitted blacks to the number of admitted American Indians and Hispanics illustrated a contradiction to the alleged goal.[260] Justice Rehnquist's refusal to endorse a constitutional permission for the law school to exercise "such free rein in the use of race"[261] was buttressed by his dismay over the absence of any precise time frame for this patent discrimination to have run its useful course.[262] The proposed twenty-five year period suggested by Justice O'Connor was not in reference to any of the law school's evidence, but merely a conjecture that the Chief Justice found untenable.[263]

Justice Kennedy echoed the Chief Justice's concern over the Court's abandonment of strict scrutiny analysis, writing that "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."[264] He termed the law school's "critical mass" concept as a "delusion used . . . to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[265] Justice Kennedy's conclusion was that the Court's approval of the law school's obvious failure to give individual consideration to each applicant was an application of a standard far beneath a strict one.[266]

Justice Scalia classified the law school's "mystical 'critical mass' justification for its discrimination by race . . . [as one which] challenges even the

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258. *See id.* at 386 (Rehnquist, C.J., dissenting) (declaring the holding to be an "unprecedented display of deference under our strict scrutiny analysis. . ."). Even Justice Powell, in his *Bakke* opinion, wrote that strict scrutiny must apply to all racial distinctions, including those that favored minorities. *See Bakke*, 438 U.S. at 299 (holding that every person is protected by the Constitutional guarantee against classifications that are not "precisely tailored to serve a compelling governmental interest").

259. *See Grutter*, 539 U.S. at 383 (Rehnquist, C.J., dissenting) (pronouncing that the alleged goal of critical mass is a sham).

260. *Id.* at 380-83.

261. *Id.* at 386.

262. *Id.*

263. *Id.* at 386-87 (regarding the time-frame as vague and ambiguous).

264. *Id.* at 388 (Kennedy, J., dissenting).

265. *Id.* at 389.

266. *Id.* at 392-95.

most gullible mind . . . [a] sham to cover a scheme of racially proportionate admissions."[267] He viewed the "diversity" rationale as something nebulous that will not be reflected on a student's law school transcript, but a "lesson of life rather than law."[268] In Scalia's view, perhaps such racial diversity will make students better citizens, but clearly not better law students, or ultimately, better lawyers.[269] Justice Scalia reminded the Court that the Constitution prohibits *all* racial discrimination and concluded, "I do not look forward" to the superfluity of cases the majority opinion will likely generate.[270]

Justice Thomas' lengthy dissent struck the reader as one coming from the soul. He began with a quote from Frederick Douglas, a former slave born in Baltimore, Maryland in 1818, speaking in 1865 to an abolitionist group:

What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*. . . . And if the Negro cannot stand on his own legs, let him fall. . . . All I ask is, give him a chance to stand on his own legs! Leave him alone. . . . Your interference is doing him positive injury.[271]

The Constitution, Justice Thomas continued, "does not . . . tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination."[272] He was perplexed by the Court's failure to address its earlier explicit holding in *Wygant*—that there was no compelling state interest in advancing diversity in the public education setting with regard to the requirement for strict scrutiny analysis.[273] He was further puzzled by the majority's departure from past holdings that there was no public interest in general societal discrimination without evidence of actual discrimination.[274] Furthermore, Justice

267. *Id.* at 346-47 (Scalia, J., concurring in part and dissenting in part).

268. *Id.* at 348.

269. *Id.*

270. *Id.* at 349.

271. *Id.* at 349-50 (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglas, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), *in* JOHN W. BLASSINGAME & JOHN R. MCKIVIGAN, THE FREDRICK DOUGLASS PAPERS – SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, 1864-1880, at 59, 68 (1991)).

272. *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

273. *Id.* at 352 (citing *Wygant*, 476 U.S. at 275-76). Interestingly, *Wygant* also regarded affirmative action in Michigan public schools, but at the primary and secondary, rather than the university level. *Wygant*, 476 U.S. at 270-71. In *Wygant*, the Court held preferential treatment afforded to black teachers when layoffs became necessary violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 282-84.

274. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (citing *Wygant*, 476 U.S. at 276 and *Croson*, 488 U.S. at 496-98). Justice O'Connor actually wrote the principal opinion in *Croson*, in which the Court struck down an affirmative action program because it viewed it as requiring quotas. *Croson*, 488 U.S. at 507-11.

Thomas expressed that social classifications are demeaning and held "that such classifications ultimately have a destructive impact on the individual our society."[275]

Perhaps the most fundamental portion of Justice Thomas' dissent was his criticism of the majority's failure to find a true state interest,[276] which reminded the reader of Justice Scalia's distinction between benefits that are arguably social and those that are educational.[277] The majority viewed the former as educationally beneficial, a position Justice Thomas strongly challenged.[278] He berated the Court for its failure to explain without any clarity how racial diversity will improve one's legal education.[279] Justice Thomas saw no public interest in Michigan even maintaining a law school at all,[280] pointing out that the vast majority of University of Michigan Law School graduates leave the state upon graduation, with less than 16% remaining in Michigan.[281]

Assuming *arguendo* that diversity is nonetheless a valid and compelling state interest, Justice Thomas referred to the *amicus curiae* brief filed by the federal government in support of the plaintiffs to reiterate that racial discrimination was not a necessary means.[282] This brief discussed race-neutral alternatives successfully practiced in Texas, Florida, and California.[283] This, Justice Thomas suggested, should be in lieu of granting preferential treatment in admissions decisions based solely on the skin color of the applicant.[284]

Finally, Justice Thomas addressed some fissures in the underlying logic to the law school's primary focus on race, rather than on other qualities of the applicants. He queried as to why black *men* are not considered underrepresented by the law school when compared with black *women*.[285] The American Bar Association-Law School Admissions Council (ABA-LSAC) Guide (page 426) reported forty-six black women and

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275. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (quoting *Adarand*, 515 U.S. at 240 (1995) (Thomas, J., concurring in part and concurring in judgment)).

276. *Id.* at 354-55 (indicating that the state interest is a masked form of racial balancing).

277. *See supra* text accompanying note 269.

278. *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part).

279. *Id.*

280. *Id.* at 358.

281. *Id.* at 359.

282. *Id.* at 361-62.

283. Brief for the United States as Amici Curiae at 13-14, Grutter v. Bollinger, 539 U.S. 306 (2003) (No 02-241) (favoring admission policies that factor race-neutral qualities such as economical, geographical, and political diversity).

284. *Grutter*, 538 U.S. at 361-62 (Thomas, J., concurring in part and dissenting in part).

285. *Id.* at 372.

twenty-eight black men enrolled in the law school.[286] What was the reason, he asked, why no action had been taken to address this underrepresentation of black men?[287] Moreover, he agreed with Chief Justice Rehnquist that the exaggerated preference given to black applicants over other minorities amounted to inter-minority discrimination.[288]

Justice Thomas, a Harvard Law School graduate, deplored the stigma imposed on deserving qualified blacks created by affirmative action.[289] In his opinion, admission policies that employed racial discrimination tars *all* black students, those who were the beneficiaries of affirmative action, and those who would have qualified in the absence of racial discrimination.[290]

Justice Thomas concluded that the Court had essentially endorsed an unconstitutional policy, one that "weaken(ed) the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."[291] This position is the quintessence of the argument opposing affirmative action.

Gratz v. Bollinger[292]

Decided the same day as *Grutter, Gratz* concerned the affirmative action program at the College of Literature, Science and the Arts at University of Michigan.[293] However, unlike the law school plan, the Court held that this program did not pass constitutional muster.[294] Though a federal district court had held the law school plan unconstitutional,[295] it upheld the undergraduate's affirmative action.[296] Ironically, the results were reversed when the two cases were decided by the Supreme Court.

The trial court in *Gratz* upheld the plan, finding it sufficiently narrowly tailored to achieve the compelling state interest of attaining diversity in the classroom.[297] Interlocutory appeals in *Gratz* were pending when the Sixth Circuit Court of Appeals reversed the federal district court and approved the law school program.[298] The Supreme Court subsequently

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286. *Id.*
287. *Id.*
288. *Id.* at 375.
289. *Id.* at 373.
290. *Id.*
291. *Id.* at 378.
292. Gratz v. Bollinger, 539 U.S. 244 (2003).
293. *Id.*
294. *Id.*
295. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).
296. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).
297. *Id.*
298. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

granted certiorari on both cases without a decision by the appellate court on the undergraduate program. When the cases reached the Supreme Court, both affirmative action programs had been judicially approved.

The undergraduate admissions decisions were made on a maximum 150-point scale.[299] Generally, applicants with 100 points were admitted.[300] Consideration was given to high school grades, Scholastic Aptitude Test scores (much like the leaving certificates in Ireland and Northern Ireland), state residency, personal essays, personal achievements, alumni relationships, and membership in one of the same three "underrepresented" minority groups.[301] However, applicants in the underrepresented minority groups were automatically credited with 20 points, regardless of the other factors.[302] This resulted in the admission of virtually every minimally qualified minority applicant.[303]

A 6-3 Court held the college's additional point allocation to be a veritable quota, which Justice Powell had held unconstitutional in his *Bakke* opinion.[304] The Court held this use of race to violate both the Equal Protection Clause of the Fourteenth amendment and Title VI.[305]

Though Justices O'Connor and Breyer voted for the law school plan in *Grutter*, they voted against the undergraduate plan. In O'Connor's concurring opinion joined by Breyer, the across-the-board lack of individual consideration of each undergraduate applicant was criticized.[306] They explicitly reiterated their approval of the usage of race as a factor in order to achieve diversity, provided it is used appropriately.[307] Justice Thomas' concurring opinion stressed his view that the Equal Protection Clause "categorically prohibited" any use of race in making admissions decisions.[308]

It was submitted that it was difficult to ascertain any substantive distinction between the law school and undergraduate policies, and for this

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299. *Gratz*, 539 U.S. at 255.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 266.

304. *See id.* at 269 (comparing the point allocation to an impermissible two-track system).

305. *Id.* at 276. The significance of Title VI is its applicability to all educational institutions in receipt of federal aid, regardless of the school's private or public nature. The Court has held that this requirement is met if a student in a private school has a federally funded scholarship. Grove City Coll. v. Bell, 465 U.S. 555 (1984).

306. *See Gratz*, 539 U.S. at 280 (O'Connor, J., concurring) (describing the current admissions policy a "nonindividualized, mechanical one.").

307. *See id.* at 279 (arguing that diversity factors, such as race, should be individually assessed).

308. *Id.* at 281 (Thomas, J., concurring).

reason, the dissenters in *Grutter* remarked upon this puzzlement. In his opinion in *Grutter*, Justice Scalia wrote that the Court's "split double-header seems perversely designed to prolong the controversy and the litigation."[309]

Conceding that the *Bakke* Court had held quotas to be patently unconstitutional,[310] the line between the addition of points to enhance an applicant's total score[311] and the favorable recruitment of black students to achieve a "critical mass"[312] is so fine as to be arguably nonexistent. The end is the same, and the means, perceptibly indistinguishable.

Ironically, the results for the plaintiffs in *Gratz* and *Grutter* were opposite at both the federal district court and Supreme Court levels:

	Federal District Court	Supreme Court
Gratz (undergraduate)	constitutional	unconstitutional
Grutter (law school)	unconstitutional	constitutional

Reactions from the Press

Well-known newspaper writers lost no time in chastising and praising the Court. However, most writers offered no explanation for the differences of the outcomes.

Opponents

Dr. Walter Williams, an African-American Economics professor at George Mason University in Virginia and syndicated editorialist, predicted *"racial fraud"* as a result of *Grutter*.[313] He mused that the University of Michigan Law School's application will invite racial fraud.[314] Since the application gives students the option to choose "one race or ethnicity that you think best applies to you" with no proof necessary, Caucasians will lie in order to share in the bounty for the sake of diversity.[315]

Pondering the mysteries of the two decisions, syndicated editorialist Paul Greenberg revisited his childhood experience in Arkansas as a son

309. *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part).

310. *Bakke*, 438 U.S. at 316-18.

311. *Gratz*, 539 U.S. at 355.

312. *See Grutter*, 539 U.S. at 381-83 (Rehnquist, C.J., dissenting) (illustrating how the law school's affirmative action favors blacks over Hispanics and American Indians).

313. Walter Williams, *Since Ruling, Expect Racial Fraud*, RICH. TIMES-DISPATCH, Aug. 7, 2003, at A13.

314. *Id.*

315. *Id.*

of a Jewish store-owner.[316] While in elementary school, he realized the difference in the treatment towards black children.[317] He wrote that "black people stopped where [school] began" and how he knew that segregation "wasn't right, that race didn't matter."[318] As Greenberg reflected upon the changes in American race relations, he was bemused by the opinion in *Grutter*.[319] Since the ruling literally held that race *does* indeed matter, he called it the "funniest Supreme Court decision I ever read."[320] Greenberg sees a circular reversion to a less progressive time, with racial discrimination being used by the Court to *end* discrimination.[321] He concluded by writing, "I knew better than that when I was six years old."[322]

Charles Krauthammer, another editorialist with the *Washington Post*, called the *Grutter* opinion "incoherent, disingenuous, intellectually muddled, and morally confused."[323] He stressed, however, that the Court did not *require* affirmative action on a constitutional basis; rather, the Court *permitted* it.[324] In Dr. Krauthammer's view, since *Grutter* pointed to no constitutional mandate, this ruling left it to the people and the legislators to dispense with the practice.[325]

The Center for Equal Opportunity, a think-tank in northern Virginia, had hoped that the Court would declare affirmative action in the public sector unconstitutional.[326] General Counsel Roger Clegg announced the Center's disappointment in the *Grutter* decision because the Court did not "put an end . . . to all of this nonsense."[327]

Press Syndicate editorialist John Leo referred to *Grutter* as the Court's endorsement of "[i]nsulation from real competition."[328] He read the decision as furthering a system that "reflects the patronizing notion that

316. Paul Greenburg, *You've Got to Discriminate to End Discrimination*, RICH. TIMES-DISPATCH, June 30, 2003, at A9.

317. *Id.*

318. *Id.* These events were prior to the landmark case requiring racial desegregation of public primary and secondary schools, *Brown v. Board of Education*, 347 U.S. 483 (1954).

319. Greenburg, *supra* note 316.

320. *Id.*

321. *Id.*

322. *Id.*

323. Charles Krauthammer, *Ruling Puts the Ball Back in Proper Court*, RICH. TIMES-DISPATCH, June 27, 2003, at A19.

324. *Id.*

325. *Id.*

326. Hardin, *supra* note 225.

327. *Id.*

328. John Leo, *Supreme Court Declared Quotas Illegal, Legal – Go Figure*, RICH. TIMES-DISPATCH, July 6, 2003, at E3.

blacks and Latinos cannot be expected to compete like members of other groups."[329]

A bit of levity emanated from the reaction of some university students who took issue with affirmative action in general. Similar actions at two prestigious Virginia universities—one private, one public—are illustrative. In 2003, students at both the College of William and Mary, a public educational institution and the second-oldest university (after Harvard) in the United States, and the University of Richmond, a private Baptist school, organized so-called "affirmative action bake sales."[330]

A sign posted at one such function at William and Mary advertised cookies at prices that were affixed to a particular race.[331] White purchasers were charged at four for $1.00; Asians were charged four for 75¢; blacks, at four for 50¢; and to American Indians, at four for 25¢.[332] An identical incident had preceded this event at the University of Richmond.[333] Both the administration of William and Mary and the college's Student Assembly Senate strongly condemned such bake sales.[334] The Office of Student Affairs shut down the affirmative action bake sale and ordered that the sign be removed, while the Student Senate passed a resolution rebuking the activity.[335] The chair of the Department of Sociology "wrote an open letter to the William and Mary community," acknowledging the students' constitutional right to free speech, but denounced their "lack of enlightenment."[336]

Similar "affirmative action bake sales" were held by College Republicans at the University of Washington, some of whom were physically attacked by protesters, University of California Irvine, Northwestern University (Chicago) and Southern Methodist University (Dallas).[337] All of the activities were shut down by campus administrators after they declared the events to be "discriminatory."[338]

Viewed as an avenue to "expose the unjust nature of the racial preferences so fervently embraced by colleges and universities," Barton Hinkle, a respected editorialist for the *Richmond Times-Dispatch*, perceived the bake sales to be no different than the affirmative actions approved in

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329. *Id.*

330. *See* A. Burton Hinkle, *Campus Bake Sale Raises Awareness, Hostility*, RICH. TIMES-DISPATCH, Dec. 23, 2003, at A9.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

Grutter—both employed disparaging treatment based on race.[339] Moreover, he concluded that "[p]erhaps affirmative action's defenders yelp so loudly against protest bake sales because the sting they feel is the pricking of their own consciences."[340]

Advocates

Those who lauded *Grutter* were no less vocal. It seemed a bit of an anachronism, however, that the non-diverse historically all-black colleges in Virginia praised the holding. Administrators of such schools as President William R. Harvey of Hampton University cited *Grutter* as a "victory for higher education," and President Marie McDemmond of Norfolk (Virginia) State University was pleased with the holding that diversity was an "important component to the learning environment."[341] Similar statements came from leading administrators at Virginia Union University (private) and Virginia State University (public); both schools are primarily black institutions.[342]

The administrative spokesman for the College of William and Mary confirmed that race was already one among various factors in what he termed a "holistic approach" to an applicant's admissions packet.[343] Washington and Lee University, a private Virginia university where Justice Powell obtained his law degree, declared that the holding was a "hoped-for decision."[344] Virginia Governor Mark Warner proclaimed that he, a person with a background in both business and law, was "heartened . . . [since he] think[s] most business[es] . . . want . . . employees . . . educated in an environment where they were exposed to diverse people and ideas."[345]

An unusual, but positive, take came from black columnist Leonard Pitts. He reminded that a "*de facto*" affirmative action historically benefited whites until the Court forced integration as a matter of law.[346] Pitts advocated the use of affirmative action until this "nation. . .no

339. *Id.*

340. *Id.*

341. Renée Petrina, *Historically Black Schools Pleased with Ruling*, RICH. TIMES-DISPATCH, June 24, 2003, at A6.

342. *Id.*

343. Hinkle, *supra* note 330.

344. Andrew Petkofsky, *Va. Schools Seem to Comply*, RICH. TIMES-DISPATCH, June 24, 2003, at A1.

345. *Id.*

346. Leonard Pitts, *Is Affirmative Action's End in Sight?*, RICH. TIMES-DISPATCH, June 28, 2003, at A11.

longer. . .needs to."[347] Unlike Justice O'Connor, however, he did not surmise when that time might be.[348]

Disappointed at an Absence of Judicial Guidance

Students from other institutions of higher education seemed discouraged, however, by the Court's lack of clarity. Dwight Norris, a student at Virginia's James Madison University, opined that "[e]ither we should get rid of it [affirmative action], or we should keep it. I don't see how this in-between [contradiction between *Grutter* and *Gratz*] is helping out at all."[349]

Virginia Attorney General Jerry Kilgore summed up what was perhaps the consensus of most by stating that the Court's two contrasting decisions "did not provide us with a 'bright line' rule on the use of race. . . ."[350] Patrick McSweeney of Richmond, a constitutional lawyer and former Republican Party chairman of the state, agreed, saying that he was "looking at an inch and a half or two inches of [high court] opinions," adding that he does not "think it adds anything to clarify the law. If anything, it further confuses the law."[351]

IV. Some Comparisons with Policing in Post-Good Friday Agreement Northern Ireland

The conflict in Northern Ireland has been a legendary and long-running one, widely reported not only in Ireland and the United Kingdom, but also in the United States. The much lauded Good Friday Agreement (GFA) of April 10, 1998,[352] inspired hope that peace would finally be a reality in the six counties that constitute Northern Ireland.[353]

Among the more contentious provisions of the document were those in the section addressing the reorganization of the former Royal Ulster

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347. *Id.*

348. *Id.*

349. Petkofsky, *supra* note 344.

350. *Id.*

351. Hardin, *supra* note 225.

352. Good Friday Agreement, Apr. 10, 1998, U.K.-Ir., 37 I.L.M. 751 [hereinafter GFA].

353. *See* Close Up Found., N. Ir. (Nov. 1998) (providing an overview of the situation in Northern Ireland), *at* http://www.closeup.org/nireland.htm (last visited Nov. 1, 2004). The seemingly insurmountable difficulties of the GFA (and implementing legislation) since its historic signing is a subject beyond this article. The Northern Ireland Assembly remains in suspension at this writing.

Constabulary (RUC), now the Police Service of Northern Ireland.[354] Pursuant to the GFA, an eight-member independent commission, led by Chris Patten,[355] was established on June 3, 1998. After more than a year of lengthy and detailed meetings, this body, the Independent Commission on Policing (hereinafter the "Patten Commission"), produced a 128-page document (hereinafter the "Patten Report") containing 175 recommendations.[356]

One recommendation was a quota system, which would be patently illegal in the United States, requiring that all new hires be 50% Protestant and 50% Catholic.[357] Predictably, the majority unionist party, David Trimble's Ulster Unionist Party (UUP), was firmly opposed to such a quota.[358] The more extreme unionist party, the Reverend Ian Paisley, Sr.'s Democratic Ulster Party (DUP),[359] adamantly riled against such a preferential system.[360] To be sure, this was affirmative action at its most extreme.

As was expected, both of the significant nationalist parties, *SinnFéin* and the Social Democratic Labour Party (SDLP), praised the proposed quotas.[361] In general, however, the Patten Report and ensuing legislation

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354. Only a few pages of the agreement dealt with the policing issue. *See* GFA, *supra* note 352, at 22-24 (establishing an independent policing reviewing commission and mandating a report by Summer 1999).

355. Chris Patten was a prominent British Conservative politician and the last British Governor of Hong Kong. *See, e.g.*, Wikipedia: The Free Encyclopedia, *Chris Patten*, *at* http://en.wikipedia.org/wiki/Chris_Patten (last visited Nov. 1, 2004).

356. INDEP. COMM'N ON POLICING IN N. IR., A NEW BEGINNING: POLICING IN N. IR. (1999) [hereinafter PATTEN REPORT].

357. *Id.* at 83, 118. These recommendations were later incorporated into the reactive legislation. *See* Police (Northern Ireland) Act, 2000, c. 32, § 46(1) (Eng.) [hereinafter Police Act].

358. *Patten Plan 'a Shoddy Document'*, BELFAST NEWS-LETTER, July 29, 2000, at 9.

359. The result of the November 2003 elections in Northern Ireland was a dramatic shift in partisan power. Not only did the DUP reap votes for a significantly greater number than did the UUP, thus becoming the strongest unionist party, but the DUP now has more seats in the still-suspended Northern Ireland Assembly than does any other party, unionist and nationalist.

The results of the 1998 Assembly elections were UUP, 28 members, and DUP, 20 members. The 2003 votes gave the DUP 30 members to only 27 for the UUP. In late January, 2004, 30 members of then-First Minister David Trimble's UUP constituency association resigned, and 3 UUP elected Assembly members—Jeffrey Donaldson, Arlene Foster, and Norah Beare—left their party and joined the DUP. Thereafter, the DUP had 33 Assembly members to the UUP's 24. One journalist categorized the UUP as a "party in turmoil". Dan Keenan, *Trimble Faces Setback: 3 Defected as 30 Leave*, IRISH TIMES, Jan. 26, 2004, at 6.

360. *See generally* PATTEN REPORT, *supra* note 356.

361. *See* Joe Carroll, *Adams Accuses Mandelson of Emasculating Patten Recommendations*, IRISH TIMES, July 11, 2000, at 6; *see also* Bruce Arnold, *Who Do We Blame for*

included something to agitate every party. To the unionists, it was a deplorable and blatant means of pandering to the nationalists; to the nationalists, although they were tacitly pleased with the quota, it did not go far enough.[362] *Sinn Féin*, in particular, while presumably delighted with the recommended quotas, wanted even greater concessions for the nationalists.[363] The SDLP actually called for a dismantling of the RUC in its entirety.[364]

This restructuring and re-naming is now a *fait accompli.* The former RUC is now the Police Service of Northern Ireland (PSNI)—the word "service" rather than "force" or "constabulary" emphasizes the downsized and non-militaristic post-GFA security personnel.[365] The implementing legislation officially changed the name of the former RUC.[366] In the view of the SDLP, the word "royal" in any sense was reprehensible as being "overtly British."[367] Surprisingly, the mail service officially remains the Royal Mail.

The Alliance, a neutral party on the nationalist-unionist issue, approved of both the Patten Report and the proposed statute in general, but nonetheless took great issue with the quota-in-hiring policy.[368] There is much merit to Alliance's opinion that such preferential treatment likely violates the Fair Employment Act.[369]

Understandably, the RUC itself objected not only to the quota, but also to most of the visible changes.[370] In its substantial response to each

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What Has Happened?, IRISH INDEPENDENT, Nov. 29, 2003, at 8; Associate Press, *Limit on RUC Reform Debate in Commons 'Deeply Insensitive'*, IRISH TIMES, July 12, 2000, at 6 [hereinafter *Limit on RUC*].

362. Carroll, *supra* note 361; *Limit on RUC*, *supra* note 361.

363. SDLP, the strongest nationalist party at the time of execution of the GFA and voting for Assembly members, is now a distant second to *Sinn Féin*. The 1998 elections gave SDLP 24 Assembly members to *Sinn Féin*'s 18. In 2004, these numbers were exactly reversed. SDLP now has only 18 members to *Sinn Féin*'s 24. Because of the striking shift on both sides so that the two most extreme unionist and nationalist parties were the most powerful, journalist Bruce Arnold penned that "[t]he GFA, in its present form, is finished." Arnold, *supra* note 361.

364. *See* Vincent Browne, *Political Prophet, but not in His Own Country*, IRISH TIMES, Mar. 10, 2001, at 12.

365. PATTEN REPORT, *supra* note 356.

366. Police Act, c. 32, § 46(1) (Eng.).

367. SDLP, POLICING: A NEW SERVICE FOR A NEW FUTURE 10 (1999).

368. THE ALLIANCE PARTY OF NORTHERN IRELAND, THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND paras. 11.1, 12.2-12.5.

369. *Id.* at para. 12.2.

370. THE ROYAL ULSTER CONSTABULARY, RESPONSE TO THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND 75-76. *See generally* PATTEN REPORT, *supra* note 356.

recommendation, the re-naming and changes of symbols were especially problematic.[371]

Interestingly, Chris Patten, then-Chair of the British Conservative (Tory) Party and member of Westminster Parliament, is himself a Catholic.[372] Perhaps the relationship between his political position and his religion was not coincidental; it is conceivable that Catholicism was a factor in selecting him. The purpose might have been to assure the public that the Chair, as a British subject, was not overly unionist. Significantly, both Patten and Westminster responded to a decades-old pattern of anti-Catholic discrimination.[373] At the time of the signing of the GFA, the sectarian composition of the RUC was 88% Protestant and 8% Catholic.[374] This Catholic-Protestant animosity lies at the heart of Northern Ireland's troubles.

The GFA, however, is unarguably a "politically correct" instrument. Nationalists' aversion to the "political symbols," such as the United Kingdom flag (the "Union Jack") was assuaged by the Patten Commission's recommendation to remove both the crown (British) and the shamrock (Irish) from the RUC symbol[375] and to cease flying the country flag of which Northern Ireland is a political part.[376]

Moreover, there had been recurring charges of anti-Catholic activity on the part of the RUC. From April 19, 1969 to January 27, 1974, state security agents in Northern Ireland had killed 350 persons. Of those, only 39 (11%) were Protestants, whereas, 305 (85%) were Catholics.[377] One allegation of the RUC complicity came after the brutal car-bombing murder of Rosemary Nelson, a nationalist solicitor who had long worked for the human rights cause. Similar charges came in the 1999 murder of Pat

371. THE ROYAL ULSTER CONSTABULARY, *supra* note 370 (responding to PATTEN REPORT).

372. Browne, *supra* note 364. Upon his appointment to Chair the Commission, Patten (who later became European Minister for External Affairs) referred to himself as one who was "born, brought up, remain, and will die a Catholic".

373. The term "decades" is used here rather loosely, strictly in reference to partition of the island of Ireland by act of Westminster in 1920. Effective 1922, the six counties which are Northern Ireland remained a part of the United Kingdom, and the twenty-six counties in the South and Northwest attained dominion status as the Free State of Ireland (*Saorstát Éireann*). In reality, governmental oppression of Catholics began with British control over all of Ireland in 1171 during the reign of King Henry II.

374. FIONNULA NI AOLIAN, THE POLITICS OF FORCE 91 (2000). The remaining 4% were listed as "religion unknown".

375. PATTEN REPORT, *supra* note 356.

376. *Id.*

377. AOLIAN, *supra* note 374, at 248.

Finucane, a high profile Catholic barrister who defended several Republicans.[378]

It is germane to point to other perceptions, if not realities, of such discriminatory treatment of Catholics. Other areas where rampant anti-Catholic policies were alleged were in housing and gerrymandering of political districts. An example of such a district that has remained strongly unionist because of the localizing of Catholic public housing is Enniskillen, County Fermanagh. Political scientist Graham Gudgeon referred to this as "malpractice to maintain Unionist control."[379] Edward Carson proudly hailed the new 1922 Northern Ireland Parliament as a "Protestant Parliament for a Protestant people," surely not a statement indicative of religious tolerance.[380]

To contrast with the affirmative action plan approved in *Grutter*, there was no evidence introduced that the University of Michigan Law School had engaged in any racial discrimination in the past. Rather, the attempt was solely to achieve the mysterious "diversity" that the Court viewed as intellectually beneficial to the entire student body.[381] Indeed, the Court's blind allegiance to Justice Powell's opinion in *Bakke* is puzzling in light of his denouncement of the legitimacy of using affirmative action to remedy "societal discrimination."[382]

On the other hand, the GFA affirmative action recommendation was directed toward actual past discrimination,[383] often more than *de facto*, and actually sanctioned by the government.[384] The 50-50 quota proposal was intended to level the playing field, so to speak, by evening out the composition of a security force that must maintain the respect and trust of both sides of the religious-political dispute.[385] The Commission's ap-

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378. Ms. Nelson represented the Catholic group that opposes the July 12 Orange Order march through the Catholic residential in Drumcree, near Portadown. *See* ROSEMARY NELSON: THE LIFE AND DEATH OF A HUMAN RIGHTS DEFENDER 23, 24 (Pat Finucane Centre, 1999). On March 25, 1999, she was killed as she left her driveway in Lurgan, County Down when a booby-trap style bomb that had been planted in her car exploded. *Id.* Suspicions of RUC complicity in her murder surfaced. *Id.* In 1989, Finucane was shot and killed while having dinner with his family in his affluent Belfast home.

379. GRAHAM GRUDGEON, THE NORTHERN IRELAND QUESTION: NATIONALISM, UNIONISM AND PARTITION 105 (Patrick J. Roche & Brian Barton eds., 1999).

380. Edward Henry Carson (1854-1935), a barrister unofficially referred to as the "uncrowned king of Ulster," fought adamantly in opposition to Home Rule for Ireland.

381. *Grutter*, 539 U.S. at 330-31.

382. *Bakke*, 438 U.S. at 310.

383. PATTEN REPORT, *supra* note 356, at 81-83 (addressing the actual discrimination found in the representation of Catholics and other minorities within the police force).

384. Police Act, c. 32, § 46(1) (Eng.).

385. PATTEN REPORT, *supra* note 356, at 81-83.

proach, and the later approach of Westminster, directly addressed the ongoing cause of the ongoing conflict.[386]

Beyond the security sector in Northern Ireland, a mention of the employment setting in general is instructive. One body crafted out of the enacted legislation pursuant to the GFA was the Equality Commission whose statutory duty was to ensure equality of opportunity.[387] Expressly stated in the statute is the duty of the Equality Commission to investigate *all* charges of violations.[388] Similar to the U.S. Constitution's Equal Protection Clause,[389] this law applied to "public authorities."[390] The concept of public versus private, however, was given a much broader interpretation. For example, the courts in the Republic of Ireland have generally interpreted "public" protections in the Constitution of Ireland to extend to private persons.[391] The post-GFA statute for Northern Ireland also contained an exhaustive list of these titular "public" bodies.[392] Generally, "public" denotes not only the government, but also a private company that services the public.

The statutory duty of the "public authorities" is to have and exercise "due regard . . . [to] *promote equality.*"[393] Since anti-Catholic discrimination in Northern Ireland had been the absolute motive of the retaliatory actions by nationalist paramilitaries (*e.g.*, the IRA), it is a contemporary provocation for violence that affects the people in general. Therefore, the word "promote" had a positive and proactive connotation, an expressly stated directive to practice affirmative action.[394]

Contrary to the University of Michigan Law School's affirmative action plan in *Grutter*, the GFA quota provision responded directly to *actual* prior and current discrimination, not to any "societal" discrimination so detested by the *Grutter* dissents.[395] Justice Powell's own insistence in *Bakke* was that mere societal discrimination was not a constitutional ground for preferential treatment.[396]

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386. *Id.*

387. Northern Ireland Act, 1998, c. 47, §§ 73-74 (Eng.) (supervising the issues of disability, employment, racial equality and equal opportunity).

388. *Id.* at § 74.

389. U.S. CONST. amend. XIV, § 1.

390. Northern Ireland Act, c. 47, § 75(1)(a)-(d).

391. From his interpretation of trade union cases, Irish employment law expert, Michael Forde, concluded that private sector employers in Ireland are bound by constitutional provisions. *See* MICHAEL FORDE, EMPLOYMENT LAW 7 (1992).

392. Northern Ireland Act, c. 47, § 75(3)(a)-(d).

393. *Id.* at § 75(1)

394. *Id.* at §§ 73-75.

395. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

396. *Bakke*, 438 U.S. at 310.

Interestingly, the term "due regard," as used in the Northern Ireland statute,[397] was adopted after considerable debate in Westminster since Parliament desired to require something beyond simple "regard."[398] Northern Ireland's former Secretary of State, Marjorie "Mo" Mowlam, identified the words "equality" and "good relations" as tandem concepts, not conflicting or opposing ones.[399] Such statements also reflected a probable intent to sanction affirmative action because of a pervasive pattern of province-wide discrimination. Significantly, however, the statute spoke of "equality of *opportunity*"[400] rather than a granting of preferential treatment for Catholics who, as a group, had been the targets of discrimination.[401] Arguably, this inferred an unspoken stance of sorts, the legislature's goal to require full consideration of Catholic job applicants for jobs or public housing. The legendary jury is still out as to whether this facially middle position, which clearly promotes more than mere "equality," goes as far as affirmative action, the most extreme position.[402] The fundamental problem in Northern Ireland, however, was rooted in religious backgrounds and political differences, and for that reason, it was logical to assume that some modicum of positive discrimination was necessary to dispose of prior preferential treatment to Protestants.

It is submitted that therein lay the underlying differences between the affirmative action approved by the Court in *Grutter* and the quota system for the PSNI. The latter does not require any specific pre-hire qualifications.[403] Any approval of preferential treatment that might be read into the GFA and subsequent legislation is applied to all persons, across the board, without regard to any requisite qualifications. Examples of qualifications might be past experience or a minimum amount of education. (To transfer into the housing sector, "qualifications" might be a proven need.) On the other hand, the University of Michigan Law School looked first at the race of an applicant and, only thereafter, at other qualifications, such as the applicant's GPA and LSAT scores.[404] The so-called bottom line is that for the law school, race is the proverbial trump card, regardless of aptitude scores or university undergraduate grades. The

397. Northern Ireland Act, c. 47, § 75(1).

398. House of Commons, Official Report, vol. 334, col. 109 (July 27, 1998).

399. *Id.*

400. Northern Ireland Act, c. 47, § 75 (emphasis added).

401. *See* PATTEN REPORT, *supra* note 356, at 81-83.

402. Northern Ireland Act, c. 47, § 75(1)(a)-(d) (listing nine areas where discrimination, presumably any discrimination, was forbidden).

403. *See* PATTEN REPORT, *supra* note 356, at 87 (calling for a standard of merit that must be met by all eligible recruits, without any value given to "religious or cultural identity, gender or ethnicity").

404. *See Grutter*, 539 U.S. at 316 (pointing to the school's "longstanding commitment" to racial and ethnic diversity).

sole aim is to attain class with 10-17% black students, the enigmatic "critical mass." The goal, then, is not "equality," as is that of the GFA's quota principle, but rather the attainment of an undefined "diversity."

Dr. John Stannard, my respected colleague at Queens University Belfast School of Law, has explained a problem when the police hiring quota is practiced. According to him, it has been extremely difficult to hire an equal number of candidates according to religion. Very few Catholics apply to the force, which has historically been the case. Perhaps this can be explained as being a vestige of the pre-GFA distrust of the security forces. Whatever the reason, it is a reality.

Moreover, the city of Belfast is now even more segregated by religion in working class areas than prior to the GFA. An alarming 98% of the city's working class are strictly separated.[405] Likewise, 98% of Northern Ireland's public housing remains segregated.[406] One unnamed academic quipped, "Belfast was always pretty bad, but this is the worst ever, and may be the worst in Western Europe."[407]

There is no affirmative action plan that can remedy this entrenched separation, at least not in the near future. It may well be that the approach taken in the GFA will initiate more integration, but there is no certainty in this hope.

V. CONCLUSION

The allegorical road map through the chronology of the United States Supreme Court's treatment of affirmative action yields some principles with regard to when racial preferences might meet constitutional muster and when not. At least the Court has been consistent in requiring a showing of a compelling state interest and applying strict scrutiny analysis to any racial distinctions in recent years. Quotas, at any rate patent ones, are not constitutionally acceptable.

Nonetheless, many legal scholars bemoan *Grutter* for having muddied the waters after the Court had begun to present some clear guidance in this regard. These guidelines are no longer lucid ones, and questions persist. For example, the Court has never adequately defined with any precision what it means by "diversity." Moreover, what is the Court's concept of a "quota"? Once a university, or college within a university, has achieved a nearly racially balanced student body, must the plan then be terminated and all applicants—in education, or in the workforce or housing settings, or all—thereafter to be treated equally? Regarding educa-

405. David McKittrick, *Bid to Break Sectarian Ghettos*, IRISH INDEPENDENT, April 7, 2004, at 13.

406. *Id.*

407. *Id.*

tional admissions decisions, how much of a differential between a non-minority's cumulative undergraduate grade-point average and LSAT scores and those of a minority applicant is constitutionally acceptable in the name of "diversity"? Finally, how much might realistically be read into *Grutter* with respect to how the Court will view affirmative action in the private sector where statutory law, rather than the Constitution, is applicable, especially in areas other than education?

Regarding the latter point, the pre-*Grutter* decisions do not reflect any significant variance between the Court's views on affirmative action and reverse discrimination under statutory and constitutional claims. Only the former applies to the private sector, but the majority's trend prophetically may well indicate its view that affirmative action is acceptable when challenged on statutory grounds. Since this will likely affect many areas, including employment, public accommodations, and education, echoes from *Grutter* may well reverberate in unexpected venues.

Comparing racial affirmative action in the United States with the quota for post-GFA police hiring in Northern Ireland, one distinction is that the latter directly addresses the root cause—inter-religious conflict—of the troubles that have plagued the province for so many years. On the other hand, public-setting racial preferences, facially contrary to the U.S. Constitution, and private-setting or public-setting affirmative action plans violate the 1964 Civil Rights Act. The enslavement of American blacks ended officially in 1863 with the adoption of the Thirteenth Amendment, and in reality in 1865 at the conclusion of the Civil War, and the comprehensive civil rights legislation in 1964—forty years ago—all which effectively branded all race discrimination unlawful. However, the religious tension in Northern Ireland has survived the GFA, and some degree of affirmative action is conceivably necessary to end discrimination, a discrimination similar to what has long been contrary to American law.

Ironically, interracial friction has been revived and exacerbated by the *Grutter* decision. The Court has deemed such inequality of treatment necessary to achieve "diversity." It is submitted that this judicially approved inequality of treatment perpetuates an emphasis on the *differences* between racial groups—differences that the Constitution instructed were to be ignored.

It could well be that the effect will be to solidify a wall of separation by continuing to divide the races by such programs as the one permitted at the University of Michigan. To the contrary, true equality would form the intended bridge between the two races that continue to be divided by such programs.