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Earl M. Maltz

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Earl M. Maltz[+]

I. INTRODUCTION

During her long tenure on the Supreme Court, Justice Sandra Day O'Connor played a pivotal role in shaping the Court's approach to the issues raised by affirmative action programs. Indeed, beginning with the 1989 decision in *City of Richmond v. J. A. Croson Co.*,[1] Justice O'Connor's position essentially determined the position that would be adopted by the Court as an institution. In *Croson*, Justice O'Connor seemed to indicate that she would generally be very hostile to race-based affirmative action programs.[2] However, in 2003, in the University of Michigan affirmative action cases—*Grutter v. Bollinger*[3] and *Gratz v. Bollinger*[4]—she showed a much greater willingness to countenance such programs.[5]

This Article will trace the evolution of Justice O'Connor's analysis of race-based affirmative action and critique her reasoning in *Grutter* and *Gratz*. The Article will begin by describing the approach outlined by Justice Lewis F. Powell, Jr. in *Regents of the University of California v. Bakke*,[6] which established the benchmark against which subsequent affirmative action decisions have been measured.[7] The Article will then describe the arguments made by Justice

[+] Distinguished Professor of Law, Rutgers (Camden).

1. 488 U.S. 469 (1989).
2. *Id.* at 493–94.
3. 539 U.S. 306 (2003).
4. 539 U.S. 244 (2003).
5. *See infra* notes 64–76 and accompanying text.
6. 438 U.S. 265 (1978).
7. *Grutter*, 539 U.S. at 323 ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

O'Connor in the affirmative action cases that came before her, and conclude that the positions she ultimately took in the University of Michigan affirmative action cases were unsound in theory and created undesirable practical consequences.

II. PRELUDE: THE *BAKKE* DECISION

The battle lines over affirmative action in education had been drawn well before Justice O'Connor came to the Court in 1981. At the time of her appointment, Justice Powell's 1978 opinion in *Bakke* was the starting point for most discussions of the issue.[8] *Bakke* was a challenge to the admissions policy of the Medical School of the University of California at Davis, which reserved sixteen of the one hundred spaces in each entering class for members of underrepresented minority groups (URMs).[9] Four Justices would have applied an intermediate level of scrutiny and concluded that the Davis Medical School plan was constitutionally unobjectionable.[10] At the same time, four other Justices would have eschewed discussion of the constitutional issue altogether, instead declaring that the plan violated Title VI of the Civil Rights Act of 1964.[11]

This division left Justice Powell with the balance of power.[12] After concluding that the statutory requirements of Title VI were coextensive with the commands of the Equal Protection Clause,[13] Justice Powell began his analysis of the constitutional issue by arguing that any classification based on race was subject to strict scrutiny.[14] Thus, he asserted that the Davis Medical School plan could only pass constitutional muster if it served a state "purpose or interest [that was] both constitutionally permissible and substantial, and that [the] use of the classification [was] 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."[15]

Against this background, Justice Powell considered a number of different interests that might have been served by the affirmative action program. He rejected the desire to achieve racial balance in the medical school class per se as insufficient on its face, and did not approve an interest in redressing past societal discrimination.[16] While conceding that improving the delivery of health care services to underserved populations might in some circumstances be sufficient to support a racial classification, Justice Powell observed that the record did not

8. *Id.*

9. *Bakke*, 438 U.S. at 269–70, 275.

10. *Id.* at 324, 358–59, 362, 379 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (explaining the application of intermediate scrutiny and concluding that the admission program should be upheld).

11. *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part).

12. *See Grutter*, 539 U.S. at 322–23 (noting that Justice Powell's opinion was the only holding for the Court in *Bakke* because of the split among the other Justices).

13. *Bakke*, 438 U.S. at 283–87.

14. *Id.* at 290–91, 305.

15. *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721–22 (1973)).

16. *Id.* at 307–10.

contain any evidence that suggested the Davis Medical School's plan actually served that interest.[17]

By contrast, Justice Powell did view the Davis Medical School's plan as one that promoted the school's interest in maintaining a diverse student body.[18] In characterizing this interest as compelling for constitutional purposes, he observed that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."[19] In addition, he asserted that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[20]

At the same time, Justice Powell rejected the university's claim that the reservation of a specific number of places for URMs was either necessary or even the most effective means of serving the interest in diversity.[21] Instead, he asserted that the university could achieve its objective by considering race as simply one factor in a process that gave individualized consideration to the diversity claims asserted by each applicant, thereby allowing persons of all races to compete for all seats in the entering class.[22] He specifically singled out the policy adopted to govern admission to Harvard College, which explicitly analogized the importance of admitting URMs to that of admitting students from Idaho.[23] Thus, although concluding that race could be given some consideration in the admissions process, Justice Powell also found that the Davis plan did not pass constitutional muster. Because the other Justices were evenly split, these conclusions became the judgment of the Court as a whole.

In the wake of the *Bakke* decision, colleges and universities rushed to conform their affirmative action programs to the standards enunciated by Justice Powell.[24] Formally, at least, the idea of considering the applications of URMs in a separate process became anathema, and individualized consideration became the watchword.[25] Admissions officers who had hitherto spoken almost exclusively in the language of redressing past discrimination suddenly discovered that the *real* reason to increase the number of URMs who were admitted was to achieve the

17. *Id.* at 310–11.

18. *Id.* at 315.

19. *Id.* at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

20. *Id.* at 313 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

21. *Id.* at 315–16.

22. *Id.* at 317.

23. *Id.* at 316.

24. *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (observing that many universities modeled their admissions programs on Justice Powell's opinion in *Bakke*).

25. *See, e.g.*, Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 577 (2000) ("[B]ecause of Justice Powell's emphasis on the almost unique legitimacy of 'diversity' as a constitutional value, it has become the catchword—indeed, it would not be an exaggeration to say 'mantra'—of those defending the use of racial or ethnic preferences.").

educational benefits of diversity.[26] These developments formed the backdrop for Justice O'Connor's entrance into the fray.

III. JUSTICE O'CONNOR AND AFFIRMATIVE ACTION FROM *WYGANT* THROUGH *ADARAND*

Wygant v. Jackson Board of Education[27] was Justice O'Connor's first encounter with the constitutional problems raised by race-based affirmative action.[28] There the Court was faced with a union contract, which provided generally that layoffs of teachers should be made in reverse order of seniority, but at the same time prohibited the local school board from reducing the percentage of minority teachers in the workforce.[29] The latter provision was challenged by nonminority teachers who were laid off despite having greater seniority than African American teachers who were retained.[30]

Justice O'Connor was one of five Justices who concluded that the affirmative action provision was unconstitutional. She joined the portions of Justice Powell's plurality opinion that both reaffirmed the applicability of strict scrutiny to all race-based classifications[31] and asserted that neither past societal discrimination nor the need to provide role models was a constitutionally sufficient justification for affirmative action programs.[32] In her concurring opinion, Justice O'Connor also emphasized that the "layoff provision [wa]s not 'narrowly tailored' to achieve its asserted remedial purpose" because the provision acted to maintain levels of minority hiring set by a hiring goal that had no demonstrable relationship to the remedying of employment discrimination.[33]

However, Justice O'Connor also seemed to indicate that she would countenance some affirmative action plans. She implicitly embraced Justice Powell's view that advancing racial diversity was a compelling governmental interest for educational institutions[34] and further suggested that the Court might well view other interests as "sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."[35] Moreover, Justice O'Connor explicitly rejected the contention that remedial racial classifications must be based on a formal determination that the government actor had engaged in intentional discrimination, concluding instead that the implementation of a race-conscious

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26. *See id.*

27. 476 U.S. 267 (1986).

28. Jennifer R. Byrne, Comment, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619, 629 (1998).

29. *Wygant*, 476 U.S. at 269–70 (plurality opinion).

30. *Id.* at 272.

31. *Id.* at 285–86 (O'Connor, J., concurring).

32. *Id.* at 288.

33. *Id.* at 293–94.

34. *Id.* at 286.

35. *Id.*

plan required only "a firm basis for believing that remedial action is required."[36] In short, as Justice Powell had done in *Bakke*, Justice O'Connor in *Wygant* embraced a theory of strict scrutiny that was significantly less than fatal in fact.

In 1988, Justice O'Connor moved to center stage in the struggle over affirmative action in *City of Richmond v. J.A. Croson Co.*[37] *Croson* was a challenge to a Richmond city ordinance that required prime contractors on city projects to subcontract at least thirty percent of the work to enterprises controlled by underrepresented minorities.[38] Justice O'Connor spoke for the five Justices who concluded that the ordinance was unconstitutional.[39]

The tone of Justice O'Connor's opinion in *Croson* was somewhat different from that of her concurrence in *Wygant*. After reiterating the view that race-based affirmative action plans were to be subjected to strict scrutiny,[40] she turned to an analysis of the specific state interests asserted in defense of the ordinance.[41] She conceded that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[42] But at the same time, observing that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight,"[43] she stated that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy,"[44] and that "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond."[45] Because operating as a contractor in the skilled trades required more than "minimal training," Justice O'Connor also rejected the notion that an inference of a pattern of intentional discrimination could be drawn from the underrepresentation of the minority population at-large, absent data for "minority participation in subcontracting."[46]

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36. *Id.*
37. 488 U.S. 469 (1989).
38. *Id.* at 477.
39. *Id.* at 511.
40. *Id.* at 493–98.
41. *Id.* at 500.
42. *Id.* at 492.
43. *Id.* at 500.
44. *Id.* at 498.
45. *Id.* at 499.
46. *Id.* at 501–03.

Thus, she concluded:

> [T]he city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.[47]

Although not categorically barring the use of race-based affirmative action programs by the government, on its face Justice O'Connor's opinion in *Croson* seemed to suggest that such programs would almost never pass constitutional muster. Indeed, despite his expressed preference for a rule that would have invalidated all race-based classifications that were not necessary remedies for victims of past racial discrimination, Justice Anthony M. Kennedy was content to join the opinion, in large measure because, in his view, the strict scrutiny standard enunciated in the opinion "will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort."[48] Soon, however, Justice O'Connor herself would revert to the less jaundiced view of affirmative action programs that she had expressed in *Wygant*.

Six years later, Justice O'Connor's renewed tolerance for affirmative action programs was evident in her opinion in *Adarand Constructors, Inc. v. Pena*.[49] In *Adarand*, she spoke for the Court in overruling the 1990 decision in *Metro Broadcasting, Inc. v. FCC*,[50] concluding that strict scrutiny applied to race-based affirmative action programs adopted by the federal government, as well as state and local authorities.[51] Nevertheless, she took pains to once again reject the notion that the level of scrutiny she endorsed was "strict in theory, but fatal in fact,"[52] observing that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[53] Further, she asserted that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[54]

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47. *Id.* at 505–06.

48. *Id.* at 518–19 (Kennedy, J., concurring in part and concurring in the judgment).

49. 515 U.S. 200 (1995).

50. 497 U.S. 547 (1990).

51. *Adarand*, 515 U.S. at 227.

52. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)).

53. *Id.*

54. *Id.*

These observations foreshadowed Justice O'Connor's treatment of the University of Michigan affirmative action cases.

IV. *GRATZ* AND *GRUTTER*

In *Gratz* and *Grutter*, the Court considered the constitutionality of the use of race in the admissions process at the University of Michigan.[55] While *Gratz* was a challenge to the affirmative action program in undergraduate admissions,[56] *Grutter* focused on admissions to the Law School.[57] On their faces at least, the two processes were quite different in operation. The undergraduate admissions process was based on a pure numerical calculation, in which being a member of a URM was worth 20 of the 100 points that guaranteed admission on a 150-point scale.[58] By contrast, the Law School purported to consider race only as one factor in a holistic process, "the hallmark of [which] is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"[59] Against this background, the Court found the affirmative action program in *Gratz* unconstitutional,[60] but rejected the constitutional attack on the program in *Grutter*.[61] In each case, the Justices divided five to four, with Justice O'Connor being the only Justice who joined the majority in both cases.[62]

In her opinion for the Court in *Grutter*, Justice O'Connor observed that Justice Powell's opinion in *Bakke* had "served as the touchstone for the constitutional analysis of race-conscious admissions policies," and had been relied upon by colleges and universities in designing such programs.[63] Noting that the Law School relied on the need for a diverse student body to justify its consideration of race, Justice O'Connor concluded that the Court should defer to the Law School's assertion that racial "diversity is essential to its educational mission."[64] She distinguished the effort to enroll a "critical mass" of URMs from "outright racial balancing," asserting that the former was defined by reference to the educational benefits that diversity is designed to produce.[65]

Justice O'Connor's opinion identified a number of these putative benefits. Drawing heavily on the briefs filed in support of the law school plan, she asserted

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55. Grutter v. Bollinger, 539 U.S. 306, 311 (2003); Gratz v. Bollinger, 539 U.S. 244, 249–50 (2003).

56. *Gratz*, 539 U.S. at 249–50.

57. *Grutter*, 539 U.S. at 311.

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

59. *Grutter*, 539 U.S. at 315.

60. *Gratz*, 539 U.S. at 275–76.

61. *Grutter*, 539 U.S. at 334–35.

62. *See Grutter*, 539 U.S. at 311, 344, 346, 349, 378, 387; *Gratz*, 539 U.S. at 249, 276, 282, 291, 298.

63. *Grutter*, 539 U.S. at 323.

64. *Id.* at 328.

65. *Id.* at 329–30.

that "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds'";[66] that an education at a law school with a substantial representation of URMs "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'";[67] that the military in particular relied on selective educational institutions to produce candidates for an officer corps that is "'*both* highly qualified *and* racially diverse'";[68] that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized";[69] that such participation requires training at institutions that are themselves racially diverse; and that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership [such as that provided by law schools] be visibly open to talented and qualified individuals of every race and ethnicity."[70]

Having concluded that the use of race in the law school plan served a compelling governmental interest, Justice O'Connor then turned to the question of whether the plan was "'specifically and narrowly framed to accomplish that purpose.'"[71] She concluded that this requirement was satisfied as well.[72] Analogizing the operation of the plan to the Harvard system that Justice Powell had praised so lavishly in *Bakke*, Justice O'Connor focused on a number of different factors in making this determination.[73] She noted that the *Grutter* plan was not a rigid quota,[74] and rather than giving a fixed weight to membership in an underrepresented racial group, the plan provided for "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[75] She also contended that "like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[76]

Justice O'Connor also asserted that, in order to pass constitutional muster, "race-conscious admissions policies must be limited in time."[77] She found that the *Grutter* plan passed this test because "[w]e take the Law School at its word

66. *Id.* at 330.
67. *Id.*
68. *Id.* at 331.
69. *Id.* at 332.
70. *Id.*
71. *Id.* at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).
72. *Id.* at 334.
73. *Id.* at 334–35.
74. *Id.* at 335–36.
75. *Id.* at 337.
76. *Id.*
77. *Id.* at 342.

that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."[78] She observed that "[i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education" and opined that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[79]

Justice O'Connor's generous treatment of the law school affirmative action program in *Grutter* stands in marked contrast to her harsh assessment of the undergraduate program in *Gratz*.[80] She found the award of a predetermined numerical credit for being a URM to be constitutionally unacceptable.[81] Noting that credit for other diversity-related factors was limited to a maximum credit of five points—one quarter of the amount awarded to each URM—she complained that "the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed."[82] Thus, in her view, the undergraduate affirmative action program failed the requirement that it be narrowly tailored to serve the compelling governmental interest in achieving diversity.

V. JUSTICE O'CONNOR'S APPROACH: AN ASSESSMENT

Justice O'Connor's treatment of the issues presented by the University of Michigan affirmative action plans is unsatisfying on a variety of different levels.[83] From a purely doctrinal perspective, her reasoning is often simply muddled. For example, she purports to subject the Law School plan to strict scrutiny[84]—a standard of review whose hallmark is the idea that the government bears the burden of demonstrating the need for its policy. Yet, almost in the next breath, Justice O'Connor declares that "[t]he Law School's *educational* judgment that [racial] diversity is essential to its educational mission is one to which we defer"[85]—a posture that, despite her protestations to the contrary, is inconsistent with the very idea of strict scrutiny.

Similarly, one of the most striking features of the *Grutter* opinion is its apparent failure to distinguish between different potential justifications for the pursuit of diversity. Justice O'Connor's basic thesis is that the Law School could

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78. *Id.* at 343.

79. *Id.*

80. *See* Gratz v. Bollinger, 539 U.S. 244, 276–77, 279–80 (2003) (O'Connor, J., concurring).

81. *Id.* at 279–80.

82. *Id.* at 279.

83. For other similar criticisms of Justice O'Connor's approach, see, for example, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1901–02 (2006), and Peter H. Schuck, *Reflections on* Grutter 1–2 (Yale Law Sch. Pub. Law & Legal Theory Res. Paper Series, Res. Paper No. 61, 2003), *available at* http://papers.ssrn.com/abstract=430606.

84. *Grutter*, 539 U.S. at 326.

85. *Id.* at 328 (emphasis added).

rely on its compelling interest in enrolling a "critical mass" of minority race students in order to gain the "educational benefits that diversity is likely to produce" by creating a "classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting."[86] In this passage, like Justice Powell before her, Justice O'Connor appealed to the importance of the *inputs* that URMs brought to the law school—the idea that their presence improves the quality of the educational experience for all students at the law school.

At the same time, however, she sought to support the claim of educational benefits by reference to *outputs*—the simple fact that, by its nature, affirmative action programs at institutions such as the University of Michigan Law School would provide URMs with credentials that would in turn be useful in helping them obtain prestigious positions after they graduated. In so doing, she relied on theories that had either explicitly or implicitly been rejected in prior case law. For example she invoked an amicus brief that declared "'a highly-qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security,'"[87] although Justice Powell had concluded in *Bakke* that increasing the representation of URMs in the profession did not constitute a compelling governmental interest.[88] In addition, when she declared that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders,"[89] and "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,"[90] Justice O'Connor came perilously close to endorsing the "role model" theory that both the majority opinion and she herself had denigrated in *Wygant*.[91] Yet Justice O'Connor showed no indication that she appreciated the tensions between her arguments and those of the earlier affirmative action cases.

Justice O'Connor's characterization of the Law School plan also obfuscated the true nature of the issues presented by *Grutter*. Taking great pains to distinguish the plan from an impermissible quota, she claimed that the plan passed constitutional muster because it did not "put [URMs] on separate admissions tracks."[92] Anyone who has had even a passing association with the admissions process at a college or university knows that this assertion beggars reality.[93] To

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86. *Id.* at 330 (internal quotation marks omitted).

87. *Id.* at 331.

88. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–07 (1978) (opinion of Powell, J.).

89. *Grutter*, 539 U.S. at 332.

90. *Id.*

91. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment).

92. *Grutter*, 539 U.S. at 334.

93. *See, e.g.*, Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 487–88 (2007) ("To achieve [student diversification], . . . selective institutions gave qualified minority applications an edge in admission. . . . [This] is an

be sure, in the wake of the decision in *Bakke*, a university administrator would have had to be either foolish or reckless to formally declare that only URMs could be admitted under programs or criteria designed to ensure "diversity." Moreover, the actual admission of a sprinkling of nonminority students through a diversity program provides additional legal camouflage. But everyone involved in the process knows that the applications of URMs are judged by an entirely different, more lenient, set of criteria than those applied to other aspirants for admission.[94]

In *Grutter* itself, the statistical evidence on this point could hardly have been clearer. An expert for the Law School testified that, if only students' grades and LSAT scores were considered, only ten-percent of URM applicants per year would have been admitted to the Law School.[95] Yet in each of the years between 1995 and 2000, no less than twenty-five percent of URM applicants were admitted.[96] Moreover, the percentage of students admitted from each underrepresented group correlated closely with the percentage of non-URMs admitted in each year.[97] Against this background, Justice O'Connor's characterization of the University of Michigan Law School program can only be ascribed to extraordinary naiveté, willful blindness, or simple disingenuousness.

The difficulties in Justice O'Connor's overall analysis of affirmative action issues become even more apparent when her analysis in *Grutter* is juxtaposed with her opinion in *Gratz*. She never explained why the Court should defer to the university administrators on the importance of diversity to the educational process, but not defer to their perception of the most appropriate means for generating that diversity. Indeed, one might easily conclude that the presumptions should be reversed, because university administrators have great experience with the admissions process and are in a particularly good position to judge the likely impact of different affirmative action programs on the dynamic of that process.

The University of Michigan approach to the integration of diversity, the more general undergraduate admissions process, exemplifies this point. On its face, the plan that was challenged in *Gratz* was a perfectly logical effort to assimilate the treatment of URMs into that process. Like that of all selective state flagship universities, the procedure of selecting the undergraduate class at the University of Michigan was almost entirely numbers driven.[98] Thus, the University generally offered admission to the students with the strongest GPA and standardized test scores in the pool of in-state applicants, as well as the students

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inevitable consequence of admission officers' growing reliance on test scores[, g]iven the lower average test scores of minority students . . . .").

94. *See id.*; *see also* Shikha Dalmia, *Legacies of Injustice*, REASON, Feb. 2008, at 33–34 ("Nearly every selective college, public and private, gives a sizeable edge to underrepresented minorities.").

95. *Grutter*, 539 U.S. at 320.

96. *See id.* at 384, tbls. 1, 2, & 3 (Rehnquist, C.J., dissenting).

97. *See id.*

98. *See* Gratz v. Bollinger, 539 U.S. 244, 253–55 (2003).

with the strongest GPA and standardized test scores in the pool of applicants from other states.[99] The difficulty was that, in the absence of some adjustment, this process would have resulted in the vast majority of URMs being denied admission.[100]

The University's solution was to determine the minimum level of qualifications that it deemed acceptable for URMs and to give a numerical plus factor, which in effect placed these URMs on par with the strongest non-URM applicants—those applicants to whom the University would normally offer admission.[101] This approach had the advantage of achieving the University's diversity goals with minimum disruption to the admissions process for all other students. Although the absolute number of non-URMs offered admission was reduced, the process by which the University compared non-URM applicants against one another remained intact.

Justice O'Connor, however, was having none of it. She asserted that, in order to be constitutional, race could only be considered in the context of a plan that provided "nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class."[102] Once again, she seemed oblivious to the practical implications of this suggestion. Even if those who were clearly accepted or rejected based on their grades and standardized test scores were excluded, Justice O'Connor's proposal on its face would entail an in-depth examination of the details of literally thousands of applications per year. Such an examination would require a massive commitment of resources, with no promise of a concomitant increase in the quality of the student body, however quality might be measured. In short, the real world effects of the approach adopted by Justice O'Connor in *Grutter* and *Gratz* are almost perverse. On one hand, she condemned the use of the simplest and most efficient method for increasing the access of URMs to higher education, and on the other provided incentives for university administrators to be disingenuous in describing the manner in which the admissions process actually functions.

The key to understanding Justice O'Connor's decision to adopt this dysfunctional approach may lie in the final paragraphs of her opinion in *Grutter*. There, as already noted, she declared that "race-conscious admissions policies must be limited in time,"[103] and

> [i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that

99. *See id.*

100. *See supra* notes 95–97 and accompanying text.

101. *Gratz*, 539 U.S. at 274.

102. *Id.* at 279 (O'Connor, J., concurring).

103. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

> 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[104]

She may have believed that, in political terms, the type of program that was at issue in *Gratz* might have been more difficult to dislodge than the more amorphous *Grutter* plan once the achievement gaps between the races had been closed.

The problem is that history tells us that Justice O'Connor's twenty-five year prediction was almost preposterously optimistic. She seemed to ascribe to a vision of race relations in America somewhat akin to the romantic liberal view that dominated "enlightened" political thought in the period between the Supreme Court's decision in *Brown v. Board of Education*[105] in 1954 and the passage of the Civil Rights Act of 1964 by Congress a decade later.[106] Many believed at that time that the problem was the existence of explicit discrimination against African Americans, and that if such discrimination could be eliminated we would all soon be living in an equal-opportunity utopia.

Of course, we were all soon disabused of that notion. Justice O'Connor is no doubt correct that, at least at the margins, some progress has been made in closing the achievement gap between URMs and other members of the society.[107] Nonetheless, the fact remains that five decades after *Brown*, four decades after the passage of the Civil Rights Act, and almost three decades after *Bakke*, no more than ten percent of the URMs applying to the University of Michigan Law School would have been offered admission in the absence of some consideration of race in the admissions process.[108] Moreover, the gap between whites and African Americans in standardized test performance shows no sign of significantly narrowing, and, in some cases, is even widening.[109] In short, the twenty-five year timeline had no basis in reality.

VI. CONCLUSION

Shortly after *Grutter* and *Gratz* were decided, one *New York Times* commentator praised Justice O'Connor for finding "the sweet spot where the American political consensus abides."[110] If this in fact was her goal, her approach

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104. *Id.* at 343 (citation omitted).

105. 347 U.S. 483 (1954).

106. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

107. Doug Lederman, *Closing the College Achievement Gap*, INSIDE HIGHER EDUC., Oct. 31, 2007, http://www.insidehighered.com/news/2007/10/31/system.

108. *Grutter*, 539 U.S. at 320.

109. *See* The Journal of Blacks in Higher Education, *A Large Black-White Scoring Gap Persists on the SAT*, http://www.jbhe.com/features/53_SAT.html (last visited Aug. 25, 2008); The Journal of Blacks in Higher Education, *The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School*, http://www.jbhe.com/news_views/51_graduate_admissions_test.html (last visited Aug. 25, 2008).

110. Bill Keller, Op-Ed., *Mr. Diversity*, N.Y. TIMES, June 28, 2003, at A15.

rested on a fundamental misconception of the role of constitutional adjudication in dealing with the issue of affirmative action. The Justices have no expertise in designing affirmative action programs. Moreover, the Court is not well placed as an institution to micromanage the myriad programs at public colleges and universities throughout the country that have been designed by the admissions officials who do have such expertise.

To be sure, if the admissions officers are pursuing a policy objective that is outlawed by the Constitution, the Court has an obligation to intervene. But Justice O'Connor quite explicitly concluded that the objective of increasing minority enrollment was not inconsistent with constitutional norms. In such a situation, the Justices at the very least are under an obligation to provide clear guidance to those who will allow admissions officials to perform their function candidly and in good faith, and that will reduce the transaction costs associated with potential litigation.

Measured against this yardstick, the approach adopted by Justice O'Connor—like that of Justice Powell before her—is a miserable failure. By constitutionalizing a Platonic ideal of a "fair" admissions process, Justice O'Connor forces admissions officials to distort the real world process and to hide what they are actually doing by parroting a fictional script that has been prepared for them by the Court. Moreover, her formulation of the appropriate test only encourages continuing litigation over the constitutionality of affirmative action programs. In short, once having concluded that the Constitution allows the state educational authorities to consider race in the context of a bona fide affirmative action program, Justice O'Connor should have simply stayed her hand and allowed admissions officials to do their jobs.