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THE CHRONICLE OF HIGHER EDUCATION

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Are Landmark Court Decisions All That Important?

By MICHAEL KLARMAN

Since June, when the Supreme Court upheld the use of racial preferences in university admissions in *Grutter v. Bollinger*, people on both sides of the affirmative-action issue have been scrutinizing the ruling and planning how to respond. What has been largely overlooked, however, is the broader context in which important Supreme Court decisions are made and what history might tell us about the ultimate impact of those decisions. What, if anything, will be the lasting consequences of *Grutter*?

A review of earlier rulings provides needed perspective, demonstrating that Supreme Court decisions generally reflect the social and political context of the times. The justices did not extend the Equal Protection Clause of the 14th Amendment to cover sex discrimination until 1971, after the rise of the women's movement. The court interpreted the Establishment Clause of the First Amendment to constrain public displays of religiosity only after the influence of America's unofficial Protestant establishment had significantly waned, around the middle of the 20th century. During the Red scares after the First and Second World Wars, the justices interpreted free-speech guarantees to permit the persecution of political leftists. The court shrank the Fourth Amendment's ban on "unreasonable searches and seizures" during the War on Drugs of the 1980s and 1990s. Today's campaign against terrorism has led lower courts to limit traditional civil rights and civil liberties.

This pattern does not mean that social and political context necessarily dictates the outcome of particular constitutional controversies. On many such issues, public opinion is split down the middle, and the justices could plausibly reach more than one outcome. That the court could not have realistically created an abortion right before the women's movement does not mean that *Roe v. Wade* (1973) had to be decided as it was. That the Warren Court's criminal-procedure revolution depended on shifting social attitudes toward race and poverty does not mean that rulings such as *Miranda v. Arizona* (1966) had to come out as they did.

The court's racial jurisprudence confirms the importance of historical

context to constitutional interpretation. American race relations reached a post-Civil War nadir in the late 19th century. On average, 100 African-Americans a year were lynched in the 1890s. The Republican Party abandoned its traditional commitment to blacks' civil and political rights. Northern whites largely acquiesced to Southern whites' reasserting control over their own race relations. Most white Americans concluded that enfranchising blacks in the 15th Amendment had been a mistake. Reflecting that context, the court upheld racial segregation, black disfranchisement, and the exclusion of blacks from juries.

World War II proved to be a watershed in American race relations. African-American soldiers returned from fighting for democracy overseas to demand their own democratic rights, and they became the vanguard of the modern civil-rights movement. The war afforded blacks unparalleled opportunities for economic and political advancement. Millions of white Americans, repulsed by the Nazi Holocaust, re-evaluated their own racial (and religious) biases. The ensuing cold war inspired Americans to reform racial practices to rebut Soviet propaganda aimed at convincing third-world nations that democratic capitalism was tantamount to white supremacy. *Brown v. Board of Education* (1954), which invalidated racial segregation in public schools, was decided in this setting.

On affirmative action, the court's jurisprudence is consistent with this paradigm of constitutional interpretation. Public opinion has always been divided on affirmative action, and so have the justices been. In *Regents of the University of California v. Bakke* (1978), Justice Lewis F. Powell imposed a compromise solution, sustaining the use of race in university admissions while repudiating quotas. In subsequent decisions the court gradually circumscribed affirmative action by imposing stringent conditions on its use. Personnel changes made the court more conservative through the Reagan and Bush administrations, and its stance toward affirmative action grew more skeptical. In light of that trend, the recent decision in *Grutter v. Bollinger* was somewhat surprising.

Justices' votes in affirmative-action cases have followed fairly predictable political lines. The three most conservative justices -- William H. Rehnquist (the chief justice), Antonin Scalia, and Clarence Thomas -- have never voted to sustain an affirmative-action plan but rather have insisted on a nearly absolute ban on government race-consciousness. The four most liberal justices -- John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer -- have rarely (or never) voted to invalidate an affirmative-action plan. Most court watchers accurately predicted that the result in the University of

Michigan cases would turn on the votes of Justice Sandra Day O'Connor and, to a lesser extent, Justice Anthony M. Kennedy.

Grutter reveals that O'Connor probably changed her mind about affirmative action over the past two decades. Before *Grutter*, she had never voted to sustain a race-based affirmative-action plan, though she had explicitly noted that such policies might be acceptable under certain stringent conditions. Based on her earlier opinions and votes, one might easily have predicted that O'Connor would invalidate the admissions policies of the University of Michigan on the grounds that they relied on the impermissible stereotype that race correlates with diversity of perspective and that they failed to adequately consider nonracial alternatives for securing a diverse student body.

But O'Connor is a classic conservative, who values preservation of the status quo. In the early 21st century, multiculturalism and multiracialism have become entrenched features of American life. Predicting such a development even 20 years ago would have been difficult. Yet probably in response to the growing racial and ethnic diversity of the nation, and possibly in response to globalization forces as well, most Americans have come to accept that all important social, political, and economic institutions should "look like America." Friend-of-the-court briefs filed in the University of Michigan cases symbolized the extent to which even relatively conservative American institutions such as Fortune 500 companies and the U.S. military have embraced this multiracial vision. Those briefs warned the justices that America's economic success and military security depended on the continued use of affirmative action.

In *Grutter*, O'Connor declined to put the nation's elite universities at risk of becoming lily white. If most Americans assume that African-Americans should be on the Supreme Court and in the cabinet, why should they not be at the University of Michigan Law School? As O'Connor put it in *Grutter*: "In 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."

So how important are Supreme Court decisions generally, and how important is *Grutter* in particular? Court rulings probably matter less than most lawyers believe they do. For one thing, court decisions are not self-enforcing. They can be evaded or sometimes even defied, especially when resistance is intense, when most individuals responsible for enforcing them are strongly opposed, and when political actors are unenthusiastic about carrying them out. Many of the court's early civil-rights decisions were utterly inconsequential. Rulings

that invalidated residential segregation ordinances and the judicial enforcement of racially exclusionary land covenants had almost no effect on segregated housing patterns. A full decade after *Brown*, just one black child in every hundred in the South attended a desegregated school.

To be sure, court decisions can have other intangible effects, such as increasing an issue's salience, educating opinion, inspiring supporters, or mobilizing opponents. However, even those intangible consequences are easily exaggerated. Conventional wisdom notwithstanding, *Brown* neither educated many whites to abandon white supremacy, nor inspired many blacks to commence direct-action street protest.

Grutter's direct effects are likely to be limited. The ruling permits universities to continue existing affirmative-action plans, perhaps with slight alteration to accommodate the invalidation of point systems in *Grutter's* companion case, *Gratz v. Bollinger*. Evaluating the impact of *Grutter* requires speculating on how efficacious a contrary ruling would have been. Proponents of affirmative action have insisted that terminating race-based preferences would dramatically decrease racial diversity on college campuses. But their incentive to exaggerate the impact of such a ruling is clear.

That a contrary decision in *Grutter* would have been very consequential seems unlikely. As Southern whites convincingly demonstrated after *Brown*, court rulings can be evaded in myriad ways. Much as the primary enforcers of *Brown* -- Southern school boards -- were passionately opposed to the court's ruling, so would the primary enforcers of a contrary decision in *Grutter* -- university admissions officers -- have been passionately opposed to its enforcement. Southern school boards used pupil-placement policies that employed multiple factors to keep segregation largely intact while purporting to comply with *Brown*; so could university admissions officers have used multifactored admissions policies to disguise the continued use of racial preferences had *Grutter* been decided differently. After *Brown*, Southern school boards capitalized on residential segregation to preserve racial separation in schools while dismantling de jure segregation; after a contrary decision in *Grutter*, university administrators could have capitalized on residential segregation to preserve racial diversity -- as under the Texas plan that guarantees university admission to students in the top 10 percent of each high-school graduating class.

This is not to say that a contrary ruling in *Grutter* would have made no difference, only that it would probably have mattered less than

affirmative-action proponents predicted. As Justice Thomas pointed out in his *Grutter* dissent, Boalt Law School has a higher percentage of minority students today than it did before California's Proposition 209 barred race-conscious admissions policies. University admissions officers will naturally be relieved that the court has permitted them to do openly what they would otherwise have been inclined to do clandestinely. But it is hard to believe that the racial diversity of university student bodies would differ greatly under the two scenarios.

What intangible consequences might *Grutter* have? That the decision will persuade many skeptics of affirmative action to change their minds seems unlikely. Court rulings rarely have such an educational effect. *Roe v. Wade* (1973) apparently did not influence many Americans to change their abortion views, as the country remains divided on abortion, much as it was three decades ago. *Bowers v. Hardwick* (1986), which sustained the criminalization of homosexual sodomy even among consenting adults in private, has not persuaded many Americans to agree with the court; rather, public opinion has gradually repudiated *Bowers*, which probably explains the court's decision to overrule it in *Lawrence v. Texas* (2003). Recent opinion polls that reveal public support for capital punishment at 70 percent or higher suggest that *Furman v. Georgia* (1972), which invalidated arbitrary enforcement of the death penalty and hinted at its abolition, has not persuaded many Americans.

Even *Brown* did not impel many Americans to abandon their belief in white supremacy. Most white Southerners denounced the decision as "shocking, outrageous, and reprehensible." Most white Northerners endorsed it, but more because they already agreed with its principles than because they were educated by the decision. It was the civil-rights movement and the street confrontations of the 1960s, not *Brown*, that profoundly influenced the racial attitudes of many white Americans. Citizens have generally felt free to disagree with the Supreme Court and to make up their own minds about moral controversies. *Grutter* seems as unlikely to exert significant educational influence as other landmark court rulings have been.

Might *Grutter* instead generate a backlash, mobilizing opposition to affirmative action? Some other prominent court decisions have had such an effect. *Furman* apparently mobilized support for the death penalty by threatening to abolish it; within four years, 35 states had amended their death-penalty statutes in the hope of satisfying the justices' constitutional qualms. *Roe* mobilized right-to-life opposition that had not previously played a significant role in American politics. *Brown* crystallized Southern whites' resistance to racial change, propelling Southern politics sharply to the right, silencing racial

moderates, and rewarding extremist politicians who encouraged violence.

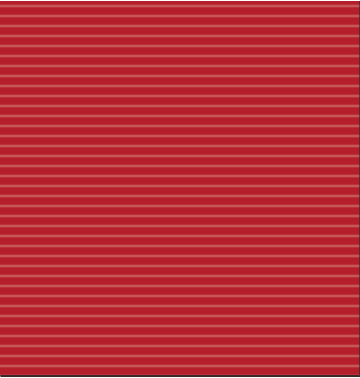
Court decisions have generated backlashes when they mandated change faster than public opinion was prepared to tolerate. In the 1950s, many Southern whites were willing to accept increases in black voter registration and the equalization of black schools, but they drew the line at the race-mixing of young schoolchildren. Unlike such backlash-inducing decisions, *Grutter* reaffirms the status quo, rather than commanding change. Thus it is no more likely to incite a backlash than were the affirmative-action policies that the ruling vindicated.

That a justice as conservative as Sandra Day O'Connor would validate an affirmative-action plan that weighed race as heavily as did that of the University of Michigan Law School is striking. *Grutter* reveals how deeply entrenched the notion that all of our social, political, and economic institutions should "look like America" has become. Justice O'Connor's conservative commitment to preserving the status quo trumped her ideological aversion to race-conscious government remedies. That *Grutter* is a striking result, however, is not to say that it is likely to be very consequential. University admissions officers are now free to do somewhat openly -- not too openly, given *Gratz* -- what they would have likely done anyway. That a contrary ruling in *Grutter* would have significantly eroded racial diversity on college campuses is far from clear. Nor is *Grutter* likely to educate opinion in favor of affirmative action or to mobilize opposition to it.

Race-based affirmative action in university admissions is likely to be with us for many years to come. O'Connor's opinion in *Grutter* ends by voicing an expectation that affirmative action will no longer be necessary in 25 years. Whether the court will follow through on this delayed threat to terminate affirmative action, and whether such policies survive long enough to make execution of that threat necessary, will depend on changes in social attitudes and court composition that are difficult to predict.

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