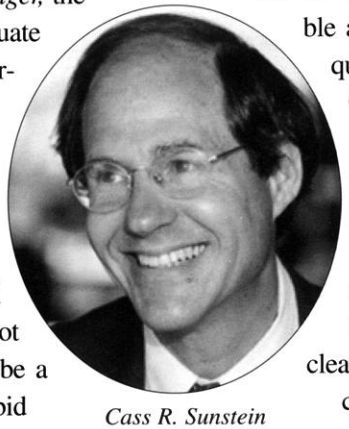
Affirmative Action in Higher Education: Why *Grutter* Was Correctly Decided

by Cass R. Sunstein

***Editor's Note**: A major constitutional scholar contends that conservatives on the Court failed to see that affirmative action in higher education is an important and constitutionally protected institutional liberty.*

IN *Grutter v. Bollinger,* the Supreme Court upheld an affirmative action program at the University of Michigan Law School. In *Gratz v. Bollinger,* the Supreme Court struck down the undergraduate affirmative action program at the same university.

I believe that *Grutter* was correctly decided and that *Gratz* was a big mistake. The reason has everything to do with the importance of judicial restraint — an idea that should have special power in the context of educational policy, which ought to be set by educators, not judges. Affirmative action may or may not be a good idea, but the Constitution does not forbid it. Federal judges should allow educational institutions, subject as they are to political constraints, to reject or embrace affirmative action as they see fit. It is ironic indeed that conservatives, who have been rightly skeptical of judicial activism, now embrace an extreme form of judicial activism in their attack on affirmative action.



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To understand my position, we need to back up a bit. In higher education, the basic constitutional framework was established in the famous *Bakke* case, decided in 1978. The Court's ruling was set out by Justice Lewis Powell, who broke a tie between four justices who wanted to require color-blindness and four justices who would have permitted colleges and universities a great deal of room to maneuver in their affirmative action programs. Justice Powell acknowledged that racial diversity was a legitimate and even compelling interest for schools of higher education to pursue. He pointed to the need for courts to respect reasonable choices by educators. But he insisted that diversity could, and must, be achieved through methods that were flexible and that avoided racial rigidity. In his view, a quota system was constitutionally unacceptable. On the other hand, a university could consider race "as a factor" alongside other factors. Hence colleges and universities could give a boost to African-American candidates — so long as every applicant received individual consideration.

For decades, then, the law was reasonably clear. Quota systems would be struck down, but colleges and universities could consider race as a plus. The hard questions arose only when a program did not clearly fall within one of Justice Powell's two categories.

In the last decade and more, however, the Supreme Court has been increasingly skeptical of affirmative action programs, and it has struck down a number of those programs. There are many ironies here, especially because the attack on affirmative action has been led by those ordinarily characterized as conservatives. The two leading conservatives on the Court, Justices Antonin Scalia and Clarence Thomas, claim to be committed to "originalism" as a method of constitutional interpretation. For originalists, the meaning of the Constitution is settled by asking what the document meant when it was originally ratified. And to their credit,

"Affirmative action was accepted by those who ratified the equal protection clause of the Fourteenth Amendment."

Justices Scalia and Thomas do usually practice the method that they preach. But in the context of affirmative action, originalism apparently goes down the drain. A great deal of historical work suggests that affirmative action was accept-

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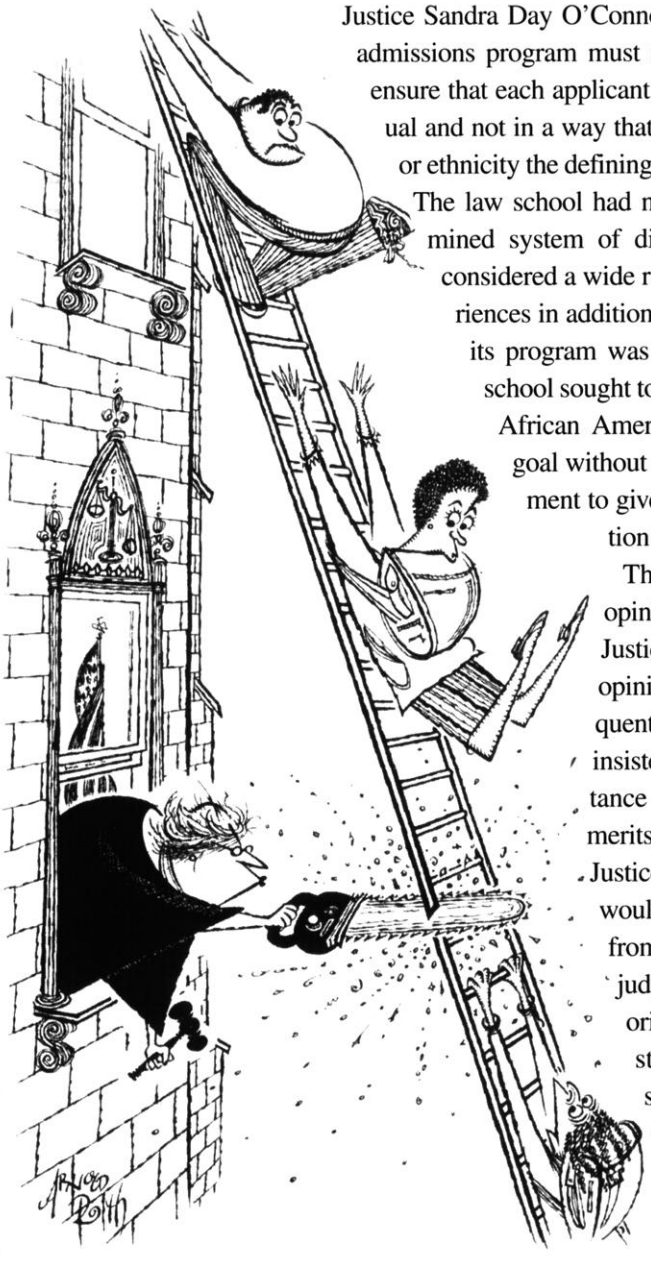
ed by those who ratified the equal protection clause.* In the aftermath of the Civil War, Congress engaged in numerous race-conscious efforts, singling out African Americans for special help. Perhaps the historical work is mistaken; but Justices Scalia and Thomas have not even bothered to investigate it.

In any case many members of the current Court claim to be committed to judicial restraint. Those who believe in judicial restraint are reluctant to disturb the practices of state and local authorities unless the Constitution clearly requires them to do so. But in the context of affirmative action, the Court has shown little reluctance to forbid states and localities from doing what they would like to do. In the context of affirmative action, restraint, along with originalism, has been abandoned. (Note that the Constitution does not apply to the acts of private universities, which are governed by civil rights laws instead; the Constitution is applicable only to public institutions and public universities.)

Thus the stage was set for *Grutter* and *Gratz*, the Court's first real encounter with affirmative action in higher education since *Bakke*. Essentially the Court reaffirmed the line drawn by Justice Powell: flexible affirmative action programs are permissible, but rigid ones are not. In *Grutter*, the Court upheld the law school's program, concluding that it was sufficiently flexible. The University of Michigan Law School used race as a "plus," but its program was "narrowly tailored," in the sense that the law school imposed no quota, reserved no places, and instead ensured individualized consideration of every applicant. Writing for the Court, Justice Sandra Day O'Connor said that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his application." The law school had no mechanical or predetermined system of diversity "bonuses," and it considered a wide range of qualities and experiences in addition to race. For these reasons, its program was acceptable. True, the law school sought to obtain a "critical mass" of African Americans, but it pursued this goal without compromising its commitment to give individualized consideration to every applicant.



The principal dissenting opinion in *Grutter* came from Justice Clarence Thomas. His opinion was exceptionally eloquent, not least because of its insistence on the moral importance of considering people's merits, not their skin color. But Justice Thomas' eloquent words would be far more convincing from a politician than from a judge who is committed to originalism and judicial restraint. Justice Thomas stresses the views of only one historical figure: Frederick Douglass. Of course Douglass was a great man, and his views are entitled to great respect. But to say the least, Douglass was not an author of the Fourteenth Amendment of the Constitution; and for an originalist, as Justice Thomas purports to be, Frederick Douglass should have little authority.

Things are worse still. In his *Grutter* dissent, Justice Thomas calls for an extraordinary exercise in judicial activism — simply because his color-blindness principle would invalidate the voluntary practices of countless educational institutions in numerous states and localities. Worst of all, Justice Thomas does not defend his color-blindness principle by reference to history, even though a great deal of

Illustration: Arnold Roth.

*See Jed Rubenfeld, "Affirmative Action," 107 Yale L.H.J. 427, 430-32 (1997); Eric Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," 71 Va. L. Rev. 753 (1985).

Conservative Panel Attacks the *Grutter* Decision

Conservatives, almost without exception, view Justice O'Connor's recent ruling upholding the affirmative action policies at the University of Michigan School of Law as a profound subversion of the constitutional order of the United States.

In a symposium entitled "Has the Supreme Court Gone Too Far?" appearing in the October issue of the conservative journal *Commentary*, former Supreme Court nominee Robert H. Bork writes: "Judicial invention of new and previously unheard-of rights accelerated over the past half-century and has now reached warp speed. The list of activist decisions constitutionalizing the left-liberal cultural agenda is lengthy."

Referring to the *Grutter* ruling, Robert L. Bartley, now columnist for *The Wall Street Journal,* wrote that Justice O'Connor's stance is "ludicrous." Bartley goes on to conclude that the Court's majority admits that "we are issuing a decision in which we understand the equal protection clause of the Fourteenth Amendment prohibits the policies we hereby sanction. But because of our view of the current social situation, this part of the Constitution is hereby suspended. If I had invested my life in the law, I would find this, if not horrifying, at least disgusting."

historical scholarship suggests that the framers and ratifiers of the Fourteenth Amendment did not mean to condemn efforts to assist African Americans as such. Justice Thomas and his fellow dissenters are certainly entitled to say that affirmative action is bad policy. But they should not read their own views into the Constitution. The Court's majority was correct, in *Grutter*, to allow the law school to continue with its program.

"What's wrong with explicitness? Why does the Constitution require admissions offices to hide the ball?"

In *Gratz*, the Court said that the undergraduate program at the University of Michigan was invalid because it was too inflexible. Under that program, applicants were given specified "points" toward admission. A student with 100-150 points would definitely be admitted; those with 75-99 remained in contention. Points could be awarded based on standardized test scores, high school grades, alumni relationship, personal essay, strength of high school, and more. An applicant who came from an underrepresented minority group would be awarded 20 points toward admission. Nonminority students would receive 20 points for athletic ability, socioeconomic disadvantage, or attendance at a socioeconomically disadvantaged high school. Applicants would also receive 10 points for being residents of Michigan, 5 for leadership and service, 5 for artistic talent, and so on.

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The Court's majority objected that this point system failed to provide individualized consideration to each applicant. Whether or not the system was a quota, the Court complained, it "automatically distributes 20 points to every single applicant from" a minority group. In the Court's view, this automatic distribution of points has the effect of making the factor of race a decisive one "for virtually every minimally qualified underrepresented minority applicant." The University of Michigan contended that because of the sheer volume of applications, individualized consideration of each applicant would be impractical. To this the Court responded dismissively: "The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."

I believe that the outcome in *Gratz* is most unfortunate. The initial problem is that in principle the program upheld in *Grutter* is no more objectionable than the one in *Gratz*. The major distinction is that the undergraduate system used numbers, rather than a system of individual discretion. But this should not make a constitutional difference. In trying to get minority students, the law school was probably as aggressive as the undergraduate program was. The law school avoided numbers, to be sure; but its admissions officers used the practical equivalent of numbers in exercising their discretion to ensure that enough minority students were able to attend its law school. The Supreme Court found it crucial that the law school did not make explicit the weight that it gave to minority applicants, whereas the undergraduate program did so. But what's wrong with explicitness? Why does the Constitution require admissions offices to hide the ball?

Perhaps the Court thought that the law school gave less weight to race than the undergraduate school did — that the law school gave the equivalent of 5 points rather than 20. But there is no evidence that this is true, and in any case the Court seems to be objecting to any system of points as such. What the Court is therefore requiring is a more costly system of individual discretion in which race does count as a factor, but in which the university is not permitted to be candid, even to itself, about how much of a factor it is. Nothing in the Constitution justifies this peculiar rule.

But the problem goes much deeper. Academic institutions have strong claims to self-rule — to be free from close judicial oversight, at least where the Constitution is not clear. Indeed, the protection of academic institutions is connected with the free speech principle itself (and federal courts have on occasion stressed the connection). On the issue of racial preferences in higher education, hundreds of American universities have engaged in affirmative action as part of their traditional right to determine what they will teach, whom they will admit for instruction, and what kind of classroom suits pedagogical and social needs. Racial preferences in higher education are not a new experiment. The nation's colleges and universities have been doing this for three decades. In this respect, the University of Michigan cases are very different from the other cases where the courts have banned racial preferences — say, considering race in allocation of public contracts.

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Universities legitimately seek diversity of many different kinds. They have many different ways of attempting to produce diversity. Some go the path of the University of Michigan Law School; others try the undergraduate program's approach; other routes are available. In our federal system, one that is committed to decentralization, different approaches are entirely permissible. Now of course the Constitution forbids some imaginable approaches by educational institutions. It would not be constitutionally acceptable to put a ceiling on the number of Catholics, or to refuse to admit Hispanics or African Americans, or to say that a school may not have more than 10 percent Asians. But all of these principles come from the unmistakable meaning of the equal protection clause of the Fourteenth Amendment. The principle of color-blindness is not part of that unmistakable meaning. On the contrary, it is a distortion of it, using a provision that was meant to eliminate the social subordination of African Americans and converting it into a weapon by which to combat reasonable efforts to undo that subordination.

Let me conclude with two cautionary notes. First, *Gratz* was incorrect, but it is not a disaster. Because of *Grutter*, colleges and universities can do a great deal to ensure that they are not all white. So long as admissions offices allow individualized consideration and avoid rigidity, they can take steps to promote a diverse educational setting. Second, my objections to *Gratz* are not meant to express approval of any or all steps that go by the name of "affirmative action." Americans reasonably disagree about that topic — about the sense and legitimacy of race-conscious efforts to assist members of traditionally disadvantaged groups. In many settings, including many educational settings, color-blindness is the most appealing principle. In principle, I think that Justice Thomas' arguments have considerable force.

What I am urging here is that these difficult questions should not be decided by federal judges. The nation has long been in the midst of an intense dispute about affirmative action programs. Sensible people have different perspectives. Sensible educational institutions have different practices. The Court should be faulted for its ruling in *Gratz* — for its aggressiveness in using the Constitution to forbid a reasonable approach by one of the nation's great universities. The Court should be praised for its restraint in *Grutter* — for its willingness to allow the nation's colleges and universities to take steps, if they choose, to ensure that the nation's classrooms are not all white. JBHE

Affirmative Action in Higher Education: He Saw the Result Three Years Ago

"There is ample evidence that Justice Sandra Day O'Connor, as well as several other members of the present Court, has already accepted that the search for racial diversity among students is a compelling interest that survives strict scrutiny."

— Ronald Dworkin, Sommer Professor of Law and Philosophy at New York University, writing in "Affirmative Action: Is It Fair?" JBHE, Number 28, Summer 2000, p. 79.