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Explaining Grutter v. Bollinger

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ESSAY

EXPLAINING *GRUTTER V. BOLLINGER*

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By approving race-conscious university admissions,[1] the Rehnquist Court echoed the opinions of Congress, the states, big business, academics, newspapers, and, to a lesser extent, the Bush administration.[2] In short, rather than join forces with the politically isolated opponents of affirmative action, the Court issued a ruling that conformed to social and political forces. For this reason, *Grutter v. Bollinger* was anything but surprising. Like most constitutional rulings, *Grutter* comported "with the policy views dominant among the lawmaking majorities of the United States."[3] Correspondingly, *Grutter* highlighted the pivotal role that elite opinion plays in shaping Court rulings.[4] Even though public opinion on affirmative action was mixed to

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[1] Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

[2] While the Bush Justice Department argued that both University of Michigan plans were unconstitutional, the President signaled to the Court that the White House would support a decision approving some form of race-conscious university admissions. *See infra* text accompanying notes 110-13.

[3] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). More recent scholarship has confirmed Dahl's thesis. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (noting the potential for government decisions to reflect majority will as viewpoints change); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 71 (1993) (describing empirical studies that show that appointed justices often sustain majority opinions on social policy); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 6 (1996) (questioning the assumption that the Justices will not consider a majoritarian opinion).

[4] *See, e.g.*, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 216

negative, economic and social leaders (who play a defining role in shaping the Court's reputation) overwhelmingly supported racial preferences.[5] This Essay will highlight these social and political forces and, in so doing, explain why the Court had strong incentives to approve affirmative action.[6]

This Essay will also explain why the same forces that underlie *Grutter* also underlie *Gratz v. Bollinger*,[7] a companion case in which the Court rejected the University of Michigan's automatic awarding of a set number of points to all undergraduate minority applicants. By placing limits on how universities take race into account while approving the Law School's plan to treat race as a plus factor in "individualized" admissions decisions,[8] the Court recognized that support for affirmative action is qualified. Correspondingly, the Court's mixed decision allowed both the Bush administration and civil rights interests to rally around it. Finally, by disallowing one of the plans, the Court was able to portray itself as an independent check on government without the fear of a majoritarian backlash.

Grutter and *Gratz*, in other words, appear to be the work of a Court that maximizes its power by paying attention to the social and political forces that surround it. This depiction is directly at odds with recent depictions of the Rehnquist Court. By settling the 2000 presidential election and invalidating thirty-one federal laws between 1995 and 2002, the Court has been characterized as "right-wing," "conservative,"

(2000) (discussing the Warren Court Justices' differing perceptions on how to reach a majority opinion when they were setting the discrete and insular minority standard); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188-94 (1998) (describing the influence of culturally elitist and countermajoritarian opinions on the Court).

[5] *See infra* notes 93, 97-104, 108 (listing the amicus briefs submitted by economic and social leaders in *Grutter* and *Gratz*).

[6] This is not to say that the Court's only choice was to approve one of the University of Michigan's affirmative action plans. As Justice Anthony Kennedy's dissenting opinion makes clear, the Court could have responded to majoritarian pressures by approving some race-conscious admissions while also invalidating both plans. *See Grutter*, 123 S. Ct. at 2370 (Kennedy, J., dissenting); *see also infra* text accompanying note 146 (providing additional discussion of a potential decision that would have garnered Kennedy's support). For reasons detailed in this Essay, however, the Court had strong incentives to uphold at least one of the two Michigan plans. *See infra* text accompanying notes 147-51 (describing the surrounding social pressures).

[7] Gratz v. Bollinger, 123 S. Ct. 2411 (2003).

[8] *See infra* text accompanying note 153 (noting the Court's differentiation of the law school plan that allowed for independent consideration of applicants and the college plan that considered "nonindividualized" factors).

"arrogant, self-aggrandizing, and unduly activist."[9] *Grutter* and other progressive 2002 term decisions, such as *Lawrence v. Texas*,[10] were therefore dubbed as "surprising" and "counterintuitive."[11] The "normally conservative high court" "upend[ed]" expectations by "play[ing] against type."[12]

The truth of the matter is that *Grutter* and other 2002-2003 term decisions follow the Rehnquist Court's practice of disappointing social conservatives. Eleven years ago, the Court dealt a seemingly fatal blow to the social conservative agenda by reaffirming both abortion rights under *Roe v. Wade* and banning school prayer under *Engel v. Vitale*.[13] The decisions of the 2002-2003 term are very much in keeping with earlier Rehnquist Court rulings on race, religion, and privacy. Specifically, the same social and political forces that stood in the way of the Court's embrace of the social conservative agenda in 1992 remain a roadblock today. For the Rehnquist Court, *Grutter* is a testament to continuity, not change.

Grutter, however, calls attention to how it is that the Supreme Court's identity is typically shaped by the Court's so-called swing Justices. On issues of social policy and federalism, Rehnquist Court decision making is largely defined by two Justices—Sandra Day O'Connor

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[9] *See* Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (stating that "[w]e are now in the midst of a remarkable period of right-wing judicial activism"); Larry D. Kramer, *No Surprise, It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that "conservative judicial activism is the order of the day"); Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2d 47, 47 (2002) (attributing accusations of arrogance and self-aggrandizement to Court critics); *see also* Barry Friedman, *Historicizing Constitutional Theory*, LAW & CONTEMP. PROBS 2 (forthcoming) (suggesting that scholars' writings about the Rehnquist Court are shaped by their ideological and political viewpoints).

[10] 123 S. Ct. 2472 (2003) (holding a Texas statute that criminalized same sex sexual conduct was unconstitutional).

[11] *See* Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1 (describing the Court's "surprising" decisions on affirmative action and homosexual rights as displaying "a new attentiveness" to cultural developments by "translating them into legal principle."); Tony Mauro, *It's a Mad, Mad, Mad, Mad Court: Justices Upended Expectations in 2002-2003 Term*, TEX. LAW., July 7, 2003, at 12 (describing the Court decisions as a step back for conservatives).

[12] *See* David G. Savage, *Justices Take a Turn to the Left*, L.A. TIMES, June 29, 2003, at A1 (characterizing the Court as "normally conservative"); Mauro, *supra* note 11, at 12 (describing the Court's progressive decisions as a departure from nine years of conservative analysis); Charles Lane, *Civil Liberties Were Term's Big Winner*, WASH. POST, June 29, 2003, at A1 (describing the Court's most recent term as "play[ing] against type").

[13] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), while replacing the trimester test with an undue burden standard); Lee v. Weisman, 505 U.S. 577 (1992) (extending *Engel v. Vitale*, 370 U.S. 421 (1962), to declare unconstitutional a prayer at an optional middle-school graduation ceremony).

and Anthony Kennedy. Like prior swing Justices, O'Connor and Kennedy are sensitive to social and political forces.[14] For example, O'Connor, according to her brother Alan Day, "doesn't like to be part of polarizing decisions . . . 'she takes it hard and feels it hard.'"[15] Kennedy is purported to pay careful attention to how his votes will impact his and the Court's reputation.[16] In other words, these Justices seem to look to signals sent to the Court by elected officials, elites, and the American people in sorting out their opinions.

This Essay is divided into two Parts. The first Part details how the Rehnquist Court has consistently heeded social and political forces in its decisionmaking. The second Part focuses on the *Grutter* decision. It describes the majoritarian forces that helped sway the Court and explains how the Court's decision reflects those social and political influences.

I. THE PAST IS PROLOGUE

Constitutional decision making is a dynamic process that involves all parts of the government and the people as well.[17] As Chief Justice William Rehnquist noted, the "currents and tides of public opinion lap at the courthouse door," for judges "go home at night and read the newspaper or watch the evening news on television; they talk to

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[14] William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 197 (1996) (finding that moderates on the Court, who tend to be swing votes, have the greatest response to changing public opinion). *See also* text accompanying notes *infra* 18, 93-120 (detailing the social and political forces that contributed to the Court's deliberations in the *Grutter* and *Gratz* decisions).

[15] Evan Thomas & Stuart Taylor, Jr., *She Helped America Seek a Middle Ground on the Thorny Subject of Race*, NEWSWEEK, July 7, 2003, at 46, 49 (quoting Alan Day).

[16] Comments made by Justice Kennedy in an October 1992 interview provide support for this claim. In explaining why it is "'dangerous'" for a Supreme Court Justice to think "'himself a philosopher,'" Kennedy remarked: "'History has its own way of unfolding, tripping you up or vindicating you. You're required to look into a crystal ball, but you don't see much there.'" Jerry Carter, *Crossing the Rubicon*, CAL. LAW, Oct. 1992, at 39, 104 (quoting Kennedy).

[17] Justices O'Connor, Kennedy, and Ginsburg have all endorsed this dynamic process. *See The Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 222-23 (1987) (statement of Anthony M. Kennedy) (testifying about the obligation of Congress to pass legislation correcting erroneous rulings); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 44 (2003) (explaining that if "one looks at the history of the Court, the country, and the Constitution over a very long period, the relationship appears to be more of a dialogue than a series of commands"); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992) (stating that effective judges engage in a dialogue with other branches of government).

their family and friends about current events."[18] Supreme Court Justices also "reflect . . . the views and values of the lawyer class from which the Court's members are usually drawn."[19] "[O]verwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's most elite universities,"[20] the views of economic and social leaders matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections). In particular, since the Justices' reputations are shaped by the media, law professors, and somewhat left-leaning lawyers' groups such as the American Bar Association, they maximize their status by taking elite opinion into account.[21]

Lacking the powers of purse and sword, moreover, the Court cannot resist "a determined and persistent lawmaking majority;" it can only put its preferences in place against "a weak majority."[22] In sorting out their personal views of how the Constitution should be interpreted, some Supreme Court Justices consider whether elected officials will comply with decisions.[23] These Justices have weaker prefer-

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[18] William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986). It is true that some Justices care passionately about an issue and, thus, are unlikely to be swayed by majoritarian forces. But other Justices (often the swing Justices who cast the decisive votes) have relatively weak preferences. It is likely that these Justices are more apt to take into account the potential political fallout of a decision.

[19] Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). For a parallel commentary suggesting that the Court's ruling in *Romer* was fueled by cultural elites, see Lino A. Graglia, Romer v. Evans: *The People Foiled Again by the Constitution*, 68 U. COL. L. REV. 409, 409-10 (1997).

[20] Klarman, *supra* note 4, at 189.

[21] *See* Stuart Taylor, Jr., *Veering Left: The Art of Judicial Evolution*, NAT'L J., July 5, 2003, at 2154 (noting recent decisions are contrary to the media depiction of the Court); Frederick Schauer, Judicial Incentives and the Design of Legal Institutions (1998) (unpublished working paper) (concluding that it would be a mistake to assume that judges are less susceptible to reputation and public approval than other decision makers), *available at* http://www.ksg.harvard.edu/prg/schauer/judicial.htm. For an argument that "heavy criticism" of *Bush v. Gore* "led to a term of unpredictable decisions" in which several Justices took "unexpectedly centrist positions," see Alan M. Dershowitz, *Curious Fallout from* Bush v. Gore, N.Y. TIMES, July 4, 2001, at A15.

[22] Dahl, *supra* note 3, at 286.

[23] *See* Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences (2000) (unpublished manuscript prepared for Midwest Political Science Association) (stating that because the Court has to rely on the other two branches of government to give judicial rulings full effect, Justices must consider the extent to which policymakers will support their decisions), *available at* http://www.unc.edu/~jstimson/papers.htm; Lee Epstein et. al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001) (arguing that Justices cannot be effective without considering the goals and

ences about the substantive issues before the Court and, consequently, are more willing to take account of the views of elites, elected officials, and the American people.[24]

The Supreme Court's practice of operating within parameters established by majoritarian forces is also tied to the judicial appointment process. Nominated by the President and confirmed by the Senate, Supreme Court Justices are products of the social and political forces at the time of their nomination. This process "favors persons with ambivalent, unknown or centrist views on the hotly contested issues of the day;" those with known "militant views . . . need not apply."[25] Furthermore, even though Supreme Court Justices are insulated from political pressures such as election, several Justices have held elected office or worked closely with elected officials.[26] These Justices are accustomed to taking into account the views of interest groups, the American people, and other elected officials.

For its part, the Rehnquist Court follows this historical pattern. Social and political forces explain both its hesitancy to embrace the social conservative agenda and its willingness, at least from 1995 to 2002, to break significant doctrinal ground on federalism.[27] Consider,

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reactions from the Legislative and Executive branches); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983) (stating that in response to resistence of citizens and public officials to the Court's holding in Brown v. Board of Education, judges were forced to approve "imperfect remedies, remedies that [did] not fully vindicate rights). For a competing perspective, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 315-16 (2002), which contends that Justices only care about personal preferences when casting their votes. For additional treatment of this point, see text accompanying notes *infra* 90-91, 122-24.

[24] *See* Mishler & Sheehan *supra* note 14, at 197 (concluding that judicial attitudes "are dynamic and susceptible to change in response to public opinion as social change").

[25] Mark A. Graber, Dred Scott Book 2-3 (n.d.) (unpublished manuscript, on file with author)

[26] Consider, for example, the Rehnquist Court's swing Justices, Sandra Day O'Connor and Anthony Kennedy. O'Connor was a state legislator and Kennedy's father was a state lobbyist. *See* Biographies of Current Members of the Supreme Court (last visited November 23, 2003) (noting that Justice O'Conner was "appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms"), *at* http://www.supremecourtus.gov/about/biographiescurrent.pdf; Robert Reinhold, *Restrained Pragmatist Anthony M. Kennedy*, N.Y. TIMES, Nov. 12, 1987, at A1 (describing Justice Kennedy's father as "a politically connected lawyer and lobbyist in Sacramento").

[27] I have made this point in other writings. *See, e.g.*, Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 462-63 (2001) (calling attention to the Court's aggressive efforts to strike down federal statutes, while remaining "somewhat middle-of-the-road on divisive social policy"); Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773, 774-76 (2003) (arguing that the Rehnquist Court, in general, and Justices

for example, the Court's federalism revival. Why did the Court limit Congress' power based on federalism principles, and why did it wait until 1995 to begin its revival? What prompted the Court to extend its somewhat ambiguous initial rulings into bolder statements about the limits of Congress' power? Why has the Court excluded race and gender from its Fourteenth Amendment, Section Five revolution? In answering these questions, it is useful to look to the majoritarian influences that shape the Justices' understanding of Congress and their power to limit Congress. Majoritarian forces that have given the Court both reason and incentive to limit Congress include the (then) ever-growing populist distrust of big government, the increasing willingness of candidates to embrace anti-Congress rhetoric, the Contract with America-spurred 1994 Republican takeover of Congress, the unwillingness of members of Congress to take issue with or even discuss Supreme Court decisions limiting federal powers, and the failure of interest groups to feel sufficiently threatened by the Court's anti-Congress decisions to mobilize in opposition to them.[28]

Social and political forces, especially Congress' support of civil and abortion rights, have also figured prominently in Rehnquist Court rulings on social issues. Unlike its federalism revival (where a coalition of five Justices joined forces to limit Congress' power), Justices Kennedy and O'Connor have refused to sign onto the conservative social agenda. Their refusal is almost certainly tied to majoritarian signals sent to the Court. From 1981–1992, for example, the Reagan and Bush administrations sought to reshape constitutional law through judicial appointments and Justice Department arguments.[29] These efforts, however, were strongly resisted by Congress, interest groups, and

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O'Connor and Kennedy, in particular, consider social and political forces when making decisions).

[28] I do not mean to suggest that lawmakers and the American people are pushing the Court to invalidate federal statutes. My point, instead, is that the Court's rulings are consistent with social and political forces. In addition to my writings on the subject, see Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) for the argument that the current Congress is generally sympathetic to Court decisions constraining lawmaker powers; Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 334-51 (2001) for the assertion that anti-Congress public opinion helps explain federalism decisions; Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001) for the proposition that the Court has taken advantage of lawmaker and interest group disinterest in Court decision making.

[29] *See infra* text accompanying notes 38-42, 56-58 (describing Justice Department arguments against affirmative action).

elites (especially academics and journalists).[30] For Justices Kennedy and O'Connor, battles between the White House, Congress, and other interests called attention to the costs of embracing the social conservative agenda. Starting in 1994, O'Connor and Kennedy often opposed granting certiorari in these cases,[31] pushing the Court away from contentious social issues and towards less controversial federalism cases.[32] More telling, some of their opinions refer to social and political forces in explaining why the Court cannot embrace conservative objectives.[33]

The best known example of this is *Planned Parenthood v. Casey*.[34] By reaffirming *Roe*, the *Casey* plurality (O'Connor, Kennedy, Souter) validated Senate Judiciary Committee efforts to preserve a constitutional right to abortion. By turning down Robert Bork's nomination and by making *Roe* the focus of subsequent confirmation hearings, the Senate made "clear to [Supreme Court] nominees that a willingness to profess belief in some threshold constitutional values is a prerequisite for the job."[35] Even more telling, by rejecting Bork, the Senate paved the way for the appointment of Justices Kennedy and Souter, both of whom lack strong ties to conservative interests and have often resisted the conservative social agenda.[36] Finally, to the extent that the Senate

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[30] *See, e.g.*, David Johnston, *Facing His Term's End, Barr Defends His Record*, N.Y. TIMES, Nov. 23, 1992, at A13 (describing Congressional criticism of the Justice Department in terms of "an agency that drove the Republicans' conservative legal agenda for a dozen years"); Editorial, *A 'Blueprint' All Right—For Segregation*, N.Y. TIMES, Feb. 1, 1984, at A26 (criticizing the Reagan administration's plan for ending mandatory busing as a blueprint for school segregation); *see also* Schwartz, *infra* note 46, at 525 n.11 (noting positive press reactions for Supreme Court support for affirmative action).

[31] *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 637 (2003) (describing O'Connor's and Kennedy's reluctance to hear cases concerning social issues due to their "reputational costs" for the Court).

[32] *See id.* at 581 (charting dramatic differences in balance between social issue and federalism cases before and after 1995). Before its 2002–2003 term, moreover, the Court broke relatively little doctrinal ground on social issue cases. *See id.* at 581-84 (discussing the Court's decisions to maintain previous doctrine on abortion, school prayer, and, to some extent, affirmative action). This is not to say that the second Rehnquist Court has steered clear of all cases raising contentious social issues. While it has been relatively less active than the first Rehnquist Court, the second Rehnquist Court has issued several significant rulings on cases implicating the conservative social agenda.

[33] See *infra* notes 65-71 (providing examples of these opinions); *see also* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (linking the Court's rejection of same-sex sodomy statute with changing social attitudes towards gay rights).

[34] 505 U.S. 833 (1992).

[35] Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 LAW & CONTEMP. PROBS. 121, 121-22 (1993).

[36] Kennedy, of course, filled the seat that Bork would have occupied. Souter (who

is a barometer of interest group and populist sentiment, Bork and subsequent confirmation battles made clear that the vigorous pursuit of social conservative causes would spill over to elections and otherwise fuel the ongoing culture wars. In this way, lawmakers signaled to the Court that the pursuit of social conservative objectives would come at a price, such as legislation overturning Court rulings and the rejection of conservative nominees. The *Casey* plurality took these social and political forces into account. Emphasizing the costs of "overrul[ing] under [political] fire" and linking the Court's "legitimacy" to the "people's confidence in the Judiciary,"[37] the *Casey* plurality tied their refusal to do the bidding of the President who appointed them to the Court's "legitimacy."

On civil rights, Rehnquist Court decision making also reflects majoritarian forces. Consider the following: the Reagan administration succeeded in only 43% of the Supreme Court cases it participated in (as compared to the Solicitor General office's average success rate of 70%). In sharp contrast, the Court agreed with Clinton administration filings 74% of the time.[38] In other words, the conservative arguments of the Reagan administration were far less successful with the Rehnquist Court than the more liberal arguments of the Clinton administration. Social and political forces figure prominently in understanding the relative success rates of the Reagan and Clinton administrations. In particular, inept policymaking and a lack of political resolve plagued Reagan administration efforts to narrow civil rights protections and eviscerate affirmative action.

Witness the Reagan Justice Department's failed campaign against affirmative action. By condemning those who "worship at the altar of forced busing and mandatory quotas"[39] and calling racial preferences

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had no paper trail) was appointed, in part, to avoid the kind of confirmation battle that was fought over the Bork nomination. It is also noteworthy that Ronald Reagan's determination to appoint the first woman to the Supreme Court resulted in the nomination of Sandra Day O'Connor. In other words, unlike Bork, Scalia, Thomas, and Rehnquist (who was elevated by Reagan), the social conservative agenda gave way to other values when Kennedy, Souter, and O'Connor were appointed to the Court.

[37] *Casey*, 505 U.S. at 867. For Mike Paulsen, the *Casey* plurality's focus on politics, not law, makes it "the worst constitutional decision of the United Supreme Court of all time." Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001-02 (2003).

[38] *See* Merrill, *supra* note 31, at 622-28 (comparing the success rate of Reagan administration in twenty-two 1986–1988 decisions to Clinton administration in twenty-three 1997–1999 decisions).

[39] Steven R. Weisman, *Reagan Strongly Defends Policies on Minority and Women's Rights*, N.Y. TIMES, Aug. 2, 1983, at A1.

"[just as] offensive to standards of human decency today as [they were] some 84 years ago when countenanced under *Plessy v. Ferguson*,"[40] Reagan and his Assistant Attorney General for Civil Rights, Brad Reynolds, launched a morally and rhetorically divisive campaign against preferences. But this absolutist campaign against preferences met stiff resistance from Congress, interest groups, state and local officials, big business, the media, and, ultimately, the courts.

For example, when the Justice Department asked states and localities to join it in challenging longstanding affirmative action consent decrees, mayors and governors almost always criticized the Department (and lower court judges uniformly turned down the Department's efforts).[41] More significantly, in 1989, the Reagan administration galvanized Congress and civil rights groups by trying to restore tax breaks to racially discriminatory private schools and by opposing bipartisan efforts to make disparate racial impact an important evidentiary tool in voting rights cases.[42] The power of civil rights groups was on full display during the battle over Robert Bork's nomination to the Supreme Court. Senate Judiciary Committee chair Joseph Biden "plotted strategy" with the NAACP Legal Defense Fund, Leadership Conference on Civil Rights, and other civil rights groups.[43]

Congress also took aim at Reagan administration affirmative action initiatives. By enacting legislation,[44] holding oversight hearings, and turning down nominees who opposed affirmative action (including the nomination of Brad Reynolds to be Associate Attorney General),[45] Congress communicated its continuing support of existing

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[40] *Oversight Hearings on Equal Employment Opportunity and Affirmative Action: Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor*, 97th Cong., 1st Sess. 137 (1981) (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights).

[41] *See* CHARLES FRIED, ORDER AND LAW 109-10 (1991) (recounting one of Reynolds' failed attempts to force modifications of local consent decrees relating to seniority systems); Stephen Engelberg, *Attack on Quotas Opposed by Cities*, N.Y. TIMES, May 4, 1985, at A1 ("In New York, New Jersey, Miami, Chicago, Boston, Philadelphia and San Francisco, officials said in interviews that they opposed the Administration's effort to eliminate quotas for hiring blacks, Hispanic-Americans and women.").

[42] *See* Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1755-56 (1991) (arguing that these "policy blunders" contributed to the lack of a centralized effort by the Reagan administration on civil rights).

[43] TERRY EASTLAND, ENERGY IN THE EXECUTIVE 246-47 (1992).

[44] *See, e.g.*, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1988, Pub. L. No. 100-202 (1987) (highlighting Congress' legislative opposition to Reagan's stance on affirmative action).

[45] *See* Howard Kurtz, *Reynolds' Nomination Voted Down*, WASH. POST, June 28, 1985, at A1 (describing Congress' "stunning rejection of [Reynolds,] the chief architect of

affirmative action programs. For their part, the press and big business strongly backed affirmative action. Twenty of twenty-one "top papers" rejected Reagan Justice Department efforts to dismantle affirmative action.[46] Big business has also been a consistent supporter of affirmative action. For reasons ranging from avoiding costly lawsuits to improving a company's public image to increasing productivity, "[b]usinessmen like to hire by the numbers."[47]

By 1986, the year Rehnquist became Chief Justice, the Reagan Justice Department's campaign against affirmative action lay in shambles. Unable to tap into populist disapproval of racial quotas, Justice Department attacks on racial preferences were portrayed as insensitive and mean spirited.[48] Rebukes by Congress, interest groups, and the press reinforced the desire of most department and agency heads to leave in place existing affirmative action programs.[49] Even the White House distanced itself from the Justice Department's campaign against affirmative action. Refusing to undo an executive order requiring 325,000 government contractors to adopt affirmative action plans, the President preferred speaking about his administration "strongly support[ing]" programs that "provide special assistance to minority businesses."[50] Consistent with these social and political forces, the Supreme

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the Reagan administration's civil rights policies").

[46] *See* Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 525 n.11 (1987) (surveying the positive reactions of newspapers to the Supreme Court's rejection of Justice Department arguments in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), the 1986 affirmative action decision barring layoffs of senior non-minority employees).

[47] Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, FORTUNE, Sept. 16, 1985, at 26 ("[P]ersuasive evidence indicates that most large American corporations want to retain their affirmative action programs, numerical goals and all."). *See also* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 172-73 (2003) (describing corporate support for affirmative action to avoid adverse publicity).

[48] *See supra* note 30, 41-43 and accompanying text (describing the resistance to the attmepts by the Reagan and first Bush adminstrations to advance a conservative social agenda).

[49] *See* Devins *supra* note 42, at 1752-58 (providing specific examples of the efforts by civil rights groups to limit the Justice Department's attempts to diminish affirmative action).

[50] President's Remarks to Members of the National Association of Minority Contractors, 20 WEEKLY COMP. PRES. DOC. 946, 949 (June 27, 1984). The Reagan administration's campaign against affirmative action, ultimately, was quite modest—limited to the Justice Department and a handful of agencies. *See* Devins, *supra* note 42, at 1752-58 (describing Reagan's uncoordinated and ultimately moderate civil rights policy). Consequently, social conservatives accused the administration of being two-faced, of "wring[ing] what[ever] partisan advantage it [could] from the pattern of racial and ethnic spoils established in the 1970s." Jeremy Rabkin, *Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15, 17.

Court rejected the Department's claim that all preferences were immoral and illegal. Initially, the Burger Court approved a range of hiring and promotion schemes that benefited racial minorities and women.[51]

The Rehnquist Court, undoubtedly aware of the political maelstrom surrounding affirmative action, largely followed its predecessor's lead. Its initial constitutional rulings were a mixed bag. In 1987, it ruled, in *United States v. Paradise*, that a requirement of one African American for one white promotion is a constitutionally permissible remedy.[52] In 1989, it concluded in *City of Richmond v. J.A. Croson Co.* that state affirmative action plans are subject to strict scrutiny review.[53] The very next year, however, it ruled that federal affirmative action plans are subject to mid-tier review.

This ruling, *Metro Broadcasting, Inc. v. FCC*,[54] is especially instructive in understanding the linkage between majoritarian forces and the Court's affirmative action jurisprudence. By filing an amicus brief in the litigation and, more importantly, enacting legislation blocking Reagan FCC reconsideration of diversity preferences, Congress embraced these affirmative-action programs.[55] The first Bush administration also signaled its support of these preferences, albeit in a less clear way. Following the lead of the Reagan administration, the Bush Justice Department formally opposed affirmative action.[56] However, the

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[51] Even when ruling against affirmative action (as it did in *Wygant*, 476 U.S. 267), the Court rejected Justice Department efforts to limit affirmative action to the actual victims of discrimination and, in so doing, handed a "significant victory [to] civil rights groups." Al Kamen, *High Court Ruling Signals Support for Affirmative Action: Groups See Victory in Teachers' Case*, WASH. POST, May 20, 1986, at Al (discussing the Wygant opinions which "showed a strong majority [of the court] in favor of affirmative action, in general, and in agreement on 'central core principles.'"). For an overview of Reagan-era Supreme Court decision making, see Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 360-78 (1989); Schwartz, *supra* note 46, at 527-37.

[52] 480 U.S. 149, 171 (1987) (holding that the "one-for-one promotion requirement was narrowly tailored to serve its several purposes."). Also in 1987, the Court refused to consider constitutional issues when approving—on statutory grounds—an affirmative action plan that granted preferences to women seeking promotions. Johnson v. Transportation Agency, 480 U.S. 616, 620 n.2 (1987).

[53] 488 U.S. 469, 493 (1989) (stating that the purpose of strict scrutiny is to insure that racial classifications are only used to pursue important governmental interests). For a discussion of statutory decisions issued in 1989, see *supra* text accompanying note 42.

[54] 497 U.S. 547 (1990) (holding that FCC affirmative action policies were substantially related to achieving broadcast diversity).

[55] *See* Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 176-78 (1993) (discussing Congress' actions to limit FCC reexamination of diversity preferences and arguments in favor of such preferences in *Metro*).

[56] *See id.* at 177-78 (describing the Justice Department's characterization of racial

President also facilitated the vigorous defense of racial preferences in *Metro* by appointing three FCC Commissioners who strongly favored diversity preferences and promised to defend those preferences in court.[57] Also, rather than have the Solicitor General (who is statutorily authorized to control FCC Supreme Court litigation) block the FCC from defending diversity preferences, the administration authorized the FCC to represent itself before the Supreme Court.[58] Finally, Bush distanced himself from Reagan Justice Department policies. Two weeks after his inauguration, he expressed disappointment with the Court's just-issued *Croson* decision, speaking of his "commit[ment] to affirmative action" and his support for a narrow reading of the decision.[59]

Elected government officials signaled their support for minority interests in other important ways during the Bush years. By commissioning "disparity studies" that supported claims of continuing discrimination in public contracting, states and municipalities were able to minimize *Croson*'s impact.[60] Even more significantly, the bitter battle over Clarence Thomas's Supreme Court nomination underscored opposition to the social conservative agenda by powerful civil rights interests and their supporters in Congress. Additionally, after officials in the Department of Education questioned the constitutionality of government-funded minority scholarships, the President made clear that he disagreed with this interpretation, stating that the question was one "for the courts to rule on."[61] Finally, Bush signed on to lawmaker efforts to invalidate the Rehnquist Court's earlier restrictive

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preferences in *Metro* as "precisely the type of racial stereotyping that is anathema to basic constitutional principles").

[57] *Id.* at 177.

[58] *See id.* at 178 (noting that the Solicitor General "allowed the FCC to serve as the government's principle voice in the case."). The Bush Justice Department did file an amicus brief opposing racial preferences. For additional discussion about the Bush administration's possible reasons for adopting these conflicting courses of action, see *id.* at 177-78.

[59] The President's News Conference, 1 PUB. PAPERS 21, 29 (Jan. 27, 1989).

[60] *See* Dorothy J. Gaiter, *Court Ruling Makes Discrimination Studies a Hot New Industry*, WALL ST. J., Aug. 13, 1993, at A1 (describing the city of Miami's reaction to disparity studies conducted as a result of the *Croson* decision); George R. La Noue, *Social Science and Minority "Set-Asides"*, 110 PUB. INT., Winter 1993, at 49, 61 ("Above all, it is the disparity studies themselves that are proving to be the greatest impediment to implementing *Croson*. No matter how poorly done, a several-hundred-page disparity study 'proving discrimination' will quiet critics in the political and business community just by its existence.").

[61] Karen De Witt, *U.S. Eases College Aid Stand, But Not All the Way*, N.Y. TIMES, Dec. 19, 1990, at A1.

readings of civil rights statutes.[62] By overruling six of these Rehnquist Court decisions, the resulting statute, the 1991 Civil Rights Act, "was designed to be, and was, a massive rebuke to the Court."[63]

Against this backdrop, unsurprisingly, the Rehnquist Court shifted its energies away from affirmative action and other social issues and toward federalism. By denying certiorari to most cases involving divisive social issues, more liberal Justices who feared conservative outcomes teamed with swing Justices (like O'Connor and Kennedy) who are not strongly committed to the conservative social agenda.[64] From its *Metro Broadcasting* decision in 1990 until *Grutter* was decided in the spring of 2003, the Court issued only one substantive ruling on the constitutionality of affirmative action: *Adarand Constructors, Inc. v. Peña*.[65]

Recognizing that the pursuit of socially conservative objectives would come at a high price,[66] the Court broke little doctrinal ground. During the Reagan and Bush years, the Court's decision making on

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[62] *See* Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 990-99 (1993) (calling attention to reports that Bush "'strongly expressed' . . . his desire to sign the bill"). When the bill was first passed by Congress, Bush depicted the legislation as a "quota bill" and vetoed it. But a compromise was reached, in large part, because Bush pressured his negotiators to meet with civil rights leaders and find a way for him to sign the bill. *Id.*

[63] Merrill, *supra* note 31, at 631.

[64] *Id.* at 637 (speculating that O'Connor and Kennedy may be more concerned about reputational costs than furthering the conservative social agenda).

[65] 515 U.S. 200 (1995) (applying a strict scrutiny analysis to government contracts). In 1993 and 2000, the Court issued decisions on the justiciability of affirmative-action lawsuits. In 1993, the Court ruled that a construction contractor's association had standing to challenge a city ordinance setting aside ten percent of city contracts for minority businesses. This decision, *Northeastern Florida Chapter of Associate General Contractors of America v. Jacksonville*, reaffirmed the Court's jurisdictional ruling in *Bakke*. 508 U.S. 656, 665-68 (1993) (citing *Bakke*, 438 U.S. 265, 280-81 n.14 (1978)). Then in 2000, the Court concluded that Colorado could not moot a follow-up to *Adarand* by modifying its affirmative action program. Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000).

The Rehnquist Court had also agreed to hear another follow-up to *Adarand*; at the urging of the second Bush administration, however, it dismissed the case as "improvidently granted." Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001). The Court also agreed to decide whether employment discrimination statutes allow a school board to consider race when terminating a teacher. This case, *Piscataway Township Board of Education v. Taxman*, was dismissed after a coalition of civil rights interest groups joined together to settle the case with the teacher who filed the lawsuit. 522 U.S. 1010 (1997), *cert. dismissed.*

[66] *See supra* text accompanying notes 41-51 (describing the contentious struggle between the Reagan and first Bush administration, and those civil rights' groups and like minded public officials over attempts to limit the scope of affirmative action)).

affirmative action was indeterminate and often unintelligible.[67] The Court's sole Clinton-era decision, *Adarand*,[68] followed this pattern. On the one hand, the Court overruled *Metro Broadcasting* by concluding that federal affirmative action programs are subject to strict scrutiny review.[69] At the same time, *Adarand* referred to the "unhappy persistence" of race discrimination and the power of the government to act "in response to it."[70] By ruling in this way, the Court sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[71] Moreover, by refusing to rule on the constitutionality of the federal affirmative action plan in *Adarand*, the Court was quickly (and correctly) dismissed as "very nearly beside the point" and "insignifican[t]" because it "settled nothing."[72] Furthermore, the Court's refusal to hear numerous post-*Adarand* challenges to affirmative action in public education gave state and federal officials free reign to sort out the constitutionality of affirmative action.[73]

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[67] *See supra* text accompanying notes 52-54 (describing the Court's incongruous rulings during the Reagan and first Bush administrations).

[68] 515 U.S. at 200.

[69] *Id.* at 227.

[70] *Id.* at 262 n.16.

[71] *Id.* at 237.

[72] Linda Greenhouse, *In Step on Racial Policy*, N.Y. TIMES, June 14, 1995, at A1 (suggesting that the Court's decision was "very nearly beside the point" because the fate of affirmative action will ultimately be decided in the political arena); Charles Krauthammer, *Affirmative Action: Settle it Out of Court*, WASH. POST, June 16, 1995, at A25 (asserting the "relative insignificance" of the Court's decision); George F. Will, *Affirmative Action: The Court's Murky Ruling*, WASH. POST, June 14, 1995, at A25 (contending that the Adarand decision "settled nothing").

[73] *See* Lyle Denniston & Patrick Healy, *Supreme Court to Weigh Race in Admissions*, BOSTON GLOBE, Dec. 3, 2002, at A1 (describing the conflicting opinions of lower courts regarding the constitutionality of affirmative action). On voting rights, however, the Rehnquist Court issued several significant rulings during this period. From 1993 to 2003, the Court issued eight decisions concerning the constitutionality of race-conscious redistricting. For the most part, these decisions follow claims made in this essay about the pivotal role that social and political forces play in explaining Rehnquist Court decision making. To start, the Court's initial foray into voting rights occurred during the first Rehnquist Court (1986–1994). *See supra* text accompanying notes 31-32 (discussing the differences between the first and second Rehnquist Courts, especially the first Rehnquist Court's willingness to resolve contentious social issues). That decision, *Shaw v. Reno*, 509 U.S. 630 (1993), cast doubt on the constitutionality of voting rights legislation that encouraged states to create voting districts in which a majority of voters were racial minorities. The scope of Shaw was expanded in Miller v. Johnson, 515 U.S. 900, 916 (1998), which held that race could not "subordinated traditional race-neutral districting principles . . . to racial considerations." Subsequently, however, the Court has largely bowed to those social and political forces that helped propel bipartisan support for race-conscious redistricting legislation. In particular, recognizing that racial minorities often vote for democratic candidates, the

Eight years after *Adarand*, the Supreme Court reentered the fray with *Grutter*. As the next Part of this essay will detail, *Grutter*, like prior Rehnquist Court decisions on affirmative action, conformed to social and political forces. These forces have always supported affirmative action. Consequently, just as the Rehnquist Court responded to majoritarian pressures by rejecting the social conservative agenda in the years before its federalism revolution, the Court in *Grutter* once again issued a decision that echoed the pressures beating against it.

II. EXPLAINING *GRUTTER V. BOLLINGER*

By linking Rehnquist Court affirmative-action decisions to the social and political forces influencing the Court, the prior Part underscores the pivotal role that majoritarian influences play in Supreme Court decision making. This Part will focus on the Court's recent approval of affirmative action in *Grutter*. Initially, it will track the ongoing support for affirmative action by elected officials and other interest groups, starting with elected government's response to *Adarand* and culminating in the *Grutter* litigation. Following this examination of majoritarian influences, it will discuss the ways in which social and political forces seem to have impacted on the outcome and reasoning of both *Grutter* and *Gratz*.

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In the years following *Adarand*, federal and state officials condemned race quotas but continued to support affirmative action. Although Clinton repudiated both proportionate representation of minorities in Congress and overly rigid preference plans,[74] he argued that *Adarand* "actually reaffirmed the need for affirmative action."[75] Through a White House-conducted affirmative-action review, the

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Court has concluded that lawmakers—when drawing district lines—can pay attention to race in order to advance political objectives. Easley v. Cromartie, 592 U.S. 1076 (2001).

[74] Clinton withdrew his nomination of Lani Gunier to head the Justice Department's Civil Rights Division for precisely this reason (although Democratic lawmakers' complaints about Gunier's writings certainly figured into his calculus). Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993, at A1 (noting that Clinton "could not defend many of her views on bolstering the political power of blacks").

[75] Remarks on Affirmative Action at the National Archives and Records Administration, II PUB. PAPERS, July 19, 1995, 1112.

Clinton administration concluded that nearly all affirmative-action programs are responsive to discrimination, do not unduly burden non-minorities, and accomplish their objectives of increasing opportunities for minorities and women.[76] The Clinton administration, moreover, resisted a Fifth Circuit ruling prohibiting affirmative action in higher education. The Justice Department asked the Supreme Court to reverse the decision and the Department of Education considered rescinding federal funds given to schools that eliminated affirmative action programs.[77]

For its part, the pre-*Grutter* George W. Bush administration had signaled its qualified support of affirmative action. Even though Bush ran on an anti-preference platform, he campaigned in African American communities, stated that racial progress was "still too slow," and "went to the NAACP convention and apologized for [the Republican party's] mistakes on civil rights."[78] Once in office, he assembled a cabinet "every bit as diverse as former President Clinton's."[79] Bush also reached out to minority voters by pursuing policy initiatives on voter fraud and racial profiling, as well as reappointing two African American judges (initially picked by Clinton) whose nominations the Republican Senate had stalled.[80] In August 2001, the administration

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[76] *See* Ann Devroy, *Clinton Study Backs Affirmative Action: Five-Month Review Supports Some Reforms*, WASH. POST, July 19, 1995, at A1 (summarizing the administration's conclusion that the "vast majority" of affirmative action programs were beneficial and should continue). Immediately after *Adarand*, government agencies were told that, "[n]o affirmative action program should be suspended prior to" an evaluation of the program's constitutionality. *Legal Guidance on the Implications of the Supreme Court's Decision in* Adarand Constructors, Inc. v. Peña, 19 Op. Off. Legal Counsel 171, 202 (1995); *see also* Alan J. Meese, Bakke *Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 482 (2000) (suggesting that the Clinton administration advanced its affirmative action agenda by, among other things, misreading *Bakke*).

[77] *See* Peter Applebome, *Texas is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES, March 26, 1997, at B11 (discussing the Department of Education's warning to Texas to keep affirmative-action provisions in place or risk losing federal funding); Ann Devroy, *Affirmative Action Rules are Revised*, WASH. POST, May 23, 1996, at A1 (reporting that the Justice Department was preparing to file a brief supporting efforts to overturn the Texas ruling barring affirmative action in higher education). *But see* Peter Applebome, *In Shift, U.S. Tells Texas It Can't Ignore Ruling Barring Bias in College Admissions*, N.Y. TIMES, Apr. 15, 1997, at A20 (describing the Department of Education's reversal and subsequent mandate that Texas ban the use of racial preferences in admissions and scholarships).

[78] JEREMY D. MAYER, RUNNING ON RACE 281, 284 (2002).

[79] Jim VandeHei, *Extending Diversity to Bush Subcabinet will be Tough Task*, WALL ST. J., Feb. 6, 2001, at A20.

[80] *See* Editorial, *Bush and the Black Agenda*, CHRISTIAN SCI. MONITOR, Mar. 7, 2001, at 8 (describing Bush's steps to confront African American disillusionment with presidential policy).

agreed to defend the constitutionality of a federal affirmative-action program before the Supreme Court.[81]

Congress has also backed affirmative action. For example, following the 1994 Republican takeover of Congress, several key Republican leaders tried to move affirmative action off the legislative schedule. Correspondingly, motivated both by a desire "to craft a positive message for minorities" and a corresponding fear that a fight over affirmative action would delay their pursuit of the Contract with America reforms,[82] Republicans in the House and Senate voted down proposals to roll back federal affirmative-action programs.[83] A bill targeting racial preferences in higher education, for example, was soundly defeated because "'a majority of the Republican Conference realize[d] that the GOP would lose popular electoral support when it support[ed] anti-affirmative action measures."[84] Indeed, with new census data suggesting that Republicans need to attract the growing number of working women and Hispanic voters, Republican lawmakers are more likely today than ever before to support affirmative action.[85]

State support for affirmative action, with few exceptions, has also been steadfast. Although voters in California and Washington, in 1996 and 1998, respectively, amended their state constitutions to ban racial preferences,[86] the populist revolts against affirmative action

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[81] Edward Walsh, *Bush Backs Minority Program: High Court Brief Defends DOT Contracting Plan*, WASH. POST, Aug. 11, 2001, at A1 (reporting on the Bush administration brief defending the constitutionality of an affirmative action program).

[82] Senator John McCain, for example, argued that the costs of repudiating affirmative action were too great for his party, when he stated that "the danger exists that our [party's] aspirations and intentions will be misperceived, dividing our country and harming our party." 144 CONG. REC. S1490 (1998).

[83] *See* James Dao, *Senate Stops Bid to End Road-Work Set-Asides*, N.Y. TIMES, Mar. 7, 1998, at A9 (detailing the Senate rejection of an effort to end a federal program that set aside ten percent of highway contracts for minorities); Kevin Merida, *Senate Rejects Gramm Bid to Bar Affirmative Action Set Asides*, WASH. POST, July 21, 1995, at A13 (noting that the Gramm vote was defeated by a 61 to 36 vote). *Cf.* Gerald F. Seib, *GOP Congress Debates an Attack on Affirmative Action*, WALL ST. J., Dec. 10, 1996, at A24 (summarizing Republican hesitancy about supporting Proposition 209, an anti-affirmative action initiative).

[84] Juliet Eilperin, *House Defeats Bill Targeting College Affirmative Action*, WASH. POST, May 7, 1998, at A4 (quoting Rep. Henry Bonilla).

[85] *See* Thomas B. Edsall, *Census a Clarion Call for Democrats, GOP: As Nation Changes, Parties are Warned They Need New Tactics to Woo Voters*, WASH. POST, July 8, 2001, at A5 (discussing Republican recognition that "the electorate is moving steadily to the left" and they need "to adopt new rhetoric and tactics to attract minority voters" to maintain leadership).

[86] *See* Alex Fryer, *Affirmative Action Fight Shifts from Ballot Box to Courtroom*, SEATTLE TIMES, Nov. 25, 2002, at A1 (discussing the movements in Washington and California

largely had fizzled by the end of the 1990s. Further, state officials, including Republican governors, typically opposed these initiatives.[87] After a 1996 backlash against the California anti-affirmative action initiative resulted in a Republican party loss of majority control of the state Assembly,[88] Republican lawmakers vigorously and successfully opposed similar ballot initiatives.[89] Anti-preference interests responded to this rebuke by turning their attention to the courts (at least before *Grutter*).

By the time the Supreme Court agreed to hear *Grutter* and *Gratz*, state and federal support for affirmative action was stronger than ever. For this reason, there was little prospect of the Court embracing the same anti-affirmative action arguments that it rejected during the Reagan and first Bush administrations. Instead, given the Court's propensity to act within the constraints of majoritarian influences, the question was not whether the Court would disavow affirmative action, but whether it would meaningfully limit the power of colleges and universities to make race-based admissions decisions. For example, the Court could have demanded that schools first pursue race-neutral schemes before resorting to race-conscious ones. Similarly, the Court could have found that a school's pursuit of a "critical mass" of disadvantaged minorities was tantamount to a quota.[90] With elected offi-

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to "prohibit public agencies from considering race and gender in hiring, public-works construction, and school admissions).

[87] *See* Davis S. Broder & Robert A. Barnes, *Few Governors Join Attack on Racial Politics*, WASH. POST, Aug. 2, 1995, at A1 (describing how the backlash against affirmative action has gained support from few governors).

[88] Fryer, *supra* note 86, at A1 (noting the anti-affirmative action campaign alienated minority voters). Ironically, former California Governor Pete Wilson made his opposition to affirmative action a centerpiece of his 1996 bid for the Republican presidential nomination. Paul Taylor, *Wilson Formally Joins Presidential Race*, WASH. POST, Aug. 29, 1995, at A8 (describing Wilson's plan to make affirmative action a central issue in his campaign).

[89] Fryer, *supra* note 86, at A1 ("Republicans across the nation are largely following the lead of President Bush, who has largely avoided the affirmative-action issue."). In Florida, lawyers for Governor Jeb Bush, claiming that a proposed affirmative action initiative violated state law, went to court to block it. Jackie Hallifax, *Connerly Petitions Argued*, MIAMI HERALD, Mar. 7, 2000, at 8B. By opposing affirmative action in higher education, however, Jeb Bush energized minority voters—so much so that a dramatic increase in minority voter turnout in the 2000 presidential election nearly cost his brother the White House. *See* MAYER, *supra* note 78, at 289 (concluding that "[w]ithout that surge in black support for Gore, Bush would have won Florida [and thus, the White House] without the help of the Supreme Court").

[90] This was the conclusion reached by the federal district court judge hearing the Michigan law school case. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (2001) ("[B]y using race to ensure the enrollment of a certain minimum percentage of un-

cials opposing quotas and opinion polls showing popular opposition to racial preferences in college admissions (despite a poll showing that eighty percent of Americans also think it important for colleges to have "a racially diverse student body"),[91] proponents of affirmative action had reason to fear the Court would approve affirmative action but narrow the ways in which schools could consider race.

During the course of the *Grutter* litigation, proponents' fears gave way to a growing recognition that social and political pressures strongly favored Supreme Court approval of preferential admissions policies. In addition to overwhelming support by government and interest group amici, developments outside the Court highlighted the costs of a Court decision invalidating or severely limiting preferences.[92] In other words, notwithstanding the fact that most Americans oppose race-conscious admissions, majoritarian forces weighed heavily in favor of the Rehnquist Court's approval of affirmative action.

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Social and political forces beating against the Court in the *Grutter* and *Gratz* cases include the amicus filings by both interest groups and lawmakers, the Bush administration's decision to embrace racial diversity as an important and legitimate governmental end, the continuing salience of race discrimination in judicial confirmation politics, the ouster of Senate majority leader Trent Lott for making racially insensitive comments, and the awareness of the difficulties of implementing a Court ruling barring or severely limiting race-conscious admissions. In the pages that follow, this Essay will examine each of these factors.

A. *Amicus filings*

One hundred two amicus briefs were filed in *Grutter* and *Gratz*—eighty-three supporting the University of Michigan and nineteen supporting the petitioners. The gap between supporters and opponents

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derrepresented minority students . . . the current admissions policy [is] practically indistinguishable from a quota system.").

[91] Charles Lane, *Polls: Americans Say Court is 'About Right,'* WASH. POST, July 7, 2003, at A15. Likewise, most Americans oppose preferences while supporting "affirmative action." Gary Langer, *Assistance, But Not Preference Poll: Most Share Bush's View on Affirmative Action Analysis, available at* http://www.abcnews.com (Jan. 27, 2003).

[92] *See infra* text accompanying notes 110-17 (describing the political developments that caused the Bush administration's embrace of racial diversity in higher education).

of affirmative action, however, was far more lopsided than this four-to-one ratio. Consider the following: no member of Congress opposed the University. Indeed, one hundred twenty-four members of the House and thirteen Senators joined four briefs supporting the university, which emphasized that the federal government had repeatedly endorsed race-conscious decision making as constitutional, and argued that the Court should give deference to the constitutionally significant opinions of the other branches.[93] Though all brief signers were Democrats, four moderate Republicans made public their support of the university. In a letter to President Bush, Senators Lincoln Chafee, Olympia Snowe, Susan Collins, and Arlen Specter urged the administration to "support the position that diversity is a compelling government interest."[94]

States also rallied behind the University. Unlike earlier challenges to the constitutionality of state-sponsored affirmative action (where states typically did not file briefs),[95] twenty-three states and the Virgin Islands joined one of three briefs supporting the university.[96] These briefs argued that the university's determination that a diverse student body is a compelling interest that "falls within the institutional autonomy afforded to universities . . . and should, therefore, be afforded deference."[97] Only one state, Florida, filed a brief supporting the peti-

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[93] Brief of Amici Curiae John Conyers, Jr., Member of Congress et al. at 24, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516); Brief of Amici Curiae Senators Thomas Daschle et al, at 22, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516).

[94] Letter from Senator Arlen Specter et al. to President Bush (Jan. 14, 2003), *available at* http://www.senate.gov/~specter/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=329&Month=1&Year=2003; *see also* Dana Milbank, *Bush's Conservative Policies Put Some Moderates on Edge*, WASH. POST, Jan. 19, 2003, at A8 (mentioning the moderate Republican's letter).

[95] In *Bakke*, no state filed an amicus brief. In *Wygant*, one amicus brief was filed on behalf of six states. Brief of Amici Curiae of the State of Minnesota et al. at 1, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1985) (No. 84-1340). In *Croson*, two briefs were filed on behalf of sixteen states and the District of Columbia. Brief of Amici Curiae of the State of New York et al. at 1, City of Richmond v. Croson, 109 S. Ct. 706 (1988) (No. 87-998); Brief of Amicus Curiae of the State of Maryland at 1, City of Richmond v. Croson, 109 S. Ct. 706 (1988) (No. 87-998).

[96] California and Washington, the two states bound by citizen initiatives prohibiting racial preferences joined these briefs. Brief of Amici Curiae of the State of Maryland et al. at 5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516).

[97] Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm at 5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516); *see also* Brief of Amicus Curiae State of Maryland, *supra* note 96, at 5,

tioner. In it, Florida argues that diversity can be pursued without racial preferences, and points to its own experiences with a race-neutral admissions scheme, which includes a program whereby the top twenty percent of high school seniors are guaranteed admission to state universities.[98]

Big-business, labor, education, and civil-rights interests also backed the university. While these interests had all embraced the constitutionality of racial preferences prior to the Michigan cases, support for the Michigan plans was more emphatic than it had been in earlier affirmative action cases. Ninety-one colleges and universities, as well as every major educational association, filed briefs in support of the university. Not one college or university filed a brief opposing affirmative action.[99] These briefs argued that "pluralistic, widely representative" colleges provide a more enriching learning environment and better preparation for life in a multiracial world,[100] and that a racially integrated student body is "critical to American democracy" because, among other things, a significant number of high-ranking public officials are graduates of elite colleges and universi-

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(arguing that *Bakke* harmonizes equal protection, academic freedom and federalism by "giving a degree of deference to a public university's academic decisions, within constitutionally prescribed limits").

[98] Brief of Amici Curiae of the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor at 17-18, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516). Briefs supporting the university, however, took issue with Florida's claim. A brief filed by a coalition of twenty-one states and the Virgin Islands called attention to news reports that "[a]ides to Gov. Jeb Bush of Florida admit that they settled on the 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students." Brief of Amicus Curiae State of Maryland, *supra* note 97, at 26 (quoting Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* CHRON. OF HIGHER EDUC., June 2, 2000, at A31).

[99] Whereas in *Bakke*, five briefs were filed on behalf of eight educational associations, colleges, and universities. Brief of Amicus Curiae Antioch School of Law, Regents of University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811); Brief of Amici Curiae Board of Governors of Rutgers, et al., Regents of University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811); Brief of Amici Curiae Columbia University, et al., Regents of University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811); Brief of Amici Curiae the State of Washington and the University of Washington, Regents of University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811); Brief of Amicus Curiae Howard University, Regents of University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

[100] Brief of Amici Curiae Amherst College et al. at 7, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516). *See also* Brief of Amici Curiae American Education Research Association et al. at 4-15, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-241) (summarizing research showing that diversity in education promotes awareness, tolerance and leadership).

ties.[101] Correspondingly, briefs filed by Fortune 500 companies and other business interests[102] claim that business needs a diverse pool of potential employees in order to compete effectively in the global marketplace. To achieve this diversity objective, schools must be able to consider race.

This emphatic, near-unanimous reaffirmation of affirmative action helped propel the University of Michigan affirmative action programs. Perhaps more significantly, a coalition of former high-ranking officers and civilian leaders of the military (including William Crowe, Bud McFarlane, Norman Schwarzkopf, and Anthony Zinni) joined forces with longstanding supporters of affirmative action. In a brief that figured prominently in both oral arguments and the Court's decision,[103] the "military brief" linked "the military's ability to fulfill its principal mission to provide national security" with existing preferential treatment programs at the nation's military academies and its ROTC programs.[104] Noting the problems of low morale and heightened racial tension in Vietnam, the brief argued that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the militar[y]."[105]

The amicus curiae filings in *Grutter* and *Gratz* are a testament to the breadth and intensity of support for affirmative action.[106] By de-

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[101] *See* Brief of Amicus Curiae Association of American Law Schools at 4, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241) (urging that "lawyers and judges occupy a distinctly powerful and privileged position within the American political system.").

[102] There are six briefs supporting racial preferences from business or business organizations (including briefs from sixty-five Fortune 500 Companies and eighteen media companies), and all support affirmative action. In contrast, when the Supreme Court heard *Adarand v. Peña* in 1995, no briefs were filed by major businesses or nonminority organizations. 515 U.S. 200 (1995).

[103] Consolidated Amicus Brief of Lt. Gen. Julius W. Becton, Jr. et al., at 5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516)); *see also* Linda Greenhouse, *Justices Look for Nuance in Race-Preference Case*, N.Y. TIMES, Apr. 2, 2003, at A1 (noting that "of the 102 briefs filed in the two cases, this was the one that had grabbed the attention of [J]ustices across the [C]ourt's ideological spectrum"); *infra* text accompanying notes 134-43 (describing how the "military brief" lent support to the Court's conclusion that informed, respectable interest groups valued racial diversity).

[104] Brief of Lt. Gen. Becton, *supra* note 103, at 5. For a discussion of how Lee Bollinger, then President of the University of Michigan, helped orchestrate the writing of this brief, see Lyle Denniston, *Military May Sway Court on Diversity*, BOSTON GLOBE, June 22, 2003, at A1.

[105] Brief of Lt. Gen. Becton, *supra* note 103, at 5.

[106] For a discussion of the impact of such lopsided filings on the Justices, see James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme*

tailing the perceived benefits of affirmative action, they provided the Court with information it could use to explain why racial diversity is a compelling government interest.[107] In sharp contrast, opponents of affirmative action remained politically isolated. The only notable brief that supported this position was an ambiguous filing by the Bush administration.[108] But as I will discuss that brief probably did more harm to their cause than good. Indeed, when compared to other controversial social issues (abortion or religion in the schools), the absence of important, powerful voices on one side of the issue seems especially stark.[109]

B. *Trent Lott and the Bush Brief*

The biggest boost for affirmative action may have come from an unlikely source: George W. Bush. On January 15, 2003, the President

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Court, 50 POL. RES. Q. 365, 377 (1997). For a somewhat competing argument, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 830 (2000), which concludes that this "interest group model . . . finds only equivocal support" and defends, instead, a "traditional legal model" that focuses on whether amici submit legally relevant information to the Court that is not already supplied by the parties to the case. In *Grutter* and *Gratz*, amicus support for the University of Michigan did provide the Court with legally relevant information. *See infra* text accompanying notes 139-40 (discussing citations to amicus filings in the Court's opinion).

[107] The information contained in amicus briefs, moreover, may have figured into the Justices' understanding of whether race diversity is a compelling interest. The military brief, for example, provided important information about the possible nexus between national security and race diversity. Brief of Lt. Gen. Becton, *supra* note 103, at 5.

[108] Brief of Amicus Curiae Unites States at 1, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) & Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241 & 02-516). While briefs by the State of Florida and the Asian American Legal Foundation argued that the Michigan plans were unconstitutional, *see supra* note 98 and accompanying text (discussing Florida's brief), the Florida brief was obscured by the filings of twenty-three other states and the Asian American Legal Foundation brief was dwarfed by sixty-four others submitted on behalf of three hundred organizations supporting the university. For a discussion of these organizations supporting the university, see Diana Jean Schemo, *Doctors, Soldiers and Others Weigh In on Campus Diversity*, N.Y. TIMES, Feb. 23, 2003, § 6 (Magazine), at 7. *Cf.* Charles Lane, *U-Michigan Gets Broad Support on Using Race*, WASH. POST, Feb. 11, 2003, at A1 (noting that opponents of preferences were "backed mainly by relatively small conservative public-interest groups").

[109] Compare, for example, abortion litigation. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), pro-choice and pro-life interests filed roughly the same number of amicus briefs. Moreover, important amicus briefs by states, members of Congress, and state lawmakers were filed on both sides of the issue. *See* Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J. LAW. & POL. 639 (1993) (analyzing *Webster*'s illustration of how governmental interests sponsor and coordinate cases). For additional discussion of these briefs, see Susan Behuniak-Long, *Friendly-Fire: Amici Curiae and* Webster v. Reproductive Health Services, 74 JUDICATURE 261 (1991).

announced that he "strongly support[s] diversity . . . including racial diversity in higher education," but that he considered the University of Michigan's affirmative action plans to be "[a]t their core" an unconstitutional "quota system."[110] The very next day, the George W. Bush Justice Department submitted a brief that, "far from insisting that any consideration of race was impermissible, did not even ask the justices to overturn the *Bakke* decision, . . . [instead] allowing race to be used as a 'plus factor.'"[111] The brief argued that government "may not employ race-based means without considering race-neutral alternatives and employing them if they would prove efficacious."[112] In other words, unlike the absolutist filings of the Reagan and first Bush administrations, the Bush Justice Department sought to steer a middle path on racial preferences. Indeed, following the Court's decisions in *Grutter* and *Gratz*, the President declared victory, "applaud[ing] the Supreme Court for recognizing the value of diversity on our Nation's campuses."[113]

The President's decision is readily understandable. On the one hand, he could not embrace the University of Michigan's programs without alienating his conservative base, represented by Attorney General John Ashcroft and Solicitor General Ted Olson.[114] On the other hand, he could not risk rejecting affirmative action because his

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[110] Remarks on the Michigan Affirmative Action Case, 39 WEEKLY. COMP. PRES. DOC. 71 (Jan. 15, 2003).

[111] Linda Greenhouse, *Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003, at A1 (quoting Brief of Amicus Curiae Unites States, *supra* note 108, at 5). For this very reason, conservatives castigated the administration for "split[ting] the difference on racial preferences" and thereby signaling the Court that "[a] conservative president does not think that he can afford to stand unambiguously for colorblindness." *Negative Reaction*, NAT'L. REV., Feb. 10, 2003, at 12.

[112] Brief of Amicus Curiae Unites States, *supra* note 108, at 9.

[113] Statement on the Supreme Court Decision on the Michigan Affirmative Action Cases, 39 WEEKLY. COMP. PRES. DOC. 803 (June 23, 2003). Other high-ranking administration officials, including White House counsel Alberto Gonzales and Education Secretary Rod Paige, also expressed approval of the decision. *See* John M. Broder, *Administration Lawyer Lauds Affirmative Action Ruling*, N.Y. TIMES, June 28, 2003, at A10 (referring to Gonzales' approval of the *Grutter* decision); Press Release, Department of Education, Paige Issues Statement on Today's Supreme Court Decisions about University of Michigan's Admissions Policies (June 23, 2003) (noting Rod Paige's support of race-neutral policies), *available at* http://www.ed.gov/news/pressreleases/2003/06/06232003a.html .

[114] For news stories recounting Ashcroft and Olson's efforts to convince the President to file an absolutist brief against preferences, see Dana Milbank, *Bush Aides Split on Bias Case at U-Mich.*, WASH. POST, Dec. 18, 2002, at A1; Peter Schmidt, *Bush Asks Supreme Court to Strike Down U. of Michigan's Affirmative-Action Policy*, CHRON. HIGHER EDUC., Jan. 24, 2003, at A20.

political advisors told him that he must do better with minority voters to win reelection.[115] Otherwise, growing minority populations, especially in closely divided states, could undermine his reelection bid.[116] Fears of alienating minority voters were driven home when several high-ranking minority appointees expressed their support for affirmative action both during internal deliberations about the Michigan cases and in public forums.[117]

Following racially insensitive remarks of then Senate majority leader Trent Lott, the President had little choice but to publicly embrace racial diversity in higher education (if not the University of Michigan plans themselves). In December 2002, Senator Lott appeared to embrace the segregationist appeals of Strom Thurmond's 1948 presidential campaign.[118] The President immediately denounced Senator Lott for making statements that "do not reflect the spirit of our country" and, at least implicitly, "distanced himself from the Senate majority leader."[119] When the administration filed its brief in January 2003, there was little question that the Lott imbroglio helped push the administration towards its middle ground position.[120]

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[115] Adam Nagourney, *With His Eye on Two Political Prizes, the President Picks His Words Carefully*, N.Y. TIMES, Jan. 16, 2003, at A26.

[116] *See* Linda Chavez, *Don't Go Wobbly, Mr. Bush!*, WALL. ST. J., Jan. 8, 2003, at A14 (noting that "the conventional wisdom among some Republican politicos [is] that opposing affirmative action is a sure way to alienate [minority] voters"); Edsall, *supra* note 85 (describing Republican worries "that long-term demographic changes . . . could result in major Democratic gains"); Nagourney, *supra* note 115 (noting that "minority populations are expanding in so many closely divided states").

[117] *See* Mike Allen, *Counsel to an Assertive Presidency*, WASH. POST, May 19, 2003, at A17 (discussing White House Counsel Alberto Gonzalez's "crucial role in persuading Bush . . . to call Michigan's system unconstitutional but remain silent on the broader question of affirmative action"); David Firestone, *From 2 Bush Aides, 2 Positions on Affirmative Action Case*, N.Y. TIMES, Jan. 20, 2003, at A17 ("Secretary of State Colin L. Powell . . . made it clear he remained a strong supporter of traditional affirmative action."); Michael Getler, *Rice, Race and Reporters*, WASH. POST, Jan. 26, 2003, at B6 (quoting National Security Advisor Condolezza Rice's statement that "it is appropriate to use race as one factor among others in achieving a diverse student body."); Milbank, *supra* note 114 (noting Gonzalez's opposition to an "administration stance against affirmative action"); Schmidt, *supra* note 114 (describing Gonzalez's concern about "a stand against race-conscious admissions").

[118] Adam Nagourney & Carl Hulse, *Divisive Words: The Republican Leader; Bush Rebukes Lott Over Remarks on Thurmond*, N.Y. TIMES, Dec. 13, 2002, at A1 (quoting Senator Lott at a party for Senator Thurmond).

[119] *Id.*

[120] *See* June Kronholz & Jeanne Cummings, *Bush Decries Racial Preferences*, WALL ST. J., Jan. 16, 2003, at A4 (noting that "[c]omplicating the political calculation [on affirmative action] was the recent rebuke of Sen. Trent Lott").

C. *Protecting the Court's Turf*

The political pressures that pushed the Bush administration to distance itself from past Republican administrations underscore a simple fact: twenty-five years after the Supreme Court signaled that race can be "a factor" in college and university admissions,[121] affirmative action has become so entrenched that the costs of taking a stand against it are greater now than ever before.[122] For the Supreme Court, these same social and political forces call attention to the institutional cost of opposing affirmative action. Lacking the power to appropriate funds or command the military, the Court understands that it must act in ways that garner public acceptance.[123] A Court decision that is ignored or skirted does the Court little good. Likewise, the Court can be hurt by a decision that prompts a political backlash.[124]

When deciding *Grutter* and *Gratz*, the Justices had reason to believe that the Court could not stop colleges and universities from devising race-conscious admissions strategies. A brief filed by the University of Texas Law School in a 1996 preferential admissions case warned: "If affirmative action is ended, inevitable political, economic and legal forces will pressure the great public universities to [find ways

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[121] I use the word "signaled" because this feature of Justice Powell's opinion in *Regents v. Bakke* may well have been dicta. *Compare* Grutter v. Bollinger, 288 F.3d 732, 739-42 (6th Cir. 2002) (arguing that Justice Powell's claim that diversity is a compelling government interest is a binding precedent), *with id.* at 785-87 (Boggs, J. dissenting) (arguing that Powell's claim is dicta). *See also* Alan J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2d 381, 390 (1998) (concluding that lower courts should not treat Powell's claim as binding precedent and should "feel free to reach their own conclusions about the propriety of employing racial preferences in the admission process").

[122] At the time of *Bakke*, affirmative action was not entrenched. The Carter administration, for example, almost filed a brief opposing preferential admissions in *Bakke*. *See* JOSEPH A. CALIFANO, JR., GOVERNING AMERICA 236-40 (1981) (discussing the Justice Department's draft brief, which argued that racial classifications were "presumptively unconstitutional"). Today it is almost inconceivable that a Democratic administration would oppose affirmative action.

[123] This, of course, is why Alexander Hamilton referred to the judiciary as "the least dangerous" branch in THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For much the same reason, an empirical study by psychologists Tom Tyler and Gregory Mitchell confirmed that "the public belief in the Court's institutional legitimacy . . . enhances public acceptance of controversial Court decisions." Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 715 (1994); *see also supra* text accompanying note 18 (noting propensity of swing Justices to take account of social and political forces).

[124] For additional discussion of how the Court takes account of whether elected officials will implement or subvert its decisions, see *supra* notes 23-26 and accompanying text.

to maintain minority enrollments]."[125] Consider, for example, plans guaranteeing admission to the top ten or twenty percent of high school seniors. Although ostensibly race-neutral, these plans are designed to ensure that a set percentage of African Americans and Hispanics secure admission to flagship state universities.[126] Another example of an ostensibly race-neutral plan designed to boost minority enrollment is the UCLA School of Law's creation of a separate admissions procedure for students interested in enrolling in that school's Critical Race Studies program. Although this program is open to students of all races, this initiative is an example of so-called "proxies" used to attract minority students.[127] Other proxies include "greater faculty discretion" in admissions decisions and greater attention to "socio-economic" status.[128]

A decision repudiating affirmative action, moreover, would have fueled Senate Democrat efforts to derail Bush judicial nominees. Complaining that the Rehnquist Court engages in "conservative judicial activism," Senate Democrats have argued that the judicial confirmation process should be used as a check on the Court.[129] When

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[125] Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES, June 1, 2003, § 6 (Magazine), at 52, 54 (quoting the amicus brief to Supreme Court by three University of Texas professors).

[126] Since many high schools are racially isolated, these plans guarantee admission to minority students who attend predominantly minority schools. *See supra* text accompanying note 98 (discussing Florida's twenty percent plan). Texas's plan has also "resulted in a nice increase in minority participation and enrollment at universities and post-graduate studies." Milbank, *supra* note 114 (quoting White House spokesman Ari Fleischer in discussion of Texas plan as being devised by Bush when he was that state's governor).

[127] *See* Daniel Golden, *Schools Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1 (providing an example of a proxy, namely interest in UCLA's Critical Race Studies program).

[128] *Id.* For example, at the University of California, Berkeley, law school officials created a system of "individualized assessment" that enabled them to admit nearly as many minority students after a voter-approved anti-affirmative action initiative as before the initiative's approval. Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11.

[129] As I have detailed elsewhere, I think that complaints of "conservative judicial activism" have relatively little to do with Democrat disappointment or with Rehnquist Court decision making; instead, these complaints are largely a smokescreen for Democrats seeking to repay Republicans for hardball politics over Clinton judicial nominees and, more generally, to constrain the Bush White House. *See* Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1307-09 (2002) (suggesting that the objectors to the Rehnquist Court come from polarization between Republicans and Democrats, and bitterness over the Court's involvement in the 2000 presidential election).

Democrats controlled the Senate Judiciary Committee in 2001 and 2002, a handful of Bush nominees were either rejected or put on hold because of their views on civil and abortion rights.[130] Following the 2002 midterm elections (when Republicans regained control of the committee), Senate Democrats have filibustered a number of Bush federal court of appeals nominees.[131]

Considering the widespread support for affirmative action in Congress and the states, there is little question that a Court decision that rejected both of the Michigan plans would have quickly spilled over to the confirmation process. By ruling in favor of affirmative action (as well as gay rights and family leave protections), the Court helped neutralize Senate Democrat complaints.[132] In other words, Justices who do not strongly disapprove of racial preferences would have good reason to steer clear of this controversy,[133] especially since it is doubtful that colleges and universities would truly conform to a Supreme Court decision calling for color-blind admissions.

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[130] For example, civil rights groups launched a successful campaign against Bush's efforts to elevate District Judge Charles Pickering to the Fifth Circuit. *See* Helen Dewar & Amy Goldstein, *Appeals Court Choice Rejected: Senate Panel Hands Bush 1st Defeat on Judicial Nomination*, WASH. POST, Mar 15, 2002, at A1 (discussing 10 to 9 party-line votes in the Senate Judiciary Committee). Claims that Pickering displayed "insensitivity and hostility" to voting rights, desegregation, and other civil rights reforms, People For the American Way, *Thanks Senators for Opposing Extremist Bush Nominees at* http://www.pfaw.org/pfaw/general/default.aspx?oid=7794 (last visited Oct. 19, 2003), prompted Senate Democrats to argue that Pickering would "supplant[] the law with his conservative views." Amy Goldstein & Helen Dewar, *Democrats Challenge Choice of Miss. Judge*, WASH. POST, Feb. 8, 2002, at A8. After the Republicans regained control of the Senate in 2002, President Bush renominated Pickering. Neil A. Lewis, *A Judge, a Renomination and the Cross-Burning Case That Won't End*, N.Y. TIMES, May 28, 2003, at A16. Senate Democrats then filibustered the nomination. *See* Neil A. Lewis, *Filibuster on Nominee to Court Seat Survives Vote*, N.Y. TIMES, Oct. 31, 2003, at A10.

[131] *See, e.g., id.*; Helen Dewar, *Nomination of Tex. Judge is Blocked*, WASH. POST, May 2, 2003, at A2 (describing the first two filibustered nominations); Robert S. Greenberger, *Estrada's Withdrawal May Spur Political Bickering*, WALL ST. J., Sept. 5, 2003, at B2 (discussing Democratic senators' continuing fight to block the nominations of two more federal court of appeals nominees, Alabama Attorney General William Pryor and Los Angeles Superior Court Judge Carolyn Kuhl); *Rainbow Filibuster Coalition*, WALL ST. J., Oct. 15, 2003, at A20 (noting that additional nominees "[c]oming up on the filibuster hit parade [are] Henry Saad, . . . nominated for the Sixth Circuit . . . [and] . . . Janice Brown, . . . nominated for the D.C. Circuit").

[132] *See infra* text accompanying note 163 (discussing Congressional approval of the Court's ruling).

[133] *See* Merrill, *supra* note 31 (noting that O'Connor and Kennedy often vote to deny certiorari in cases raising divisive social issues); Thomas & Taylor, *supra* note 15, at 49 (noting that O'Connor "doesn't like to be part of polarizing decisions"). For additional discussion, see *supra* text accompanying notes 24-26.

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When deciding *Grutter* and *Gratz*, the Supreme Court paid homage to the majoritarian forces beating against it.[134] Indeed, the Court's conclusions about whether and how colleges and universities can take race into account are perfectly in sync with social and political forces. While a single Justice (Sandra Day O'Connor) is largely responsible for the Court's balancing act, the fact remains that six Justices explicitly ruled that race-based admissions are constitutionally permissible[135] (and a seventh, Chief Justice William Rehnquist, sidestepped that question).[136] Likewise, six Justices explicitly ruled that both quotas and mechanical formulas that award a certain number of points to all minority students are unconstitutional[137] (and a seventh, Justice John Paul Stevens, sidestepped that question).[138]

The least surprising feature of the Court's rulings is its conclusion that racial diversity is a compelling governmental interest. Mainstream amici (even those, like the Bush administration and State of Florida, who thought that the two Michigan programs went too far) were unanimous in their embrace of racial diversity.[139] In *Grutter*, the majority relied on these amicus filings and cited briefs by the Bush administration, educational associations, colleges and law schools, big business, and the so-called "military brief."[140] It did not matter that

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[134] Indeed, for only the second time in its history, the Court allowed for the live broadcast of oral arguments in the case. This decision reflected the Justices recognition of "the extraordinary public interest" in the case. *Eavesdropping on History*, N.Y. TIMES, Apr. 2, 2003, at A20.

[135] In addition to Justices O'Connor, Breyer, Ginsburg, Souter, and Stevens (the *Grutter* majority), Justice Anthony Kennedy reached this conclusion. 123 S. Ct. at 2370 (Kennedy, J., dissenting).

[136] *See Grutter*, 123 S. Ct. at 2365 (Rehnquist, Chief J., dissenting) (avoiding comment on the constitutionality of race-based admissions, and limiting his opinion only to "the limited circumstances when drawing racial distinctions is permissible") (internal citations omitted).

[137] In addition to Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas (the *Gratz* majority), Justice Breyer expressed this view in a concurring opinion. 123 S. Ct. at 2433-34 (Breyer, J., concurring).

[138] *See Gratz*, 123 S. Ct. at 2434-38 (Stevens, J., dissenting) (remaining silent on the merits of the case and arguing that the plaintiffs' claims were no longer ripe).

[139] *See supra* text accompanying notes 91-107. Of these amici, the State of Florida was the only one to explicitly argue that this compelling interest could not be pursued through race-conscious admissions programs. *See* Brief of Amici Curiae of the State of Florida, *supra* note 98 at 4-5.

[140] The Court cited eight amicus briefs in this part of its opinion. *Grutter*, 123 S. Ct. at 2336, 2340, 2341, 2345.

some of these briefs advanced interests, such as national security, that were not advanced by the University. Rather, the Court wanted to make clear that racial diversity was compelling, and that informed, respectable interests overwhelmingly supported it.[141] Under these circumstances, a contrary holding would have been judicial hubris, placing the Court's views ahead of all others.[142]

For the same reason, it is unsurprising that the Court would find that colleges and universities may take race into account. In particular, once the Bush administration signaled that preferential admissions schemes are sometimes constitutional, majoritarian forces overwhelmingly supported the Court reaching a similar conclusion.[143] Justice Sandra Day O'Connor, who had never voted to approve a race-based preference scheme, undoubtedly saw her approval of preferential admissions as simply cementing the status quo (with business, educational, and elected government interests all backing preferences).[144] More tellingly, the dissenting opinions in *Grutter* underscore the breadth of support for affirmative action. Not only did swing Justice Anthony Kennedy explicitly embrace race-conscious university admissions, Chief Justice Rehnquist never questioned whether race can be used in admissions. Instead, his dissent was limited to how the law school took race into account.[145]

The real question in *Grutter* and *Gratz* was how much latitude schools would have when employing race and, relatedly, whether the Court would approve one of the University of Michigan plans. As I will now explain, the Court's decisions were a picture-perfect reflec-

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[141] The term "respectable" was used by Bill Van Alstyne when discussing the sources of support upon which the Court relied in its opinion. Discussion with Bill Van Alstyne, William R. Perkins and Thomas C. Perkins Professor of Law, Duke Law School, in Williamsburg, VA (Feb. 2003).

[142] Even though the Court's citation to amicus briefs showed that opponents of affirmative action were politically isolated, it may also be that these briefs were cited because they alerted the Justices to legally relevant information. *See supra* text accompanying note 106 (noting that these briefs gave the Court information it could use in formulating its opinion).

[143] *See supra* text accompanying notes 96-101, 109-11 (listing numerous amicus briefs submitted in support of allowing race to be used as a factor in college and university admissions).

[144] For a perceptive treatment of O'Connor's embrace of the status quo, see Michael Klarman, *Are Landmark Court Decisions All That Important?*, CHRON. HIGHER EDUC., Aug. 8, 2003, at B10-11.

[145] *See Grutter*, 123 S. Ct. at 2365 (Rehnquist, Chief J., dissenting) ("I do not believe, however, that the University of Michigan Law School's . . . means are narrowly tailored to the interest it asserts . . . . [T]he Law School's program is revealed as a naked effort to achieve racial balancing.").

tion of the social and political forces beating against it. With that said, I am not contending that the Court had no choice but to approve one of the two Michigan programs. A decision, for example, approving some race-based admissions schemes but striking down both plans as mechanistic quota-like systems would have reflected social and political forces. Such a decision would have appealed to a Justice like Anthony Kennedy, who found the Michigan plans offensive but still wanted to take social and political forces into account.[146]

Nevertheless, social and political forces strongly supported the Court's decision to uphold the law school program that purportedly provided "meaningful individualized review of applicants,"[147] while striking down the undergraduate program because it did not consider "the particular background, experiences, or qualities of each individual applicant."[148] A decision striking down both programs—even one that recognized that individualized treatment of race is constitutionally permissible—would have come at a cost. As previously mentioned,[149] such a decision might have been portrayed as anti-civil rights and spilled over to confirmation politics and the 2004 elections. In addition to placing the Court in the middle of a political imbroglio, a decision striking down both programs (while recognizing that race diversity is a compelling interest) would have clarified very little. In response, colleges and universities likely would either come forward with new affirmative action plans or new explanations as to why they have no choice but to adhere to existing preferential admission programs.[150] Over time, there would be new circuit conflicts and increas-

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[146] Along the same lines, Justice O'Connor's approval of the law school plan may well have been tied to her belief that the Court must work to achieve "both the perception and the reality of equal justice" because "a substantial number of our citizens believe our legal judicial system is unresponsive to them because of racial bias." Justice Sandra Day O'Connor, Remarks of the Honorable Sandra Day O'Connor, Recipient of the Honorary Degree Doctor of Laws (May 25, 2003), *available at* http://www.gwu.edu/~media/pressrelease.cfm?ann_id=6782; *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) (noting that Marshall's "personal histories and experiences" shaped O'Connor's thinking). For additional discussion, see *infra* note 162 (noting the connection between O'Connor's decision in *Grutter* and relevant social and political forces).

[147] *Gratz*, 123 S. Ct. at 2431 (O'Connor, J., concurring).

[148] *Id.*

[149] *See supra* text accompanying notes 114-16, 129-31 (identifying potential effects of a decision against affirmative action).

[150] *See supra* text accompanying notes 125-28 (listing various plans used to maintain or increase minority enrollment); *see also* Brief of Amicus Curiae American Education Research Association, *supra* note 100, at 25-29 (arguing that a school's compelling

ing pressure for the Court to issue a more decisive opinion. A decision upholding the law school program therefore comports with the Rehnquist Court's post-1995 practice of shifting its energies away from divisive social issues.[151]

What then can we take from Justice Scalia's claim that the Court's qualified approval of racial preferences "seems perversely designed to prolong the controversy and the litigation"?[152] For Justice Scalia, future litigation would examine whether a school's consideration of race, in fact, is individualized, and whether the school's expressed commitment to diversity is a mere smokescreen to disguise discriminatory admissions. These claims, however, ignore the Court's methodology in *Grutter* and *Gratz*. Specifically, the Court drew a sharp line between admissions systems that purportedly allow for independent consideration of each applicant and "nonindividualized [and] mechanical" formulae that *mandate* that *all* minority applicants be placed in a separate admissions pool, be given a specified number of bonus points, etc.[153] For the majority, the latter category is clearly impermissible, while the former category is subjected to deferential review and is almost certainly permissible. In *Grutter*, for example, the Court "[took] the law school at its word that it would like nothing better than to find a race-neutral admissions formula" and that it considers each applicant's claim that she will add to the school's diversity.[154] The fact that the law school distinguished among groups of underrepresented minorities (preferring African Americans to Hispanics and Native Americans) was considered irrelevant.[155] Likewise, the Court saw no reason to discuss why it was that the law school seemed to look to the percentage of African Americans in its applicant pool in determining how many admissions offers it would extend to African Americans.[156] Finally, the Court did not explore why the percentage of

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interest in race diversity can only be pursued through race-conscious admissions schemes).

[151] *See supra* text accompanying note 64 (identifying the Rehnquist Court's denial of certiorari to socially divisive cases).

[152] *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part and dissenting in part).

[153] *Gratz*, 123 S. Ct. at 2433 (O'Connor, J., concurring).

[154] *Grutter*, 123 S. Ct. at 2346. Indeed, the Court accepted the law school's claim that it admits nonminority students "who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id.* at 2345.

[155] Chief Justice Rehnquist made much of this fact in his dissent. *See id.* at 2366-67 (Rehnquist, C.J., dissenting) (noting the differences in the "critical mass" of students sought from different minority groups). The majority opinion did not respond.

[156] *See id.* at 2368-69 ("But the correlation between the percentage of the law school's pool of applicants who are members of the three minority groups and the

minority offers "at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range."[157]

By granting broad latitude to colleges and universities that employ ostensibly individualized admissions systems, *Grutter* validates claims by lawmakers and elites about both the importance of race diversity and the difficulties schools face when pursuing this end. Majoritarian forces did not support the validation of the undergraduate admissions. While elected officials, interest groups, and newspapers overwhelmingly back preferences, quotas are taboo.[158] More significantly, public opinion polls support the placing of limits on affirmative action. These polls show that the American people, while supporting racial diversity in higher education, oppose racial preferences.[159] Opinion polls, however, also reveal that the Court has significant leeway to decide what kinds of affirmative action are constitutionally permissible. For instance, fewer than one in five white voters claimed that affirmative action would play a significant role in sorting out their presidential preference,[160] and one day after Californians approved an anti-affirmative action initiative, an exit poll revealed that neither Republicans nor Democrats would rank affirmative action as one of the

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percentage of the admitted applicants who are members of these same groups is far too precise to be discussed as merely the result of the school paying 'some attention to the numbers.'").

[157] Id. at 2371 (Kennedy, J., dissenting); *see also* Mark V. Tushnet, *The Supreme Court and Affirmative Action*, AALS NEWSLETTER, Aug. 2003, at 1 (suggesting that Michigan Law School had a "rough target percentage of minorities," and that the school "might increase" the weight given to race "to ensure that the target was met"). The majority, however, did note that the range of minority students in each class "varied from 13.5 to 20.1 percent, a range inconsistent with a quota." 123 S. Ct. at 2343. In response, the dissenters noted both that the law school monitored the number of minority students who accepted its offers, *id.* at 2372 (Kennedy, J., dissenting), and, correspondingly, that the school could only control who it made offers to, not who enrolled at the law school. *Id.* at 2369 (Rehnquist, C. J., dissenting).

[158] Even Bill Clinton, a strong advocate of racial preferences, rejected mechanical formulas designed to ensure proportionate minority representation. *See* Lewis, *supra* note 74, at A1 (discussing Clinton's withdrawal of Lani Guinier's nomination in response to Senate Democrat complaints). Correspondingly, I do not think that the Court felt pressure to uphold the college plan because amici, instead of distinguishing the two plans, argued that both plans were constitutional. The Court knew that the concern of amici was the approval of racial preferences and the granting of wide latitude to colleges and universities in implementing affirmative action programs. This is precisely what the Court did and, not surprisingly, amici were overjoyed by the Court's ruling. *See infra* text accompanying notes 167-68 (recounting popular expressions of support for the Court's approval of diversity as a permissible goal).

[159] Langer, *supra* note 91.

[160] Jennifer L. Hochschild, *The Stranger Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1001 (1998).

top seven issues facing voters.[161] Thus, Americans would certainly accept a decision approving some, but not all, racial preferences. The question of how much latitude the Court was giving universities simply would not register with most voters.

The Court therefore had strong reason not to give colleges and universities a carte blanche to sort out if and when race should be taken into account.[162] By upholding the law school's "individualized" consideration of race while rejecting the college's across-the-board plan, "'[t]he court comes across as temperate, reflecting the complexity of opinion in the public itself.'"[163] Furthermore, knowing that its decisions would be embraced by elected officials and opinion leaders, the Court (by ruling against the college in the face of widespread amicus support for the college) was able to appear independent and countermajoritarian without worrying about possible political reprisals.

CONCLUSION

Reaction to the Court's approval of race-based preferences, not surprisingly, was overwhelmingly positive. The decisions were hailed

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[161] *Id.*

[162] In *Grutter*, Justice O'Connor recognized the costs of giving colleges and universities unbounded authority. She notes that schools should, if possible, consider race-neutral alternatives. *See* 123 S. Ct. at 2346 ("Universities in other states can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). She also concluded her opinion by commenting that it "has been 25 years since [*Bakke*]" and that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 2346-47. By qualifying the Court's support for affirmative action, O'Connor signaled that her decision to uphold the law school program was tied to social and political forces, including her publicly expressed concern about the Court's need to improve its image on race issues. *See* O'Connor, Remarks of the Honorable Sandra Day O'Connor, *supra* note 146 (illustrating O'Connor's opinion on race and the judicial system).

[163] David Von Drehle, *Court Mirrors Public Opinion*, WASH. POST, June 24, 2003, at A1 (quoting Andrew Kohut, director of the Pew Research Center). For Justice O'Connor, moreover, this distinction comports with her dissent in *Metro Broadcasting*, a case upholding diversity preferences for minorities. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 602 (O'Connor, J., dissenting) (suggesting that O'Connor would support a government program sponsoring individualized consideration of race in admissions, but not one as broad in its use of race as a qualification as was the one in this case). For Justice O'Connor, nonindividualized diversity preferences wrongly assumed that all minorities would make similar programming decisions. *See id.* ("To uphold the challenged programs, the Court departs . . . from our traditional requirement that racial qualifications are permissible only if necessary and narrowly tailored to achieve a compelling interest.")

by the President and his aides,[164] by every Democratic presidential contender,[165] by eight of the nine Senators and Representatives who spoke about the case on the floor of Congress,[166] and by nearly every major newspaper. Colleges and university officials likewise embraced the rulings, noting that they now "planned to focus on finding ways to shield race-conscious admissions policies against future legal challenges."[167]

The question remains: will the Court's rulings settle the affirmative action wars once and for all (at least with respect to preferential school admissions)? After all, if social and political forces strongly back affirmative action and the Supreme Court has blessed preferential admissions, it seems as if there is no prospect of an affirmative action counterrevolution. Indeed, even though future Supreme Court appointees might transform the Rehnquist Court in ways that cannot be predicted, the political forces that pushed for the defeat of Robert Bork and Republican Party acquiescence to affirmative action will probably stand in the way of the Supreme Court's reversal of *Grutter*.[168] On the other hand, even though anti-preference ballot initiatives stalled in the face of mainstream Republican opposition, it is possible that the leaders of this ballot initiative movement will be energized by the Court's rulings.[169] Also, affirmative action may fall under the

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[164] *See* sources cited *supra* note 113 (noting reaction of Bush and his appointees).

[165] Democratic candidate comments to the Court's decision can be found in Associated Press, *Dem's Target: Bush*, CHI. TRIB., June 23, 2003, at 3.

[166] Congressional Record data is based on a search for references to the case immediately after the Court's decision (June 23-27, 2003). *See* 149 CONG. REC. H94,5799 (daily ed. June 24, 2003) (statement of Rep. King); 149 CONG. REC. S94,8432 (daily ed. June 24, 2003) (statement of Sen. Durbin); 149 CONG. REC. S95,8548 (daily ed. June 25, 2003) (statements of Sens. Kennedy and Feingold); 149 CONG. REC. E 97,1386 (statement of Rep. Clay).

[167] Peter Schmidt, *College Leaders Discuss Ways of Preserving Affirmative Actions*, CHRON. HIGHER EDUC., July 17, 2003, *available at* http://www.chronicle.com/daily/2003/07/2003071702n.htm.

[168] That is not to say that lower court judges will not narrow the decision. Also, it is certainly imaginable that, following the 2004 elections, conservative interests will successfully push both the White House to nominate and the Senate to confirm a Justice sympathetic to the conservative social agenda. Jonathan Groner, *Alberto Gonzales: A Washington Education*, LEGAL TIMES, Mar. 3, 2003, at 12 (describing the mixed opinions of conservatives on the possibility of Gonzales as a Supreme Court Justice). If that happens, the Court may reflect the growing power of conservatives and pursue the social conservative agenda by, among other things, narrowing *Grutter*.

[169] *See* V. Dion Haynes, *New Battle on Affirmative Action: Opponents Plan to Seek Ban Via Vote in Michigan*, CHI. TRIB., July 8, 2003, § 1, at 5 (noting ongoing effort to put an anti-affirmative action initiative on the Michigan ballot). *But see* Rebecca Trounson & Nancy Vogel, *The Recall Election, Propositions 53 and 54, Both Ballot Measures Go Down in*

weight of the nation's changing demographics. In particular, with an increasingly diverse and ever-growing minority population, there is good reason to question the political saliency of affirmative action plans that are limited to just a few groups.[170]

In the short run, however, the Court has responded to social and political pressures. Its decision, moreover, seems designed to keep the Court out of this thicket and return the issue to the states, where schools, elected officials, and voter initiatives can sort out the details of racial preferences. In so doing, *Grutter* and *Gratz* are emblematic of the Rehnquist Court's practice of operating within parameters set by social and political forces.

Defeat, Backers Say the Racial Data and Infrastructure Proposals were Lost in the Recall Hysteria, L.A. TIMES, Oct. 8, 2003, at A26 (discussing the October 2003 defeat of an anti-affirmative action initiative in California).

[170] More generally, rising rates of interracial marriage and changing immigration patterns suggest that race and ethnicity are "extremely fluid," "increasing[ly] arbitrar[y]" constructs. George F. Will, *Crude Remedy for a Disappearing Problem*, WASH. POST, June 24, 2003, at A21. *But see* Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES, June 22, 2003, at D11 (arguing that political support for affirmative action is now tied to limiting preferences for African Americans, Native Americans, and most Latinos).