

## APPENDIX

## “I MISS JUSTICE POWELL”

[Text of the author’s speech given on July 11, 2003]

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“The late U.S. Supreme Court Justice Lewis F. Powell, Jr. was the epitome of the southern gentleman. By some accounts, he served as a role model and mentor for the Supreme Court’s first female Justice, Sandra Day O’Connor. More personally, for the past several years, Justice Powell’s words in the landmark *Bakke*<sup>1</sup> case have been in equal measure my ally and my constant tormentor in the battle waged against the University of Michigan’s race-conscious admissions policies.

“Though I never thought I’d say this, I miss Justice Powell’s opinion in *Bakke* more than one can imagine. Their murkiness notwithstanding, there was a grandeur in his words, an eloquence, containing a noble and deeply moving discussion of what I had always believed to be our nation’s most cherished principle: *That all men are created equal.*<sup>2</sup>

“Sadly, Justice Powell’s adherence to the principle of equality so prevalent in *Bakke*, is entirely missing in its sequel, *Grutter v. Bollinger*.<sup>3</sup> Nowhere, for example, in the majority’s opinion in *Grutter* is there any meaningful convergence of its reasoning with the principle first announced in *Brown v. Board of Education*,<sup>4</sup> a case which I believe to be the greatest ever decided by our Supreme Court. Nor is there a whit of consistency between *Grutter* and the simple language of Title VI of the Civil Rights Act of 1964.<sup>5</sup> In a case which literally cried out for reaffirmation of the holding in *Brown*—‘that racial discrimination in public education is unconstitutional’<sup>6</sup>—I find the *Grutter* Court’s lack of allegiance to this principle disheartening.

“As a result of this decision, the door to Michigan’s law school has been closed and locked in Barbara Grutter’s face. Barbara, who as a young girl was raised in a culture where higher education for young women was not highly valued, would have brought a truly unique form of diversity to the Law School. I suspect it is the sort of diversity which is entirely missing in most law school classrooms today. At the time Barb applied, she was already a wife; and the mother of two home-schooled sons. The road which she traveled to obtain higher education took her first, not to Harvard or Stanford, but to a local community college in Grand Rapids, Michigan, and then on to a state university where she eventually graduated with high honors.

“Indeed, Barbara’s personal quest for higher education is the very exemplar of what America’s promise *should* be all about.

“Yet now, Barbara and thousands of other men and women innocent of any claims of discrimination on their part, have been told by our highest Court that no matter what their personal hardships, no matter what obstacles they may have overcome, no matter what cultural barriers they have had to fight through, the protections afforded to each citizen by the Fourteenth Amendment and the simple language of the Civil Rights Act of 1964 do not extend to them—solely because of their skin color. Their right to equal treatment under our Constitution has been declared expendable in order to further a concept called ‘diversity.’<sup>7</sup>

“If I may, let me turn for a moment to what I sincerely, though—as it turned out—mistakenly, believed would be the theme of a nearly unanimous majority opinion in *Grutter*. The following words are taken from earlier Supreme Court cases dealing with the question of race:

Classifications based on race carry a danger of stigmatic harm. Unless they are *strictly reserved for remedial settings*, they may in fact promote notions of racial

inferiority and lead to a politics of racial hostility.<sup>8</sup>

The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs.<sup>9</sup>

At the heart of the Constitution’s guarantee of equal protection lies the simple command that Government must treat citizens “as individuals, not as ‘simply components of a racial, religious, sexual or national class.’”<sup>10</sup>

*The dangers of [racial] classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs . . . Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.*<sup>11</sup>

“The author of the opinions from which every one of those words is taken? Justice Sandra Day O’Connor.

“Yet now, as of June 23, 2003, the principle first enunciated by Justice John Marshall Harlan in his lonely dissent in *Plessy v. Ferguson*,<sup>12</sup> and frequently echoed by Justice O’Connor and others, has not merely faded; it seems to have been lost altogether.

“Justice Harlan’s 100-plus-year-old words bear endless repeating: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’<sup>13</sup> He continued:

In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>14</sup>

“These noble sentiments were finally adopted in 1954 in *Brown v. Board of Education*, and later proudly enshrined as part of our Nation’s legislative landscape in 1964 through the passage of Title VI. Yet, inexplicably, they were shredded the moment the Court released its opinion in *Grutter*. Now, rather than taking ‘no account . . . of his color,’<sup>15</sup> as Justice Harlan implored us, the University’s Law School may take exquisite account of a man’s color and consider it a ‘plus’ when deciding whether he is ‘equal before’ its admissions committees.

“Indeed, the Court’s decision now raises this troubling question: Have we unwittingly created a new ‘separate but equal’ doctrine? The original, plainly immoral, version of that doctrine required almost 60 years before it was rejected by the Supreme Court in *Brown*. Sadly, it has taken less time than that for a different Court to give life to a new version, yet one which may turn out, in principle, to be every bit as pernicious.

“Why, it is fair to ask, do I say this? I say this because Michigan’s policies assume a chronic, if not permanent inability on the part of certain minority students to compete academically with other students. It is a difference in perceived ability, if you will, which Michigan insists it must make up for by considering an applicant’s race. Now, with the Court’s blessing, universities will be allowed to measure, and thus compensate for, this presumed disparity by

considering an applicant’s racial and ethnic background. If this is not racism, nothing is.

“In fact, nothing is sadder to me than the truly bizarre suggestion contained within the Court’s opinion that there is a 25-year sunset clause placed on the University’s use of race.<sup>16</sup> I wonder if the author of this judicially-created time limit considered the horribly demeaning implication contained within it? It is the heartbreaking suggestion that minority boys and girls, even those who’ve yet to be born (and won’t be for another 7 or 8 years), will still, somehow, 25 years from now need to be viewed as presumptively incapable of competing with non-minority applicants unless their skin color is given positive weight in the admissions process. Again, if that is not racism, what is?

“Michigan’s justification for its use of racial classifications—built on the flimsy social science argued by the University—simply masks the law school’s view that but for the application of a highly-camouflaged differential to, say, the LSAT scores of certain of its applicants, these applicants will be incapable of competing for admission to its ‘elite’ law school. The implication is patently false, particularly when applied to *individuals*. Yet, now, law schools like Michigan’s are legally free to apply what every single person recognizes are *separate* admissions standards depending solely upon an applicant’s racial *group*, and call the outcome *equal*.

“But, of course, just like in *Plessy*, and later in *Brown*, ‘separate’ is not ‘equal.’ And it never will be so long as such policies exist.

“The establishment of separate standards for admission based on race is the inevitable result of the Court’s sanctioning the assignment of a ‘plus’ to an applicant because of one’s skin color. And while it is obviously unfair to the students who are rejected because their skin color separates them from those eligible to receive a plus,’ even more destructive is the *Orwellian* message which the University sends to those minority students who do qualify for the racial bonus. ‘You,’ the University now says, ‘are “equal” even though you are

being measured for admission against a demonstrably “separate” (read demonstrably “lower”) standard.’

“Nothing could be more damaging to our country’s quest for a color-blind society.<sup>17</sup> Nothing could be more unfair to the students who are denied admission in favor of a person whose different skin color made the difference in admission. And nothing could be more destructive to the student who, whether she needed it or not, is awarded a ‘plus’ for her race based on the premise that without it, she could not successfully compete for admission.

“As I was reading the opinion in *Grutter* for the first time, I kept thinking about Thurgood Marshall’s once-successful plea to an earlier Court. He wrote:

[We] submit that this Court should enter a decree which will order the defendants to discontinue the use of race or color as a criterion for [the] admission of students.<sup>18</sup>

“It is word-for-word the identical decree which Barbara Grutter was seeking in her case against the University of Michigan’s law school.

“A unanimous Supreme Court in 1954 issued such a decree in *Brown* and instantly America became a better nation. Not because we accomplished the goal perfectly, or that we shall ever do so. What was important was that in *Brown* our highest Court made clear that discontinuing ‘the use of race’ was what we *must* do because it is what our Constitution *demand*s that we do.

“Now, in what can only be described as incredible irony, that principle has once again been relegated to a dissenting opinion, authored most eloquently by our only sitting black Justice. In *Grutter*, Justice Clarence Thomas wrote:

Like [Frederick] Douglass, I believe that blacks can achieve in every avenue of

American life without the meddling of university administrators. . .<sup>19</sup>

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The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. ‘Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society’ *Adarand Const., Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment).<sup>20</sup>

“Justice Thomas also quotes former Justice William O. Douglas, long regarded as one of the Court’s most liberal members, who once wrote in another case involving the use of race in law school admissions:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. *DeFunis*, 416 U.S., at 342 (Douglas, J., dissenting).<sup>21</sup>

“But these quotes, again, do not form the majority opinion in *Grutter*. Instead, they are words written in dissent. And so, unlike our country after the unanimous decision in *Brown*, we are not, I

submit, a better country today following the fractured decision in *Grutter*.

“I leave you with these thoughts, the first by Washington Post commentator Richard Cohen, who suggested within a day or so after the cases were argued, that no matter the outcome before the Supreme Court, Michigan’s race-conscious policies will remain, in a word, *immoral*.<sup>22</sup>

“In a related vein, Justice Anthony Kennedy, writing in dissent made this observation:

Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.<sup>23</sup>

“Both Cohen and Justice Kennedy are right. But let us pray Justice Kennedy’s concerns do not come to pass. Nor should they so long as the painful failure of the Court in *Grutter* does not remain overly-long as part of our nation’s constitutional landscape.

“Justice O’Connor once joined in the remark, in reference to *Plessy v. Ferguson*, that it ‘was wrong the day it was decided.’<sup>24</sup> I expect that some future Court will, one day, say the same thing about *Grutter*. And when that day comes, hopefully soon, we will once again be back on track in our quest to achieve Dr. King’s dream of a society where our children are judged by the content of their character, and not by the color of their skin.

“Thank you.”

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<sup>1</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>2</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>3</sup> *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003).

<sup>4</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); and *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

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<sup>5</sup> 42 U.S.C. § 2000d (2000).

<sup>6</sup> *Brown*, *supra* note 4, 349 U.S. at 298.

<sup>7</sup> For a detailed discussion of the so-called “diversity” rationale, *see, generally*, Peter Wood, DIVERSITY: THE INVENTION OF A CONCEPT (2003); and R. Lawrence Purdy, “Prelude: Bakke Revisited,” 7 TEX.J.LAW & POLITICS 313 (Spring 2003); and Brian P. Fitzpatrick, “Essay: The Diversity Lie,” 27 HARV.J. OF LAW & PUB. POL’Y 385 (Fall 2003).

<sup>8</sup> *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989)(emphasis added).

<sup>9</sup> *Id.* at 505-06 (emphasis added).

<sup>10</sup> *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (O’Connor, J., with whom The Chief Justice, Scalia, and Kennedy, JJ., join, dissenting) (emphasis added).

<sup>11</sup> *Id.* at 603-04 (emphasis added).

<sup>12</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>13</sup> *Id.* at 559.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Grutter*, *supra* note 3, at 343.

<sup>17</sup> That our Constitution is “color-blind” was not only the “dedicated belief” of Thurgood Marshall and his colleagues when they argued in *Brown v. Bd. of Educ.* (*see, generally*, R. Lawrence Purdy, “Prelude: Bakke Revisited,” 7 TEX.REV. LAW & POLITICS 313, 343 (Spring 2003), note 149), it was the “dream” of Dr. Martin Luther King, Jr., expressed most eloquently in his speech on the steps of the Lincoln Memorial on Aug. 28, 1963.

<sup>18</sup> MEMORANDUM BRIEF FOR APPELLANTS IN NOS. 1, 2, AND 3, AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT WITH RESPECT TO THE EFFECT OF THE COURT’S DECREE at 11, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), quoted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 10 (Philip B. Kurland & Gerhard Casper, eds., 1975).

<sup>19</sup> *Grutter*, *supra* note 3, at 350 (THOMAS, J., concurring in part and dissenting in part).

<sup>20</sup> *Id.* at 353-54.

<sup>21</sup> *Id.* at 374.

<sup>22</sup> Richard Cohen, “Diversity At What Cost?” WASH. POST (April 3, 2003) at A23.

<sup>23</sup> *Grutter*, *supra* note 3, at 388 (KENNEDY, J., dissenting).

<sup>24</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992).