

# Maintaining the Legitimacy of the High Court: Understanding the “25 Years” in *Grutter v. Bollinger*

VIJAY S. SEKHON

## I. INTRODUCTION

The Supreme Court’s decisions in *Grutter/Gratz v. Bollinger* were among the most anticipated rulings in recent history. Legal scholars, media commentators, and laypeople alike eagerly awaited the release of the Court’s decision on whether the use of race in the admissions processes of institutions of higher education would be held constitutional under the Fourteenth Amendment.<sup>1</sup> Given the divided opinion of the American public on the issue of affirmative action in higher education, it was expected that the Court’s rulings would ignite fervor amongst individuals on either side of the debate, whichever way the decisions came out.<sup>2</sup>

However, after the Court’s opinions in *Grutter* and *Gratz* were released on June 23, 2003, there was far less disdain towards the Court than one might have expected.<sup>3</sup> To be sure, ideologues on both sides of the debate had their fair share to say about the Court’s decision to uphold the University of Michigan Law School’s use of race in its admissions policy from an equal protection challenge after rejecting that of the University’s College of Literature, Science, and the Arts.<sup>4</sup> However, legal scholars and commentators around the nation were confused by the final sentence in Justice O’Connor’s opinion in *Grutter*, which read: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>5</sup>

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<sup>1</sup> See, e.g., Debra Rosenberg, *Michigan’s Day in Court: In Arguments Over Affirmative Action in Admissions, the Justices Seemed to Favor a Less Drastic Overhaul of the Law*, NEWSWEEK, April 14, 2003, at 52.

<sup>2</sup> A survey by The Gallup Poll conducted from June 12-15, 2003 found that 49% of Americans favored “affirmative action programs for racial minorities,” while 43% opposed such programs. The Gallup Poll, *Affirmative Action*, available at <http://www.pollingreport.com/race.htm>.

<sup>3</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>4</sup> See generally, Terrance J. Pell, Editorial, *Camouflage for Quotas*, WASH. POST, June 30, 2003, at A15; Nicholas Lemann, *Ideas and Trends: Beyond Bakke; A Decision That Universities Can Relate To*, N.Y. TIMES, June 29, 2003, at Sec. 4, 14.

<sup>5</sup> *Grutter*, 539 U.S. at 343. See generally Lino A. Graglia, *Winks, Nods -- and Preferences*, WALL ST. J., June 25, 2003, at A12; Paula C. Johnson, *Jam Tomorrow and Jam Yesterday: Reflections on Grutter, Gratz, and the Future of Affirmative Action*,

The goal of this comment is to explain the rationale behind the “25 years” sentence in Justice O’Connor’s *Grutter* opinion. First, I will briefly delineate the background and reasoning of Justice O’Connor’s opinion in *Grutter*. Second, I will explain how the equal protection argument used by the Court in *Grutter* leans strongly against a 25-year statute of limitations on the use of race in college admissions. Third, I will argue that the primary rationale behind Justice O’Connor’s decision to insert the “25 years” sentence into her *Grutter* opinion stemmed from a political motivation to maintain the legitimacy of the Supreme Court in the eyes of the American public. I will conclude with some general observations.

## II. *GRUTTER* BACKGROUND AND OPINION

The lawsuit in *Grutter* originated in the United States District Court for the Eastern District of Michigan, where the plaintiff Barbara Grutter filed a lawsuit alleging that the University of Michigan Law School violated her rights to equal protection under the Fourteenth Amendment, 42 U.S.C. § 2000d, and 42 U.S.C. § 1981(a) by utilizing race as a factor in rejecting her application.<sup>6</sup> The Law School explicitly utilized race as a variable in its admissions decisions in order to attain a “critical mass” of underrepresented minority students to foster a diverse student body, but only considered race as one of many factors and only on an individualized basis.<sup>7</sup>

The District Court, utilizing strict scrutiny analysis,<sup>8</sup> ruled in favor of Ms. Grutter, holding that the Law School’s interest in a diverse

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Jurist Online Symposium, available at <http://jurist.law.pitt.edu/forum/symposium-aa/johnson.php>.

<sup>6</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 824 (E.D. Mich. 2001). Section 1 of the Fourteenth Amendment to the Constitution stipulates that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 2.

42 U.S.C. § 2000d states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1964).

42 U.S.C. § 1981(a) mandates that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...and to the full and equal benefit of all laws and proceedings for the security of person and property.” 42 U.S.C. § 1981(a) (1991).

<sup>7</sup> *Grutter*, 137 F. Supp. 2d at 825.

<sup>8</sup> The District Court was compelled to examine the governmental racial classifications under strict scrutiny pursuant to the Supreme Court’s ruling in *Adarand Constructors v.*

student body was not compelling, that the use of race in the Law School's admissions policy was not narrowly tailored to further that interest.<sup>9</sup> On appeal and sitting en banc, the Sixth Circuit reversed, holding that a diverse student body was a compelling interest, and that the Law School's race-based admissions policy was "merely a potential plus factor," and conformed to Justice Powell's opinion in *Bakke v. Regents of the University of California*.<sup>10</sup>

The Supreme Court affirmed the Sixth Circuit's decision, with Justice O'Connor writing the majority opinion.<sup>11</sup> In holding the policy constitutional under the Fourteenth Amendment, Justice O'Connor reemphasized that diversity in the context of higher education is a compelling state interest. She held that the Law School's admissions policy provided a "highly individualized, holistic review of each applicant's file" and considered race as just one of many factors in the admissions decision, as opposed to establishing an unconstitutional quota.<sup>12</sup> The Supreme Court also rejected argument that the Law School's goal of a "critical mass" of underrepresented minority students amounted to a quota, citing the fact that the number of African American, Latino, and Native American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.<sup>13</sup>

However, at the end of Part III of her opinion, Justice O'Connor stated that:

[w]e are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands . . . . It has been 25

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*Pena*, which held that: "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Pena*, 515 U.S. 200, 227.

<sup>9</sup> *Grutter*, 137 F. 3d at 872.

<sup>10</sup> *Grutter v. Bollinger*, 288 F. 3d 732 (6th Cir. 2002); *see also* *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978).

<sup>11</sup> *Grutter*, 123 S. Ct. at 2325.

<sup>12</sup> *Id.* at 2330.

<sup>13</sup> *Id.* at 2343.

years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>14</sup>

### III. THE INCONSISTENCY OF “DIVERSITY” AND “25 YEARS”

Justice O'Connor cited Justice Powell's opinion in *Bakke* in granting deference to the Law School's judgments about its educational goals and philosophy, pointing to Justice Powell's statement that, “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>15</sup> Citing the District Court opinion, Justice O'Connor found that the enrollment of a “critical mass” of underrepresented minority students at the Law School is indeed a compelling interest because it “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”<sup>16</sup>

Granting Justice O'Connor's determination of a compelling interest in the Law School's attainment of a “critical mass” of underrepresented minority students, it is difficult to ascertain how the “25 years” clause logically flows from her reasoning. Presumably, the Law School's compelling interest in diversity will remain in 2028, but Justice O'Connor felt the need to limit the use of race in admissions because such race-conscious admissions policies “are potentially so dangerous that they may be employed no more broadly than the interest demands.”<sup>17</sup> Justice O'Connor substantiated her flexible 25-year statute of limitations by pointing out that race-conscious admissions policies will not be needed in order to achieve the “critical mass” of underrepresented minority students in 2028 because, since the *Bakke* decision in 1978, “the number of minority applicants with high grades and test scores has indeed increased.”<sup>18</sup>

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<sup>14</sup> *Id.* at 2346-47 (internal citation omitted.)

<sup>15</sup> *Id.* at 2339, quoting *Bakke*, 438 U.S. at 312.

<sup>16</sup> *Id.* at 2340.

<sup>17</sup> *Id.* at 2347.

<sup>18</sup> *Id.* (internal citation omitted). It should be noted that, in an exclusive interview with the *Chicago Tribune* on the day following the release of the *Grutter* decision, Justice O'Connor stated that she “offered the (25 year) time frame as an expression of hope -- not a definitive endpoint.” Jay C. Greenburg, *O'Connor Voices Hope For Day*

The evidence leans strongly against Justice O'Connor's implied conclusion that the use of race at competitive institutions of higher education will be unnecessary in 25 years to attain a "critical mass" of underrepresented minority students. The sheer magnitude of the gap in grades and test scores is formidable to say the least. In the 1995 entering class at the University of Michigan Law School, Caucasian American students had a median undergraduate grade point average (GPA) of 3.59 and a median Law School Admissions Test (LSAT) score of 167 (96<sup>th</sup> Percentile), while the corresponding figures were 3.18 and 155 (67<sup>th</sup> Percentile) for African American students, and 3.35 and 159 (81<sup>st</sup> Percentile) for Mexican American students.<sup>19</sup> Given the fact that the Law School, as most law schools do, explicitly affords great weight to applicants' LSAT and GPA in the admissions decision, underrepresented minority applicants will have to dramatically improve their performance on these two variables by 2028 in order to maintain a "critical mass" at the Law School without the use of race as an admissions factor.<sup>20</sup>

In addition to the sizeable gap in grades and test scores between underrepresented minority and other applicants, the evidence shows that this disparity is not diminishing. African American University of

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*Affirmative Action Not Needed*, CHI. TRIB., June 25, 2003, at 1. It is puzzling, then, why Justice O'Connor did not explicitly make this point in her opinion. Nevertheless, the underlying motives behind Justice O'Connor's placement of the "25 year" clause where she did and in the manner that she did will be elaborated upon in Part IV of this paper.

<sup>19</sup> *Grutter*, 137 F. Supp. 2d at 833. For reference, the median LSAT and undergraduate GPA for the 2003 entering class was 167 and 3.60, respectively. The University of Michigan Law School, *Admissions*, available at [http://www.law.umich.edu/prospective\\_students/Admissions/index.htm](http://www.law.umich.edu/prospective_students/Admissions/index.htm). The disparate LSAT scores between whites and their underrepresented minority counterparts are similar in magnitude at the national level. In 1995, whites had an average LSAT score of 152, whereas African Americans and Hispanics averaged 141 and 146, respectively. LAW SCHOOL ADMISSIONS COUNCIL, MINORITY DATABOOK 14 (2002). In addition, statistics have shown that applicants' LSAT scores are correlated with their GPA, further substantiating the contention that underrepresented minority applicants are currently at a significant disadvantage in the law school admissions process. William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving 'Elite' College Students*, 89 CAL L. REV. 1055, 1098 (2001); see also Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997).

<sup>20</sup> The University of Michigan Law School's website, like most other selective law schools, states that its primary evaluation mechanism of potential applicants consists of a "composite of an applicant's LSAT score and undergraduate GPA." The University of Michigan Law School, *Frequently Asked Questions*, available at <http://www.law.umich.edu/prospectivestudents/Admissions/faq.html>.

Michigan Law School applicants in 1993 who scored 165 (95<sup>th</sup> Percentile) and above on the LSAT comprised only 1.1% of the total applicants in that score range, even though such applicants represented 11.1% of all applicants.<sup>21</sup> The numbers were similar in 2000, with 1.0% of African American applicants in that score range, while African Americans constituted 11.3% of the applicant pool.<sup>22</sup> The LSAT trends are similar for members of the other underrepresented minority groups across the nation, and the LSAT trends correlate with the GPA of underrepresented minority applicants.<sup>23</sup> In other words, the record does not indicate a decrease in the gap between the grades and test scores of underrepresented minority applicants and their counterparts.

However, Justice O'Connor leads the reader to believe that race will not need to be considered in 2028 because "the number of minority applicants with high grades and test scores has indeed increased," and directs the reader to page 43 of the Oral Argument transcript as her sole effort to corroborate her contention.<sup>24</sup> Justice O'Connor presumably referred to the statement by the Law School's attorney Maureen Mahoney that "in 1964 when there was a race-blind policy (at the Law School), there were no blacks admitted, and under a race-blind policy today, probably six blacks would be admitted without consideration of race."<sup>25</sup> This statement is made with no corroborating evidence.

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<sup>21</sup> *Grutter*, 123 S. Ct. at 2364 (Thomas, J., dissenting).

<sup>22</sup> *Id.*

<sup>23</sup> See Kidder, *supra* note 19 (LSAT scores of applicants correlated with undergraduate GPA). The nationwide average LSAT scores of underrepresented minority students has not been increasing, contrary to Justice O'Connor suggestion in her *Grutter* opinion; indeed, the evidence suggests a slight decline in the average LSAT of underrepresented minorities. African Americans and Mexican Americans averaged 142.0 and 147.5 on the LSAT in 1994, and 141.64 and 147.4 in 2000. The corresponding scores of Native American test-takers were 148.2 and 147.2. LAW SCHOOL ADMISSIONS COUNCIL, *supra* note 19.

<sup>24</sup> *Grutter*, 123 S. Ct. at 2346-47.

<sup>25</sup> Oral Argument Transcript for *Grutter v. Bollinger et al.* 40 (April 1, 2003). The only other relevant reference on Page 40 of the Transcript is also presented by Ms. Mahoney, where she states that "there has been improvement, in fact, Justice Powell cited to a study, it was done by Manning, it's in footnote 50 of Justice Powell's opinion and it gives the number of minorities who had achieved a 165 and a 3.5 on the LSAT." *Id.* at 41. (error in original). Footnote 50 of Justice Powell's opinion in *Bakke* points us to pages 57 to 59 of Winton Manning's report entitled "The Pursuit of Fairness in Higher Education." Winton Manning, *The Pursuit of Fairness in Higher Education*, in SELECTIVE ADMISSIONS IN HIGHER EDUCATION 57-59 (1977). However, these pages in Manning's report delineate the problems with a "quota" admissions system – holding that such an admissions system is "uncomfortably similar to operating two segregated schools" - with no mention of the LSAT or the number of minorities who a certain

However, even if true, it demonstrates the painfully slow progress that underrepresented minorities - if they are to be represented together by the sole reference to African American applicants by Mahoney - have made in the past 25 years, and does not illustrate the number of black admittees who would accept such offers of admission.

Even if all six black admittees accepted their admissions offers from the Law School, which is highly unlikely considering the 35% enrollment rate at the Law School in 2003, African Americans would constitute only 1.5% of the Law School's entering class.<sup>26</sup> Granting Justice O'Connor a constant trend in the increase in the number of black admits at the Law School, which is again highly dubious considering the aforementioned statistics, blacks would only constitute 3.0% of the entering class.<sup>27</sup> Thus, even in the best of circumstances, Justice

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GPA. *Id.* The part of the book that does deal with law school admissions, entitled "The Status of Selective Admissions," was written by Warren W. Willingham and Hunter M. Breland, and gave no numbers substantiating Ms. Mahoney's claim. Warren W. Willingham & Hunter M. Breland, "The Status of Selective Admissions," in *SELECTIVE ADMISSIONS IN HIGHER EDUCATION* 96-106 (1977) (explaining the increased competitiveness of law school admissions in recent years and citing the increased total minority enrollment in legal institutions of higher education, noting both their lower acceptance rates at such institutions than whites and their higher acceptance rates within specific LSAT score and GPA bands). Therefore, the only colorable reference that Justice O'Connor can cite to on page 43 of the *Grutter* oral argument transcript is the quote mentioned and explained in the body of the paper.

<sup>26</sup> *Best Graduate Schools*, U.S. NEWS & WORLD REPORT, April 14, 2003, at 70.

<sup>27</sup> Indeed, as mentioned earlier, most of the statistical evidence points to a widening of the "achievement gap" between underrepresented minority and white students, further putting in doubt the contention of even a constant rate of increase in the number of qualified - in terms of LSAT and undergraduate GPA - underrepresented minority students to law schools. For example, in 1991 the average combined Scholastic Assessment Test (SAT) score for African American and Mexican American Students was 846 and 913, respectively, while whites scored an average of 1031. In 2001, the average African American SAT score rose 13 points to 859, while the average Mexican American SAT score dropped 4 points to 909. On the other hand, the average white SAT score rose 29 points to 1060. College Entrance Examination Board, *News 2000-2001, Table 9: SAT Averages Rose For Almost All Racial/Ethnic Groups Between 1991 and 2001*. In addition, although the percentage of whites between the ages of 25 and 29 who have completed college increased 10 points from 26% to 34% between 1990 and 2000, the corresponding increase was only 5 points (13% to 18 %) for African Americans and 2 points (8% to 10%) for Hispanics. U.S. Department of Education, *Status and Trends in the Education of Blacks*, National Center for Education Statistics, 107 available at <http://nces.ed.gov/pubs2003/2003034.pdf>. Finally, between 1990 and 1999 white 17-year-olds have either improved more or fallen less than their African American and Hispanic counterparts in national standardized reading and mathematics. *Id.* at 49, 51. In short, if anything the statistical evidence corroborates the contention that the number of qualified underrepresented minorities in the secondary and post-

O'Connor's reference to Mahoney's statement in oral argument lends little support to her claim that race will not be necessary in 2028 to enroll a "critical mass" of underrepresented minority students at the Law School.

#### IV. MAINTAINING THE LEGITIMACY OF THE SUPREME COURT

Cognizant of the paucity of an evidentiary basis for Justice O'Connor's "25 years" clause in her *Grutter* opinion, I posit that the underlying motivation behind the clause was the desire to reach the correct constitutional decision while minimizing the loss of the Court's political capital with the American public.

Ever since former President Andrew Jackson's purported response to the Court's decision in *Worcester v. Georgia* – "Mr. Marshall has made his decision, now let him enforce it" – legal scholars and analysts have been acutely aware of its limited enforcement capability under the Constitution.<sup>28</sup> As Brian M. Feldman explains, much of the muscle behind the Court's jurisprudence stems from its legitimacy in the eyes of the American people as a learned, fair adjudicator of disputes, accurately interpreting the mandates of the Legislative Branch and the Constitution.<sup>29</sup> The Court has not been oblivious to this political pressure, the most telling example being the "switch in time that saved nine" in 1937 during President Franklin

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secondary levels – in terms of test scores and percentage of college graduates – vis a vis their white counterparts is increasing, albeit slightly.

<sup>28</sup> Brian M. Feldman, *Evaluating Public Endorsement of the Strong and Weak Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 989-90 (2003). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 392-94 (1998); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 346-47 (1956). For a more thorough description of the actual facts surrounding the *Worcester* controversy, see CHARLES WARREN, I THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835 759 (rev. ed. 1928). Another famous example of the enforcement limitations of the Court was Abraham Lincoln's response to the Court's famous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). According to Barry Friedman, "Lincoln accepted . . . the binding nature of the decision as to the parties before the Court, but denied that the Court could bind people in future cases." Friedman, *supra* note 28, at 424. See also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 785 (2002) (stating that "the Lincoln administration felt free to ignore the Court's opinion in order to recognize black citizenship in the context of the regulation of coastal ships, passports and patents, as well as to pass laws abolishing slavery in the territories and the District of Columbia").

<sup>29</sup> Feldman, *supra* note 28, at 1003-04.

Roosevelt's tenure in the Oval Office.<sup>30</sup> In short, the Court is aware of limitations and has been known to occasionally tailor its opinions in accordance.

In addition to being acutely aware of its limited enforcement ability, the Court realizes the potential deleterious effect that its decisions in highly politicized cases can have on American society. The aftermath of the Court's decision in *Roe v. Wade* is the most telling example of the social chaos that can result from the Court's jurisprudence in hotly disputed issues.<sup>31</sup> Not only did *Roe* incite violence between pro-choice and pro-life activists that continues to this day, but it also decreased the legitimacy of the Court in the eyes of many Americans, most of whom were adamant pro-lifers.<sup>32</sup> It seems evident that the Court would prefer to reach its constitutional rulings in highly politicized cases without the deleterious societal and political effects that resulted from its holding in *Roe*.

As mentioned in the Introduction, the Court knew that its decisions in *Grutter* and *Gratz* were going to be among the most scrutinized and potentially dangerous, both socially and politically, in its recent history. Justice O'Connor presumably also knew at some point that she would be the deciding vote in both cases, and that if she ruled decisively in either upholding or reversing the use of race in admissions in higher education it would instigate social unrest and draw upon the political capital of the Court. Therefore, it seems likely that Justice O'Connor inserted the nebulous "25 years" clause in order to satisfy her dual desire to both interpret the Constitution to the best of her ability – or promote her political agenda, as cynics would contend – and mitigate the deleterious consequences of her jurisprudence.

Indeed, the aftermath of the Court's decisions in *Grutter* and *Gratz* illustrates the political effectiveness of Justice O'Connor's "25 years" clause. Although commentators on both sides of the debate spilled much ink over the Court's decisions, many were confused over the meaning of the "25 years" clause and hypothesized as to the legal

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<sup>30</sup> *Id.* at 1009. See also G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 13-32 (2000) (describing historical interpretations of the Court-packing plan).

<sup>31</sup> *Roe*, 410 U.S. 113 (1972).

<sup>32</sup> See generally Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D1. See also Mother Teresa, Amicus Brief in *Loce v. New Jersey* and *Krail et al. v. New Jersey*, 510 U.S. 1165 (Feb. 1994) (contending that "your decision in *Roe v. Wade* has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships") available at [http://www.swiss.ai.mit.edu/~rauc/h/nvp/roe/mothertheresa\\_roe.html](http://www.swiss.ai.mit.edu/~rauc/h/nvp/roe/mothertheresa_roe.html).

ramifications of the clause.<sup>33</sup> Nevertheless, the use of race in higher education admissions is still constitutional, and the large protests in front of the Court after its decisions never matriculated, a tribute to the political success of Justice O'Connor's *Grutter* opinion.

#### V. CONCLUSION

In summary, given the incomprehensible nature of Justice O'Connor's juxtaposition of her Equal Protection reasoning in upholding the Law School's admissions program and her "25 years" clause in her *Grutter* opinion, the only plausible explanation for the clause is that it was an attempt to reach a conclusion on the constitutionality of the use of race in higher education admissions while minimizing the American public's loss of faith in the legitimacy of the Court. I will end this comment with some concluding remarks as to the efficacy of the political tailoring of judicial decisions by the Court.

In *Planned Parenthood v. Casey*, Justice O'Connor wrote for the majority in another highly politicized case on abortion rights:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.<sup>34</sup>

The circumstances surrounding and following the Warren Court's decision in *Brown v. Board of Education* illustrate Justice O'Connor's point in *Planned Parenthood*.<sup>35</sup> Although the American people as a whole, particularly in the South, were opposed to desegregation efforts by the government, the Court's decision in *Brown* was largely respected and followed because it was seen as a constitutional mandate that was thoroughly reasoned by the Court's majority.<sup>36</sup> In addition, the Court's

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<sup>33</sup> See generally Pell, *supra* note 4; Lemann, *supra* note 4.

<sup>34</sup> 505 U.S. 833, 865-66 (1992).

<sup>35</sup> 349 U.S. 294 (1955).

<sup>36</sup> See generally Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) and RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF*

reasoning in *Brown* withstood the test of time, and is still regarded as one of the Court's most respected decisions in its history.<sup>37</sup>

The inverse of the Court's *Brown* decision can be seen in the public's reaction to *Bush v. Gore*.<sup>38</sup> The Court's decision in *Bush*, although followed by the American public and state governments, was seen as a politically motivated one.<sup>39</sup> This perception of *Bush* translated into many Americans losing confidence in the Court as an institution.<sup>40</sup>

Judging from a cursory glance at the history of highly publicized cases that have been decided by the Court, it seems that those like *Brown* that have been perceived to be reasoned fully in accordance with constitutional principles have fared the best in the long run in maintaining the legitimacy of the Court in the eyes of the American people. Although the "25 years" clause in Justice O'Connor's *Grutter* opinion may have looked enticing at the moment to appease the

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BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1987). Although there was significant resistance to the Court's *Brown* decision in areas of the South, desegregation efforts largely continued unopposed in most of the country, despite the tenuous race relations of the 1950s. Indeed, when presented with a case involving resistance in Arkansas to the Court's desegregation order in *Brown*, Earl Warren emphasized that "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). Following the Court's ruling in *Cooper*, the desegregation efforts at Little Rock's Central High School continued as planned. The principled, apolitical nature of the Warren Court's decisions thus typified Justice O'Connor's prescription for Supreme Court jurisprudence in *Planned Parenthood*.

Nevertheless, for a critical analysis of the *Brown* decision and its effectiveness, see JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2000). For an article arguing that the *Brown* decision did not abide by constitutional principles, see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

<sup>37</sup> See L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697 (2003).

<sup>38</sup> *Bush*, 531 U.S. 98 (2000).

<sup>39</sup> A survey conducted by The Harris Poll from December 14 to 21, 2000 found that 41% of Americans believed that the Court's *Bush* decision "mainly reflect the political views of the judges." The Harris Poll, available at <http://www.pollingreport.com/wh2post.htm>. For a close examination of the Court's opinion in *Bush* and its partisan characteristics, see Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) and David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein and Richard A. Epstein eds., 2001).

<sup>40</sup> In a joint survey conducted by CNN, USA Today, and The Gallup Poll on December 13, 2000, it was found that 30% "[lost] confidence" in the Supreme Court as a result of the *Bush* decision. CNN, USA Today, and The Gallup Poll, available at <http://www.pollingreport.com/wh2post.htm>.

opposing viewpoint on affirmative action, its political basis will likely be marred by her acquiescence to political pressures in the Court's decision in *Bush*. In turn, this will serve to diminish the long-term legitimacy of the Judicial Branch.