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A GLIMPSE BEHIND AND BEYOND *GRUTTER*

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Many people have suggested that the recent battle over affirmative action was a defining moment for the contemporary relevance of *Brown v. Board of Education*¹ and that it would determine the promise and potential for widespread societal integration. In my remarks, I want to comment upon a couple of comparisons and links between the *Brown*, *Bakke*,² *Grutter*,³ and *Gratz*⁴ cases.

As Camille suggested, in some ways I'm uniquely positioned, along with my predecessor dean of Michigan, to view these cases through several different lenses, wearing the hats of litigator, educator, and constitutional law scholar. That is in and of itself an interesting experience, but today I'll mostly wear the litigator's hat and try to integrate our view of the case from the inside—from a litigator's strategic perspective—with some of the broader themes and questions in mind, some of which Professor Goldstein has nicely illuminated for us.

I want to start by talking about the choice of this case as the vehicle for resolving the issue of affirmative action. I think law students are too often lulled into a false sense that cases are simply presented to themselves and presented to judges as decisions from the past, decisions that then form the working materials for guiding new decisions. In fact, as litigators well know, precedential cases are created; they are not handed down or found somewhere. You all know that *Brown* was not an isolated case; rather, *Brown* itself was the culmination of a very careful, very well-orchestrated social movement and legal campaign headed by Thurgood Marshall, Jack Greenberg, and a number of other very distinguished and courageous individuals.⁵ *Brown* itself came on

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1. 347 U.S. 483 (1954).

2. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

3. *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

4. *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

5. See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994).

the back of *Sweatt*,⁶ *Gaines*,⁷ and a number of other cases that set the stage for it. Here, we had a similar campaign by a number of groups that were opposed to affirmative action in higher education. The specific moving force behind the Michigan cases was an organization called Center for Individual Rights (CIR).⁸ The Center had been involved in some of the other lawsuits that formed part of this campaign, playing a major role in the original lawsuit that you all know of as *Hopwood*.⁹ That was the case that culminated in the decision by the Fifth Circuit Court of Appeals to eliminate affirmative action in higher education.¹⁰ The case itself had to do with the University of Texas, but obviously that case had precedential impact that would resonate around the country. The Center was involved in the campaign in California to eradicate, through the use of the initiative process and Proposition 209, the State's effort to attain diversity through, among other things, race-conscious programs.¹¹ And so the Center took the lead in *Grutter* and *Gratz*, trying to come up with a strategy that would close the door on affirmative action.

CIR made an intentional decision to come after the University of Michigan. I want to suggest a couple reasons why I think that was, in hindsight—actually in foresight, if I were advising them—a big mistake. I think it had a large impact on the way the case developed and unfolded; whether it made a difference in the bottom-line outcome is difficult to say, but I'm confident that it made a difference—as Professor Goldstein discussed—in the ways in which Justice O'Connor ended up explaining and justifying, and in some ways expanding upon, the *Bakke* principle.¹²

6. *Sweatt v. Painter*, 339 U.S. 629 (1950).

7. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

8. For information about CIR, see the organization's Web site at www.cir-usa.org (last visited Jan. 9, 2004).

9. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

10. *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (holding that the pedagogic interest in diversifying the student body along racial as well as other lines was not sufficiently compelling to justify a race-conscious admissions policy).

11. See The Center for Individual Rights, *A Brief History of CIR*, at <http://www.cir-usa.org/history.html> (last updated Jan. 17, 2002).

12. As Professor Jack Greenberg pointed out, the fact that the Michigan cases reached the Supreme Court as the first post-*Adarand* test of affirmative action was due not just to the affirmative choices of CIR, but also the influence of other individuals and groups, most notably the NAACP, in steering other potential appellate vehicles away from the Court during the past few years. For example, in *Taxman v. Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted* 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997), the Third Circuit held unlawful a school board's affirmative action plan that had been used in making a decision to retain a black teacher while laying off a white teacher. The case was settled just before it was scheduled to be heard by the Supreme Court. See *Piscataway Settles Race Dispute, Ending Supreme Court Case*, at <http://archive.aclu.org/news/w112197b.html> (Nov. 21, 1997). Further, in *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), the Eleventh Circuit invalidated a University of Georgia admissions policy that awarded a

The first thing that CIR decided to do was to go after a very prestigious public school. Obviously a public school would be constrained by the Fourteenth Amendment of the U.S. Constitution. CIR wanted to go after a prestigious school because it wanted the case to be a focal point for the entire nation. Wearing my dean's hat, I frequently maintain (I think justifiably so) that Michigan is *the* premiere public law school in the entire country. Some might mention in the same breath a couple of other schools, but there are reasons why CIR didn't want to go there. It made no sense to go after Boalt School of Law at the University of California at Berkeley because Boalt was, of course, already subject to the injunction of Proposition 209 and ostensibly was not practicing affirmative action anymore. CIR did not want to go after Virginia, I believe, because it didn't want to go after a school in the South. As Professor Goldstein indicated, there are several rationales that have been provided for affirmative action in the past, and CIR wanted to avoid a school that could plausibly offer a remedial justification for affirmative action.¹³ CIR knew that Michigan could and would offer no such remedial justification, and it wanted to go after a school where the only defense would be the diversity defense because CIR wanted to put an end to *Bakke*.

I think that targeting Michigan was a big strategic mistake for several reasons. The first is that, by going after a selective school, CIR allowed us to make a couple of arguments that we could not have made as easily if we were not a highly selective school. We could and did say quite plausibly that if we could not take racial diversity into account in our admissions programs, we would have an almost all-white student body. Only highly selective schools in this country would be able to maintain and support that claim with strong evidence. And that allowed us to tell the Court: This is what the consequence is going to be—we are going to have a largely all-white, top-flight public institution. Secondly, we were able to say to the Court: We have a problem in this country concerning the training and development of future leaders. Highly selective educational institutions such as Michigan are responsible for producing the top leaders in business, in government, and in law. If you want to make sure that the future leadership of this country is diverse and integrated, which many people claim is essential for the future health and strength of our society, you've got to pay attention to the diversity of the leaders that come out of the top-ranked institutions of the country. Again, this is an argument that could not have been made had the defendant in this case been a less-selective school.

fixed numerical bonus to non-white applicants. Georgia decided not to seek review by the Supreme Court.

13. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (stating that a state has a substantial interest in ameliorating specific, identifiable discrimination, but does not have a substantial interest in remedying the effects of broad, societal discrimination).

CIR encountered a second problem in coming after Michigan. Almost every public institution of higher education in this country is closely connected to the state executive branch and the state legislative branch. And when a public school is sued, it generally means that the defense is going to be mounted by the Attorney General's office in the state. That means that the defendant will be represented by a litigator who is highly constrained by budgetary and political concerns. And obviously, in this case, had the Michigan Attorney General been responsible for defending the state's school, there would have been a long, difficult discussion about the propriety of spending a lot of time and energy defending this type of program. But because of a strong separation-of-powers principle contained within the Michigan state constitution, the state's educational institutions are essentially independent; they're like a fourth branch and are basically constitutionally autonomous.¹⁴ That meant that, by suing the University of Michigan, CIR ensured that the decision about how to represent the school's interest would be made by the Dean of the Law School and the President of the University; and moreover, they were going to be able to draw upon a self-funded liability insurance fund. The bottom line was that the institution could decide for itself how it wanted to defend this case. It could decide for itself whether it wanted to go out and attract a top-flight legal team. We secured a quality of representation and a zealous defense of the program that I think never could have happened had we been represented by a state official.

CIR's third mistake was to sue us, not just under the Equal Protection Clause of the Constitution,¹⁵ but also under Title VI.¹⁶ Title VI is the federal statute that imposes an anti-discrimination norm on every school in the country that accepts federal funds. So basically, all but a handful of schools in the country are covered by Title VI. CIR argued that our program violated Title VI as well as the federal Constitution. Why was that significant? Because Title VI applies to all the *private* schools in the country that would not otherwise have been covered by this litigation. So, in other words, we were able to say that the precedent from this case was not going to apply just to the public schools—that is, Berkeley, Virginia, and so on—but to all of the private schools—meaning Harvard, Yale, Princeton, Stanford, NYU, Columbia, and so on. What was the significance of that? Well, first of all, it radically magnified our ability to tell the Court that there would be major societal consequences if the Court ended up terminating affirmative action in this case

14. See MICH. CONST. art. VIII, § 1.VIII(5) ("The regents of the University of Michigan and their successors in office shall constitute a body corporate Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.").

15. U.S. CONST. amend. XIV, § 1.

16. 42 U.S.C. § 2000d (2000).

because this precedent would apply to all leading institutions, not just Michigan and other publics. Secondly, it helped us coordinate the amicus campaign that we did, getting many other private schools to weigh in, saying: Michigan doesn't do anything different than what we do; we *all* do the same thing; and, overruling *Bakke* would really require a sea change in the way education institutions have to operate.¹⁷

CIR's final mistake, I think, was seeking cert before judgment in the undergraduate case. To refresh your memory, the law school and undergraduate cases had been litigated separately before two different district court judges;¹⁸ the law school program had been invalidated at the district court level,¹⁹ while the undergraduate program had been upheld at the district court level.²⁰ Both of the cases were appealed to the Sixth Circuit Court of Appeals and argued on the same day. The Sixth Circuit issued a decision upholding the law school program,²¹ but never issued a decision in the undergraduate case, for reasons we can speculate about to the end of our days. CIR brought a cert petition in the law school case and got that up to the U.S. Supreme Court. Then, it decided to take the extraordinary step of seeking a cert petition before judgment was ever issued by the Sixth Circuit Court of Appeals in the undergraduate case, in order to get both of the cases up to the Court at the same time. Now frankly, that was a clear mistake. We on the Michigan legal team were already wishing that the Supreme Court had the opportunity to review both cases together. I think CIR's decision to join the two cases before the Court had a strong impact on the litigation, because it meant two things. First, it gave even greater salience to the rest of the amicus briefs that Professor Goldstein talked about, particularly the military brief.²² This brief had no direct relevance whatsoever to the law school program, but had a great deal of relevance to the undergraduate case. The brief persuasively explained that the military academies and the selective undergraduate schools such as Michigan that have large ROTC programs constitute the educational pipeline that produces future officers and leaders of our nation's military units. If these military academies and other selective schools could no longer use

17. Including a Title VI claim might have made strategic sense if CIR had argued that the statute imposes more strict limits on race-consciousness than does the Equal Protection Clause, so the plaintiffs could win under the former even if they lost under the latter. But CIR never advanced any such argument, and therefore the Title VI claim was entirely redundant legally vis-à-vis Michigan even while rallying private schools to Michigan's cause.

18. *Grutter* was litigated before Judge Friedman in the district court. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001). *Gratz* was litigated before Judge Duggan in the district court. See *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

19. *Grutter*, 137 F. Supp. 2d at 872.

20. *Gratz*, 122 F. Supp. 2d at 836.

21. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002).

22. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et. al, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) (Nos. 02-241, 02-516).

race-conscious admissions programs to ensure diverse student populations, then the military would fail in its efforts to maintain a racially diverse officer corps and military preparedness would suffer as a consequence. The second thing is, those of us who have been watching Justice O'Connor over the years know that she is inclined in close cases to try to find a middle ground, to try to split the decision in some way. I thought one of the easiest ways to convince her of the viability of the law school program was to give her something that she *didn't* like; and I thought that the undergraduate program, with its more mechanized point system, was something that she would find troubling. Of course, some of the features of the undergraduate program, such as its transparency, arguably offered certain comparative advantages as well. Either way, having one (either) program that could serve as the sacrificial lamb for the other could be quite useful for us; let me just put it that way.

So let me now step back and summarize by saying that cases are created, they are constructed; the folks who litigated the *Brown* case clearly in hindsight *had* the right strategy and carefully thought through exactly where they wanted to go, in what order, and determined what was going to be the killer, final case. I think there are lots of ways in which CIR made a mistake in choosing to come after the University of Michigan and framing the litigation as broadly as it chose to frame it. You can never really know ultimately how much of an impact that had on the outcome, but I certainly think that the discussions about the case that we're having today—and the way in which the majority opinion is written and the precedential consequences it might have—would be quite different.

Let me spend just a little bit of time talking about one other issue in the case, and this touches upon something that Professor Goldstein addressed. In what ways did Justice O'Connor broaden, or go beyond, the rationale that was embraced in *Bakke*? From our perspective as litigators, we knew that we wanted to push beyond *Bakke* and, frankly, we suspected that Justice O'Connor would want to go there. There were all sorts of reasons for thinking—and frankly, I was fairly confident—that Justice O'Connor would be a fifth vote to support the diversity rationale. Part of that confidence had to do with her long-standing personal affinity for Justice Powell, and her professional affinity for the way he thinks about constitutional cases. We thought it would be unlike Justice O'Connor—presumably a year or two, at the most three years before she retires—to want to leave as her legacy essentially undoing the very case that Justice Powell has become most remembered by. The second reason for my confidence was the way that she handles her own clerkship hiring. I don't know what her practices are with respect to racial diversity, but I do know that she cares a lot about diversity in any number of other ways with respect to the choosing of her clerks. She seems to prefer having no more than one clerk from the same school. She seems to prefer to have clerks from different parts or regions of the country. And she seems to

prefer to have clerks with different substantive legal interests, and that brings to chambers different backgrounds and experiences in a wide variety of ways. I thought she would, therefore, be quite open to the argument that, when you're inviting students into a class, you are not rewarding them; it is not a question of merit (i.e., who *deserves* to get into a school), but it's a question of a school assembling the *group* of people, who working *together* are going to be the most productive for the mission of the school, in the same way that Justice O'Connor wants to hire clerks that will, *as a group*, be most productive for her role as a Supreme Court Justice. And finally, we just thought that her general approach to the relationship between law and society was such that she would care a great deal about the way this case would resonate throughout society and what the actual implications would be for the civic life of our communities and for the leadership of future generations.

But, of course, we had all sorts of worries about how to present the broad argument. We knew doctrinally that it was not really open to us to talk about role models, or to talk about making up for societal discrimination. We really had to work within the confines of *Bakke*. We also thought that if you focus too much on the role of educational institutions as being "social engineers," even Justice O'Connor might recoil. We thought that the best way to introduce these broader arguments was through an amicus strategy, to try to make sure that our amicus friends were the ones that were able to make arguments that we thought would be important—but that we ourselves could not make precisely because we couldn't quite trace them to Justice Powell's opinion in the *Bakke* case.

This leaves some interesting questions for the future. Justice O'Connor does talk a lot, or at least in a key paragraph, about making sure that the pathways to leadership remain "visibly open."²³ Now I want to focus on that just for a moment, because I wonder how far she means to stretch that phrase, to raise the same question that Professor Goldstein did a moment ago. Justice O'Connor nowhere actually says that there is a compelling interest in having leaders that are diverse, right? To be sure, she does say that it is important for the military to have officers that are diverse.²⁴ But after that, she just talks about the pathway being open, not necessarily that the pathways get filled by minorities who end up becoming judges and legislators and powerful businesspersons, and so on. She really seems to be focusing more on the *appearance* of opportunity.

If that's right, then it's interesting to me that nowhere in her opinion does she choose to take a moment to challenge the presumption of meritocracy that was essentially the basis for the CIR attack. The CIR attack was that educational institutions ought to be open to all based on merit, and race-

23. *Grutter v. Bollinger*, 123 S.Ct. 2325, 2341 (2003).

24. *Id.* at 2340.

consciousness is a violation of this meritocratic principle. Justice O'Connor could have come back and said that merit (narrowly and rigidly defined, as CIR would do) is not the sole appropriate premise for educational admissions. She could have come back and said, even assuming merit is the key principle, it is false to assume that the playing field today is level or that the supposedly "objective" indicia of merit are really, truly objective—something I know that Professor LaPiana will focus on. Justice O'Connor didn't do any of that, and in some ways I think that's unfortunate, because I think it's very important for the public to get the message that the conveniently simple "merit-is-all" slogan is unpersuasive. There's nothing in the case that furthers that message. Now again, the Court's apparent decision to pull some punches in discussing the broader social assumptions and implications of its decision is nothing new, right? We've discussed this before. For example, take Justice Powell's decision in *Bakke*, where he might not have said all that he truly believed. We know from *Brown* that the Court was very careful to frame its argument in certain ways that it thought would resonate with the public, but it didn't say some of the things that it probably, honestly felt—revealed by the later cases that came out right after *Brown*, expanding beyond education to golf courses, buses, and so on.²⁵ Justice O'Connor was justifiably leery of going as far as she could have. But the opinion, as is, does raise some questions because she is a little vague regarding what it means to maintain a "visibly open" pathway.²⁶

Let me just tie this point to one other litigation question. Justices Scalia and Thomas are basically trying to foment, in their separate opinions, further litigation. Justice Scalia laments the fact that this decision will open the door to more lawsuits and then says: Here are the ten suits you ought to bring next.²⁷ Quite interestingly, one of them was based on the notion that there should be some careful attention paid to the choice of the groups that are involved.²⁸ For instance, Michigan cares about a critical mass of African-Americans, Latinos, and Native Americans. Justices Scalia and Thomas made some noises about how perhaps you should take a look at how those groups compare to each other, and why are there more African-Americans than Latinos—is that unconstitutional discrimination between those groups? As a matter of fact, he got that wrong. We have more Latino students than African-American students this year. But he's raising this question of whether or not a school can possibly justify caring more about one minority group than another. Now if

25. See, e.g., *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *New Orleans City Park Improvement Assoc. v. Detiege*, 358 U.S. 54 (1958) (parks).

26. *Grutter*, 123 S.Ct. at 2341.

27. *Id.* at 2349-50.

28. *Id.* at 2350.

you're limited to arguments about educational pedagogy, it's hard to do. The arguments why you want to overcome the potential for social isolation among members of these groups by having a critical mass don't necessarily support the idea that the potential for isolation could be more real for one particular group than the other, right? But if we're talking about pathways to leadership, maybe there's more of a debate here. So it opens the door, perhaps, for schools—let's say in Arizona or New Mexico—to say the demographic makeup of their state really is Native American, or really is Latino, rather than African-American. Those law schools produce the leaders for the government or businesses in their state. So could they say, "We want to have an affirmative action program that really focuses on Native Americans, or on Latinos, and not the other groups," using this argument about trying to maintain "visibly open" pathways to leadership tailored to the demographics of their state? I don't know the answer to that question yet, but I do assume that it's going to be addressed by the next round of litigation, where schools now try to take the victory Michigan provided and tailor it to their own educational missions and their own particular stories.

Thank you.

