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Introduction to Law, Ethics, and Affirmative Action in America

Joseph P. Tomain

University of Cincinnati College of Law, joseph.tomain@uc.edu

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INTRODUCTION*

*Joseph P. Tomain***

I want to thank Professor Julian Wuerth of the University of Cincinnati Philosophy Department, and also the University of Cincinnati Law Review, for organizing this important symposium. It is not often that the College of Law hosts the world's foremost legal philosopher, as well as litigants on both sides of what has already proven to be one of the most important United States Supreme Court cases in history.

There will be no shortage of commentary about *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² particularly as the country celebrates the fiftieth anniversary of *Brown v. Board of Education*.³ Indeed, it cannot be gainsaid that our country has failed to settle the issue of racial segregation in its schools since *Brown*. Nor can it be gainsaid that *Bakke*⁴ has failed to settle the issue of affirmative action in higher education. The legacies of *Brown* and *Bakke*, sadly, remain. Our country continues to struggle with the matter of race, and it no doubt will for some time to come; likely longer than the next twenty-five years.⁵

* On June 23, 2003, the United States Supreme Court decided two landmark cases on affirmative action, *Grutter v. Bollinger* and *Gratz v. Bollinger*. In both decisions, the Court resoundingly endorsed the use of racial differences in university admission policies. It did so, however, while simultaneously striking down the specific implementation of this policy at the University of Michigan's undergraduate college and validating the admissions policy at Michigan's Law School. In response to these watershed cases, the University of Cincinnati College of Law and the University of Cincinnati Law Review sponsored a symposium entitled "Law, Ethics, and Affirmative Action in America."

The symposium, held October 7, 2003, reunited the principal legal architects on the opposing ends of *Grutter* and *Gratz*, Kirk O. Kolbo and Marvin Krislov, for their first public appearance together since the Supreme Court's decisions. The event also featured prominent legal commentators, including keynote speaker Ronald Dworkin, professor of philosophy Robert B. Westmoreland, and professor of law Verna L. Williams.

To view an archived webcast of the symposium, please visit <http://www.law.uc.edu/current/aa031007/>.

** Joseph P. Tomain is the Dean and Nippert Professor of Law at the University of Cincinnati College of Law.

1. 123 S. Ct. 2325 (2003).
2. 123 S. Ct. 2411 (2003).
3. 347 U.S. 483 (1954).
4. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

5. The reference is to Justice O'Connor's statement, or aspiration, that matters of affirmative action in higher education should be settled in 25 years, even while recognizing that *Bakke* was decided twenty-five years before: "It has been 25 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." *Grutter*, 123 S. Ct. at 2346-47.

Justice O'Connor's prediction may be overly optimistic. It may also be aspirational, a goal which we all can hope to achieve. As a society, we can only wish that Justice O'Connor is correct, but one wonders. The twenty-five-year timetable is unfortunately unrealistic because of the depth of the divide between us, and the difficulty of reaching racial reconciliation in America today.

Of course, the *Grutter* opinion affecting public law school admissions hits close to home, and the following comments are about that case rather than its companion. *Grutter* should have been a simple opinion; it should have been an easy opinion; and yet it was not. The rhetoric and language that we use to address race is difficult, if not tortured. Let me dispose of why I believe that *Grutter* should have been simple and easy, and then go on to discuss the tricky language in the case. The Articles contained in this Symposium Edition should help enrich our understanding of those concepts.

Grutter should have been an easy case because it is so obviously consistent with *Bakke*. The only reason the country needed to revisit *Bakke* is the rise of affirmative action opponents, not because of any change in fundamental law. Lower court opinions in the Fifth, Sixth, and Ninth Circuits⁶ demonstrate how aggressively affirmative action's opponents scrutinized *Bakke* for fissures and gaps. Justice Powell's opinion in *Bakke* was subjected to scrutiny worthy of Talmudic exegetes. Therefore, Justice O'Connor's reaffirmation of *Bakke* is extraordinarily important. Justice O'Connor made it clear that *Bakke* is the law of the land, tortured readings notwithstanding. Its reaffirmation, and, I hope, its enduring significance, can help us understand and find common ground with regard to affirmative action in higher education.⁷

An ancillary yet important point is that Justice O'Connor's majority opinion recognizes the importance of judicial deference in matters of university admissions, the type of deference that courts once gave to universities as a matter of course. Justice O'Connor says in general that "universities occupy a special niche in our constitutional tradition."⁸ Her opinion then goes on to argue specifically, quoting from *Bakke*, that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."⁹ Thankfully, that principle has been reaffirmed by the Court.

6. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188 (9th Cir. 2000).

7. *Grutter*, 123 S. Ct. at 2337.

8. *Id.* at 2339.

9. *Id.*

Grutter should have been an easy decision because the enduring significance of *Sweatt v. Painter*¹⁰ is also recognized. If it was wrong to exclude African-American law students from majority law school classrooms in 1950, is it any better to have them underrepresented in 2004? The significance of professional schools in general, and law schools in particular, for the cultivation of leaders in our society was recognized in *Sweatt* and then reaffirmed in *Grutter*:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.¹¹

Like *Bakke*, *Sweatt* was and is the law of the land, even though we seem to have had temporary amnesia about that fact.

Now we reach the point where law and rhetoric meet on troubled grounds. I want to discuss two examples where the vocabulary of race fails us. The matter of “critical mass” is one; the matter of the “educational benefits of diversity” is the other. In both instances, neither side of the argument accurately or adequately defines the issues. Without useful definitions, citizens cannot engage in the meaningful discussion required for our nation to one day reach resolution and acceptance. Our continued failure to find a common language is precisely what makes Justice O’Connor’s “25-year” dicta unrealistic. To anticipate my conclusion, the failure is real because the stakes are so very high—*Grutter*, no less so than *Gratz*, is about the racial division of wealth and power in our country and the consequences of that division.

Both sides can be faulted for failing to articulate with clarity and specificity the nature of the fight. It may very well be the case that—as a society and as individuals—we cannot be as honest as we would like to be on matters of race, so we resort to rhetoric to help us live with and think about these deep issues. First is the issue of “critical mass.” Affirmative action advocates will do all they can to avoid uttering the

10. 339 U.S. 629 (1950).

11. *Grutter*, 123 S. Ct. at 2341 (citation omitted).

most dreaded of all five letter words—quota. For to admit that an admissions plan has an implicit or explicit quota is to doom that plan in the eyes of the law.¹² As a result, in the *Grutter* litigation, the phrase “critical mass” was used as a way to avoid the death shoals of quotas.¹³

“Critical mass,” however, is not a mere litigation strategy or trick, it has real substantive content—people do not live happily in isolation. Like-minded people are comfortable with the like-minded, are challenged by the other-minded, and flourish with both. For “like-minded,” feel free to read “like-experienced” or, more awkwardly, “similarly experienced.” The intent of these synonymous phrases is to encompass race, gender, ethnicity, culture, and the like, as well as upbringing and background.

The heart of the matter is quite precisely that tokenism helps no one, neither majority nor minority. Full learning cannot take place within either group alone—both are needed. The lone minority in the classroom struggles too much with what is said and unsaid, and such psychological pressure should be put on no one under any circumstances. And yet, what is critical mass other than a sufficient number of persons of like experience who can share with each other and attain a level of comfort in an institution that allows and encourages learning to take place from others?

At one level, the distinction between “quota” and “critical mass” is semantic: both refer to some designation, size, or number of persons in a larger group. Yet, as we have learned, the distinction is of constitutional significance—quotas are taboo; critical mass is legitimate.¹⁴ Even this constitutional dimension requires fuller articulation.

We argue so vociferously about this matter because it is so deep and so difficult. Having said as much, however, it is just plain wrong not only as a matter of legal style but morally to dismiss the issue of critical mass as “mystical;” so much so that it “challenges even the most gullible mind.”¹⁵ Indeed, it would seem that at least five of Justice Scalia’s colleagues had such gullible minds. It is not gullibility about which we fight. It is about the nature of the good.

Both sides of the critical mass controversy can be faulted. The Petitioners argued that critical mass and quotas are indistinguishable and they said that to argue that they are distinguishable is essentially dishonest.¹⁶ The Respondents argued that the Petitioners dishonestly

12. See *id.* at 2342 (“[A] race-conscious admissions program cannot use a quota system.”).

13. *Id.* at 2341.

14. *Id.* at 2342-43.

15. *Id.* at 2348 (Scalia, J., dissenting).

16. See Petitioners’ Reply Brief at 14, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

distorted the word “quotas.”¹⁷ The history of quotas in higher education is that quotas have been used as *exclusionary* devices to limit the number of Jewish persons who sought admission to large, elite, private universities in the 1910s and 1920s.¹⁸ Quotas are a means of exclusion, not inclusion. Is it not more accurate, and honest, to say that critical mass and quotas are similar concepts and can pass constitutional muster when, and only when, they are not harmful to a suspect class?

Even if we equate quotas with critical mass, neither was the reason Barbara Grutter was not accepted into the University of Michigan School of Law. The reason Barbara Grutter did not get into the University of Michigan Law School was not because of exclusionary racial classification. Rather, she was denied admission because she did not have an application, grades and all, acceptable to the University of Michigan Law School—period.

Embedded in this whole issue of admissions is the question of “lowering standards.” This is an argument that cannot be taken too far. Does a law school “lower standards” when it admits one student with an LSAT score of 170 and another student with a score of 165? Presumably, “standards” have been lowered. What if the student with the 165 LSAT score was from Yaak, Montana, or was the captain of a national championship football team, or was a ballerina, or was the son of the president of the United States, or the daughter of a major donor of the university? Have standards been lowered? In each case? These are tired examples emphasizing as they do geography, extracurricular activities, and “connections.” Yet, these examples are telling in two ways. First, they “lower standards” as affirmative action opponents claim—but only narrowed to the issue of quantifiable test scores. Second, they are constitutionally inapposite because they avoid the fateful word “race.”

For now, affirmative action opponents have captured the constitutional and societal rhetoric on this issue. They are happy to trot out Justice Harlan’s dissent in *Plessy v. Ferguson* and wave the flag of colorblindness.¹⁹ They attempt to champion racial equality regardless of effects or consequences on minorities of continuing racial classifications. But this flag-waving touches the central point: our racial vocabulary has been insufficient to point out that Harlan’s dissent was also about

17. See Brief for Respondents James et. al. at 31, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

18. See Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 127-28 (2003).

19. See *Grutter*, 123 S. Ct. at 2365 (Thomas, J., dissenting) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

exclusion, and that exclusion of persons for reasons specified, including race, is unacceptable in a pluralistic democracy.

This matter of language surrounding quotas and critical mass encompasses a significantly deeper problem. Specifically, the legal standard that is applied when reviewing cases of racial segregation first looks to the matter of whether or not the rule or practice under review constitutes a racial classification. If so, then that classification faces a nearly insurmountable burden even to the point of ignoring the injuries that may be caused by the classification itself.²⁰ We might be better served if we recall President Lyndon Johnson's 1965 Howard University commencement address entitled "To Fulfill These Rights," where he said:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and say, "you are free to compete with all the others" and still justly believe that you have been completely fair.²¹

The anticlassification standard is the starting line, it is not fairness *per se*.

Affirmative action proponents, however, are not free from criticism either, and are peculiarly silent about the long-term consequences of continuing to make racial distinctions. Stigmatization, continued racial sensitivity, and program proliferation are not insubstantial by-products. Both sides lack an adequate vocabulary to understand the relationship between race and the Constitution. Then again, our system of constitutional justice enables deep moral disagreements to be aired, resolved, and revised accordingly.²² It seems, however, that the controversy over race has been with us all of our lives with no end in sight.

Language also fails us in the discussion of the "educational benefits of diversity" that forms the heart of the University's case²³ and comes under particular attack by Justice Antonin Scalia. Justice Scalia's attack comes in a special way. His attacks on the nature of teaching simply are not credible:

20. See Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

21. Lyndon Johnson, *To Fulfill These Rights*, quoted in RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 759 (rev. ed. 2004).

22. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 94-98 (2000).

23. See generally, WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be “taught” in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an “educational benefit” at all, it is surely not one that is either uniquely relevant to law school or uniquely “teachable” in a formal educational setting. *And therefore:* If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a “critical mass” that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to “critical masses” of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also “teach” good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.²⁴

Let’s avoid the jurisprudence of sarcasm inherent in that quotation and talk about teaching, learning, and educational benefits. And if it is too harsh a criticism to label Justice Scalia’s approach as sarcastic, then let’s accept it as a skeptic’s position.

Justice Scalia makes the point that diversity education cannot be taught “in the usual sense” and that it is not “uniquely ‘teachable’ in a formal educational setting.” These points are troubling, coming as they do from a former law teacher who should know better and whose qualifications “in the usual sense” and “uniquely” add nothing distinguishing to his criticism. For what is it we do in law school “in the usual sense” or otherwise? Do we teach *values*? Do we teach *politics*? Do we teach *analysis*? Do we teach *thinking*? What is it we do in universities? Do we teach *knowledge*? Do we teach *wisdom*? Do we teach *information* and *data*? If by “teach” we mean inculcate, or force feed, or pour into the mind of a student values, beliefs, norms, analysis, ability to think, and the like, then no teacher “teaches” and we should admit it. But if “teach” means to create an environment and design curricula and education settings that allow people to discuss values, politics, analysis, culture, and philosophy in the hope that knowledge and wisdom will be attained through processes of conversation, debate, and reflection, then

24. *Grutter*, 123 S. Ct. at 2349 (Scalia, J., dissenting).

yes we do teach. In exactly the same way we can and do teach diversity and the educational benefits thereof. By making diversity a part of a school's curriculum, by allowing students to discuss it openly in a safe educational environment, and by saying that diversity is a matter worthy of discussion and consideration, we are thus teaching by awakening in students the cultural values central to *Brown*.²⁵ Such discussion is not something that just affects gullible minds. Moreover, and perhaps more significantly, the "educational benefits of diversity" are inherent in non-curricular academic programming, social activities, interest groups, and by simply just living together.

Let us assume, *arguendo*, that Justice Scalia's point about education "in the usual sense" is intended to encompass non-academic learning and teaching. The consequence of this position is that nonacademic learning and teaching cannot count as a compelling factor when undergoing constitutional scrutiny. Let us go further and say that the nonacademic category might include what today is called networking, the development of a different set of expectations about education, the development of different attitudes about education, the experience of a different environment, the development of a different sense of self given a new environment, and the like. Assuming that this list and other similar items come under the heading of nonacademic, then the question, it seems to me, should be appropriately posed as: If such nonacademic learning and education does not take place in school, then where does it happen and when does it occur?

Justice Scalia's skepticism seems to be based on the assumption that racial groups come to each other with hardened predispositions that preclude such teaching or learning. Believing that people with different backgrounds cannot learn from others is twice self-defeating. First, if Justice Scalia is right that teaching cannot take place because people are predisposed to their own views, then affirmative action is necessary precisely to overcome a narrow-mindedness which reproduces those in power and which walls-out minorities. Justice Scalia's assumption about racial predispositions proves the University's case. It does not defeat it.

The second way that Scalia's argument is self-defeating is that his skepticism about predisposition proves too much. If people are predisposed on matters of race in such a way that they cannot be taught

25. "Today, education is perhaps the most important function of state and local governments . . . today it is a principle instrument in awakening the child to cultural values, and preparing him for later professional training, and in helping him adjust normally to his environment. And these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

“in the usual sense” or “uniquely,” then how is it that persons who are disposed to believe other things can be taught? Can a person predisposed to utilitarianism be taught non-consequentialist philosophy? Can a person predisposed to believe in laissez-faire be taught anything about distributivist policies? Was Mill not exactly correct in arguing that our beliefs must be subjected to criticism and thought and testing before they stagnate?²⁶ Indeed, this symposium was organized in order for litigants and scholars from all sides to speak, address, and inform, and to allow us to test our own predispositions against the ideas of others. This very symposium is an occasion for teaching. It gives lie to Justice Scalia’s skepticism.

To conclude, our rhetorical difficulties are evidence of the high stakes of race in America, and the real reason for affirmative action are at least twofold. First, this is an opportunity for the educational benefits of diversity to be real, not feigned. It is an opportunity for individuals to recognize each other, to appreciate their breadth and the uniqueness of all human experience, including cultural, racial, and class understandings. It is an opportunity for learning and teaching to take place. This reason for affirmative action is, in Martha Nussbaum’s phrase, “the cultivation of humanity.”²⁷ Indeed, anyone who believes in the value of the life of the mind believes in diversity of views and values, racial and otherwise. Diversity allows us to think beyond our boundaries, beyond our experiences; it allows us to think about the other and others.

The second, and perhaps the most frightening and difficult aspect of affirmative action—and I believe that fairness demands that we be frank about this—is that affirmative action is about political participation, and political participation is about sharing wealth and power. Our country cannot prosper as a nation divided in two—one part black, one part white, with continuing income and educational disparities. In Lani Guinier’s words, university admissions are, in fact, “political acts” and democratic ones at that.²⁸

If for no other reason than a sharing of wealth and power in our society we must be committed to affirmative action as part of our national agenda. Both of these ideas, the cultivation of humanity and the participation in political society, are moral principles. They are also principles of social justice. Understanding those principles, their individual and social contexts as well as in their historic and global

26. JOHN STUART MILL, ON LIBERTY, ch. 2 (Gertrude Himmelfarb ed., 1974).

27. See MARTHA C. NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION, ch. 5 (1997).

28. Guinier, *supra* note 18, at 135.

contexts, are what we try to understand and what we explore in universities. These are the things, as educators, that we should be doing.

Affirmative action is about the heart and soul of America, involving as it does law, politics, policy, philosophy, and moral judgment. It would seem then that this symposium itself is testament to the educational benefits of diversity as we explore each of those facets of the problem. Lawyers can learn from Marvin Krislov's and Kirk Kolbo's analyses of the law and policy behind the law school's admissions process at the University of Michigan. Lawyers and students can also learn from Professor Westmoreland and Professor Dworkin as they look at the philosophy and policy of arguments behind the affirmative action. Finally, we can all learn the moral dimensions of balancing race and diversity from Professor Thomas. In precisely these several ways, this symposium proves the claim that educational benefits derive from diversity.