Cases from the United States

This session will consist of a discussion of a number of cases. The descriptions are taken from Wikipedia (with some abbreviations), but the full text of opinions is available on-line at www.supremecourtus.gov/opinions. The cases chosen are a few with significant implications for how race is dealt with by American public schools and universities. Included also is the most recent decision by the US Supreme Court, which has added interest because it reversed a previous decision on affirmative action by the Court's new member, Justice Sonia Sotomayor, and became a major issue in her confirmation hearings.

The history of race relations in the United States is one of almost unrelieved shame until the decades after the Second World War, and of tremendous efforts – though often in the nature of two steps forward and one step back – since then to remove barriers to equal opportunity. At first these efforts took the form of anti-discrimination laws, regulations, and enforcement to prevent new injustices against black adults and children. As it became clear that segregation and unequal status established in the past were continuing to have their effect even in the absence of new discrimination, courts and policy-makers began to design remedies that gave preferential or at least different treatment to black individuals in order to remedy these continuing patterns. In effect, almost as soon as law and public policy became 'color blind' to prevent invidious discrimination, they abandoned that color blindness to practice preferential discrimination.

As we have seen, the Fourteenth Amendment, added to the Federal Constitution in 1868, after the Civil War and the emancipation of slaves, is the constant reference-point in matters affecting race and America's long struggle to undo the effects of past racial discrimination. The first section is significant for our purposes:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

The requirement of "equal protection of the laws" has been interpreted to forbid in the strongest terms the use of race as a basis for distinguishing between individuals . . . except when that is necessary to correct past injustices. That seemed straightforward in the 1970s, when those injustices had had a clear effect on particular individuals, including black pupils who had been confined because of their race to inferior schools. Thirty years later, however, it is more difficult to argue for the appropriateness of making distinctions on the basis of race, even though there are still lingering differences in academic and professional achievement that seem to call out for remedy. The core issue in the cases which follow is thus whether race should still matter.

Race: School Desegregation

Formal schooling, along the approximate lines of that provided to children of the White majority, of the children of Americans and Canadians of African ancestry was, for several hundred years, officially provided in most places – when it was provided at all – in segregated settings. Official ('*de jure*') segregation of schools continued to be an accepted practice in parts of both the US and Canada until the 1960s, and it was in most cases associated with unequal resources and

lower expectations.

The *Brown v Board of Education* decision began the process of eliminating *de jure* segregation of schools, at first in the southern states where it had been established by law, and then in a number of northern cities where public officials had in one way or another promoted racial separation. The brief filed by the National Association for the Advancement of Colored People, in October 1953, in the cases which led to the *Brown v. Board of Education* decision of May 1954, argued that "the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." In school assignments, "the racial classifications here have no reasonable relation to any valid legislative purpose"; in fact, "candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery." Earlier decisions of the Supreme Court in the law school cases had recognized "the educational detriment involved in racially constricting a student's associations," and the Court was now asked to apply this logic to school experiences.

There can be no question that the Court was influenced, in its decision, by changes in the world that would not have seemed relevant at the time of the *Plessy v. Ferguson* decision in 1896 upholding "separate but equal" treatment of Blacks, or even during the 1930s. In its earlier decisions, "the Supreme Court had, in effect, told the Negro to seek solace not in the law of the land but, like Stephen Foster's Old Black Joe, in cotton fields, mournful song, darkey friends, and the hereafter." But after the Second World War, revulsion against Nazi racism, the adoption of the *Universal Declaration of Human Rights* in 1948, and the worldwide competition with the Soviet Union all made it clear that the United States needed to address at least the more egregious examples of its own official racism. A brief filed on behalf of the Federal Government by the Attorney General, in 1952, in relation to the school cases quoted the Secretary of State as saying that the

> segregation of school children on a racial basis is one of the practices in the United States which has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a strong supporter of freedom, justice, and democracy.

As an indication of what national policymakers thought was at stake in the *Brown* decision, the result was broadcast by the Voice of America in 35 languages within hours of its release!

Chief Justice Warren, delivering the opinion of the Court, noted that each of the cases which had been consolidated in *Brown* involved "minors of the Negro race" who had been "denied admission to schools attended by White children under laws requiring or permitting segregation according to race." Lower courts had refused to strike down these laws, citing the principle of "separate but equal" which had been the basis of the *Roberts* case in Massachusetts, many years before, and had been used by the Supreme Court in deciding *Plessy v. Ferguson* in 1896. However, Warren noted, "the plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws" guaranteed by the Fourteenth Amendment since 1868. Review of the "circumstances surrounding the adoption of the Fourteenth Amendment" had not proved helpful, Warren pointed out, but there had been recent decisions involving graduate school admissions in which "inequality was found in that specific benefits enjoyed by White students were denied to Negro students of the same educational qualifications."

In the school cases consolidated in *Brown*, however, there was evidence that "the Negro and White schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." (These efforts were being made by Southern states and local governments precisely to lend credence to the "separate but equal" doctrine, after decades of grossly unequal treatment of the schools attended by Black pupils.) The Supreme Court's decision, Warren wrote, "cannot turn on merely a comparison of these tangible factors in the Negro and White schools involved in each of the cases. We must look instead to the effect of segregation itself on public education." The Court here anticipated by several decades the more recent trend in education reform, which focuses less on the inputs of education and more on its outcomes.

"In approaching this problem," Warren wrote, "we must consider public education in its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." In effect, he was saying, it was irrelevant that Congress, in the 1860s and 1870s, had considered and rejected a requirement that schools be racially integrated; the important question was whether racial segregation could be justified as providing equal education under the conditions of the 1950s.

Then, in one of the most famous passages in American jurisprudence, Warren wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate out recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed if he is denied the opportunity of any 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.
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> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In the graduate school cases, the Court had noted "those qualities which are incapable of objective measurement but which make for greatness in a law school" and the importance, for a graduate student, "to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Warren pointed out that "such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." He cited with approval the conclusion of one of the lower courts in the case, that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn, segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." The Supreme Court had concluded that, "whatever may have been

the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Although by the summer of 1955 the NAACP had filed desegregation petitions signed by local residents with 170 school boards in seventeen states, the pace of actual implementation was glacial for nearly a decade. In a number of Southern states, legislatures declared that – in the words of the Alabama vote – the Supreme Court's decision was "null, void, and of no effect" because of the "interposition" of state authority. Mississippi stated that the *Brown* decision was "unconstitutional and of no lawful effect," while four states adopted penalties against local officials who dared to comply with the Court. Two states amended their constitutions to allow public schools to be abolished altogether, and South Carolina repealed compulsory school attendance. Alabama enacted a law providing for dismissing teachers who advocated desegregation, allowed the state government to close the schools whenever "necessary to avoid friction or disorder," and allowed public funds to be used for substitute private schools. While there was full or partial compliance in the District of Columbia and some border states, in the eight states of the "solid South" there was no compliance at all. By 1958 eleven states had enacted 145 laws intended to protect segregated education and, after the initial burst of compliance in some areas, there was almost no additional progress during the late 1950s. By 1962-63, nine years after *Brown*, "fewer than 13,000 Negro public school pupils out of 2,803,882 were in school with Southern whites."

Eventually, however, hundreds of school districts across the United States have implemented, under court orders, plans to remedy the effects of previous *de jure* segregation, usually through assigning students on the basis of their race in ways which promoted racial integration. Perhaps the most notorious of these northern cases was Boston, where I was the state official charged with developing a remedial plan. In recent years, many of the school districts which had been found guilty of de jure segregation in the 1960s and 1970s have been declared 'unitary' and the court order have been lifted; in Boston, for example, while vestiges of the desegregation plan remain in place, assignments are no longer made on the basis of race.

Given the residential concentration of African-Americans, however, *de facto* segregation continues in the sense that most black pupils attend schools in which the great majority of their classmates are black. Latino pupils (descended from Spanish-speaking peoples of the Americas), while not considered a racial minority since in fact the group is multi-racial, are also heavily concentrated with other Latino and with black pupils. Some school districts have adopted, voluntarily, plans to increase racial and ethnic integration. The two cases below struck a blow to these efforts.

> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), decided together with Meredith v. Jefferson County Board of Education, is a decision of the U.S. Supreme Court that prohibited assigning students to public schools solely for the purpose of achieving racial integration and declined to recognize racial balancing as a compelling state interest. In a fragmented opinion delivered by Chief Justice John Roberts, five justices held that the School Boards did not present any "compelling state interest" that would justify the assignment of school seats on the basis of race. Associate Justice Anthony Kennedy filed a concurrence that presented a more narrow interpretation, stating that schools may use "race conscious" means to achieve diversity in schools but that the schools at issue in this case did not use a sufficient narrow tailoring of their plans to sustain their

goals. Four justices dissented from the Court's conclusions.

None of the nine Supreme Court justices disputed that, as Justice Kennedy put it, the case was "argued on the assumption...that the discrimination in question did not result from de jure [i.e. state-sponsored] actions." This made the case different from Brown v. Board of Education. All of the dissenting justices acknowledged that "the Constitution does not impose a duty to desegregate upon districts," if the districts have not practiced racial discrimination. However, the dissenters argued that the Constitution permits such desegregation even though it does not require it.

Background of the case

Seattle

The Seattle School District allowed students to apply to any high school in the District. Since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 41% white and 59% non-white), the racial tiebreaker went into effect. At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal. No distinction was made between various categories of non-whites; Asian-Americans, Latinos, Native Americans, and African-Americans were all treated solely as "non-white" for purposes of the tiebreaker.

A non-profit group, Parents Involved in Community Schools (Parents)(www.piics.org), sued the District, arguing that the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment as well as the Civil Rights Act of 1964 and Washington state law. A federal District Court dismissed the suit, upholding the tiebreaker. On appeal, a three-judge panel the U.S. Court of Appeals for the Ninth Circuit reversed, but upon en banc rehearing the court affirmed the lower court decision.

Under the Supreme Court's precedents on racial classification in higher education, Grutter v. Bollinger and Gratz v. Bollinger, race-based classifications must be directed toward a "compelling government interest" and must be "narrowly tailored" to that interest. Applying these precedents to K-12 education, the Circuit Court found that the tiebreaker scheme was not narrowly tailored. The District then petitioned for an en banc ruling by a panel of 11 Ninth Circuit judges. The en banc panel came to the opposite conclusion and upheld the tiebreaker. The majority ruled that the District had a compelling interest in maintaining racial diversity. Applying a test from Grutter, the Circuit Court also ruled that the tiebreaker plan was narrowly tailored, because 1) the District did not employ quotas, 2) the District had considered race-neutral alternatives, 3) the plan caused no undue harm to races, and 4) the plan had an ending point.

Jefferson County

This case is the last of a trilogy of cases against Jefferson County Public Schools (JCPS) and their use of race in assigning students to schools. The first case started in 1998 when

five African American high school students sued JCPS to allow them to attend Central High School, a magnet school. The suit alleged that they were denied entrance because they were black. In 2000, Federal Judge John Heyburn, after finding that the JCPS school system did not need to be under a court-ordered desegregation policy, ruled that race could not be used for student assignment placement in the JCPS school system in regard to their magnet school programs. In 2004, he ruled the same for the traditional schools, but allowed the regular public schools to use race as the admission requirement. It is this part that went before the US Supreme Court as the other two cases were not appealed by JCPS.

JCPS is the 26th largest school district in the United States. Students are assigned to school based on the race makeup of each school, no less than 15%, no more than 50%. Race is defined as Black and “Other”. Asian, Hispanic, White, etc are classified as “Other”. Magnet and Traditional are exempt from this ratio per the 2000 and 2003 Court Order. Louisville’s population is about 58% White; 38% Black, 2% Asian, 1.3% Hispanic.

Chief Justice John Roberts wrote the opinion of the court as to Parts I, II, III-A and III-C.

[discussion of parts I and II eliminated]

Part III A first reiterated that "when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." This is because "'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" In order to survive strict scrutiny analysis, "a narrowly tailored plan" must be presented in order to achieve a "compelling government interest."

Roberts noted that prior Supreme Court cases had recognized two compelling interests for the use of race.[7]

* First, "remedying the effects of past intentional discrimination."

    * But the Seattle schools had never been segregated by law; and the Kentucky schools, though previously segregated by law, had their desegregation decree dissolved by a District Court in 2000 on the finding that they had achieved "unitary status". Neither school could plead this compelling interest, because "[w]e have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"

* Second, "the interest in diversity in higher education", as upheld in Grutter v. Bollinger.

    * But Roberts distinguished Grutter from this case, and argued that this case was more similar to Gratz v. Bollinger. In Grutter, the interest was student body diversity "in the context of higher education," and was not focused on race alone but encompassed "all factors that may contribute to student body diversity". The Grutter Court quoted the articulation of diversity from Regents of Univ. of Cal. v. Bakke, noting that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." What was upheld in Grutter was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though

important element." "The entire gist of the analysis in Grutter was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group." As the Grutter Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." The point of the narrow tailoring analysis in which the Grutter Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," ibid.; race, for some students, is determinative standing alone. Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. "The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, "[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box."" Furthermore, Roberts wrote:

> In upholding the admissions plan in Grutter ... this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." [18]The Court in Grutter expressly articulated key limitations on its holding--defining a specific type of broad-based diversity and noting the unique context of higher education--but these limitations were largely disregarded by the lower courts in extending Grutter to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by Grutter.

Part III B rejected the notion that racial balancing could be a compelling state interest, as to do so "would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."

Part III C addressed the school districts claim that "the way in which they have employed individual racial classifications is necessary to achieve their stated ends." Roberts replied that these classifications were clearly not necessary, since they had a "minimal effect" on student assignments.[24] He contrasted this circumstance to Grutter, where "the consideration of race was viewed as indispensable" in more than tripling minority representation at the law school--from 4 to 14.5 percent. The districts have also failed to

show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," Grutter, supra, at 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304, and yet in Seattle several alternative assignment plans--many of which would not have used express racial classifications--were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. By contrast, Croson, notes that racial classifications is permitted only "as a last resort".

Plurality opinion by Chief Justice Roberts

Associate Justice Anthony Kennedy did not join the rest of the opinion by the Chief Justice, therefore, those parts of the opinion did not command a majority. In this Plurality Opinion, Roberts wrote that the Schools at issue contend that a racially diverse environment is beneficial for education and they submit this as the reason why they consider race alone in their school assignments. However, Roberts considers that this interest is not compelling and that the use of race for this goal is not narrowly tailored, it is instead used for racial balancing, which is unconstitutional. The schools base their numbers in demographics, therefore making this goal a means to achieve a numerical quota to achieve racial balancing. Roberts concludes that racial balancing cannot be a compelling state interest.

The Chief Justice finally concludes his opinion by answering some of the issues raised by Justice Stephen Breyer in his dissent. He writes that Justice Breyer misused and misapplied previous Supreme Court precedents in this area and that he greatly exaggerates the consequences of the decision of this case. He also chastises Justice Breyer for saying that the Court silently overruled Grutter with this case and that the method that Breyer applies to this case is that of "the ends justify the means". Roberts concludes his opinion for the plurality by saying: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

Concurrence by Justice Thomas

In concurrence with the majority opinion Justice Clarence Thomas wrote about the unsettled debate concerning whether racial balance or diversity has a positive effect on educational outcomes. Justice Thomas recoils at the suggestion that black students can only learn if they are sitting next to white students. Most of the concurrence consists of social science citations and statistics showing that black students can succeed in majority black schools such as HBCUs. Justice Thomas concludes noting "If our history has taught us anything it has taught us to beware of elites bearing racial theories." In a footnote the Justice added a personal mention of Justice Breyer: “Justice Breyer’s good intentions, which I do not doubt, have the shelf life of Justice Breyer’s tenure.”

Concurrence by Justice Kennedy

Justice Anthony Kennedy did not join parts of the opinion of Chief Justice Roberts. In cases where an opinion or parts of an opinion do not reach a majority, the narrower opinion represents the holding, so Justice Kennedy's opinion represents parts of the holding of the case. In his concurrence, Kennedy differed with the plurality because, he found, the goal of obtaining a diverse student body is a compelling state interest. "Diversity, depending on its

meaning and definition, is a compelling educational goal a school district may pursue."

Furthermore, Kennedy found that that race-conscious mechanisms can be used by school districts to further the goal of diversity, a position rejected by the plurality. Kennedy argued that the government had an interest in ensuring racial equality: "The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."

Finally, Kennedy wrote: "A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."

Nevertheless, Kennedy found the school districts did not narrowly tailor the use of race to achieve the compelling interests in the case. Specifically, Kennedy finds that the districts could have achieved the same goal through less racially charged means.

Justice Kennedy asserts that the dissent must "brush aside two concepts of central importance" to uphold the racial classification in the case. First, Kennedy harshly faults the dissent for consciously ignoring the difference between de jure and de facto segregation. And second, Kennedy faults the dissent for ignoring the "presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals."

Dissent by Justice Stevens

Justice John Paul Stevens wrote a sharply worded short dissent in which he accused the plurality of misusing and misapplying previous Supreme Court precedents including Brown v. Board of Education. He concluded by saying that the current Court has greatly changed and that previously. "[I]t was...more faithful to Brown and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."

Dissent by Justice Breyer

Justice Stephen G. Breyer, in the principal dissenting opinion, dismissed Justice Kennedy's proposed alternatives to the labeling and sorting of individual students by race and, in a surprisingly emotional 20 minute speech from the bench, denounced the majority opinion. “It is not often in the law that so few have so quickly changed so much,” Justice Breyer said of the Court's decision. In the Justice's 77-page written opinion he called the ruling a "radical" step away from established law that would take from communities a critical tool used for many years in the prevention of resegregation.

Race: Affirmative Action

Legal issues involving race/ethnicity in higher education have, in recent decades, concerned its use in decisions about admission to undergraduate and graduate programs in an effort to remedy the under-representation of black and Latino students in colleges, graduate schools, and in the professions.

Regents of the University of California v Bakke, 438 U.S. 265 (1978) was a landmark decision of the Supreme Court of the United States on affirmative action. It bars quota systems in college admissions but affirms the constitutionality of affirmative action programs.

The Medical School of the University of California at Davis had two admissions programs for the entering class of 100 students - the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall under-graduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he or she was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), the rating being based on the interviewers' summaries, overall grade point average, science courses grade point average, Medical College Admission Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score."

The full admissions committee then made offers of admission on the basis of their review of the applicants' files and their scores, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program.

The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (Blacks, Hispanics, Asians, Native Americans). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee.

Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made.

No disadvantaged Caucasians were admitted under the special program, though many applied. Allan Bakke, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected because no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than Bakke's.

After his second rejection, Bakke filed an action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and 601 of Title VI of the Civil Rights Act of 1964 (which provides that no person shall on the ground of

race or color be excluded from participating in any program receiving federal financial assistance). UC Davis Medical School counter-claimed for a declaration that its special admissions program was lawful.

The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that UC Davis Medical School could not take race into account in making admissions decisions, the court declared the program violated the Federal and State Constitutions and Title VI. The court did not order Bakke's admission, however, because there was no proof at trial that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical facility, and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds, the court held that UC Davis Medical School's special admissions program violated the Equal Protection Clause. Because the Medical School could not satisfy its burden of demonstrating that, absent the special program, Bakke would not have been admitted, the court ordered his admission to the Medical School. Bakke began his studies at the University of California Medical School at Davis in fall of 1978, graduated in 1982, and later served as a resident at the prestigious Mayo Clinic in Rochester, Minnesota.

Decision

The court ruled 5-4 in Bakke's favor on June 23, 1978. Justice Lewis Powell delivered the opinion of the court that race could be only one of numerous factors used by discriminatory boards, such as those of college admissions. Powell found that quotas insulated minority applicants from competition with the regular applicants and were thus unconstitutional because they discriminated against non-minority applicants. Powell however stated that universities could use race as a plus factor. He cited the Harvard College Admissions Program which had been filed as an amicus curiae as an example of a constitutionally valid affirmative action program which took into account all of an applicant's qualities including race in a "holistic review".

The decision was split with four justices firmly against all use of race in admissions processes, four justices for the use of race in university admissions, and Justice Powell, who was against the UC Davis Medical School quota system of admission, but found that universities were allowed to use race as a factor in admission. Title VI of the civil rights statute prohibits racial discrimination in any institution that receives federal funding. Justices Burger, Stewart, Rehnquist, and Stevens supported a strict interpretation and, thus, ruled in favor of Bakke. Justices Brennan, Marshall, Blackmun, and White, however, disagreed with a rigid and literal interpretation of Title VI. The nature of this split opinion created controversy over whether Powell's opinion was binding. However, in 2003, in Grutter v. Bollinger and Gratz v. Bollinger, the Supreme Court affirmed Powell's opinion, rejecting "quotas", but allowing race to be one "factor" in college admissions to meet the compelling interest of diversity.

Gratz v Bollinger, 539 U.S. 244 (2003), was a United States Supreme Court case regarding the University of Michigan undergraduate affirmative action admissions policy. In a 6–3 decision announced on June 23, 2003, the Supreme Court ruled the university's point

system (which automatically awarded points to under-represented ethnic groups) was too mechanistic in its use of race as a factor in admissions, and was therefore unconstitutional.

The University of Michigan used a 150-point scale to rank applicants, with 100 points needed to guarantee admission. The University gave underrepresented ethnic groups, including African-Americans, Hispanics, and Native Americans, an automatic 20-point bonus on this scale, while a perfect SAT score was worth 12 points.

The petitioners, Jennifer Gratz and Patrick Hamacher, both white residents of Michigan, applied for admission to the University of Michigan's College of Literature, Science, and the Arts (LSA). Gratz applied for admission in the fall of 1995 and Hamacher in the fall of 1997. Both were subsequently denied admission to the university. Gratz and Hamacher were contacted by the Center for Individual Rights, which filed a lawsuit on their behalf in October 1997. The case was filed in the United States District Court for the Eastern District of Michigan against the University of Michigan, the LSA, James Duderstadt, and Lee Bollinger. Duderstadt was president of the university while Gratz's application was under consideration, and Bollinger while Hamacher's was under consideration. Their class-action lawsuit alleged "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment... and for racial discrimination."

Like *Grutter*, the case was heard in District Court, appealed to the Sixth Circuit Court of Appeals, and [then appealed] to be heard before the Supreme Court.

Issues of Standing [deleted]

Decision of the Court

The Court, in a ruling by Chief Justice Rehnquist, held that the policy was unconstitutional:

> Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

The court held a 6-3 opinion in favor of Gratz. Justice O'Connor, joined in part by Justice Breyer, wrote a concurrence that contrasted the college's more mechanical plan with the law school's more individual plan, which was held constitutional in Grutter v. Bollinger. Breyer wrote a separate opinion concurring in the judgment (but not the opinion) of the court.

Justice Stevens, joined by Justice Souter, argued in dissent that the plaintiff lacked standing. Justice Souter's own dissent, joined by Justice Ginsburg, argued that the college's plan was not a quota and met narrow tailoring. Souter also argued that alternative plans would merely obfuscate the means of attaining racial balance without changing the goal. Justice Ginsburg's dissent, joined by Justice Souter, elaborated on the point of obfuscation--she argued that the majority would encourage universities to remedy the real problems of racial disadvantage by resorting to dishonest means that did not facially take account of race.

Grutter v Bollinger, 539 U.S. 306 (2003), is a case in which the United States Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School. The 5-4 decision was announced on June 23, 2003.

The case originated in 1996 when Barbara Grutter, a White Michigan resident with a 3.8 GPA and 161 Law School Admissions Test (LSAT) score, was rejected by the University of Michigan Law School. She contacted the Center for Individual Rights which filed suit on her behalf in December 1997, alleging that the university had discriminated against her on the basis of race in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964. She said she was rejected because the Law School used race as the main factor, giving applicants belonging to underrepresented minority groups (African Americans, Hispanics, and Native Americans) a significantly greater chance of admission than White and Asian American applicants with similar credentials. She argued that the university had no compelling interest to justify that use of race.

The named defendant in the case was Lee Bollinger, who was at that time the president of the university, who fought for the university's status quo, with the purpose of achieving racial diversity in the student body.

Lower courts

In March 2001, U.S. District Court Judge Bernard A. Friedman ruled that the admissions policies were unconstitutional because they "clearly consider" race and are "practically indistinguishable from a quota system." In May 2002, the Sixth Circuit Court of Appeals reversed the decision, citing the Bakke decision and allowing the use of race to further the "compelling interest" of diversity. The plaintiffs subsequently requested the Supreme Court review. The Court agreed to hear the case, the first time the Court had heard a case on affirmative action in education since the landmark Bakke decision of 25 years prior.

Supreme Court's decision

The Court's majority ruling, authored by Justice Sandra Day O'Connor, held that the United States Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Court held that the law school's interest in obtaining a "critical mass" of minority students was indeed a "tailored use". O'Connor noted that sometime in the future, perhaps twenty-five years hence, racial affirmative action would no longer be necessary in order to promote diversity. It implied that affirmative action should not be allowed permanent status and that eventually a "colorblind" policy should be implemented. The opinion read, "race-conscious admissions policies must be limited in time." "The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." The phrase "25 years from now" was echoed by Justice Clarence Thomas in his dissent. Justice Thomas, writing that the system was "illegal now", concurred with the majority only on the point that he agreed the system would still be illegal 25 years hence.

The decision largely upheld the position asserted in Justice Powell's concurrence in Regents of the University of California v. Bakke, which allowed race to be a consideration in admissions policy, but held that quotas were illegal.

Public universities and other public institutions of higher education across the nation are now allowed to use race as a plus factor in determining whether a student should be admitted. While race may not be the only factor, the decision allows admissions bodies to take race into consideration along with other individualized factors in reviewing a student's application. O'Connor's opinion answers the question for the time being as to whether "diversity" in higher education is a compelling governmental interest. As long as the program is "narrowly tailored" to achieve that end, it seems likely that the Court will find it constitutional.

In the majority were Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented. Much of the dissent concerned a disbelief in the validity of the law school's claim that the system was necessary to create a "critical mass" of minority students and provide a diverse educational environment.

The case was heard in conjunction with Gratz v. Bollinger, 539 U.S. 244 (2003), in which the Court struck down the University of Michigan's more rigid, point-based undergraduate admission policy, which was essentially deemed a quota system. The case generated a record number of amicus curiae briefs from institutional supporters of affirmative action. A lawyer who filed an amicus curiae brief on behalf of members and former members of the Pennsylvania legislature, State Rep. Mark B. Cohen of Philadelphia said that O'Connor's majority decision in Grutter v. Bollinger was a "ringing affirmation of the goal of an inclusive society."

Dissent

Chief Justice Rehnquist, joined by Justice Scalia, Justice Kennedy, and Justice Thomas, argued the Law School's admissions policy was an attempt to achieve an unconstitutional type of racial balancing. The Chief Justice attacked the Law School's asserted goal of reaching a "critical mass" of minority students, finding the absolute number African-American, Hispanic, and Native American students varied markedly, which is inconsistent with idea of a critical mass, in that one would think the same size critical mass would be needed for all minority groups. He noted that "[f]rom 1995 through 2000, the Law School admitted . . . between 13 and 19 . . . Native American[s], between 91 and 108 . . . African American[s], and between 47 and 56 . . . Hispanic[s].... [O]ne would have to believe that the objectives of 'critical mass' offered by respondents are achieved with only half the number of Hispanics, and one-sixth the number of Native Americans as compared to African Americans." Citing admissions statistics, the Chief Justice noted the tight correlation between the percentage of applicants and admittees of a given race and argued that the numbers were "far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'"

Justice Thomas, joined by Justice Scalia, issued a strongly worded opinion, concurring in part and dissenting in part, arguing that if Michigan could not remain a prestigious institution and admit students under a race-neutral system, the "Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system." In Justice Thomas' opinion, there is no compelling state interest in Michigan maintaining an elite law school, due to the fact that a number of states do not have law schools, let alone elite ones. Moreover, Justice Thomas noted that in United States v. Virginia, 518 U.S. 515 (1996), the Court required the Virginia Military Institute to radically reshape its admissions process and the character of that institution.

Another criticism raised by Justice Thomas compared Michigan Law to the University of California at Berkeley Law School, where California's Proposition 209 had barred Berkeley Law from "granting preferential treatment on the basis of race in the operation of public education." Despite Proposition 209, however, Berkeley Law was still able to achieve a diverse student body. According to Thomas, "the Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with 'reputations for excellence'...rivaling [Michigan Law's] have satisfied their sense of mission without resorting to prohibited racial discrimination."

A final criticism leveled at Justice O'Connor's opinion was the length of time the racial admissions policy will be lawful. Justice Thomas concurred that racial preferences would be unlawful in 25 years, however, he noted that in fact the Court should have found race-based affirmative action programs in higher education unlawful now:

> I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to "'eliminate the [perceived] need for any racial or ethnic'" discrimination because the academic credentials gap will still be there. [citation omitted] The Court defines this time limit in terms of narrow tailoring, [internal citation omitted] but I believe this arises from its refusal to define rigorously the broad state interest vindicated today. [internal citation omitted]. With these observations, I join the last sentence of Part III of the opinion of the Court.
>
> For the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 527, 559, [. . .] (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Justice Scalia also issued a critique of O'Connor's logic as effectively neutering the 14th Amendment's Equal Protection guarantees.[citation needed]

Law Adopted Post Case

Following the decision, petitions were circulated to change the Michigan State Constitution. The measure, called Proposal 2, passed and changed the racial admissions processes at the Law School. Proposal 2 joins California's Proposition 209 and Washington's Initiative 200 as significantly popular initiatives banning the use of racial preferences in public university admissions.

The most recent affirmative action case decided by the Supreme Court did not involve educational institutions, is worth noting because it reversed a lower-court decision in which President Obama’s nominee for a Supreme Court vacancy, Sonia Sotomayor. The detailed account which follows suggests how complicated efforts seeking to achieve proportional representation of black individuals at all levels of American public life have become in recent

years, and what difficulties public officials face in finding the appropriate course of action.

Ricci v DeStefano is a 2009 decision by the Supreme Court of the United States arising from a lawsuit brought against the city of New Haven, Connecticut by eighteen city firefighters alleging that the city discriminated against them with regard to promotions. The firefighters, seventeen of whom are white and one of whom is Hispanic, had all passed the test for promotions to management. City of New Haven officials invalidated the test results because none of the black firefighters who passed the exam had scored high enough to be considered for the positions. They stated that they feared a lawsuit over the test's disparate impact on a protected minority. The complainants claimed they were denied the promotions because of their race—a form of racial discrimination.

The Supreme Court heard the case on April 22, 2009 and issued its decision on June 29, 2009. The Court held 5-4 that New Haven's decision to ignore the test results violated Title VII of the Civil Rights Act of 1964.

Background

In November and December 2003, the New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain. The City's Department of Human Resources issued an RFP for these examinations, as a result of which I/O Solutions ("IOS") designed the examinations. Under the contract between the City and the New Haven firefighters' union, the written exam result counted for 60% of an applicant's score and the oral exam for 40%. Those with a total score above 70% on the exam would pass.

For the 118 firefighters who took the exams, the pass rate for black candidates was approximately half that of the corresponding rate for white candidates:

* The passage rate for the Captain exam was: 16 (64%) of the 25 whites; 3 (38%) of the 8 blacks; 3 (38%) of the 8 Hispanics. The top 9 scorers included 7 whites and 2 Hispanics; given that there were 7 Captain vacancies when the tests were administered, and that the "Rule of Three" in the City Charter mandates that a civil service position be filled from among the three individuals with the highest scores on the exam, it appeared that no blacks and at most two Hispanics would be eligible for promotion.

* The passage rate for the Lieutenant exam was: 25 (58%) of the 43 whites; 6 (32%) of the 19 blacks; 3 (20%) of the 15 Hispanics. All the top 10 scorers were white; given that there were 8 vacancies, under the "Rule of Three" it appeared that no blacks or Hispanics would be eligible for promotion.

Hearings of the Civil Service Board

The CSB, which must vote to certify test results, held five hearings between January and March 2004 on the issue of whether to certify the test results were racially biased, i.e. had a disparate impact on minorities.

* At the initial hearing on January 22, 2004, New Haven's counsel (and co-defendant) Mr. Thomas Ude characterized the exam results as "a very significant disparate impact..." His comments "emphasize[d] . . . that the case law does not require that the City find that the test is indefensible in order to take action that it believes is appropriate to remedy . . .

disparate impact from examination." He advised that "federal law does not require that you [the CSB] make a finding that this test . . . was not job-related, which is another way of saying it wasn't fair. A test can be job-related and have a disparate impact on an ethnic group and still be rejected because there are less discriminatory alternatives for the selection process." Id. at 36.

* Several firefighters spoke in favor of certifying the results. Plaintiff Frank Ricci stated that the questions on the test were drawn from "nationally recognized" books and New Haven's own Rules and Regulations and Standard Operating Procedures. He stated that he "studied 8 to 13 hours a day to prepare for this test and incurred over $ 1,000 in funds [sic] to study for this test," including purchasing the books and paying an acquaintance to read them on tape because he is dyslexic and learns better by listening.

* The CSB heard from an IOS representative, who advised the city to approve the test results, and concluded by "implor[ing] anyone that had . . . concerns [about disparate impact] to review the content of the exam. In my professional opinion, it's facially neutral."

* The board heard from a representative of an IOS competitor, who testified that the results showed “adverse impact” and that he could design tests with less disparate results and better measuring the jobs’ requirements. He also conceded that the City’s tests did not show an adverse impact greater than that allowed by law.

* At the final hearing, Defendant Ude, the Corporation Counsel, strongly advocated against certifying the exam results. Defendant Walton spoke "on behalf of the Mayor" and also advocated discarding the test results, primarily because the eligibility list, when combined with the Rule of Three and the number of vacancies then available, would "create a situation in which African-Americans are excluded from promotional opportunity on both the Captain and Lieutenant positions and Latinos are excluded from promotional opportunity on the Lieutenant examination." She questioned whether there were "other ways of making the selection," that would be less "discriminatory."

The board split 2-2 on the question of certifying each exam (with one member recusing herself because her brother was a candidate for promotion on the Captain's examination). As result, the promotional lists were not certified; the city threw out the test and promoted no one, citing a desire to avoid violating Title VII of the Civil Rights Act.

Ricci and sixteen other white test takers, plus one Hispanic, all of whom would have qualified for consideration for the promotions, sued the city including Mayor John DeStefano, Jr. The lead plaintiff was Frank Ricci, who has been a firefighter at the New Haven station for 11 years. Ricci gave up a second job to have time to study for the test. Because he has dyslexia, he paid an acquaintance $1,000 to read his textbooks on to audiotapes. Ricci also made flashcards, took practice tests, worked with a study group, and participated in mock interviews. He placed 6th among 77 people who took the lieutenant's test.

Lt. Ben Vargas, the lone Hispanic petitioner, was allegedly attacked by unknown African-American assailants in Humphrey’s East Restaurant in 2004 and had to be hospitalized afterwards. He has since stated that he believes the attack was orchestrated by the African-American firefighters in retribution for bringing in the legal case; his account is vigorously disputed. Vargas quit the Hispanic firefighters’ association, which includes Vargas’s brother, after the group declined to support his legal case.

Among other things, the suit alleged that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e et seq., and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.

On appeal, a three-judge panel of the Second Circuit Court of Appeals (Pooler, Sack and Sotomayor, C.JJ.) heard arguments in this case of discrimination. Judge Sotomayor (who was subsequently nominated to the U.S. Supreme Court) vigorously questioned the attorneys in the case, and repeatedly discussed whether the city had a right to attempt to reformulate its test if it was afraid that the original test was discriminatory. The three-judge panel then affirmed the district court's ruling in a summary order, without opinion, on February 15, 2008.

However, after a judge of the Second Circuit requested that the court hear the case en banc, the panel withdrew its summary order and on June 9, 2008 issued instead a unanimous per curiam opinion. The panel's June 9, 2008 per curiam opinion was eight sentences long. It characterized the trial court's decision as "thorough, thoughtful and well-reasoned" while also lamenting that there were "no good alternatives" in the case. The panel expressed sympathy to the plaintiffs' situation, particularly Ricci's, but ultimately concluded that the Civil Service Board was acting to "fulfill its obligations under Title VII [of the Civil Rights Act]". The panel concluded by adopting the trial court's opinion in its entirety.

The Supreme Court granted certiorari and heard oral arguments on April 22, 2009.

Justice Kennedy, writing for a 5-4 majority (Kennedy, Roberts, Scalia, Thomas, and Alito), concluded that the City's action in discarding the tests was a violation of Title VII:

1. In these circumstances, the standard for permissible race-based action under Title VII is that the employer must "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."
2. The respondents cannot meet that threshold standard.

First, Kennedy rejected arguments that the City did not discriminate. It engaged in "express, race-based decisionmaking" (i.e.disparate treatment/intentional discrimination) when it declined to certify the examination results because of the statistical disparity based on race—"i.e., how minority candidates had performed when compared to white candidates". The District Court was wrong to argue that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent." "That argument turns upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective."

Second, Kennedy examined the statutory framework of Title VII, to determine whether Title VII's proscription of disparate treatment [24] is afforded any lawful justifications in the disparate impact provision that it seems to conflict with. Looking to analogous Equal Protection cases, he reached the statutory construction that, in instances of conflict between the disparate-treatment and disparate-impact provisions, permissible justifications for

disparate treatment must be grounded in the strong-basis-in-evidence standard. He concluded that "once [a] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, §2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race."

* He rejected petitioners' "strict approach," that under Title VII, "avoiding unintentional discrimination cannot justify intentional discrimination." That assertion ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination, and would render a statutory provision "a dead letter".
* He rejected petitioners' suggestion that an employer "must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit." This rule would run counter to what we have recognized as Congress's intent that "voluntary compliance" be "the preferred means of achieving the objectives of Title VII." Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill. Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment.
* He rejected the respondents' position that "an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct." This position would ignore "the original, foundational prohibition of Title VII", which bars employers from taking adverse action "because of . . . race." §2000e–2(a)(1); and when Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k). Respondents' policy would encourage race-based action at the slightest hint of disparate impact -- e.g. causing employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination -- which would amount to a de facto quota system, in which a "focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures." "That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing." §2000e–2(j). The purpose of Title VII "is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."
* He cited Justice Powell who, announcing the strong-basis-in-evidence standard for the plurality in Wygant v. Jackson Board of Education, recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other, stating that those "related constitutional duties are not always harmonious," and that "reconciling them requires . . . employers to act with extraordinary care." Ibid. The plurality required a strong basis in evidence because "[e]videntiary support for the conclusion that remedial action is war-ranted becomes crucial when the remedial program is challenged in court by nonminority employees." Ibid. The Court applied the same standard in Richmond v. J. A. Croson Co., observing that "an amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota."
* The same interests are at work in the interplay between the disparate-treatment and

disparate-impact provisions of Title VII: Congress imposes liability on employers for unintentional discrimination, in order to rid the work-place of “practices that are fair in form, but discriminatory in operation.” But Congress also prohibits employers from taking adverse employment actions “because of” race. Applying the strong-basis-in-evidence standard to Title VII gives effect to both provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances.

* The standard leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination. See Firefighters, supra, at 515.
* And the standard appropriately constrains employers’ discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.
* Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. See §2000e–2(l). Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics. If an employer cannot rescore a test based on the candidates’ race, §2000e–2(l), then it follows a fortiori that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations.

Next, Kennedy inquired whether the city's justifications for its disparate-treatment discrimination met this strong basis in evidence standard. He concluded that they did not: "Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination...[t]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The test results produced significant racial adverse impact, and confronted the City with a prima facie case of disparate-impact liability. That compelled them to "take a hard look at the examinations" to determine whether certifying the results would have had an impermissible disparate impact. The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity,[36] and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the

City's needs but that the City refused to adopt. §2000e–2(k)(1)(A), (C). Neither condition holds:

1. He found no genuine dispute that the examinations were job-related and consistent with business necessity. The City's assertions to the contrary are "blatantly contradicted by the record." (Section II-C-1)
2. He found that respondents also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt. (Section II-C-2.)

Respondents raise three arguments to the contrary, but each argument fails.

* First, respondents refer to testimony before the CSB that a different composite-score calculation—weighting the written and oral examination scores 30/70—would have allowed the City to consider two black candidates for then-open lieutenant positions and one black candidate for then-open captain positions. (The City used a 60/40 weighting as required by its contract with the New Haven firefighters' union.) But respondents have produced no evidence to show that the 60/40 weighting was indeed arbitrary. In fact, because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason.
* Second, respondents argue that the City could have adopted a different interpretation of the "rule of three" that would have produced less discriminatory results. Respondents claim that employing "banding" here would have made four black and one Hispanic candidates eligible for then-open lieutenant and captain positions. But banding was not a valid alternative for this reason: Had the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII's prohibition of adjusting test results on the basis of race.
* Third, and finally, respondents refer to statements by Hornick in his telephone interview with the CSB regarding alternatives to the written examinations. But when the strong-basis-in-evidence standard applies, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. And there is no doubt respondents fall short of the mark by relying entirely on isolated statements by Hornick.

He concluded: The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair. The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a law-suit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to

disregard the tests based solely on the racial disparity in the results.

Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Scalia, though concurring in full, regretted that the Court declined to clarify the conflict between Title VII's disparate-impact provisions and the Constitution's guarantee of equal protection. Specifically: although the Court clarified that the disparate-treatment provisions forbid "remedial" race-based actions when a disparate-impact violation would not otherwise result, "it is clear that Title VII not only permits but affirmatively requires such [remedial race-based] actions" when such a violation would result. In the latter situations, Title VII's disparate-impact provisions "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." "That type of racial decision making is, as the Court explains, discriminatory."

But if the Federal Government is prohibited from discriminating on the basis of race,[39] then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race.

* Defenders of the disparate-impact laws point out that they do not mandate imposition of quotas, but that argument is flawed: they do bar private employers who avoid a quota but instead intentionally design hiring practices that achieve the same end, so Government compulsion of such design might violate equal protection principles as well.
* Nor would it matter that Title VII requires consideration of race "on a wholesale, rather than retail, level": "[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."
* And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute.
* It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to "smoke out," as it were, disparate treatment. Disparate impact is sometimes (though not always, see Watson v. Fort Worth Bank & Trust, 487 U. S. 977, 992 (1988) (plurality opinion)) a signal of something illicit, so a regulator might allow statistical disparities to play some role in the evidentiary process. But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (i.e., non racially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable. See post, at 15–16, and n. 1 (GINSBURG, J., dissenting) (describing the demanding nature of the "business necessity" defense). "It is one thing to free plaintiffs from proving an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable."