

## THE LAST TWENTY FIVE YEARS OF AFFIRMATIVE ACTION?

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In a pair of much-watched cases decided by the Supreme Court in 2003, affirmative action has been vindicated, if not declared alive and well.<sup>1</sup> The decisions, at least for a time, put to rest a controversy that raged over the 1990s.<sup>2</sup> Since the Court in 1978 placed its somewhat obtuse imprimatur on affirmative action in the famous case of *Regents of the University of California v. Bakke*,<sup>3</sup> race conscious affirmative action programs rose and later, at least in some jurisdictions, fell.<sup>4</sup> The latest pair of cases announced a truce of sorts in the affirmative action hostilities. In so doing, however, the Court has virtually guaranteed that the debate over affirmative action will rage again in the not-too-distant future.<sup>5</sup>

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1. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); RICHARD D. KAHLENBERG, *THE REMEDY* (1996); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299 (1999); Charles R. Lawrence, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2001).

3. 438 U.S. 265 (1978).

4. See *infra* text accompanying notes 19-31. See generally GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* (2000) (analyzing affirmative action law over last few decades).

5. Justice Scalia contended that, because the different results in the two cases rest on fact-specific differences in the affirmative action programs, *Grutter* and *Gratz* will "prolong the controversy and the litigation" over affirmative action. *Grutter*, 539 U.S. at 346 (Scalia, J., concurring in part, dissenting in part).

The Court's decisions in the two University of Michigan cases (*Gratz v. Bollinger* and *Grutter v. Bollinger*)—one involving undergraduate admissions, the other law school admissions—raise fascinating questions, many of which undoubtedly will be addressed in this symposium. This essay considers one issue. In *Grutter*, Justice O'Connor, writing for a majority of the Court, bluntly stated the Court's expectation that, although lawfully permissible today, affirmative action programs like the one employed by the elite University of Michigan law school should not be necessary in 25 years.<sup>6</sup>

The 25-year time limit announced by Justice O'Connor grabbed immediate attention.<sup>7</sup> At first blush, the Court's pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion. However, well-settled precedent requires time limits on affirmative action programs. Supreme Court decisions have repeatedly emphasized that affirmative action programs to remedy past discrimination are "temporary" measures and should be eliminated when no longer necessary.<sup>8</sup> Indeed, in certain instances, the Court has expressly required that affirmative action programs have time limits.<sup>9</sup> A limit ensures periodic review of a race-conscious program and that it is maintained only if needed or, if warranted, modified to better achieve its goals.

Despite the caselaw supporting durational limits on affirmative action programs, the 25 years announced by the Court, which came out of the blue in the opinion in *Grutter*, can be criticized. The instinctive reaction of many affirmative action advocates was that two-and-a-half decades will not be long enough to eliminate the need for affirmative action at elite public universities, most of which currently lack many minority students despite having had affirmative action programs in place for decades.<sup>10</sup> Racism has existed for centuries in the United States and, although the most blatant forms of racial discrimination have been declared unlawful, racism's legacy has proven ex-

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6. See *Grutter*, 539 U.S. at 343; *infra* text accompanying notes 42-54.

7. Compare Stuart Taylor Jr., *Getting Serious About Race: The Next 25 Years*, NAT'L J., June 28, 2003 at 2085 (opining that Justice O'Connor's "25-year sunset clause" provides universities with "a license to discriminate for another quarter-century against Asian-Americans and whites in pursuit of racial balance"), with Shannon Muller, *Backers: No Quick End to Affirmative Action*, ASBURY PARK PRESS, June 29, 2003, at A1 (quoting observers skeptical about the possibility that affirmative action would be unnecessary in 25 years).

8. See *infra* text accompanying notes 56-69.

9. *Id.*

10. *Id.*

tremely difficult to remedy. Nor does the nation appear on the road to educational equity. A crisis exists in the public elementary and secondary schools, which are racially segregated with a disproportionate number of minority children attending poorly financed schools.<sup>11</sup> No cure-all appears on the horizon, much less one that seems as if it can be implemented in time to benefit this generation of public school students.

But there is a more fundamental flaw in the Court's expected 25-year sunset of affirmative action. The Supreme Court accepted the affirmative action plan of the University of Michigan law school as serving the compelling state interest of ensuring a diverse student body, not to remedy past discrimination.<sup>12</sup> Race conscious programs designed to achieve a "critical mass" of minority students, and a diverse student body, would not seem to demand any expiration date, although periodic review might make policy sense in order to ensure scrutiny of the results of affirmative action programs and to evaluate whether the consideration of race remains necessary to ensure a diverse student body. Remedial-based affirmative action, in contrast, would not be necessary after the impacts of an institution's discrimination had been remedied.<sup>13</sup> Put differently, universities could still want to strive for a racially diverse student body even if an institution's past discriminatory history had been fully addressed, or even if the institution had never discriminated against racial minorities.

Moreover, even if one is sympathetic to the notion of time limits, an objection to the legitimacy of the Court's 25 year pronouncement exists. The Court arguably should not be in the business of establishing the precise limits on the duration of an affirmative action program. Political decision-makers, not the courts, ordinarily establish time limits, which by their nature appear arbitrary, such as limitations periods on claims for relief and sunset provisions in laws. Such periods reflect a wide variety of policy judgments best made by legislatures and policy-makers.<sup>14</sup>

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11. See *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) (recognizing racial segregation in the elementary and secondary public schools combined with lack of resources in schools with high minority enrollments); *Gratz v. Bollinger*, 539 U.S. 244, 298-305 (Ginsburg, J., dissenting) (summarizing large racial disparities among various indicators of social well-being in United States). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (analyzing widespread segregation in United States); GARY ORFIELD & JOHN T. YUN, *RESEGREGATION IN AMERICAN SCHOOLS* (1999) (finding growth in racial segregation in public schools in United States).

12. See *infra* text accompanying notes 36-41.

13. See *infra* text accompanying notes 56-69.

14. See Katherine F. Nelson, *The Federal "Fallback" Statute of Limitations: Limita-*

The *University of Michigan* law school, not the U.S. Supreme Court, arguably should have provided for periodic review of its affirmative action programs—whether remedial or diversity-driven. Without regular review of the program, the argument goes, the Michigan law school's affirmative action program was not "narrowly tailored" to further a compelling state interest, the test applied to racial classifications used by the state.<sup>15</sup>

Along these lines, the argument could be made that the Supreme Court lacked the institutional competence to arbitrarily create a time limit that is the legitimate province of the political branches.<sup>16</sup> In this vein, Justice O'Connor, writing for the majority in *Grutter*, offered precious little justification or reasoning for the 25 year limit, but simply declared it to be. Some might speculate that this statement, which is technically dicta, was in the opinion as part of a political bargain to build a majority on the Court that would leave intact the University of Michigan law school's affirmative action program. That tends to lessen, not increase, the legitimacy of the Court's pronouncement that affirmative action should no longer be necessary in 25 years.

This paper analyzes the Supreme Court's statement in *Grutter* about the expected end of affirmative action. Part I offers background on *Grutter* and *Gratz*, summarizes the decisions, and discusses the debate on the Court over the future of affirmative action. Part II analyzes the efficacy of the 25-year limit announced by Justice O'Connor and the Court's previous emphasis on the "temporary" nature of affirmative action.

## I. AFFIRMATIVE ACTION THROUGH *GRUTTER* AND *GRATZ*

With grudging approval by the Supreme Court in 1978, affirmative action at universities across the United States grew for more than fifteen years.<sup>17</sup> In the 1990s, however, some lower courts and states wavered in their commitment to affirmative action. Race-conscious university admissions programs came under

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*tions by Default*, 72 NEB. L. REV. 454, 461-66 (1993) (reviewing policy issues balanced in selection of limitations periods for claims to relief).

15. See *infra* text accompanying notes 47-49.

16. See *infra* text accompanying notes 70-76.

17. See *Grutter v. Bollinger*, 539 U.S. 306, 323 ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.") (citations omitted).

attack in a number of lawsuits and the political process abolished the programs in some jurisdictions.<sup>18</sup> In early 2003, the nation anxiously awaited the Supreme Court's latest pronouncement on affirmative action. To the surprise of some knowledgeable observers, the Court ruled that race-conscious admission programs that are narrowly tailored to further the compelling state interest of a diverse student body could survive strict scrutiny, thereby breathing new life into affirmative action.

#### A. AFFIRMATIVE ACTION SINCE *BAKKE*

In the 1978 case of *Regents of the University of California v. Bakke*,<sup>19</sup> the various opinions of a splintered Supreme Court were conventionally read as permitting affirmative action to ensure a diverse student body, which Justice Powell championed in his opinion in that case.<sup>20</sup> Although embraced by major universities across the country, the diversity rationale for the consideration of race in admissions—that is, that a public university should be allowed to consider race in pursuit of a diverse student body—has been much-criticized.<sup>21</sup>

The other primary rationale for affirmative action—that race conscious programs were needed to remedy past discrimination by the university was not presented by the University of Michigan in *Grutter* and *Gratz*. The Supreme Court has recognized the propriety of the use of affirmative action to remedy past racial discrimination.<sup>22</sup> Some commentators have sought to justify affirmative action in public universities in certain states

18. See *infra* text accompanying notes 19-31.

19. 438 U.S. 265 (1978).

20. See *Bakke*, 438 U.S. at 312-15 (Powell, J.). Justice Powell used the Harvard University admissions process as an example of an appropriate diversity-based admissions program that considered an applicant's race among many factors. See *id.* at 320-24.

21. See, e.g., Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Women's Development*, 59 OHIO ST. L.J. 811 (1998); Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. CT. 1, 7-15, 21-26; Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2070-76 (1996); see also PETER H. SCHUCK, *DIVERSITY IN AMERICA* 134-202 (2003) (questioning affirmative action as a matter of sound public policy). For an analysis of the justifications for diversity-based affirmative action, see Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998); Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003) (book review); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881 (1996).

22. See, e.g., *Richmond v. Croson*, 488 U.S. 469, 509-11 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-83 (1986) (plurality).

on the need to remedy their past discrimination.<sup>23</sup> However, the Court's decisions have made it difficult for government to justify an affirmative action program as a remedy absent a clear showing of past discrimination by the particular institution implementing such a program;<sup>24</sup> the Court has stated unequivocally that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."<sup>25</sup>

Since *Bakke*, the Supreme Court in *Adarand Constructors, Inc. v. Peña*<sup>26</sup> and *Richmond v. J.A. Croson Co.*,<sup>27</sup> endorsed the color-blindness principle—the idea that the law must be color-blind with respect to race, applied strict scrutiny to racial classifications in public contracting programs, and held that they violated the Equal Protection guarantee. The color-blindness principle undermined the race-consciousness seemingly endorsed by the Court in *Bakke*. Building on *Adarand* and *Croson*, the court of appeals in the famous *Hopwood* case held that *Bakke* did not survive those subsequent decisions and invalidated the University of Texas law school's affirmative action plan.<sup>28</sup> *Hopwood* by itself wiped out affirmative action in Texas, Louisiana, and Mississippi.

23. See, e.g., Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) [hereinafter Delgado & Stefancic, *Home-Grown Racism*].

24. See Delgado & Stefancic, *Home-Grown Racism*, *supra* note 23, at 712-14 (summarizing law); see, e.g., *Croson*, 488 U.S. at 498-506 (stating that race preferences in public contracting program could not be justified because there had been no showing of discrimination by the city of Richmond).

25. *Wygant*, 476 U.S. at 276.

26. 515 U.S. 200, 227 (1995).

27. *Croson*, 488 U.S. at 493. The color-blindness principle has been much-criticized. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991). In *Gratz*, Justice Ginsburg expressed disagreement with the requirement that strict scrutiny review must apply to race-conscious affirmative action programs; she contended that, in her view, "government decisionmakers may properly distinguish between policies of exclusion and inclusion," and subject the latter to more lenient judicial review. *Gratz v. Bollinger*, 539 U.S. 244, 297, 301 (Ginsburg, J., dissenting) (citation omitted); see also Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227 (2001) (contending that claims that electoral redistricting impermissibly considered race should be reviewed deferentially by the courts).

28. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.*, 518 U.S. 1033 (1996); Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification*, 29 TEX. TECH. L. REV. 1 (1998). For criticism of *Hopwood*, see Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in Hopwood v. Texas*, 16 LAW & INEQ. 359 (1998). In the not-too-distant past, the University of Texas law school had engaged in racial discrimination. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

Moreover, political movements in some states eliminated affirmative action. In California, perhaps the most well known example, voters passed a law, Proposition 209 or the "Civil Rights Initiative," which ended affirmative action in the University of California and California State University systems.<sup>29</sup> In the states in which affirmative action ended, public universities experimented with race neutral schemes to help ensure a diverse student body.<sup>30</sup> The most well known experiments occurred in California, Florida, and Texas, all which adopted percentage programs that ensured that the top graduates (Florida (20%), Texas (10%), California (4%)) of each high school in the state would be eligible for that state's public universities.<sup>31</sup>

In sum, the debate over affirmative action had continued for years, with legal and political developments in the 1990s placing its future in question. The vitality of the *Bakke* decision was vigorously debated. Rollbacks of affirmative action occurred in some states, as the political winds brought challenges to, and close scrutiny of, the programs.

#### B. 2003: THE MICHIGAN CASES

*Gratz* and *Grutter*, at least for a time, will reinvigorate affirmative action at universities across the United States. They marked the end of a string of legislative and judicial limits on affirmative action and served as an important signal to the nation that race-conscious affirmative action was not *per se* unlawful.

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29. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (upholding initiative to constitutional challenge); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (invalidating public contracting program under Proposition 209); *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001) (invalidating several state programs under Proposition 209). For an analysis of the constitutional deficiencies in this initiative, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

30. Although upholding the University of Michigan law school's affirmative action program, the Court in *Grutter* suggested that, in order to end affirmative action in the next 25 years, universities look at the results of these and other experiments with race neutral programs designed to yield a diverse student body. See *Grutter v. Bollinger*, 539 U.S. 306, 343.

31. The political movement for the Texas percentage plan is discussed as a success story of multiracial coalition building and political mobilization in LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 67-74 (2002). It is not clear, however, that such programs have had much of a positive impact. See Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2517-38 (2003) (book review); William C. Kidder, *The Struggle for Access From Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 29-36 (2003). For analysis of the percentage plans, see Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729 (2001); Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587 (2003).

By upholding the law school's affirmative action program, *Grutter* may continue to assist a small number of minorities to gain admission to law school. Importantly, the cases had emerged as the focal point of a national campaign to keep affirmative action and to fight the perceived re-segregation of the public universities.<sup>32</sup> The Court's decision in *Grutter* undoubtedly will allow for affirmative action programs to continue at many schools. Moreover, the message of encouragement to people of color was much needed after years of attacks on affirmative action.<sup>33</sup>

However, the results of the University of Michigan law school's affirmative action program may leave doubt about how effective it was in ensuring a diverse student body, and, more generally, place in question the positive impact of affirmative action programs. In the fall of 2002, the law school had an entering class with a total minority population of about 25 percent, but with *no* Mexican-Americans among its 6.8 percent Hispanics and 6 percent African Americans.<sup>34</sup> By comparison, the University of California at Berkeley School of Law had almost 40 percent minority students, with African Americans comprising more than 5 percent and Mexican Americans over 7 percent of the first year class.<sup>35</sup> Although demographic differences exist between the states, both Michigan and California pride themselves as elite national law schools that draw their student bodies from across the country.

#### 1. The Legal Test Applied to Race-Conscious Affirmative Action

As summarized by Professor Erwin Chemerinsky, the 2003 affirmative action cases "adhered to the position articulated by Justice Lewis Powell in *Bakke* a quarter century ago: Diversity is a compelling state interest in education and universities may use race as a factor to ensure diversity, but quotas or numerical quantification of benefits is impermissible."<sup>36</sup> In *Grutter*, the Court upheld the University of Michigan law school's program that ensured individual review of each applicant's file and allowed race to be considered as one of many factors in the admis-

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32. See BAMN—Coalition to Defend Affirmative Action & Integration, and Fight for Equality By Any Means Necessary <<http://www.bamn.com>> (listing various political activities).

33. See *supra* text accompanying notes 19-31.

34. See ABA-LSAC, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2004 EDITION 426 (2003).

35. See *id.* at 150.

36. Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory*, *Determine Constitutional Law*, 6 GREEN BAG 2D 367, 369 (2003).

sion decision in the law school's pursuit of a diverse student body with a "critical mass" of minority students.<sup>37</sup> In contrast, the Court in *Gratz* invalidated the undergraduate admissions scheme at Michigan, which relied on a point system with minority applicants receiving twenty points for being a racial minority.<sup>38</sup> In the Court's estimation, the point allocation based on race effectively determined whether or not an applicant would be admitted and, as it operated in practice, did not constitute individual review of each application.<sup>39</sup>

*Grutter* and *Gratz* together refine the requirement that race conscious programs must be "narrowly tailored" to further a compelling state interest. The Court believed that the individual review of each file on its merits as done by the University of Michigan law school was the quintessence of narrow tailoring.<sup>40</sup> In contrast, the point system in Michigan's undergraduate admissions scheme that made individual review of the entire file almost irrelevant for minority applicants, was not narrowly tailored to further a compelling state interest.<sup>41</sup>

## 2. The Hoped for End of Affirmative Action

In upholding the University of Michigan law school's affirmative action program, the Court in *Grutter* emphasized that

race-conscious admissions policies *must be limited in time*. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. *Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.*<sup>42</sup>

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37. See *Grutter v. Bollinger*, 539 U.S. 306, 326-41 (2003). The Court emphasized that deference must be accorded to the university in its exercise of academic judgment. See *id.* at 2339.

38. See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

39. See *id.* at 271-74.

40. See *Grutter*, 539 U.S. at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

41. See *Gratz*, 539 U.S. at 306-10.

42. *Grutter*, 539 U.S. at 342 (emphasis added); see also *id.* ("The requirement that all race-conscious admissions programs have a termination point 'assure[s]... that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'") (citing *Richmond v. Croson*, 488 U.S. at 510). The Court noted that the law school had conceded that there must be a reasonable time limit on affirmative action programs. See *id.* (citing Brief for Respondents *Bollinger et al.* 32).

The Court added that “the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>43</sup>

But the Court did not stop, as it had in the past, with generally expressing the need for an end to race-conscious affirmative action. Rather, the Court continued:

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.*<sup>44</sup>

The 25 year expectation for the end of affirmative action was curious, even to other Justices on the Court. In a concurring opinion, Justice Ginsburg challenged the limitation: “it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery.”<sup>45</sup> Because of the deficiencies in the public education of many minorities in the modern United States, she cautioned that “[f]rom today’s vantage point, *one may hope, but not firmly forecast*, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”<sup>46</sup> In sum, Justice Ginsburg was considerably less certain than Justice O’Connor that the need for affirmative action would evaporate within 25 years.

Chief Justice Rehnquist’s dissent bluntly contended that “the Law School’s program fails strict scrutiny because it is devoid of *any* reasonably precise time limit on the Law School’s use of race in admissions.”<sup>47</sup> While the majority offers a 25 year

43. *Grutter*, 539 U.S. at 342.

44. *Id.* at 343 (citation omitted) (emphasis added).

45. *Id.* at 345 (Ginsburg, J., concurring) (citations omitted). Justice Breyer joined the concurrence. *See id.* at 344.

46. *Id.* at 346 (emphasis added) (footnote omitted). Justice Ginsburg stated, however, that “[t]he Court’s observation that race-conscious programs ‘must have a logical end point,’ . . . accords with the international understanding of the office of affirmative action.” *Id.* at 344 (citation omitted). Justice Ginsburg thus differed with Justice O’Connor about the length of time that affirmative action would be needed.

47. *Id.* at 378, 386 (Rehnquist, C.J., dissenting) (emphasis added).

limit, the law school is "more ambiguous" about the existence of any time limit,<sup>48</sup> which Chief Justice Rehnquist believed was constitutionally fatal. Similarly, Justice Kennedy in dissent found that "[i]t is difficult to assess the Court's pronouncement that race-conscious admissions will be unnecessary 25 years from now."<sup>49</sup>

Concurring in part and dissenting in part, Justice Thomas read the majority's 25 year language expansively to "hold[] that racial discrimination in higher education admissions *will be illegal in 25 years*"<sup>50</sup> and chastised the majority for effectively sanctioning constitutional violations for at least 25 years.<sup>51</sup> To Justice Thomas, "[t]he majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe."<sup>52</sup> At the same time, he did not see two-and-a-half decades as sufficient time to increase African American representation at the top law schools without affirmative action.<sup>53</sup> Reading between the lines, Justice Thomas's opinion reflects skepticism about, if not disdain for, university administrators' race-conscious affirmative action efforts while also seeking to maintain the school's elite status.<sup>54</sup>

The various opinions raise legitimate questions about the time limit conjured up by the majority in *Grutter*. The next section analyzes some of those questions

## II. THE LAST 25 YEARS?

The new 25-year limit on affirmative action, which stuck out in the Supreme Court's opinion in *Grutter*, was widely reported

48. *Id.* at 386-87; see *infra* text accompanying notes 56-69 (discussing cases requiring that affirmative action programs have time limits).

49. *Id.* at 394 (Kennedy, J., dissenting) (emphasis added) (footnote omitted).

50. *Id.* at 351 (Thomas, J., concurring in part, dissenting in part) (emphasis added); see *id.* at 375 ("I agree [with the majority] that in 25 years the practices of the Law School *will be illegal* . . .") (emphasis added). Justice Scalia joined most of Justice Thomas's opinion, including the discussion of the 25-year end of affirmative action. See *id.* at 346 & n.\* (Scalia, J., concurring in part, dissenting in part).

51. See *id.* at 349 (Thomas, J., concurring in part, dissenting in part).

52. *Id.* at 375-76 (footnote omitted).

53. See *id.* at 376.

54. See, e.g., *id.* at 349-50 ("Like [Frederick] Douglas, I believe blacks can achieve in every avenue of American life *without the meddling of university administrators*." (emphasis added)); *id.* at 354-55 & n.3 (rejecting the law school's claimed interest in diversity as interest in a racial "aesthetic"); *id.* at 355 n.3 ("[T]he Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."); *id.* ("[T]he Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution").

by the media.<sup>55</sup> This section attempts to put the time limit in its proper context, while also critically analyzing the sunset provision. As we will see, the time limit imposed by the Court in some ways is consistent with precedent but also raises legitimate questions of institutional competence. Importantly, the specific limit summarily announced by the Court—25 years—also may be subject to criticism as unrealistic in light of the great difficulties in removing the deeply ingrained vestiges of racial discrimination from U.S. social life.

#### A. THE JUSTIFICATION FOR TIME LIMITS

The 25-year time limit on affirmative action in some ways makes perfect sense. Advocates of affirmative action often emphasize that race-conscious university admission schemes are a “temporary” remedy.<sup>56</sup> The Supreme Court in the past has made it clear that, for programs in which government considered race in awarding public contracts in the attempt to remedy past discrimination in public contracting, a time limit was required. In *Adarand*, for example, the Court stated that, in deciding whether a minority public contracting program was “narrowly tailored” to further a compelling state interest it must consider “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>57</sup> Other decisions of the Court emphasize the “temporary” nature of race-based programs designed to remedy past racial discrimination.<sup>58</sup>

No less than legendary civil rights advocate Jack Greenberg understood the Court’s affirmative action decisions before *Grutter* and *Gratz* as requiring that race-based programs be limited in

55. See, e.g., *supra* note 7.

56. See, e.g., *Adarand v. Peña*, 515 U.S. 200, 270 (1995) (Souter, J., dissenting) (stating that affirmative action measures were temporary and would disappear over time).

57. *Id.* 515 U.S. at 237 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1972) (Powell, J., concurring) (emphasis added)).

58. See *Richmond v. Croson*, 488 U.S. 469, 510 (1989) (stating that race-conscious programs are “a temporary matter . . . taken in the service of the goal of equality itself”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) (disapproving remedies for discrimination that are “timeless in their ability to affect the future”); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (emphasizing that employer’s affirmative action program was only “a temporary measure” to correct racial imbalance in workforce); see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1725-26 (2001) (“[T]he Court’s opinions suggest that the temporary character of remedial affirmative action programs may prove determinative of constitutionality.”) (footnote omitted).

time.<sup>59</sup> In his view, “[n]arrow tailoring requires that [an affirmative action] program be limited in time . . . . I am not aware that college or university plans include time limits, *but they should, either by imposing a termination date or requiring periodic reviews of the need for affirmative action.*”<sup>60</sup> Greenberg offered this opinion before the Court’s latest affirmative action decisions.

Other commentators have suggested the general need for time limits on affirmative action programs.<sup>61</sup> For example, one observer stated that affirmative action programs could be deemed “prima facie invalid” if lacking a time limit, which is needed to “make the programs subject to regular political review and support (or dismantling) and [to] prevent the adoption and perpetuation of unexamined set-asides.”<sup>62</sup>

Criticisms have been made of *Grutter* along these lines. The Michigan program arguably should have included some time limit for review and reconsideration of the need for the consideration of race, as well as providing a means for evaluating the effectiveness of the program.<sup>63</sup> By announcing a time limit as opposed to requiring the University of Michigan to establish one, Justice O’Connor can be seen as stretching the law to avoid invalidating the law school’s affirmative action program.

However, time limits are normally associated with affirmative action programs designed to remedy past discrimination, not those aimed at ensuring a diverse student body. “Durational limits are conventional and sensible where affirmative action is taken to remedy discrimination; *remediation is by nature temporal*. A time limit does not, however, well fit enhancing diversity, which administers not a remedy but an inherent academic

59. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521 (2002).

60. *Id.* at 611 (emphasis added).

61. See Charles F. Abernathy, *Federalism and Anti-Federalism as Civil Rights Tools*, 39 HOW. L.J. 615 626-30 (1996) (opining that there “must be some time limit” on affirmative action programs); Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEM. L. 73, 90 (1998) (stating that law requires a periodic reevaluation of need for affirmative action programs); Schuck, *supra* note 2, at 83-84 (stating that affirmative action is generally defended as a “temporary remedy”).

62. Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms*, 16 YALE L. & POL’Y REV. 59, 106 (1997).

63. See Lawrence J. Siskind, *The Preferred Response*, LEG. TIMES, Aug. 4, 2003, at 59 (“In the rare instances in the past when the Court permitted racially conscious remedies, it generally noted their limited duration. But Michigan’s law school made no attempt to show that its remedies were time-limited, and Justice O’Connor did not press the issue. She merely expressed the expectation . . . that 25 years would suffice to sunset the program.”).

value.”<sup>64</sup> Thus, the Court’s suggestion of a 25 year time limit seems peculiar because it justified the University of Michigan’s affirmative action program on a diversity rationale, not as a way of remedying past discrimination by the University of Michigan.

If a diverse student body is the justification for affirmative action, it is uncertain why the law would require a time limit. Durational limits on a university’s affirmative action program make sense to any affirmative action program only if one believes, as many proponents do, that remedying past discrimination really is the true justification for affirmative action, notwithstanding the claim of public universities that they seek a diverse student body.<sup>65</sup> The diversity rationale is a way around the requirement that the state must establish a particular history of discrimination by the institution, rather than rely on general societal discrimination to justify race-conscious admissions.<sup>66</sup>

As a matter of policy, time limits make sense if one wants to ensure periodic review of any affirmative action program. Such review ensures that race, a disfavored classification in our constitutional order, is carefully considered and, in fact, necessary to ensure a diverse student body. Universities can be criticized for not reviewing race-based affirmative action programs to evaluate how they are working. Administrators, faculties, and admissions offices may come to rely on race-based admissions to “solve” any diversity issues.<sup>67</sup> Consequently, affirmative action

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64. Martin Michaelson, *The Court’s Pronouncements Are More Dramatic and Subtle Than the Headlines*, CHRON. HIGHER EDUC., July 18, 2003, at 11 (emphasis added); see Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 67 n.306 (2003) (“The time-limitation requirement announced by *Grutter* . . . makes theoretical sense only if the justification for diversity that it announces are taken to be quasi-remedial”).

65. See *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting) (stating that various defenders of affirmative action “readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds”) (quoting Schuck, *supra* note 2, at 34). Student intervenors in the Michigan cases sought to justify affirmative action on other than diversity grounds. See Miranda Massie, *A Student Voice and a Student Struggle: The Intervention in the University of Michigan Law School Case*, 12 LA RAZA L.J. 231 (2001).

66. See *supra* text accompanying notes 24-25.

67. See *Grutter*, 539 U.S. at 354-55, 369-70 (Thomas, J., concurring in part, dissenting in part) (suggesting that University of Michigan should not be permitted to consider race while declining to experiment with other ways of achieving a diverse student body, relying on the Law School Admissions Test, and seeking to remain an elite law school). The 25-year time limit in *Grutter* thus can be seen as a way of maintaining pressure on colleges and universities to consider alternatives to race-conscious affirmative action to maintain a racially diverse student body. See Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 373-81 (2003); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 200-01 (2003).

can become a crutch that renders it unlikely that universities will make serious efforts to design and implement alternative methods for ensuring a diverse student body. One positive response to the end of affirmative action in some jurisdictions was the sustained attention paid to formulating alternatives to race-conscious programs to ensure a diverse student body.<sup>68</sup>

In *Grutter*, as Chief Justice Rehnquist contended,<sup>69</sup> the lack of any temporal limit to the law school's affirmative action program arguably rendered it constitutionally invalid. Despite the deficiency, the invalidation of the Michigan law school's program on that ground might have been viewed by the public as an overly technical way for the Court to reach an ideological result, the invalidation of an affirmative action program. If it took this route, the Court would undoubtedly have been attacked as acting in a partisan way.

#### B. INSTITUTIONAL COMPETENCE OF THE COURT TO ESTABLISH AN END DATE FOR AFFIRMATIVE ACTION

Even if a time limit may be justified, some commentators would contend that the limit should be established by the institution that created the affirmative action program, not the courts. The lack of a time limit, or some provision to ensure the periodic review of the need for the University of Michigan law school's affirmative action program, arguably fails the Supreme Court's requirement that race conscious programs must be narrowly tailored to serve a compelling state interest.<sup>70</sup> Moreover, the courts are not generally in the business of setting time limits. Legislatures ordinarily create statutes of limitations and sunset provisions in laws, after deliberation, hearings, and debate. The university that has established the affirmative action program, not the courts, arguably should be required to provide for a period for review of such programs.

This logic has superficial attractiveness. However, there is well-established precedent allowing the federal courts to engage in a certain degree of lawmaking, including adding limitation periods to claims under federal laws; even more broadly, the Supreme Court has created entire bodies of federal common law when it concluded that federal interests so required.<sup>71</sup> Specifi-

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68. See *supra* text accompanying notes 29-31.

69. See *supra* text accompanying notes 47-48.

70. See *supra* text accompanying notes 36-41.

71. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (federal de-

cally, rather than allow claims to be brought indefinitely into the future, the Supreme Court has willingly created statutes of limitations when a law passed by Congress lacked one.<sup>72</sup> The reason for this was the basic idea that every claim *must* have a statute of limitations.<sup>73</sup>

One could approach the issue for affirmative action programs lacking a time limit as analogous to the federal law lacking a limitation period on a claim for relief; the argument would be that a time limit should be implied in both instances. However, one important difference between the limitations period cases and the time limit in *Grutter*, warrants mention. In the limitations period cases, the Supreme Court "borrows" a limitations period from another state or federal law.<sup>74</sup> Such a practice tends to circumscribe judicial discretion. In *Grutter*, the Court arbitrarily set a 25-year limit without discussion of where it came from or offering any justification for its selection. Creation of a time period in this manner heightens the claim of judicial arbitrariness. This discretionary creation, however, may be equated to the equitable doctrine of laches, although a court can be expected to explain its balancing of the equities in invoking that doctrine.<sup>75</sup>

The institutional competence argument militates in favor of invalidating the Michigan law school's affirmative action program as not being narrowly tailored because the program lacked any time limit. That is certainly one course that the Court could have

fense contractor liability); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (federal labor law); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (federal commercial paper). See generally Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996) (tracing trajectory of federal common law in Supreme Court decisions); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1167-71 (1986) (outlining contours of federal common law).

72. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151 (1983). For analysis of the "borrowing" of limitations periods to fill gaps in federal statutes, see Kevin R. Johnson, *Bridging the Gap: Some Thoughts about Interstitial Lawmaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879 (1991). To eliminate to a certain extent the "borrowing" of limitations periods by the courts, Congress in 1990 passed a law providing that a four-year statute of limitations governed any claim under any law enacted after December 1, 1990 that lacked a limitations period. See The Implementation Act, Pub. L. No. 101-650, § 313(a), 104 Stat. 5114, 5115 (1990) (adding 28 U.S.C. § 1658 (2000)).

73. See *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' . . . Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.") (citation omitted).

74. See, e.g., *id.*, at 266-68; *M'Cluny v. Silliman*, 28 U.S. 270, 277 (1830).

75. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (addressing question whether federal court in diversity case would apply federal equitable doctrine of laches or state limitations period).

taken. However, given its willingness to add limitations periods and create entire bodies of federal common law, the pronouncement of an expected 25-year sunset, a rather small aspect of Michigan law school's affirmative action program, is relatively modest.

At the same time, by encouraging future litigation, a 25-year limit almost ensures the Court's reconsideration of affirmative action. This deadline will likely create strong incentives for universities to carefully craft and meaningfully monitor affirmative action programs. The 25-year period ensures the continuous use of, and experimentation with, affirmative action programs for a time without judicial intervention. Such programs can develop and mature, and perhaps improve with periodic adjustments. At the same time, the time limit effectively ensures judicial review at a later date. Although some, including Justice Thomas, have claimed that 25 years, however, is too long a period to "immunize" narrowly tailored affirmative action programs,<sup>76</sup> others contend that it is unrealistic to expect the need for affirmative action to end in so short a time.

### C. 25 YEARS AS A REALISTIC TIME LIMIT?

Some observers might contend that Justice O'Connor's 25-year time limit on affirmative action is wishful thinking at best, and unnecessarily inviting future legal challenges to affirmative action programs at worst. A variation of this objection could build on the institutional competence argument—that the Court selected too short, or perhaps too long, a time period because it lacked the competence to have any idea of a realistic period of time for the elimination of affirmative action.<sup>77</sup>

Concerns have long been expressed over how long the nation needs the expedient of "temporary" affirmative action.<sup>78</sup> The difficult question is, if temporary, how much time will be necessary before affirmative action can be eliminated. In response to the suggestion that preferences might not be needed much longer, Justice Thurgood Marshall in the Court's deliberations in the 1978 *Bakke* case, expressed the view that affirmative action would be necessary for another hundred years.<sup>79</sup>

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76. See *supra* text accompanying notes 50-54.

77. See *supra* text accompanying notes 70-76.

78. See *supra* text accompanying notes 56-69.

79. See Schuck, *supra* note 2, at 84 n.410 (citing JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 487 (2001)).

The racial progress in the last generation does not suggest a quick end to the need for affirmative action. Despite *Bakke*, relatively few African Americans and Latina/os currently attend colleges and universities in the United States. The status of African Americans in terms of income differentials, jobs, and housing segregation appears little different from 25 years ago.<sup>80</sup> The criminal justice system has a racial caste quality to it reminiscent of the days of Jim Crow, with African American and Latino men over-represented in our prisons.<sup>81</sup>

The view that affirmative action of the type currently in place will not be needed in twenty five years seems wrong on its face, at least absent aggressive steps to ensure true diversity in university student bodies and radical shifts in student enrollment. As one activist noted after the Court decided *Grutter* and *Gratz*, "If all we do over the 25 years . . . is affirmative action, then we will still need affirmative action."<sup>82</sup> At a bare minimum, the crisis in the public schools<sup>83</sup> must be addressed before true integration of colleges and universities is a possibility.

Besides the fact that the unfortunate legacy of past discrimination is unlikely to be fully remedied, complications arise with respect to various racial groups and the emergence of new and different "races."<sup>84</sup> Disputes have arisen, for example, about whether immigrants,<sup>85</sup> Hispanics,<sup>86</sup> and mixed race people should

80. See *supra* text accompanying note 11.

81. See, e.g., Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GENDER, RACE & JUST. 381 (1997); Cruz Reynoso, *Hispanics and the Criminal Justice System*, in *HISPANICS IN THE UNITED STATES: AN AGENDA FOR THE TWENTY-FIRST CENTURY 277* (Pastora San Juan Cafferty & David W. Engstrom eds., 2000).

82. Nat Hentoff, *Sandra Day O'Connor's Elitist Decision*, VILLAGE VOICE, July 29, 2003, at 30 (quoting Lisa Naverette); see Eugene E. García & Julia Figueroa, *Access and Participation of Latinos in the University of California: A Current Macro and Micro Perspective*, 29 SOC. JUST. 47 (2002); Daniel Solorzano, et. al, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15 (2002).

83. See *supra* text accompanying note & note 11.

84. For a summary of some of those issues, including the rapidly growing Latina/o population in the United States, an increasing overlap between people of color and immigration status, and growing numbers of mixed race people, see Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and the New Civil Rights Law*, 49 UCLA L. REV. 1481, 1499-1510 (2002). See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994) (analyzing racial formation in the United States).

85. See KAHLENBERG, *supra* note 2, at 74-80, 115; Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 207-08 (1998); Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 963, 2000-04 (1996) (book review). The Mexican American Legal Defense and Educational Fund submitted an *amici curiae* brief in the Michigan cases that argued for affirmative action for Latina/os based on, among other

be eligible for affirmative action.<sup>87</sup> In the last twenty years, more attention has been paid to the difficult issues raised by affirmative action in terms of different racial minorities, with different histories and experiences.<sup>88</sup> Affirmative action can be seen as not only addressing discrimination in the distant past, such as slavery and its legacy, but also as directed at more recent, and subtle, forms of discrimination

With affirmative action cut back in recent years, it seems unlikely that minority enrollment in public colleges and universities will turn around dramatically by 2028. Nonetheless, the Supreme Court's review of affirmative action might focus attention by universities on admissions, a result that the Court might have desired. The Court called on universities to investigate alternatives considered in the states that had eliminated affirmative action.<sup>89</sup> Rather than simply maintain current race-conscious programs, universities were instructed to seek to improve the diversity of their student bodies through race neutral means.

In this way, the Court's time limit will serve important purposes. Affirmative action arguably has been a crutch relied on to ensure a small percentage of minorities, denoted as a "critical mass," in the student body, not ensure a truly diverse student body.<sup>90</sup> Inertia often sets in when university administrators believe that they have "fixed" a problem. To attempt to avoid this in the future, the Court guaranteed reconsideration of affirmative action.

Others might contend that 25 years, even if not a sufficient time in which to expect the elimination of the need for affirmative action, is too long to ensure a periodic review of its performance at a public university. Careful attention to diversity outcomes might assist in fine-tuning and reviewing the outcomes of an affirmative action program. Attorneys and administrators are familiar with deadline-driven attention to matters.

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things, a history of discrimination in the United States. See *Amicus Briefs in Grutter v. Bollinger and Gratz v. Bollinger, in Support of the University of Michigan: Brief of Mexican American Legal Defense and Educational Fund et al. as Amici Curiae*, 14 LA RAZA L.J. 1 (2003) (reprinting brief).

86. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom*, 47 STAN. L. REV. 855, 890 (1995); Orlando Patterson, *Race by the Numbers*, N.Y. TIMES, May 8, 2001, at A27.

87. See Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233 (1996). See generally MIXED RACE AND THE LAW: A READER (Kevin R. Johnson ed., 2003) (providing various perspectives on issues of law and racial mixture).

88. See Brest & Oshige, *supra* note 86.

89. See *supra* note 30.

90. See *supra* text accompanying notes 34-35.

## CONCLUSION

The University of Michigan affirmative action cases no doubt will be of monumental importance to public universities with, or contemplating, affirmative action programs for the foreseeable future. The curious 25-year sunset provision imposed by the Supreme Court raises many questions, ranging from the unlikelihood that the last vestiges of centuries of slavery and segregation will disappear in the next 25 years to the competence of the Court to establish a time limit. Because there is no quick fix to the legacy of racial discrimination in the United States, the elimination of affirmative action in 25 years is problematic. However, the Court aptly saw the need for periodic review of affirmative action programs and the need to investigate alternative means to ensure a diverse student body. New ideas must be explored as the nation seeks to address the poor representation of racial minorities in higher education.

Whatever the objections, the Supreme Court effectively announced a tentative 25-year cease fire in the debates about the constitutionality of affirmative action. The issue, however, will likely arise again. Not long after the Supreme Court decided *Grutter*, some affirmative action opponents advocated political movements to eliminate affirmative action, including a possible ballot measure in Michigan like California's "Civil Rights Initiative" that ended race-conscious programs in that state.<sup>91</sup> The Court's decision might fuel a political movement against affirmative action and careful scrutiny of any future Supreme Court nominee's views on the controversial subject appears inevitable. The protection of a woman's right to choose in *Roe v. Wade*<sup>92</sup> laid the groundwork for the growth of a strong political movement by anti-abortion activists.<sup>93</sup> The same may be true for the opponents of affirmative action. Thus, with the Court's decision in *Grutter* and *Gratz*, the affirmative action battles for the time being may shift from the courts to the political arena.

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91. See Kim North Shinc, *Anti-Affirmative Action Activist Targets Michigan Policy*, DETROIT FREE PRESS, July 9, 2003; Ward Connerly, *Taking It to Michigan*, NAT'L REV., July 8, 2003.

92. 410 U.S. 113 (1973).

93. See Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle Over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397, 397 (1998) (discussing galvanizing impact of Court's decision in *Roe v. Wade* resulting in political battles for years over abortion); see also William E. Nelson, *Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication*, 131 U. PA. L. REV. 489, 505-07 (1982) (faulting Court for provoking political controversy by offering rationale in *Roe v. Wade* that did not square with a societal consensus on abortion).