SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.*

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante*, at 20; see *Grutter* v. *Bollinger, post*, at 13–21. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante*, at 21 (quoting *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 224 (1995); *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 494 (1989) (plurality opinion)). This insistence on "consistency," *Adarand*, 515 U. S., at 224, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.*, at 274–276, and n. 8 (GINSBURG, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

In the wake "of a system of racial caste only recently ended," *id.*, at 273 (GINSBURG, J., dissenting), large dis-

*JUSTICE BREYER joins Part I of this opinion.

parities endure. Unemployment,[1] poverty,[2] and access to health care[3] vary disproportionately by race. Neighborhoods and schools remain racially divided.[4] African-

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[1] See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African-Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

[2] See, *e.g.,* U. S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African-Americans, 10.8% of Asian-Americans, and 21.2% of Hispanics were living in poverty); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B–5, 2000) ("Blacks, Hispanics, and Native Americans . . . each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

[3] See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p. 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African-Americans, 18.0% of Asian-Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites . . . .").

[4] See, *e.g.,* U. S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980–2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file), ("[W]hites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white."); *id.,* at 28 ("[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority . . . . More than one in six black children attend a school that is 99–100% minority . . . . One in nine Latino students attend virtually all minority schools.").

American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions.[5] Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education.[6] Equally credentialed job applicants receive different receptions depending on their race.[7] Irrational prejudice is still encountered in real estate markets[8] and consumer transactions.[9] "Bias both conscious and unconscious,

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[5] See, *e.g.,* Ryan, Schools, Race, and Money, 109 Yale L. J. 249, 273–274 (1999) ("Urban public schools are attended primarily by African-American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

[6] See, *e.g.,* Statistical Abstract 140 (Table 211).

[7] See, *e.g.,* Holzer, Career Advancement Prospects and Strategies for Low-Wage Minority Workers, in Low-Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("[I]n studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http://gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165–186 (M. Fix & R. Struyk eds. 1993).

[8] See, *e.g.,* M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp. i, iii (Nov. 2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals—one minority and the other white—pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

[9] See, *e.g.,* Ayres, Further Evidence of Discrimination in New Car

reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.,* at 274 (GINSBURG, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L. Rev. 1251, 1276–1291 (1998).

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." Amdt. 14, §1. In implementing this equality instruction, as I see it, government decision-makers may properly distinguish between policies of exclusion and inclusion. See *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 316 (1986) (STEVENS, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978)] was the same as the issue in [*Brown* v. *Board of Education,* 347 U. S. 483 (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classifica-

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Negotiations and Estimates of its Cause, 94 Mich. L. Rev. 109, 109–110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

tion, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931–932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.*, at 932, no automatic proscription is in order. For, as insightfully explained, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Ed.,* 372 F. 2d 836, 876 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization Of Civil Liberties And Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter*, *post*, at 1 (GINSBURG, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women).

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County*, 372 F. 2d, at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand*, 515 U. S., at 275 (GINSBURG, J., dissenting), and to "ensure that prefer-

ences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.*, at 276.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by JUSTICE SOUTER, I see no constitutional infirmity. See *ante*, at 3–8 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.*, at 111a. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra*, at 1–4. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondents 10; Tr. of Oral Arg. 41–42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber

minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.").[10]

The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L. Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities

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[10] The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ[e]" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov. 2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10 or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Brief for Respondents 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14–19 (2003), http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities. Moreover, because such plans link college admission to a single criterion—high school class rank—they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the 'X-Percent Solution,' Chronicle of Higher Education, June 2, 2000, p. A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.,* Steinberg, Using Synonyms for Race, College Strives for Diversity, N. Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14–15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.[11]

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For the reasons stated, I would affirm the judgment of the District Court.

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[11] Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 27, n. 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 4–5. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.