Chapter Eight
Argument

Supreme Court argument on the two Michigan cases was held on April Fools' Day, after a cold blustery night that left many who had camped where they stood in line in the hope of getting a cherished seat in the courtroom shaking as much from the chill as from anticipation. Demonstrators, most of them supporters of race preferences, urged the Court to save affirmative action. Some attacked the justices themselves for failing to hire black law clerks, perhaps signaling a note of irony that this venerable institution—as merit conscious as any in the nation—was being asked by the university to allow academic merit to take a back seat to race.

The cases would be argued separately but successively, with *Grutter*, the law school case, at 10:00 A.M., and *Gratz*, involving undergraduate admissions, at 11:00. Kolbo's burden of arguing both cases while Mahoney and Payton divided the task of defending Michigan was eased somewhat by the presence of Solicitor General Theodore B. Olson, who sought to persuade the Court that both the law school and the undergraduate admissions practices were unconstitutional. A bril-

liant advocate, Olson was still basking in the glow of his victory in *Bush v. Gore*, the case that decided the presidency. As a private practitioner, Olson had argued and won the *Hopwood* case, where he had convinced the Fifth Circuit Court of Appeals to declare *Bakke* a dead letter and race-conscious admissions illegal. He had urged the Bush administration to take a similar position in these cases, but the White House had demurred, instructing him to argue simply that both the law school and undergraduate admissions policies were functional quotas that violated the *Bakke* standard. Thus, Olson argued in brief that "this case requires this Court to break no new ground"[1] and to merely hold Michigan's practices unconstitutional as disguised quotas that were not narrowly tailored since the same diversity could be achieved with race-neutral alternatives. Indeed, the Olson brief went so far as to list a smorgasbord of admissions criteria that a school could apply to candidates to promote racial and ethnic diversity, including "a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high schools, volunteer work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected in essays."[2] In other words, the more opaque the process, the greater the likelihood of winding up with the desired racial and ethnic mix without ever purporting to consider race or ethnicity. Texas, California, and Florida were held out not only as models but also as road maps

1. Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

2. *Id.* at 19.

to follow lest one crash through the barricades of unconstitutional race consciousness.

Kolbo approached his argument like a fighter with a very logical but inflexible battle plan whose strength could be dissipated by an unorthodox or unanticipated counterattack. He began by stating that Barbara Grutter had been denied her constitutional rights when race was employed to tip the scales against her. Justice O'Connor was waiting. "Is your position that [race] cannot be one of many factors?"[3] Kolbo responded in the affirmative.

Justice O'Connor already seemed intent upon clearing the obstacles from a path she might choose to follow. The Court has allowed the consideration of race in "certain contexts," she reminded him, for example, as a remedy for past discrimination.

Kolbo acknowledged that was the case. Then this was not a question of absolutes, said Justice O'Connor. "I think we have given recognition to the use of race in a variety of settings."[4]

Was this the same justice who had been so categorical in limiting the applicability of race in cases like *Croson*, *Metro Broadcasting*, and *Shaw*? As opponents of race preferences had feared, Justice O'Connor's support could no longer be taken for granted.

Justice Kennedy entered the conversation with one of the ultimate considerations of the case—the paucity of minority candidates qualified to compete as equals for places at the law school. "Suppose you have a law school with two or three

3. Transcript of Oral Argument at 3, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

4. *Id.* at 4.

percent Hispanic and black students, is that a legitimate concern for the university and for the state officials?"[5]

Kolbo said there was no "right number for each racial group," and he was probably right. However, a critical early chance to make a key point escaped him, never to surface in the oral argument and to appear only in Justice Scalia's later dissent. No, the state of Michigan has no interest, let alone a compelling one, in the number of minorities at the elite national law school because the university places little if any priority on feeding its distinguished graduates into practice there. Only about a quarter of each class comes from Michigan; fewer than that go on to practice in the state—in contrast, say, to Detroit's Wayne State University, which sends three-quarters of its graduates into Michigan practice. The only compelling interest issue was Justice Powell's acceptance of the limited right of each school to define the contribution of racial and ethnic diversity to the educational environment.

Kolbo would have to contend with another brief, one to which he had paid scant attention in preparing for his oral argument. Put together with the active behind-the-scenes intervention of Secretary of State Colin Powell, a group of twenty-eight retired military officers, national security officials, and present and former members of the United States Senate, the so-called "Green Brief" urged that military necessity required substantial representation from African American and other minorities in the officer corps.[6] The brief contended that, with the military more than 20 percent African American, it cannot afford another Vietnam period where fewer than 3 percent of the officers were black. Morale dete-

5. *Id.*

6. Consolidated Brief of Lt. Gen. Julius W. Becton et al., as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

riorated. The military was "on the verge of self-destruction," so it decided to change. It has changed. However, in the military, as in so many other settings, the strict application of merit to the award of ROTC scholarships and admission to the service academies would result in the functional exclusion of blacks. "At present no alternative exists to limited, race-conscious programs to increase the pool of high quality minority officer candidates and to establish diverse educational settings for officers."[7]

Justice Ginsburg introduced the "Green Brief" to the argument, an instrument with which Kolbo would be pilloried for many valuable noncontiguous minutes, reminding the counsel that its authors saw no way of satisfying their defense needs without affirmative action. Kolbo pleaded for mercy. The issue of the brief was not one between the parties to the case; there was no record developed below to warrant discussion. Yet Justice Ginsburg was relentless and Kolbo tepidly offered that "other solutions could be looked at addressing the problem why there are not minorities in the military."[8] Neither the United States nor the military academies had taken a position on the issue in this case.

However, according to Justices Stevens and Souter, the military academies did practice race consciousness. Again Kolbo pleaded no record below. Justice Scalia tried to rescue Kolbo, suggesting that race-neutral remedies, like socioeconomic condition, could help the academies, but Souter held on like a bulldog. Suppose the military did come up with other factors. Souter asked, "Do you seriously believe that that would be anything but a surrogate to race? It would take race out of the categorization of the label that we put on it,

7. *Id.* at 7.
8. *Id.* at 6.

but do you believe it would function in a different way but as a surreptitious approach to race?"[9]

From the day of their first moot court or appellate practice argument in law school, attorneys are trained never to dismiss a question from the bench as irrelevant, no matter how irrelevant it is. The judges collectively will take offense. They will settle scores with you and, through you, your client. Yet some questions are wide of the mark, as was the entire colloquy on the military brief. Not only was no record made below, as Kolbo noted, but also, he might have gone on to say, a situation involving the national security of the United States stands on a different footing from the case at bar. In the name of national security, this society has abided the suspension of habeas corpus proceedings, major encroachments on free speech and association, the forced relocation of American citizens of Japanese descent, and very recently the denial of the right of an Air Force officer who happened to be an Orthodox Jew to wear a yarmulke on the job.[10] So whatever decision is made in the Michigan case should not apply to the service academies or to the ROTC programs. Let the president, as commander-in-chief, determine the level of race consciousness needed to sustain these institutions in optimum fashion. At such time as the president's determination is challenged, the Court can look at the matter and decide it on its own, quite apart from any decision in the instant case.

Instead, Kolbo found himself engaged with Justice Kennedy on the constitutionality of race consciousness in the recruitment of minority academy candidates or for training programs designed to prepare them to score well on the

9. *Id.* at 9.
10. *Booker v. Gilless*, 67 Fed. Appx. 860 (6th Cir. 2003).

entrance exams. Kolbo said he had no problem with that. "Casting a wider net" was fine as long as race consciousness was dropped "at the point of competition" among candidates.[11] Kolbo would walk all over himself with that point, but later conceded that a racially exclusive scholarship was okay, "[b]ecause it doesn't prevent someone from applying. The key is to be able to compete on the same footing at the point of competition."[12] Justice Scalia finally rescued Kolbo, drawing agreement that a segregated preparatory program would be constitutionally troublesome. By that point, however, Kolbo probably felt as though he had been through an unforeseen crash course in military personnel practices.

On occasion, Kolbo would score a point. For example, when Justice Breyer wandered through a long dissertation on the need for efforts to rescue minority children from de facto segregated inferior schools and wondered why race cannot be a factor in educating the students, military officers, and businesspeople who would one day break the spell, Kolbo was direct and eloquent in reply: "Because, very simply, Justice Breyer, the Constitution provides . . . individuals with the right of equal protection. And by discriminating on the basis of race at a point of competition, innocent individuals are being injured in their constitutional rights."[13] But just as suddenly Kolbo ended up back in the midst of the military muddle. When presented with a hypothetical question that he might have anticipated, he took such a hard line as to seem inflexible. Justice Ginsburg confronted him with just such a question about a hypothetical prison with a large minority population "and the state wanted to give a preference so that

11. Transcript of Oral Argument at 9, *Grutter*.
12. *Id.* at 13.
13. *Id.* at 12.

it would have a critical mass of correction officers of the minority race, that would be impermissible?"[14]

Kolbo's reply: "It would be impermissible, Your Honor, unless based upon a compelling interest and the only one that has been recognized in the employment context is identified discrimination. And I don't see that in your hypothetical."[15]

A better response: The key here is to recruit and hire a diverse police or prison guard force using race-neutral methods that have worked throughout the country. Included would be Spanish-speaking officers or others who had grown up or lived in heavily minority areas—both of which are legitimate qualifications for officers dealing with concentrated minority populations. In fact, geographic affirmative action would be critical here since the prisons are often located in rural white areas, while most of the inmates come from the inner cities. The mistake would be to atone for poor planning by parachuting in at the eleventh hour to beg that a compelling need exists for discriminatory hiring.

But Kolbo wasn't up to it.

Olson tried to save an argument that was badly off course. "The Michigan Law School admissions program fails every test this Court has articulated for evaluating government racial preferences," he began.[16] But he too became sidetracked on the Green Brief issues as the clock ticked on.

Then, after an exchange with Justice Breyer over whether the law school's approach reinforced or dispelled racial stereotypes, Justice O'Connor weighed in with the last question that Olson wanted to hear. "General Olson, do you—do you

14. *Id.* at 16.
15. *Id.*
16. *Id.* at 17.

agree with the articulated proposal of Justice Powell in the *Bakke* case of using race as a plus-factor as he—as he saw the use of it? Do you disagree with that approach?"[17]

Olson couldn't answer the question substantively without taking a position on the issue President Bush had instructed him to avoid, the correctness of *Bakke*. Olson tried to dodge by raising the issue of whether Justice Powell's lonely opinion had really enjoyed the imprimatur of the Court, but Justice O'Connor wouldn't let him get away with that and asked him again whether he agreed with Powell's approach.

Olson waffled again, returning to the claim that even Justice Powell's standard had been exceeded by Michigan, but the liberals on the Court persisted. Justice Stevens asked him whether he agreed with Justice Powell's use of the Harvard Plan as a model for race consciousness. Olson started to dismiss the suggestion that the Harvard Plan was examined under a compelling interest lens, but caught himself, perhaps remembering that Justice Powell had attached the plan to his opinion that diversity could be a compelling interest, or at least one that schools could pursue under their First Amendment rights.

After a brief discussion with Justice Breyer over the Texas "top ten" plan, in which the justice suggested that the plan differed only in disguise from what Olson was protesting in Michigan, Olson was finished. Having been hog-tied by the White House to the point where he could not maintain an intelligent conversation about *Bakke*, he had not done much to retrieve the situation he had inherited from Kolbo, who would love to have seen *Bakke* reversed but who had to downplay that to stay on the same page as his colleague.

17. *Id.* at 22.

Now it was Mahoney's turn. Mahoney knew that if five justices decided to overturn *Bakke*, she was dead. Sensing that was unlikely, however, she simply assumed, for purposes of her argument, that Powell's *Bakke* views were still good law and argued that the law school's admission practice was more like the Powell plus factor than the sixteen-place quota for minority medical students the *Bakke* court had rejected. This was not a program of fixed numbers or even ranges, she maintained. "[W]hat has occurred over the years with this program is that there have been offers that have ranged from 160 to 232 over the course of eight years, there have been enrollments that went from 44 to 73. It has been a very flexible program."[18]

Justice Scalia, the point man for anti–race preference sentiment on the Court, then launched an argument of his own that made technical sense but that presented the entire issue in a way that would be anathema to educators from coast to coast. Justice Scalia said he found it hard to take seriously the state's claim that its diversity need was sufficiently compelling "to warrant ignoring the Constitution's prohibition of distribution on the basis of race." After all, the problem had been generated by Michigan itself by deciding "to create an elite law school." That meant taking students from an academic level where few minorities are to be found. "Now if Michigan really cares enough about that racial imbalance, why doesn't it do as many other state law schools do, lower the standards, not have a flagship elite law school? It solves the problem."[19]

"Your Honor," Mahoney replied, "I don't think there's anything in this Court's cases that suggests that the law school

18. *Id.* at 28.
19. *Id.* at 29.

has to make an election between academic excellence and racial diversity."[20]

Justice Kennedy came to Justice Scalia's defense: "Where's the compelling interest? Isn't Michigan simply making a choice to provide a law school in a particular way and it doesn't have to do that?"

"But your Honor," Mahoney insisted, "there is a compelling interest in having an institution that is both academically excellent and racially diverse, because our leaders need to be trained in institutions that are excellent, that are superior academically, but they also need to be trained with exposure to the viewpoints, to the perspectives, to the experiences of individuals from diverse backgrounds."[21]

Technically, both Justices Scalia and Kennedy were right. Only a small handful of states—Michigan, California, Virginia—maintain top-rung public law schools, with North Carolina and Texas a notch below. Several states, New York included, maintain no public law schools at all. So Michigan's need in that narrow respect was hardly compelling. However, the problem is that the same argument can be made with respect to all elite schools, graduate and undergraduate, public and private, that maintain race-conscious programs. Harvard can become Hofstra and take in a class that is 10 percent African American with no affirmative action employed. Amherst can become Temple; Berkeley, Boise State. Fine and honorable schools, of course, but not the sort of metamorphosis to warm the heart of student or educator alike. Months later, even before the opinions came down, Michigan lawyers would chuckle when Justice Scalia's line of questioning was recalled, suggesting there wasn't a single

20. *Id.*
21. *Id.* at 30.

college president's office in the country where dumbing down to achieve race-neutral diversity would earn much of a hearing.

Next came one of those moments—precious to Supreme Court junkies—where both a justice and the counsel got their facts wrong on a very prominent case. Mahoney was in the midst of trying to convince Justice Kennedy that Michigan's numerical targets were more "aspirational" rather than quota-like in character, when Justice Ginsburg intervened to compare them with the Harvard Plan endorsed by Justice Powell in *Bakke*.

"Excuse me," interjected Justice Scalia. "Did *Bakke* hold that the Harvard plan was constitutional?"

Mahoney: "Yes, Your Honor."

Justice Scalia: "If adopted by—by a state institution?"

Mahoney: "Yes, Your Honor."

Justice Scalia: "It was held that it was constitutional?"

Mahoney: "Yes. What we . . ."

Justice Scalia: "We didn't even—We didn't even have the details of the Harvard Plan before us."

Mahoney: "Your Honor, in fact, the Court upheld—or Justice Powell appended the Harvard plan to his opinion in this case and there were fives votes that the reason that the mandate of the California supreme Court [enjoining the consideration of race in admissions] should be reversed was because there was an effective alternative for—for enrolling minorities and that effective alternative was a plan like the Harvard plan."[22]

Justice Scalia's mistake was evident and Mahoney promptly corrected him—the Harvard Plan was central to the Powell opinion and more than adequately described in and

22. *Id.* at 31–34.

appended to that opinion. But Mahoney's mistake was fundamental to an understanding of *Bakke* in two respects. First, Justice Powell never endorsed the Harvard Plan as an "effective alternative" to the quotas he rejected, but rather as a constitutional means of employing limited race consciousness to produce a diversity of viewpoint and experience in the class. Even more fundamental, the four justices who joined him in lifting the injunction against race-conscious admissions did so not on the basis of diversity but because, like private employers hiring blacks to cure the effects of historically segregated job categories, states may also adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. Powell's rationale was rejected by his four brethren unless employed to redress past societal discrimination.

Just when Mahoney appeared to have tripped over her precedent, Justice Scalia returned with another bit of odd history, suggesting that "when the Harvard plan was originally adopted, its purpose was to achieve diversity by reducing the number of unusual students from New York that were getting into Harvard on the basis of merit alone."[23]

In fact, a number of prestigious institutions, including Harvard, contrived ways to hold down the number of New York Jews entering by virtue of academic merit, but that had occurred a generation before this Harvard Plan was born.

Justice Scalia finally found some solid footing by taking apart the claim that a "critical mass" with a range of 8 to 12 percent is any different from a 10 percent quota. However,

23. *Id.* at 33.

that was an issue so fundamental to the case that it is doubtful any opinions were going to be swayed by argument.

Of all the attributes of diversity for supporters of race-conscious admissions, the most marvelous is its lack of any inherent time constraint. When an employer hires blacks against whom he has previously discriminated, the ameliorative process stops when the victims of his discrimination are compensated and restored to their rightful employee status. When another hires blacks or Hispanics over whites to achieve a more balanced workforce in traditionally segregated job categories, that process too ends when the force comes to resemble the outside workforce in the relevant field. In each case, the discrimination involved is viewed as a necessary evil, finite in time, limited in impact on the majority race.

But this is not so with diversity, the theory of which is that diversity is a positive educational value benefiting students of all races and all ethnicities. It needs no past discrimination as justification. Michigan never discriminated; it admitted all students with the requisite academic credentials. In a race-blind system, Mahoney acknowledged, no blacks were admitted to the law school in 1964. In 2003, with race-blind admission procedures, only four would get in. Numbers like that provide their own justification for preferences in perpetuity. Michigan is not atoning, not ameliorating, not compensating—it is just educating.

However, Justice O'Connor seemed troubled by the timeless quality of the program. "Other affirmative action programs, you could see an end to it," she declared. "How do you deal with that aspect?"[24]

It could end, suggested Mahoney, either when there are

24. *Id.* at 39.

enough qualified minorities to drop the effort or when society evolves to the point "where the experience of being a minority did not make such a fundamental difference in their lives, where race didn't matter so much that it's truly salient to the law school's educational mission."[25] Yet she said nothing to suggest the imminence of either moment.

Mahoney argued that at Michigan, in general, only about 80 out of 2,500 admissions decisions were influenced by race, so, at worst, only 5 percent of white applicants were disadvantaged.

"I don't know any other area," Justice Scalia replied tartly, "where we decide the case by saying, well, there are very few people who are being treated unconstitutionally."[26]

The argument in *Gratz* was clearer cut because the issue was clearer cut. Michigan's undergraduate admissions program—with its separate admissions guidelines by race and ethnicity, protected or reserved seats, and segregated waiting lists—had initially resembled that of the University of Texas School of Law tossed out in *Hopwood*. During the trial below, Michigan had altered its method, now awarding a flat twenty-point bonus for preferred minority status, strikingly similar to the University of Georgia system rejected by the Court of Appeals for the Fourth Circuit. At trial, university officials had acknowledged that the purpose was to change the technique rather than the outcome of the process. In attacking a system on which he was nearly certain to prevail, however, Kolbo was able to reinforce his broader argument in both cases.

"The fundamental problem with the diversity rationale is that it depends on the standardless discretion of educa-

25. *Id.*
26. *Id.* at 52.

tors," he urged.[27] With any license to make race-conscious decisions for diversity's sake, the universities would be able to define the races and ethnic groups that they thought contributed most to the process. Out the window would go the critical process of strict scrutiny, which is essential in equal protection cases.

Both Kolbo and Olson could have done more with this concept to expose the practice for its corrupt infrastructure. At the time, Michigan was seeking to favor blacks, Hispanics, and Native Americans at the expense of whites and Asian Americans. The school claimed that this was a First Amendment academic right. Suppose, instead, that a state university determined that Jews were a particularly varied group in their intellectual development and political advocacy. Could the school admit Jews in numbers well beyond their academic credentials to the detriment of others? Or suppose a faculty committee determined that black social and political advocacy was as repetitive as a stuck needle and that black social and residential habits were limiting rather than enhancing student campus interaction. Could the university then ban blacks or lower their acceptance rates for purposes of academic diversity? Doesn't any race preference system become a de facto racial entitlement, even after it has supposedly gone away? Isn't that what "critical mass" is really all about? In fact, isn't the real lesson from Texas, California, and Florida that the notion of entitlement becomes so deeply fixed that it can even survive a change in the law? Drop the black numbers at Michigan five or ten years from now, and every civil rights advocate, every *New York Times*–reading liberal, would be crying foul.

27. Transcript of Oral Argument at 8, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (No. 02-516).

Given time to develop his argument without the distraction of the military brief, Olson made some cogent points. For instance, he articulated the contradiction inherent in the diversity rationale whose supporters claim that first we must admit you because your experience living in this society provides you with a common focus on events, but we must also admit enough of you so our white students will see how different you are from one another.

Olson was also at his most effective in responding to Justice Ginsburg, who noted a desirable race consciousness in places like Canada, the European Union, and South Africa. Olson's reply: "I submit, Justice Ginsburg, that none of those countries has our history, none of those countries has the Fourteenth Amendment, none of those countries has the history of statements by this Court which has examined the question over and over again that the ultimate damage that is done by racial preferences is such that if there ever is a situation which such factors must be used that they must be—race neutral means must be tried to accomplish those objectives, narrow tailoring must be applied, and this—this—these fail all of those tests."[28]

Justice Kennedy provided the coda for the *Gratz* argument, declaring, "I have to say that in—in looking at your program it looks to me like this is just a disguised quota."[29]

Both sets of attorneys came out of the oral argument with a sense of optimism. Kolbo and his colleagues felt the undergraduate Michigan scheme was dead and buried and that the law school's "critical mass" was so quota-like in character that Justice O'Connor would treat it as inconsistent with the criteria she had advanced in case after case.

28. *Id.* at 24.
29. *Id.* at 31.

For their part, the Michigan lawyers were certain that *Bakke*—never seriously challenged thanks to the White House—would survive and with it, probably, their law school admissions plan. They could certainly live with that, indeed, they would be heroes of all academia. They could also live with the loss of their two systems as long as *Bakke* survived to provide a window for race-conscious admissions. They might have added that in light of Texas, Florida, and California, a loss would be more a blow to their pride than a real setback for affirmative action.

It was clear from the day's argument that the early wisdom favoring a reversal was probably wrong. Justice O'Connor at least seemed disposed to embrace *Bakke*, or at least its essential permission of race-conscious admissions. Of course, we could once again find that both the undergraduate and law school programs had failed the *Bakke* test, but the intuition of most observers went the other way. On the steps outside following the argument, University President Mary Sue Coleman, who had succeeded Bollinger after he moved to Columbia, led supporters in a rousing rendition of "Hail to the Victors." When she finished, Barbara Grutter peeled away from Jennifer Gratz and Patrick Hammacher to respond to a reporter asking how she felt. "I feel my life is hanging in the balance waiting to hear if I will have equal justice under law," she replied.[30]

30. Liz Cobbs, *Powerful Hours Overtake Emotions at U.S. Supreme Court*, ANN ARBOR NEWS, Apr. 2, 2003.