SUPREME COURT OF THE UNITED STATES

No. 02–241

BARBARA GRUTTER, PETITIONER *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 BREYER joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," *ante*, at 29, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422–423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR Res. Supp. (No. 14) 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid*; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR Res. Supp. (No. 46) 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto*

equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").

The Court further observes that "[i]t has been 25 years since Justice Powell [in *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." *Ante*, at 31. For at least part of that time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See *Hopwood* v. *Texas*, 78 F. 3d 932 (CA5 1996); cf. *Wessmann* v. *Gittens*, 160 F. 3d 790 (CA1 1998); *Tuttle* v. *Arlington Cty. School Bd.*, 195 F. 3d 698 (CA4 1999); *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 2001). Moreover, 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. See *Brown* v. *Board of Education,* 347 U. S. 483 (1954); cf. *Cooper* v. *Aaron,* 358 U. S. 1 (1958).

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. See, *e.g., Gratz* v. *Bollinger, ante,* at 1–4 (GINSBURG, J., dissenting); *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 272–274 (1995) (GINSBURG, J., dissenting); Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L. Rev. 1251, 1276–1291, 1303 (1998). As to public education, data for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the

Dream? p. 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (as visited June 16, 2003, and available in Clerk of Court's case file). And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See *id.,* at 11; Brief for National Urban League et al. as *Amici Curiae* 11–12 (citing General Accounting Office, Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area, 17 (2002)).

However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, A National Priority: Americans Speak on Teacher Quality 2, 11 (2002) (public opinion research conducted for Educational Testing Service); The No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425 , 20 U. S. C. A. §7231 (2003 Supp. Pamphlet), it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From 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.*

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*As the Court explains, the admissions policy challenged here survives review under the standards stated in *Adarand Constructors, Inc* . v. *Peña,* 515 U. S. 200 (1995), *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469 (1989), and Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978). This case therefore does not require the Court to revisit whether all governmental classifications by race, whether

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designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review. Cf. *Gratz, ante,* at 4–5 (GINSBURG, J., dissenting); *Adarand,* 515 U. S., at 274, n. 8 (GINSBURG, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," *ante*, at 13, rank as sufficiently important to justify a race-conscious government program. Cf. *Gratz*, *ante,* at 5 (GINSBURG, J., dissenting); *Adarand,* 515 U. S., at 273–274 (GINSBURG, J., dissenting).