

**Performance, Improvisation¹ and Comedy at the U. S. Supreme Court:
The Michigan Admissions Lawsuits**

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On the morning of April 1, 2003, while the United States military was speeding to Baghdad to topple the statues of Saddam Hussein, the US Supreme Court gathered to hear oral arguments in the cases of *Grutter* and *Gratz v. Bollinger*, the strangely alliterative and closely watched Michigan affirmative action cases.

According to the “Oyez” website, these cases are only the second in which audio copies of the oral arguments were made available the same day that they took place.³ This unique development and the (no doubt accidental) timing of these arguments which coincided with the decision processes in colleges and universities, created a buzz around the cases and drew an unusual amount of attention to the arguments.

Oral argument, which is often of some interest to the public, has not been a focus of much scholarly attention because in general the arguments have not been readily available. There are exceptions.⁴ I have been interested in argument for some time. First as I told the institutional story which I called “the cult of the Court”. Then, when legal historian Peter Irons made materials on many of the greatest Supreme Court arguments available, in spite of the preferences of the Supreme Court,⁵ I had a panel on oral argument at the Political Science Meeting in New York City.

The full blown visual performance is not yet readily available and I suspect that it shouldn't be but that is not the issue here. With available technology and access, during arguments you can hear the justices talking about law.⁶ The qualities of law as a linguistic activity are more precisely and unmitigately evident during oral argument than they are in the written opinions. Argument serves today the way the presentation of opinion in open court did years ago, to link the justices to the ideas and concepts of the law.

In both of the University of Michigan cases, one dealing with admission to the law school and the other to the undergraduate college at the university, Theodore B. “Ted” Olson, the Solicitor General of the United States, called General by the justices, represented the administration of George W. Bush and the United States government, which opposed the Michigan procedure. He followed Kirk O. Kolbo who was the

¹ See Appendix 1.

² This paper was prepared for the roundtable on “Neglected Politics” at the Law and Society Meeting to be held in Pittsburgh, PA June 5-8, 2003. I am grateful for my reintroduction to improvisational techniques by Jennifer Kuhr, a member of “MissionIMPROVable” at the University of Massachusetts, Amherst. To Atticus Brigham, whose enthusiasm for the form is boundless and to Tom Soter whose improv classes preceding “Sunday Night Improv” at the West Side YMCA in NYC exemplify the creative and democratic aspects of this form. I could go on, but this is just a little paper.

³ These are available at www.oyez.org.

⁴ John R. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures*, NY: Holt, Rinehart and Winston, 1963, an important early discussion of procedures has little to say about argument at all.

⁵ *May It Please the Court*.

⁶ “During the oral argument we see the Court working.” *The Cult of the Court*, Philadelphia: Temple University Press, 1987, p. 183.

attorney for Barbara Grutter who couldn't get into the law school at the University of Michigan and for Jennifer Gratz and Patrick Hamacher who couldn't get into the undergraduate college. The only difference in the players was that Maureen Mahoney argued the law school case and John Payton argued the case for the University of Michigan undergraduate college. Attorney Payton is black. So is Justice Thomas. Lee Bollinger was President of the University of Michigan when the cases began but he had moved to Columbia to be President by the time the cases were argued.⁷ He has been very successful and very committed to affirmative action which is good because his name is all over these cases.

Grutter, the law school case, came first. At 10 am. At precisely an hour later, *Gratz* was argued. This paper is about the improvisational form as an aspect of Supreme Court argument.⁸ It is not a complete treatment of what went on at the Court but emphasizes what is called "improv" in the theater. Unlike judicial opinions but perhaps like conference discussions on cases, improvisation is a distinctive feature of Supreme Court argument.

At the very formal and outwardly staid Marble Temple which is the home of the Supreme Court on Capitol Hill, the justices engage in behavior during oral argument that, in most contexts, would simply seem rude.⁹ Attorneys making the most important appearances of their career are routinely and mercilessly interrupted as "argue" their side in the dispute. They must shift focus and build on interests expressed by the justices in brief but intense exchanges.

When one thinks of televising the proceeding and why the Court resists, the distinctive character of this activity deserves note. Like athletics, where the outcome is not known prior to playing the game and like "talk" shows where unscripted things are meant to happen, argument before the Court takes form in a tradition closely related to that of improvisational theater.¹⁰

Court arguments are spontaneous and interactive. They are sometimes funny and often engaging. There is always an element of theater. This is a theater of law and the drama is a function of the stakes and the setting. The humor is sometimes intentional but often arises from mistakes and the spontaneity is a function of the practice of preceding more like a seminar than a lecture.

Grutter TRANSCRIPT

There is nothing improvisational about the beginning of arguments at the Supreme Court. On argument days, the Court is buzzing and casual tourist visits with children skipping along the marble corridors are curtailed. There are the struggles to get in to the sessions and there is an effort to maintain decorum in the midst of this occasional frenzy.

The ritual in the courtroom is highly scripted. It is formal and traditional. The Marshal says his "Oyez, oyez" and the CJ calls the court to order and announces the case

⁷ He was born in Santa Rosa, California and he is often described as having "Robert Redford good looks".

⁸ The transcript is from www.debatingracialpreference.org and I have Curtis Crawford to thank for his transcription. As an appendix I have attached some of his editorial comments which are included on the web. These are another level of improvisational work that is a part of Affirmative Action law.

⁹ Some time ago, in a convention not so far away (NYC), I organized a panel on oral argument.

¹⁰ Some background on improv and my experience with it is included in an appendix.

and the attorney who will speak first. In doing so in these cases, William Rehnquist is the master of ceremonies but he is not a particularly active participant. In these arguments, the attorneys begin with the invocation “Mr. Chief Justice and may it please the Court.”¹¹

Attorney Kolbo speaks for about a minute and fifteen seconds in a highly polished introductory statement. The Chief Justice, on the audio provided by the “Oyez” site, sounds like Darth Vader.

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-241, *Barbara Grutter v. Lee Bollinger*. Mr. Kolbo.

Mr. KOLBO: Mr. Chief Justice and may it please the Court: Barbara Grutter applied for admission to the University of Michigan Law School with a personal right guaranteed by the Constitution that she would not have her race counted against her. That race -- that the application would be considered free from the taint of racial discrimination. The law school intentionally disregarded that right by discriminating against her on the basis of race as it does each year in the case of thousands of individuals who apply for admission. The law school defends its practice of race discrimination as necessary to achieve a diverse student body. The diversity that the law school is committed to ensuring in meaningful numbers or critical mass is of a narrow kind defined exclusively by race and ethnicity. The constitutional promise of equality would not be necessary in a society composed of a single homogeneous mass.

It is precisely because we are a nation teeming with different races and ethnicities -- one that is increasingly interracial, multiracial, that it is so crucial for our Government to honor its solemn obligation to treat all members of our society equally without preferring some individuals over others.

Kolbo is interrupted by Justice O'Connor. Or we could say Justice O'Connor breaks in with a question. This appears to force the attorney to alter his presentation and respond to the question. And, it is her question, not one that the attorney has elicited, though we expect it is one that he has prepared for. From the perspective of the Justice, the contribution is not an “offering” in the tradition of improv. But, as in the improv tradition, it is not considered appropriate to reject it. Instead, the question is something on which, from this point, the argument must be built.

Justice O'Connor goes on to interrupt four more times before Justice Kennedy joins the discussion. She seems legitimately curious and the extent to which she alters the presentation is a decidedly secondary issue in comparison with the desire to have the justice accept the argument of the students who were denied admission.

JUSTICE SANDRA DAY O'CONNOR: Well, of course, you -- I mean, a university or a law school is faced with a serious problem when it's one that gets thousands of applications for just a few slots. Where it has to be selective. And inherent in that setting is making choices about what students to admit. So you have an element here that suggests that there are many reasons why a particular student would be admitted or not. And a lot of factors go into it. So how do you single this out and how are we certain that there's an injury to your client that she wouldn't have experienced for other reasons?

MR. KOLBO: Well, Your Honor, first of all, race is impermissible because of the constitutional command of equality. The university is certainly free to make many different kinds of choices in

¹¹ A locution that simply means I'm ready to go but, given what follows, could mean “I submit myself to you”.

selecting students. And to look for all kinds of different diversity, experiential diversity, perspective diversity without regard to race, but race because, Your Honor, of the constitutional command of equality, must be beyond the bounds –

JUSTICE O'CONNOR: You say that's not -- it can't be a factor at all. Is that it? Is that your position that it cannot be one of many factors?

MR. KOLBO: Our view, Your Honor, is that race itself should not be a factor among others in choosing students because of the Constitution.

JUSTICE O'CONNOR: Well, you have some -- some precedents out there that you have to come to grips with, because the Court obviously has upheld the use of race in making selections or choices in certain contexts, for instance, to remedy prior discrimination in other contexts.

MR. KOLBO: Oh, absolutely, Your Honor.

JUSTICE O'CONNOR: All right.

MR. KOLBO: And I want to be clear about that. We are –

JUSTICE O'CONNOR: Well, but you are speaking in absolutes and it isn't quite that. I think we have given recognition to the use of race in a variety of settings.

MR. KOLBO: And we absolutely agree, Justice O'Connor.

JUSTICE ANTHONY M. KENNEDY: Is it cause for concern with you -- if you're the dean of the law school or the president in the university or the Governor of the State, that minority students, particularly from the Black and Hispanic community are underrepresented by a large factor, according to their -- their share of the population? Suppose you have a law school with two or three percent Hispanic and -- and black students, is that a legitimate concern for the university and for the State officials?

Kolbo's response to Kennedy here has the element of spontaneity one associates with improv. The question and answer format is a relatively untheatrical level of improv since no story is built. Instead, issues are examined and positions unfold. Ideally, they become clarified.

MR. KOLBO: We believe not, Your Honor, for the reason that we need to get away from the notion that there's some right number for each racial group.

Justice Ginsburg is the next jurist to join the exchange. She introduces a new line of argument and offers an issue to be considered. How is the military to maintain diversity in its leadership ranks? The question points up the effort Kolbo makes to stick to a limited script while the Justice expresses, in an improvisational sort of way, the larger policy issues to be addressed. Then, in her follow-up, Ginsburg cuts the attorney off. This would be rude in the tradition of improv or even in the practices of a seminar. As an aspect of the hierarchical nature of this setting it seems largely to be excused due to the status differential between justice and attorney. However, in this case, the position of the justice is generally assumed to be skeptical of the anti affirmative action position and probably hostile to its core.

JUSTICE RUTH BADER GINSBURG: Mr. Kolbo, may I call your attention in that regard to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race. It cannot be done through a percentage plan, because of the importance of having people who are highly qualified. What is your answer to the argument made in that brief that there simply is no other way to have Armed Forces in which minorities will be represented not only largely among the enlisted members, but also among the officer cadre?

MR. KOLBO: Justice Ginsburg, I don't believe we have an adequate record in this case from which to conclude that we wouldn't have representation of minorities. The military in the absence of –

JUSTICE GINSBURG: Suppose that were true. Let's take that as the fact, would you still say nonetheless even if it's true that there will be very few, if any, minority members admitted to the military academies, still you cannot use race?

Following a response in which attorney Kolbo sticks to the logic of his position and says that race can't be taken into account in admissions decisions and that the military has not taken a position in the case, Justice Stevens says that he disagrees. In the most delicate of moments in this dance, Kolbo, in response, seeks to bolster his own position in opposition to the justice. And, while he doesn't need Stevens to win his case, the open quality of the argument always runs the risk that something damaging or difficult will arise and other justices will be lost to the cause, as in the military issue above.

JUSTICE JOHN PAUL STEVENS: Yes, they have, if the brief is accurate about the regulations, the academies have taken a position.

MR. KOLBO: As I understand it, Justice Stevens, the briefs are filed on the behalf of individuals.

JUSTICE STEVENS: I understand that. But they are quoting material that the academies have distributed, which indicate they do give preferences.

After a continuation of this line of questions with Justice Souter, Justice Scalia offers a safety net and the response from attorney Kolbo might be characterized as something of a sigh of relief. This leads to the more classic “yes, and” situation, where Justice Scalia proceeds to offer support for the government's argument which is then developed in a give and take that goes on until Justice Souter intercedes.

JUSTICE ANTONIN SCALIA: It depends on what fact you're talking about, doesn't it? You accept the fact that they're giving preferences, but that doesn't convert to the fact that if they didn't give preferences, there is no other way to get an officer corps that includes some minority people, does the brief say that?

MR. KOLBO: It does not, Your Honor. We have no evidence as to what the extent of representation is.

JUSTICE SCALIA: The issue as I understand it is not whether without preferences there can be a military academy population with some minorities, the question is whether without the -- the weighting of race that they do in fact give, they can have an adequate number of minorities in the

academies to furnish ultimately a reasonable number of minorities in the officer corps, that's the issue, isn't it?

MR. KOLBO: Well, Your Honor, again, the -- the terms you've used, reasonable and adequate, we have no information in this record on which I can make those --

JUSTICE SCALIA: More than what would happen if they did nothing?

MR. KOLBO: And that number, Your Honor, I don't know what it is. Again, because it wasn't part of this case. I think it's more --

JUSTICE SCALIA: More than what would happen if they did something else, such as making special provision for all people of economically disadvantaged background. We don't know whether that would have produced the same number, either.

MR. KOLBO: That's correct, Your Honor. As the Court --

JUSTICE SOUTER: Do you believe that that would be an adequate -- at least means of experimenting here -- take it as an alternative?

A bit later in the argument, Justice Kennedy attempts to shift the attention from the military schools and he pointedly offers Kolbo a chance to get back to the case before the Court. It offers Justice Breyer an entree and in much more pointed exchange Breyer fundamentally challenges the government's position. The exchange seems less about convincing the most liberal justices than holding some rhetorical ground

JUSTICE KENNEDY: Would you allow recruiting targeted at minorities?

MR. KOLBO: I don't see the constitutional objection with that, Your Honor.

JUSTICE STEPHEN G. BREYER: Fine. If you can use race as a criterion for spending money, I take it one argument on the other side, which I'd like you to address, is that we live in a world where more than half of all the minority -- really 75 percent of black students below the college level are at schools that are more than 50 percent minority. And 85 percent of those schools are in areas of poverty. And among other things that they tell us on the other side is that many people feel in the schools, the universities, that the way -- the only way to break this cycle is to have a leadership that is diverse. And to have a leadership across the country that is diverse, you have to train a diverse student body for law, for the military, for business, for all the other positions in this country that will allow us to have a diverse leadership in a country that is diverse. Now, you're familiar with that argument. But if it is reasonable to use race as a criterion, as a plus for spending money, why isn't it also reasonable to use it as a plus to see that -- to obtain that set of objectives that I've tried to summarize in a second that you're very familiar with.

MR. KOLBO: 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. That's the distinction between that and simply trying to cast a wider net, recruiting spending money on outreach efforts, a very principled line it seems to me can be drawn between those two things.

JUSTICE BREYER: The reason that the injury is more severe to the white person who doesn't get in when that white person doesn't get in because she's not an athlete or he's not an alumnus or he's not any of the other things that fit within these other criteria? What is the difference there?

MR. KOLBO: The difference is the Equal Protection Clause, Your Honor. It does not apply to alumni preferences in scholarships. It applies to race.

JUSTICE BREYER: That's the legal conclusion. But the reason if I thought, for example, that there is a difference under the Equal Protection Clause, between a system that says to the discriminated-against people, the law does not respect you, and a system that says the law does respect you, but we are trying to help some others, suppose I thought that that is a sound legal distinction as reflected in this Court's cases, you would reply that?

MR. KOLBO: Sound and reasonable, Your Honor, is not enough when it comes to race. It must be a compelling purpose. And that is the difference. There are many policy choices a university can make that I may disagree or agree with, and that I have no legal standing or no client has a legal standing to challenge, because they don't implicate important constitutional rights. There is something special about race in this country. It's why we have a Constitution about it. It's why we have a constitutional amendment.

JUSTICE GINSBURG: Why -- why do you draw the line at -- you said you can recruit -- you can use a race criterion, if I understood you correctly, to recruit, you could have minority students only given the benefit of scholarships to go to these preparatory schools. You were surely recognizing the race criterion there. Why is that permissible?

The questions are pointed and in the tradition of argument, the tradition that governs the routine like traditions in jazz and other improvisational forms are governed, Justice Ginsburg is presenting problems. She is not contributing to the narrative so much as trying to disrupt it. The result is an effort to save the attorney that is launched by Justice Scalia.

MR. KOLBO: Because it prevents someone from applying. The key is to be able to compete on the same footing at the point of competition.

JUSTICE SCALIA: These preparatory schools -- do you concede that they're only for minority students? I'm familiar with those preparatory schools; they are not.

MR. KOLBO: Certainly not --

JUSTICE SCALIA: The majority of the people that attend them are young men and women who really want to get into the service academies, but don't have the grades for it. And the service academy tells them whether they're black, white or anything else, go to these preparatory schools and you'll have a better chance next time around.

MR. KOLBO: That --

JUSTICE SCALIA: It isn't just for minorities.

MR. KOLBO: They're not, Your Honor. They are open to -- accessible to all.

And so it went, with Justice Ginsburg trying to get back in and return to the point she was arguing. With the two justices traditionally on opposite sides of the issue, the drama of the issue at hand and its implications for how careers are advanced in the United States heightens the performance.

Later, the Solicitor General speaks, but only for about ten seconds before he is interrupted. Perhaps this is because he is expected to know the drill and has been through it often. In any case, he is not given the courtesy of much time to speak at all.

GENERAL OLSON: Mr. Chief Justice and may it please the Court: The Michigan law school admissions program fails every test this Court has articulated for evaluating governmental racial preferences. First, it is –

JUSTICE STEVENS: General Olson, just let me get a question out and you answer it at your convenience. I'd like you to comment on Carter Phillips' brief. What is your view of the strength of that argument?

GENERAL OLSON: Well, I'm not sure –

JUSTICE STEVENS: That's the one about the generals and about the military academies.

The discussion continues in the manner of the earlier exchanges on the military, which was certainly in the public mind because of the war being waged in Iraq. It seems likely not to have been what the Solicitor General planned to develop in his argument. It is what the public heard about when the argument was reported.

GENERAL OLSON: I understand -- the -- our position with respect to that is we respect the opinions of those individuals, but the position of the United States is that we do not accept the proposition that black soldiers will only fight for black officers, [and we believe] that race neutral means should be used in the academies as well as other places. And that to the extent that there's any difference in analysis, the Court might consider its position, the position it articulated in connection with the military in *Rostker v. Goldberg*. But our position with respect to that brief is that –

JUSTICE STEVENS: Your suggestion is that the military has broader latitude than the private university?

GENERAL OLSON: No, I'm suggesting that – ...

Later, Justice Ginsburg presses the point further, creating a widely reported comment from Olson.

JUSTICE GINSBURG: But you recognize, General Olson, that here and now, all of the military academies do have race-preference programs in admissions?

GENERAL OLSON: The Coast Guard does not. It's prohibited by Congress from doing so. I do acknowledge, Justice Ginsburg that the other academies are doing so. It's the position of the United States –

JUSTICE GINSBURG: That that's illegal what they're doing?

GENERAL OLSON: Pardon me? ...

One aspect of improvising is drawing on what you know. In a number of the exchanges participants draw on material from the pool of general knowledge in order to participate in the discussion. For the justices the form is often one of seeking

clarification. For the attorneys it is offering examples and developing themes. Here, in the context of arguing against race as a consideration, Olson mentions Exeter as an example of a fine secondary school.

GENERAL OLSON: But that person -- that person if he went to Exeter and he has a great GPA and so forth gets an extra opportunity either a portion of the class is set aside for that individual solely on the basis of race, irrespective of his experience. And the application isn't examined for the type of experience or the type of viewpoint. That race-diversity characteristic is used as a substitute for any examination of the individual [as an] individual.

In an exchange Olson would likely have prepared for, Justice O'Connor asks him if he is seeking to overturn *Bakke*. He goes on to emphasize that the Powell opinion which had articulated affirmative action policy for 25 years was not accepted by a majority of the Supreme Court.

JUSTICE O'CONNOR: General Olson, do you -- do you 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?

GENERAL OLSON: We disagree with that approach in the sense that we -- we -- in the first place, contrary to what our opponents have said, we would not believe that that single opinion, which was the only opinion, to examine the issue of diversity under a compelling argument --

JUSTICE O'CONNOR: I don't think it commanded a court. I'm just asking if you agreed with that approach. ...

Interjecting in a supportive discussion Justice Scalia had been having with Olson, Justice Stevens seeks to return the discussion to *Bakke*.

JUSTICE STEVENS: General Olson, I'm not sure you answered Justice O'Connor's question. Do you agree with Justice Powell's suggestion that race could be used as a plus in something like the Harvard program?

GENERAL OLSON: No, the Harvard program (a) wasn't examined according to any compelling governmental interest. It was examined only --

JUSTICE STEVENS: So your answer is no, you would not agree with that?

GENERAL OLSON: We would not, based upon what we see in that opinion, which is --

Whatever give and take has gotten underway, it is checked by the Chief Justice who keeps the time and turns the floor over to the attorney for the Law School, Maureen Mahoney.

MS. MAHONEY: Mr. Chief Justice, and may it please the Court: The Solicitor General acknowledges that diversity may be a compelling interest but contends that the University of Michigan Law School can achieve a diverse student body through facially race neutral means. His argument ignores the record in this case.

JUSTICE KENNEDY: I'm not sure -- in his brief does he acknowledge that can be a compelling interest?

MS. MAHONEY: The brief says that it is one of the paramount interests of government to have diversity in higher education. And it has certainly been the consistent position of the Department of Education for the past years that *Bakke* is the governing standard, that schools are encouraged to use programs to achieve diversity, because of the important interests it serves for students of all color.

Other than supervising the proceedings, the first interjection by the Chief Justice during the morning session comes in Maureen Mahoney's argument for the University of Michigan Law School. He speaks in the colloquial fashion that the justices use in argument, referring to cases by their common name and to the University in the *Bakke* case as "Cal Davis".

CHIEF JUSTICE REHNQUIST: Ms. Mahoney, supposing that after our *Bakke* decision came down, whereas Cal. Davis had set aside 16 seats for disadvantaged minorities, and Cal. Davis said we're going to try to get those 16 seats in some way, we're going to try high school graduates, we're going to try socioeconomic and none of those methods get the 16 seats that they want. Can they then go back and say we've tried everything, now we're entitled to set aside seats?

MS. MAHONEY: I don't think so, Your Honor. I think what the Court's judgment in *Bakke* said and certainly what Justice Powell's opinion said is that it's simply not necessary to do a set aside, because a plan like the Harvard plan, which takes race into account as one factor, can be used as an effective means to -- ...

I find Justice Scalia's first comment to the University counsel quite challenging. It may be the context we live in where Affirmative Action has seemed to be on the defensive, but compared with Justice Breyer or even Ginsburg on the other side, Justice Scalia, in a tight and pointed comment cuts to at least one of the hearts of the matter. And Justice Kennedy seems excited by it and wants to help.

JUSTICE SCALIA: If it claims it's a compelling State interest. If it's important enough to override the Constitution's prohibition of racial discrimination, it seems to me it's important enough to override Michigan's desire to have a super-duper law school.

MS. MAHONEY: Your Honor, the question isn't whether it's important to override the prohibition on discrimination. It's whether this is discrimination. Michigan -- what Michigan is doing benefits...

JUSTICE KENNEDY: No, no. No. The question is whether or not there is a compelling interest that allows race to be used.

MS. MAHONEY: That's correct, Your Honor.

JUSTICE KENNEDY: And Justice Scalia's question is designed to put to you the fact that this isn't a compelling interest, because it's a choice that the Michigan law school has made to be like this. ...

Justice Ginsburg helps Mahoney develop the notion that *Bakke* would accept the Michigan formula but both women are soon derailed by Justice Scalia on the attack.

JUSTICE GINSBURG: Is there in fact a difference between the Michigan plan and the Harvard plan? The Harvard plan is touted in *Bakke*. It seems to me, that they were pretty close and is there any suggestion that Michigan is looking for critical mass that Harvard didn't look for?

MS. MAHONEY: Absolutely not, Your Honor. The evidence indicates that the Harvard plan works in exactly the way the Michigan plan does. In fact, Harvard's brief in this case indicates that under their plan over the last four years, they enrolled eight to 9 percent African Americans which is a stable range. In the last four years of the record evidence here, the University of Michigan Law School enrolled 7 to 9 percent African Americans.

JUSTICE SCALIA: Excuse me. Did *Bakke* hold that the Harvard plan was constitutional?

MS. MAHONEY: Yes, Your Honor.

JUSTICE SCALIA: If adopted by -- by a State institution?

MS. MAHONEY: Yes, Your Honor.

JUSTICE SCALIA: It held that it was constitutional?

MS. MAHONEY: Yes. What we --

JUSTICE SCALIA: We didn't even -- we didn't even have the details of the Harvard plan before us.

MS. MAHONEY: Your Honor, in fact, the Court upheld -- or Justice Powell appended the Harvard plan to his opinion in this case and there were five votes that the reason that the mandate of the California Supreme Court 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. And the -- the dissenting --

JUSTICE SCALIA: Did -- did the Court know what -- what social scientists have later pointed out and many people knew before it that when the Harvard plan was originally adopted, its purpose was to achieve diversity by reducing the number of Jewish students from New York that were -- that were -- that were getting into Harvard on the basis of merit alone?

MS. MAHONEY: Your Honor, I don't think that was --

JUSTICE SCALIA: Did that come up in the course of the case?

MS. MAHONEY: Your Honor, I don't think that's the purpose of the Harvard plan that was attached.

This goes on for another minute and a half before Justice Souter returns to the conversation. And Justice Scalia is out for a minute or so before returning to his effort to link the university to a quota. He ends with the notion of “quota land”.

JUSTICE SCALIA: Is 2 percent a critical mass, Ms. Mahoney?

MS. MAHONEY: I don't think so, Your Honor.

JUSTICE SCALIA: O.K. 4 percent?

MS. MAHONEY: No, Your Honor, what --

JUSTICE SCALIA: You have to pick some number, don't you?

MS. MAHONEY: Well, actually what --

JUSTICE SCALIA: Like 8, is 8 percent?

MS. MAHONEY: Now, Your Honor.

JUSTICE SCALIA: Now, does it stop being a quota because it's somewhere between 8 and 12, but it is a quota if it's 10? I don't understand that reasoning. Once you use the term critical mass and -- you're -- you're into quota land....

When looking at the argument from the perspective of politics AND improv it is hard not to be drawn to the power dynamics in oral argument. There are justices peering down on attorneys, attorneys with an eye and ear to history standing before the high bench and all the while an audience of millions some in the room, some on the web and most receiving this material on paper. But in improv this is a facet of the relationship. There are also numerous theatrical dimensions like the pace, tone and cleverness of the exchanges. Here the Chief Justice uses the word “quota” which Justice Scalia had been hammering at for much of the Mahoney argument. But he appears to be willing to return to the word the attorney prefers when corrected.

CHIEF JUSTICE REHNQUIST: Can -- can we tell from the statistics whether things have been achieved say, more and more minorities are getting in on their own to the University of Michigan Law School without the quotas?

MS. MAHONEY: Yes.

MS. MAHONEY: Yes, they're not quotas, Your Honor.

CHIEF JUSTICE REHNQUIST: The critical mass? ...

Back to the colloquy about the world. How does it work?

JUSTICE O'CONNOR: Well, there are other law schools in California, too, are there not?

MS. MAHONEY: Yes, UCLA, well, this is mainly Your Honor a problem for the highly selective schools because of the nature of the pool.

JUSTICE O'CONNOR: You have some good law schools. You have UCLA. You have USC?

MS. MAHONEY: UCLA.

JUSTICE O'CONNOR: USC is private?

MS. MAHONEY: Yes.

JUSTICE O'CONNOR: But UCLA?

Who knew that in these arguments Justice O'Connor would face the fact that USC is private. She must even have known it at some time.

To indicate that Mahoney is nearing the end of her time, the Chief Justice characterizes a statement by Justice Scalia as "not a question" so that the attorney will not feel the need to respond.

JUSTICE SCALIA: I don't know any other area where we -- where we decide the case by saying well, there are very few people who are being treated unconstitutionally. I mean, if this indeed is an unconstitutional treatment of -- of this woman, because of her race, surely, it doesn't make any difference whether she is one of very few who have been treated unconstitutionally.

CHIEF JUSTICE REHNQUIST: I think you can regard that as a statement rather than a question.

MS. MAHONEY: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Mr. Kolbo, you have two minutes remaining.

When attorney Kolbo reclaims the two minutes of his time he does not attempt to return to his text of the earlier presentation but instead seeks to continue discussion of the theme developed during the discussion with Mahoney. And here he is allowed to continue for his allotted two minutes without interruption. This is by far the longest presentation in the case.

MR. KOLBO: Thank you, if I may follow-up on the last question. Counsel's answer to the last couple of questions, I think, really crystallizes the difference between their position and ours. The University of Michigan sees this as a question of group rights. There are rights on the part of minorities. And there are rights -- there are rights on the part of whites and Asians and other -- other groups.

We see it very differently. The Constitution protects the rights of individuals, not racial groups. The *Bakke* case opening up 16 spaces in the class when that system was struck down meant that about 2,500 students, 2,500 to 3,000 students who had previously been discriminated against now had an opportunity to compete for those seats. So it seems to me the question is not answered by how many have been discriminated against. The question is whether in fact discrimination is occurring against the individual and it certainly is in this particular case.

Counsel was asked some questions about the open-ended nature of the policy at issue here. And I think it's very critical that we understand that if the interest that they are asserting here to be compelling is upheld as compelling by this Court, we have in fact the first indefinite, ongoing, unlimited compelling interest. The Court previously has confined its analysis to remedying -- remedying identified discrimination. A remedy based on societal discrimination or a role-model

theory for example in *Wygant*. A couple of the reasons that the Court struck down those rationales was because they were so unlimited, so amorphous, indefinite with respect to time. That certainly is the case with the interest that is being urged here today.

And it seems to me that that is -- it is very clear in the University's argument that what they've done -- and they didn't argue so much this in the lower court, but they made it very clear that their justification for the preferences is based in effect on remedying societal discrimination. Their argument and their briefs and in this Court has been that when the day comes, someday and maybe it will come someday, we hope that it will, that someday that we will be able to stop using race for these purposes. And the opinion that accepted that rationale it seems to me would be a dramatic step backward from this Court's precedents which rejected the notion that something as amorphous as societal discrimination would be sufficient.

Gratz TRANSCRIPT

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 02-516, *Jennifer Gratz and Patrick Hamacher v. Lee Bollinger*. Mr. Kolbo. The beginning is again scripted and it is also in its attack on the University program.

MR. KOLBO: Mr. Chief Justice, and may it please the Court: Jennifer Gratz and Patrick Hamacher were denied admission to the University of Michigan's flagship undergraduate institution, the College of Literature and Science and the Arts under an admissions -- under admissions policies that facially and flagrantly discriminated on the basis of race. The history of their case and of the University's defense of its discriminatory admissions policies is a powerful argument about the perils of entrusting to the discretionary judgments of educators the protection of the Constitution's guarantee of equality to all individuals. For nearly five years, the University vigorously defended in the district court and the court of appeals the admissions systems that were in place when petitioners Gratz and Hamacher applied. These systems featured separate admissions guidelines for different races, protected or reserved seats in the class for select minorities, that is blacks, Hispanics and Native Americans, racially-segregated wait-lists, and a policy of never automatically rejecting students from their preferred -- from the preferred minority groups while doing so for others.

Justice O'Connor raised the question of Mr. Hamacher's standing in the case and sounded both concerned and conscientious. Subsequent discussion gave an opportunity to assess audience reaction. After a question by Rehnquist about the implications of his standing Kolbo responded.

MR. KOLBO: ... If Mr. Hamacher prevails, then the rights of many thousands of others will have been vindicated and they will be able to compete under a nondiscriminatory system.

JUSTICE STEVENS: Of course that would be true even if he doesn't have standing. (Laughter.)

MR. KOLBO: That's true. Well, Your Honor they would not be able to compete under a nondiscriminatory system unless this particular system is struck down.

When the Solicitor General makes his second appearance he is allowed to continue a bit longer than when he spoke in *Grutter*

GENERAL OLSON: Mr. Chief Justice, and may it please the Court: The University of Michigan admissions program has created a separate path and a separate door for preferred minorities. For those groups, if they meet basic qualifications, their path is always clear, and their door is always

open. Nonpreferred racial groups face rigorous competition to get through the other door. The University admits that race is such an overarching factor in its admissions process that virtually every qualified underrepresented minority applicant will be admitted. The 20 point bonus, which is one full grade point, nearly twice the benefit of a perfect SAT score, and six times better than an outstanding essay, the -- that bonus is actually unnecessary with the way the plan actually works, because every qualified candidate who gets the bonus gets into the University. It might just as well be an admissions ticket.

The University acknowledges that its pre-1999 admissions program used separate grids, separate qualifications, separate standards and protected seats. They acknowledge that this system was -- which was held unconstitutional and was not challenged, yet they stipulated that the only changes that they made from that system affected only the mechanics, not the substance of how race and ethnicity were considered in the admissions process.

In the matter of spontaneity and improvisation the interjection by Justice Stevens appears to be a bit disruptive and it comes with the assertion that the government is in disagreement with the lower federal court

JUSTICE STEVENS: First, the changes were sufficient to convince the district judge that it was on the other side of the constitutional line?

GENERAL OLSON: Notwithstanding the fact that the -- the University -- we -- we respectfully disagree with that conclusion, because the -- the University itself admitted that it only changed the mechanics. It intended to produce the same -- ...

In a series of exchanges with Olson, Justices Souter, Stevens and Breyer tag team in the discussion seeking refinements and answers to concerns each have but also building on one another.

JUSTICE SOUTER: What do you say to the argument that number one, it's not stigmatizing, because the Bok study certainly didn't show that it was, and number two, the objective is not to show that there is a correlation between race and one point of view. The objective is to show students what the correlation or no correlation is between races and points of view. And it seems to me that the Michigan plan is equally consistent with the latter interpretation as with the former.

GENERAL OLSON: What we're saying is that if you assume that because you are white or you are red or you are brown or you are black, you must have certain experiences and you must have certain viewpoints.

JUSTICE STEVENS: The argument is that you need to have enough of them to demonstrate that the point of view does not always fit just one person.

GENERAL OLSON: Well, but Justice Stevens --

JUSTICE STEVENS: And that was a finding I think?

GENERAL OLSON: -- that's a self-contradictory rationale that they've come up with. They say first of all you have these characteristics because you're black but we must admit enough of you into the class to prove to the other students that -- that black isn't the reason you're ...

Breyer here is conscientious and very thoughtful. He has been described as professorial and here with the Solicitor General as with other attorneys he probes to

understand the constitutional issues and refuses to be flustered when he slips on a non sequitur, like people growing up in America who are “black, regardless of race.” Others, like Mr. Crawford who put up the website that I used, wonder if the tone is not patronizing and due to the fact that Payton is black.

JUSTICE BREYER: No that is not -- the argument is basically that, look, people who have grown up in America and are black, regardless of race, no, not regardless of race, [laughter] regardless of socioeconomic background have probably, though not certainly, shared the experience of being subject to certain stereotypical reactions from people throughout their lives. Now, that may have led them to react one way, or another way or not react at all. And indeed many of the students in our class will have stereotypical reactions. And it's good for them as well as for everyone else to rid themselves of those reactions. And we want people in this school of all kinds who are black, because that will be helpful education.

Now, that's their argument, I think, in that respect, not the argument that all black people are poor, not the argument that all black people have been discriminated against, not the argument that all black people share a point of view. ...

The plaintiffs challenging the constitutionality of the Michigan programs are represented by two white men. Michigan is represented by a woman and a black man, Attorney John Payton. You know it is not going to officially matter in the written opinions or in the briefs but some say that the gender and race of the attorneys may have mattered during arguments. Where is does it is likely in the spontaneous and improvisational style that is characteristic of the arguments.

MR. PAYTON: Mr. Chief Justice and, may it please the Court: I think I want to spend just a few minutes briefly setting the record straight on why it is the educational judgment of the University of Michigan that the educational benefits that come from a racially and ethnically diverse student body are crucial for all of our students and why those benefits do not depend in any way on the assumption that, for example, all African Americans think alike. LS&A, our premiere undergraduate institution, is an undergraduate college, most of its entering students come in as 18-year-olds, about two-thirds come from Michigan, and about half from Detroit or the greater Detroit area. Michigan, I think as everyone knows, is a very segregated State.

The CJ, having introduced Payton seems to remain involved to a greater extent than he does during most of the proceedings and the other justices appear to stay on the sidelines. Payton's “Yes” should really be a “No” but this lack of logic doesn't seem to matter to the Chief Justice.

CHIEF JUSTICE REHNQUIST: Half of the ones who come from Michigan come from Detroit?

MR. PAYTON: Yes. Half of our students come from -- yes.

Michigan is a very segregated State. Detroit is overwhelmingly black. Its suburbs and the rest of the state are overwhelmingly white. While Michigan is extreme in this regard, it's not that extreme from the rest of the country. The University's entering students come from these settings and have rarely had experiences across racial or ethnic lines. That's true for our white students. It's true for our minority students. They've not lived together. They've not played together. They've certainly not gone to school together. The result is often that these students come to college not knowing about individuals of different races and ethnicities. And often not even being aware of the full extent of their lack of knowledge. This gap allows stereotypes to come into existence. Ann Arbor

is a residential campus, just about every single entering student lives on campus in a dorm. On campus, these 18-year olds interact with students very different from themselves in all sorts of ways, not just race, not just ethnicity, but in all sorts of ways. Students, I think as we know, learn a tremendous amount from each other. Their education is much more than the classroom. It's in the dorm, it's in the dining halls, it's in the coffee houses. It's in the daytime, it's in the nighttime. It's all the time.

Here's how critical mass works in these circumstances. If there are too few African American students, to take that same example, there's a risk that those students will feel that they have to represent their group, their race. This comes from isolation and it's well understood by educators. It results in these token students not feeling completely comfortable expressing their individuality. On the other hand, if there are meaningful numbers of African American students, this sense of isolation dissipates.

CHIEF JUSTICE REHNQUIST: Mr. Payton, what is a meaningful number?

MR. PAYTON: It's what we've been referring to as critical mass.

CHIEF JUSTICE REHNQUIST: Okay. What is critical mass?

MR. PAYTON: Critical mass is when you have enough of those students so they feel comfortable acting as individuals.

CHIEF JUSTICE REHNQUIST: How do you know that?

MR. PAYTON: I think you know it, because as educators, the educators see it in the students that come before them, they see it on the campus.

CHIEF JUSTICE REHNQUIST: Do they -- professors at the University of Michigan spend a lot of time with the students?

MR. PAYTON: Yes, they do. This is an incredibly vibrant and complex campus that has diversity in every conceivable way. And I think --

CHIEF JUSTICE REHNQUIST: Do they spend a lot of time with them other than lecturing to them?

MR. PAYTON: They do. In the record, we actually have an expert report, that's not contradicted in any way, by Professor Raudenbush and by Professor Gurin just on the issue of how do you know when you have enough students in different contexts and circumstances so that there will be these meaningful numbers.

CHIEF JUSTICE REHNQUIST: What do they say?

MR. PAYTON: They said that given the numbers that have been coming through in the last several years, we are just getting to that critical mass. And the way they analyzed it was to look at the circumstances in which students interact. Entering seminar, a dorm context, a student activities context, student newspaper context, to see what would happen if you distribute the students across these small encounter opportunities.

Justice Scalia is certainly a hostile justice to Attorney Payton's position and their first exchange takes on that character. Asked about the sort of dormitories Michigan has

Payton seems confident, though it is hard to image that he is very familiar with the dormitory structure at the university. But he is also forceful in a fashion that seems to indicate some discomfort with Scalia's questions. Certainly Payton is a little taken aback by Scalia announcing that "none of that matters".

JUSTICE SCALIA: Does Michigan have, as some schools I know have, schools that have affirmative action program, does it have a minority dormitory?

MR. PAYTON: No. The answer is no. We have dormitories like I said. Just about every single entering student stays in a dormitory. We do not have any dormitories where your entrance into it is governed by your race. But we have tremendous representation in our dormitories because everybody has to stay there, O.K.? So the answer is --

JUSTICE SCALIA: I mean, apart from being excluded, if -- it is in fact the residential pattern quite mixed and there are no dormitories that are, you know, just as sometimes there is -- there is the jocks dormitory, there is really no African American dormitory?

MR. PAYTON: The answer is there is no African American dormitory, but it -- the full answer is more complex. After students are there for their first year, they can choose to move off campus. They can choose to stay on campus. Many stay on campus, many move off campus. Ann Arbor is a college town and off campus is actually in the larger campus community and what they do off campus is obviously up to the students themselves, but I think that's -- you know, that's the real world. If you have the meaningful numbers of minority students, what then happens is that students will see a range of ideas, a range of viewpoints from and among those students and they will then see things that they may not have expected, similarities and differences, and those in turn will have the result of undermining stereotypes, you know, and this happens for the minority students, and the white students. ... (Justice Scalia raises the quota issue here.)

MR. PAYTON: Here's how our system works and I believe it's not a quota at all and I can believe -- I can simply explain this. The way it works, an application comes in, it is reviewed on the basis -- every single application is read in its entirety by a counselor, every single application. It is in fact judged on the basis of the selection index, which has the 20 points for race and 20 points for athletics, but it also has all sorts of other things that it values, in-state, underrepresented state, underrepresented county within Michigan, socioeconomic status, what your school is like, what the curriculum that you took at your school is like.

JUSTICE SCALIA: But none of that matters.

MR. PAYTON: Your grades --

JUSTICE SCALIA: None of that matters. If you're minimally qualified and you're one of the minority races that gets the 20 points, you're in, correct? The rest is really irrelevant.

At one point, the Chief Justice seems impatient and a bit condescending toward Payton.

CHIEF JUSTICE REHNQUIST: When you say underrepresented, it sounds like something almost mathematical, that you're saying, we only have a certain percentage of -- and we should have this percentage, well, what is this percentage?

MR. PAYTON: It's actually not a percentage at all and it really is driven by the educational benefits that we want from our diverse student body. If we had in our applicant pool sufficient numbers of minority students, African Americans, for example –

CHIEF JUSTICE REHNQUIST: What is a sufficient number?

MR. PAYTON: So that when we made our selection --

CHIEF JUSTICE REHNQUIST: I asked you, what is a sufficient number?

MR. PAYTON: Yes.

CHIEF JUSTICE REHNQUIST: An answer -- would you answer it?

Payton does answer and the Chief Justice sits back. Justice Scalia picks up the issue with which he began. If Michigan wanted more minorities it could become a school that was easier to get into.

JUSTICE SCALIA: You don't have to be the great college you are, you can be a lesser college if that value is important enough to you.

MR. PAYTON: I think that decision which would say that we have to choose, would be a Hobbesian choice here. Our premiere institutions of higher education, I'd say, are part of our crown jewels. We have great educational institutions in this country. The University of Michigan is one of them. I think we are the envy of the world. If we had to say, gee, our educators tell us that it is crucial that for the full education they want for those students, all of those students we needed for a student body, that the decision is, oh, gee, we want to you decide to either have a poor education for the essentially white students and/or you can say, change what you are as an institution. I think we get to decide what our mission is. I think the Constitution gives us some leeway in deciding what our mission is and how we define ourselves.

JUSTICE SCALIA: And anything that contradicts that mission is automatically a compelling State interest.

MR. PAYTON: No. I think what we're saying is we can achieve both of those things, because, in fact, achieving the educational benefits that come from a diverse student body can be achieved, given our mission, if we can go about selecting students in a way to achieve the critical mass of minority students that we need. We want both of those things. We think that –

The following exchange was said by Crawford to be patronizing in that Breyer was gentle and supportive and Payton is black. It is a characteristic of the exchanges that one can hope to perceive social dynamics that are not evident anywhere else in the life of the Court. In this case the characterization of Breyer as patronizing is a serious criticism. Intentions are also difficult to establish from the exchange without knowing more.

JUSTICE BREYER: Go ahead. Are you finished?

MR. PAYTON: Yes.

JUSTICE BREYER: I wanted to go back to Justice Kennedy's question. The point system here, does it meet the opinion of Justice Powell in *Bakke* when that was called for individualized

consideration? Now, the concern that it does not, is that you under this system would seem to have the possibility that two students -- one is a minority, African American, one is not, majority, and they seem academically approximately the same and now we give the black student 20 points and the white student, let's say, is from the poorest family around and is also a great athlete, and he just can't overcome that 20 points -- the best he can do is tie. And so that's the argument that this is not individualized consideration. And I want to be sure I know what your response is to that argument.

MR. PAYTON: I have two responses. The first is to say that it is individualized if that white student actually was socioeconomically disadvantaged, that could be taken into account.

JUSTICE BREYER: But remember he has that and gets 20 points for it.

MR. PAYTON: Yes.

JUSTICE BREYER: And he also is a great athlete and I've constructed this example to make it difficult for you, [laughter] and -- but I mean you see he can only get 20 points, no matter how poor he is. And no matter how great an athlete he is as well, and the -- let's say the black student who has neither ties him.

MR. PAYTON: Yes.

JUSTICE BREYER: But on individualized consideration, the black student might lose, if there were the individualized consideration.

MR. PAYTON: Well, he might --

JUSTICE BREYER: And that's -- and that's what you're giving him. Now what is the answer? I'm -- I'm trying to find your answer.

MR. PAYTON: The answer is we value both of those aspects of diversity. We want both of those represented in our student body, all right, if they tie, they will be judged exactly the same as far as how the selection index works. ...

At one point, Payton is allowed to continue for some time, uninterrupted.

MR. PAYTON: I guess I'm not sure what the more individualized assessment would be here. I'm not saying that obviously there are things that could be done differently. We've done things differently. The two schools do things quite differently. But I think we're both trying to achieve the critical mass, that I think there's no dispute at all from anyone that the critical mass is essential to get the educational benefits that we're talking about.

If this goal is a compelling interest, then critical mass is essential to its attainment, given the small pool size that we're talking about. Can it be crafted in another way? Obviously, from the amicus briefs, there are a lot of schools that do it in different ways. We're doing it in a very individualized way that in fact does allow students to compete. Every student is evaluated on the same criteria. You know, head to head. We do take race into account in the way that you've heard described. But I'm not sure that lacks the individuality that you would be striving for.

This is, you know, an enormously important case. When Justice Powell said in Bakke that it's not too much to say that the Nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples, I think that statement was absolutely correct then. I think it is, you know, it has never been truer than it is today. This is of enormous importance, not just to the University of Michigan, I'd say to all of higher education and

I think to our country as a whole to be able to do things that bring us together, that bring us understanding, that result in tolerance and, I'd say, make us the -- more -- closer to the day that we all look forward to when, in fact, we are beyond some of these problems that we've been discussing rather intensely here today.

Justice Thomas comments after a while. Here the only two persons of color in the piece have a chance to explore the meaning of diversity at a different level where they knowingly include aspects of cultural life more familiar to black Americans, like historically black colleges. It is in the context of this exchange that Payton concludes his presentation.

JUSTICE CLARENCE THOMAS: Mr. Payton, do you think that your admissions standards overall at least provide some head wind to the efforts that you're talking about?

MR. PAYTON: Yes, I do. I think they do in all sorts of ways. They are certainly producing black students, white students, Hispanic students, Native American students who go out into our communities and change their communities.

JUSTICE THOMAS: You may have misunderstood me. I mean the -- Ms. Mahoney said earlier that the problem of law school admissions, in response to Justice O'Connor, that it was for the elite schools, it was more a problem at the elite schools, when she was talking about Boalt Hall, for example, you meant -- you suggested or alluded to in your argument today that, you know, you don't want to choose between being an elite school and the whole diversity issue. It -- would it be easier to accomplish the latter if the former were adjusted, that is the overall admissions standard?

MR. PAYTON: I think that --

JUSTICE THOMAS: Now, I know you don't want to make the choice, but will you at least acknowledge that there is a tension?

MR. PAYTON: I think, you know, some of our other schools, the nonselective schools, actually some can end up with completely undiverse populations as well; that the fact that a school does not have selectivity doesn't mean that the community college, in fact, is diverse. So I don't think it necessarily follows at all, that if you lower your standards and distribute this all across the country, we will get these educational benefits, you know, throughout our educational system.

JUSTICE THOMAS: Now -- about 10 terms ago, we had the University of Mississippi higher ed. case in here --

MR. PAYTON: Yes.

JUSTICE THOMAS: -- and the argument was made that the historically -- the HBCs, the historically black colleges provided a different benefit to minorities. Would the same arguments with respect to diversity apply to those institutions?

MR. PAYTON: Yes. You mean do they benefit if they had a racially and ethnically diverse student body? I believe most every single one of them do have diverse student bodies. ...

Attorney Kolbo's remaining three minutes is again offered without interruption. It is the last thing the Court hears on the matter of racial preferences. It is pretty ponderous. Kolbo is clearly returning to some of his stock material. He may expect to be interrupted,

but he is not. I don't have evidence of when the light goes on but there is some indication that the attorney is racing the clock and his rhetoric begins to have a frantic more connected to the end of his time than to the give and take that is characteristic of the improvisational mode.

MR. KOLBO: With respect to the point system, Counsel has made it sound as if it's sort of a fortuity that the University of Michigan has an admissions system that ends up admitting -- admitting virtually all minority students. In fact, I want to talk a little bit about the record here. We put in the record the guidelines from the original system that was in place in 1995 and 1997. At the joint appendix, at page 80, it's made very clear that the guidelines were set in 1995, when Jennifer Gratz applied, to admit all qualified minority students. It's also undisputed in this record that the way the University got to the 20 points was to statistically design it based on the old model. So what they've done is they've taken the old guidelines that were set to admit all qualified minority students, statistically figured out how many points they needed to give -- to give to students under the new system to replicate the old system, and that's how we ended up with 20 points. So it -- it strikes me as disingenuous to suggest that it's simply an accident.

These policies have a purpose. They grant a preference for a purpose. And the new system does what the old system did -- did, which is to create a two-track system. It's not enough if you're Jennifer Gratz or Patrick Hamacher to be merely qualified to get admitted to the University. To be admissible is not simply enough because of their skin color. If however you're a member of one of the minority students and you meet those minimum qualifications, that's sufficient. If that's not a two-track system, I can't imagine what one -- what one would actually look like.

With respect to test scores, a question was made -- a question was asked about how long are these systems going to last. There's actually evidence, and this was not put in the -- in the record by the University, with respect to test scores and disparities, but there's -- there's also opposing opinion which has indicated that as long as we have these preferences, they create perverse incentives. We've cited the work of John McWhorter, for example, in our reply brief indicating that test scores to the extent that they're not narrowing, or to the extent that the gaps are increasing may, in fact, be to the fact -- due to the fact of these -- of these preferences. With respect to the Hobbesian choice that Mr. Payton has talked about, they have resolved a different Hobbesian choice. The University has decided that they are willing to lower their academic standards to get their critical mass. They've resolved that -- that Hobbesian choice that way. But they've resolved the other Hobbesian choice, how to get those objectives and stay selective, they've resolved that Hobbesian choice on the backs of the constitutional rights of individuals like Jennifer Gratz and Patrick Hamacher. They are the ones that are paying for the Hobbesian choice that the University has resolved with -- by the use of a two-track admission system. With respect to the concept of critical mass, all I have to say, if one can't ascertain from the way it's defined, meaningful means sufficient, sufficient means critical, critical means sufficient, that meets the definition, it seems to me, of an interest that's too amorphous, too ill-defined, too indefinite, just like the role model theory, just like a remedy for societal discrimination, too indefinite to support the use of a compelling -- to suit -- to use -- to be a basis for racial preferences.

CHIEF JUSTICE REHNQUIST: Thank you Mr. Kolbo. The case is submitted.

When oral argument is discussed by commentators in the moment from journalists to political scientists, it is often seen as a key to how the justices will decide.¹² This

¹² Lawrence Baum, *The Supreme Court*, Fourth Edition, DC: CQ Press, 1992 devotes considerable attention to the effectiveness of counsel in oral argument and their experience. The second Justice Harlan warned that "The first impressions that a judge gets of a case are very tenacious...and those impressions are

commentary is an excellent example of the kind of discussion that dominates constitutional interpretation. It is instrumental. Its focus is drawn to policy and outcome rather than the institutions, cultures or social practices that are central to the study of law.

By focusing on improvisation, I have tried to suggest qualities of interest in oral presentation beyond what it can indicate about how the case will turn out, beyond the instrumental and beyond policy. Here, matters of institutional form, the public engagement of intellectuals and the discursive flow of ideas are at the center of the stage. What they mean and their contribution is part of the authority of the Court and its contribution to constitutional interpretation. In this work I associate my interests with those of Barbara Perry who has paid close attention to the Supreme Court's image.¹³

actually gained from the oral argument." John Marshall Harlan, "What Part Does the Oral Argument Play in the Conduct of an Appeal?" *Cornell Law Quarterly* 41:6, 1955, cited in Brigham, *Cult*, p. 185.

¹³ *The Priestly Tribe: The Supreme Court's Image in the American Mind*, Westport: Praeger, 1999.

Appendix 1 IMPROVISATION

Improvisation in the theater is an old and loosely constituted tradition. It is a process of creating theater without a script. As Tom Soter says, in the way that we live life most of the time, by confronting what is put before us.

Today, improvisation or “improv” is a highly developed theatrical form associated with sketch comedy and actors workshops.¹⁴

It may be that in its nature those who engage in improv are sketchy about its past. Jennifer Kuhr gave me a copy of Keith Johnstone’s *Improv: Improvisation and the Theatre*. It’s a wonderful book on technique but it is hard to get much history out of it.¹⁵ Jen and others point to Commedia Dell’Arte as a precursor to the modern improvisational activity that seems to center around Second City and the Chicago Improv scene which has often taken off nationally on Saturday Night Live where the live sketch comedy has improvisational dimensions. But in this sketchy chronology there is a pretty big gap between the 1500’s and the Chicago that has sent stars to Saturday Night Live for the last 20 years.

My experience with improv goes back to The Committee in San Francisco which I attended from time to time in the early 1960s and The San Francisco Mime Troop which was an important part of the Bay Area counter culture around 1965.

I hadn’t paid much attention to improv until this year when I went semi-regularly to performances of Mission IMPROVable at UMass, worked with Ms. Kuhr on a thesis employing improv in school settings, and attended the class on improv comedy taught by Tom Soter in New York City.

I found the Soter class by going on the improv web site “YESand” which stands for the notion that in an improv company, actors will build on what other members of the troop say.¹⁶

¹⁴ Viola Spolin, *Improvisation for the Theater* (1999).

¹⁵ NY: Routledge, 1981.

¹⁶ www.YESand.com. There is an excellent bookstore attached to this site.

Appendix 2 PICTURES

Lee Bollinger



Barbara Grutter



Jennifer Gratz



Maureen Mahoney



Ted Olson



John Payton

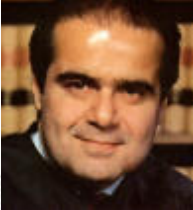


Kirk O. Kolbo

CJ Rehnquist



Antonin Scalia C. Thomas



Kennedy, O'Connor, Breyer



Stevens



Ruth Ginsburg



David Souter



Appendix 3 CRAWFORD COMMENTS

This is an example of Mr. Crawford's editorial comment on the website.

Mr. KOLBO: Mr. Chief Justice and may it please the Court: Barbara Grutter applied for admission to the University of Michigan Law School with a personal right guaranteed by the Constitution that she would not have her race counted against her. That race -- that the application would be considered free from the taint of racial discrimination. The law school intentionally disregarded that right by discriminating against her on the basis of race as it does each year in the case of thousands of individuals who apply for admission. The law school *defends its practice of race discrimination* as necessary to achieve a diverse student body. **The diversity that the law school is committed to ensuring in meaningful numbers or critical mass is of a narrow kind defined exclusively by race and ethnicity.** The constitutional promise of equality would not be necessary in a society composed of a single homogeneous mass.

** Without ever admitting that its use of race is "race discrimination."*

*** True, although this "narrow" and crucial commitment to racial diversity is defended by Michigan as serving a broad, viewpoint diversity.*

It is precisely because we are a nation teeming with different races and ethnicities -- one that is increasingly interracial, multiracial, that it is so crucial for our Government to honor its solemn obligation to treat all members of our society equally without preferring some individuals over others.

JUSTICE SANDRA DAY O'CONNOR: Well, of course, you -- I mean, a university or a law school is faced with a serious problem when it's one that gets thousands of applications for just a few slots. Where it has to be selective. And inherent in that setting is making choices about what students to admit. So you have an element here that suggests that there are many reasons why a particular student would be admitted or not. And a lot of factors go into it. So how do you single this out and how are we certain that there's an injury to your client that she wouldn't have experienced for other reasons?

Is O'Connor questioning whether the Michigan Law School discriminates against applicants based on their race? Or, more narrowly, is she questioning whether Barbara Grutter's rejection was because of her race?