Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?

Mary Kate Kearney
JUSTICE THOMAS IN GRUTTER V. BOLLINGER: CAN PASSION PLAY A ROLE IN A JURIST'S REASONING?

MARY KATE KEARNEY†

INTRODUCTION

Among the most widely anticipated decisions of the United States Supreme Court's 2002 Term were the Michigan affirmative action cases. The companion cases involved challenges to the University of Michigan's (the "University") use of race as a factor in admissions at the undergraduate and Law School levels. In Gratz v. Bollinger,1 the Court struck down the University's policy at the undergraduate level because "the University's policy, which automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, [was] not narrowly tailored to achieve [an] interest in educational diversity."2 In Grutter v. Bollinger,3 the Court upheld the University of Michigan Law School's (the "Law School") policy which allowed race to be used as a factor in admissions decisions.4

The Grutter case arose when the Law School rejected the application of Barbara Grutter, a white Michigan resident with an undergraduate grade point average of 3.8 and a LSAT score of 161.5 In a suit filed against the Law School, she claimed that her

---

1 Professor of Law, Widener University School of Law; B.A., Yale University; J.D., Notre Dame Law School; LLM., Harvard Law School. Randy Lee provided his usual thorough and incisive comments, and Deryck Henry and Robert Kearney offered helpful suggestions and critiques. Michele Roda provided superb research assistance, and Paula Heider and Kim Schrack gave valuable administrative assistance. Widener University School of Law supported the writing of this Article with a summer research grant.

2 Id. at 2427–28.
4 Id. at 2347.
5 Id. at 2332.
application was denied because the Law School made race a "'predominant' factor" in its decision and, in so doing, favored minority applicants with similar credentials. After a fifteen-day bench trial, the United States District Court for the Eastern District of Michigan determined that the Law School's use of race in its admissions decisions was unconstitutional. Using a strict scrutiny standard, the court held that the Law School did not have a compelling interest in a diverse student body, and even if it did, it "had not narrowly tailored its use of race to further that interest."

The United States Court of Appeals for the Sixth Circuit, sitting en banc, reversed the district court's decision. The court determined that the Supreme Court's decision in Regents of University of California v. Bakke established that a university's goal of diversity was a compelling state interest. Furthermore, the court held that the Law School's use of race in its admissions policy was narrowly tailored to achieve such an interest. The United States Supreme Court granted certiorari to resolve the issue of "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."

In a five to four decision, the Court determined that the policy did not violate the Equal Protection Clause of the Constitution. In reaching that conclusion, the Court found that the Law School used race in a narrowly tailored fashion in making admissions decisions and did so "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." In the majority opinion, written by Justice O'Connor, the Court distinguished the Law School's flexible admissions policy from an unconstitutional quota

---

6 Id. at 2332–33.
7 Id. at 2333, 2335.
8 Id. at 2335.
9 Id.
11 Grutter, 123 S. Ct. at 2335.
12 Id.
13 Id.
14 Id. at 2330–31, 2347. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
15 Grutter, 123 S. Ct. at 2347.
The Court noted that nothing prohibited the Law School from "consider[ing] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." Because the Law School's flexible admissions policy took into account many factors other than race, the Court found that the school's diversity goals were broader than race. Therefore, the Court concluded that "the Law School's race-conscious admissions program [did] not unduly harm non-minority applicants."

One of the four justices who did not sign the majority's opinion was Clarence Thomas, the lone African-American member of the Court. Justice Thomas wrote a separate opinion in which he concurred in part and dissented in part. His opinion attracted attention for two reasons: first, the belief that he has been the beneficiary of those same policies to which he objects, and second, the perception that he has not evaluated accurately his own life experiences which form the basis of his

---

16 Id. at 2342.
17 Id.; see Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315–17 (1978) (discussing how an applicant's ethnic background or race could be used as a "plus" factor so long as categories of applicants deemed to possess "certain desired qualifications [were not insulated] from competition with all other applicants").
18 Grutter, 123 S. Ct. at 2343–44. Besides the race of the applicant, the University of Michigan Law School's 1992 policy considered the following for admissions based on diversity: whether the applicant had lived or traveled abroad, whether the applicant was fluent in several languages, whether the student had an impressive record of community involvement or service, past employment success, and whether the applicant had to overcome diversity or hardships. The University of Michigan Law School, Report and Recommendation of the Admissions Committee (April 22, 1992), http://www.law.umich.edu/newsandinfo/lawsuit/admissionspolicy.pdf (last accessed Dec. 27, 2003). Applicants attempting to gain admission to the University of Michigan Law School had the opportunity to "highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School." Grutter, 123 S. Ct. at 2344. "The Law School's . . . admissions program consider[ed] race as one factor among many, in an effort to assemble a student body that [was] diverse in ways broader than race." Id. at 2345.
19 Grutter, 123 S. Ct. at 2346. The Court offered evidence showing that the non-minority applicant was not unduly harmed by the Law School's race-conscious admissions program. Justice O'Connor highlighted that Michigan frequently accepted non-minority applicants who possessed lower grades and test scores than under-represented minorities. Id. at 2344. The Court further determined that because the Law School considered such a multitude of diversity factors besides an applicant's race, non-minority applicants could benefit from this type of admissions program as well. Id.
20 See id. at 2350–65.
views about affirmative action.\textsuperscript{21}

This Article examines Justice Thomas's dissent and the criticisms of it. Part I of this Article examines the structure of Justice Thomas's opinion. Part II explores Justice Thomas's perspective on affirmative action and the validity of the criticisms of that perspective. The Article concludes that Justice Thomas's opinion resonates ultimately because he confronts his audience with his perspective about the reality of affirmative action policies.

I. THE STRUCTURE OF JUSTICE THOMAS'S OPINION

Justice Thomas's fifteen page opinion is divided into seven parts. The opening grabbed the reader's attention when Justice Thomas invoked the words of Frederick Douglass, the abolitionist, from a speech that Douglass gave entitled "What the Black Man Wants" in which he proclaimed: "All I ask is, give [the black man] a chance to stand on his own legs! Let him alone!... [Y]our interference is doing him positive injury.\textsuperscript{22} Justice Thomas immediately introduced his personal beliefs into the opinion when he stated that he shared Frederick Douglass's views about the ability of blacks to "achieve in every avenue of American life without the meddling of university administrators."\textsuperscript{23} He further explained that, while he was sympathetic to the idea of blacks succeeding in law school and

\textsuperscript{21} See Maureen Dowd, \textit{Could Thomas Be Right?}, N.Y. TIMES, June 25, 2003, at A25 ("It's impossible not to be disgusted at someone who could benefit so much from affirmative action and then pull up the ladder after himself.").

\textsuperscript{22} \textit{Grutter}, 123 S. Ct. at 2350 (Thomas, J., dissenting) (quoting What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)). See generally DeWayne Wickham, \textit{Thomas Distorts Douglass' Speech}, USA TODAY, June 30, 2003, http://www.usatoday.com/news/opinion/editorials/2003-06-30-opcom_x.htm (discussing the crucial language of Douglass' 138-year-old speech that Justice Thomas omitted and how his improper use of the speech was an "[unsuccessful] attempt to find support for his opposition to affirmative action"). The second ellipsis replaces Douglass's original words, words that help put what he said into proper context. Douglass's original speech included:

Let him alone. If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him along, don't disturb him! If you see him going into a work-shop, just let him alone,—your interference is doing him positive injury.

\textit{Id.}

\textsuperscript{23} \textit{Grutter}, 123 S. Ct. at 2350 (Thomas, J., dissenting).
elsewhere, the Constitution does not permit success to rest on a discriminatory admissions policy that favors black applicants over white ones.\textsuperscript{24} Finally, Justice Thomas concurred with the parts of the majority opinion, which stated that some uses of race in admissions were unconstitutional and held that affirmative action policies would no longer be needed in twenty-five years.\textsuperscript{25} He dissented from the parts of the majority opinion that upheld the Law School's use of race in the admissions process and, in his opinion, distorted the meaning of the Equal Protection Clause.\textsuperscript{26}

In Part I, Justice Thomas embarked on traditional legal analysis by examining the Court's treatment of racial classifications in past cases. He discussed the standard introduced in \emph{Korematsu v. United States}\textsuperscript{27} which justified the use of racial discrimination in the face of "'[p]ressing public necessity.'"\textsuperscript{28} That standard, which has evolved into the "'compelling state interest'" test,\textsuperscript{29} allows the government to discriminate based on race in two limited situations: for national security reasons\textsuperscript{30} and to address past discrimination created by the government.\textsuperscript{31} Justice Thomas distinguished these

\textsuperscript{24} \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{25} \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{26} Justice Thomas believed that the majority was not interpreting the Constitution when it chose to uphold Michigan's racial discrimination in violation of the Equal Protection Clause but was instead "responding to a faddish slogan of the cognoscenti." \textit{Id.} at 2350 (Thomas, J., dissenting).

\textsuperscript{27} 323 U.S. 214 (1944).

\textsuperscript{28} \textit{Grutter}, 123 S. Ct. at 2351 (Thomas, J., dissenting) (quoting \textit{Korematsu}, 323 U.S. at 216).

\textsuperscript{29} \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{30} \textit{Id.} (Thomas J., dissenting). In \textit{Korematsu}, the Court upheld the conviction of an American citizen of Japanese descent who chose to remain in a "'military area'" in violation of a civil exclusion order. \textit{Korematsu}, 323 U.S. at 215–16, 224. The Court reviewed the case under a strict scrutiny standard because it "curtail[ed] the civil rights of a single racial group." \textit{Id.} at 216. The Court stated that it was not "beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did." \textit{Id.} at 217–18. Military officials in Hawaii claimed that they were unable to separate the loyal from the disloyal members of the group and, therefore, felt the exclusion was necessary to protect our country at the time that American citizens of Japanese ancestry were being excluded from their homes. \textit{Id.} at 218. The Court agreed and stated that this type of exclusion should occur only under "circumstances of direst emergency and peril." \textit{Id.} at 219–20.

\textsuperscript{31} \textit{Grutter}, 123 S. Ct. at 2351 (Thomas, J., dissenting) (citing \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469 (1989)). In \textit{City of Richmond}, the city adopted a Minority Business Utilization Plan that required contractors who were awarded
situations from those in which the Court has declined to discriminate based on race, such as child custody determinations.\textsuperscript{32} He concluded that given the Constitution’s “abh[or]rence”\textsuperscript{33} of racial classifications, the Court has been justifiably reluctant to uphold them. The personal language used at the outset of the opinion resurfaced at the end of this section when Justice Thomas stated that the use of race to determine burdens or benefits “demeans us all.”\textsuperscript{34}

In Part II, Justice Thomas stated that he needed to first address the nature of the Law School’s interest in using race as part of its admissions policy before he could determine whether a compelling state interest existed. Justice Thomas questioned the Law School’s stated interest of seeking to gain “‘educational benefits that flow from student body diversity.’”\textsuperscript{35} He interpreted the diversity that the Law School spoke of to mean a concern for “‘aesthetic[s]’”\textsuperscript{36} or the look or composition of a law school class. From his perspective, those aesthetics allegedly yielded the educational benefits that the Law School sought, and those

construction contracts to subcontract a minimum of thirty percent of the dollar value of their contract to “ Minority Business Enterprises” (MBEs). \textit{City of Richmond}, 488 U.S. at 477. MBE’s were defined as businesses at least fifty-one percent controlled by certain minority groups. \textit{Id.} at 478. After a denial of a waiver and loss of its contract, the construction company challenged the plan as unconstitutional under the Fourteenth Amendment’s Equal Protection Clause. \textit{Id.} at 483. The Supreme Court upheld the Court of Appeals ruling that the plan was not constitutional based on compelling state interests because there was no evidence of past discrimination by the city. \textit{Id.} at 485–86. \textit{But see} Fullilove v. Klutznick, 448 U.S. 448, 477–78 (1980) (upholding the validity of minority business plans due to abundant evidence that these businesses had been “denied... participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination”).

\textsuperscript{32} \textit{Grutter}, 123 S. Ct. at 2351–52 (Thomas, J., dissenting) (citing \textit{Palmore v. Sidoti}, 466 U.S. 429, 433 (1984)). In \textit{Palmore}, the Court held that the current husband’s race could not be considered as a factor when determining whether to remove the child from her natural mother. \textit{Palmore}, 466 U.S. at 434. The Court also stated that “the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother. . . . The Constitution cannot control such prejudices but neither can it tolerate them.” \textit{Id.} at 433.

\textsuperscript{33} \textit{Grutter}, 123 S. Ct. at 2352 (Thomas, J., dissenting).

\textsuperscript{34} \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{35} \textit{Id.} (Thomas, J., dissenting) (quoting from the Brief for Respondents at 14, \textit{Grutter v. Bollinger}, 123 S. Ct. 2325 (2003) (No. 02-241)).

\textsuperscript{36} Justice Thomas believed that the University of Michigan Law School “want[ed] to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.” \textit{Id.} at 2352 n.3 (Thomas, J., dissenting).
educational benefits represented the alleged compelling state interest. Furthermore, according to Justice Thomas, the Law School's refusal to compromise its admissions standards by adopting a race-neutral admissions policy, which might reduce the overall academic quality of its classes, suggested that its interest was not "simply 'diversity.'" For him, the Law School's interest rested rather on "offering a marginally superior education while maintaining an elite institution." This interest did not fall within the pressing public necessity standard which gave rise to a compelling state interest.

Part III of Justice Thomas's dissent undercut the majority's conclusion that the Law School had a "compelling interest in securing the educational benefits of a diverse student body." He questioned an approach that broadly defined a compelling interest to include the use of race to determine the composition of a law school class. For Justice Thomas, "Michigan ha[d] no compelling interest in having a law school at all, much less an elite one." According to Justice Thomas, the only recognized interests of a state law school were the education of its citizens and the preparation of lawyers to serve the state. Justice Thomas noted that Michigan, in contrast to other state law schools, did little to serve the state because the vast majority of its graduates leave the state to practice elsewhere. Therefore,

37 In the words of Justice Thomas, the school was only "seek[ing] to improve marginally the education it offered without sacrificing too much of its exclusivity and elite status." Id. at 2353 (Thomas, J., dissenting).
38 Id. (Thomas, J., dissenting).
39 See id. at 2341 (Thomas, J., dissenting).
40 See id. at 2354 (Thomas, J., dissenting).
41 Id. (Thomas, J., dissenting). Justice Thomas believed that to determine whether certain activities fall within the "pressing public necessity" standard, it could be asked whether "all [s]tates feel compelled to engage in that activity." Id. (Thomas, J., dissenting). Justice Thomas continued by stating that evidence of States engaging in that activity is also not demonstrative of a pressing public necessity. Id. (Thomas, J., dissenting). However, the mere fact that some states reject particular activities—in this case, the absence of public, American Bar Association accredited law schools—creates a presumption that the activity itself is not a compelling state interest. For example, Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island do not operate ABA accredited schools. Id. (Thomas, J., dissenting). Justice Thomas concluded that this rejection by some states offers "further evidence that Michigan's maintenance of the Law School does not constitute a compelling state interest." Id. (Thomas, J., dissenting).
42 Id. at 2355 (Thomas, J., dissenting).
43 Justice Thomas believed that Michigan's decision to maintain an elite institution did not "advance the welfare of the people of Michigan or any cognizable
the state's interest in developing an elite law school does not rise to the level of a compelling interest under the Equal Protection Clause.

In Part IV, Justice Thomas attacked the majority's deference to the Law School's determination of what constituted a compelling state interest. Turning to Supreme Court precedent, he traced the Court's history of affording academic institutions more freedom under the First Amendment than it would afford other institutions. The result was virtually a double standard for Equal Protection purposes: the Court's willingness to adopt the Law School's standard for what constituted a compelling state interest for using race in admissions decisions would not pass constitutional muster in other situations.

Justice Thomas next examined the effects of the Law School's determination to maintain an elite institution did not rise to the standard of a compelling state interest when the State of Michigan was not benefiting from the University. The Law School only served as a "way station" and training ground for the rest of the country's lawyers.

44 See id. at 2356-57 (Thomas, J., dissenting).

45 "The constitutionalization of 'academic freedom' began with the concurring opinion of Justice Frankfurter in Sweezy v. New Hampshire." Id. (Thomas, J., dissenting) (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)). Sweezy, who was a Marxist economist, was under investigation by the Attorney General for being a subversive. The prosecution was seeking the contents of a lecture that Sweezy had given at the University of New Hampshire, but the Court held that it was a violation of due process. Sweezy, 354 U.S. at 254-55. Justice Frankfurter "reason[ed] that the First Amendment created a right of academic freedom that prohibited the investigation." Grutter, 123 S. Ct. at 2357 (Thomas, J., dissenting) (citing Sweezy, 354 U.S. at 256-67). Frankfurter went even further and quoted a scholar who noted,

[I]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there 'prevail the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study.

Sweezy, 354 U.S. at 263 (citation omitted).
School's admissions policy. He explained that there was conflicting social science research about whether black students learned better in heterogeneous settings, such as the one that the Law School sought to create, or homogeneous environments, such as historically black colleges. If the latter were true, then under the majority's rationale, a school could assert a compelling interest in the educational benefits of homogeneity to justify racial segregation in schools.

In that vein, Justice Thomas compared the majority opinion to the Court's decision in United States v. Virginia (VMI). In VMI, the Court used an intermediate standard of scrutiny to determine if an all-male military institution had to open its doors to women. Concluding that changes to the character of the education offered would be required by the inclusion of women, the Court did not defer to VMI's claim that these changes would be too significant. Justice Thomas pointed out

---

46 Grutter, 123 S. Ct. at 2358 (Thomas, J., dissenting) (showing concern that this Court's deference to the school's racial experimentation would have "serious collateral consequences").

47 Id. (Thomas, J., dissenting) (citing Lamont Flowers & Ernest Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J.C. & STUDENT DEV. 669, 674 (1999)). Some conclude that black students attending historically black colleges (HBCs) experience superior cognitive development. See id.; see also Walter R. Allen, The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 HARV. EDUC. REV. 26, 35 (1992) (reaching the conclusion that African American students who attended HBCs reported higher academic achievements than African American students who attended a predominantly white colleges).

48 "The majority grant[ed] deference to the Law School's 'assessment that diversity would, in fact, yield educational benefits.'" Grutter, 123 S. Ct. at 2358 (Thomas, J., dissenting). Justice Thomas believed that under that umbrella, it was only fair that if a HBC that chose to make an assessment that racial homogeneity would yield educational benefits should be afforded the same deference. Therefore, under the majority's view of the Equal Protection Clause, an HBC would be permitted to reject white applicants in order to maintain its racial homogeneity. Id. (Thomas, J., dissenting). This was one of the "serious collateral consequences" that Justice Thomas believed would result from the Court's deference to the law school's racial experimentation. He strongly believed that the majority opinion contained a "seed of a new constitutional justification for a concept [he] thought long and rightly rejected—racial segregation." Id. (Thomas, J., dissenting).


50 Grutter, 123 S.Ct. at 2359 (Thomas, J., dissenting) (posing that cases involving sex discrimination were subjected to intermediate, rather than strict, scrutiny).

51 The Court decided that any changes that would result from allowing women to be admitted would be "manageable." VMI, 518 U.S. at 551 n.19.
that the Court was unwilling to defer to the school’s interests when the standard of review was lower, and it would have been easier to do so.\textsuperscript{52} He concluded that this was the result of a double standard.\textsuperscript{53}

Finally, in this section, Justice Thomas compared the experiences of California state law schools to those of Michigan. He stated that an elite California law school, such as Boalt Hall, which eliminated race as a factor in admissions decisions, has continued to admit minorities at the same or even greater rate than it did when race was a factor in the decision.\textsuperscript{54}

In Part V, Justice Thomas began to move away from the legal analysis of the earlier sections of his opinion as he examined the admissions process of elite universities and law schools.\textsuperscript{55} He acknowledged that admissions to those schools was not based purely on merit and noted, as an example, the use of “‘legacy’ preferences” which favor the children of alumni.\textsuperscript{56} Although he might disapprove of the use of these preferences, he distinguished them from the use of racial preferences because only the latter are prohibited by the Equal Protection Clause.\textsuperscript{57} He noted the problems with a selective admissions process that “has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators.”\textsuperscript{58} Since

\textsuperscript{52} Under an intermediate standard of scrutiny, greater flexibility was permissibly granted to VMI’s educational policies. However, the Law School, under a standard of strict scrutiny, received more deference than VMI. \textit{Grutter}, 123 S. Ct. at 2359 (Thomas, J., dissenting).

\textsuperscript{53} “Apparently where the status quo being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.” \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{54} Before the State of California was barred from “grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education,” CAL. CONST. art. I, § 31(a), Boalt Hall enrolled 20 blacks and 28 Hispanics in its 1996 entering class. In 2002, absent any racial discrimination in the admissions process, Boalt’s entering class was comprised of 14 blacks and 36 Hispanics. Currently, the enrollment of underrepresented minority students now exceeds the levels in 1996, proving that institutions that have a reputation for excellence can maintain that sense of mission without needing to resort to racial discrimination. \textit{Grutter}, 123 S. Ct. at 2359 (Thomas, J., dissenting) (citing University of California Law and Medical School Enrollments, http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html (last visited Nov 3, 2003)).

\textsuperscript{55} \textit{See Grutter}, 123 S. Ct. at 2359 (Thomas, J., dissenting).

\textsuperscript{56} \textit{Id.} (Thomas, J., dissenting).

\textsuperscript{57} \textit{See U.S. CONST.} amend. XIV, § 1.

\textsuperscript{58} \textit{Grutter}, 123 S. Ct. at 2360 (Thomas, J., dissenting). Justice Thomas
Michigan chose to use the LSAT as part of its merit-based admissions process, the Law School must live with that choice. It cannot have a double standard for the LSAT scores of white and black applicants.59

Justice Thomas moved to a more personal critique of the majority's analysis in Part VI.60 In strong language, he took issue with the majority's acceptance of the Law School's position that its admissions policy ultimately benefited the minority students who are admitted. He offered two important criticisms of the Law School's affirmative action policy. First, Justice Thomas maintained that such a policy hurts unqualified students because they were overmatched and, therefore, destined to fail.61 Second, he argued the policy equally tainted qualified minority students because others would assume that they were not at the Law School on the basis of their own merit.62 Justice Thomas returned to precedent at the end of this compared the Law School's argument that it would have "too many" whites if it could not discriminate in its admissions to the infamous arguments of Columbia and Harvard that they would have had "too many" Jews. Id. (Thomas, J., dissenting). In an attempt to lower the number of Jewish students admitted to Columbia, the school employed certain intelligence tests with full knowledge that the Jewish applicants, who were predominantly immigrants, would score much worse. As a result, Columbia could claim that

\[
\text{[they] ha[d] not eliminated boys because they were Jews and [did] not propose to do so. [They] ha[d] honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turn[ed] out that a good many of the low grade men [were] New York City Jews.}
\]

Id. (Thomas, J., dissenting) (quoting Letter from Herbert E. Hawkes, Dean of Columbia College, to E.B. Wilson, June 16, 1922, reprinted in QUALIFIED STUDENT 160–61 (sixth alteration in original)).59 The University of Michigan Law School is permitted to continue to utilize the LSAT and other merit-based standards however it likes. However, "[w]hat the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination." Grutter, 123 S. Ct. at 2361 (Thomas, J., dissenting).

60 See infra text accompanying notes 92–99 (providing further discussion of Justice Thomas's personal critique).

61 Justice Thomas believed that the Law School "tantalize[d] unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers," Grutter, 123 S. Ct. at 2362 (Thomas, J., dissenting), and that these students took the bait but would later find that they could not succeed in the "cauldron of competition." Id. (Thomas, J., dissenting).

62 Each year the Law School admitted a small number of blacks who would be admitted regardless of racial discrimination. However, the majority of blacks were admitted because of discrimination and therefore all were "tarred as undeserving." Id. (Thomas, J., dissenting). Blacks face the question of whether their skin color played a role in their advancement in academia, industry, and the highest places of
section when he reminded his audience that the Court refused to use race to remedy societal discrimination in other contexts.\(^6\)

Finally, Justice Thomas concluded by noting the majority’s points with which he was in agreement and then explained where he departed from those points. First, he stated that he agreed with the majority that the issue of preferences among minority groups was not an issue in this case.\(^6\) Second, he agreed with the majority’s statement that the Law School’s admissions policy would not be necessary in twenty-five years. He departed, however, from the majority because he did not believe that it was necessary to wait that long for the Law School’s admissions policy to be unconstitutional. From his perspective, it was unconstitutional now.\(^6\)

Justice Thomas closed as he began, with a reference to Frederick Douglass’s exhortation to “[d]o nothing with us!”\(^6\) For Justice Thomas, the majority’s decision meant that Douglass’s request must wait for at least another twenty-five years.

II. JUSTICE THOMAS’S PERSPECTIVE

Justice Thomas’s dissent has received widespread attention and criticism.\(^6\) Commentators have questioned his opposition to government. \(\text{Id. (Thomas, J., dissenting).}\) Justice Thomas believed that “[t]he question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.” \(\text{Id. (Thomas, J., dissenting).}\)

\(^6\) See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–84 (1986) (plurality opinion) (refusing to allow the school board to extend preferential protection against layoffs to some of its employees based on their race or origin in an attempt to remedy societal discrimination); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that the Minority Business Utilization Plan requiring primary contractors with city contracts to subcontract at least 30% of contracts to Minority Business Enterprises was unconstitutional because there was no evidence of past discrimination by the city and the plan was not narrowly tailored to achieve a remedial purpose).

\(^6\) Grutter, 123 S. Ct. at 2363 (Thomas, J., dissenting) (observing that the Law School maintains that it does not engage in such practices and the petitioner never alleged that such practices occur).

\(^6\) Id. at 2364 (Thomas, J., dissenting).

\(^6\) Id. at 2365 (Thomas, J., dissenting). Specifically, Justice Thomas stated, “It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to '[d]o nothing with us!' and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principal of equality vindicated.” \(\text{Id. (Thomas, J., dissenting).}\)

\(^6\) See generally Joel McNally, Affirming Affirmative Action, CAP. TIMES, July 5,
affirmative action on different grounds. Many of those critics assume that he has been the beneficiary of affirmative action policies, and they are offended that he is opposing those very policies that they believe have led him to his current position on the Supreme Court.\(^6\) In their estimation, Justice Thomas does not have the moral authority to make the case against affirmative action because he “is himself one of the most notorious affirmative action hires in history.”\(^6^9\)

The problems with these criticisms are twofold. First, they assume without proof that Justice Thomas’s achievements are related to the color of his skin and not to his abilities. Second, they validate one of the concerns that he expressed in his opinion: that affirmative action policies lead people to believe that minorities who reach high levels cannot possibly be there on the basis of merit.\(^7^0\)

Another observation about Justice Thomas’s opinion relates to its tone and rhetoric. Justice Thomas criticized the Law School’s affirmative action policies forcefully, and some of those criticisms appeared to be infused by personal experiences.

Justice Thomas is certainly not the first Justice to inject
passion and a personal element into an opinion.\textsuperscript{71} In his famous lecture to honor Judge Cardozo, entitled \textit{Reason, Passion, and "The Progress of the Law"}, Justice William Brennan stated that the "internal dialogue of reason and passion... does not taint the judicial process, but is in fact central to its vitality."\textsuperscript{72} Justice Brennan further complimented Judge Cardozo for "awaken[ing] America to the human reality of the judicial process"\textsuperscript{73} and for recognizing that "judges... are flesh-and-blood human beings, not demigods to whom objective truth has been revealed."\textsuperscript{74} There is a role for judicial "passion"\textsuperscript{75} in opinion writing. The issue is what kind of balance should be struck between reason and passion.\textsuperscript{76}

It may be argued that the use of rhetoric, emotion, and life experiences is more appropriate in a dissenting opinion. In that situation, a Justice may feel less constrained by the conventions of appellate opinion writing and, therefore, freer to express his

\textsuperscript{71} See Laura Krugman Ray, \textit{Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions}, 59 WASH. & LEE L. REV. 193 (2002). Ray's article examines the styles of writing of Supreme Court Justices and how judicial personality asserts itself when Justices draw not only upon their intellect but also upon emotion and experience as well when shaping their opinions. \textit{Id.} at 195; see also Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (claiming that he was a more qualified reader of legislative history due to his previous work). Chief Justice Rehnquist, in a recent case involving the Family Medical Leave Act, wrote with heartfelt sensitivity about the burdens that women face in the workplace. See Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1982–83 (2003); see also Linda Greenhouse, \textit{Evolving Opinions: Heartfelt Words by the Rehnquist Court}, N.Y. TIMES, July 6, 2003, § 4, at 3 (discussing the Chief Justice's majority opinion).


\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 5; see also Patricia M. Wald, \textit{Disembodied Voices—An Appellate Judge's Response}, 66 TEX. L. REV. 623, 627 (1988) ("[T]here have been many perfectly pitched human voices over the years rising from some of our greatest appellate judges... ").

\textsuperscript{75} Brennan, \textit{supra} note 72, at 9.

\textsuperscript{76} In a lecture honoring Justice Cardozo, Justice Brennan discussed how Cardozo attacked the myths that "judges were oracles of pure reason," instead asking the public to "consider the role that human experience, emotion, and passion play in the judicial process." \textit{Id.} at 5. Justice Brennan argued that the "interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality." \textit{Id.} at 3. Brennan defined passion as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason." \textit{Id.} at 9.
own beliefs. Moreover, a dissenting opinion does not have the same precedential value as a majority opinion, so a Justice may be writing it for different reasons. For instance, he may want to point out deficiencies in the majority's position or attract the attention and sympathies of his reader. In fact, the author of a dissenting opinion may not even attempt to offset emotion with reason. In response, however, perhaps it should not matter whether the opinion is a majority opinion as opposed to a dissenting one. A judge's reliance on emotional appeal, personal beliefs, and life experiences, at least in part, may be equally appropriate in a majority or a dissenting opinion.

One well-known example of an emotional opinion is Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services.* In *DeShaney,* the majority of the Supreme Court determined that the State did not have an affirmative obligation under the Due Process Clause of the Fourteenth Amendment to protect a child from his father's abuse even though the State was aware of the father's conduct, had held itself out as an entity that would protect children, and had numerous opportunities to remove the child from the father's custody. The case arose when the State left four-year-old Joshua DeShaney in his father's custody despite its awareness of ongoing abuse in the home. After the father beat Joshua into a coma, Joshua and his mother, who lived out of state, sued the State under 42 U.S.C. § 1983 arguing that the State had deprived Joshua of his liberty interests by failing to protect him from his father's known violence.

---

77 See Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent,* 61 TEMP. L. REV. 307, 346 (1988) ("A justice writing in dissent has the license to speak with a more distinctive voice than the author of a majority opinion."); see also HOLMES-LASKI LETTERS 68 (Mark DeWolfe Howe ed., 1953) (referring to the writing of dissents as a "fine sport [because] one is freer and more personal than when one is speaking for others as well as for oneself"); Susan K. Rushing, *Is Judicial Humor Judicious?* 1 SCRIBES J. LEGAL WRITING 125, 139 (1990) (alleging that judges writing dissents have a freer hand than those who write majority opinions).
79 Id. at 201.
80 Id. at 191.
81 42 U.S.C. § 1983 provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be
Both Justices Brennan and Blackmun authored dissents to Justice Rehnquist's majority opinion. Justice Brennan disputed the majority's narrow reading of the Due Process Clause and offered an interpretation that would have obligated the State to aid the child based on its many actions toward Joshua.\(^\text{82}\) In a tightly reasoned opinion, Justice Brennan challenged Justice Rehnquist's interpretation of relevant precedent and demonstrated that the State's responsibility toward Joshua rested on the many affirmative steps it took to separate Joshua from other sources of aid.\(^\text{83}\)

Justice Blackmun took a different approach in his dissent. He attacked his brethren for turning away from the human suffering endured by Joshua DeShaney. In harsh language, he criticized the majority opinion for "retreat[ing] into a sterile formalism"\(^\text{84}\) and ignoring the human elements of the case. According to Justice Blackmun, the majority's narrow reading of the Due Process Clause, in effect, adopted the same passivity that the State engaged in when it treated Joshua. Justice Blackmun's interpretation was consistent with Justice Brennan's reading of the Due Process Clause because it "comport[ed] with dictates of fundamental justice and recognize[d] that compassion need not be exiled from the province of judging."\(^\text{85}\) He began the final paragraph of his dissent with the exhortation, "Poor Joshua!"\(^\text{86}\) and concluded that the Court had let Joshua down by failing to provide him

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .


\(^\text{82}\) See DeShaney, 489 U.S. at 205 (Brennan, J., dissenting). Brennan chose to "begin from the opposite direction." Id. He detailed the ways in which the State had separated Joshua from other sources of aid, thus creating an obligation to care for him. Id. at 208. The State's child welfare system "invite[d]—indeed, direct[ed]—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse." Id. The State's reporting system directed private citizens, police, and medical personnel to report suspicions of child abuse to designated county agencies. Id. Reporting discharged those individuals of responsibility and the agency intervened if necessary. Id. at 208, 210. See generally Mary Kate Kearney, DeShaney's Legacy in Foster Care and Public School Settings, 41 WASHBURN L.J. 275, 280 (2002) (discussing the affirmative steps taken by the State to separate Joshua from other possible sources of aid).

\(^\text{83}\) See DeShaney, 489 U.S. at 207, 210 (Brennan, J., dissenting).

\(^\text{84}\) Id. at 212 (Blackmun, J., dissenting).

\(^\text{85}\) Id. at 213 (Blackmun, J., dissenting).

\(^\text{86}\) Id. (Blackmun, J., dissenting).
with a remedy.

Some commentators have found Justice Blackmun's opinion to represent an excess of emotion and to favor passion to the exclusion of reason. The emotional pitch, however, may be quite calculated for several different reasons. First, Justice Blackmun may have believed that it was not necessary to engage in traditional legal analysis because Justice Brennan had done so thoroughly in his dissenting opinion. Justice Brennan's careful critique of Justice Rehnquist's interpretation of judicial precedent and the Due Process Clause might have freed Justice Blackmun to use his dissent for other purposes.

Furthermore, Justice Blackmun may have sought to capture his audience's attention with a less traditional opinion. His fellow Justices, as part of his audience, could hardly ignore his harsh criticisms of the impact of their decision. Moreover, his sympathetic statements about Joshua DeShaney's mistreatment at the hands of the State and the Court would likely resonate with the other part of his audience, the general public, suggesting that the Court is more about politics than law.

Finally, Justice Blackmun might have believed that the nature of the case and the insensitivity of the majority opinion called for a strong, moral response of outrage rather than a more cautious, diplomatically worded legal opinion. His intention may have

87 See, e.g., Ray, supra note 71, at 230–31 (attempting to put a human face on Joshua DeShaney's suffering, Justice Blackmun failed to use legal argument to support his point, but "illustrated it with a bluntness that makes the reader uncomfortably aware of its obvious pitfall, the overwhelming of reason by understandable but undisciplined sympathy"). Authors have said that his "passionate dissent... invites but does not develop." Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 Harv. L. Rev. 1359, 1363 (1992). Others believe that the dissenters in DeShaney were "more willing to describe the violence in vivid terms and more willing to draw from emotions and passions." Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 Vand. L. Rev. 1665, 1675 (1990).

88 See DeShaney, 489 U.S. at 212 (Blackmun, J., dissenting) ("Today, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy'.").


90 Another example of the use of personal experiences in an opinion is Justice Blackmun's dissent in Planned Parenthood v. Casey, 505 U.S. 833, 922-43 (1992) (Blackmun, J. dissenting). At the end of his dissent, Justice Blackmun stated, "I am 83 years old [and] cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us
been to give a voice to someone who no longer could speak for himself.  

In contrast, Justice Thomas's dissent in *Grutter* balanced reason and passion. Justice Thomas led off with the stirring rhetoric from Frederick Douglass's speech and followed it with a personal statement of his own viewpoint: "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators." From there, however, he moved into a constitutional analysis of the ways in which the Law School's admissions policy promoted racial discrimination. In a discussion spanning twenty pages, Justice Thomas set forth his reasons for believing that the Equal Protection Clause did not support the Law School's preferential admissions policy toward minorities.

In the latter part of his dissent, Justice Thomas referenced a selection of facts that differed from the selection in the majority's opinion when he challenged the majority's assumption that the Law School's affirmative action policy necessarily benefited those admitted under it. He again employed the personal pronoun "I" and used scathing rhetoric to decry the effects of those policies on students with lesser qualifications:

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the

today. That, I regret, may be exactly where the choice between the two worlds will be made." *Id.* at 943 (Blackmun, J., dissenting).

91 Justice Blackmun, in an impassioned dissent, exclaimed, "Poor Joshua!" *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting). "Blackmun said it was a sad commentary upon American life, and constitutional principles... that this child... is now assigned to live out the remainder of his life profoundly retarded." Al Kamen, *State Absolved in Rights Case Over Failure To Protect Child*, WASH. POST, Feb. 23, 1989, at A6 (quoting *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting)). Brennan and Blackmun argued passionately and went to "pains to point out how many times hospital, police and social workers could see Joshua's many bruises and dangerous home environment—and... they took no action." *Cold Comfort and a Beaten Child*, N.Y. TIMES, Feb. 26, 1989, at E22.


93 See *supra* notes 24–26 and accompanying text. Stanley Fish took issue with those who read Justice Thomas's opinion as a "personal expression of anger at having been the beneficiary of a policy that retroactively casts a shadow over his achievements." Stanley Fish, *One Man's Opinion*, N.Y. TIMES, June 30, 2003, at A21. Fish argued the opposite was true, that "the opinion [was] a repudiation of the personal in favor of the principles of justice as Justice Thomas [understood] them." *Id.* Justice Thomas found that the Equal Protection Clause forbids discrimination on the basis of race, whether or not educational benefits resulted. *Id.*

94 *Grutter*, 123 S. Ct. at 2361 (Thomas, J., dissenting).
opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.... And the aestheticists will never address the real problems facing 'underrepresented minorities,' instead continuing their social experiments on other people's children.\textsuperscript{95} In strong language, he challenged the majority's position that affirmative action helps and does not hurt its recipients.

Justice Thomas expanded and personalized this critique of affirmative action when he examined its effects on the hiring and promotion of blacks in society.\textsuperscript{96} He explained how affirmative action policies impose "stigmas" not just on black law students but also on all minorities who ascend to prominent positions.\textsuperscript{97} Because the policies do not distinguish between minorities who benefited from affirmative action and those who did not, the perception exists that any minority in a high-level position is there based on the color of his or her skin. In the same way that all black students at the University of Michigan's Law School are "tarred as undeserving" because of the school's affirmative action policies, individuals, such as Justice Thomas, who have ascended to prominent positions, are similarly regarded.\textsuperscript{98}

A discussion of Justice Thomas's opinion, however, should not focus on whether he has a right to express his own views on affirmative action—he has only followed suit and done what other Supreme Court Justices have done before him. The issue, instead, is whether his perspective on affirmative action and his arguments against the Law School's admissions policy are accurate. The ultimate criticism of Justice Thomas's critique of affirmative action, then, may not rest so much on his reliance on personal experiences that have shaped his viewpoint. Instead, a more apt criticism may be that he is not the best evaluator of those life experiences. In other words, critics do not so much question his right to utilize his experiences in his judging as they do the accuracy of his perceptions of those experiences.\textsuperscript{99}

\textsuperscript{95} Id. at 2362 (Thomas, J., dissenting).

\textsuperscript{96} See id. (Thomas, J., dissenting) ("When blacks take positions in the highest places of government, industry or academia, it is an open question today whether their skin color played a part in their advancement.").

\textsuperscript{97} See supra note 62.

\textsuperscript{98} See Grutter, 123 S. Ct. at 2362 (Thomas, J., dissenting); see also supra note 62.

\textsuperscript{99} Jane Mayer and Jill Abramson, after conducting hundreds of interviews over a span of two years, brought to light the idea that Justice Thomas's perceptions of
As noted earlier, Justice Thomas's critics maintain that his position is hypocritical given the fact that he is an affirmative action hire and "one of the most mediocre Supreme Court appointees of all time." Whether Justice Thomas has benefited from the kind of policies that he now seeks to eliminate, however, is not the issue when evaluating the contribution that his opinion makes to the understanding of the effect of affirmative action policies. At issue is whether his own perspective, developed through personal experiences with affirmative action, strengthens his voice in the debate. I believe that it does.

Justice Thomas is the only black member of the Supreme Court and therefore has a unique vantage point on affirmative action. He is the most likely member of the Court to have had direct experience with racial discrimination. Those experiences have informed and shaped his beliefs, and he gave voice to them in *Grutter*. These subjective beliefs are not necessarily inaccurate or wrong—instead, they enlightened his perspective. His voice resonated powerfully because it is the product of deeply held convictions. When he wrote passionately about the Law School's affirmative action policy, he compelled the reader to listen to that voice.101

The fact that his perspective may be accurate leaves many of his readers uncomfortable. Justice Thomas opposed the Law School's affirmative action policy because he did not believe that

his own life experiences may have been distorted in an effort to further himself. *Jane Mayer & Jill Abramson, Strange Justice: The Selling of Clarence Thomas* (1994). The authors interviewed W. W. Law, a civil rights activist, who claimed that "'Thomas's was a select, pampered development that wasn't the experience of the vast majority of blacks... [h]e was in a very elite and ideal situation.'" *Id.* at 41 (quoting W. W. Law). Mayer and Abramson later questioned Thomas's "characterizations of having 'fended for himself... without government assistance' at the time when the federal government began to implement "policies without which most 'black people might still be riding in the back of the bus.'" *Id.* at 42 (quoting William E. Nelson). A family friend of Thomas's grandfather later was quoted as saying, "'[Thomas] likes to talk so much about pulling yourself up by your bootstraps, But how are you going to do that if you've got no boots? He forgets to say that first someone had to give him boots... ." *Id.* at 40 (quoting Sam Williams).

100 McCarthy, *supra* note 67, at A42; *see also* Dowd, *supra* note 67, at B7 (claiming that the "dissent is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received" and "[i]t drives him crazy that people think he is where he is because of his race, but he is where he is because of his race").

101 *See supra* note 91 and accompanying text.
it was constitutional and believed that it harmed, rather than helped, its putative beneficiaries.\textsuperscript{102} In making his argument, he cut through the political niceties of a discussion about affirmative action and exposed the flaws that he saw inherent within it. For example, if by admitting students with lower credentials, particularly LSATs, the school is setting minority students up for failure, then it is undermining the very goals it seeks to achieve through affirmative action.\textsuperscript{103} Additionally, the school's affirmative action policy could be seen as tarnishing the accomplishments of minorities who would have succeeded without it. Justice Thomas challenged us to focus on the reality of affirmative action rather than its lofty and somewhat amorphous goals. We should accept this challenge and, in doing so, decide whether these goals are best advanced by policies such as the one in place at the University of Michigan Law School.

Like Justice Blackmun in \textit{DeShaney}, Justice Thomas stripped away the formalism that can distance judges, particularly Supreme Court justices, from the reality of the situation at hand. Both men forced their readers to confront the hard truths of uncomfortable situations and to respond to them. In so doing, they moved the language of judging from the detached to the personal and the essence of judging from abstract legal discourse to a search for the truth. The passion in Justice Thomas's opinion infused his reasoning with a power that is difficult to ignore.

\textsuperscript{102} See \textit{supra} notes 61–62 and accompanying text.

\textsuperscript{103} Grutter, 123 S. Ct. at 2362 (Thomas, J., dissenting).