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## Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in *Grutter* and *Gratz* and Beyond Celebrating the Jurisprudence of Justice Ruth Bader Ginsburg

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# Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond Celebrating the Jurisprudence of Justice Ruth Bader Ginsburg

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**RETURNING THE LANGUAGE  
OF FAIRNESS TO EQUAL PROTECTION:  
JUSTICE RUTH BADER GINSBURG'S  
AFFIRMATIVE ACTION JURISPRUDENCE IN  
*GRUTTER* AND *GRATZ* AND BEYOND**

*Shira Galinsky\**

I. INTRODUCTION

Like the opinions in many other recent equal protection cases, the Supreme Court's opinions in *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*,<sup>2</sup> the cases decided in June 2003 that challenged the University of Michigan's affirmative action plans, are disturbing in their mechanical, technical tone and seeming distance from real life racial inequality. The language of equal protection analysis has become regimented, fixed, and increasingly removed from the problems of ignorance, intolerance, and outright racism that continue to plague American society. Against this backdrop, a minority of Supreme Court justices have written about the need to depart from the strict formalism of equal protection review and the need to confront societal discrimination openly.<sup>3</sup> Justice Ruth Bader

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\* Columbia University, B.A., 2000, CUNY Law School, Class of 2005. Many thanks to Professors Frank Deale and Ruthann Robson for their feedback and comments. Special thanks to the staff and editorial board of the New York City Law Review.

<sup>1</sup> 539 U.S. 306 (2003).

<sup>2</sup> 539 U.S. 244 (2003).

<sup>3</sup> Justice Marshall protested the oversimplification of equal protection review in his dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Justice Stevens has written in *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring):

There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

*Id.*

In *Craig v. Boren*, Justice Rehnquist opposed the subjective element of the tiers of review, asking, "how is this Court to divine what objectives are important? How is it to

Ginsburg is notable among this group for her open and transparent discussion of societal injustice and racism, her encouragement of similar openness and transparency in affirmative action programs, and her concrete suggestions for developing a more flexible standard in reviewing equal protection cases. Ginsburg's separate opinions in *Grutter* and *Gratz* add a thoughtful articulation of the anti-formalism position to the affirmative action debate by laying a foundation in equality and human rights doctrine and advocating for a less formalistic standard of review in these cases.

## II. BEFORE *GRUTTER* AND *GRATZ*: THE SUPREME COURT'S AFFIRMATIVE ACTION ANALYSIS

### A. *Affirmative Action Review Under the Three-Tiered System*

The Supreme Court currently views government actions that differentiate between people based on their race with extreme suspicion. Under the Court's strict scrutiny standard of review, laws that treat people of one race or ethnicity differently from those of another must be *narrowly tailored* to serve a *compelling* governmental interest in order to be deemed constitutional under the Equal Protection Clause of the Fourteenth and Fifth Amendments.<sup>4</sup> This standard of review has been used to strike down many malevolent laws that discriminated against African-Americans, such as those promoting school segregation and banning interracial marriage.<sup>5</sup>

After some initial uncertainty, the Court has decided that race-based affirmative action policies as well as race-based discriminatory policies should be subject to strict scrutiny because they differentiate among people according to their race and ethnicity.<sup>6</sup> Initially, in *Regents of University of California v. Bakke*, a case that in-

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determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement?" 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting). See also Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163-65 (1984).

<sup>4</sup> The concept of strict scrutiny was first used with reference to racial classifications in *Korematsu v. United States*, 323 U.S. 214 (1944), which held that the policy of incarcerating individuals of Japanese descent during World War II was constitutional because it responded to national security concerns. Strict scrutiny was subsequently developed in a series of race-related cases. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that an anti-miscegenation statute was unconstitutional because there was no overriding purpose to the statute other than racial discrimination); see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1466-514 (2d ed. 1988) (discussing the development of strict scrutiny for race-based classifications).

<sup>5</sup> See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving*, 388 U.S. 1.

<sup>6</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

volved a challenge to the University of California's plan to set aside a certain number of medical school seats for minority students, the Court ruled against the race-based affirmative action program, but the Court did not issue a majority opinion, and it did not reach a consensus on what standard of review to apply.<sup>7</sup> Four justices wrote that in order for race-based affirmative action programs to survive constitutional scrutiny, the government policies must be *substantially related* to serving *important* governmental interests—one could label such standard as intermediate scrutiny, although none of the four justices had called it so.<sup>8</sup> According to Justice Powell, however, strict scrutiny should be applied to race-based affirmative action programs, and achieving diversity, *not* remedying general societal discrimination nor increasing medical services in minority communities, constituted a compelling state interest<sup>9</sup>—an element under strict scrutiny. However, he stated that reserving a specified number of seats for minority students in an academic program, which was the case in *Bakke*, was not narrowly tailored to achieving diversity.<sup>10</sup> Thus, race or ethnicity could only be one among many factors considered when making individual admissions determinations.<sup>11</sup>

After *Bakke*, the Court continued to vacillate on the appropri-

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<sup>7</sup> 438 U.S. 265, 271 (1978).

<sup>8</sup> *Id.* at 359 (“[A] number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives.” (internal quotation marks omitted)).

<sup>9</sup> *Id.* at 305-15. Powell wrote:

[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

*Id.* at 311-12.

<sup>10</sup> *Id.* at 315.

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed.

*Id.*

<sup>11</sup> *Id.* (Justice Powell states that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.” (emphasis in original)).

ate standard to apply to race-based affirmative action, in part because of its ambivalence about the appropriate level of deference to give to Congressional action. For example, in *Fullilove v. Klutznick*, the Court deferred to Congress and upheld a federal program that granted government contracts to minority-owned businesses, again without a majority consensus on the appropriate standard of review to apply.<sup>12</sup> In *City of Richmond v. J.A. Croson Co.*, however, the Court ruled in favor of applying strict scrutiny to race-based affirmative action programs and rejected the assertion that remedying past general societal discrimination is a compelling state interest. The Court held that a Richmond, Virginia, program that favored construction contract grants to minority-owned businesses was unconstitutional.<sup>13</sup> The Court, however, applied intermediate scrutiny in *Metro Broadcasting, Inc. v. Federal Communications Commission*, a case that involved a challenge to a federal program that gave minority applicants preference for receiving television and radio broadcast licenses.<sup>14</sup> The Court deferred to Congress and held in *Metro Broadcasting* that intermediate scrutiny applied to benign race-based classifications, whether they aimed to remedy discrimination or promote diversity.<sup>15</sup> *Metro Broadcasting's* affirmative action program survived constitutional scrutiny under this standard because promoting broadcast diversity was deemed an important governmental interest and expanding minority ownership was considered substantially related to this goal.<sup>16</sup> Thus, the affirmative action program met both elements of intermediate scrutiny. However, the dissenting justices pointed out that Congress should not receive extra deference nor should federal affirmative action programs be reviewed under a different level of scrutiny as states'

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<sup>12</sup> 448 U.S. 448, 472 (1980).

A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to provide for the . . . general Welfare of the United States and to enforce, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.

*Id.* (internal citations and quotation marks omitted).

<sup>13</sup> 488 U.S. 469, 493 (1989) (holding that all classifications based on race are suspect and should be subject to the same standard of review regardless of the legislative intent).

<sup>14</sup> 497 U.S. 547 (1990).

<sup>15</sup> *Id.* at 564-65 (holding that benign race-conscious measures mandated by Congress, even if those measures are not "remedial," are "constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives").

<sup>16</sup> *Id.* at 567-68.

programs.<sup>17</sup> This seemingly was the case if one compares *J.A. Croson Co.*, involving a state statute reviewed under strict scrutiny, and *Metro Broadcasting*, involving a federal statute reviewed under intermediate scrutiny.

In *Adarand Constructors, Inc. v. Peña*, however, the Court reversed *Metro Broadcasting* to hold that, in the interests of applying consistent standards to all race-based classifications, viewing all such classifications skeptically, and applying congruent analyses to Fourteenth Amendment and Fifth Amendment equal protection cases, all race-based classifications were to be subjected to strict scrutiny.<sup>18</sup> Since then, the Court has continued to apply strict scrutiny to race-based affirmative action programs. Although Justice O'Connor wrote in the *Adarand* opinion that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'"<sup>19</sup> it has nevertheless been difficult for race-based affirmative action plans to survive such a stringent review.<sup>20</sup>

Gender classifications, unlike race-based ones, are subject only to intermediate scrutiny review,<sup>21</sup> and this standard has made it easier for gender-based classifications to survive equal protection review.<sup>22</sup> Gender classifications, unlike race-based ones, were made for the alleged purpose of "protecting" women rather than oppressing them. However, when Ginsburg argued a series of landmark gender discrimination cases before the Court in the 1970s, she demonstrated that laws intending to award women special benefits based on stereotypical assumptions about their roles in society only perpetuated those stereotypes.<sup>23</sup> As a result, she advo-

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<sup>17</sup> *Id.* at 604 (O'Connor, J., dissenting) ("[T]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications.").

<sup>18</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995).

<sup>19</sup> *Id.* at 237.

<sup>20</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that a law school's affirmative action plan that fashioned racial classifications furthered no compelling state interest).

<sup>21</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971). See also TRIBE, *supra* note 4, at 1561-77.

<sup>22</sup> See Angela D. Hooton, *Constitutional Review of Affirmative Action Policies for Women of Color: A Hopeless Paradox?*, 15 WIS. WOMEN'S L.J. 391, 404 (2000) (describing how gender-based affirmative action is more easily upheld than race-based affirmative action because it is subject to the less stringent intermediate scrutiny standard).

<sup>23</sup> Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 821-22 (1978) [hereinafter *Some Thoughts*]. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), involved stereotype-based alleged benefits to women. In that case, Ginsburg challenged a federal statute giving Social Security benefits presumptively to widows but not to widowers, who needed to prove their dependency. In *Craig v. Boren*, 429 U.S. 190 (1976), Ginsburg argued that allowing women to buy beer at age eighteen but requiring men to wait until age twenty-one was based on and perpet-

cated that gender classifications that are constitutional should be based on “real” sex differences, not stereotype-based distinctions.<sup>24</sup>

The U.S. Supreme Court has yet to decide a gender-based affirmative action case under the Equal Protection Clause,<sup>25</sup> and the lower courts are divided on the appropriate standard for reviewing such programs.<sup>26</sup> The majority of the circuits apply the intermediate scrutiny test to gender-based affirmative action programs, making them easier to survive judicial review than the race-based affirmative action programs, which are reviewed under strict scrutiny.<sup>27</sup> While this distinction may make some sense in the universe of legal logic, there is something perverse about the Court’s analysis of equal protection cases, and the distinction the Court has drawn when reviewing race-based and gender-based affirmative action programs. The Equal Protection Clause was originally created for the purpose of instituting racial equality<sup>28</sup> and was only later extended to gender issues;<sup>29</sup> however, the Court’s analysis of cases

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uated stereotypes about women. *Califano v. Goldfarb*, 430 U.S. 199 (1977), involved a challenge to a policy that awarded survivors’ benefits automatically to women but not to men. *Duren v. Missouri*, 439 U.S. 357 (1979), involved challenges to systems that required men but not women to serve on juries. Finally, *Kahn v. Shevin*, 416 U.S. 351 (1974), involved a challenge to a Florida law giving a tax break to widows but not to widowers.

<sup>24</sup> See *Califano v. Webster*, 430 U.S. 313, 317 (1977). In this case, compensating women for economic discrimination in the workplace was held to be based on a real gender difference and not on stereotyping.

<sup>25</sup> Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CAL. L. REV. 1169, 1173 (1998). While the U.S. Supreme Court did decide a case that dealt with a gender-based affirmative action program, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987), its analysis was based on Title VII, not the Equal Protection Clause. *Id.* at 1173 n.27.

<sup>26</sup> Skaggs, *supra* note 25, at 1174-75. The Third, Ninth, Tenth, and Eleventh Circuits have used intermediate scrutiny for gender-based affirmative action, while the Sixth Circuit uses strict scrutiny, despite its application of intermediate scrutiny to all other gender-based classifications. See *Engineering Contractors Ass’n v. Metro. Dade County*, 122 F.3d 895, 929 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) (applying intermediate scrutiny to a Florida “gender-conscious” affirmative action plan); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990, 1000-01 (3d Cir. 1993) (applying intermediate scrutiny to a gender-based government affirmative action program); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991) (applying intermediate scrutiny to a government gender-based affirmative action program); *Concrete Works of Colorado, Inc. v. City of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (holding that intermediate scrutiny should apply to the gender classifications in a government affirmative action program). *But see Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (finding that both race- and sex-based classifications must be narrowly tailored to survive strict scrutiny review).

<sup>27</sup> Skaggs, *supra* note 25, at 1176.

<sup>28</sup> Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 479 (2003).

<sup>29</sup> TRIBE, *supra* note 4, at 1561.



under the Equal Protection Clause makes it easier to institute policies that promote gender equality than racial equality.<sup>30</sup> Justice Stevens noted this anomalous result in his dissent in *Adarand*.<sup>31</sup>

*B. Ginsburg's Departure from the Tiers of Review*

Ginsburg's equal protection analysis stands out against this backdrop for its willingness to inject the language of fairness into an area of law that has become all too dominated by legal formalism. Following Justice Marshall's and Justice Stevens's objections to the use of three formal tiers of review,<sup>32</sup> Ginsburg's equal protection jurisprudence is characterized by a lack of willingness to compress a complex area of legal analysis into a three-tiered, overly

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<sup>30</sup> See *id.* at 1564.

<sup>31</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting). In Stevens's dissent, he wrote that

today's lecture about 'consistency' will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.

*Id.*

<sup>32</sup> Justice Marshall, in his dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting), protested the oversimplification of equal protection Review into two simple standards, writing that:

I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization.

*Id.* (internal citations omitted). Justice Stevens believed in only one standard of review, writing that:

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

*Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). See also *Shaman*, *supra* note 3, at 163-65.

simplified, all-purpose standard.<sup>33</sup> She shies away from the prevailing tendency to divide equal protection review into three formal, distinct tiers, believing that the Court has in reality used a much wider range of review in analyzing different types of classifications.<sup>34</sup> She has noted the absurdity of a three-tiered system that makes race-based affirmative action plans that aim to remedy racial inequality much more difficult to uphold than gender-based affirmative action plans.<sup>35</sup> She has also criticized “endeavors to bundle the U.S. Supreme Court’s equal protection decisions into neat packages under the headings [of] ‘strict scrutiny,’ ‘intermediate inspection,’ and relaxed or rational ‘relationship.’”<sup>36</sup>

Ginsburg’s opinion in *United States v. Virginia (VMI)* demonstrates her flexibility toward equal protection analysis.<sup>37</sup> In that case, women seeking admission to the all-male Virginia Military Institute (VMI) challenged Virginia’s restriction of admitting only men into VMI’s unique military style education as a violation of the Equal Protection Clause.<sup>38</sup> The Virginia Court of Appeals held that the program was in fact unconstitutional and offered the state several options for curing the constitutional violation, including admitting women, establishing a separate program for women, and privatizing the school, so that state action was no longer involved

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<sup>33</sup> On the other side of the affirmative action debate, Justices Rehnquist and Scalia have also objected to the tiers of review.

How is this Court to divine what objectives are important? How is it to determine whether a particular law is “substantially” related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at “important” objectives or, whether the relationship to those objectives is “substantial” enough.

*Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting).

Justice Scalia has also criticized the tiers of review. *United States v. Virginia (VMI)*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Justice Scalia argues in his *VMI* dissent that imposing restrictions on state activities by heightening equal protection analysis under the tiers of review is arbitrary, discretionary, and unnecessary, and longstanding practices not expressly prohibited by the Bill of Rights should not be prohibited by the Court under heightened equal protection review. *Id.* Despite this criticism from both the left and the right, the tiers of review still survive.

<sup>34</sup> Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 20-21 (1975) [hereinafter *Gender*] (writing that “while formal invocation of two polar equal protection standards continues, in a range of subject areas, lines in fact drawn by the Court appear more variegated”).

<sup>35</sup> See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 270 (1999).

<sup>36</sup> *Id.* at 269.

<sup>37</sup> 518 U.S. 515 (1996) [hereinafter *VMI*].

<sup>38</sup> *Id.* at 520-24.

and the school could have greater leeway to pursue gender-based policies.<sup>39</sup> Virginia chose to establish a separate school for women, and *VMI* involved a challenge to the constitutionality of that plan.<sup>40</sup> The plaintiffs argued that establishing a separate school was not an adequate remedy because the separate school for women did not have the same resources that VMI had, and it did not use VMI's strict "adversative method"—the refusal to use that method was based on stereotypes about women.<sup>41</sup>

Despite Ginsburg's earlier advocacy for the application of strict scrutiny to gender-based classifications in her work with the Women's Rights Project of the American Civil Liberties Union (ACLU), in *VMI*, she declined to raise the standard of review for gender-based discrimination to strict scrutiny. Ginsburg thereby disappointed many feminist observers; she, however, did apply a higher form of scrutiny to gender-based classifications than the standard that had previously been applied by the Court. While Ginsburg's *VMI* opinion technically comports with precedent and applies intermediate scrutiny to Virginia's sex-based classification, she heightens intermediate scrutiny by referring to it as "skeptical scrutiny"<sup>42</sup> and by requiring an "exceedingly persuasive justification" element, instead of the merely "important state interest," one previously mandated by intermediate scrutiny.<sup>43</sup> Her opinion de-

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<sup>39</sup> *Id.* at 525-26.

<sup>40</sup> *Id.* at 526-27.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."). See also Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 105-06 (1997). Morgan notes that:

the majority opinion in *United States v. Virginia* did not announce a new equal protection test for sex-based classifications, nor did it endorse an abandonment of the traditional intermediate scrutiny test. The *United States v. Virginia* opinion used the traditional statement of the intermediate scrutiny test interchangeably with a new phrase 'skeptical scrutiny,' and a less common—but not novel—formulation of the intermediate scrutiny test which requires that parties who seek to defend sex-based government action must demonstrate an 'exceedingly persuasive justification' for that action.

*Id.* (emphasis in original omitted) (internal quotation marks and brackets omitted).

<sup>43</sup> The "exceedingly persuasive justification" standard was initially introduced in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979), and the Court later relied on the standard in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). For discussion on the development of the standard see Elizabeth A. Douglas, Note: *United States v. Virginia*:

parts from the rigid three-tiered system by elevating the requirements of intermediate scrutiny, yet falling short of strict scrutiny.

Some commentators attribute Ginsburg's reluctance to raise the standard of review for gender-based classifications to strict scrutiny to her desire to ensure a greater likelihood of success for affirmative action programs for women.<sup>44</sup> Ginsburg has indicated that she finds it problematic that the more demanding standard for race-based discrimination makes race-based affirmative action more difficult to uphold than gender-based affirmative action.<sup>45</sup> She may therefore have been motivated by the desire that strict scrutiny not be used to invalidate gender-based affirmative action, as was the case for the race-based affirmative action in *Adarand*, a case decided by the Court shortly before *VMI*.<sup>46</sup> These concerns, combined with Ginsburg's willingness to depart from a strict three-tiered system of review, may have contributed to her decision to adopt a heightened standard of review for the gender-based classification at issue in *VMI* without applying strict scrutiny. Ginsburg's *VMI* decision displays an overall willingness to be flexible that transcends the formal and rigid tripartite system of categories of review.<sup>47</sup>

Ginsburg's dissenting opinion in *Adarand* also reflects her flexibility with respect to equal protection analysis. She encourages

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*Gender Scrutiny Under an "Exceedingly Persuasive Justification" Standard*, 26 CAP. U.L. REV. 173 (1997).

<sup>44</sup> See Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 755-58 (1998). Ellington et al. write:

In *VMI*, Ginsburg had the opportunity to advance her lifelong position regarding judicial review of gender classifications. She argued for strict scrutiny in the past; the United States sought strict scrutiny at oral argument; and she may have been able to win a majority of the Court. Perhaps though, as Justice Scalia pointed out in his dissent in *Edmonson v. Leesville Concrete Co.*, strict scrutiny would work against minorities. Or perhaps, a recent racial classification case, *Adarand Constructors, Inc. v. Peña*, had proven to be too dangerous to affirmative action. . . . *Adarand* was undoubtedly on Ginsburg's mind when she drafted the *VMI* opinion.

*Id.*

<sup>45</sup> See Ginsburg & Merritt, *supra* note 35, at 270 ("Ironically, the less rigid standard for sex classifications has led some decisionmakers to conclude that efforts to assist women through affirmative action are less vulnerable to constitutional attack than efforts to aid historically disadvantaged racial minorities. That, I think, is a most troublesome notion.").

<sup>46</sup> See Ellington et al., *supra* note 44, at 756.

<sup>47</sup> Justice Scalia criticized the *VMI* majority opinion's reliance on the "exceedingly persuasive" standard in his dissenting opinion in that case as an unjustified departure from precedent and an unsubstantiated reading of the holdings in *Hogan* and *J.E.B. United States v. Virginia (VMI)*, 518 U.S. 515, 571-72 (Scalia, J., dissenting).

deference to Congress,<sup>48</sup> and although she writes approvingly of the need for close review of affirmative action programs, she observes that the purpose of strict scrutiny is to “distinguish legitimate from illegitimate uses of race in governmental decision making, to differentiate between permissible and impermissible governmental use of race, to distinguish between a ‘No Trespassing’ sign and a welcome mat,” as well as to prevent undue trammeling of the majority’s rights.<sup>49</sup> Her proposed standard of review is much less strict than the majority justices’, and she indicates that the program at issue would survive it.<sup>50</sup> Ginsburg’s dissent represents her effort to highlight common ground with the other justices’ opinions while striving to keep open the possibility that the Court would apply a different standard to future affirmative action cases.<sup>51</sup>

Ginsburg has also voiced opposition to differentiating rigidly between the standards for reviewing race-based and gender-based classifications. Because there is no constitutional mandate for gender equality, Ginsburg, like many other advocates, relied in part on analogizing gender-based to race-based discrimination when she argued for heightened scrutiny of gender-based classifications before the Supreme Court during her years working with the ACLU.<sup>52</sup> In *Reed v. Reed*,<sup>53</sup> for example, Ginsburg contends that sex, like race, is a suspect classification, and compares sex-based to race-based classifications, showing how both are based on and perpetuate discrimination.<sup>54</sup> Ginsburg also grounds her *VMI* opinion in part in the race discrimination line of cases by citing to *Sweatt v. Painter*, pointing out the similarity between “separate but equal” arguments with respect to both race and gender discrimination, and

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<sup>48</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting).

<sup>49</sup> *Id.* at 276 (internal quotation marks and citations omitted).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 271; see also Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 664-65 (2003).

<sup>52</sup> Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 739 (2002). Sullivan writes:

In the absence of gender-specific constitutional text, the story of constitutionalizing American women’s equality is a story of creative interpretation of the Equal Protection Clause and of advocates’ bravado. Led with inventiveness and strategic brilliance by now-Justice Ruth Bader Ginsburg, litigating as a founding director of the American Civil Liberties Union Women’s Rights Project, women’s rights advocates persuaded the Court to read guarantees of sex equality into the Equal Protection Clause by analogizing sex discrimination to race discrimination.

*Id.*

<sup>53</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>54</sup> Ellington et al., *supra* note 44, at 724.

noting the lack of equality in the separate educational institutions at issue in *Sweatt* and *VMI*.<sup>55</sup> Elsewhere, she has noted that both sex and race are immutable characteristics bearing no relationship to ability to perform, and has suggested that suspect classes are in fact characterized by immutable traits.<sup>56</sup>

At the same time that she emphasized the similarities between race and gender to advance her goal of achieving heightened scrutiny for gender-based classifications, however, Ginsburg has also recognized the inaccuracy of the analogy. While race and gender are immutable characteristics (although both are more fluid than is commonly acknowledged)<sup>57</sup> and both have been the basis for creating formal legal disadvantages in civic life, there are differences between the two categories.<sup>58</sup> There is no sex-based segregation the way that there is race-based segregation, and women are not a minority with respect to men.<sup>59</sup> Furthermore, sex-based and race-based discrimination have had different histories and motivations.<sup>60</sup> Some commentators argue that there remains an inherent difference between women and men with respect to child-bearing while race is now widely considered to be a social construct.<sup>61</sup>

In addition, separating methods of reviewing race and gender discrimination does not allow courts to account for the ways that individuals' identities overlap and for the fact that discrimination can be based on a combination of factors. Discrimination against Latina women, for example, can be different from that faced by African-American men. Commentators on the subject have a tendency to discuss African-Americans *and* women, thus ignoring the existence of African-American women.<sup>62</sup> In contrast, Ginsburg has experienced the phenomenon of intersecting identities and has attributed her difficulty in finding work as a lawyer in the 1950s to

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<sup>55</sup> See Ray, *supra* note 51, at 642; *United States v. Virginia (VMI)*, 518 U.S. 515, 553-54 (1996) (concluding that “[i]n line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities . . . at VWIL and VMI”).

<sup>56</sup> Ellington et al., *supra* note 44, at 725 n.220 (noting that Ginsburg differentiated between legislative actions that distinguished between those based on need or ability and those based on gender or race, or “another congenital trait of birth”).

<sup>57</sup> See, e.g., KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* (1994).

<sup>58</sup> Sullivan, *supra* note 52, at 742.

<sup>59</sup> *Id.* at 742-43.

<sup>60</sup> *Id.* at 744.

<sup>61</sup> *Id.*

<sup>62</sup> See generally Hooton, *supra* note 22; Serena Mayeri, Note: “A Common Fate of Discrimination”: *Race-Gender Analogies in Legal and Historical Perspective*, 110 *YALE L.J.* 1045 (2001).

the discrimination she encountered as a Jew, a woman, and a mother.<sup>63</sup> Ginsburg's equal protection analysis therefore shies away from making sharp differentiations in the standard of reviewing race-based and gender-based classifications. She recognizes the problems, both practical and conceptual, in making these types of differentiations.

Consistent with her overall approach to equal protection cases and her alignment with a position that shies away from formal tiers of review, Ginsburg's affirmative action jurisprudence departs from the Court's prevailing formalism in equal protection analysis. She argues that plans that employ racial classifications to remedy the effects of discrimination against particular groups (affirmative action plans) should be subject to a lower standard than those that aim to oppress (discriminatory plans).<sup>64</sup> Contrary to the prevailing trend, Ginsburg favors applying a similar standard to both race-based and gender-based affirmative action plans. She believes that affirmative action is a necessary part of a comprehensive effort to combat discrimination, and grounds this opinion in part in international law.<sup>65</sup> Supported by human rights conventions to which the United States is a party, Ginsburg claims that affirmative action rectifies both civil and social inequalities and helps disadvantaged groups achieve a measure of freedom within the societies that oppress them.<sup>66</sup>

When the Supreme Court issued its opinions on the University of Michigan's affirmative action plans in *Grutter*<sup>67</sup> and *Gratz*,<sup>68</sup> Ginsburg wrote separately in both cases, concurring in *Grutter*<sup>69</sup> and dissenting in *Gratz*.<sup>70</sup> These opinions are striking examples of Ginsburg's flexible approach to equal protection analysis and her willingness to rethink the entrenched tenets of prevailing equal protection review.

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<sup>63</sup> See Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1446 (1998).

<sup>64</sup> *Gratz v. Bollinger*, 539 U.S. 244, 298 (Ginsburg, J., dissenting) (2003) ("This insistence on 'consistency,' would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools." (internal citations omitted)).

<sup>65</sup> See Ginsburg & Merritt, *supra* note 35, at 255 (noting that "an 'effective remedy,' in the context of centuries of discrimination . . . must include at least some modes of positive governmental action").

<sup>66</sup> *Id.* at 254.

<sup>67</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>68</sup> *Gratz*, 539 U.S. at 244.

<sup>69</sup> *Grutter*, 539 U.S. at 344.

<sup>70</sup> *Gratz*, 539 U.S. at 298.

III. EQUAL PROTECTION FORMALISM IN THE TWO  
*BOLLINGER* CASES

The most recent Supreme Court opinions on race-based affirmative action were *Grutter v. Bollinger* and *Gratz v. Bollinger*, issued in June, 2003.<sup>71</sup> In these cases, white students who had been rejected from the University of Michigan's law school and undergraduate college, respectively, challenged the use of affirmative action for minorities in Michigan's admissions process. They argued that considering race in university admissions constituted an unconstitutional racial classification. The Supreme Court ruled against the plaintiffs in *Grutter*<sup>72</sup> and in favor of the plaintiffs in *Gratz*.<sup>73</sup> Both cases were decided within the existing limited framework of applying strict scrutiny to race-based affirmative action and requiring such affirmative action programs to meet stringent requirements in order to be considered constitutional.

The admissions systems that were challenged in the two *Bollinger* cases differed. In the undergraduate admissions policy at issue in *Gratz*, applicants were awarded up to a total of 150 points based on a variety of factors, including grade point average (GPA) and standardized test scores.<sup>74</sup> In addition, admissions officers awarded points for "soft factors," including in-state residency, leadership, and participation in community activities.<sup>75</sup> Candidates with more than a certain number of points were admitted, others below a certain number of points were rejected, and those in the middle were earmarked for additional, more individualized review.<sup>76</sup> As part of this system, members of underrepresented minority groups received twenty points solely because of their race or ethnicity.<sup>77</sup>

In *Grutter*, the law school admissions policy involved a more individualized review than did the undergraduate policy in *Gratz*. The law school considered applicants' LSAT scores and GPAs, and then reviewed other soft factors, including applicants' letters of recommendation, essays, and potential "contributions to the intellectual and social life of the institution."<sup>78</sup> An applicant's race and ethnicity could be included in this consideration.<sup>79</sup> The school

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<sup>71</sup> *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

<sup>72</sup> *Grutter*, 539 U.S. at 342.

<sup>73</sup> *Gratz*, 539 U.S. at 275.

<sup>74</sup> *Id.* at 253-57.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Grutter*, 539 U.S. at 315.

<sup>79</sup> *Id.* at 316.



aimed to achieve a diverse student body and to admit a critical mass of minority students.<sup>80</sup>

A. *The Constraints of Diversity: The Majority's Analysis in Grutter and Gratz*

The affirmative action policy at issue in *Gratz* was held to be unconstitutional, and, while the Court ultimately ruled in favor of the affirmative action plan in *Grutter*, both *Gratz* and *Grutter* adhered to conventional equal protection analysis. In both cases, the Court applied strict scrutiny without delving particularly far into the complexities of racial discrimination. The end-product of this analysis is a set of opinions that seem strangely sanitized and removed from the reality of race relations in Twenty-First Century America.

In both *Grutter* and *Gratz*, the Court affirmed that all racial classifications, even those intended to benefit minorities, or those in affirmative action programs, were subject to strict scrutiny.<sup>81</sup> In *Grutter*, the Court reiterated that, although some racial classifications were acceptable, strict scrutiny was necessary to identify and reject those that were not.<sup>82</sup> In order to be deemed constitutional, Michigan University therefore had to demonstrate that its affirmative action plans met the strict scrutiny standard of being narrowly tailored to serve a compelling governmental interest.<sup>83</sup> The Court followed Powell's opinion in *Bakke* and concluded in both *Grutter* and *Gratz* that achieving racial diversity in universities, especially in light of the academic freedom accorded academia, was a compel-

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<sup>80</sup> *Id.*

<sup>81</sup> *Gratz*, 539 U.S. at 270 (finding that “[i]t is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized” (internal quotation marks omitted)); *Grutter*, 539 U.S. at 326 (holding that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”).

<sup>82</sup> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

*Grutter*, 539 U.S. at 326 (internal citations and quotation marks omitted).

<sup>83</sup> *Id.* at 326.

ling state interest.<sup>84</sup> However, it invalidated the undergraduate admissions policy, but not that of the law school, because of differences in the schools' respective affirmative action policies.

In *Gratz*, the Court concluded that the undergraduate admissions program's practice of assigning points based on minority status was not narrowly tailored to achieving the compelling state interest of diversity according to Powell's conception of narrow tailoring, because it did not involve a sufficiently individualized review.<sup>85</sup> The Court decided that the point system made admission automatic for most minimally qualified minority students and made race too decisive a factor in admissions decisions.<sup>86</sup> According to the Court, the system placed minority students in one oversimplified category and failed to account for differences in students' backgrounds.<sup>87</sup> To achieve diversity, a narrowly tailored system would involve individualized determinations about particular students, and the school would not admit a large group of minority students with similar backgrounds.<sup>88</sup> The *Gratz* opinion quotes Powell's statement in *Bakke* that "critical [admissions] criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."<sup>89</sup>

In *Grutter*, however, the Court ruled that the law school's more individualized system of review, which did not establish a separate admissions track for minorities and considered race and ethnicity in the context of particular applicants' other qualifications, was acceptable.<sup>90</sup> Under this system, membership in an underrepresented minority group was a "plus" but was not decisive in admissions decisions.<sup>91</sup> The Court ruled that this admissions process was more consistent with the Powell opinion in *Bakke*, and it constituted narrowly tailored means to achieve the compelling state interest of diversity.<sup>92</sup>

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<sup>84</sup> *Id.* at 329 (finding that "[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

<sup>85</sup> *Gratz*, 539 U.S. at 271 (referring to Justice Powell's emphasis on considering each applicant individually and assessing his or her qualities and ability to diversify the class, and finding that the college did not provide a consideration of that type).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 273-74.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 272-73.

<sup>90</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>91</sup> *Id.* at 334.

<sup>92</sup> . . . [T]he Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly indi-

In addition, the Court in *Grutter* ruled that the law school's goal of achieving a critical mass of minority students was acceptable.<sup>93</sup> According to the Court, since diversity was a compelling state interest and admitting a critical mass of minority students was important to achieving the educational benefits of diversity, striving for a critical mass was satisfactory.<sup>94</sup> The educational benefits of diversity, according to the Court, included achieving cross-racial understanding, breaking down stereotypes, and preparing students for citizenship in a diverse society.<sup>95</sup>

Finally, the Court ruled that affirmative action programs should not outlast the need for them, and they should include a sunset provision with periodic reviews to ensure that they are retired once diversity can be achieved without them.<sup>96</sup>

Although the Court ultimately approved the affirmative action plan in *Grutter*, the Court in both *Grutter* and *Gratz* discussed affirmative action only within the narrow constraints of the three-tiered equal protection review. Its failure to concomitantly deal openly and frankly with the gravity of racism and its effects on minority students resulted in a glaringly incomplete discussion of affirmative action. The Court decided that rectifying general societal discrimination was not a compelling state interest,<sup>97</sup> so it was limited to

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vidualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. . . .

*Id.*

<sup>93</sup> *Id.* at 330.

<sup>94</sup> *Id.* at 328-31.

<sup>95</sup> *Id.* at 330.

<sup>96</sup> *Id.* at 342.

<sup>97</sup> See, e.g., *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 310 (1978).

. . . [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

discussing affirmative action within the narrow constraints of either remedying very specific institutional discrimination<sup>98</sup> or, as in *Grutter* and *Gratz*, of achieving diversity. However, societal discrimination is at the heart of the need for affirmative action, and it is doubtful that a discussion of affirmative action that leaves out such an integral feature could yield a satisfying result.

*B. Ginsburg's Approach: Transcending Formalism*

In contrast to the majority opinions, Ginsburg's dissent in *Gratz* and concurrence in *Grutter*<sup>99</sup> are notable for their straightforward discussion of issues of justice and fairness, their encouragement of transparency in affirmative action programs, and their flexible treatment of equal protection cases. In both cases, Ginsburg contributes an honest perspective on racial inequality that is sorely lacking in the majority opinions, and demonstrates a corresponding flexibility toward equal protection review.

In *Gratz*, Ginsburg argues that using the same standard of review for all race-based classifications, including ones that attempt to remedy the effects of discrimination rather than promote it, is inappropriate.<sup>100</sup> Instead, she urges that government decision-makers be allowed to distinguish between policies that burden groups that are already victims of discrimination from those that strive to remedy discrimination and its effects.<sup>101</sup> Ginsburg contends that race is a suspect category only because it has traditionally been

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*Id.*

<sup>98</sup> See, e.g., *Cotter v. City of Boston*, 323 F.3d 160 (1st Cir. 2003) (holding that a police department plan to promote minorities served a compelling state interest of rectifying past discrimination within the department).

<sup>99</sup> *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting); *Grutter*, 342 U.S. at 344 (Ginsburg, J., concurring).

<sup>100</sup> *Gratz*, 539 U.S. at 298.

[T]he Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. This insistence on 'consistency,' would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

*Id.* (internal citations omitted).

<sup>101</sup> *Id.* at 302.

To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.

*Id.*

used for the purpose of discrimination, not of remedying discrimination, and that the Constitution only prohibits classifications that deny benefits, cause harm, or impose burdens, not those that correct inequalities.<sup>102</sup> In addition, affirmative action in university admissions need not and does not impose an undue burden on white students, as demonstrated by a study showing that the statistical chances for the acceptance of white applicants are not significantly diminished when there are a large number of places in a class and many more white applicants than minority ones.<sup>103</sup>

Ginsburg's *Gratz* dissent also cites studies and statistics demonstrating the racial inequalities in the United States that create a need for government programs to promote equality.<sup>104</sup> She describes the continuing racial disparities in employment, health care, poverty rates, schooling, earnings, real estate transactions, and consumer transactions, as well as the pervasive conscious and unconscious biases that prevent true equality in all areas of society.<sup>105</sup> Ginsburg further observes that permitting race-based classifications that promote, rather than hinder, equality is consistent with international human rights doctrine.<sup>106</sup> She endorses Michigan's "fully disclosed," point-based undergraduate affirmative-action plan because having an open plan is better than achieving the same results surreptitiously, through "winks, nods, and disguises."<sup>107</sup>

The *Gratz* majority opinion asserted that close scrutiny of race-based classifications continues to be necessary because it is important to ensure that these classifications are not "in reality malign, but masquerading as benign," and that they do not unduly burden members of the once-preferred groups.<sup>108</sup> According to Ginsburg, Michigan's undergraduate policy would pass this test because the policy genuinely aimed to rectify the effects of current and past discrimination and there was no evidence of undue harm to non-

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 303. "In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants." *Id.* (citing Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002)).

<sup>104</sup> *Id.* at 299-01.

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* at 305.

<sup>108</sup> *Id.* at 302.

minority students.<sup>109</sup>

Similarly, Ginsburg's concurrence in *Grutter* highlights support for her position drawn from international human rights doctrine that uses affirmative action to protect groups that have historically been subject to discrimination and then discontinues these programs once their objective of remedying discrimination and its effects is achieved.<sup>110</sup> Citing to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women,<sup>111</sup> Ginsburg again emphasizes the persistence of racial bias in that members of minorities still attend predominantly segregated schools with fewer educational resources.<sup>112</sup> She remarks somewhat skeptically that the Court could "hope . . . but not firmly forecast" that affirmative action programs could be discontinued in twenty-five to thirty years because of the achievement of nondiscrimination and genuine equal opportunity.<sup>113</sup>

Ginsburg's opinions in *Gratz* and *Grutter* offer support for affirmative action in the persistence of discrimination and its effects and consequently urge the application of a different standard of review to remedial classifications than to invidious ones. Ginsburg turns to international human rights doctrine to bolster her position. She advocates for a standard of review for affirmative action that weeds out malign classifications masquerading as benign, without unduly burdening members of the majority. In addition, Ginsburg supports fully disclosed affirmative-action plans, but expresses skepticism about the possibility of being able to sunset affirmative-action plans in the near future.

#### IV. THE ROAD AWAY FROM EQUAL PROTECTION FORMALISM: GINSBURG'S CONTRIBUTIONS IN *GRUTTER* AND *GRATZ*

Ginsburg's analysis of affirmative action in *Gratz* and *Grutter* contributes several important points to the pro-affirmative action, anti-formalism position. Ginsburg addresses issues of societal discrimination and racial injustice openly and transparently and advocates for similar transparency in affirmative action programs. She also emphasizes the importance of international human rights doc-

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<sup>109</sup> *Id.* 302-03 ("[T]here [has not] been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race.").

<sup>110</sup> *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 345.

<sup>113</sup> *Id.* at 346.

trine by partly grounding her argument in it. Finally, she offers alternate standards of review that retain some of the conceptual linchpins of equal protection analysis while dispensing with the excessive formalism of the Court's prevailing equal protection review.

A. *Laying the Human Rights Foundation*

The first striking aspect of Ginsburg's opinions in *Gratz* and *Grutter* is their grounding in an open discussion of societal discrimination and racial injustice. The *Gratz* and *Grutter* majorities maintain that, in the absence of particularized discrimination, race-based affirmative action may be justified by the state's compelling interest in promoting diversity.<sup>114</sup> Ginsburg, however, supports affirmative action as necessary to fighting general societal discrimination, and uses international human rights doctrine, in addition to United States precedent, to support her view.

In contrast to the Court's rejection of affirmative action to remedy general societal discrimination as a compelling state interest for race-based affirmative action,<sup>115</sup> Ginsburg discusses the persistence of societal discrimination and its effects as justification for affirmative action,<sup>116</sup> and thereby suggests that affirmative action should be grounded in the need to compensate minority groups for societal wrongs committed against them. She writes that "[t]he stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital."<sup>117</sup> Ginsburg believes that general historic oppression itself constitutes justification for adopting affirmative-action plans.

Consistent with her discomfort with the formal standards of review relied on by the Court and with the Court's refusal to lower its standard of review for remedial race-based classifications, Ginsburg's dissenting opinion in *Gratz* does not dwell on diversity as a

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<sup>114</sup> *Id.* at 326-28.

<sup>115</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310 (1978).

. . . [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

*Id.*

<sup>116</sup> *Gratz v. Bollinger*, 539 U.S. 244, 298-01 (2003) (Ginsburg, J., dissenting).

<sup>117</sup> *Id.* at 304.

compelling state interest to justify affirmative action. Her concurring opinion in *Grutter*, while explaining that the qualifications for a compelling state interest were not at issue because the majority ruled that the affirmative-action plan satisfied strict scrutiny,<sup>118</sup> discusses general societal injustice. In both cases, Ginsburg justifies the need for affirmative action programs for disenfranchised minorities with statistics on the nationwide persistence of discriminatory attitudes and the lingering effects of past discrimination.<sup>119</sup> In order to pass constitutional muster, affirmative action should not need to be justified as a means of achieving diversity; instead, the general societal injustices committed against certain racial and ethnic groups should themselves provide sufficient justification for taking remedial action.

Ginsburg's position is drastically different from the majority's constrained view of what constitutes a compelling state interest, as illustrated by her support for transparency in affirmative action admissions programs in higher education. Ginsburg writes that colleges should be allowed to rely on the more overt type of affirmative action at issue in *Gratz* in response to the need for combating general societal discrimination. "One can reasonably anticipate," she writes,

that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative-action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage.<sup>120</sup>

Ginsburg therefore encourages adoption of affirmative-action plans as a direct response to historical oppression, which would allow universities to be candid and overt in their reliance on such plans.

To Ginsburg, affirmative action is an essential part of any effort to fight discrimination. Eliminating discrimination and its effects means both fighting discrimination itself and correcting its consequences.<sup>121</sup> Affirmative action, according to Ginsburg, advances both civil and economic rights by redressing the lingering

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<sup>118</sup> *Grutter*, 539 U.S. at 345.

<sup>119</sup> *Gratz*, 539 U.S. at 298-01; *Grutter*, 539 U.S. at 345.

<sup>120</sup> *Gratz*, 539 U.S. at 276.

<sup>121</sup> Ginsburg & Merritt, *supra* note 35, at 256-57. Ginsburg quotes U.S. President Lyndon Johnson when he famously declared: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others.'" *Id.* at 255-56.



effects of civil rights deprivation and by ensuring the economic and social well-being of groups that experience disproportionate poverty, unemployment, and poor health.<sup>122</sup>

The human rights argument that Ginsburg advances in her two *Bollinger* opinions is consistent with her wider perspective on affirmative action and her belief that affirmative action is necessary to achieve equality. Ginsburg's use of international human rights documents underscores her argument that basic fairness and transcendent, and universal principles of human decency require compensating minorities for social and economic wrongs perpetrated against them. Ginsburg is also generally interested in promoting comparative law and international law analysis in Supreme Court cases, and her willingness to look to international and comparative law for support for affirmative action stems from her belief that doing so can help the Court navigate the difficulties of creating effective affirmative action programs.<sup>123</sup> While other countries

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<sup>122</sup> *Id.* at 254. Ginsburg writes:

Affirmative action stands at the intersection of these two complementary categories. Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health. Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind.

*Id.*

<sup>123</sup> See Ruth Bader Ginsburg, *Sherman J. Bellwood Lecture: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003):

The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred up majorities. National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message in these remarks is simply this: We are the losers if we do not both share our experience with, and learn from others. That message is hardly original. A prominent jurist put it this way 14 years ago: For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States

have looked to the United States in their affirmative action jurisprudence, the U.S. Supreme Court has not exhibited a similar willingness to use comparative and international law.<sup>124</sup>

Ginsburg cites two international human rights documents that support the use of affirmative action as a measure for remedying discrimination in her opinions in *Grutter* and *Gratz*: the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>125</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>126</sup> (The United States has ratified CERD and signed but not ratified CEDAW.<sup>127</sup>) As Ginsburg has previously written, CEDAW aims to eliminate the prejudices that assign women to certain roles, to create recognition of common responsibility for childrearing, and to allow affirmative action for women to speed up the process of achieving equality.<sup>128</sup> CERD calls for special and discrete measures to ensure equal rights and freedoms and the use of affirmative action when called for.<sup>129</sup>

Ginsburg grounds her analysis of affirmative action in *Grutter* and *Gratz* in an open discussion of historical discrimination and its effects as well as in international human rights doctrine in a way that starkly differentiates her opinions from the majority's constrained, diversity-bound position. Her support for allowing affirmative action programs to be overt in their efforts to combat racial discrimination is consistent with her general open and transparent approach to the need for affirmative action programs.

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courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. *Id.* at 1-2 (alteration in original) (internal citations omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Gratz*, 539 U.S. at 302; *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/6014, Art. 2(2) (1965), available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm)).

<sup>126</sup> *Gratz*, 539 U.S. at 302; *Grutter*, 539 U.S. at 344 (citing the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/34/46, Art. 4(1) (1979), available at <http://www.un.org/womenwatch/daw/cedaw/>).

<sup>127</sup> *Status of Ratifications of the Principal International Human Rights Treaties*, Office of U.N. High Commissioner for Human Rights, at 11 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>; <http://www.unhchr.ch/pdf/report.pdf>.

<sup>128</sup> Ginsburg & Merritt, *supra* note 35, at 259.

<sup>129</sup> *Id.* at 260-61. It should be noted that Ginsburg has also written about the implicit support for affirmative action provided by the Universal Declaration of Human Rights. *Id.* at 261. She does not, however, include that document in her *Grutter* and *Gratz* opinions, presumably because it is a declaration, not a formal treaty or convention, and therefore does not have the same weight as CEDAW and CERD.

*B. Loosening the Language of Equal Protection*

Ginsburg's approach to reviewing affirmative action programs is consistent with her general view of affirmative action as a response to general societal discrimination. She creates a more flexible equal protection standard while remaining grounded in precedent by referring to certain concepts that characterize prevailing equal protection jurisprudence, but altering her word choice to avoid the strict formalistic definitions associated with mainstream equal protection analysis. Thus, Ginsburg describes the need for "close review" of affirmative action programs as to ensure that they are not malign classifications masquerading as benign and that they do not unduly burden majority groups.<sup>130</sup> In doing so, she invokes the same general concept of heightened review of racial classifications that characterizes prevailing equal protection analysis, yet dispenses with the formalistic baggage that accompanies such analysis. Moreover, Ginsburg's standard for what constitutes an undue burden is more flexible than that of the majority.

Ginsburg has employed this strategy of relying on conventional equal protection analysis but stretching the parameters of that analysis by altering her language before. For example, Ginsburg has written that affirmative-action plans should match the injuries to be remedied.<sup>131</sup> Ginsburg thereby invokes the concept of "narrowly tailored" by way of analyzing the targeting programs in the context of the societal problems they are to remedy, while evading the loaded connotations of that concept.

Likewise, Ginsburg's proposed test for affirmative action programs echoes the majority's concern to avoid unduly burdening white students,<sup>132</sup> but exhibits greater flexibility in addressing that

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<sup>130</sup> *Gratz*, 539 U.S. at 302. Ginsburg writes that "[c]lose review is needed to ferret out classifications in reality malign, but masquerading as benign, and to ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups" (internal citations omitted).

<sup>131</sup> *Gender*, *supra* note 34, at 29 (noting that "[m]ovement in [the direction of genuine neutrality with respect to sex-based discrimination] . . . requires remedies necessary and proper to alter deeply entrenched discriminatory patterns. But changing those patterns entails recognition that generators of race and sex discrimination are often different. Neither ghettoized minorities nor women are well served by lumping their problems in the economic sector together for all purposes.").

<sup>132</sup> In finding that "the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity[.]" the Court is effectively saying that in order to survive equal protection review, a race-based affirmative action must give the

concern. Ginsburg differs from the majority in her belief that the University of Michigan's undergraduate admissions policy did not unduly burden white students.<sup>133</sup> She also mentioned the need for this type of test in her dissenting opinion in *Adarand*, but concluded that the program at issue in *Adarand* would survive it.<sup>134</sup> Recently, Ginsburg has noted that, although affirmative action has the potential to promote civil and economic rights, its major drawback is that it generates accusations of reverse discrimination.<sup>135</sup> However, she does not view this phenomenon as an obstacle like the majority does, and recommends looking to other countries and to international human rights law for guidance in navigating these difficulties.<sup>136</sup> While Ginsburg shares the majority's concern on undue burdening, she differs from it in finding that neither Michigan's undergraduate nor its graduate affirmative action program constitutes an undue burden, and therefore sets a more flexible standard for what constitutes an undue burden.<sup>137</sup>

The system of affirmative action analysis that Ginsburg advocates is therefore more flexible than the majority's while adhering to some of the principles of prevailing equal protection review.

C. *Race-Based and Gender-Based Affirmative Action: Different Contexts, Common Themes*

Ginsburg's *Gratz* dissent simplifies and loosens equal protection review by applying a standard for race-based classifications in affirmative action programs that is analogous to the one she advocates for gender-based classifications. Ginsburg dispenses with the traditional differentiation between reviews of race-based and gender-based differentiations in favor of applying a similar test to both.

The first part of Ginsburg's test in *Gratz*—affirmative action

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smallest edge possible to minority students to promote the school's interest in diversity so as to impose the lowest burden possible on other students. *See Gratz*, 539 U.S. at 270.

<sup>133</sup> *Id.* at 303 (finding that "there has [not] been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race").

<sup>134</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting). "Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign." *Id.*

<sup>135</sup> Ginsburg & Merritt, *supra* note 35, at 281.

<sup>136</sup> *Id.* at 282.

<sup>137</sup> Ginsburg's finding that the university's affirmative action plan for minority undergraduates did not impact white students' chances of admission in a statistically significant way differs from the majority finding that the undergraduate school's automatic awarding of points to minority candidates was an undue burden on white applicants. *Gratz*, 539 U.S. at 303.

programs should not be malign classifications masquerading as benign<sup>138</sup>—is the same as the one she has proposed for gender-based classifications. Ginsburg has written extensively on the problem of malignant classifications masquerading as benign in the context of gender-based classifications. Most of her work as the legal director of the ACLU Women's Rights Project and as the lead counsel in a string of 1970s gender discrimination cases demonstrated that many of the gender-based classifications that were justified as benefiting women were in fact based on stereotypes about women's role as dependents and men's role as providers.<sup>139</sup> Ginsburg argued that, in the aggregate, such classifications perpetuated stereotypes that were detrimental to women's efforts to achieve social equality.<sup>140</sup>

Ginsburg's gender jurisprudence has focused on eradicating assumptions about people's capabilities based on their gender.<sup>141</sup> Although these cases have been criticized as taking away the few benefits belonging to women,<sup>142</sup> their goal was to destabilize the system of gender roles.<sup>143</sup> Although Ginsburg has been criticized for opposing benefits for caregivers,<sup>144</sup> what she opposes, in reality, is the use of gender to signify caregiver status.<sup>145</sup> She favors benefits for caregivers, but advocates for creating these benefits as caregiver benefits, rather than women's benefits.<sup>146</sup>

The cases Ginsburg argued with the ACLU challenged benefits that were designed in response to the "ideal worker/marginalized caregiver" dyad.<sup>147</sup> For example, *Reed v. Reed* involved a challenge to a statute that preferred males as estate administrators

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<sup>138</sup> *Id.* at 302.

<sup>139</sup> Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 J. CONTEMP. LEGAL ISSUES 279, 301 (1998).

<sup>140</sup> *Some Thoughts*, *supra* note 23, at 821-22.

<sup>141</sup> Ray, *supra* note 51, at 646 (writing, "[t]he rejection of 'unwarranted assumptions' about the capacities of individuals has long been central to Ginsburg's thinking about women's rights.>").

<sup>142</sup> Williams, *supra* note 139, at 301-02, notes that Ginsburg and other formal equality feminists have been criticized for not responding to the needs of working class and single mothers. Ginsburg's ACLU cases have been criticized for depriving women of rights or giving men the few benefits formerly accorded only to women. Williams counters that Ginsburg was not striving to eliminate caregiver's benefits, only to break down societal stereotypes about gender roles.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 302-03.

<sup>147</sup> *Id.* at 301. Williams notes that Ginsburg never opposed caregivers' benefits except in *Kahn v. Shevin*, a case that Ginsburg did not support, had not hand-picked as she had the other ACLU cases, and that she only argued for damage-control pur-

when males and females of the same degree of relationship were vying for that position.<sup>148</sup> Ginsburg argued that giving one gender preference over another based on gender stereotypes only to further administrative convenience by circumventing the need to hold hearings on the merits was an arbitrary legislative choice that violated the Equal Protection Clause.<sup>149</sup> Similarly, Ginsburg argued in *Frontiero v. Richardson* that a military policy automatically granting military wives housing and medical benefits while requiring military husbands to affirmatively prove their dependence on their service member wives was an unconstitutional, detrimental classification that was disguised as a benefit to women but was based on and perpetuated stereotypes about women's dependency.<sup>150</sup> By way of a number of other similar cases throughout the 1970s, Ginsburg slowly chipped away at gender-based stereotypes and convinced the Court to apply heightened review to gender discrimination cases.<sup>151</sup> She demonstrated that laws that were held out as beneficial to women were, in fact, poorly disguised efforts to perpetuate stereotypes about women's roles.

Ginsburg has argued that, because of the history of disguising detrimental gender classifications as beneficial, the masquerading problem emerged in the context of gender-based classifications.<sup>152</sup> Past lax scrutiny of gender-based classifications led to this problem, and she demonstrated the need for close review of allegedly positive gender classifications.<sup>153</sup> However, Ginsburg has also written about the masquerading problem in the context of race-based affirmative action. In her dissenting opinion in *Adarand*, Ginsburg wrote that the Court appropriately called for close review of race-based affirmative action to weed out programs that may have this

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poses. According to Williams, Ginsburg advocates for basing laws on "functional categories" rather than gender proxies. *Id.* at 302.

<sup>148</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>149</sup> See Sullivan, *supra* note 52, at 739-40; *Gender*, *supra* note 34, at 10.

<sup>150</sup> See Sullivan, *supra* note 52, at 740.

<sup>151</sup> See *supra* note 23.

<sup>152</sup> *Some Thoughts*, *supra* note 23, at 814 ("Because of the historical tendency of lawmakers and jurists to regard virtually all gender-based classifications as designed for women's benefit or protection, the notion of affirmative action in the context of sex presents a special problem.")

<sup>153</sup> *Id.*; see also Ginsburg & Merritt, *supra* note 35, at 258:

Patriarchal rules long sequestered women at home in the name of "motherhood," rather than allowing them to integrate parenthood with paid labor. It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid work and parenting, from laws that operate to confine women to their traditional subordinate status, and to relieve men of their fair share of responsibility for childraising.

quality.<sup>154</sup> Ginsburg therefore applied a common test to both gender- and race-based classifications when she wrote in *Gratz* that affirmative action programs should be reviewed to ensure that they do not constitute malign classifications masquerading as benign. Ginsburg's history of applying the standard articulated in *Califano v. Webster*,<sup>155</sup> displays her desire to unify the standards of review for race- and gender-based classifications.

The standard in *Califano v. Webster*, incorporates what might be called the "masquerade test."<sup>156</sup> In *Webster*, the Court upheld a law that altered the calculation of women's Social Security retirement benefits to compensate for discrimination-based lower wages and mandatory early retirement for women as permissible affirmative action.<sup>157</sup> The Court's decision was based on its holding that legislation that directly and specifically addresses gender-based discrimination and strives to remedy it through affirmative action programs that are closely targeted to the desired end is constitutional. In contrast, legislation based on stereotypes that does not aim to remedy discrimination is unconstitutional.<sup>158</sup> In other words, *Webster* requires that affirmative action programs be judged according to whether they genuinely and specifically redress discrimination, or whether they are in fact malignant classifications that are based on and perpetuate stereotypes, in order to eliminate improper classifications.<sup>159</sup> This case thus allows for preserving equal treatment while allowing for genuine compensation for past general discrimination.

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<sup>154</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275-76 (1995) (Ginsburg, J., dissenting).

<sup>155</sup> 430 U.S. 313 (1977).

<sup>156</sup> *See Some Thoughts, supra* note 23, at 823 ("*Webster* . . . attempts to preserve and to bolster a general rule of equal treatment while leaving a corridor for genuinely compensatory classification.>").

<sup>157</sup> *See Webster*, 430 U.S. 313, 318 (1977).

<sup>158</sup> *Id.* at 317 (holding that

[t]he more favorable treatment of the female wage earner enacted here was not a result of archaic and overbroad generalizations about women, or of the role-typing society has long imposed upon women, such as casual assumptions that women are the weaker sex or are more likely to be child-rearers or dependents (internal quotations and citations omitted)).

<sup>159</sup> *Some Thoughts, supra* note 23, at 823. Ginsburg writes that

[i]f the Court adheres to the *Webster* synthesis, it will uphold a gender classification justified as compensatory only if in fact adopted by the legislature for remedial reasons rather than out of prejudice about 'the way women (or men) are,' and even then, only if the classification neatly matches the remedial end.

*Id.*

Ginsburg has used the *Webster* standard in her gender-based equal protection jurisprudence. She relied in part on the *Webster* standard in her opinion in *VMI*,<sup>160</sup> arguing that the VMI establishment of a separate and inferior school for women perpetuated women's legal, social, and economic inferiority rather than compensating them for their economic and social disabilities,<sup>161</sup> because the separation of the two schools was based on "generalizations about the way women are."<sup>162</sup> Furthermore, the remedy of establishing a special school for women did not closely fit the violation, nor did it eliminate discriminatory effects, and prevent future discrimination,<sup>163</sup> because it did not afford women equal facilities, opportunities, or funding. In addition, the substitute school did not provide women with the unique characteristics of a VMI education or the benefits of a VMI degree.<sup>164</sup>

In her dissenting opinion,<sup>165</sup> Ginsburg also advocated using this standard to prohibit the gender-based classification involved in *Miller v. Albright*.<sup>166</sup> In *Miller*, the 21-year-old Philippines-born daughter of a Filipino mother and a U.S. Air Force member father challenged a law that prevented her from being granted citizenship because it required the citizen father of a foreign-born child with a non-citizen mother to legally attest to paternity before the child's eighteenth birthday in order for the child to be eligible to become a citizen.<sup>167</sup> The law did not require this procedure if the mother was a citizen and the father was not.<sup>168</sup> The Court upheld the classification on the grounds that it applied to a specific set of circumstances, which was not based solely on gender, and its purposes, to foster the development of a healthy relationship between the child and the father and to encourage early ties with the United States, were legitimate.<sup>169</sup> In *Miller*, Ginsburg dissented on the ground that the statute was based on overbroad stereotypes

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<sup>160</sup> "Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered," citing *Califano v. Webster*, 430 U.S. 313 (1977). *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996); see also Morgan, *supra* note 42, at 105.

<sup>161</sup> *VMI*, 518 U.S. at 533-34.

<sup>162</sup> *Id.* at 550.

<sup>163</sup> *Id.* at 547.

<sup>164</sup> *Id.* at 553.

<sup>165</sup> *Id.* at 460-71.

<sup>166</sup> 523 U.S. 420 (1998).

<sup>167</sup> *Id.* at 424-26. The challenged statute was 8 U.S.C. § 1409(a). *Id.* at 427.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 442-45.



about men and women's relationships with their children,<sup>170</sup> even though it appeared to be a form of affirmative action for women that granted them a benefit not allowed to men.<sup>171</sup> She wrote that the statute should not survive the *Webster* test because of its reliance on overgeneralizations.

Ginsburg has previously argued in favor of applying the *Webster* test to race-based affirmative action as well.<sup>172</sup> She has written that the *Webster* standard should be adopted in affirmative action cases and could have been used by the *Bakke* Court to uphold the case's race-based affirmative action program.<sup>173</sup> Under the *Webster* standard, the program in *Bakke* would be constitutional because it directly redressed the effects of social and economic discrimination and it did not involve "historic role-typing nourished by race-based animus."<sup>174</sup>

However, despite her earlier advocacy for adopting the *Webster* standard in race-based affirmative action cases, Ginsburg's *Gratz* decision uses only half of the standard, the masquerade test, and omits the part of the *Webster* test that requires that affirmative action programs be closely targeted to the injury they are striving to redress. This latter element is related to Ginsburg's other concern, which also is not discussed in the context of race in *Gratz*, namely, that gender should not serve as a proxy for other characteristics where it would be possible and more fitting to make a classification based on gender-neutral characteristics.<sup>175</sup> It is impossible to know

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<sup>170</sup> *Id.* at 460 (finding that "[o]n the surface, § 1409 treats females favorably. Indeed, it might be seen as a benign preference, an affirmative action of sorts.")

<sup>171</sup> *Id.* at 469 (holding that "[e]ven if one accepts at face value the Government's current rationale, it is surely based on generalizations (stereotypes) about the way women (or men) are. . . . We have repeatedly cautioned, however, that when the Government controls gates to opportunity, it may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females. . . ." (internal quotation marks omitted)).

<sup>172</sup> *Some Thoughts*, *supra* note 23, at 823-24.

<sup>173</sup> *Id.* Ginsburg wrote that

[t]he line between impermissible adverse discrimination and permissible rectification of past injustice sketched in *Webster* may well be elaborated in the Court's resolution of more heated 'affirmative action' controversies. In *Regents of California v. Bakke*, for example, involving an equal protection challenge by a white male to a state medical school's special minorities admission program, the *Webster* opinion could have served as a framework for decision.

*Id.*

<sup>174</sup> *Id.* at 824.

<sup>175</sup> See *Miller v. Albright*, 523 U.S. 420, 470-71 (Ginsburg, J., dissenting). Ginsburg wrote that alleged differences between mothers and fathers do not "justify reliance on gender distinctions when the alleged purpose—assuring close ties to the United States—can be achieved without reference to gender." *Id.* at 470.

Ginsburg's motivation for leaving out the "close targeting" element of the *Webster* test. It may be that she omitted it because she did not find it applicable in the context of race. Or, it may be that social conditions in the United States are such that minority status is sufficiently correlated with lack of opportunity so that the "masquerade" element alone can justify the classification as constitutional. Furthermore, Ginsburg may not have considered this part—"close targeting"—of the *Webster* test essential, and may have wanted to avoid constructing extra hurdles for affirmative action programs in an opinion, and the purpose of this was to promote a more flexible standard of affirmative action review.

Ginsburg's race-based standard in *Gratz* is not entirely less strict than her gender-based standard because she adds the requirement that race-based affirmative action programs should not unduly burden the majority, while she has not addressed a similar concern in the gender context.<sup>176</sup> However, as noted above, Ginsburg addresses this concern in the context of race-based affirmative action, because it was a major concern of the majority justices, and she raises it in order to assert that, unlike the majority, she finds that Michigan's affirmative action program did not unduly burden white students. Therefore, Ginsburg may have added this standard to her test for race-based affirmative action because the majority's concern necessitated her doing so, and she made the best of it.

Ginsburg also constrains her support of race-based affirmative action with a qualified endorsement of the majority's preference for a sunset clause. She had previously articulated a conception of both race-based and gender-based affirmative action as a transitional measure to be used during the process of eradicating discrimination and its effects and of achieving full equality.<sup>177</sup> However, she loosens this constraint on affirmative action when expressing her doubts that true equality and the retirement of affirmative-action plans will be achieved in the near future. As a result, the test that Ginsburg applies to race-based affirmative action is

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<sup>176</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275-76 (1995) (Ginsburg, J., dissenting) (noting that

[c]lose review also is in order [because] . . . some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.)

<sup>177</sup> See *Gender*, *supra* note 34, at 34; *Some Thoughts*, *supra* note 23, at 825. In both articles, Ginsburg refers to the use of affirmative action during a "transition period."

novel in that it is grounded in the standard she endorses for gender-based classifications, even though she adopts it to the concerns and exigencies of *Gratz*.

#### V. CONCLUSION

Ginsburg adds an important articulation of a less formalistic view of equal protection to the affirmative action debate. Affirmative action is a complicated issue that rarely lends itself to absolute, definitive answers. However, the equal protection framework within which affirmative action cases are currently decided has become so mired in formalistic technicalities that courts cannot help but lose sight of the issues of racial injustice and discrimination that are at the heart of the need for affirmative action. The result is a judicial approach to affirmative action that seems hopelessly out of touch with the real issues surrounding the subject and is therefore unlikely to reach a satisfying solution to the problem. Against this backdrop, Ginsburg's willingness to ground her analysis of affirmative-action plans in a discussion of historic inequality and injustice and to dispense with some of the formalism of the majority adds a levelheaded, clearly articulated, anti-formalism position to the affirmative-action debate.

