ON ARGUING
Grutter v. Bollinger
Leading the firm’s appellate and constitutional practice, Maureen Mahoney, '78, is a partner in the Washington D.C. office of Latham & Watkins, LLP. Earlier this year she represented the University of Michigan in the landmark case upholding the constitutionality of admissions programs that consider race as one of many factors in order to attain the educational benefits of a diverse student body. She has argued twelve cases before the Supreme Court and won eleven of them; in October of this year she will defend accounting firm Arthur Andersen before the Fifth United States Circuit Court of Appeals. The National Law Journal recently identified her as one of America's top fifty women litigators. In the following interview, Mahoney shares some insights on arguing Grutter v. Bollinger.
Will you briefly describe the Court’s ruling in Grutter v. Bollinger?

The general question was whether the Constitution requires the admissions policies of higher education institutions to be colorblind. The Court decided that it does not. Specifically, the most important conclusion in this case is that racial diversity is a sufficiently compelling interest to permit those institutions to take race into account in admissions. One thing that has not been widely reported is that there were six Justices who agreed with that conclusion, because in addition to the five-person majority in our favor, Justice Kennedy also accepted it in his dissent. Chief Justice Rehnquist, in his dissent, didn’t take a position on it. So, regarding that threshold question, you could say the outcome was six to two with one abstention.

The second issue was whether the program used by the law school to select students for admission operated as a quota, placing undue emphasis on race. The Court held that the law school’s program was properly devised—narrowly tailored to achieve the aim of a diverse student body, and not a quota.

What’s important about this decision?

The most important thing is that it preserves the status quo and there won’t have to be re-segregation of institutions that have worked hard to achieve diversity. If elite law schools had to select on a colorblind basis, they’d go back to having very small numbers of minority students. In the year 2000, for example, of all students in the country with GPAs of 3.5 or higher and LSAT scores of 165 or higher, 26 were African-American. Over 3000 were White and Asian.

Justice Scalia suggested that the colorblind solution to that problem would be to lower admission standards.

Yes, but the majority did not agree that it is necessary to choose between high educational standards and a diverse student body.

Does it trouble you that the Court was friendly to subjective diversity plans and so tough on formulaic ones, such as the Michigan undergrad plan?

We certainly wanted to win both cases, but there is some logic to the distinction drawn by the Court. The Equal Protection Clause is about fair access to opportunity. Diversity programs should be designed to ensure that all of a students’ potential contributions to diversity can be considered in the admissions process. A program that is too formulaic can prevent that kind of flexible consideration.

As the Chief Justice put it, a diversity program that gives no credit to a student who can paint like Monet is not properly tailored to the goal of student body diversity. We argued that the undergraduate program was sufficiently flexible, but the Court disagreed.

Does this make non-transparent government safer?

I think the differences in the programs related more to flexibility than transparency. The University of Michigan Law School’s program expressly acknowledged that it was affording a plus to the unusual applicant who had the experience of growing up as a member of a racial minority in America. But the policy also permitted consideration of every other type of diversity, and the record showed that many white applicants benefited from that feature of the policy.
A lot of organizations filed amicus briefs on your side in this case. The most amicus briefs in Supreme Court history! It took me four twelve-hour days just to read through them all. Most (sixty-nine out of eighty-eight) were on our side, and they came from every facet of American society. Nearly seventy of the most prestigious United States corporations were represented in those briefs, more than sixty-five top private universities, as well as a large number of our best-known and most respected active and retired military officers. It was widely recognized that programs like the one at Michigan’s law school are in the best interests of those institutions and of the country as a whole.

Did you learn anything from the amicus briefs? What do you make of their sheer number, other than a reflection of a hot issue?

Some of the amicus briefs were quite helpful in demonstrating the need for race-conscious admissions programs to achieve diversity and the inadequacy of race-neutral alternatives. As for the number, we actually tried to discourage so many separate filings and still ended up with the largest number ever filed. I think this reflected the fact that the values of diversity have really become deeply engrained in the national culture.

Professor David Strauss of the Law School wrote this was essentially a “conservative” decision, in that it respects actions set in place over many years to deal with a recognized national concern. Would you characterize it similarly?

Yes, I believe that in respecting and preserving the status quo in this way, the decision is in the best conservative tradition.

Did you prepare in any special ways?

The current Clerk of the Court, William Suter, tells everyone who’s going to present argument that there are three things they need to do in order to perform well—prepare, prepare, and prepare.

Considering your track record when arguing before the Supreme Court, you must be heeding those rules.

Well, I guess my preparation routines so far have been pretty effective. For this case, I did three moot courts instead of two. I also had a very unique opportunity: because I was representing one of the great law schools, I got the chance to collaborate with some brilliant faculty members in putting together the arguments and testing them. One of my moot courts was with faculty of the University of Michigan’s law school. It was stimulating and great fun, too. For every case, I write down all the questions I can think of—literally hundreds of them, for this case—and then devote myself to answering them all.

After all that preparation, did anything during these oral arguments take you by surprise?

I was asked eighty-six questions in that half-hour, and I felt well prepared to respond to all of them. I wouldn’t say I was surprised by this, but I was pleased that there weren’t as many questions as I had anticipated about whether diversity is a compelling interest, because that pattern of questions suggested to me that maybe on the threshold question—whether any selection based on race was permissible—the Justices, or enough of them, might be seeing things our way.

Similarly, my spirits lifted when the very first line of questions, from Justice O’Connor to one of the attorneys arguing for the other side, seemed to express some skepticism about the plaintiff’s interpretation of the Equal Protection Clause as requiring colorblind decision making. We knew that her support would probably be crucial. I always tell people that you do your planning in a full-bore effort to win your case nine to nothing, but I was pretty sure this one would turn out closer than that.

I was really happy at the conclusion of the argument. I didn’t know that we had won, but the argument had gone as well as I could have expected in terms of the nature of the questions that were asked.

What do you think was the weakest part of your argument?

We argued that the Court should follow Justice Powell’s opinion in Bakke under principles of stare decisis. This was a difficult argument because no other justice joined Justice Powell’s opinion, but even Justice Scalia had called Powell’s
opinion the “law of the land” in a law review article written years ago. In the end, the Court did not resolve the issue of stare decisis and just adopted Justice Powell’s opinion based upon the persuasiveness of his reasoning. Where does this area of the law go from here? I think regarding diversity in higher education it will be settled law for some time to come. Clearly, race can be a factor in admissions as long as it’s accomplished in appropriate ways. In the companion case [Gratz v. Bollinger] the Court invalidated the method used by the University of Michigan to select undergraduate admits, so some schools will have to change their methods. But the lion’s share of selective schools will be able to keep doing what they’ve been doing. I’m sure there will be more activity on other frontiers—in employment law under Title VII, for example.

American Lawyer says that when you argued your first case before the Supreme Court, you were “so well-schooled, poised, and disciplined that, according to one justice, the justices passed notes among themselves during the argument praising Mahoney and asking questions about her background.” Did you notice that happening? No, I was very, very focused on what I was doing. There’s often activity or motion on the bench of one form or another. I was flattered to hear about that later, but I think if I had noticed activity like that at the time, it might have been a bit disconcerting—I might have thought “Oh, no!” and wondered what I was doing wrong.

Can the University of Chicago Law School take some credit for your professional accomplishments? I felt then like I had an incredible education, and that feeling hasn’t changed. The Law School prepared me for the most intellectual practice of law, and opened so many doors. The school helped me get my clerkship with Justice Rehnquist: so many people went to bat for me, and I’m so grateful for that. There’s no question in my mind, from my own experience and what I have observed, that the University of Chicago Law School prepares its students more rigorously than many of the other top law schools. This was a historic moment—only the second time that the audio of an oral argument before the Supreme Court case has been made available to the public.

Yes, and we all felt it inside the Court building. I can’t speak for the Justices, of course. The fact that it was broadcast meant that a much larger segment of the public got involved. This is the only case, for example, where I’ve received fan mail and flowers. E-mails from people all over the country who I’ve never met—really moving e-mails about the importance of this issue to them and their lives. Requests for autographed copies of my brief, which were then auctioned. This is as close to being a rock star as most lawyers ever get.—G.de J.

A lot has been made of Justice O’Connor’s comment in the majority opinion that race-related considerations should be unnecessary in twenty-five years.

What she said was important, which is that no one can deny that seeking diversity in this manner creates burdens as well as benefits, and even though for now the benefits outweigh the burdens, it sure would be good if everyone in society worked to make this unnecessary in the future. She was setting a marker, urging us to eliminate the need to make choices like this.
A Conservative Victory by David Strauss

Everyone knows that liberals favor affirmative action and conservatives oppose it. So when the U.S. Supreme Court decided on Monday that universities may engage in affirmative action, it was a great victory for liberals, or at least something of a defeat for conservatives, right?

Actually no. The Supreme Court's affirmative action decision was deeply conservative, in an important way. The fact that it wasn't perceived as conservative tells us something not about affirmative action but about what counts as conservatism in the United States today—about how American "conservatives" like those who fought affirmative action are not conservative at all but radical social engineers, a right-wing version of what they claim to condemn.

Conservatism took shape in the late 18th Century, in response to the violence and the wrenching changes of the French Revolution. The great conservative thinkers—like Edmund Burke, the 18th Century British statesman who was the most famous critic of the French Revolution—had some very clear reasons for objecting to revolutionary change. Societies, they said, are complex organisms that obey their own internal logic, a logic that cannot be captured in abstract theories about justice and the good society. The actual, on-the-ground practices of a society reflect a kind of accumulated wisdom; they are the result of thousands of decisions by individuals and groups, grappling with complex problems as best they can. Revolutionary thinkers—people who want to uproot their fine-sounding abstract ideals over the humble, day-to-day lessons of experience—are, conservatives like Burke said, "sophisters and declaimers." They presume to know better than all the people whose combined efforts built the social practices they are attacking. They are an arrogant, destructive menace.

Over the last generation, affirmative action has become deeply woven into the fabric of American life. That's one thing that became clear during the litigation over the University of Michigan's affirmative action programs. Businesses, universities, governments, the media, the military—all of them engage in affirmative action. So do presidents, including nominally anti-affirmative action presidents, in appointing Cabinet officers and Supreme Court justices, but that's another story.) This nearly universal practice of affirmative action didn't happen because someone commanded it. It didn't even happen because an intellectually satisfying rationale for affirmative action became widely accepted. It happened because each of these institutions, in struggling to deal with its own part of the enormously complex problem of race in America, found that things worked best if they allowed some role for affirmative action.

The critics of affirmative action, by contrast, have a bright, shining abstraction—the ideal of colorblindness. With that abstract ideal they proposed to sweep away these accumulated decisions of literally thousands of individuals and institutions, big and small. This is not conservatism; it's radical social engineering that the French revolutionaries would have recognized. It was an effort to make society conform to an intellectually pleasing blueprint.

The current Supreme Court—a very conservative Supreme Court—wouldn't go for it. It was, for the justices in the majority, just too big a change to impose for the sake of intellectual symmetry. The justices didn't have a very satisfactory rationale of their own; Justice Sandra Day O'Connor's opinion, with its distinctions between "holistic" and "mechanical" admissions decisions, is already being picked apart. But theoretical soundness was beside the point. The court was simply not going to uproot a practice that much of American society had already settled on, for myriad, often unarticulated, reasons of its own.

Some of us would prefer to defend affirmative action in a less conservative way, on the basis of ideals of equality and racial inclusion. But the Supreme Court's decision was not based on those ideals. It was based on a resolutely conservative rejection of the right-wing radicals' efforts at social engineering. On Monday, the conservatives won. It was the revolutionaries, the latter-day successors to Burke's sophisters, who lost.

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Good for Business by Thomas A. Gottschalk, '67

On June 23, 2003, the United States Supreme Court issued its opinion on whether the University of Michigan can use an applicant’s membership in a minority racial group as a positive factor in its admission process. The cases decided by the Court, Grutter v. Bollinger (law school admissions) and Gratz v. Bollinger (undergraduate admissions) addressed one of the most widely debated public issues in recent years—affirmative action in university admissions. The Court upheld the constitutionality of considering an applicant’s race and ethnicity in university admissions. In doing so, it determined that while admission processes that involved narrow tailoring to achieve diversity would be permissible (Grutter), overly broad systems that gave insufficient consideration of each applicant as an individual would not pass constitutional scrutiny (Gratz). With the filing of its brief in July of 2000 in proceedings before the United States District Court, in 2001 before the United States Court of Appeals, and subsequently before the United States Supreme Court, General Motors Corporation assumed a public role in this discussion.

With a global workforce of 350,000 employees, General Motors maintains major market presences in more than 200 different countries on six continents. Similarly, the vast majority of businesses in the Fortune 500 maintain operations or do business outside of the United States. GM recognizes, as have most major American corporations, that the ability of American businesses to thrive in the twenty-first century will depend in large measure on our nation’s responses to two inevitable forces: the increasingly global and interconnected nature of the world economy and the increasing diversity of our own population.

To succeed in this dynamic environment, American businesses must identify and develop leaders who possess cross-cultural competence—the capacities to interact with and to understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories. As an employer of a large number of University of Michigan graduates, General Motors depends upon the university and similarly selective institutions to prepare students for employment—to teach them the skills required to succeed and lead in the global marketplace. The robust exchange of ideas and perspectives from a multitude of sources which occurs at institutions of higher learning furthers the development of these skills. Cross-cultural competence improves business performance by helping to: (a) identify and satisfy the needs of diverse customers; (b) recruit and retain a diverse workforce to work together to develop and implement innovative ideas; and (c) form and foster productive working relationships with business partners and subsidiaries around the globe.

A ruling proscribing the consideration of race and ethnicity in admissions decisions altogether would likely reduce the racial and ethnic diversity in the pool of employment candidates from which business can draw future leaders, thereby impeding a company’s efforts to obtain the benefits of diversity in its own workforce. A loss of affirmative action programs would reduce African-Americans, Hispanics, and other minorities’ access to many quality universities and raise real concerns about the re-segregation of educational institutions and potentially businesses. For that reason, more than sixty-five other Fortune 500 companies joined with GM in filing “friend of the court” briefs supporting the need for diversity in higher education.

Although General Motors fully supported the use of race in admissions as a legally permissible compelling interest, GM left to the University of Michigan to defend its elaborate 150-point “Selection Index” for undergraduates. This system, which provided a twenty point bonus for minorities, as well as points for sons, daughters, and grandchildren of alumni, men seeking nursing degrees, or women majoring in engineering, etc., was eventually struck down by the Court. The Court reasoned that the undergraduate admissions approach treated applicants as distinct groups rather than as multi-faceted individuals with many unique characteristics. The University of Michigan Law School’s approach, which was acceptable to the Court, did not use the point system, but did give special consideration to children of out-of-state alumni.

General Motors has and will continue to benefit from a management team and a workforce that has openness to differing life experiences, nuances, and perspectives. As customers change and business reinvents itself, GM will benefit from a workforce that has the capacity to rethink what has been previously thought. Affirmative action progress in higher education makes this society more inclusive not only on campus, but in business as well.

Thomas A. Gottschalk, '67, is Executive Vice President and General Counsel at General Motors Corporation.
Grutter at Home by Ann K. Perry

The Admissions Office at the Law School waited with great anticipation for the Supreme Court's decision in the Grutter case. There was a possibility that the ruling would require significant changes in the way applications were reviewed. Instead, the Court affirmed the criteria we use to make admissions decisions.

The Admissions Committee's goal is to assemble a diverse learning community. Diversity, of course, can be defined many different ways. We seek students from a variety of racial, ethnic, religious, and socio-economic backgrounds, as well as different educational and work experiences. Students come from all over the world and have different political ideologies. With a wide range of viewpoints and experiences represented in the classroom, the exchange of ideas is much more dynamic. Diversity in the classroom enhances learning.

The Law School received over 5,000 applications for the Class of 2006. Each applicant provides an LSAT score, his or her academic history, two letters of recommendation, a resume, and a personal statement. The Admissions Committee looks for students with demonstrated academic achievement, as well as individuals who will bring an interesting voice to the classroom. These voices can be heard through their personal statement, their resume, and their letters of recommendation. In their personal statements, applicants share information about the contributions they would bring to the class. We find information about past experiences, and information obtained from letters of recommendation useful as well. Still, when all is said and done, evidence of intellectual horsepower and a passion for learning and thinking loom largest.

Over time, our faculty have come to be increasingly impressed with the ways in which diversity (of various kinds) enhances the exchange of ideas among professors and students at the Law School. The thinking behind Grutter v. Bollinger may once have seemed inconsistent with academic excellence, but it has now come to be welcomed as a means of building the sort of educational community we value.

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