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THE SUPREME COURT, CONGRESS AND HIGHER EDUCATION

PART I

**THE UNITED STATES SUPREME COURT:
A CRITICAL REVIEW OF RECENT AND PENDING CASES THAT ARE LIKELY TO
HAVE A SIGNIFICANT IMPACT ON HIGHER EDUCATION ADMINISTRATION**

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Introduction

A little more than a year has passed since the United States Supreme Court issued its decision in *Bush v. Gore*, the case that effectively decided the 2000 Presidential election.¹ The decision sounded the crescendo in an anguished national debate over the appropriate boundaries of judicial involvement in the political process. In the immediate aftermath of the decision, commentators wondered whether the Court had done lasting damage by injecting itself so directly into the political process. New York University Law School Professor Seth Harris told a reporter that “the Supreme Court has succeeded in finding a way that everyone loses. Gore loses the case and the election. Bush loses the opportunity for the legitimacy of the recount and the clear mandate of a unified Supreme Court decision. And the Supreme Court loses a substantial chunk of its credibility. It is the worst possible outcome to a very difficult case.”² Others

* The views expressed in this paper are those of the author, and do not necessarily reflect those of The Pew Charitable Trusts. Portions of the introductory section and Parts I and II of this paper borrow from a paper the author prepared for last year’s Stetson Conference.

¹ 531 U.S. 98, 121 S. Ct. 525, 2000 U.S. LEXIS 8430 (2000).

² “National Expert: Court’s Decision Made Losers of Us All,” *South Florida Sun-Sentinel*, December 14, 2000, p. 22A.

scoffed: “Although there will doubtless be claims of partisanship in the high court's decision,” wrote University of Denver Law School Professor Robert Hardaway, “50 years from now this decision will be remembered not for its technical arguments relating to election law and equal protection, but rather for the fact that it finally ended a fiercely contested election dispute that was threatening to dissolve into political and social chaos.”³

A year later, life has returned to a semblance of normal in the halls of the Supreme Court. Relations among the Justices seem unaffected by the rancor that came to the surface immediately after the presidential election. As Jeffrey Toobin wrote in his excellent book on *Bush v. Gore*:

Nineteen days after the decision, Justices Ginsburg and Scalia celebrated New Year's Eve together with their families, as they had done for many years. In the next few months, several justices on both sides of the decision gave speeches saying they continued to respect their colleagues and believed that the Court remained an essentially apolitical institution. ... Polls showed that public esteem for the Court was essentially unchanged, though critical reaction to the decision in *Bush v. Gore* remained harsh.⁴

On one level, the Court is back to the routine of picking cases (frequently narrow, technical cases) and deciding them. On another level, nothing is as it used to be. There's no pretending that the Court makes law without an eye to the political implications of its work. Politics has come to be perceived, cynically or otherwise, as an important dimension of Supreme Court jurisprudence and we live with the fact that the Court doesn't just *follow* the election results—it *determines* 'em.

I. A Supreme Court Primer

The United States Supreme Court is established by Article III of the United States Constitution and is the ultimate decision-making body in the federal judicial system. The Court consists of nine Justices: the Chief Justice of the United States and eight Associate Justices. Members of the Court are appointed by the President and confirmed by the United States Senate.

³ “Bush vs. Gore: Legal Experts Dissect Supreme Court Decision and Its Long-Term Effects,” *Denver Rocky Mountain News*, December 17, 2000, p. 1B.

⁴ Jeffrey Toobin, *TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001), page 275.

Once Justices are confirmed the Constitution provides that they serve during “good Behaviour,” meaning in effect they serve for life or until they retire or resign.

The Supreme Court is a court of *limited jurisdiction*. Unlike a trial court, which is generally required to adjudicate any case filed in its clerk’s office, the Supreme Court hears only the cases it chooses to hear—and it selects only a minuscule proportion of cases to decide on the merits. Parties who wish to have their cases heard by the Supreme Court file a petition—technically known as a petition for writ of certiorari—with the Court. In the last Supreme Court Term, the Court received about 7,700 petitions. The Court chose only 99 cases to hear – about 1.3 percent of the total.⁵ There is no appeal from the Supreme Court’s denial of a petition for writ of certiorari. The Court has unfettered discretion to select the cases it will decide, and that power is among the most significant and politically charged of those wielded by the Court.

How, as a practical matter, does the Court decide when to grant a petition for certiorari? Rule 10 of the Supreme Court’s Rules⁶ sets out three broad categories of cases that the Court will, under the appropriate circumstances, accept for review:

- When a federal appellate court enters a decision that is “in conflict with the decision of another [appellate court] on the same important matter,” the Court may grant certiorari in one or both cases (so-called “split in the circuits” jurisdiction).
- When a state court or federal appellate court “has decided an important question of federal law that has not been, or should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court,” then review may be granted (“important federal question” jurisdiction).
- The Court may accept review when a lower court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.”

All three categories contain ample wiggle room (the matter has to be “important” to warrant review, and so forth). To repeat, the Court has virtually unfettered freedom to decide what cases it will hear or not hear as part of any given year’s docket of cases.

⁵ *The Supreme Court, 2000 Term: The Statistics*, 115 HARV. L. REV. 539, 546 (2001).

⁶ www.supremecourtus.gov/ctrules/rules.pdf.

II. The Supreme Court Today

Reproduced in an appendix at the end of this paper are the biographies of the nine Justices who serve on the Supreme Court today.⁷

The Chief Justice, William Rehnquist, was appointed as an Associate Justice in 1972 and ascended to the Chief Justiceship in 1986, when former Chief Justice Warren Burger retired.

Like Chief Justice Rehnquist, six of the eight Associate Justices (John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas) were appointed to the Court by Republican Presidents. The Court's most junior members—Ruth Bader Ginsburg and Stephen Breyer—were appointed by President Bill Clinton, a Democrat.

Incumbent Supreme Court Justices, by Date of Appointment and Party Affiliation

<i>Justice</i>	<i>Year Appointed</i>	<i>By President --</i>	<i>Party</i>
William H. Rehnquist	1972	Nixon	Republican
John Paul Stevens	1975	Ford	Republican
Sandra Day O'Connor	1981	Reagan	Republican
Antonin Scalia	1986	Reagan	Republican
Anthony M. Kennedy	1988	Reagan	Republican
David H. Souter	1990	Bush	Republican
Clarence Thomas	1991	Bush	Republican
Ruth Bader Ginsburg	1993	Clinton	Democrat
Stephen G. Breyer	1994	Clinton	Democrat

In comparison to other epochs in the history of the Court, today's Court has four unique characteristics that define it in political terms.

First, it is an unusually experienced Court. The nine Justices have been on the Court for an average of sixteen years each, an unusually long time. Two Justices (Chief Justice Rehnquist

⁷ These biographical materials are taken from the Supreme Court Web site at www.supremecourtus.gov/about/biographiescurrent.pdf.

and Justice Stevens) have been on the Court for more than a quarter of a century, and seven of the nine Justices have served for ten years or more. Even before they reached the Supreme Court, eight of the nine Justices (all but Chief Justice Rehnquist) served apprenticeships as judges on the lower federal courts or state trial and appellate courts. Eight of the nine Justices, in fact, have worn judicial robes for twenty years or more; only Justice Thomas (11 years) has been a judge for less than two decades.

In another respect, the Justices are very experienced: four (Justices Scalia, Kennedy, Ginsburg and Breyer) were university faculty members prior to their appointments to the bench. Justice Scalia taught at the law schools of the Virginia, Chicago, Georgetown and Stanford. Justice Kennedy spent 23 years on the faculty at the McGeorge School of Law in California. Justice Ginsburg taught for seventeen years at the law schools at Rutgers and Columbia. Justice Breyer was on the faculty at Harvard. In comparison to Courts of the past, this one has first-hand experience in academia and understands what higher education stands for and how it works.

Second, it is an unusually stable Court. The nine Justices who are on the Court today have served together for eight years—or to make the same point in another way, it has been eight years since a vacancy on the Court was filled by a new Justice. Not since 1823 has the Court been through a longer period without a change in personnel. By way of comparison, between 1930 and 1990, a period of sixty years, Presidents appointed 33 new Justices, an average of one new appointee every 22 months.

Third, it is an unusually—one could even say startlingly—polarized Court. It is a Court with strongly cohesive and well-defined voting blocs, and indeed one cannot understand today's Court without an appreciation of the ideological divide represented by those blocs.

On the left, politically speaking, are the four Justices who form the Court's more or less dependably liberal bloc (and who constituted the four-Justice minority in *Bush v. Gore*): Justices Stevens, Souter, Ginsburg and Breyer.

On the right are the four Justices who form the Court's solidly conservative bloc: Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas.

In the middle is Justice O'Connor, who plays a remarkable role as the Supreme Court's pivot point. The Court is so intractably divided, and Justice O'Connor's vote is so frequently

determinative of the outcome, that as a practical matter she almost never dissents. Her vote is cultivated by advocates who argue before the Court and by the Justices themselves, who reason that she will provide the fifth vote needed to cement a Court majority. Consider these statistics:

Every Term, many cases are relatively uncontroversial cases that are decided by unanimous vote. In the October 1999 Terms, as in past Terms, unanimous opinions accounted for more than one-third of all decisions—42 percent, in fact, or 32 out of the 77 cases decided by written disposition. In only 45 cases did one or more of the Justices file a dissenting opinion.⁸

In those 45 cases, however, 18—40 percent of the total—were decided by margins of 5 to 4. That’s an extraordinarily high number, reflecting the close divisions and degree of polarization among the Justices. And of those 18 cases decided by 5-4 votes, Justice O’Connor sided with the majority in 15 of them! Justice Souter, by comparison, voted with the five-member majority in only six of the 18 cases; Justice Breyer in only four; Justice Ginsburg in only three.⁹

Fourth and finally, this Court suffers from—or enjoys, depending on your viewpoint—an unusually high political profile. In the last decade, to an extent unprecedented in its history, the Court has been the subject of sustained, intense, and often far from flattering attention from the media. The Court has been in the spotlight because of—

- Justice Thomas’s nationally televised and highly controversial face-off against Anita Hill during his confirmation hearing in the summer of 1991;
- Chief Justice Rehnquist’s role as presiding officer during the Senate impeachment trial of President Clinton in 1998 and 1999;
- The emergence of the Supreme Court and several individual Justices as issues during the 2000 Presidential election campaign¹⁰; and

⁸ *The Supreme Court, 2000 Term: The Statistics*, 115 HARV. L. REV. 539, 543 (2001). As for the unaccounted-for balance (86 reported decisions, 30 decided unanimously and 49 decided with one or more dissents—leaving seven cases unaccounted for), there were seven cases in which one or more of the Justices filed a concurring opinion—an opinion agreeing with the disposition of the case but offering different or embellished grounds.

⁹ *Id.* at 544.

¹⁰ During the summer of 2000, Republican candidate George W. Bush, in answer to a reporter’s question, described Antonin Scalia and Clarence Thomas as the Justices he most admired, and promised that his appointees to the Court would fit their conservative mold. Democratic candidate Al Gore pounced

- The unprecedented attention paid to the Supreme Court's two decisions in the Florida Presidential election dispute in December, 2000.¹¹

The predictable result is that, more loudly than many astute observers of the political scene believe is healthy, the Court has become the object of rancorous partisan finger pointing. The Court's decision in *Bush v. Gore*, reported *Newsweek Magazine*, "exposed the raw undercurrent of politics that runs beneath [the Justices]. Their actions sullied the naive but necessary faith in their Olympian neutrality. In pulling the legal fire alarm, we may have set the fire station ablaze—with high courts just another set of institutions cuffed around in the hardball culture."¹²

III. The Supreme Court and Higher Education: The Current Docket and Speculation on What Might Lie Ahead

The Supreme Court's higher education docket is, at the moment, thin. The Court will decide four higher education cases this Term. All present relatively narrow issues on technical points of law. The Court has also decided an important disability-rights case that will significantly change the analysis of cases filed against college and universities under the

on the issue during one of the televised Presidential debates, saying in answer to a question about Supreme Court appointments: "[T]he next president is going to appoint three, maybe four Justices of the Supreme Court. And Governor Bush has declared to the antichoice groups that he will appoint Justices in the mold of Scalia and Clarence Thomas who are known for being the most vigorous opponents of a woman's right to choose." "Supreme Interest: For Some Justices, The Bush-Gore Case Has a Personal Angle," *Wall Street Journal*, December 12, 2000, page A1.

¹¹ The complete texts of court decisions and briefs in the Florida Presidential election dispute appear on the Supreme Court Web site—www.supremecourtus.gov/florida.html.

For an example of how angry the reaction was in some quarters to the decision in *Bush v. Gore*, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1108, 1109 (2001), which among other things characterizes the decision as a "judicial coup" that would not be tolerated in a "third world country" and concludes with this peroration: "It is easy to understand why most lawyers and legal academics, like most people in the country more generally, do not want to accept the possibility that five Justices fundamentally betrayed their oaths of office"

¹² "Disorder in the Courts: Judicial Rollercoaster: Bush vs. Gore is Headed Back to the U.S. Supreme Court. Will the Fierce Legal Battles Finally Get Us a New President and End the Chaos--or Ignite a Constitutional Crisis?", *Newsweek Magazine*, December 18, 2000, page 26.

Americans with Disabilities Act. But overhanging everything is the possibility that the Court, this Term or next, will finally wade into an issue of unsurpassing importance to the higher education community: the legality of race-based affirmative action in college admission and financial aid decision making.

A. Cases Decided this Term or on the Docket Today

(1) *When is a physical or mental impairment a “disability” under the Americans with Disabilities Act?* Congress passed the Americans with Disabilities Act in 1990.¹³ Described at the outset in almost apocalyptic terms—“one of the century's most significant pieces of civil rights legislation,” a “20th century Emancipation Proclamation for all persons with disabilities,” “arguably the most significant civil rights and social policy legislation to become law” during the civil rights era¹⁴—it quickly generated a tidal wave of litigation on college and university campuses, as well as contempt from conservative commentators who derided its “‘accommodate almost everything’ mandate” and labeled it an “unmitigated disaster.”¹⁵

As even its ardent supporters concede, the ADA contains a “poorly drafted definition” of a key concept—“disability.”¹⁶ Under the ADA, a disability is defined (in pertinent part) as “a physical or mental impairment that substantially limits one or more of the *major life activities* of such individual ... [emphasis added].” That definition has been the subject of unusually intense

¹³ 42 U.S.C. §12101 *et seq.* For an excellent treatment of the history and purpose of the ADA, see Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L. J. 1071, 1080-1098 (1999).

¹⁴ S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 603 (2001); 136 CONG. REC. 17369 (1990) (statement of Sen. Tom Harkin, chief sponsor of the ADA); David Broder, “101st Congress Doesn't Deserve the Bad Rap It Got,” *Chicago Tribune*, Dec. 5, 1990, Section 1, p. 23.

¹⁵ James Bovard, “The Disabilities Act’s Parade of Absurdities,” WALL STREET JOURNAL, June 22, 1995, p. A16; Walter Olsen, “Under the ADA, We May All Be Disabled,” WALL STREET JOURNAL, May 17, 1999, p. A27.

¹⁶ Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C.L. REV. 1405, 1408 (1999).

Supreme Court scrutiny over the last few years. In three cases decided in 1999, the Court narrowed the scope of the ADA by adopting relatively restricted interpretations of the statutory definition.¹⁷ The narrowing process accelerated this Term when the Supreme Court decided *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 2002 U.S. LEXIS 400 (No. 00-1089 January 8, 2002). Ella Williams, an assembly line worker at an automobile manufacturing plant, suffered from carpal tunnel syndrome, which effectively prevented her from working with the kinds of pneumatic tools used to assemble auto parts. Her employer initially accommodated the disability by transferring her to a job conducting visual inspections of cars as they rolled down the assembly line. Later, however, inspectors' jobs were modified; inspectors were required to apply a light sheen of "highlight oil" using a sponge and a wiping cloth. Immediately, Mrs. Williams started to experience pain in her neck and shoulders, and a visit to the auto plant's in-house medical service confirmed that she had again incurred various disabilities related to the original diagnosis of carpal tunnel syndrome. When the company refused Mrs. Williams's request to eliminate the oil-application step from her inspection job, Mrs. Williams claimed that she was unable to work and was soon fired for poor attendance.

In her ensuing ADA lawsuit, Mrs. Williams claimed that her physical impairments limited her in performing her work-related duties, which she claimed was a "major life activity" under the definition of the term "disability" in the statute. Mrs. Williams relied on implementing regulations promulgated by the Equal Employment Opportunity Commission under which the term "major life activities" was defined to encompass "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, *and working*."¹⁸ But the

¹⁷ Discussion of those three decisions—*Sutton v. United Air Lines, Inc.* 527 U.S. 471 (1999), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)—is beyond the scope of this paper. Very briefly, *Sutton* rejected ADA claims by airline flight attendants who wore glasses on the ground that an easily correctable vision impairment was not a "disability" under the ADA; *Murphy* held that a mechanic suffering from with elevated blood pressure was not disabled when his condition was controllable through medication; and in *Albertson's*, perhaps the most difficult of the three, the Court held that a truck driver with a non-correctable visual impairment was not disabled because he had not established the connection between his impaired vision in one eye and his inability to perform a "major life activity." See Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L. J. 1071, 1099-11108 (1999).

¹⁸ 2 C.F.R. §1630.2(i) (1999) (emphasis added).

Supreme Court, in an unusual unanimous opinion, brushed aside Mrs. Williams's argument and held that she was not disabled and hence not entitled to the protection afforded by the ADA, because she was not impaired in performing a "major life activity." The Court's reasoning, in an opinion written by Justice O'Connor, went something like this:

- Only the words in the statute are important. The interpretive EEOC regulation is not persuasive because the ADA does not authorize the EEOC or any other federal agency or department to issue regulations interpreting or glossing the statutory definition of the key term "disability."
- That definition is restrictively worded. An impairment must *substantially* limit (not just *limit*) the performance of a *major* life activity (not just a *life activity*).
- "[The phrase] '[m]ajor life activities' thus refers to those activities that are of central importance to daily life." An individual "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." 2002 U.S. LEXIS 400, at 24, 26.
- Finally and most significantly, the inability to perform work is not an impairment of a major life activity unless the inability extends to "a 'broad range of jobs,' rather than a specific job." *Id.* at 29. Mrs. Williams cannot prevail by showing that her impairments prevent her from performing "occupation-specific tasks" associated with a particular job (which is, of course, what Mrs. Williams and a decade's worth of prior litigants had shown); the plaintiff in an ADA case must instead show that her ailments are severe enough to prevent her from performing "a broad range of jobs."

Toyota v. Williams was immediately assailed by disability advocates, who lamented in the words of one well-known scholar that the decision "is likely to pose new problems for some plaintiffs, many of whom have already been shut out of court by the Supreme Court's earlier rulings and by lower courts' responses to those rulings."¹⁹ But the nation's editorial pages reacted to the decision with equanimity. Typical of the reaction of newspapers from all sides of the ideological spectrum was this editorial from the *Chicago Tribune*:

The U.S. Supreme Court performed a valuable public service this week when it limited the scope of the Americans with Disabilities Act. That is not as heartless as it may sound.

¹⁹ Linda Greenhouse, "Justices Narrow Breadth of Law on Disabilities," *New York Times*, January 9, 2002, page A1 (paraphrasing Georgetown University law professor Chai Feldblum).

What the court did is focus attention on the original intent of the ADA. Congress passed and the president signed this civil rights law in 1990 to make sure that employers made reasonable accommodations so that disabled workers who could otherwise perform the work—once the accommodations were made—would not face discrimination.

It was not the intent of Congress to turn every temporary workplace injury into a permanent disability. Nor was it Congress' intent to transform every injured worker into a member of a protected class. ...

The standard should be high. The ADA should be reserved for those whose disabilities substantially restrict their daily lives—not those who can do everything but one specific job.²⁰

Toyota v. Williams is the Supreme Court's fourth decision in three years to address the statutory definition of "disability" in the ADA, and for our purposes the message is clear: ADA claimants face formidable obstacles in bringing actions against colleges and universities. Plaintiffs who may once have assumed that their impairments were unambiguously covered by the statute may have a difficult time showing that those impairments—while undeniably real and even life-threatening—prevent them from undertaking "major" life activities.

(2) *Can students (or their parents) sue for unauthorized release of "education records" as that term is defined and used in the Buckley Amendment?* The Family Education Rights and Privacy Act, commonly referred to as the Buckley Amendment after its principal congressional champion, former New York Senator James L. Buckley,²¹ was enacted in 1974, and although it has spawned a reasonable number of lawsuits over the years none was ever deemed significant enough by the Supreme Court to warrant review—until this Term, when, to the surprise of the higher education community, the Court decided to hear *two* Buckley Amendment cases.

The first is not, technically speaking, a higher education case, in that it involves middle-school students in a Florida public school system. That case is *Owasso Independent School District No. I-011 v. Falvo*, No. 00-1073, 121 S. Ct. 2547, 2001 U.S. LEXIS 4701 (petition for

²⁰ "The Court Defines Disability," *Chicago Tribune*, January 10, 2002, p. 14.

²¹ 20 U.S.C. §1232g *et seq.* Senator Buckley was defeated for reelection in 1976 and was subsequently appointed to the federal bench by President Reagan. He served as a member of the United States Court of Appeals for the District of Columbia Circuit, one of the nation's most powerful and visible courts, from 1985 until his retirement in September 2000.

cert. granted June 25, 2001). *Falvo* involves a challenge to the common classroom practice of peer grading—having students grade one another’s work assignments and then call out the grades in class. Mrs. Falvo, the mother of three middle-school students, claimed that the practice embarrassed her children by allowing other students to learn their grades, and sued to have the practice enjoined under the Buckley Amendment on the grounds that her children’s grades were “education records” protected from disclosure under federal law.

The Buckley Amendment defines the term “education records” to encompass “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution...” 20 U.S.C. §1232g(a)(4)(A). The question in *Falvo* was whether the definition should be construed *narrowly* to exclude grades recorded by anyone but a teacher in an official grading notebook, as the Department of Education maintained, or *broadly* to cover any recorded antecedent to an official course grade, as urged by Mrs. Falvo. While that’s not exactly a question of heart-stopping importance, it implicates two issues of importance to higher education administrators: how much deference to give Department of Education interpretations of the Buckley Amendment and implementing regulations (the 10th Circuit Court of Appeals, in ruling in Mrs. Falvo’s favor, gave next to no deference to the Department’s interpretation), and how literally to read the definitions in the Buckley Amendment (the 10th Circuit accepted a liberal reading of the statute that had the effect of expanding considerably the universe of education records protected by the privacy provisions in the Buckley Amendment).²²

Falvo was argued in the Supreme Court on November 27, 2001. But due to subsequent events, it’s not clear that the Court will ultimately rule on the merits of the case.

The Buckley Amendment, like many federal statutes, does not specifically authorize aggrieved private parties—students who believe their privacy rights have been violated by

²² The Buckley Amendment has become a flashpoint for conservative activists, who equate the privacy protections in the statute with broader issues of parental rights. Kristja Falvo, the plaintiff in the *Falvo* case, was represented by lawyers from the Rutherford Institute, described in the *New York Times* as “a conservative legal organization that represented Paula Corbin Jones in her sexual harassment suit against President Bill Clinton.” The *Times* noted that the Eagle Forum and its president Phyllis Schlafly filed a friend-of-the-court brief in support of Mrs. Falvo in the Supreme Court. Linda Greenhouse, “Justices Hear Case on Privacy of Students,” *New York Times*, November 28, 2001, page A23.

unwarranted release of education records, or (if the students are still minors) their parents—to file lawsuits in their own names. The statute provides only that, if an institution of higher education violates its terms, the Department of Education may institute proceedings to cut off the institution’s eligibility for federal funds. Notwithstanding the fact that the Buckley Amendment does not authorize a *private right of action* (to use the technical term), most courts have concluded that students and parents are entitled to file civil rights suits in their own names to vindicate privacy rights protected by the Buckley Amendment.²³

In *Falvo*, all the parties assumed that the court had jurisdiction over Mrs. Falvo’s private right of action. When the case was argued before the Supreme Court three months ago, it quickly became apparent that several Justices did not necessarily agree and were irritated that the defendant school district had not properly raised or preserved the jurisdictional question when the case was first brought.²⁴ Because the Supreme Court subsequently granted certiorari in a second Buckley Amendment case in which the defendant properly raised and preserved the jurisdictional question (see below), it is entirely conceivable that *Falvo* was ultimately be vacated and sent back down to the lower appellate court without reaching the substantive interpretive questions that formed the basis for the lower court decision.

Which brings us to the other Buckley Amendment case the Court will hear this Term—*Gonzaga University v. Doe*, No. 01-679, 2002 U.S. LEXIS 408 (petition for cert. granted January 11, 2002). John Doe (a pseudonym), a student in a teacher education program at Gonzaga University, filed a multi-count lawsuit against the university after being accused of sexual assault and date rape. A state court jury awarded Doe more than \$1 million in damages, including \$450,000 in compensatory and punitive damages for asserted violations of his rights under the Buckley Amendment. Doe successfully argued to the jury that university officials had provided

²³ Citations to that effect are collected in *Falvo v. Owasso Independent School District No. I-011*, 229 F. 3d 956, 965 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547 (2001). Such lawsuits are brought under an omnibus civil rights statute—42 U.S.C. §1983—that allows suits for money damages against persons acting unlawfully “under color of state law.”

²⁴ Linda Greenhouse, “Justices Hear Case on Privacy of Students,” *New York Times*, November 28, 2001, page A23.

confidential information from his education records to the state agency that certifies teachers as part of that agency's investigation into Doe's fitness to be certified.

One of the issues on appeal was whether students (or parents) could bring private section 1983 lawsuits for asserted violations of rights protected by the Buckley Amendment. The Washington Supreme Court answered yes: the Buckley Amendment "does create individual rights privately enforceable under section 1983."²⁵ It is that question the United States Supreme Court agreed to review when it granted certiorari in the *Gonzaga University* case last month.

In all likelihood, the Supreme Court will refrain from ruling in the *Falvo* case until it decides *Gonzaga University*. A decision in the latter case is not expected until the end of the current Term this summer.

(3) *What are the filing requirements for federal discrimination claims under Title VII of the 1964 Civil Rights Act? Edelman v. Lynchburg College*, No. 00-1072, 121 S. Ct. 2547 (petition for cert. granted June 25, 2001), is a case only lawyers could love. Under Title VII of the Civil Rights Act of 1964,²⁶ victims of unlawful discrimination cannot file a lawsuit unless they first file a written charge of discrimination with the Equal Employment Opportunity Commission. By statute, the EEOC charge must be "in writing *under oath or affirmation*," and must be filed within 300 days of the action complained of.²⁷ Edelman, a biology professor, was denied tenure on June 6, 1997. On November 14, 1997—less than 300 days later—he wrote a letter to the EEOC alleging that the college's decision was the product of gender discrimination and discrimination on the basis of his religion (Jewish) and ethnic origin (Polish). But the letter was not notarized or otherwise sworn to under oath—it was just a plain letter. On March 18, the EEOC mailed a draft charge to Edelman for his review and signature. Edelman completed the form, signed a written attestation, and returned the form to the EEOC on April 15, 1998—313 days after receiving notice of tenure denial.

²⁵ *Doe v. Gonzaga University*, 143 Wash. 687, 709 (2001), *cert. granted*, 2002 U.S. LEXIS 408 (January 11, 2002).

²⁶ 42 U.S.C. §2000e *et seq.*

²⁷ 42 U.S.C. §2000e-5(b), (e)(1) (emphasis added).

When Edelman finally took Lynchburg College to court, the college moved to dismiss his complaint on the ground that he had not filed a properly sworn statement with the EEOC within the 300-day deadline specified by statute. Edelman responded by invoking a longstanding EEOC regulation that provided, “a charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.”²⁸ But the Fourth Circuit Court of Appeals rejected Edelman’s argument and dismissed his complaint, holding that the EEOC did not have the authority to modify, by regulation, the unambiguous statutory requirement that EEOC charges be filed under oath.²⁹

Edelman was argued in the Supreme Court on January 8, 2002, and a decision is expected later this spring.

(4) *Under what circumstances does the Eleventh Amendment provide state universities with constitutional immunity against state-law causes of action?* The Eleventh Amendment is an increasingly powerful defense available to public colleges and universities that are sued for money damages in federal courts. Over the last half-dozen years, the Supreme Court, in a series of Eleventh Amendment decisions, has broadened the circumstances under which public colleges and universities can avail themselves of the constitutional defense, making it successively more difficult for employees at public institutions to sue for damages under federal anti-discrimination statutes.³⁰ Two more Eleventh Amendment cases with higher-education implications are on the Court’s docket this Term, both illustrating the lengths to which plaintiffs will go to avoid the Eleventh Amendment defense.

The first is *Raygor v. Regents of the University of Minnesota*, No. 00-1514, 121 S. Ct. 2214 (petition for cert. granted June 4, 2001). Parties who believe they are victims of unlawful

²⁸ 29 C.F.R. §1601.12(b).

²⁹ *Edelman v. Lynchburg College*, 228 F. 3d 503 (4th Cir. 2000).

³⁰ See generally *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Ass’n for Disabled Americans, Inc. v. Florida Int’l University*, Case No. 99-3513-CIV-JORDAN (S. D. Fla. Dec. 12, 2001); *Garcia v. State Univ. of*

discrimination frequently have an array of federal and state remedies from which to choose. A party, for example, who wishes to challenge an employment decision on age discrimination grounds could file a lawsuit in federal court under the Age Discrimination in Employment Act,³¹ a lawsuit in state court under the analogous state human rights act, or both. Under a federal law commonly referred to as the supplemental jurisdiction statute,³² litigants are allowed under appropriate circumstances to consolidate causes of action under both federal law and state law into a single federal lawsuit. The supplemental jurisdiction statute has an interesting feature that, at first blush, appears designed to preserve the state-court options of a litigant who proceeds by filing a consolidated action containing state-law claims in federal court. That feature “tolls” the applicable state statute of limitations during the pendency of the federal-court proceeding—meaning that, if the federal action is dismissed for any reason, the litigant still has the option of proceeding in state court even if the limitations period for filing a state-court action would otherwise have expired.³³

The supplemental jurisdiction statute—specifically the tolling provision in the statute—could thus be characterized as a federal law *enlarging* the potential liability of state agencies for money damages. The issue in the *Raygor* case is whether the supplemental jurisdiction statute violates the states’ Eleventh Amendment immunity. The two plaintiffs in *Raygor*, Lance Raygor and James Goodchild, are employees at the University of Minnesota. In August 1995, they filed age discrimination charges under the Minnesota Human Rights Act with the Minnesota Department of Human Rights. MDHR investigated, and approximately eleven months later ruled

New York Health Sciences Center of Brooklyn, 2001 U.S. App. LEXIS 21366. *See also* the symposium on Eleventh Amendment jurisprudence in the NOTRE DAME LAW REVIEW, Vol. 75, March 2000.

³¹ 29 U.S.C. §621 *et seq.*

³² 28 U.S.C. §1367.

³³ Let me try to put this in simpler terms. State law frequently establishes a deadline for instituting a court action. So-called “statutes of limitation” provide that a lawsuit must be filed within a certain number of days (or months, or years) of the action complained of. A “tolling provision” essentially stops the clock from running on the limitations period. The supplemental jurisdiction statute tolls the state statute of limitations for as long as the federal claim is pending, thus extending the period of time for instituting proceedings in state court.

in the university's favor. On July 17, 1996, MDHR advised Raygor and Goodchild that, under the applicable state statute of limitations, they had 45 days to contest the adverse decision by filing an action in state court. On August 29, 1996, *less* than 45 days later, Raygor and Goodchild filed a lawsuit, but in *federal* rather than state court. The lawsuit asserted a federal cause of action under the Age Discrimination in Employment Act and a state cause of action under the Minnesota Human Rights Act.

There ensued a veritable tornado of procedural thrusts and ripostes. In the summer of 1997, the university succeeded in getting the federal case dismissed on Eleventh Amendment grounds. On August 1, 1997—more than a year after MDHR advised the plaintiffs that they had only 45 days—the plaintiffs filed a lawsuit in state court. When the university promptly moved to dismiss on statute-of-limitations grounds, the plaintiffs invoked the tolling provision in the supplemental jurisdiction statute and argued that the 45-day limitations period was tolled during the pendency of the federal-court proceeding. In early 2001 the Minnesota Supreme Court ruled in the university's favor, dismissed the state-court proceeding on statute-of-limitations grounds, and held that the tolling provision in the supplemental jurisdiction statute violated the Eleventh Amendment.

The Supreme Court granted certiorari on June 4, 2001. The case was argued in November, and a decision is expected late this winter or early in the spring.

The other Eleventh Amendment case on the Court's docket is *Lapides v. Board of Regents of the University System of Georgia*, No. 01-298, 122 S. Ct. 456 (petition for cert. granted October 29, 2001). In the wake of an internal disciplinary proceeding, Paul Lapides, a business professor at Kennesaw State University in Georgia, filed a defamation action against two college administrators and the Board of Regents. Knowing that the action would encounter Eleventh Amendment problems if filed in federal court, Professor Lapides's attorney filed the case in a Georgia state court. The university's lawyer promptly filed a motion to remove the case to federal court; once the state-court judge granted that motion, the university lawyer moved to dismiss the federal case on Eleventh Amendment grounds. Although the trial judge denied that motion, the appellate court reversed and ruled in the university's favor. The court rejected the plaintiff's argument that the university, by removing the case to federal court, had effectively

waived its right to assert a defense to the federal action under the Eleventh Amendment: “While we are ... troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity, ... we hold that the defendants did not waive their Eleventh Amendment immunity by removal of the case.”³⁴

Lapides was argued in the Supreme Court last week. A decision is expected this spring.

B. Waiting in the Wings: The Biggest Case of All—The Fate of Affirmative Action

For a quarter-century, perhaps even longer, the legal status of affirmative action has been uncertain. The last time the Supreme Court addressed it in the higher education context was in 1978, when a badly splintered Court decided *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In upholding an affirmative action program adopted by the medical school of the University of California at Davis, Justice Lewis Powell described “the attainment of a diverse student body” as “a constitutionally permissible goal for an institution of higher education.”³⁵

Over the years the lower federal courts have regarded Justice Powell's discussion of diversity in *Bakke* as something approaching a definitive pronouncement on the issue. Nevertheless, the portion of Justice Powell's opinion dealing with diversity commanded the support of no other Justice on the Supreme Court, and there is considerable question in the minds of legal commentators whether today's Supreme Court would endorse the notion that affirmative action could ever be justified except as a remedial measure following an explicit finding that it is necessary in order to remedy the lingering effects of past discrimination.³⁶

³⁴ *Lapides v. Board of Regents*, 251 F. 3d 1372, 1377, 1378 (11th Cir.).

³⁵ 438 U.S. at 311-313, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

³⁶ See Walter Dellinger, “Memorandum to General Counsels—*Adarand*,” U.S. Dep't of Justice, Office of Legal Counsel, June 28, 1995, pp. 14-19, reprinted at http://clinton1.nara.gov/White_House/-EOP/OP/html/aa/adarand3.html.

To understand affirmative action in legal terms, let's take a step back. Under federal law, colleges and universities are prohibited from discriminating on the basis of race, color, or national origin in the operation of their programs and activities. In a series of decisions over the past two decades, courts have placed a heavy burden on institutions whose affirmative action programs are challenged. Such programs, the courts have ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof—the so-called “strict scrutiny” standard—when they are challenged on legal grounds.

Under the strict scrutiny standard, a program that relies in whole or in part on race-based criteria is illegal unless the institution can demonstrate that the program serves a demonstrably *compelling institutional interest*. Starting with *Bakke* and with consistency since then, the courts have recognized two justifications for affirmative action programs that are suitably compelling to satisfy the first prong of the two-part “strict scrutiny” test:

- (i) *Remedying the present effects of past discrimination.* If unlawful discrimination against African-Americans actually occurred (for example, if the institution had a written policy excluding them from applying or enrolling), then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination.

I won't have more to say in this paper on the so-called “remedial” justification for affirmative action. Only a very small number of institutions—those that operated officially segregated systems of higher education in the days before dual systems were declared unconstitutional—could conceivably take advantage of the remedial justification, and even that small number of institutions would have practical difficulties making the case for remedial affirmative action.

- (ii) *Diversity.* An affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body or the workforce.

We'll focus in the rest of this section on the so-called “diversity” justification for affirmative action.

The 1996 decision of the Fifth Circuit Court of Appeals in *Hopwood v. Texas*, 78 F. 3d 932, *cert. denied*, 518 U.S. 1033 (1996), marked a startling departure in affirmative action law. Like Alan Bakke before her, Cheryl Hopwood was a white applicant denied admission to a state-

supported professional school—the law school at the University of Texas. Hopwood’s undergraduate grade-point average and standardized test scores were higher than those of African-American and Mexican-American applicants whom the law school accepted under its race-based affirmative action program. Hopwood and other unsuccessful white applicants sued for reverse discrimination. At trial, the judge found that the law school’s affirmative action program was necessary both to remedy present effects of decades of formal discrimination against minorities and to foster diversity in the law school’s student body. The trial court held that Texas’s affirmative action plan was in most respects narrowly tailored to serve those compelling interests, although the court ruled that the use of a separate subcommittee to evaluate minority applicants was unconstitutional and ordered the State of Texas to pay Hopwood one dollar in nominal damages.

Hopwood appealed. The Fifth Circuit decision, rendered March 18, 1996, sent shock waves through the higher education community. The court reversed the trial court and held that the University of Texas Law School violated the law by using an affirmative action program that relied *even in part* on race as an admission criterion. The court took the unusual step of suggesting that Justice Powell’s decision in *Bakke* was no longer controlling law (due to the accretion of anti-affirmative-action Supreme Court decisions over the last decade), and that, with *Bakke* essentially overruled, diversity was no longer a sufficiently compelling justification for race-based affirmative action.

After *Hopwood*, several lawsuits were filed by affirmative action opponents seeking to broaden the scope of the *Hopwood* holding and invite long-awaited Supreme Court review.

The University of Georgia Litigation. In March, 1997, a group of unsuccessful white applicants for admission to the University of Georgia filed suit on the ground that the university’s “dual track” admission system—utilized since 1990 but replaced in 1995 by a different system—discriminated against them on the basis of their race. Under the system in use between 1990 and 1995, black applicants received automatic admission if they achieved a combined score of 800 on the SAT coupled with a 2.0 high school grade point average; white applicants were admitted automatically only upon achieving an SAT score of 980 and a 2.5 high-school GPA. In early 1999, the trial judge ruled in the plaintiffs’ favor and invalidated the

(already replaced) affirmative action plan that had been in effect between 1990 and 1995. The judge's ruling was based on the relatively narrow ground that the university, by operating a "dual track" program, had not operated its program in a fashion that was *narrowly tailored* to serve the institution's interest in diversity. Even so, the judge grumbled and betrayed considerable skepticism about the continued vitality of the diversity rationale:

Although the Court recognizes the theoretical benefit of an educational setting which is open to a diverse collection of viewpoints, it is not convinced that these benefits – furthered here only in an abstract sense – justify outright discriminatory admission practices which cause concrete constitutional injuries.³⁷

Six months later, in July, 1999, the same trial judge issued a second decision in the University of Georgia litigation. The plaintiff in the second case had applied in 1997 under the admission program that replaced the one discontinued in 1995, and that plaintiff, too, had not been admitted. The judge dismissed the plaintiff's lawsuit on narrow technical grounds related to the plaintiff's standing to bring the suit, but in the process issued a blistering attack on the diversity rationale, leaving no doubt that he viewed diversity as less than a compelling justification for race-conscious affirmative action. Calling diversity "amorphous" and asserting that affirmative action "stigmatizes ... non-white students for the sake of a largely symbolic racial preference," the judge criticized the university for "fail[ing] to meaningfully show how [affirmative action] actually fosters educational benefits." *Tracy v. Board of Regents of the University System of Georgia*, 59 F. Supp. 2d 1314, 1322, 1323 (S.D. Ga. 1999).

But in April 2001—about ten months ago—the 11th Circuit Court of Appeals reinstated the plaintiffs' lawsuit and dealt the foes of affirmative action a significant victory.³⁸ After a summer of maneuvering and tactical decisionmaking, the University of Georgia announced three months ago that it would not appeal the adverse ruling to the Supreme Court. As explained in a story that subsequently appeared in the *Chronicle of Higher Education*:

³⁷ *Wooden v. Board of Regents of the University System of Georgia*, 32 F. Supp. 2d 1370, 1380 (S.D. Ga. 1999). See the next footnote for the case's subsequent appellate history.

³⁸ *Wooden v. Board of Regents of the University System of Georgia*, 247 F. 2d 1262 (11th Cir. 2001).

University officials, the state system's Board of Regents, and lawyers for students who joined the case to defend affirmative action said they had decided not to pursue further appeals because they believe that two federal lawsuits involving admissions decisions at the University of Michigan at Ann Arbor would present a stronger defense of racial preferences before the Supreme Court.

“This was not, in our opinion, the best test case for the Supreme Court to weigh the appropriate use of race as an admissions factor in higher education,” said Arlethia Perry-Johnson, chief spokeswoman for the University System of Georgia. “Our decision making involved our larger sense of responsibility to the higher-education community.”³⁹

The University of Washington Litigation. The same lawyers who represented the plaintiffs in *Hopwood* filed another lawsuit against the University of Washington Law School. They alleged that differential admission standards for white and minority applicants violated the constitutional and statutory rights of whites. Their arguments were rebuffed, first by the trial court in Seattle and subsequently by the Ninth Circuit Court of Appeals in San Francisco. The plaintiffs appealed to the Supreme Court, but last year the Court declined to grant certiorari.⁴⁰

The University of Michigan Cases. In late 1997 the lawyers behind *Hopwood* and other affirmative action challenges filed two more lawsuits, both against the University of Michigan. One challenges the affirmative action plan used by the law school admissions office, and the

³⁹ Sara Hebel, “U. of Georgia Won’t Appeal Affirmative-Action Case to Supreme Court,” *Chronicle of Higher Ed.*, November 23, 2001, p. A23.

⁴⁰ *Smith v. University of Washington Law School*, 2 F. Supp. 2d 1324 (W. D. Wash. 1998), *aff’d*, 233 F. 3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001).

Smith is responsible for a *Hopwood* postscript. After the Supreme Court declined to review *Hopwood* in 1996, that case was returned to the trial court for further proceedings on damages. Two years later, the trial judge surprised the parties by ruling that the plaintiffs had failed to show that they would have been admitted to the University of Texas Law School even under a constitutionally defensible admission system. *Hopwood v. Texas*, 999 F. Supp. 872 (W. D. Tex. 1998). The plaintiffs appealed, and the University of Texas cross-appealed and invited the Fifth Circuit to reconsider its *Bakke*-related holding in light of the Ninth Circuit’s contrary holding in the *Smith* case. On December 21, 2000, the Fifth Circuit Court of Appeals declined the University of Texas’s invitation and reaffirmed its repudiation of *Bakke*. *Hopwood v. Texas*, 236 F. 3d 256 (5th Cir. 2000). The university once again appealed to the Supreme Court, and on June 25, 2001, the Court for the second time declined to hear the *Hopwood* case—ending that case a mere ten years after the plaintiffs in that case first applied for admission to the law school at Texas. *Texas v. Hopwood*, 121 S. Ct. 2550 (2001).

other challenges affirmative action in undergraduate admissions.⁴¹ The two cases resulted in different outcomes at the trial level. On December 13, 2000, the judge in the undergraduate case ruled that “under *Bakke*, diversity constitutes a *compelling governmental interest* in the context of higher education justifying the use of race as one factor in the admissions process”⁴²

Three months later, in March 2001, the judge in the law school case reached exactly the opposite conclusion: “under the Supreme Court’s post-*Bakke* decisions, the achievement of ... diversity is *not a compelling state interest* because it is not a remedy for past discrimination.”⁴³

Both decisions were appealed to the Sixth Circuit Court of Appeals. Although they were not formally consolidated, the cases are being considered together and were both argued before the appellate court, sitting *en banc*, on December 6, 2001. A decision is expected this year, and there is wide agreement that the two cases are higher education’s best chance to entice the Supreme Court into the affirmative action fray.

A quick scorecard, in sum:

- The Supreme Court denied review in *Hopwood* in 1996, and again in June 2001.
- The Supreme Court denied review in *Smith* (the Washington case) in May 2001.
- *Wooden* (the Georgia case) ended in November 2001 before Supreme Court review was sought.

⁴¹ The undergraduate case is *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), and the law school case is *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E. D. Mich. 2001). Information on the two cases, including details of the affirmative action programs operated by the undergraduate and law school admissions offices, is available on the University of Michigan Web site at www.umich.edu/~urel/-admissions. *Gratz* was filed first (in October 1997) and marked an escalation of tactics by lawyers spearheading the attack on affirmative action in that the former and then-current presidents of the University of Michigan were named as defendants and were sued for punitive damages. “This lawsuit,” said the plaintiffs’ lawyer, “should serve notice on college presidents everywhere that they will be held individually liable under federal civil-rights laws if they do not act now to bring their admission policies into compliance with the law.” Douglas Lederman, “Suit Challenges Affirmative Action in Admissions at U. of Michigan,” *Chronicle of Higher Education*, October 24, 1997, p. A27 (quoting Michael McDonald, president of the Center for Individual Rights.). When the law school case was filed two months later, it too included punitive-damage claims asserted against university officials in their individual capacities.

⁴² *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000) (emphasis added).

⁴³ *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E. D. Mich. 2001) (emphasis added).

- The two University of Michigan cases are last in the queue, and all indications point to a petition for certiorari inviting Supreme Court review later this year.

So what might the Supreme Court do with an affirmative action case if the Court were to accept one (or two) for review later this year? From a paper Professor Mark Rahdert prepared for last year's Stetson Conference:

Just what *Bakke's* fate will be remains uncertain. Of the current Justices, only two (Rehnquist and Stevens) also served when *Bakke* was decided, and neither of them found it necessary to reach the constitutional equal protection issue in that case. Clearly, the Court has tacked sharply to the right on affirmative action issues in the two decades since *Bakke* came down. Yet like so many Rehnquist Court decisions on pressing social issues, the decision on this matter promises to be sharply divided. Three Justices on the current Court (Rehnquist, Scalia, and Thomas) will probably vote against a diversity rationale. Three other Justices (Stevens, Ginsburg, and Breyer) are reasonably likely to support a diversity rationale. Three other Justices (O'Connor, Kennedy, and Souter) represent the middle "swing" votes. A closer look at their views suggests that the outcome will be exceedingly close.

... Justice Souter has shown a fair degree of tolerance for race-conscious affirmative measures in other settings and thus may likely vote in favor of a diversity rationale for affirmative action in college-university admissions. Justice Kennedy, on the other hand, has registered strong antipathy to race conscious measures elsewhere and is thus likely to vote against a diversity rationale.

That leaves eight of the Justices evenly split, with the outcome probably dependent on the outlook of the remaining Justice—O'Connor. Her prior opinions in this area ... show a firm commitment to vigorous strict scrutiny analysis wherever racial classifications have been used. ... While ... [she has in the past] rejected a diversity justification for government contracting and licensing programs, she stopped short of ruling that diversity may *never* be used as a justification for race-conscious measures. Though she is likely to be skeptical regarding diversity justifications for affirmative action, her vote could go either way and might very well depend on the particular affirmative action methods employed in the case or cases before the Court.⁴⁴

⁴⁴ Mark C. Rahdert, *The Future of Higher Education Law in the U.S. Supreme Court: Recent Supreme Court Developments Affecting Higher Education*, Stetson University College of Law, 22nd Annual National Conference on Law and Higher Education, February 19, 2001.

Just two months after Professor Rahdert wrote these words, the Supreme Court agreed to hear what was widely viewed as an important affirmative action case—*Adarand Constructors, Inc. v. Mineta*, No. 00-730, *petition for certiorari granted*, 121 S. Ct. 1598 (April 13, 2001). *Adarand*, a case with a lengthy

IV. Conclusion

Fourteen months after *Bush v. Gore*, the Supreme Court has resumed the daily grind of selecting and deciding cases. Its higher education docket, like its docket in general, reflects the steady work of keeping the judicial gears meshed and working. Cases address inconsistencies in lower court decisions and unresolved interpretive questions concerning the meaning of statutes enacted by Congress—nothing exciting, nothing commanding intensive media coverage, nothing of special interest beyond the litigants involved in particular cases or others with a vested interest. “There’s something somehow reassuring about the Court’s docket,” observed Supreme Court reporter Nina Totenberg when she prepared a report at the opening of the new Supreme Court Term in October. “[It’s] full of the same old fights that we’re used to—affirmative action, vouchers, the death penalty.”⁴⁵

On one plane, then, life at the Supreme Court is back to normal. But on another plane, things are subtly different in the wake of the turbulence generated by the presidential election cases. Seasoned Supreme Court litigators comment on the grimness that seems to embrace Supreme Court proceedings today. Lawrence Tribe, the Harvard Law School faculty member who represented Vice President Gore when the first election case, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), reached the Court, wrote reflectively about his experience in an article that appeared in the HARVARD LAW REVIEW this fall:

Although I think I have gained some perspective on the decision in my role as a teacher of constitutional law, appearing before the Court in the wake of *Bush v. Gore* has been another matter. I did so twice within the several months following the decision. The

history, did not involve college and university admission programs directly; rather, it involved the legality of a Transportation Department regulation establishing a minority set-aside program for the award of highway construction contracts. The decision to hear *Adarand* worried supporters of affirmative action, who thought the Court might use it as a vehicle for clarifying the “diversity” rationale from *Bakke*. But at oral argument in late October, several Justices noted that the particular feature in the challenged regulation that had precipitated the *Adarand* lawsuit was subsequently repealed. Four weeks after oral argument, on November 27, 2001, the Supreme Court, by *per curiam* opinion without dissent, dismissed the writ of certiorari in the *Adarand* case as “improvidently granted”—thus yielding no additional clues about the Justices’ current thoughts on affirmative action. *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511 (2001).

⁴⁵ National Public Radio, *Morning Edition*, October 1, 2001. The audio of the Totenberg report can be heard online at www.npr.org.

sense of solidarity, of shared pride, that I used to feel each time I got up to argue in that marble hall ... seemed to have slipped away, replaced by a grim realism of a sort to which I have not grown, and hope never to grow, accustomed. In the past, I had disagreed fairly often with decisions the Court had rendered ..., but those disagreements had not left me with a strong feeling of disconnection, of alienation from a core enterprise that, in significant part, defines the current Court and its sense of its constitutional role.⁴⁶

Where might this Court be headed in the future, insofar as the higher education community is concerned? First, it's reasonable to assume that there will be turnover on the Supreme Court in the not-too-distant future. By contemporary standards, the nine Supreme Court Justices are collectively old. Three Justices are 70 years old or more, and one (Justice Stevens) is in his 80s. The Justices on the Court today may not be as healthy, collectively, as those who have served in the past. Two of the Justices on the Court today (O'Connor and Ginsburg) are cancer survivors, and two (Rehnquist and O'Connor) have had disabling back problems. Finally, some Court watchers speculate that partisan rancor among the Justices may take its toll in either or both of two ways: it may fatigue one or more battle-weary Justices to the point where they might consider retiring, and it may prompt conservative Justices to retire during the incumbency of a conservative President who could presumably be trusted to appoint ideologically sympathetic replacements. Some compare the situation today to the one that existed in 1993, when the newly elected Democratic President, Bill Clinton, inherited a politically divided Court that had one Justice in his eighties (Justice Harry Blackmun, then 84), two in their seventies (Justices Byron White, then 75, and Stevens, then 72), and an average age of 63. In the first two years of President Clinton's first term, two Justices retired (Blackmun and White) and were replaced by Clinton appointees (Ginsburg and Breyer).

The alteration of even a single vote on today's Court could presage seismic shifts in Supreme Court jurisprudence in the immediate future. Some of the most provocative issues on the social agenda—affirmative action, abortion rights, Eleventh Amendment and sovereign immunity, the right to be protected from discrimination on the basis of sexual orientation—have all been the subjects of 5-4 decisions during the last two Supreme Court Terms. The addition of

⁴⁶ Lawrence Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 301 (2001) (footnote omitted).

even a single new Justice could create a new majority on either the right or the left of the Court, and two or more new Justices would almost certainly rearrange existing voting blocs.

Finally, what cases might be looming on the horizon, in addition to the two affirmative action cases that could reach the Supreme Court as early, possibly, as this fall? It's reasonable to assume that cases comprising tomorrow's higher education docket in the Supreme Court are wending their way through the lower courts today. To get an impressionistic sense of what's being litigated in higher education cases today, let's take a look at the CHRONICLE OF HIGHER EDUCATION's list of stories on pending lower-court cases.⁴⁷

<i>Court case involving:</i>	<i>No. of CHRONICLE stories:</i>
Students	73
Athletics	31
Campus judicial systems	12
Fraternities and sororities	6
Graduate student organizing	5
Scholarships and loans	5
Grades	5
Dormitories and housing	5
Students whose parents are divorced	4
Discrimination	73
Gender (including sexual harassment)	36
Disabilities	15
Race and ethnicity	11
Religion, religious expression	10
Age	1
Faculty	70
Disciplinary proceedings	19
Academic freedom	12
Salaries and benefits	11
Intellectual property/technology transfer	11
Applications for tenure	6
Scientific misconduct allegations	6
Collective bargaining	5
	[continued]

⁴⁷ www.chronicle.com/daily/courts/subject.htm (accessible only with a subscription and password).

<i>Court case involving:</i>	<i>No. of CHRONICLE stories:</i>
Other institutional subjects.....	107
First amendment, free expression	38
Affirmative action	20
Cyberspace issues	11
Public safety	10
Open records and open meetings	8
Status of traditionally black institutions	6
Property tax exemption	4
Alumni(ae) affairs	3
Animal research	2
Preservation of historic buildings	2
Endowment management	1
Buckley Amendment	1
Trustees	1