US news

A supreme showdown

When American teenager Jennifer Gratz failed to get into her college of choice, she blamed not her grades but her genes: if she'd been black, she said, she'd have been sure of a place. And so she took the university to court. Gary Younge reports on a case that has divided the nation

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As a teenager, Jennifer Gratz's mind was focused and her heart set. With good grades and an impressive range of extracurricular activities on her CV, she was determined to go to the University of Michigan in the nearby town of Ann Arbor. Michigan has one of the best reputations of any publicly funded university in the US, and Gratz grew up in Southgate, a working-class suburb of Detroit. Her father was a retired police sergeant, her mother a secretary. Neither had finished college.
But Gratz, who was 17 at the time, plugged away. She finished 13th in a class of 298, and was the vice-president of her student council and Southgate's homecoming queen. "Jennifer did everything we asked her to do, and more," her former assistant principal, Ron Dittmer, told the Washington Post. "I wouldn't ask any more of my own daughter."

So intent was Gratz on her goal, and so certain was she that she would achieve it, that she did not apply to any other universities. So when a thin letter bearing her rejection arrived, she was devastated. On opening it, she cried, turned to her father and asked, "Dad, can we sue?" Gratz believed she had been turned down because she was white. The University of Michigan uses a points system when selecting graduates, and applicants from underrepresented racial minorities are automatically awarded extra points.

On April 1 this year, Gratz, now 26 and a software trainer for a vending machine company in California, had her day in the highest court in the land. Surrounded by demonstrators in an atmosphere one lawyer described as "electric", the US Supreme Court heard arguments for and against the claim that Michigan had acted unconstitutionally when considering her application.

By the end of this month, when the Supreme Court announces its verdict, Gratz's personal disappointment will have a judicial legacy, with potentially enormous consequences for the whole country. Before she even opened the letter, it already had a political context. It was 1995 when Gratz was rejected - the year OJ Simpson was found innocent and hundreds of thousands of black men marched on Washington with separatist leader Louis Farrakhan at their head. In a nation that has had many years fraught with racial tension, this one stood out.

On Capitol Hill, the pollsters had identified a new voting bloc as the primary constituency of the rightwing Republican revolution that had swept to Congressional power the year before. They called it the angry white male. And there was nothing that made them angrier than affirmative action - efforts to improve the employment or educational opportunities of racial minorities and women.

"Why did 62% of white males vote Republican in 1994?" asked Bob Dole, the Republican presidential candidate in 1996. "I think it's because sometimes the best qualified person does not get the job, because he or she may be one colour. I'm beginning to believe that may not be the way it should be in America."

Unbeknown to Gratz, one white man was particularly annoyed with affirmative action. Carl Cohen, a philosophy professor at the University of Michigan, read an article claiming that the acceptance rate among black students at the most prestigious universities was higher than among whites. Cohen filed a request to see his university's admissions policy and discovered the racial weighting in the points system. When local Republicans found out, they called a conservative Washington-based law firm, the Centre for Individual Rights (CIR), and asked it to take up the case. The CIR put out an appeal for plaintiffs and Gratz - along with another unsuccessful undergraduate applicant, Patrick Hamacher, and a failed law school hopeful, Barbara Grutter - came forward.

Although the law school does not use the points system, it still counts race as a factor in admissions. Its case is technically separate, but since it touches on the same issues at the same university, the court agreed to hear them both together. The plaintiffs say that, by taking race into account, the university violated their 14th amendment rights to "equal protection of the laws". Now the Supreme Court is poised to rule on whether race can ever be used as a factor in university admissions.

But the ramifications of its decision will go way beyond the campus at Ann Arbor or the field of education. "If you're right," said Justice Ruth Ginsburg, addressing Gratz's lawyer at the April hearing, "this case is much larger than 'public universities'. It's all colleges and universities, and it's the entire realm of employment." At present, the great majority of universities and corporations operate affirmative action. Even in individual states where affirmative action has been effectively outlawed, colleges have still found ways to ensure diversity.

This case is potentially every bit as momentous as Brown v Board of Education, the Supreme Court ruling that less than 50 years ago declared "separate but equal" facilities for different races to be illegal. What started then as a case about schooling in the small town of Topeka, Kansas, provided the political impetus and legal framework for the civil rights movement. Just a year later would come the Montgomery bus boycott and the birth of a new era of anti-racist activism. "The law got rid of segregation and the law can bring it back," said one Michigan administrator who did not wish to be named.

It is a mark of the contentiousness of the current case that it has produced one of the few public splits within President George Bush's administration. In January, the White House filed papers with the Supreme Court supporting Gratz and accusing the university of operating a "quota system". Bush also spoke out against college admissions policies that "unfairly reward or penalise prospective students solely on their race".

A week later, Colin Powell, who as secretary of state is the highest ranking black American in the country, openly disagreed: "I am a strong proponent of affirmative action," he said. "I believe race should be a factor [in college admissions]. I thought the University of Michigan had a strong case." The other senior black member of Bush's team, Condoleezza Rice, also crafted a nuanced response. Rice, who openly acknowledges that she was a beneficiary of affirmative action when she went to Stanford University, said she believed that race can and should be a factor in admissions policies, but continued to back the president.

It is a sign of the breadth of concern over the case that the university has submitted a record number of supporting statements, or amicus briefs, not only from other universities but from military leaders and the corporate world as well. Eight years after Gratz's rejection, she and her co-plaintiffs are poised to make racial and legal history. The president is supporting her. And an incongruous collection of household names - including Gulf war leader Norman Schwarzkopf, civil rights champion Jesse Jackson, Nike and IBM - are against her.

In spring, the University of Michigan's campus is a verdant, splendid place - a patchwork of impressive gothic architecture and modern buildings, all woven together with coffee shops, bars and bookstores. To describe it as a university town would be misleading. The university does not describe the town; it is the town. The median age of Ann Arbor is less than 30.

It is little wonder that Gratz - who was subsequently turned down by Notre Dame University, and eventually went to the Dearborn campus of Michigan, near where she lived - was so keen to come here. The university, which was founded in 1817 with the motto "An uncommon education for the common man", is ranked first in the country for its teaching of management, environmental health, undergraduate research, human resources, African-American history, social work, anthropology, archaeology and US politics. Among its flagship departments, its law school comes seventh, its business school 13th and its medical research work eighth.

In 2002, 25,081 students applied for just 5,186 places. Whichever way you cut it, around 20,000 people are going to be disappointed. The question for the university is not whether or not it takes applicants who are qualified, but which qualified applicants it wants to take. "It's an issue of maths," says Julie Peterson, a spokesperson for the university. "There is no way that all of the students qualified to come here are going to come here. No matter what system you use, there are going to be some students who feel, 'That's not fair.'"

Herein lies the central problem with Gratz's allegation that she was rejected because she is white. The number of African-American, native American and Hispanic students who apply to the university is very small, so they have only a negligible effect on the odds of white students being accepted. Take 1995, the year Gratz was turned down: minorities comprised just 11% of the applicants. Even if all of them had been rejected, the percentage of white students accepted would have risen only from 25% to 30%.

The truth, says the university, is that Gratz would not have got in, anyway -

not because she is white or because she was not smart, but because, given the stiff competition, she was simply not smart enough. "People don't get in for a lot of reasons," says Peterson. "It's a myth to say, 'But for that minority student, I would have got in.' It's mathematically ridiculous. Race is a very emotional subject in our country. People have very strong feelings about it, and they are not always grounded in fact."

The system that Michigan uses to filter the unwieldy flood of hopefuls is a mixture of the complex and the crude. It awards a maximum of 150 points, with applicants needing at least 100 to be considered. The university allots 110 of these points purely on the basis of academic achievement. The remaining 40 (the absolute maximum, regardless of your circumstances) come under the heading "Other factors". Here, you can get five points for both personal achievement and leadership/service; four if your parents or step-parents went to the university; and three for the quality of the compulsory essay explaining why you want to go there. An applicant from the state of Michigan automatically gets 10 points; one from an underrepresented county within Michigan gets another six; and an applicant from another underrepresented state gets two.

The plaintiffs have challenged none of these. But in the bottom right-hand corner, under the subheading "Miscellaneous", stands the nub of the controversy in black and white. Here, the university awards five points if you are a man who wants to go into nursing, and 20 points, at the provost's discretion, if you are at socioeconomic disadvantage, a scholarship athlete or from an underrepresented racial or ethnic group. The latter alone is the target of the plaintiff's ire. No one can score more than 20 in this section. So a poor, black, male basketball supremo who wants to go into nursing would score only 20, as would a wealthy, white tennis champion.

The university does not claim it is ideal. "The bottom line about all this is there's no perfect admissions process in the world," says Marvin Krislov, vice-president and general counsel of the university. "What you're trying to do is capture a lot of different factors, and from those factors you try to get a competitive environment where there's a mix. There's an ideal of learning from each other."

Whatever its shortcomings, it is not, as the Bush administration claims, a quota system. Over the past four years, the percentage of underrepresented minorities accepted as undergraduates at Michigan has swung between 12% and 17%. The number of such students at the law school ranges from 44 to 73, and currently stands at 12% of the total - one thing that can be said for the points system is that it is transparent. Academic ability remains the primary ingredient of a mix in which race is just one element. The result, they say, is a better education on campus and more constructive citizens in the outside world.

The university does not simply believe this, it says it can prove it. Among the supporting research submitted to the Supreme Court to back up its case was a report by psychology professor Patricia Gurin, the interim dean of the college of literature, science and the arts in Ann Arbor. Analysing surveys of more than 10,000 students of all races from around 200 colleges and universities, Gurin concluded that university provides a unique opportunity to confront segregation during early adulthood, when people are at their most questioning.

The study showed that white students who attended more diverse colleges were more likely to show academic motivation and growth in learning, and placed a greater value on academic skills five years after they left university than those who did not. They were also more likely to have a racially diverse group of friends, live in a diverse area and work in a diverse environment. While there were similar if less marked results for minorities, African-American and Hispanic students in diverse colleges were also more likely to participate in community service when they left.

Studying at a diverse campus holds two main benefits, claims Gurin: students learn better while they are there and they become more constructive citizens when they leave. "Diversity of all forms in the student body - including racial diversity - is crucially important in helping students become conscious learners and critical thinkers, and in preparing them for participation in a pluralistic, diverse society." John Payton, a Washington lawyer representing the university before the Supreme Court, said: "Their education is much more than the classroom. It's in the dorm, it's in the dining halls, it's in the coffee houses. It's in the daytime, it's in the night-time. It's all the time."

Wander around the Ann Arbor campus and you will see plenty of students of different races. Ask them if the university is diverse and they will say yes. Ask if they have friends of different races and they say yes. But ask if it is usual for people to mix outside their racial group after class and they pause. "No," says one Latino student who did not wish to be named, but who seems to reflect the common view. "People usually stick to their own, where they feel more comfortable."

Evidence of this voluntary segregation is everywhere. On the Greek letters of the African-American and Hispanic fraternities that students wear on their jackets; at the Association of Black Professionals, Administrators, Faculty and Staff's annual meeting; on the Martin Luther King poster advertising the black law students' alliance in the law school.

The university does not deny the extent of voluntary segregation on campus - given that 92% of white students and 53% of African-American students enrolled grow up in racially separate communities, it says that the problem is partly inherited. Through various in-house programmes, it also tries to engineer greater integration on campus.

"A lot has been made of this self-segregation argument, and it is something we worry about," says Krislov. "If people are of a particular religion or ethnicity, I don't think it's problematic that they self-identify. But we want to create an environment where there are enough minority students that the chances of meaningful interaction between majority and minority students improve. We think we're doing pretty well at that, but we could do better."

Which begs the question: "How many is 'enough'?" The university's answer is that it cannot be defined by a number, but can be described by a single phrase - "critical mass". This lies at the heart of its rationale for race-conscious admissions. For while a "colour-blind" approach would make little difference to the odds for white applicants, it would have a huge effect on those of blacks, Hispanics and native Americans. "Because of the small pool size, if we had a system where you just didn't count race at all, we would see a dramatic decline in racial minorities to about 4%," says Peterson. This would leave the university with a "tokenistic" minority presence that would be incapable of making any impact. It was because the university decided that tokenism was not good enough that it decided to take race into account. So while it is false to claim that Gratz was rejected because she is white, it would be true to say that she probably would have been accepted if she were black.

Little wonder, then, that "critical mass" lies at the heart of the plaintiffs' contention. "We believe the socioeconomic stuff is just a show," says Curt Levey of the CIR. "What makes race different is that they're not trying to achieve a critical mass in anything else." The issue became a sticking point at the Supreme Court hearing as the conservative judge, Justice Antonin Scalia, attempted to portray critical mass as little more than a disguised quota.

"Is 2% a critical mass?" he asked

"I don't think so, your honour," responded Maureen Mahoney on behalf of the university law school.

"OK, 4%?"

"No, your honour."

"You have to pick some number, don't you? Like 8, is 8%?"

"Now... your honour."

"Now does it stop being a quota because it's somewhere between 8 and 12, but it is a quota if it's 10? Once you use the term critical mass, you're in quota land."

On June 4 1965, US president Lyndon B Johnson delivered the graduation speech at the historically black university of Howard, Washington DC. "You do not wipe away the scars of centuries by saying: 'Now you are free to go where you want, do as you desire and choose the leaders you please,'" he said. "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', and still justly believe that you have been completely fair."

Given America's propensity to lecture the world on democracy, it is easy to forget just how recently the concept took hold there. Any African-American over the age of 39 was born without legal assurance of the right to vote; anyone over the age of 49 was born in a country where the separation of the races was legal. It is easy to forget that the year Nelson Mandela was sentenced to life imprisonment for opposing apartheid in South Africa, Martin Luther King was awarded the Nobel peace prize for doing the selfsame thing in America.

"No African came in freedom to the shores of the new world," wrote the 19th-century French intellectual Alexis de Tocqueville in his landmark book Democracy In America. "The Negro transmits to his descendants at birth the external mark of his ignominy. The law can abolish servitude, but only God can obliterate its traces."

Anyone needing to jog their memory and find those traces need only take a 40-minute drive from the leafy quadrangles of Ann Arbor campus to the bombed-out concrete shell they call Downtown Detroit. Following the race riots of 1967, whites fled the city centre and took their resources with them, leaving the city the second most segregated metropolitan area in the country and one of the poorest. The motor city that built the cars and made the music that shaped America's postwar culture and economy is going nowhere.

America was built on discrimination. From the theft of the land from the native Americans to the theft of labour during slavery; from Uncle Tom's Cabin in the 19th century to the shacks that house migrant Mexicans in the 21st. But it was also built on an ideal, that "all men were created equal" and free in their "pursuit of life, liberty and happiness". It is a principle that continues to attract millions of immigrants to the country and inspire the citizens within it.

These two competing traditions are what make America what it is today. Without the discrimination, it would not be so powerful, wealthy or racially and ethnically Balkanised. Without the ideal, it would not be so dynamic, hopeful, confident and culturally vibrant.

It is from this tension - between the prejudice and the promise - that affirmative action emerged. It is not a new thing. On January 16 1865, in the dying days of the American civil war, General Sherman ordered that "respectable Negroes" be awarded 40 acres and a mule. In March of that year came the Freedmen's Bureau bill, establishing a government department to supervise the relief and educational activities of freed slaves and refugees. As long as it has existed, it has been a subject of considerable tension between the legislature, the judiciary and popular political pressure. Assistance first granted was often later revoked as attempts to address the iniquities of the past came up against the entrenched and unenlightened self-interest rooted in the inequities of the present.

President John F Kennedy first invoked the term "affirmative action" in Executive Order 10925, after he observed that too few blacks were employed by defence contractors. Four years later, President Johnson demanded that federal contractors take affirmative action to provide equal opportunity. The first president to attach goals and timetables and add women into the equation was none other than Richard Nixon in 1969.

From its inception, there have been those who have attempted to pluck affirmative action from its historical context and claim that it is unfair. But for all the attacks on it, the principle of affirmative action remains surprisingly popular. In a poll released last month by the nonpartisan Pew Research Centre, 63% of Americans said they supported affirmative action programmes to overcome past discrimination, while 60% thought programmes to increase black and minority students on college campuses were a good idea. A significantly lower percentage said such programmes were fair, but the fact that they supported them anyway suggests that they none the less believed them to be necessary.

Faced with such scepticism, opponents of affirmative action have shifted from portraying it as a programme to overpromote unqualified minorities to employing a more subtle rhetoric borrowed from the civil rights movement no less. White people, they insist, are now the victims of discrimination. The plaintiffs in the University of Michigan case say the admissions procedures are in violation of their rights under the 14th amendment - ratified in 1868 to ensure equal protection before the law with the original purpose of protecting the rights of freed slaves.

All else being equal, they would have a point. Regardless of the small numbers, the fact is that a handful of white students do not get into the University of Michigan because of something over which they have no control - the colour of their skin. The trouble is, all else is not equal and never has been. President Bush himself provides a salient example. He was admitted to one of the nation's premier universities, Yale, with a C average (where normally A grades are expected) solely on the grounds that he was a legacy - his father went there. It was not a racial preference. But it was an unearned advantage that robbed someone else of a place.

According to the US census, the median household income is $46,305 for whites, $33,565 for Hispanics, $32,116 for native Americans and $29,470 for African-Americans. The poverty rate is 7.7% for whites, 22.8% for Hispanics, 23.6% for blacks and 24.5% for native Americans. A report by the US Federal Reserve earlier this year indicates that those gaps are widening.

To demand "fairness" in principle in a university admissions procedure, while denying the impact of the unfairness that exists in practice, is simply not tenable. Universities discriminate between races because America has discriminated against them. "The reason we need special treatment is because we had special mistreatment," said Al Sharpton, the Democratic presidential hopeful, on the steps of the Supreme Court before the hearing. "It was against the law for us to go to school. It was against the law for us to read and write. We're not asking the court for favours. We're asking the court to make right what it made wrong."

It is no accident that this debate has most often been filtered through issues relating to education. "Going to college is a very big deal in this country," says Krislov. "It's viewed as the gateway to opportunity." The current dispute is no exception. The University of Michigan's case is premised on the Bakke decision of 1978, when the Supreme Court declared the admissions policy of the University of California's medical school unconstitutional because it set aside a fixed quota of places for minorities. A majority of the court none the less maintained that race could be taken into consideration as one of many factors in an admissions procedure, so long as the process is "narrowly tailored" (not too crude) and there is a "compelling interest".

Since then, universities have been free to regard diversity as a "compelling interest". The CIR's legal challenge fundamentally disputes this. Among the several attempts to whittle away at affirmative action through the courts, this is by far the boldest to date. Both sides agree that the points system and the law school procedures are secondary matters. The big prize will be what the court decides on whether diversity can ever be a "compelling interest".

"Bakke has become part of the national landscape," says Krislov. "It says there are certain ways you can and cannot achieve diversity. [This case] is going to define those methods, at least for a generation or two. The Bakke decision was not welcomed by civil rights institutions. At best, they considered it a half-loaf, and now they want to take that half."

April 1 was a bad day to challenge affirmative action. As the US troops made their most significant advance on Baghdad to date, an African-American brigadier general, Vince Brooks, announced that a white woman, Jessica Lynch, had been rescued in Iraq by special forces.

Whatever its record abroad, at home the US military is widely regarded as the most successful illustration of affirmative action there is. The US army was integrated by the time of the Korean war, meaning that black and white Americans could carry guns together before they could eat burgers together or sit next to each other on the bus.

Several prominent retired military officials, including three joint chiefs of staff, two former defence secretaries and several four-star generals, submitted a brief supporting the university's entrance procedures. Best known among them was "Storming" Norman Schwarzkopf, who led the US military during the Gulf war in 1991.

"In the 1960s and 1970s, while integration increased the percentage of African-Americans in the enlisted ranks, the percentage of minority officers remained extremely low, and perceptions of discrimination were pervasive," argued the brief. "Today, there is no race-neutral alternative that will fulfil the military's and the nation's compelling need for a diverse officer corps of the highest quality to serve the country."

From the thousands of pages of amicus briefs before them, the judges focused on just 30 from the military. Before solicitor general Theodore Olson had made his first point on behalf of the Bush administration, justice John Paul Stevens interrupted him, demanding his opinion on the military leaders' brief. "I'm not sure," were Olson's first words, before Stevens cut him off again.

"The timing was remarkable," said Carter Phillips, a Washington-based attorney who wrote the brief. "The context of us being at war, in a multicultural environment, with a whole series of concerns about diversity. I don't think you can discount Norman Schwarzkopf." The CIR, meanwhile, is keen to play down their impact, but acknowledges that the military briefs played a role. "I don't think legally it was a problem," says Levey. "But from a PR view, it didn't help that we were in the middle of a war."

To an extent, the university had made its own luck. Its strategy had been to cohere a wide range of voices both within and outwith academia in support of its case. "We realised the only way to win on this was to unite higher ed and bring in mainstream America," said Lee Bollinger - former president of the University of Michigan and a defendant in the lawsuits, and now president of Columbia University - in the New York Times.

"We were very pleased by the support - it clearly made a difference," says Krislov, referring to the amicus briefs. "Support from other universities and civil rights groups you could expect, but the military and the corporations were our two most surprising allies. It said to the court, 'Everyone is telling us that diversity is important.'"

And so, in the biggest of big tents, the university had the alma maters of every Supreme Court judge and several Fortune 500 companies - including Microsoft, American Express, BP and Coca-Cola - behind it. The companies argued that racial andethnic diversity in colleges and universities is vital to their ability to maintain a diverse workforce, and to "continued success in the global marketplace".

Alongside the corporate and military coalition briefs filed inside the courtroom were the civil rights activists on the outside. More than 60 busloads of protesters came from Detroit alone. One placard read, "Affirmative Action: Hey, it got Bush into Yale." Meanwhile, the Rev Jesse Jackson was rousing black and Hispanic student protesters: "There are more blacks in prison than in college. Young America, fight back," he said.

The hearing lasted one hour and 58 minutes, with Grutter versus the law school heard first, followed by Gratz and Hamacher against the undergraduate programme. There are nine judges on the Supreme Court, but for the purposes of those presenting, only one really mattered: Sandra Day O'Connor. Nominated by Ronald Reagan as the first female member of the court, O'Connor has proved a more moderate conservative than many at first anticipated. Moreover, she tends to take the court's few waverers with her. As she votes, usually, so votes the court. When the case started, all eyes were on O'Connor. It was she who started the questioning of the plaintiff's lawyer, Kirk Kolbo. "You have some precedents out there that you have to come to grips with," she said. "Because the court obviously has upheld the use of race in making selections or choices in certain contexts."

It was a line of questioning with which the university was more than happy, especially when O'Connor then challenged Kolbo on when he thought race might be considered: "You are speaking in absolutes and it isn't quite that. I think we have given recognition to the use of race in a variety of settings."

But she had some tough questions for the university, too. "In all programmes which this court has upheld in [affirmative action], there's been a fixed time period within which it would operate. You could see an end to it. There is none in this, is there? How do we deal with that aspect?" she asked.

Reflecting on the question in his Ann Arbor office, Krislov says, "The simple answer is, we don't know. Things are improving, but we're not there yet. This whole issue starts with the fact that there's a history of segregation and discrimination in this country. If race ever ceases to be a salient factor in American life, then it will be less important as an educational goal. But if you look at what is happening in this country, then I don't think it's going to happen in my lifetime. I wouldn't hold my breath in my children's lifetime."

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