Prelude: Bakke Revisited

R. Lawrence Purdy

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I. INTRODUCTION

A. Promises Made . . .

The Board of Regents of the University of Michigan has adopted the following statement:

EQUAL OPPORTUNITY/AFFIRMATIVE ACTION:

It is the policy of the University of Michigan that no person, on the basis of race, color, religion, national origin, or ancestry, . . . shall be discriminated against in . . . admissions. . . .

The University of Michigan believes that educational . . .

decisions should be based on individuals' abilities and qualifications and should not be based on irrelevant factors or personal characteristics which have no connection with academic abilities or job performance. Among the traditional factors which are generally “irrelevant” are race, . . . and national origin . . . .

The Law School, of course, embraces both policies.²

B. Promises Broken . . .

There are applicants whom we admit who would not be admitted if we were prohibited from taking their race into account.

There are minority students for whom race was determinative in whether or not they were given an offer of admission.

Had that student been white or Asian American, they would not have been admitted.³

C. Foreword

At the conclusion of a recent class on a prestigious west coast university campus during which the professor expressed his skepticism over the benefit of using racial preferences in college admissions, an earnest student asked the professor, “Aren’t you in favor of diversity?” Yet what does such a question mean? How do the participants in these sorts of conversations know what one another has in mind when using the word diversity?

Take one example: the current dean of the highly-regarded University of Michigan Law School recently described his law faculty as “dazzlingly diverse.” No doubt it was, despite the fact that at the time, only one out of the approximately forty full-time tenured faculty members was a racial minority. Yet this same dean, who was perfectly comfortable describing his racially homogeneous faculty as “dazzlingly diverse,” takes an altogether different view in describing his law school’s student body. He insists that to be properly “diverse,” the student body must contain a “critical mass” or “meaningful numbers” of students from certain underrepresented racial and ethnic minority groups. At the University of Michigan Law School, “critical mass” translates into underrepresented minority enrollment between 10-17%. It is a range, to be sure, but a range with a

4. John H. McWhorter, The Campus Diversity Fraud, CITY J., Winter 2002, at 74, 81. As McWhorter has observed, “[T]he ‘diversity’ argument in college admissions . . . has been, from the start, an argument shot through with duplicity and bad faith. It is a craven, disingenuous, and destructive canard, antithetical to interracial harmony and black excellence—and racist besides.” Id. at 74.

5. “The [meaning of the] word ‘diversity,’ like any other abstract concept . . . depends not only on the time and place, but also upon the person uttering it.” Wessman v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (citing Towne v. Eisner, 245 U.S. 418, 425 (1918)). The malleable nature of the word is demonstrated by the fact that on April 6, 1864, United States Senator Willard Saulsbury of Delaware invoked “diversity” as one reason why slavery should not be abolished by an Amendment to the Constitution. 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 10 (Phillip B. Kurland & Gerhard Casper eds., 1975) (quoting Appendix to the Supplemental Brief for the United States on Reargument at 5, Brown v. Bd. of Educ., 347 U.S. 483 (1954)) [hereinafter LANDMARK BRIEFS 49A].

6. UNIV. OF MICH., MICHIGAN LAW SCHOOL BULLETIN (1997-1999), Grutter I, Trial Exhibit No. 8 at 5.

7. See Grutter I, Deposition Testimony of Jeffrey Lehman (Jan. 21, 1999) at 16, 29-30 [hereinafter Lehman Deposition].

8. Under the law school’s policy, the preferred racial and ethnic groups are defined as “African-Americans,” “Hispanics” (though some persons of Hispanic background are, in fact, excluded), and “Native Americans.” Grutter I, Trial Exhibit No. 4 at 12. During discovery and trial, the terms “African-American” and “Caucasian” often were used interchangeably with “black” and “white,” respectively.

minimum the law school and those who administer its admissions well understand. It means that every year, the law school’s director of admissions is fully expected to assemble an entering class containing not less than 10% underrepresented minority students. No director of admissions has ever failed in that effort. And the evidence is undisputed that the law school’s target enrollment is achieved only by giving heavy weight to the race and ethnicity of its applicants.

While at least 10% minority enrollment may constitute a “critical mass” to the law school at the University of Michigan, and may represent adequate racial and ethnic “diversity” in the eyes of its administrators, this level may be something quite different at other prominent institutions. For example, with regard to black enrollment specifically, Professor Glenn Loury notes that educators Derek Bok and William Bowen are “appalled at the prospect that blacks might become as few as two or three percent of the students on elite college campuses” if the use of racial preferences is ended.

But if two to three percent black enrollment is “appalling,” what, then, must one make of former President Clinton’s recent description of the graduates of Carleton College located in Northfield, Minnesota? In his last commencement address as a sitting president, Clinton praised Carleton as “a school that celebrates diversity,” and its graduates as “a remarkably diverse

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10. “[T]he law school has an unwritten policy of constituting each entering class so that at least 10-12% are students from underrepresented minority groups. This percentage has fluctuated somewhat from one year to another, but . . . has been established as the minimum level needed to achieve a ‘critical mass’ of students from these groups.” Id. at 843, 851 (emphasis added).

11. Id. at 842 (“Over the years, this target has been achieved, and even exceeded . . .”).

12. See generally id. at 832-35 (discussing the trial testimonies of Directors of Admissions Dennis Shields and Erica Munzel, Dean Jeffrey Lehman, and Professor Richard Lempert, saying the sole purpose for considering race is to “ensure that a ‘critical mass’ of minority students is enrolled”). It is “indisputable . . . that no other soft factor is even remotely as significant as race in [the law school’s] admissions decisions.” Grutter II, 288 F.3d 732, 799 (6th Cir. 2002) (Boggs, J., dissenting).

13. A former law school professor testified that it might be “enough to have one [minority] student” in a class if “that one student is an extraordinary individual.” Grutter I, Trial Testimony of Vanderbilt Law School Dean Kent Syverud (Jan. 22, 2001), Trial Transcript Vol. V, at 39, 82.

group. The fine young men and women at Carleton no doubt fit the description. Yet they undeniably did so while attending an institution where underrepresented minority enrollment has rarely, if ever, satisfied Michigan’s definition of “critical mass,” and whose black enrollment in particular historically has been in Bok and Bowen’s “appalling” range.

These are examples of how formless the concept of diversity is, particularly when limited to race and ethnicity. Ironically, whatever factors make Michigan’s law faculty “dazzlingly diverse” apparently do not matter, at least to the dean, when it comes to measuring the diversity of its student body. Indeed, the only thing that determines whether diversity exists within the law school’s student body is the one thing effectively missing in its “dazzlingly diverse” faculty.

The University of Michigan and its race-conscious admissions policies perfectly embody the fact that today, at our nation’s preeminent flagship universities, race and ethnicity are the sole determinants of student body diversity. What this prestigious law school does to achieve its diversity goal is now the focus of an important case the United States Supreme Court soon will decide. It is the first case challenging the explicit use of racial preferences in college and university admissions to reach the Court since its landmark decision in Regents of the University of California v. Bakke.

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16. For the academic year that concluded with President Clinton’s commencement address, Carleton reported a student body of approximately 3% blacks, 4% Hispanics, and 1% Native Americans. See COLL. BOARD, COLLEGE HANDBOOK 513 (2000).

17. While former Harvard President and law school expert witness Derek Bok condones the use of race preferences in college admissions, he has vehemently opposed the consideration of race and ethnicity when it comes to faculty hiring. See DEREK BOK, BEYOND THE IVORY TOWER 105, 111-13 (1982).

18. Grutter I, 137 F. Supp. 2d 821 (E.D. Mich. 2001), rev’d, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 U.S. 617 (2002). On the same date, the Court also granted plaintiffs’ Rule 11 Petition for review in Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), cert. granted, 125 U.S. 602 (2002). Cross-appeals before the Sixth Circuit in Gratz, which challenged the University of Michigan’s race-conscious undergraduate admissions program, were heard the same day as the law school case. For unexplained reasons, the Court of Appeals had not issued a decision in Gratz. This prompted plaintiffs’ request that the Supreme Court review the case notwithstanding the Sixth Circuit’s inaction. As a result, the District Court’s decision in Gratz bypasses the Sixth Circuit and moves directly to the Supreme Court for resolution along with the law school case. For additional discussion of the Gratz matter, see infra note 122.

II. INTRODUCTION TO GRUTTER V. BOLLINGER

In December 1996, Michigan resident Barbara Grutter applied at the age of forty-three for admission into the fall 1997 first-year class of the University of Michigan Law School (“the law school”). Ms. Grutter was married before either she or her husband attended college. Both worked and initially attended a junior college in Grand Rapids, Michigan. Later, both transferred to Michigan State University where in 1978, Ms. Grutter graduated with High Honors, earning a 3.8 undergraduate GPA. She received an LSAT score of 161, representing the 86th percentile nationally. The law school initially placed her on the “wait list.” Subsequently she was denied admission.

Ms. Grutter is white. Had she been a member of one of the preferred racial or ethnic minority groups, the law school acknowledged, she likely would have been offered admission. However, solely because of her race and the school’s interest in “diversity,” Ms. Grutter was denied admission in favor of numerous minority students who were far less qualified.

III. THE LAW SCHOOL’S “SPECIAL ADMISSIONS” POLICY

Before 1992, the law school had in place a “special admissions” program that explicitly sought to achieve minority enrollment of at least “10% to 12%.” The policy in place at the time Ms. Grutter applied was adopted in April 1992. In it, the school ratified its nearly two-decade-old practice of using race as...
a factor in making admissions decisions. The law school acknowledges that race plays a determinative role in the admissions process with some applicants being “aided significantly” by their classification as a member of an underrepresented minority group. The policy also states that without its “commitment to racial and ethnic diversity,” students from groups which have historically been discriminated against “might not be represented in our student body in meaningful numbers.”

The 1992 policy abandoned the term “special admissions” and also eliminated all references to specific numerical target enrollment goals for certain minorities. But like its retention of race-conscious admissions, the 1992 policy effectively ratified and reaffirmed its pre-1992 goal of not less than 10-12% minority enrollment. To accomplish this, it simply excised numbers and replaced them with what the policy euphemistically refers to as a “critical mass” of historically underrepresented minority students. It was not a phrase without meaning.

The law school justifies its use of race on one ground only: that it serves a compelling interest in achieving diversity among its student body. The policy describes its desire to enroll a diverse class for the purpose of “enrich[ing] everyone’s education,” with diversity initially being defined by individual characteristics and achievements not overtly associated with race. The policy concludes, however, with an altogether

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30. The current Policy, immediately following its discussion of the law school’s commitment “to have substantial and meaningful racial and ethnic diversity,” states: “Speaking generally, the faculty believes that the admission process has functioned well in recent years, producing classes both diverse and academically outstanding. . . . Our object in this memorandum is therefore as much to ratify what has been done and to reaffirm our goals as to announce new policies.” Policy, supra note 29, at 12-13 (emphasis added).

31. Id. at 13.

32. Id. at 12 (emphasis added).

33. See id.

34. Id. at 12.


37. See id. at 5 (referring to applicants who “may have had a successful career as a concert pianist or may speak five languages”). Other examples included an applicant with an Olympic gold medal or a Ph.D. in physics, a 50-year-old in a class lacking anyone over age 30, or “a Vietnamese boat person.” Id. at 11. This last example (focusing on the experiential diversity offered by an applicant who may have been “a Vietnamese boat person”) is particularly ironic since Asian-American applicants, like white applicants, are
different discussion of diversity. Though no longer explicitly labeled a special admissions program, one portion of the law school’s policy (like the UC-Davis medical school special admissions program struck down in *Bakke*) is focused solely on race and ethnicity:

There is, however, a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have historically been discriminated against, like African-Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.

Over the past two decades, the law school has made special efforts to increase the numbers of such students in the school... By enrolling a “critical mass” of minority students, we have ensured their ability to make unique contributions to the character of the Law School; the policies embodied in this document should ensure that those contributions continue in the future.

Nowhere within the four corners of the 1992 policy can one find a definition of the phrase “critical mass” or “meaningful numbers.” Despite that, the record is extraordinarily clear as to how the law school itself defines these phrases. For example, the dean testified that it was “unlikely” that a class made up of 5% underrepresented minority enrollment would constitute a “critical mass,” but that once the school reaches 10%, “critical mass” is beginning to be achieved. Similarly, the school’s director of admissions from 1991 through 1997 agreed that 5% “would not be enough,” but that 10% “might suffice.” Other members of the faculty committee responsible for drafting the 1992 policy also understood “critical mass” to mean something in excess of 10% of the class being comprised of underrepresented minority students. This was fully consistent

afforded no preference based on race under the law school’s policy. The proof at trial demonstrated that Asian-Americans are among the applicants the law school’s policies penalize most. See, e.g., *Grutter I*, Trial Exhibit 143, Table 8.

40. Id. at 187-88.
41. *Grutter I*, 137 F. Supp. 2d at 832 (referencing the testimony of Dennis Shields).
with the law school’s minority enrollment goals beginning in the late 1960s and early 1970s, as well as its historical pattern of minority admissions over the years preceding and following the adoption of the 1992 policy.43

In fact, explicit numerical goals appeared in the early drafts of the present policy:

Our goal is to have substantial and meaningful racial and ethnic diversity . . . . [I]t is important to note that in the past we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African-American, Hispanic, and Native American members has been about 11% to 17% of total enrollees.44

At the end of the policy-drafting process, the illusive substitute “critical mass” was inserted for the actual numbers over the written objection of one faculty committee member who complained that in the interest of “candor,” the “target range” percentages should remain.45 It was this committee member’s view that removing the numbers “did not . . . change how the policy worked in terms of guiding the admissions office; it just changed the statement of the policy.”46 As this same faculty member observed, “it wouldn’t have been a different policy [with the eleven percent to seventeen percent numbers included] . . . . It would have been a better statement of the policy.”47 It would have been an honest statement of how the policy operates.

Not surprisingly, the law school’s minority enrollment goal has been met or exceeded every year since the adoption of the policy.48 Applying different admissions standards depending solely upon the race of the applicant enables the school to

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43. Id. at 171-72. See also Grutter I, 137 F. Supp. 2d at 830-31, 831 n.8.
44. Grutter I, 137 F. Supp. 2d at 835 (referencing Trial Exhibit No. 34 at 13) (emphasis added).
45. E.g., Lempert Trial, supra note 42, at 181-82; Grutter I, Trial Exhibit No. 32. See also Grutter I, 137 F. Supp. 2d at 835, 840 (noting that a percentage goal “was omitted from the final version despite Professor Regan’s suggestion that it remain for the sake of ‘candor’”).
47. Id. at 59 (emphasis added).
48. See Grutter I, 137 F. Supp. 2d at 832, 834 (noting that every year since the adoption of the policy, “at least 11% of each entering class” has been made up of the designated underrepresented minority students according to the dean and the former director of admissions). See also Grutter I, Trial Exhibit No. 189 (showing underrepresented minority enrollments for 1995-2000).
accomplish this.\textsuperscript{49} In 1995, for example, the average LSAT score for all admitted applicants to the school was approximately the 97th percentile.\textsuperscript{50} The average undergraduate GPA for all admittees was approximately 3.64.\textsuperscript{51} To illustrate the difference race played in individual admissions decisions, the following examples are taken directly from the school’s own admissions grids. In 1995 there were ten black applicants to the school with an LSAT score in roughly the 75th percentile range who also had undergraduate GPAs in the 3.25 to 3.49 range.\textsuperscript{52} All ten were offered admission.\textsuperscript{53} In comparison, there were fourteen Asian-American applicants seeking admission in the fall of 1995 with similar credentials, and not one was offered admission.\textsuperscript{54} There were fifty-one white applicants in this same grid position, only one of whom was admitted.\textsuperscript{55}

The law school’s former director of admissions admitted that these results were “generally . . . explained by the extent to which race is taken into account in the admissions process.”\textsuperscript{56} In fact, as confirmed by the statistical analyses both the plaintiffs and the school offered, no factor other than race can begin to

\textsuperscript{49} See \textit{Grutter I}, 137 F. Supp. 2d at 834-35 (quoting the dean as saying “race is considered to the extent necessary to achieve a critical mass [of underrepresented minority students]”). The law school’s own statistical expert confirmed the “extent” to which race mattered, suggesting that “if race were not considered . . . underrepresented minority students would have constituted 4% of the entering class in 2000, instead of 14.5%.” \textit{Id.} at 839 (citation omitted). The school’s exhibit is fully consistent with the suggestion that race played a role in the admission of approximately 10-12% of every entering class between 1995 and 2000 (the only classes depicted on the exhibit). See \textit{Grutter I}, Trial Exhibit No. 189.

\textsuperscript{50} See \textit{Grutter I}, Trial Exhibit No. 143.

\textsuperscript{51} The data was presented at trial on grids—in a manner similar to the grid appended to the policy—and broken down, as the law school did, by race. The average LSAT and GPA combination for white admittees in 1995 was in the 98th percentile with a 3.68 undergraduate GPA. The average combination for black admittees was in the 81st percentile with a 3.33 undergraduate GPA. See \textit{Grutter I}, Trial Exhibit No. 143, Tables 5 and 6.

\textsuperscript{52} See \textit{Grutter I}, Trial Testimony of Dennis Shields (Jan. 19, 2001), Trial Transcript Vol. IV, at 209-13 (mentioning Trial Exhibit No. 15). See also Lehman Trial, \textit{supra} note 3, at 208-10.

\textsuperscript{53} See \textit{Grutter I}, Trial Testimony of Dennis Shields (Jan. 19, 2001), Trial Transcript Vol. IV, at 211 (mentioning Trial Exhibit No. 15). There were 404 black applicants for the fall 1995 entering class. \textit{Grutter I}, Trial Exhibit No. 143, Table 1.

\textsuperscript{54} See \textit{Grutter I}, Trial Exhibit No. 15 at 7. There were 470 Asian-American applicants for the fall 1995 entering class. \textit{Grutter I}, Trial Exhibit No. 143, Table 1.

\textsuperscript{55} See \textit{Grutter I}, Trial Testimony of Dennis Shields (Jan. 19, 2001), Trial Transcript Vol. IV, at 212 (mentioning Trial Exhibit No. 15). There were 2,316 white applicants for the fall 1995 entering class. \textit{Grutter I}, Trial Exhibit No. 143, Table 1.

explain the huge disparity in how applicants of different races are treated.\footnote{The size of the disparity is confirmed in the statistical analysis the plaintiffs’ expert performed. See Grutter I, Trial Exhibit No. 137. As the expert noted, “attaining a relative odds of 2 or 3 for cure of a disease is often the goal of a medical study. That is, a drug that doubled or tripled the odds of cure would be of great value. Double and triple digit relative odds [of admission (e.g., ‘estimated relative odds’ of 257.93 for African-Americans in 1995)] are simply enormous!” Grutter I, 137 F. Supp. 2d at 837, 837 n.20 (emphasis added).}

As the law school dean admitted in deposition and at the time of trial:

[There] are applicants who we admit, who would not be admitted if we were prohibited from taking their race . . . into account.

[T]here are minority students for whom race was determinative in whether or not they were given an offer of admission . . . .

[And] the same student who was admitted because race made a difference, had that student been white or Asian American, they would not have been admitted . . . .\footnote{As a matter of [Constitutional] principle, there is no difference between considering race as a factor and considering race as a quota . . . . You’re either admitted or you’re not. And race either made the difference or it did not. It doesn’t matter to the person who loses a place because of affirmative action whether the particular mechanism was an absolute exclusion from some part of the available spaces or a partial penalty in competing for all the places. Every place that goes to a different person because of race is a quota of one.}

[There are minority applicants] who are admitted even [though] they have qualifications lower than applicants who are non-minorities.\footnote{Historian John Hope Franklin, a proponent of affirmative action, provided an important contrast when he testified as an expert witness for the intervenors. During cross-examination, Professor Franklin admitted that when it comes to college and university admissions, he “do[es] not support the admission of less qualified minority applicants over more qualified Asian or white applicants.” Grutter I, Trial Testimony of John Hope Franklin (Jan. 24, 2001), Trial Transcript Vol. VII, at 144 [hereinafter Franklin Trial]; see also Grutter I, 137 F. Supp. 2d at 860.}

And as the District Court noted:

Plaintiffs’ and defendants’ statisticians\footnote{Lehman Trial, supra note 3, at 196. Historian John Hope Franklin, a proponent of affirmative action, provided an important contrast when he testified as an expert witness for the intervenors. During cross-examination, Professor Franklin admitted that when it comes to college and university admissions, he “do[es] not support the admission of less qualified minority applicants over more qualified Asian or white applicants.” Grutter I, Trial Testimony of John Hope Franklin (Jan. 24, 2001), Trial Transcript Vol. VII, at 144 [hereinafter Franklin Trial]; see also Grutter I, 137 F. Supp. 2d at 860.} analyzed the admissions data and both provide testimony and expert
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reports which assisted the court in understanding the extent to which race is considered in the law school’s admissions process. Dr. Larntz’ cell-by-cell analysis provided mathematically irrefutable proof that race is indeed an enormously important factor.\textsuperscript{61}

The court later noted that “[e]ven the testimony and reports of the law school’s statistician . . . supports [the conclusion that] the law school places a very heavy emphasis on an applicant’s race in deciding whether to accept or reject.”\textsuperscript{62}

The chairman of the faculty committee that drafted the current policy confirms this difference in the treatment of applicants based solely on race.

Q: Do you believe that each year there are Asian and/or white applicants who are rejected by the University of Michigan Law School, but who, had their skin color or ethnicity been the only change in their application, most certainly would have been admitted? . . .

A: I think that there are people who if their applications had been strengthened by belonging to a historically discriminated [against] minority, they would have been admitted to the law school.\textsuperscript{63}

Of course, every student has the opportunity to strengthen her application by working hard to improve her LSAT score or undergraduate GPA, committing more time to campus or community activities, or demonstrably overcoming unusual personal obstacles or disadvantage. But no person can “strengthen” her application by changing the color of her skin.

\textsuperscript{60} The plaintiffs’ expert was Dr. Kinley Larntz, Professor Emeritus in the Department of Applied Statistics at the University of Minnesota. Dr. Larntz’s expert reports were admitted as Trial Exhibits Nos. 137-42. Exhibit No. 143 consists of the tables and charts of Dr. Larntz’s PowerPoint presentation. The defendants’ expert was Dr. Stephen Raudenbush, a Professor of Education at the University of Michigan. Dr. Raudenbush’s expert reports were admitted as Trial Exhibits No. 145-50. See generally Grutter I, 137 F. Supp. 2d at 836-42.

\textsuperscript{61} Grutter I, 137 F. Supp. 2d at 841 (emphasis added). The District Court “specifically adopt[ed] Dr. Larntz’ analysis and his conclusion that ‘membership in certain ethnic groups is an extremely strong factor in the decision for acceptance.”’ Id.

\textsuperscript{62} Id. at 842.

\textsuperscript{63} Grutter I, Deposition Testimony of Richard O. Lempert (Aug. 10, 2000) at 229-30 [hereinafter Lempert Deposition]. This was confirmed in his trial testimony: “It certainly would not surprise me that if, in competition, a person . . . did not have . . . as a characteristic [membership in an historically discriminated against ethnic group], that would have made a difference in how the application was treated.” Lempert Trial, supra note 42, at 201-02 (emphasis added).
The law school’s brief opposing the plaintiffs’ petition seeking Supreme Court review lays bare that it is mere skin color that is important: “[S]tudents from groups which have been historically discriminated against have experiences that are integral to [the law school’s pedagogical] mission, regardless of whether they are rich or poor or ‘victims’ of discrimination.”

But the school’s obsession with race is not just confined to words in a brief. Nor is it buried in a mass of statistical evidence. It was jarringly exposed in the following exchange during oral argument of the school’s appeal before the Sixth Circuit:

[Circuit Judge Boggs stated,] “If Barbara Grutter walked in to whoever the current Dean of the Law School is and said, ‘Dean, would you let me in if I were black?’ wouldn’t he have to honestly say either ‘yes’ or ‘pretty darn almost certain’?” Counsel [for the law school] agreed, but responded that “a black woman who had otherwise an application that looked like Barbara Grutter, that would be a different person.”

As Judge Boggs noted, “That answer puts starkly the policy of discrimination practiced throughout the ages.” Judge Boggs elicited the following admission as well: “When I then asked counsel whether, if she were of a different race, she would have been admitted whether or not she had come of age in inner-city

64. “[T]o give advantaged members of a minority a preference in admissions is simply to reward them for the accident of their race . . . .” Alan Dershowitz & Laura Hanft, Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?, 1 CARDOZO L. REV. 379, 419 (1979).

65. Brief in Opposition to Petitioner’s Petition for Writ of Certiorari at 3, Grutter v. Bollinger, 123 U.S. 617 (2002) (No. 02-241) (emphasis added). This admission perhaps places the law school’s conduct within that which would have gained Justice Marshall’s approval in Bakke, where he argued in dissent that a university should be permitted to “employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.” Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting). But this would fall squarely outside of the range of conduct that the Court and Justice Powell would have condoned: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” Id. at 307.

66. An example of the law school’s skewed view that “race matters” is found on its website: “When individuals meet on the street, when they decide where to live, when they decide whom to befriend, when they decide whom to work with, race matters.” One would think that everything implied in this statement would be offensive to all but the most ardent pro-segregationists. UNIV. OF MICH., QUESTIONS AND ANSWERS ABOUT THE LAWSUIT AGAINST THE UNIVERSITY OF MICHIGAN LAW SCHOOL (emphasis added), at http://www.law.umich.edu/newsandinfo/lawsuit/qanda.htm (last visited Mar. 25, 2003).


68. Id. (Boggs, J., dissenting).
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Prelude: Bakke Revisited 

Detroit or in Grosse Pointe, he answered: ‘That’s probably right.’

The following illustrates the absurdity of the law school’s position: How would a “rich” black American student who may never have experienced recognizable racial discrimination (and who receives an enormous preference in admissions based solely on his or her skin color) add more to the pedagogical mission of the law school—merely because he or she is of African descent—than would a poor dark-skinned American student of Southeast Asian ancestry or a poor white student (neither of whom receives a preference in admissions)? Yet the school asserts that the wealthy black student can add more, and thus receive the preference, merely because his skin color identifies him as a descendant of a group which had been “historically discriminated against.”

As a result, the following proposition seems clear: If, in the name of diversity, the University of Michigan and its law school can use racial classifications in the manner, and to the extent, and for the purpose, which it indisputably does, virtually no race-conscious system ever can be forbidden when it comes to admissions.

In upholding the law school’s current system, the Sixth Circuit Court of Appeals laid down only one stricture: avoid any mention of a “fixed goal or target.” Yet the language of the

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69. Id. at 790. (Boggs, J., dissenting).

70. Policy, supra note 29, at 12. The example of a “rich” Hispanic or Native-American student, many of whom clearly have never experienced recognizable racial discrimination, equally makes the point.

71. “It would be cause for consternation were a court, without more, free to accept a term as malleable as ‘diversity’ in satisfaction of the compelling interest needed to justify governmentally-sponsored racial distinctions.” Wessman v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998). Yet unfettered and unlimited discretion to use race to achieve “diversity” is precisely what the law school and its amici urge the Supreme Court to grant to every institution of higher learning: “The decision of a university as to which minority groups deserve favorable consideration . . . and the weight of such consideration, are necessarily and appropriately decisions to be made as a matter of educational judgment.” Brief of Amici Curiae, Harvard University, Brown University, The University of Chicago, Dartmouth College, Duke University, The University of Pennsylvania, Princeton University, and Yale University at 28, Grutter II, 288 F. 3d 732 (6th Cir. 2002) (No. 02-241) (emphasis added) [hereinafter Harvard Amicus Brief in Grutter]. These universities filed the same brief in Gratz. See Brief of Amici Curiae, Harvard University, Brown University, The University of Chicago, Dartmouth College, Duke University, The University of Pennsylvania, Princeton University, and Yale University, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 01-1447).

72. Grutter II, 288 F.3d at 748.
policy does create a “fixed goal or target.” The target is to enroll a “critical mass” of underrepresented minority students, expressly defined by prior written resolutions and demonstrated by the historical enrollment patterns as meaning not less than “10%-12%.” It is a “target” which was numerically described in the original drafts of the current policy as being not less than “11%” minority enrollment. It is a “target” that faculty members, the dean, and the former directors of admissions all understood to mean not less than 10% underrepresented minority enrollment. And the enrollment of underrepresented minority students has never once fallen below that level since the policy went into effect.

For all of these reasons, Grutter provides the perfect backdrop for the Supreme Court to revisit Bakke and to decide whether the University of Michigan’s overtly race-conscious policies, and others similar to them, can be justified on the basis of Justice Powell’s “diversity” rationale—and even were that so, whether the particular manner in which Michigan seeks to achieve that goal is “narrowly tailored.”

IV. PROCEDURAL HISTORY OF GRUTTER: THE DISTRICT COURT

A. The District Court’s Findings on “Diversity” and “Narrow Tailoring”

After the law school rejected her, Ms. Grutter filed suit in December 1997, challenging the school’s use of race on the grounds that it violated both her right to equal protection under the Fourteenth Amendment of the Constitution and the express language of Title VI of the Civil Rights Act of 1964.

On December 22, 2000, the District Court heard the parties’ motions for summary judgment. The court took the motions under advisement and thereafter conducted a trial on the following issues:

73. The language of the Policy expressly “ratif[ied]” both the law school’s past and present commitment to enroll “a ‘critical mass’ of minority students” who “without this commitment might not be represented in our student body in meaningful numbers.” Policy, supra note 29, at 12-13.

74. 42 U.S.C. § 2000d (2000). See also 42 U.S.C. § 1981 (2000). In Bakke, Justice Stevens wrote, “the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program. . . . [U]nder Title VI, it is not ‘permissible to say ‘yes’ to one person; but to say ‘no’ to another person, only because of the color of his skin.” Univ. of Cal. v. Bakke, 438 U.S. 265, 418 (1978) (Stevens, J., concurring and dissenting) (citing remarks of Sen. John Orlando Pastore).
1. The extent to which race is a factor in the law school’s admissions decisions;

2. Whether the law school’s consideration of race in making admissions decisions constitutes a double standard in which minority and non-minority students are treated differently; and

3. Whether (as the intervenors argued) the law school may take race into account to “level the playing field” between minority and non-minority applicants.76

The District Court further ruled that it would decide as a matter of law whether “diversity” was a compelling interest that might otherwise justify a properly devised—i.e., “narrowly tailored”—use of race in admissions.76

Following a fifteen-day bench trial commencing on January 16, 2001, the District Court issued its Findings of Fact, Conclusions of Law, and Order on March 27, 2001. Among the court’s findings were the following:

- The law school gives a preference based on race to applicants from certain racial groups—including African-Americans, Mexican-Americans, and Native Americans—that it considers to be underrepresented in the Law School.77
- The school “indisputably” places a “very heavy emphasis on an applicant’s race in deciding whether to admit or reject” an applicant.78
- The school seeks to enroll what it calls a “critical mass” of underrepresented minority students. In practice, this has meant that the school attempts to enroll an entering class consisting of 10-17% underrepresented minority students.79

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76. See Adarand Constrs. v. Pena, 515 U.S. 200, 227 (1995) (holding “all racial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests”).
78. Id. at 840. “As Dr. Larntz noted, this fact is apparent on the face of the law school’s admissions grids. One does not need to undergo sophisticated statistical analysis in order to see it; the statistical analysis simply confirms empirically what the grids suggest intuitively.” Id. at 841. For further discussion, see generally id. at 839-41.
79. Id. at 840.
The school also seeks to ensure that each year’s entering class consists of a minimum of 10-12% underrepresented minority students. This has meant that each year, the law school “effectively reserve[s]” approximately 10% of the entering class for students from the underrepresented minority groups, and those numbers of seats are “insulated from competition.”

There is no time limit on the school’s use of race as a factor in the admissions process.

The District Court also considered expert statistical evidence in resolving the parties’ factual dispute about the “extent” to which race is a factor in the admissions process. The court “adopt[ed]” the expert statistical analysis of plaintiff’s expert. It rejected criticisms by the law school’s statistical expert.

Summarizing his findings, Judge Friedman wrote:

"[T]he testimony of the witnesses who are familiar with the inner workings of the law school’s admissions office confirmed that race is considered and that it makes a difference in admissions decisions. The current and former dean, as well as the current and former admissions directors, all testified that race is considered to the extent necessary to enroll a critical mass of under-represented minority students. While none of these witnesses acknowledged that they have a particular number or percentage in mind as the admissions season progresses, the written and unwritten policy at the law school charges the admissions office with assembling entering classes which consist of [at least] 10% . . . African American, Native American, and Hispanic students. Over the years this target has been achieved, and even exceeded, despite the under-represented minority students’ generally lower LSAT scores and undergraduate GPA’s. The court also finds it significant that the dean and the admissions director monitor the law school’s “daily admissions reports,” which classify applicants by race. These reports inform the reader how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit. There would be no need for this information to be categorized by race.

80. Id. at 851.
81. Id.
82. Grutter I, 137 F. Supp. 2d at 841.
83. Id.
unless it were being used to ensure that the target percentage is achieved.\textsuperscript{84}

After making its factual findings, the court moved to what it characterized as “the central issue in this case: whether the Constitution permits the consideration of race in order to achieve racial diversity.”\textsuperscript{85} Neither the court nor the plaintiff expressed any doubt that racial diversity in the student body may provide “important and laudable” educational benefits.\textsuperscript{86} Nevertheless, the court concluded as a matter of law that the law school’s stated interest in achieving diversity in the student body was not a compelling interest that could justify its racial preferences in admissions.\textsuperscript{87}

The court also found that even if the school’s interest in diversity were compelling, its use of race was not narrowly tailored to achieve that interest.\textsuperscript{88} It characterized the school’s policy as one that was “practically indistinguishable from a quota system.”\textsuperscript{89} As the court explained:

While the law school has not set aside a fixed number of seats for under-represented minority students, as did the medical school in \textit{Bakke}, there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure. Under either system, students of all races are not competing against one another for each seat, with race being simply one factor among many which may “tip the balance” in particular cases. The reservation of some seats for applicants of particular races, and the attendant lack of competition for these seats [necessary to constitute a “critical mass”] was the principal reason Justice Powell found UC Davis’ quota system unconstitutional. . . . [T]he fact of the matter is that approximately 10\% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. The practical effect of the law school’s policy is indistinguishable from a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. It appears that the law school is engaging in simple racial balancing by

\textsuperscript{84} Id. at 842 (emphasis added).
\textsuperscript{85} Id. at 843.
\textsuperscript{86} Id. at 850.
\textsuperscript{87} \textit{Grutter I}, 137 F. Supp. 2d at 849-50.
\textsuperscript{88} Id. at 850.
\textsuperscript{89} Id. at 851.
focusing so carefully on admitting and enrolling a particular percentage of students from particular racial groups.\(^{90}\)

**B. The District Court’s Discussion of Race-Neutral Alternatives**

The District Court also noted that the law school never gave serious consideration to several “race-neutral alternatives” for achieving diversity. These included increasing recruiting efforts; decreasing the emphasis for all applicants on LSAT scores and GPAs,\(^{91}\) using a lottery system\(^{92}\) for all qualified applicants; employing a system whereby a certain number of the top graduates from various colleges and universities are admitted;\(^{93}\) more carefully determining whether individual applicants have had to overcome any particularly challenging or difficult obstacles;\(^{94}\) and eliminating the preference now given to the sons and daughters of law school alumni.\(^{95}\) Even one of the

\(^{90}\) *Id.* (citation omitted).

\(^{91}\) One of the law school’s witnesses, former professor and current Vanderbilt Law School Dean Kent Syverud, agreed with the District Court that racial diversity—if deemed important to a law school’s pedagogical mission—could more easily be accomplished if the school “abandon[ed] the LSAT and GPA as significant factors in admissions.” Syverud, *supra* note 13, at 85-86.

\(^{92}\) The author of the current policy agreed that he “would have no problem at all with the lottery [and] would probably argue for it” so long as “selecting at random would guarantee . . . a mix like we have today.” Lempert Trial, *supra* note 42, at 159-60. Of course, the school has no idea whether this particular “race-neutral alternative” might work because, like every other race-neutral alternative, it has never tried it. Moreover, Professor Lempert’s testimony about “guarante[ing] a mix like we have today” is a subtle but no less direct admission of the law school’s intent to use race to the degree necessary to retain “a mix like we have today.”

\(^{93}\) *Grutter I*, 137 F. Supp. 2d at 853, 870.

\(^{94}\) *Id.* at 871 (“So long as the law school acknowledges that such obstacles may confront an applicant of any race, consideration might be given to such things as growing up in difficult family circumstances, attending underfunded public schools, or learning English as a second language.”). It is a view former Harvard President and law school expert Derek Bok echoes: “[E]very attempt to penalize one group to benefit another will produce a number of individual injustices. Few would argue that all white students have benefited from the hardships of discrimination, or that every successful minority applicant has suffered greater hardships or disadvantages than every white who is turned away.” Bok, *supra* note 17, at 94 (emphasis added). It is noteworthy that Professor Bok’s alma mater has recently attempted to convert the “individual injustices” which palpably occur under race-conscious policies into a *group* impact that Harvard suggests is so slight that the Supreme Court arguably should be unconcerned. Harvard Amicus Brief in *Grutter*, *supra* note 71, at 21. Of course, this disingenuous *group* focus—lifted from Bok’s work in *The Shape of the River*—ignores Bok’s earlier and obvious recognition that the injustices occur to individuals, not groups; and it is the *individual’s* rights, secured under the Constitution, that are being trampled in the process. See, e.g., Univ. of Cal. v. Bakke, 488 U.S. 265, 320 (1978).

\(^{95}\) *Grutter I*, 137 F. Supp. 2d at 871.
intervenors’ experts, who fully supports the law school’s use of race in admissions, admitted that there exist race-neutral alternatives that the school has never tried.\textsuperscript{97}

On this subject, the court concluded:

\textit{[T]he court heard very little testimony from the authors of the 1992 admissions policy, or from those who have been involved in administering it, as to whether the deans or the faculty at the law school itself have ever given serious consideration to race-neutral alternatives. . . . Even if these alternatives would not be as effective in enrolling significant numbers of underrepresented minority students, the law school’s failure to consider them . . . prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring.}\textsuperscript{98}

\textbf{C. The Impact of Eliminating Race in Admissions}

The law school’s witnesses, and many of the intervenors’ witnesses, asserted that unless its use of race were permitted to continue, minority enrollment at the school would drop to “token levels.”\textsuperscript{99} The basis for their claim was “the experience of the University of California at Berkeley, where minority enrollment dropped sharply after passage of Proposition 209.”\textsuperscript{100}

While ending the school’s impermissible use of race undoubtedly may have an initial impact on minority enrollments, the facts concerning Proposition 209’s effect on racial and ethnic diversity within the University of California system do not support the law school’s or the intervenors’ assertions. First, based on the reported undergraduate enrollments at both UC Berkeley and UCLA, both campuses remain the most racially and ethnically diverse flagship schools in the country, and both continue to enroll larger percentages of underrepresented minority students than does Michigan.\textsuperscript{101}

\textsuperscript{96} The intervenors were forty-one individuals and three student groups who support the law school’s use of race in admissions. They argued that the school is justified in using race as a “remedy [for] past discrimination.” \textit{Grutter II}, 288 F.3d 732, 735 (6th Cir. 2002).

\textsuperscript{97} \textit{See Grutter I,} Trial Testimony of Gary Orfield (Jan. 23, 2001), Trial Transcript Vol. VI, at 218-21.

\textsuperscript{98} \textit{Grutter I}, 137 F. Supp. 2d at 853.

\textsuperscript{99} \textit{Id.} at 834.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} UC Berkeley’s undergraduate enrollment is listed as 42% Asian, 30% Caucasian, with 14% underrepresented minorities. \textit{See PRINCETON REV., THE BEST 345 COLLEGES 534.}
Second, the underrepresented minority law enrollments at Berkeley and UCLA rebounded to 10% and 12%, respectively, by 2000 (numbers the Michigan law school describes as within its definition of a “critical mass”), and by the fall of 2002 had increased to almost 20% at Berkeley. Moreover, the evidence suggests that the chronic drops in black enrollment at both law schools immediately following Proposition 209 stemmed from factors other than the removal of race from admissions. For example, black students undeniably faced intense pressure from Proposition 209 opponents not to apply to or attend UC’s flagship schools. This resulted in a significant decrease in the overall numbers of black applicants to both law schools, a pattern that continues to some extent and indisputably dampens black enrollment.

It was a pattern repeated in Texas following the court decision in *Hopwood v. Texas*, which banned the use of race in admissions at the University of Texas Law School. Notwithstanding these unfortunate pressures, the University of

(permn. ed., rev. vol. 2003) [hereinafter BEST COLLEGES]. UCLA is listed as 39% Asian, 35% Caucasian, with 19% underrepresented minorities. Id. at 540. By comparison, the University of Michigan, which applies a heavy numerical advantage to freshman applicants from select minority groups, lists its undergraduate enrollment as 64% Caucasian, 13% Asian, with 12% underrepresented minorities. Id. at 590.

102. See, e.g., *Grutter I*, 137 F. Supp. 2d at 870; Trial Exhibit No. 132. The total minority first-year enrollments (including Asian-American students) at each of the three University of California law schools, even after the imposition of race-neutral systems, remain significantly higher in 2002-2003 than the total minority enrollment at Michigan: Berkeley 39.7%, UC Davis 36.8%, UCLA 30.5%, Michigan 25.6%. UNIV. OF CAL., UNIVERSITY OF CALIFORNIA’S LAW SCHOOLS, at http://www.ucop.edu/acadadv/datamgmt/lawdata/lawschl3.html (last visited Mar. 25, 2003). These same data show that the UC law schools’ underrepresented minority enrollments are comparable to or, in the case of UC Berkeley, significantly exceed that at Michigan. For current Michigan data, see UNIV. OF MICH., QUESTIONS AND ANSWERS ABOUT THE LAWSUIT AGAINST THE UNIVERSITY OF MICHIGAN LAW SCHOOL, at http://www.law.umich.edu/newsandinfo/lawsuit/qanda.htm (last visited Mar. 25, 2003).

103. Both the law school’s and intervenors’ own expert witnesses confirmed this unfortunate phenomenon. See Orfield, *supra* note 97, at 209. See also Bowen & Bok, *supra* note 14, at 38 n.23.

104. See *Grutter I*, Trial Exhibit No. 132. For example, 493 black students applied to Boalt Hall for the fall of 1993, and only 206 did so in the fall of 1998. The numbers for UCLA were 487 and 209, respectively. Id.

105. *Id.*


Texas Law School reports a rebound in minority law enrollment, while undergraduate enrollment at UT Austin fully returned to pre-Hopwood levels in less than three years.

Particularly relevant was the testimony of Dr. Eugene Garcia, Dean of the School of Education at the University of California at Berkeley. Dr. Garcia, who favors race-conscious admissions, admitted that without using race, Berkeley’s highly regarded graduate School of Education has succeeded in enrolling a racially and ethnically diverse class, with 28% of the class consisting of underrepresented minorities. According to Dr. Garcia, the school accomplished this by expending greater effort in recruiting new students and decreasing reliance on the Graduate Record Examination (the standardized test many graduate school programs at UC Berkeley and elsewhere use for admissions).

Finally, despite the possible negative consequences of striking down the law school’s use of race, the District Court concluded with this observation:

Regardless of one’s analysis of the admissions data in California and Texas, the constitutionality of the current admissions system at the University of Michigan Law School does not turn on the predicted consequences of instituting a race-blind admissions system. The current system is either constitutional or it is not. The court is unaware of any precedent for the proposition that a constitutional challenge to a voluntarily adopted racial classification may be defeated by the argument that elimination of the classification will or may have undesirable consequences, be they political, social, economic or otherwise. If undesirable consequences are likely or even certain to occur, the answer is not to retain the

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108. See Grutter I, Trial Exhibit No. 131 (showing underrepresented minority law enrollment for the fall of 1999 to be 10.2%). UT’s total underrepresented minority enrollment in the law school in the fall of 2002 had climbed to 14.2%, with Hispanic enrollment returning essentially to pre-Hopwood levels (150 students, or 10.1% of the student body). UNIV. OF TEX., FALL ENROLLMENT BY LEVEL AND ETHNICITY 1-2 (2002). As these data clearly demonstrate, total underrepresented minority enrollment at UT’s law school under a race-neutral system is fully comparable with the underrepresented minority enrollment at Michigan.

109. “First-time freshman” underrepresented minority enrollment rebounded to pre-Hopwood levels within three years, i.e., by the fall of 1999. See Grutter I, Trial Exhibit No. 131. Since then it has consistently remained near 18%. BEST COLLEGES, supra note 101, at 652. UT’s undergraduate underrepresented minority enrollment under a race-neutral system substantially exceeds that at Michigan (12%). Id. at 590.


111. See id.
unconstitutional racial classifications but to search for lawful solutions, ones that treat all people equally and do not use race as a factor.\textsuperscript{112}

D. The District Court’s Holding on Using Race to Remedy “Societal Discrimination”

The District Court also rejected the intervenors’ alternative argument seeking to justify race-based admissions to redress the effects of historical societal discrimination.\textsuperscript{113} After listening to the extensive testimony about the history of racial discrimination in this country,\textsuperscript{114} the court nevertheless concluded:

[T]he legal conclusion [the intervenors] draw therefrom is flawed both as a matter of logic and as a matter of constitutional law.

The logical flaw in the argument is that it assumes all members of underrepresented minority groups have suffered adversity entitling them to some degree of upward adjustment in their UGPA and LSAT scores. Conversely, the intervenors’ argument assumes that no members of non-minority groups have suffered any such adversity which would entitle them to a similar adjustment in their grades and scores. Of course, neither assumption is correct. Every law school applicant is an individual whose personal history is unique. . . . There is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege.\textsuperscript{115}

The legal flaw in the intervenors’ conclusion is even more daunting, and it is this: the Supreme Court has held that the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making.\textsuperscript{116}

\textsuperscript{112} Id. at 870 (citation omitted).

\textsuperscript{113} For a discussion, see generally id. at 855-72.

\textsuperscript{114} “[T]here is no question about the long and tragic history of race discrimination . . . .” Id. at 863.

\textsuperscript{115} The court’s comment mirrors a similar statement from law school expert Derek Bok: “Who is to say that a black student of middle-class parents who has studied at Andover Academy has had to labor under greater handicaps than the son of poor white immigrants who has graduated from an inner-city high school?” Bok, supra note 17, at 94.

\textsuperscript{116} Grutter I, 137 F. Supp. 2d at 868-69.
Justice Powell had expressed the same view earlier in *Bakke*.

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.\(^{117}\)

Based on its findings, the District Court enjoined the law school’s continued use of race in its admissions process.\(^ {118}\) In its order denying the school’s request for a stay of the injunction pending appeal, the court noted that there was “overwhelming evidence” that the school’s admissions process was not narrowly tailored to achieve an interest in a diverse student body.\(^ {119}\) The court also made clear the scope of its injunction:

This court’s injunction should not be understood as prohibiting any and all uses of racial preferences, but only the uses presented and argued by the defendants and intervenors in this case—namely, in order to assemble a racially diverse class or remedy the effects of societal discrimination. No other justifications were offered by the parties to this lawsuit, no[] others were considered by this court, and no[] others are enjoined by this court’s order.\(^ {120}\)

V. PROCEDURAL HISTORY BEFORE THE SIXTH CIRCUIT COURT OF APPEALS

On April 5, 2001, the Sixth Circuit reversed the District Court’s orders granting plaintiff’s injunction and denying the law school’s request for a stay pending appeal.\(^ {121}\) Thus, the school’s use of race continues unabated as of this writing. On May 11, 2001, the plaintiff in *Grutter* filed a petition for initial hearing *en banc* of this case and its companion case, *Gratz v.*

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118. *Grutter I*, 137 F. Supp. 2d. at 872.
120. *Id.* (citation omitted).
**Bollinger.** On October 19, 2001, the court issued an order granting the petition for initial hearing *en banc*. Oral arguments were heard on December 6, 2001. On May 14, 2002, the Sixth Circuit, in a 5-4 decision, reversed the judgment of the District Court.

**A. The Sixth Circuit Majority**

1. Chief Judge Martin’s Opinion

In an opinion authored by Chief Circuit Judge Boyce F. Martin, Jr., the five-judge majority held that Justice Powell’s opinion in *Bakke* was binding legal precedent establishing “diversity” as a compelling state interest sufficient to justify the law school’s use of racial preferences in admissions. Because it

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122. 122 F. Supp. 2d 811 (E.D. Mich. 2000). While presenting the identical issue of whether “diversity” is a compelling state interest that may justify the use of race in college and university admissions, the undergraduate admissions policies at the University of Michigan (of which there were several over the years at issue) are different in form from the law school’s policy. The current undergraduate system assigns a numerical weight to every factor contained in a student’s application. For example, an applicant is awarded between forty to eighty points for high school GPAs ranging from 2.0 to 4.0; from zero to a maximum of twelve points for a perfect SAT/ACT score; a maximum of three points for submitting an “outstanding” essay (changed from one point in 1999); a maximum of five points for “outstanding” leadership; ten points for Michigan residency; four points if the applicant’s parent is an alumnus; and twenty points if the student identifies him or herself as a member of an “underrepresented racial/ethnic minority.” Other factors can add or subtract from the total points accumulated. UNIV. OF MICH., SELECTION INDEX WORKSHEET (n.d.). According to guidelines the University’s admission personnel follow, one generally needs between 95 and 100 points to earn an automatic offer of admission. UNIV. OF MICH., OFFICE OF UNDERGRADUATE ADMISSIONS’ GUIDELINES FOR ALL TERMS OF 1998 173 (1998). The District Court in *Gratz* decided the case after hearing the parties’ respective motions for summary judgment. In his order, Judge Duggan determined that “diversity” was a compelling state interest that justified the University’s current race-conscious admissions program. See *Gratz*, 122 F. Supp. 2d at 820-22. However, Judge Duggan found the University’s undergraduate admissions policies for the years 1995-98, inclusive, to be unconstitutional because they were not “narrowly tailored.” *Id.* at 827. Judge Duggan upheld the current system, described above. See *id.* at 836.


124. *Grutter II*, 288 F.3d at 739, 742.

125. Because of this holding, the Sixth Circuit did not address whether the separate interest the intervenors preferred—remedying past discrimination—was sufficient to satisfy strict scrutiny review. *Id.* at 739 n.4. Chief Judge Martin determined that Justice Powell’s opinion with respect to diversity constituted the rationale for the holding of the Supreme Court in *Bakke* by applying the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977). This article does not focus on the courts’ *Marks* analyses. For the reader interested in how *Marks* was applied by the various judges who addressed it in *Grutter*, see the District Court’s approach, *Grutter I*, 137 F. Supp. 2d at 844-48; and the widely divergent approaches of Chief Judge Martin, *Grutter II*, 288 F.3d at 739-41, and Judge Boggs, *id.* at 778-87 (Boggs, J., dissenting).
decided that Bakke compelled a conclusion that “diversity” is a compelling state interest, the Sixth Circuit never addressed the question of whether or “why ‘diversity’ should be a compelling state interest.”

The Court of Appeals also determined that the law school’s use of race was “narrowly tailored.” Without any support in the record, the court viewed the school’s policy as “virtually identical to the Harvard plan” discussed in Bakke. The court thereafter held that the school achieved its objective of enrolling a “critical mass” of underrepresented minority students by using race as a “plus” factor in the manner Justice Powell approved (referring to Harvard’s system). The court reached this unusual conclusion in spite of its concession that Justice Powell neither defined nor discussed the size of the “plus” Harvard gave to certain races.

Thus, the court had no idea how Harvard treated the grades and test scores of minority applicants with those non-minority applicants presented, or how that treatment compared to the manner in which the law school weighted race. Because of that, the court did not evaluate the District Court’s findings on the size of the law school’s racial preferences other than to observe (again, without any principled analysis or explanation) that the “difference, on average, between the standardized test scores and/or undergraduate grades” for minority and non-minority students did not render the school’s admissions policy unconstitutional.

Given the evidence concerning the indisputably significant differences in that regard, the Sixth Circuit left wholly unanswered what degree of difference in

126. Grutter II, 288 F.3d at 776 (Boggs, J., dissenting). Were the Supreme Court to agree with the Sixth Circuit based on a Marks analysis and hold that Justice Powell’s “diversity” rationale is binding precedent, it could focus solely on whether the policy is narrowly tailored. Alternatively, the Court could strike down the law school’s policy as not narrowly tailored and avoid deciding the “diversity” issue altogether in a manner similar to Judge Gilman’s analysis. See id. at 816-18 (Gilman, J., dissenting). Irrespective of its analysis of Justice Powell’s opinion, it is equally clear that the Court is free to make its own determination of whether “diversity” is, or should be, a compelling state interest sufficient to withstand “strict scrutiny” review.

127. See generally id. at 744-51.
128. Id. at 749.
129. Id. at 752.
130. Id. at 748-49.
131. See Grutter II, 288 F.3d at 748-49.
132. Id. at 749.
admissions standards, or whether any degree of difference, would be enough to invalidate the school’s policy. 133

The Sixth Circuit’s discussion of the law school policy’s supposed similarity with the Harvard Plan is also problematic for several other reasons. In the first place, apart from the single fact that neither policy explicitly mentions a specific numerical enrollment goal (assuming, of course, that one entirely ignores the school’s “critical mass” as shorthand for “not less than 10%”), there is no demonstrable similarity between the Harvard undergraduate admissions program and the law school’s program. At no point does the Sixth Circuit majority analyze the two plans’ supposed parallel features.

The second problem is more obvious. Neither Bakke nor Grutter involved the Harvard Plan. Thus, as the Sixth Circuit essentially concedes, Justice Powell’s comments about the Harvard Plan are dicta. 134 The Sixth Circuit’s lack of any reasonable basis for comparing Harvard’s opaque and undefined treatment of race with the demonstrable weight it is given under the law school’s policy 135 caused Judge Boggs to observe:

How does the majority know that the Law School’s system is “virtually identical” to Harvard’s? I am deeply puzzled regarding how the majority could place both its confession of ignorance regarding the details of the Harvard plan and its claim that the two plans are identical in the same paragraph...
[T]here is nothing in the Harvard description that even hints that its preferences for race or other factors of diversity are of the magnitude here . . . .

Though there is no court record anywhere that reflects it, it may well be true that Harvard's view of race was similar to that which one Sixth Circuit judge neatly characterized as a "plus among equals." That is certainly the view expressed by at least one widely read educational journal that explicitly deals with minority educational issues. As Sixth Circuit Judge Ronald Lee Gilman described it:

[I]n differentiating between two applicants with essentially equal LSAT scores and GPAs, where one is Caucasian and the other African-American, I have little doubt that favoring the under-represented African-American would pass constitutional muster if educational diversity is recognized as a compelling government interest. . . .

[S]uch an admissions policy would presumably avoid the animosities stirred up by the common perception that admitted minority students are less qualified than their non-minority peers.

Evidence one of the intervenors’ experts produced suggests that the “plus among equals” Judge Gilman described may come the closest to reflecting Harvard’s approach. In a letter to Harvard’s president from the United States Department of Education’s Office of Civil Rights (in response to a civil rights claim in which Harvard was accused of discriminating against Asian-American students in its undergraduate admissions program), Harvard produced materials which described the “plus” given to race as “a preference which may help in some

136. Grutter II, 288 F.3d at 799-800 (Boggs, J., dissenting).
137. Id. at 818 (Gilman, J., dissenting).
138. "Many . . . supporting racial preferences in higher education have done so in the belief that race is being taken into account by admissions officers only when other academic and standardized credentials are relatively equal." The Progress of Black Student Matriculation at the Nation's Highest-Ranked Universities and Liberal Arts Colleges, J. BLACKS IN HIGHER EDUC., Autumn 2000, at 18 [hereinafter Black Matriculation] (emphasis added). In what can only be described as an understatement, the Journal’s editors observed that “many universities have not always adhered to this rule.” Id.
139. Grutter II, 288 F.3d at 817-18 (Gilman, J., dissenting) (emphasis added). “[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.” Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (citing DeFunis v. Odegaard, 416 U.S. 312 (1974)).
situations where all other factors are substantially equal for two candidates . . .” Whether constitutional or not, such a “plus among equals” is a far cry from the law school’s heavy-handed use of race.

Finally, for all of its talk about merely using race as a “plus,” it is ironic that the law school’s own faculty handbook characterizes race not as a “plus” but as “irrelevant,” having no connection with academic ability or job performance. It is precisely the “irrelevant” factor of race that weighs so heavily in the law school’s admissions decisions.

2. Judge Clay’s Concurring Opinion

Circuit Judge Eric L. Clay wrote a separate opinion concurring with the majority, joined by Judges Karen Nelson Moore, R. Guy Cole, Jr., and Martha Craig Daughtrey. All four agreed with Chief Judge Martin’s conclusion that Justice Powell’s opinion respecting diversity was binding legal precedent. Judge Clay went further, however, justifying the diversity rationale on the basis of so-called empirical evidence and even on remedial grounds relating to the entire educational system:

140. Letter from Thomas Hibino, Acting Director, United States Department of Education, Office of Civil Rights, to Derek Bok, President, Harvard University 4 (Oct. 4, 1990) (emphasis added) (on file with author). In the late 1980s, Harvard was being investigated to determine whether it was discriminating against Asian-American applicants in the Harvard-Radcliffe undergraduate program in violation of Title VI. The OCR’s director recited the above quote as Harvard’s description of how it used “tips” for ethnic groups, legacies, and recruited athletes. Id. Howard University law professor Frank Wu produced this document during his deposition testimony given on behalf of intervenors on Aug. 11, 2000.

141. “We know . . . from the indisputable statistical evidence in this case and the Law School’s own admission that no other soft factor is even remotely as significant as race in its admission decisions.” Grutter II, 288 F.3d at 799 (Boggs, J., dissenting).

142. Grutter I, Trial Exhibit No. 78 at 16.

143. Grutter II, 288 F.3d at 758 (Clay, J., concurring).

144. Judge Clay refers to a “major study” conducted by Patricia Gurin, a University of Michigan Professor of Psychology and Women’s Studies and an expert witness the law school retained. See id. at 759-62 (Clay, J., concurring). Despite being listed as a witness by the law school, she never appeared at trial. There is little doubt as to why. Professor Gurin’s “study” was so thoroughly deficient in its methodology that it became impossible for the school to call her as a witness. For a sampling of the reasons, see generally, e.g., Brief of Amici Curiae National Association of Scholars, Grutter II, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447); Robert Lerner & Althea K. Nagai, A CRITIQUE OF THE EXPERT REPORT OF PATRICIA GURIN IN GRATZ V. BOLLINGER (2001); Thomas E. Wood & Malcolm J. Sherman, RACE AND HIGHER EDUCATION: WHY JUSTICE POWELL’S DIVERSITY RATIONALE FOR RACIAL PREFERENCES IN HIGHER EDUCATION MUST BE REJECTED (May 2001), at http://www.nas.org/rhe.pdf (last visited Feb. 7, 2003); Thomas E. Wood & Malcolm J. Sherman, SUPPLEMENT TO RACE AND HIGHER EDUCATION: WHY JUSTICE POWELL’S
Diversity in education, at its base, is the desegregation of a historically segregated population and as the intervenors essentially argue, *Bakke* and *Brown* must therefore be read together so as to allow a school to consider race or ethnicity in its admissions for many reasons, including to remedy past discrimination or present racial bias in the educational system.  

Judge Clay did not explain how his analysis could be reconciled with the result in *Bakke* where the Court found the UC Davis Medical School’s special admissions program unlawful. Nor did he attempt to square his views with the fact that the Court in *Bakke* expressly rejected the rationale that “countering the effects of societal discrimination” could justify UC Davis’ use of race in *Bakke*. Nor is anything Judge Clay said consistent with the Supreme Court’s unanimous holding in *Brown*. Indeed, taking Judge Clay’s last point first, the intervenors’ argument—


Finally, following the *Grutter* trial, one influential expert in the field of higher education, Dr. Alexander Astin, upon whose data and work Professor Gurin largely relied, was quoted as saying that the hypothesis Gurin and others proposed (that more racially diverse campuses better educate their students) “is yet to be convincingly demonstrated.” Peter Schmidt, *Debating the Benefits of Affirmative Action*, CHRON. HIGHER EDUC., May 18, 2001, at A25. Astin’s view has most recently been expounded by Professors Stephen Cole and the late Elinor Barber in a landmark study all eight Ivy League colleges and universities funded and sponsored through the Council of Ivy Group Presidents, as did William Bowen and the Mellon Foundation. In it, Cole and Barber assert:

In our opinion so far there is no clear-cut evidence demonstrating that diversity (meaning having, let us say, a higher number of African American students enrolled) has any meaningful influence on the other students attending the university... The data we present later in fact show that race sensitive admissions policies likely have at least some negative educational consequences on those they are intended to help.


145. *Grutter II*, 288 F.3d at 768 (Clay, J., concurring).


147. “[T]he purpose of helping certain groups whom the faculty... perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” *Id.* at 310. Justice Marshall wrote in dissent: “[In my view] there is ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of discrimination....[yet] the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.” *Id.* at 400 (Marshall, J. dissenting) (emphasis added).
which Judge Clay approved—is directly at odds with the argument Thurgood Marshall and his colleagues in Brown advanced: “The State of Kansas has no power [under the Fourteenth Amendment] to use race as a factor in affording educational opportunities to its citizens.”\textsuperscript{148}

And in a statement of principle undiluted by considerations of “diversity,” Marshall argued in Brown, “That the Constitution is color blind is our dedicated belief.”\textsuperscript{149} Those words are as

\begin{itemize}
\item[\textsuperscript{148}] Brief for Appellants at 5, Brown v. Bd. of Educ., 347 U.S. 483 (1954), \textit{quoted in LANDMARK BRIEFS 49, supra note 133, at 31.}
\item[\textsuperscript{149}] Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, Brown v. Bd. of Educ., 347 U.S. 483 (1954), \textit{quoted in LANDMARK BRIEFS 49, supra note 133, at 578. Emphasizing the strength of their “dedicated belief” that the Constitution is “color blind” are the words of Marshall and his colleagues which make up some of the hundreds of pages of briefing filed in Brown. They began with this observation: “It is [our] thesis [that] the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” \textit{Id.} at 528. They then framed the question that could as easily be the question before the Court in Grutter: “The importance to our American democracy . . . can hardly be overstated. The question is whether a nation founded on the proposition that ‘all men are created equal’ is honoring its commitments to grant ‘due process of law’ and ‘the equal protection of the laws’ to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.” \textit{Id.} at 529.

Indeed, there can be no misunderstanding of where Marshall and his colleagues stood on the question of whether the Constitution was color-blind: “The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated on race or color. . . . The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence.” \textit{Id.} at 531. Referring to Shelley v. Kraemer, 334 U.S. 1 (1948), they added: “The sole basis for the decision . . . was that the Fourteenth Amendment compels states to be color blind in exercising their power and authority.” Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, Brown v. Bd. of Educ., 347 U.S. 483 (1954), \textit{quoted in LANDMARK BRIEFS 49, supra note 133, at 555.}

Marshall and his colleagues expressed praise for Massachusetts Senator Charles Sumner (who eventually played an important role in the Congress that formulated the Fourteenth Amendment). \textit{Id.} at 583-84. It was Sumner who crystallized the meaning of “equality before the law,” in part, with these words: “He may be poor, weak, humble, or black—he may be Caucasian, Jewish, Indian or Ethiopian race—he may be of French, German, English or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English or Irish; he is a MAN, the equal of all his fellowmen.” \textit{Id.} at 585 (citation omitted). Included in the \textit{SUPPLEMENT} to their brief, see \textit{id.} at 712 \textit{et seq.}, was this early view of the Constitution: "[R]ace and color—‘grades and shades’—whenever and wherever employed as criteria and determinants of fundamental rights, violate[] both the letter and spirit of American institutions; race \textit{per se} [is] not only an ignoble standard; it [is] an irrational and insubstantial one.” \textit{Id.} at 728 (citation omitted).

And finally, after quoting favorably from several speeches by Ohio Republican Congressman John A. Bingham, who helped draft sections of the Fourteenth Amendment, Marshall and his colleagues observed that "Bingham . . . regard[ed] . . . the right to know, to education, as one of the great fundamental natural ‘rights of person which God gives and no man or \textit{state} may rightfully take away,’ and which hence are ‘embodied’ also within, and secured by, ‘the great democratic idea that all men before the law are equal.’" \textit{Id.} at 740-41. They added, “In short, the concept and guarantee of the equal
relevant today as when Marshall first signed his name to them during the October Term, 1953, including his demand that the Supreme Court enter a decree commanding the defendants “to discontinue use of race or color as a criterion for admission of students.” It is word-for-word the same command and decree that Barbara Grutter seeks in her case against the law school.

One must turn the law and the written words (particularly those of the Supreme Court in *Brown*) on their respective heads to conclude that *Bakke* and *Brown*, read separately or together, permit a school to consider race or ethnicity in its admissions for many reasons, much less for the purpose of creating some ill-conceived notion of “diversity.”

**B. The Sixth Circuit Dissent**

Four dissenting judges on the *en banc* panel found the law school’s policy to be unlawful. Judge Danny J. Boggs authored the lead dissent, concluding that (1) diversity was not a compelling interest that could justify racial preferences in admissions and (2) the law school’s preferences were not, in any event, narrowly tailored to achieve an interest in diversity. Judge Boggs was joined by Judge Alice M. Batchelder and, in

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151. “[R]acial discrimination in public education is unconstitutional. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.” *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

152. One is also constrained to ask: How can a school use race to correct racial bias in the educational system? Stated another way, how can a school’s use of race correct the misuse of race in the educational system? Isn’t it the very use of race that reflects racial bias in the first instance? In order to *prevent* or correct racial bias in the educational system, does not call for one to *end*, rather than commence, the use of race? Indeed, is that not precisely what the landmark ruling in *Brown* sought to achieve, an *end* to using race rather than a *beginning*? Sadly, Thurgood Marshall, truly one of our nation’s legal giants in the battle for equal rights, adopted a different position once he became Justice Marshall. He steered around his earlier principled arguments in *Brown* and seemed willing to sacrifice the right to equal treatment held by students such as Allan Bakke who, as Justice Blackmun observed, “is not himself charged with discrimination and yet is the one who is disadvantaged.” *Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring and dissenting). One wonders what happened to Marshall’s “dedicated belief” that the Constitution is color-blind.


154. Id. at 815 (Batchelder, J., dissenting).
part by Judge Eugene E. Siler, Jr. (who joined all except the Procedural Appendix). In a separate dissent, Judge Ronald Lee Gilman concluded that it was unnecessary to decide whether diversity was a compelling interest because he agreed with Judges Boggs, Batchelder, and Siler that the school’s race-conscious policies were not narrowly tailored. Like the District Court and his fellow dissenters, Judge Gilman characterized the law school’s “critical mass” as “functionally indistinguishable from a quota.”

1. Judge Boggs’ Lead Dissent

Judge Boggs began his “careful and scholarly” dissent with this observation: “This case involves a straightforward instance of racial discrimination by a state institution.” He also makes a point too often overlooked in discussions concerning the use of race in admissions: Attacks on these policies are emphatically not attacks against “affirmative action.” Judge Boggs noted the crucial importance of the words surrounding these policies in general and the law school’s policy in particular. After reciting the history of the phrase “affirmative action,” he rightly noted that “whatever else Michigan’s policy may be, it is not

155. Id. at 815 (Siler, J., dissenting).
156. Id. at 815-18 (Gilman, J., dissenting).
157. Id. at 816 (Gilman, J., dissenting).
158. Grutter II, 288 F.3d at 815 (Batchelder, J., dissenting).
159. Id. at 773 (Boggs, J., dissenting).
160. “There are, in fact, not less than four distinct usages of affirmative action that do not involve any kind of racial classifications to which people are assigned and by which they are then measured by race.” William Van Alstyne, Affirmative Actions, 46 WAYNE L. REV. 1517, 1526 (2000). See also David B. Oppenheimer, Distinguishing Five Models of Affirmative Action, 4 BERKELEY WOMEN’S L.J. 42 (1989) (noting that several different forms of “affirmative action” do not require explicit consideration of race).
161. Boggs notes:

[A]s used in the context of our society’s struggle against racial discrimination, the term [affirmative action] first enters the public print and the national vocabulary in Executive Order 10925, issued by President John F. Kennedy on March 6, 1961, and subsequently incorporated into a wide variety of statutes and regulations. It ordered government contractors to “take affirmative action, to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”

This distinction is not lost on anyone who carefully considers the question. For example, Professor John Hope Franklin, who testified on behalf of the intervenors in support of “affirmative action” plans generally, fully comprehends the difference between racial preferences, which result from race-conscious admissions systems, and “affirmative action.” In his pretrial deposition, he noted: “When I talk about affirmative action, I’m not talking about preferential treatment. I’m talking about fair treatment.”

Judge Boggs followed with poignant reminders of why racial or ethnic classifications necessarily receive a most searching

162. Many people understand the crucial distinction between “affirmative action” and “racial preferences.” Secretary of State Colin Powell provides one of the best examples in his 1995 autobiography:

Equal rights and equal opportunity . . . mean just that. They do not mean preferential treatment. Preferences, no matter how well intended, ultimately breed resentment among the nonpreferred. And preferential treatment demeans the achievements that minority Americans win by their own efforts. The present debate over affirmative action has a lot to do with definitions. If affirmative action means programs that provide equal opportunity, then I am all for it. If it leads to preferential treatment or helps those who no longer need help, I am opposed. I benefited from equal opportunity and affirmative action in the Army, but I was not shown preference. The Army, as a matter of fairness, made sure that performance would be the only measure of advancement. . . . Affirmative action in the best sense promotes equal consideration, not reverse discrimination. Discrimination ‘for’ one group means, inevitably, discrimination ‘against’ another; and all discrimination is offensive.


163. Professor Franklin admitted that he knew nothing about the admissions policies at either the law or the undergraduate school at the University of Michigan. See Grutter I, Deposition Testimony of John Hope Franklin (Sept. 25, 2000) at 12-13 [hereinafter Franklin Deposition]. When informed about Michigan’s undergraduate admissions policy, which currently awards a black applicant twenty points based solely on skin color, Professor Franklin expressed total incredulity that such a policy could exist. When presented with a hypothetical involving identically qualified black and white applicants, both of whom, exclusive of race, had applications totaling eighty points toward undergraduate admission to Michigan, and then with the addition of twenty points for race, the black applicant receives 100 points and is admitted, Dr. Franklin said: “[T]his is a case that’s beyond . . . imagination. I mean, it strains my credulity as well as my imagination to think that that could come out like that.” Id. at 93. When asked if he felt such an outcome was fair, he replied, “No.” Id. at 94.

164. Law school expert witness Derek Bok has acknowledged that race-conscious schemes are nothing more than systems of “racial preferences.” He recently posed this plainly rhetorical question: “How does the prospect of indefinite racial preferences fit with Martin Luther King Jr.’s ideal of a world in which advancement is determined not by the color of one’s skin but by the content of one’s character?” Derek Bok, Assessing the Results of Race-Sensitive Admissions, J. BLACKS HIGHER EDUC., Autumn 2000, at 109 (emphasis added).

165. Franklin Deposition, supra note 163, at 86.
examination under the Constitution. He began, not surprisingly, with Justice Powell’s own words from Bakke: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” Later, in the context of his discussion of the meaning of “diversity” itself, Judge Boggs noted:

There are yet more fundamental problems with the broad-brush rationale of diversity. The fundamental premise of our society is that each person is equally “diverse” exactly because of her equality before God and the law. The very words of the Declaration of Independence are: “all men are created equal. . . and are endowed by their Creator with certain inalienable rights.” Thus, the starting basis is one of equality, not of separately assigned categories that are used to measure diversity. From that starting point, every person’s experiences are “diverse” from those of every other.

If the law school were to recognize and respect each person as the individual he or she surely is, with unique personal experiences the totality of which no other person conceivably shares, it would be forced to acknowledge Judge Boggs’ observation as true beyond any doubt. Yet as Judge Boggs points out, “some of those differences do not count [to the school,] though race surely does:

[T]o the Law School, ten under-represented-minority students, each a child of two-parent lawyer families, are considered to be diverse, while children whose parents are Chinese merchants, Japanese farmers, white steel workers, or any combinations of the above are all considered to be part of a homogeneous (and “over-represented”) mass.

Judge Boggs also notes that the school never explains how it defines the groups, and the applicants supposedly encompassed within them, that should be favored:

166. Grutter II, 288 F.3d at 773-74 (Boggs, J., dissenting) (citing Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)).

167. Id. at 774 (Boggs, J., dissenting) (quoting Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

168. Id. at 792 (Boggs, J., dissenting).

169. Id. (Boggs, J., dissenting).

170. Id. (Boggs, J., dissenting).

171. Grutter II, 288 F.3d at 792 (Boggs, J., dissenting). The extent to which the law school and its amici go to claim this as a “right” subject only to their “educational judgment” is nothing short of amazing. Harvard Amicus Brief in Grutter, supra note 71, at 28. Were the Supreme Court to concede this “right” to universities as a matter of nothing
Ultimately [the law school] must make, on some basis, a decision on who is, and is not, an “African-American, Hispanic, or Native American.” Such judgments, of course, have a long and sordid history. The classic Southern Rule was that any African ancestry, or “one drop” of African blood, made one black. The Nazi Nuremberg laws made the fatal decision turn on the number of Jewish grandparents.  

Judge Boggs offered the following hypothetical: “A child with one parent of Chinese ancestry and one of Chilean would find his level of ‘diversity’ [and his degree of preference] depends wholly on whether the Law School chooses to assign him based on one parent or the other.”

But this is not a hypothetical at all. Testimony obtained during pre-trial discovery demonstrated the insidious nature of such inquiries. As a former director of admissions explained, minority students within the law school itself raised objections as to who should, and should not, be considered “black” in terms of qualifying for a racial preference. In one instance, students at the law school (presumably certain about the relative purity of their own or others’ black African ancestry) demanded that a “black” applicant not be considered under the special admissions program “because his mother was white.” This is a modern-day example of the “sordid” nature of considering race in admissions, the implications of which caused Judge Boggs to conclude that “to apply boldly a system of half- or quarter-credit for assigned status would reveal the racist nature of the system to a degree from which even its proponents would shrink.”

The pre-trial testimony of the chairman of the faculty committee responsible for drafting the law school’s current policy perfectly illustrates the absurd nature of categorizing more than educational discretion, it would suggest a dismantling of this nation’s deep body of law dealing with racial discrimination and would, at a minimum, disarm the Court’s unanimous holding in Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (“declaring the fundamental principle that racial discrimination in public education is unconstitutional”).

172. Grutter II, 288 F.3d at 792-93 (Boggs, J., dissenting) (citations omitted) (emphasis added).

173. Id. at 792 (Boggs, J., dissenting).


175. Grutter II, 288 F.3d at 793 (Boggs, J., dissenting). A similar concern was expressed more than two decades earlier. If race were to remain a factor in admissions decisions, “among the more obvious issues . . . [is] by what test . . . each of us [is] to be assigned ‘our’ race . . . .” William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 804 (1979) [hereinafter Rites of Passage].
applicants by race. When first asked how he might classify a particular applicant who had an African-American father and an Asian-American mother for purpose of receiving “diversity consideration” under the policy he drafted, he responded, “I can’t even answer that.” Of course, if he cannot, who can?

However, this same witness makes clear the “choice” the school’s policy presents to those who must actually fill out the admissions forms. He testified that for the above-described person to become eligible for diversity consideration under the policy, “it requires African American heritage plus self-identification.” Presumably, that “self-identification” requires that the applicant leave Mom out of the equation altogether.

When this witness was then asked how he would determine whether or not applicants were “African-American” for the purpose of qualifying as part of the “critical mass” of underrepresented minorities sought by the law school, he simply responded, “I’d have to meet them and see them.” Presumably visually satisfying himself that the applicant was “black” (or black

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176. Lempert Deposition, supra note 63, at 114.

177. Id. at 115 (emphasis added).

178. Consider the reverse situation, e.g., an applicant with an Asian-American father (with the surname of Chen) and an African-American mother (with the maiden name of Smith). No doubt this applicant can claim to be as “black” as a different applicant with a black father (surname Jones) and Asian-American mother (maiden name Wu). Does applicant “Chen” disclaim his father’s ethnicity in order to vie for the possibility of obtaining a “racial diversity” preference from the law school based on his mother’s race? Does applicant Jones disclaim her mother’s ethnicity in order to do the same? Can any person seriously argue that their respective contributions to the “diversity” of the law school class depend upon which choice they make? Indeed, if applicant Chen marks the “box” identifying himself as “Asian-American,” the law school automatically views him as not adding the sought-for diversity in the class. But were he to mark the “box” identifying himself as “Black/African-American” (see UNIV. OF MICH., APPLICATION FOR ADMISSION TO LAW SCHOOL (1997)), the school would view him as adding to diversity. Yet Chen is the same student and adds the same “diversity” to the class regardless of which box he checks.

And finally (though not “finally” at all, since the permutations are infinite), what of applicant Jones’ hypothetical half-sister whose biological father was, like their mother, an Asian-American (surnamed Nguyen, and thus with no choice as to which “box” to check off on the application form)? Does Nguyen offer less “diversity” to the law school than does Jones, her mixed-race half-sibling? As Judge Boggs wrote, the uses made of this information (which is wholly irrelevant when it comes to evaluating whether Chen or Jones or Nguyen are qualified for, and have earned, a seat in the law school’s class) are “sordid.” Grutter II, 288 F.3d at 792 (Boggs, J., dissenting).

179. Lempert Deposition, supra note 65, at 118 (emphasis added). This professor’s response is eerily reminiscent of Justice Henry Billings Brown’s opinion in Plessy v. Ferguson, in which the Court discusses “the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person,” noting that one method is whether there is “any visible admixture of black blood.” Plessy v. Ferguson, 163 U.S. 557, 552 (1896) (emphasis added).
enough\textsuperscript{180}) would be sufficient for this doubtless well-intentioned faculty member to determine that the applicant would add “diversity” to the class, irrespective of any other individual characteristic this student presented. One supposes this professor is also capable of visually discerning who may be “brown” or “red” (or brown or red enough) to qualify as an Hispanic or Native-American eligible to receive diversity consideration (though members of both groups, like Mr. Plessy, can be racially as well as ethnically indistinguishable from whites). It leads to all sorts of odious, sordid, and perhaps diversity-defeating situations having to do with the consideration of obviously irrelevant characteristics—skin color and ethnic background—when it comes to deciding who merits admission.\textsuperscript{181}

2. An Analysis of the Empirical Evidence Regarding the Educational Value of “Diversity”

Judge Boggs introduced his discussion of diversity by noting that the majority provided no argument as to “why the engineering of a diverse student body should be a compelling state interest sufficient to satisfy strict scrutiny.”\textsuperscript{182} Although Judge Boggs did not address any “empirical” evidence on the subject (other than to acknowledge Judge Clay’s mention of Professor Gurin’s work and other articles\textsuperscript{183}), two facts remain.

First, the District Court (and the Sixth Circuit majority), not unlike Justice Powell in \textit{Bakke}, treated the question of whether “diversity” was compelling as a question of law, not one of empirical proof. Second, with the exception of current and former law professors at the University of Michigan who offered their anecdotal observations of the value of diversity, only one

\textsuperscript{180}. As the record before the Supreme Court in \textit{Plessy} noted, “petitioner was seven-eighths Caucasian and one-eighth African blood; [and] \textit{the mixture of colored blood was not discernible in him . . . .}” \textit{Plessy}, 163 U.S. at 541 (emphasis added). By this professor’s “meet and see” test, the law school would not have recognized Mr. Plessy’s contribution to racial diversity (it being not readily apparent that Mr. Plessy was “colored” and because “Plessy declined and refused . . . to admit that he was in any sense or in any proportion a colored man,” \textit{id.} at 537).

\textsuperscript{181}. It is altogether possible that a black, Hispanic or Native American who is not otherwise “identifiable,” like Mr. Plessy himself (or because the student may be lacking an identifiable Hispanic or Native American surname), could receive a racial/ethnic diversity preference and yet never while matriculating at the law school be recognized for the racial or ethnic diversity which he or she received the preference to provide.

\textsuperscript{182}. \textit{Grutter II}, 288 F.3d at 788 (Boggs, J., dissenting).

\textsuperscript{183}. \textit{See id.} at 759-63 (Boggs, J., dissenting).
witness took the stand with the intention of providing empirical support for the so-called “educational benefits” of enrolling a racially and ethnically diverse class at the law school itself.\textsuperscript{184} Though no doubt unintended, this witness made important admissions about the relative importance of ethnic diversity when it comes to contributing to the educational experience at the law school. For example, in a survey conducted of all Michigan’s minority law alumni (including all minority graduates between 1970 and 1996 as well as a sampling of white graduates from that same time period),\textsuperscript{185} the subjects were asked to respond to this question: “How much did each of the following contribute to the value of your classroom experience at the University of Michigan Law School? (Please circle one number in each row).”\textsuperscript{186} The seven items to be evaluated were the following:

\begin{itemize}
  \item a. Faculty abilities as teachers
  \item b. Faculty abilities as scholars
  \item c. Being called upon in class
  \item d. Intellectual abilities of classmates
  \item e. Ideological diversity of classmates
  \item f. Gender diversity of classmates
  \item g. Ethnic diversity of classmates\textsuperscript{187}
\end{itemize}

\textsuperscript{184} Former Harvard President Derek Bok was originally listed as an expert witness for the law school on the educational value of diversity. Professor Bok never appeared at trial. Patricia Gurin, whose study Judge Clay referenced, was also withdrawn. In reliance on the law school's decision not to call Professor Bok, the plaintiff agreed not to call her rebuttal expert, Dr. Finis Welch, who specifically criticized the “study” done by Bok and his colleague, William Bowen. BOWEN & BOK, supra note 14. The plaintiff also did not call law professor and former law school dean Gail Heriot. Reports by each of these witnesses were made part of the trial record but none addressed any educational benefits the law school itself allegedly achieved because of its race-conscious policies, or whether the racial/ethnic mix under a race-neutral admissions system would adversely impact the legal education the school's students received.


\textsuperscript{186} Respondents were asked to assign a number between one (no importance) and seven (a great deal of importance) to each of the seven factors presented. UNIV. OF MICH., LAW SCHOOL PROFESSIONAL DEVELOPMENT SURVEY (1997).

\textsuperscript{187} Id.
On the last day of trial, one of the authors of the study (coincidentally, the same person who drafted the 1992 policy), testified that, among other things, “alumni responded and said a lot of benefit comes from ethnic diversity.” However, on cross-examination, he admitted that the two most important contributors to the classroom experience were “a” and “d.”

According to the alumni, the two least important factors were the “ethnic diversity of classmates” and “being called upon in class.”

Another witness produced transcripts of recent survey interviews the Gallup Organization obtained in 1999 from law students at Harvard and Michigan. The verbatim comments found in these transcripts appear to demonstrate that the diversity these students most valued was diversity based on socio-economic, class, and ideological differences, and not diversity based on skin color. Harvard and Michigan law students’ comments include the following (which represent a mere sampling of similar comments found throughout this trial exhibit):

“Cultural and intellectual diversity is not acquired genetically and it would be good if the law school would understand that.”

“I think there can be a lot of diversity even if everybody is [the] same race.”

“I don’t believe skin deep diversity is real diversity.”

“Diversity would be better met if it was [achieved using] socio-economic [factors] instead of . . . ethnicity.”

188. Lempert Trial, supra note 42, at 121-22.
189. Id. at 126-28.
190. Id. at 127-29. The mean ranking (one to seven) for the seven factors based on the random sample the law school provided ranged from a high of 5.1 for “faculty’s abilities as teachers” and 4.9 for the “intellectual abilities of classmates” to a low of 4.1 for both “ethnic diversity of classmates” and “being called upon in class.” The chart used during cross-examination, reflecting the analysis of a random sample of the survey responses the school’s lawyers selected, is on file with the author. Professor Lempert testified that, in his view, only two factors (“faculty’s abilities as teachers” and “intellectual abilities of classmates”) were statistically significantly above the other five factors. Id. at 128.
191. See, e.g., Grutter I, Trial Exhibit No. 178; Orfield, supra note 97, at 212 et seq.
192. Grutter I, Trial Exhibit No. 178 at GO 0018.
193. Id.
194. Id. at GO 0021.
“I think that other kinds of diversity, such as social, economic, political, geographic are . . . more important . . . The students at our school [Harvard or Michigan], black, white, and other colors tend to come from privileged backgrounds. . . . [We] need to move towards more of a social status versus a racial status.”

“I just don’t think [diversity] plays that much role in the classroom. It doesn’t matter what color the person is, it’s the idea that’s important.”

“Admissions decisions should be color blind.”

“I think there has been too much emphasis on racial diversity at the law school at the expense of intellectual and ideological diversity.”

“[T]he law schools should not forget the plight of the daughter of an Asian immigrant who is not protected by the current policy [at Michigan] in favor of the son of a wealthy black or Hispanic professional.”

And finally, there is the recent article authored by the law school’s highly respected former dean and current professor Terrance Sandalow. In his analysis of the issues surrounding the use of racial preferences in law school admissions, in which he critiques the work and conclusions University experts William Bowen and Derek Bok reached, Professor Sandalow wrote:

My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class . . . . [E]ven though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial

195. Id. at GO 0022.
196. Id. at GO 0031.
197. Grutter I, Trial Exhibit No. 178 at GO 0031.
198. Id. at GO 0055.
199. Id.
200. Id. at GO 0061.
202. See generally Bowen & Bok, supra note 14. The University listed Bowen as an expert witness in Gratz. Bok was listed as an expert in Grutter.
implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so.  

This evidence—(1) the first-hand experience of Professor Sandalow, (2) the survey responses of the law school’s alumni, and (3) the observations of recent Michigan (and Harvard) law school students—thoroughly refutes the idea that racial diversity in and of itself measurably adds to the classroom experience at the University of Michigan Law School. This evidence, of course, does not demonstrate that racial and ethnic diversity cannot add to the educational experience. It can, depending upon the individuals involved. But the above evidence (which did, in fact, deal with the law school) directly contradicts the “empirical evidence” the law school highlighted and Judge Clay cited (none of which dealt with the contribution of ethnic diversity within the law school itself).

3. The Harvard Plan Redux

Judge Boggs also included substantive criticisms of the “Harvard plan” Justice Powell so effusively praised. After reviewing its history, Judge Boggs wrote:

The fact that the “Harvard plan” of the 1930’s basically cut Jewish numbers by half or more would belie the lack of a

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204. As Judge Boggs noted, “the law school never provided any evidence that the existence of ‘critical mass’ would in fact contribute to classroom dialogue or would lessen feelings of isolation or alienation.” Grutter II, 288 F.3d 732, 803 (6th Cir. 2002) (Boggs, J., dissenting).

205. Like Professor Sandalow, Professor Dershowitz and Ms. Hanft noted that:

An applicant’s potential ability to contribute to the diversity of the student body is uniquely a function of his or her individual experiences, interests, approaches, talents, and characteristics. The prep school black brought up in a middle-class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklyn, a Portuguese fisherman from New Bedford, a coal miner from Kentucky, or a recent emigre from the Soviet Union.

Dershowitz & Hanft, supra note 64, at 419 (emphasis added). Such a person, they go on to observe, may contribute “far more to real diversity than does the relative superficiality of color pigmentation, linguistic background, or surname.” Id. (emphasis added). They also observed that “the perceived need for racial diversity in our universities—as an educational goal as distinguished from diversity as a means of increasing the number of minorities in the professions—is simply not a very compelling state interest.” Id. at 408 (emphasis added).

206. Grutter II, 288 F.3d at 793-95 (Boggs, J., dissenting).
“facial intent to discriminate.” The University of Michigan’s plan, which by its own calculations inflates the numbers of students from favored groups approximately three-to-four fold, similarly betrays a “facial intent to discriminate.”

Many others have subjected Justice Powell’s praise of the Harvard Plan to vigorous criticism on these same grounds. One of the most succinct is this: “[T]he Harvard College ‘diversity admission’ program, which Mr. Justice Powell’s opinion so generously praises, was designed to reduce as inconspicuously as possible the disproportionate number of New York Jewish students that a merit admissions system had produced.” It is, to say the least, odd that a plan seemingly adopted for such a blatantly discriminatory purpose, has been elevated to “model” status, first by Justice Powell in Bakke and now by the Sixth Circuit in Grutter.

4. Judge Boggs’ Analysis of “Narrow Tailoring”

Regarding “narrow tailoring,” Judge Boggs criticized the majority’s conclusion that using race as a “plus” factor was permissible as long as an admissions system “neither sets aside an exact number of seats for racial and ethnic minorities nor admits minorities with a specific quota of admittees in mind.” He also expressed the view that it was important to examine the size of the preference (which the majority had not done) because he could not believe “that a ‘plus’ of any size, no matter how large” could be constitutional. He agreed with the District Court’s unchallenged finding that the law school assigned a

207. Id. at 794 (Boggs, J., dissenting) (citations omitted).
209. “Mr. Justice Powell legitimated an admissions process that is inherently capable of gross abuse and that . . . has in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.” Dershowitz & Hanft, supra note 64, at 385 (emphasis added).
210. A University of Michigan Medical School graduate recently described a far more compelling and perfectly constitutional “model” system. See Benjamin S. Carson, Compassionate Action, WALL ST. J., Feb. 26, 2003, at A14. Dr. Carson, a professor and director of neurosurgery at Johns Hopkins, argues, as do the plaintiffs in both Grutter and Gratz, that an appropriate system should take social disadvantage into account, not race. Id.
211. L.2d at 796 (Boggs, J., dissenting).
212. Id. (Boggs, J., dissenting). It is a position with which the law school and its amici evidently disagree. See Harvard Amicus Brief in Grutter, supra note 71, at 28.
heavy weight to race, characterizing it as staggering in magnitude.\textsuperscript{215}

Judge Boggs also agreed that the school effectively maintained a “two-track”\textsuperscript{214} admissions system, with students from underrepresented minority groups held to lower standards for admission than students from non-preferred racial groups. Judge Boggs accurately defined the true meaning of “critical mass” as a “critical number of minority students,”\textsuperscript{215} and agreed with the District Court that the law school’s concept of “critical mass,” combined with its consistent levels of minority admissions, was “functionally, and even nominally, indistinguishable from a quota system.”\textsuperscript{216} Finally, Judge Boggs noted that “[t]he Supreme Court has made clear that courts must determine whether a state’s racial classification is necessary with reference to the efficacy of race-neutral alternatives.”\textsuperscript{217}

Based on this principle, Judge Boggs concluded that the law school’s preferences could not survive an inquiry into whether race-neutral alternatives were available to achieve the purported benefits of diversity, many of which he and the District Court before him discussed.\textsuperscript{218} The plethora of such alternatives, none of which the school has ever considered,\textsuperscript{219} makes clear that the school’s heavily race-conscious system is not by any definition “narrowly tailored.”

Like both the District Court and Judge Boggs, Professor Dershowitz and Ms. Hanft also identified “several appropriate steps that a university could take—short of considering the race of an applicant—that would increase the number of minority persons in their student bodies and in the professions.”\textsuperscript{220} These include:

\begin{footnotesize}
\begin{enumerate}
\item See id. at 776, 796-800 (Boggs, J., dissenting) (discussing in detail the “True Magnitude of the Law School’s Racial Preference”).
\item Id. at 798 (Boggs, J., dissenting).
\item Id. at 801 (Boggs, J., dissenting).
\item Grutter II, 288 F.3d at 802-03 (Boggs, J., dissenting).
\item Id. at 806 (Boggs, J., dissenting) (citations omitted) (emphasis added).
\item Id. at 806-08 (Boggs, J., dissenting). Colleagues of intervenors’ expert Gary Orfield have also studied additional race-neutral alternatives. See Orfield, \textit{supra} note 97, at 218-22.
\item When one intervener expert was asked whether the race-neutral alternatives that one of his colleagues at the Harvard Civil Rights Project had evaluated might work if put into practice at Michigan, he responded: “I don’t think anybody who is a researcher could tell you they knew the results of something that hadn’t been tried yet.” Orfield, \textit{supra} note 97, at 221.
\item Dershowitz & Hanft, \textit{supra} note 64, at 410 (emphasis added).
\end{enumerate}
\end{footnotesize}
“[T]he abolition of preferences that perpetuate past patterns of discrimination; such preferences include those currently given to relatives of alumni [echoing the District Court in *Grutter*], faculty members, and the rich and powerful in general;”221 and

“[T]he abolition of geographic quotas, floors, or preferences” which the authors argue have the effect of discriminating against applicants who tend to be concentrated in inner-city metropolitan areas.222

In discussing “the development of affirmative action programs based on non-racial considerations,”223 Professor Dershowitz and Ms. Hanft cited the arguments of “two distinguished liberal jurists,” Supreme Court Justice William O. Douglas and California Supreme Court Justice Stanley Mosk, who favored “requiring universities to seek to achieve their commendable goals without using race *qua* race as a factor in admissions decisions.”224 Justice Douglas put it this way:

The key to the problem is consideration of such applications in a racially neutral way. . . . There is . . . no bar to considering an individual’s prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefitted by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School’s interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we

221. *Id.*
222. *Id.* at 411-12.
223. *Id.* at 415 (emphasis added). This is consistent with the view that “affirmative action” is often, and needlessly, confused with the use of racial preferences.
224. *Id.*
have never held administrative convenience to justify racial discrimination.\textsuperscript{225}

Justice Mosk put it this way:

In short, the standards for admission employed by the university are not constitutionally infirm except to the extent they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.\textsuperscript{226}

Judge Boggs concluded his dissent with this:

Michigan’s plan does not seek diversity for education’s sake. It seeks racial numbers for the sake of the comfort that those abstract numbers may bring.\textsuperscript{227} It does so at the expense of the real rights of real people to fair consideration. It is a long road from Herman Sweatt\textsuperscript{228} to Barbara Grutter. But they both ended up outside a door that a government’s use of racial considerations denied them a fair chance to enter.\textsuperscript{229}

5. Judge Gilman’s Separate Dissent

In his separate opinion dissenting from the majority, Judge Gilman agreed with the District Court’s holding that the law school’s policy was not “narrowly tailored.”\textsuperscript{230} He would have upheld the court’s judgment on that basis alone. For that reason, he saw no need to determine whether diversity may be a compelling interest sufficient to justify using race in admissions.\textsuperscript{231} On narrow tailoring, Judge Gilman wrote:

The primary problem with the Law School admissions policy is that the “critical mass” of minority students that it seeks to enroll is

\textsuperscript{225} Dershowitz & Hanft, supra note 64, at 415 (citing DeFunis v. Odegaard, 416 U.S. 312, 340-41 (1974) (Douglas, J., dissenting)).

\textsuperscript{226} Id. (citing Bakke v. Univ. of Cal., 553 P.2d 1152, 1166 (Cal. 1976), aff’d in part & rev’d in part, 438 U.S. 265 (1978)).

\textsuperscript{227} See infra section VIII (discussing Shelby Steele’s observations on this topic).

\textsuperscript{228} See Sweatt v. Painter, 339 U.S. 629 (1950) (ordering the University of Texas School of Law to admit Herman Sweatt after finding that he was rejected for admission solely because of his race and that his rejection constituted a violation of his rights under the Fourteenth Amendment).

\textsuperscript{229} Grutter II, 288 F.3d 782, 810 (6th Cir. 2002) (Boggs, J., dissenting).

\textsuperscript{230} Id. at 816 (Gilman, J., dissenting).

\textsuperscript{231} Id. (Gilman, J., dissenting) Judge Gilman did, however, take note of the “confusion created by the various opinions in Bakke.” Id. (Gilman, J., dissenting).
functionally indistinguishable from a quota. . . . The “critical mass” therefore appears to be a euphemism for the quota system that Bakke explicitly prohibits.

I believe that the Law School’s pursuit of a critical mass of minority students has led to the creation of a two-track admissions system, not only in the sense that a minimum percentage of seats is set aside for under-represented minorities, but also because the Law School gives grossly disproportionate weight to race and ethnicity in order to achieve this critical mass. . . . In my view, Justice Powell’s opinion in Bakke unequivocally prohibits such a de facto dual admissions system that applies one standard for minorities and another for all other students.  

The District Court’s and Sixth Circuit’s analyses (both majority and dissent) require a thorough re-analysis of Bakke. As will be developed, whatever view the Supreme Court may take of Justice Powell’s diversity rationale when it decides Grutter, much of what the Court said in Bakke will likely remain good law.

VI. BAKKE REVISITED

A. Justice Powell’s Opinion of the Court

Decided almost twenty-five years ago, Bakke included the reasoning of a lone Supreme Court justice upon which the modern day evolution of the phrase “diversity” is based. Speaking only for himself, Justice Lewis F. Powell, Jr., wrote: “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”

The law school argues that this statement formed part of the Court’s holding in Bakke. Yet the words of Powell’s colleague, Justice William Brennan, strongly suggest that the school’s argument is incorrect: “The difficulty of the issue presented—whether government may use race-conscious programs to redress the continuing effects of past discrimination—and the mature consideration which each of our Brethren has brought

232. *Id.* at 816-17 (Gilman, J., dissenting) (citing *Bakke*, 438 U.S. at 317) (emphasis added).

Justice Powell and Justice Brennan agreed on little. Of the fifty-five pages Powell authored, Brennan (and Justices White, Marshall, and Blackmun) joined only Parts I and V-C. Part I consisted of the largely undisputed factual and procedural history of the case. Part V-C reads in its entirety:

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Nowhere in Part V-C of Justice Powell's opinion is the State's "substantial interest" defined. For his part, all that Justice Brennan said was: "Mr. Justice Powell agrees that some uses of race in university admissions are permissible" and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.

In Part IV-D of his opinion, Justice Powell described the interest in attaining "a diverse student body" as a

234. Id. at 324-25 (Brennan, J., concurring and dissenting) (emphasis added). The confusion Bakke spawned is reflected in the decisions various federal circuit courts of appeals (not to mention several district courts) have issued, which are diametrically split over the question of whether Justice Powell was speaking for the Court when he announced his "diversity" rationale. See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1995) (holding that "any consideration of race by the law school for the purpose of achieving diversity is not a compelling interest under the Fourteenth Amendment"), aff'd, 236 F.3d 256, 274-75 (5th Cir. 2000) (noting that "[n]one of the [concurring Justices in Bakke] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admissions criterion"); accord, Johnson v. Univ. of Ga., 263 F.3d 1234, 1249 (11th Cir. 2001) (holding that "Justice Powell's opinion does not establish student body diversity as a compelling interest for the purpose of this case"); contra, Smith v. Univ. of Wash., 233 F.3d 1188, 1198 (9th Cir. 2000) (acknowledging that "none of the other Justices fully agreed with Justice Powell's opinion," but upholding diversity as a compelling interest based on a Marks analysis).


236. Id. at 320.

237. Neither Brennan nor any of the other four opinion writers in the case (Justices White, Marshall, Blackmun, and Stevens) speculated as to what Justice Powell's "permissible uses" were. Powell himself discussed only two: redressing the effects of "identified discrimination" and "diversity." Id. at 307, 311-12.

238. Id. at 326 (Brennan, J., concurring and dissenting).
“constitutionally permissible goal.” But no other justice joined that portion of Powell’s opinion. The words “diverse” or “diversity” do not appear anywhere in Brennan’s articulation of the “central meaning” of Bakke. Nor are these words uttered in any other opinion in the case.

Justice Brennan described the “substantial interest” as “redressing the continuing effects of past discrimination,” which Justice Powell, at several points throughout his opinion, rejects. Powell viewed “remedying the effects of ‘societal discrimination’ [as] an amorphous concept of injury that may be ageless in its reach into the past.” Powell agreed, however, that “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.” He cited the example of an employment discrimination case:

[The Court] approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary “to make the victims whole for injuries suffered on account of unlawful employment discrimination.”

Distinguishing his position from that of Justice Brennan, Justice Powell wrote:

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. Without such findings . . . it cannot be said that the government has any greater interest in helping

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239. *Id.* at 311-12.
240. *Bakke*, 438 U.S. at 324 (Brennan, J., concurring and dissenting). Brennan added, “[T]he central meaning of today’s opinions is that government may take race into account . . . to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.” *Id.* at 325 (Brennan, J., concurring and dissenting).
241. *See id.* at 296 n.36.
242. *Id.* at 307.
243. *Id.* (emphasis added).
244. *Id.* at 301 (citing Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).
245. Justice Powell observed that it is the “victims” who have been “injured” whose “legal rights . . . must be vindicated,” rather than merely “persons perceived as members of relatively victimized groups.” *Bakke*, 438 U.S. at 307 (emphasis added).
one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. . . .

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. 246

It is this distinction—between being a victim of identified discrimination versus being a member of a group perceived as a victim of discrimination—that, even under the most liberal construction of Bakke, would require rejection of the law school’s position since its use of race is openly and admittedly designed to enroll certain minority students “regardless of whether they are rich or poor or ‘victims’ of discrimination.” 247 In other words, the school’s use of race is simply a mechanism to enroll a certain number of minority students solely because they come from groups perceived as victims of discrimination. 248 It is not done for the permissible purpose of redressing legal injury from identified discrimination. And the school quite clearly does not use race for the purpose of vindicating the legal rights of “victims” of discrimination based on “judicial, legislative, or administrative findings of constitutional or statutory violations.” No evidence of any such violations was offered at trial, and no findings of that sort were made. 249 This distinction places the law

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246. Id. at 307-10 (citations omitted) (emphasis added).
248. The law school Admissions Policy contains a virtually identical phrase, describing its commitment to enroll a critical mass of students from “groups which have been historically discriminated against [sic].” Policy, supra note 29, at 12.
249. The law school has a long history of enrolling racial and ethnic minorities: “The School, which had never excluded students on the grounds of race, admitted its first African American student . . . in 1868 and [subsequently] became the second American university to confer a law degree on an African American . . . By 1894, the Law School had enrolled its first Mexican American students.” MICHIGAN LAW SCHOOL BULLETIN, supra note 6, at 9.
school’s use of race into a category which even Justice Powell would never have condoned.

The school’s policy also begs several other questions. How do society and the courts remedy the effects of discrimination formerly oppressed groups perhaps have practiced against a different set of groups who may now be perceived as its victims? Are these effects any less damaging? Are its victims any less entitled to redress from their former oppressors? Shall the Constitution become, in the process, less a statement of avowed principles and more a means of seeking infinite retribution?

This was a result Justice Powell fully foresaw:

The concepts of “majority” and “minority” necessarily reflect temporary arrangements and political judgments. . . . Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose special injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classification at the expense of individuals belonging to other groups. . . . [As] the consequences of past discrimination were undone, new judicial rankings would be necessary.

Indeed, one cannot read Justice Powell’s opinion in its entirety without making this observation: Virtually every word Justice Powell writes and virtually every principle he recites weighs against permitting any consideration of race in college and university admissions. His opinion so convincingly supports the viewpoint that racial distinctions do not belong in our public discourse and decisionmaking that it shall forever remain puzzling how Powell momentarily strayed when he announced his “diversity” rationale. Perhaps most puzzling is this: Of all the reasons offered by UC Davis for why it should be permitted

250. If “social justice” were the issue, the history of Native Americans who owned African slaves provides an instructive example of how fickle and unjust the law school’s use of race can be. See, e.g., Treaty with the Cherokee Indians, July 19, 1866, arts. 4, 9, 14 Stat. 799, 800-01. Should, for example, the Native American descendant of a Cherokee slave owner who fought for the Confederacy be given a racial preference over the white applicant who descended from abolitionists who gave their lives in the battle to end slavery?


252. It is often overlooked that it was Justice Powell who cast the fifth and deciding vote in Bakke to strike down UC Davis’ program as unconstitutional.

253. Boston University professor Peter Wood accurately observes that “‘Diversity’ is not cited in the Declaration of Independence, the Constitution or the Bill of Rights; not covered by some synonymous term; not even remotely implied.” PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 14 (2003).
to use race in its medical school admissions, easily the least compelling is the one Justice Powell, alone, approved. 254

Examples of Justice Powell’s eloquent opposition to using race in the manner that fairly characterizes the University of Michigan Law School’s admissions system begin with language from Title VI of the Civil Rights Act of 1964. He characterizes it as “like that of the Equal Protection Clause, . . . majestic in its sweep”:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. . . .

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . .

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. . . .

254. The four reasons UC Davis offered for using race were:

(i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Bakke, 438 U.S. at 306 (citations omitted). Powell rejected the first three state interests as not compelling. Id. at 307-11.

255. Id. at 284.

256. Id. at 289-90.

257. Id. at 290-91 (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

258. Id. at 295 n.35 (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975)).
Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids... 259

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, *including their own potential for contribution to educational diversity*, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. 260

From Justice Powell’s summation above, one need only replace “Asians” with “Native Americans,” substitute “Hispanic” for “Chicano,” and insert “critical mass of seats” in place of “special admissions seats” to have an exact description of the University of Michigan Law School admissions system at issue in *Grutter*. In fact, one can persuasively argue that the law school’s use of race is, like the Harvard Plan Justice Powell praised, 261 less

259. *Bakke*, 265 U.S. at 307 (citations omitted).
260. *Id.* at 319-20 (citation omitted) (emphasis added). Note Powell’s often-ignored recognition that each individual, regardless of race, has the potential to contribute to “educational diversity.” *Id.*
261. Dershowitz and Hanft describe the Harvard program thusly:

> [T]he admissions program at Harvard is ultimately less fair than the program at Davis. In order to receive special consideration under the discredited Davis Program, an applicant had to be both (a) individually disadvantaged, and (b) a member of a specified racial minority group. Under the Harvard program, the applicant’s race alone “may tip the balance” in his favor, even if he is the scion of a wealthy and powerful family who attended the best schools and has not been substantially scarred or disabled by the trauma of racial discrimination. Harvard’s program thus has the effect of preferring the wealthy and advantaged black applicant, for example, over the poor and disadvantaged black or white applicant. . . . Harvard’s emphasis on the group characteristic of racial identity rather than on individual advantages or disadvantages of the applicant [like the law school’s] is thus classically overinclusive (including advantaged blacks) and underinclusive (not including disadvantaged whites).
defensible than the UC Davis system struck down in *Bakke*. On its face, Davis’ system did not explicitly exclude from consideration applicants who were of any particular race. Many “disadvantaged” white applicants applied each year for consideration under the Davis “special admissions program.” They simply were not admitted.

In contrast, the law school’s policy explicitly describes its commitment to enroll a certain number (or “critical mass”) of students from specified minority groups. It is not race-neutral. It cares nothing about “disadvantage.” And as the evidence proves, it admits sufficient applicants from the designated racial and ethnic groups with qualifications significantly below those possessed by, among others, hundreds of rejected white and Asian American applicants such that students from the preferred groups comprise at least 10% of each entering class.

Despite this difference, there is a perfect symmetry between the UC Davis medical school and Michigan law school programs, as demonstrated in the following:

The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admission seats [or, in the law school’s case, to fill a minimum of ten percent of the class in order to achieve “critical mass”], white [and, in the case of the law school, Asian-American, Arab-American, and other non-preferred] applicants could complete only for 84 seats in the entering class, rather than the 100 open to minority applicants [which, in the case of the law school, limited whites, Asians, and other non-preferred applicants to something less than 90% of the total seats available]. Whether this limitation is described as a quota or a goal [of enrolling a “critical mass”], it is a line drawn on the basis of race and ethnic status.

The transition from the unlawful UC Davis system to the law school’s system is seamless. Like UC Davis (“[C]ompletely unqualified students will not be admitted simply to meet a

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Dershowitz & Hanft, *supra* note 64, at 416 n.114 (citations omitted). This is precisely the same situation as under the law school’s admissions policy.

262. *Bakke*, 438 U.S. at 275-76.
263. *Id.* at 276.
the law school asserts that it will not admit any student who does not meet “the minimal criterion” (i.e., “that no applicant . . . be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems”). And like UC Davis, the law school stresses that even if a “critical mass” or “meaningful numbers” (analogous to UC Davis’s “goal”) of preferred minority applicants is achieved, there “is obviously not a ceiling on the admission of . . . members of [the preferred] group[s].” In summary, there is no meaningful distinction between the law school’s policy and the unlawful UC Davis policy that can salvage the former’s constitutionality.

B. A “Color-Blind” Constitution

In *Bakke*, Justice Brennan addressed the argument of whether the Constitution is, or should be, “color-blind.” It was the same argument Thurgood Marshall made a quarter century earlier in *Brown v. Board of Education*. Notably, it was Justice Marshall’s own liberal colleague on the Court (now joined by Mr. Justice Marshall himself) who refused to support the “color-blind” principle first enunciated, albeit in lonely dissent, by Justice John Harlan in 1896. Surprisingly, Justice Brennan refused to ascribe Justice Harlan’s principle to the Congress that passed the Civil Rights Act of 1964. As Justice Brennan wrote:

[It might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI’s prohibition of race-conscious action.]

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266. *Id.* at 288 n.26.


268. *Id.* at 13.

269. *See supra* note 149 and accompanying text.

270. “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Justice Harlan went on to say: “In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.” *Id*. In a prophetic phrase, he concluded that “[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.” *Id.*

It is a sound argument. Yet Justice Brennan proceeded to list “three compelling reasons to reject such a hypothesis.” His first reason is that “no decision of this Court has ever adopted the proposition that the Constitution must be color blind,” which only begs the question of why, even if that statement were true, the Court did not make Bakke the first case to do so. As Justice Brennan pointed out, such an interpretation would not preclude the remedial use of race whenever compelling state interests required it. His second and third reasons for rejecting a color-blind interpretation amounted to little more than a tortured argument that the Constitution and Title VI should be, of all things, race-conscious: “It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations.

But it makes little sense to argue that one can voluntarily eliminate an “evil” by voluntarily practicing the same evil. History has proven the futility of such an approach. The far better practice is the one distinguished law professor William Van Alstyne (among others) offers:

[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach; in all we do in life, whatever we do in life, to treat any person less well than another or to favor anyone more than another for being black or white or brown or red, is

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272. Id. (Brennan, J., concurring and dissenting).
273. Id. at 356 (Brennan, J., concurring and dissenting). It is a position with which four of Brennan’s brethren disagreed: “[I]t seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government . . . .” Id. at 415-16 (Stevens, J., concurring and dissenting). Justice Stevens also quoted from the floor debate where Senator John Orlando Pastore, after quoting from Justice Harlan’s “prophetic dissenting opinion,” said: “Our Constitution is colorblind.” . . . So—I say to Senators—must be our Government.” Id. at 416 n.19 (Stevens, J., concurring and dissenting).
274. This is the conundrum presented by Justice Blackmun’s comment that “[i]n order to get beyond racism, we must first take account of race.” Id. at 407 (Blackmun, J., concurring and dissenting).
wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

It is as though Justice Brennan and his three brethren who made up “the Brennan group” in Bakke concluded that Justice Harlan was simply wrong—and remains so—when he wrote in Plessy that “[o]ur Constitution is color-blind.” Yet does anyone seriously suggest that in 1978, much less 25 years later, a single member of the Court would not have preferred that Justice Harlan had been speaking for a unanimous Court in 1896, rather than in lonely dissent? Were a single Justice today given the ability to alter the outcome in Plessy by substituting Justice Harlan’s “color-blind” interpretation for Justice Henry Billings Brown’s “separate but equal” majority holding in Plessy, does anyone seriously believe he or she would refuse to do so, and base such a refusal on Justice Brennan’s, or any other Justice’s observation, that (at least since 1868 following ratification of the Fourteenth Amendment) the Constitution is not “color-blind”?

More than a century has passed since Justice Harlan issued his famous dissent. That is long enough for his plain-spoken statement that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens” to become recognized—as most assuredly, the vast majority of Americans recognize it—as the law of the land.

C. Justice Powell’s Diversity Rationale

Nowhere in his opinion did Justice Powell fully define what he meant by a “diverse student body” or by the word “diversity.” Nor did he define how an institution might go about measuring whether its goal of “attain[ing] a diverse student body” had been achieved. What was clear, however, was that Justice Powell did not view diversity as limited to race and ethnicity: “The diversity that furthers a compelling state interest encompasses a far

275. Similar words are found in Bakke. “[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination.” Id. at 415 (Stevens, J., concurring and dissenting) (quoting Senator Hubert H. Humphrey).

276. Rites of Passage, supra note 175, at 809-10.

277. See supra note 270.
broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.\textsuperscript{278}

Even though supportive of “diversity,” Justice Powell was explicit in his condemnation of an institution’s intent to focus solely on racial diversity:

If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.\textsuperscript{279}

Powell also recognized that such a focus would be inconsistent with the goal of achieving real diversity: “Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”\textsuperscript{280}

Of course, it is probably inaccurate for Justice Powell to suggest that any admissions program is “focused solely on ethnic diversity.” Even the UC Davis medical school admissions program, including the “special admissions” aspect of it, did not focus solely on race or ethnicity. It also required a showing of economic and/or educational disadvantage.\textsuperscript{281} Thus, like most every program that openly considers race, the medical school’s

\textsuperscript{278} Bakke, 438 U.S. at 315. Justice Powell goes on to mention other diversity factors including “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” \textit{Id.} at 317. With specific reference to the question of diversity based on socio-economic differences, it is worth noting that the University of Michigan undergraduate admissions process awards twenty points in a facially race-neutral manner for applicants who demonstrate “Socio-economic Disadvantage.” \textit{See SELECTION INDEX WORKSHEET, supra note 122.} The plaintiffs did not challenge this “preference” in either \textit{Gratz} or \textit{Grutter}. Moreover, “if it is true—as the proponents of race-specific affirmative action programs argue—that a disproportionately high percentage of minority persons are disadvantaged, then it should follow that a disproportionately high number of persons admitted under a race-neutral affirmative action program will be minority persons.” Dershowitz & Hanft, \textit{supra} note 64, at 418. For the most recent exposition of this view, see Carson, \textit{supra} note 210.

\textsuperscript{279} Bakke, 438 U.S. at 307. This, of course, perfectly describes the law school’s policy.

\textsuperscript{280} \textit{Id.} at 315 (citation omitted).

\textsuperscript{281} \textit{See id.} at 272-73 n.1. Every year in question, the medical school enrolled more minority students than the sixteen seats set aside for “disadvantaged” minorities. \textit{Id.} at 275-76 n.6.
“special admissions program” was only one part of what was a much broader policy.

In terms of achieving a broadly diverse student body, a university may properly hope to enroll cellists and oboists, nose guards and point guards, artists and chess champions. But whatever else a university may consider in terms of achieving “diversity,” to the extent it focuses on race at all, it does so for the sole purpose of achieving some specified level of enrollment of persons based on race. Thus, even were a university to decide that “a diverse student body” was any student body which enrolled at least (or only) one student of a different race and fashioned a system to assure that outcome (in other words, a system designed to ensure there was at least some percentage of different-race students above zero), that still would appear to represent the sort of “focus” Justice Powell condemned.

As one of Justice Powell’s brethren observed:

There is no particular or real significance in [setting aside 16 seats in the entering class for disadvantaged minority applicants] at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis’ special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.283

The law school’s system, like the illegal UC Davis system before it, certainly includes an impermissible focus on race.

1. Justice Powell’s Discussion of the “Harvard Plan”

Justice Powell’s opinion expressed approval for using race as a “plus” factor, citing what he at least suggested would be a constitutionally permissible admissions system that appeared to do so. It was the “Harvard plan.”284 Neither Justice Powell nor the

282. “[T]he University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, [letters of] recommendation[,], character, and matters relating to the needs of the profession and society, such as an applicant’s professional goals.” Id. at 272 (citing Bakke v. Univ. of Cal., 533 P.2d 1152, 1166 (Cal. 1976) (citation omitted)). Also included was consideration of a candidate’s “extracurricular activities and other biographical data.” Bakke, 438 U.S. at 274. As Justice Powell also noted, the special admissions program “operat[ed] in conjunction with the regular admissions process.” Id. at 273.

283. Bakke, 438 U.S. at 404 (Blackmun, J., concurring and dissenting) (emphasis added).

284. See generally id. at 316-17, 321-24.
language describing the plan itself\(^{285}\), made clear how race would, or even could, be “weighed fairly and competitively”\(^{286}\) in such a process. It is a statement that makes little sense.\(^{287}\) Even Justice Brennan understood this. In comparing the Harvard Plan\(^{288}\) to the UC Davis Program, Justice Brennan (who approved UC Davis’ quota system) used language directly analogous to the program the law school has employed:

Davis’ special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged\(^{289}\) racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. . . . There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points\(^{290}\) to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

\(^{285}\) The only description was provided in the Brief of Amici Curiae, Columbia University, Harvard University, Stanford University, and The University of Pennsylvania, Univ. of Cal. v. Bakke, 438 U.S. 265, 321-24, 322 n.55 (1978) (No. 76-811) (appendix to opinion of Powell, J.).

\(^{286}\) Bakke, 438 U.S. at 318.

\(^{287}\) “Mr. Justice Powell allows a candidate’s race to be given positive weight—thereby, in practice, allowing other candidates’ race to be given negative weight—in order to satisfy the relatively unimportant interest of allowing universities to seek to improve their educational goals . . . .” Dershowitz & Hanft, supra note 64, at 408 (emphasis added).

\(^{288}\) “We also agree with Mr. Justice Powell that a plan like the ‘Harvard’ plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.” Bakke, 438 U.S. at 326 n.1 (Brennan, J., concurring and dissenting) (emphasis added).

\(^{289}\) In stark contrast to the Davis program, the law school’s policy lacks any requirement that the preferred minority applicants demonstrate any degree of “disadvantage” resulting from race. See Brief in Opposition to Petitioner’s Petition for Writ of Certiorari at 3, Grutter v. Bollinger, 123 U.S. 617 (2002) (No. 02-241). Yet throughout Justice Brennan’s opinion, the focus was on “disadvantaged” minority students.

\(^{290}\) The awarding of points for one’s race alone is precisely the mechanism by which the University of Michigan’s undergraduate admissions system ensures a “critical mass” of minority students are enrolled in each first year class. See supra note 122.
The “Harvard” program . . . openly . . . employs a racial criterion for the purpose of ensuring that some of the scarce places . . . are allocated to disadvantaged minority students. . . . It may be that the Harvard plan is more acceptable to the public than is the Davis “quota.” . . . But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.”

Even Justice Powell recognized the obvious: “an admissions program which considers race only as one factor” may simply be “a subtle and more sophisticated—but no less effective—means of according racial preference than the [illegal] Davis Program.” Though supporting Harvard’s plan, Justice Powell also seemed to acknowledge, as does the language describing the plan itself, that race never should trump individual achievement:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.

No one, and certainly not Justice Powell, would argue that one’s race determines the “qualities” he discussed. They are individual qualities. Justice Powell seems to be advocating that the black applicant be awarded the seat only if his individual “qualities” equal or exceed those of the Italian-American applicant. Harvard arguably agrees. After citing an example
where “a white student with extraordinary artistic ability” might be given the edge over two black candidates (one “the child of a successful black physician in an academic community with promise of superior academic performance” and the other “a black who grew up in an inner-city ghetto of semi-literate parents”), the Harvard Plan concludes: “[T]he critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.”

The Princeton admissions program, which Justice Powell also cites, makes the same point, as does William Bowen, the former Princeton University president whose writings Powell references. In a passage not included in Justice Powell’s opinion, Bowen is quoted as telling an incoming class at Princeton:

We have been proud to say that the opportunity to study at Princeton depends on an individual’s talent, character, determination, and personal qualities. . . . This principle is related to a broader national goal—to the proposition that in this country individuals should be able to move up the ladder of accomplishments as far as their energies and abilities will take them.

One can search in vain to find anyplace where Bowen ever equated a student’s skin color with his “talent, character, determination, and personal qualities . . . energies and abilities.” In the end, it is the individual who is being evaluated, not skin color. And, of course, “exceptional personal talents,” as well as “overcoming disadvantage,” know no color line.

2. Diversity and its Inevitable Focus on Numbers

Were one to stipulate that diversity is compelling, as Justice Powell posits, then achieving diversity inevitably requires an institution to focus on numbers in terms of how many students of
any one racial or ethnic group must be included to realize the educational benefits of “a diverse student body.” Thus, by definition, there is some minimum number of students from certain racial groups that, if not enrolled in the class, means that diversity and its benefits have not been achieved.

It is a fact the law school dean was forced to admit while at the same time refusing to give any number in response:

Q: Well, I assume that if you’re saying that you want to enroll a critical mass of minority students you have to have some number [in mind] below which you would feel you have failed in that effort, is that a fair statement?

A: Yes.

Q: Okay. What is that number?

A: It depends on the context.

Q: Give me the lowest number in any context below which if you didn’t have that number of minority students you believe you would have failed to reach a critical mass necessary to accomplish the goal [described in earlier testimony]?

A: Ask that question again. I’m not sure what you’re meaning. Of course, a number never was provided.

Whether couched in terms of the number of students from “disadvantaged designated minority groups” (UC Davis Medical School) or the number of students from “groups which have been historically discriminated against” (University of Michigan Law School), there is no avoiding the fact that the number of such students is the single measure of whether the particular institution’s goal of racial diversity has been achieved.

Therefore, the initial (but by no means only) difficulty in announcing as a matter of constitutional principle that “diversity” is compelling is that there is no delimiting principle that says how much diversity is permissible.\textsuperscript{301} Nor is there a

\textsuperscript{300} Lehman Trial, supra note 3, at 201; see generally id. at 198-206.

\textsuperscript{301} The law school dean conceded that if, hypothetically, “100% of the most highly qualified applicants [for next year’s class] were minorities,” he would admit them all. Presumably he could live without the diversity some of the law school’s white applicants might have brought to the classroom. See Lehman Deposition, supra note 7, at 154. Two years later during trial, when asked a similar question, he did indicate his “concern” over
method by which to delimit the extent to which race could be used to achieve that goal. Nor for how long the use of race shall be permitted to continue for the purpose of achieving diversity.\textsuperscript{302}

Consider the example of a highly selective school that does not need to consider race in order to achieve what it considers to be a racially diverse class. Assume that a second highly selective school desires to emulate the level of racial diversity found at the first school. School number two believes that unless it enrolls a class that is as racially diverse as that school number one has enrolled, it cannot offer the same educational benefits as those found at the first school. And suppose that the second school (perhaps for reasons related to its locale, its climate, and other factors) demonstrates that in order for it to achieve the same level of racial diversity found at school number one, it not only must use race as a factor in admissions, but it must use it in an extraordinarily heavy manner. Assume the second school convincingly shows that without using a dual admissions system (by which candidates are measured against entirely separate admissions standards based solely on race), its desired level of diversity simply cannot be achieved.

If achieving racial diversity is a compelling state interest, upon what principled basis can any future court tell school number two “Yes, diversity is compelling,” and “Yes, you may use race to achieve it,” and “Yes, the evidence proves that your school cannot achieve it (whatever it is) without applying dramatically different—even non-competitive—standards to certain students based solely on their race” . . . but “No, you cannot use the method you have chosen” (even though the court agrees that

\textsuperscript{302}The Sixth Circuit, which accepted the law school’s argument that diversity is a “compelling interest,” acknowledged that the interest is not limited in time: “Unlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point.” \textit{Grutter II}, 288 F.3d 732, 752 (6th Cir. 2002). The District Court in the Michigan undergraduate case reached the same conclusion, stating that “the need for diversity lives on perpetually,” and noting “the permanency of such an interest.” \textit{Gratz v. Bollinger}, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000) (emphasis added). See also \textit{Hopwood v. Texas}, 78 F.3d 932, 947 (5th Cir. 1995).
without using it, your minority enrollment goal—meaning your compelling interest in diversity—simply cannot be achieved)?

If the setting-aside of a specific number of seats for certain racial/ethnic groups proves to be the most “narrowly tailored” means of accomplishing the goal (because it is shown to be the only means of accomplishing the goal), how could any court forbid it? If it means altering or, in some cases, altogether suspending admissions standards for certain groups based solely on skin color, how could that be forbidden? Indeed, if diversity is a compelling state interest, it is difficult to conceive of a use of race that would be forbidden so long, and for as long, as it were shown to be necessary in order to reach the desired level of racial diversity. As at least two courts have already held, the “as long as” is forever.

Do the courts, including the Supreme Court, want to become the arbiters of what is a constitutionally acceptable level of diversity, each “pontiusly pilot[ing] its way through proposed heaps of . . . racial spoils systems, conferring the noblesse oblige of racial shares on the wretchedly shaky foundations of racial politics—deferring to ‘good faith’ efforts, differing as they will (and as they already do)”?

And made constantly subject to revision as the racial and ethnic composition of our country inevitably changes?

If “enrolling a diverse student body” is a compelling state interest, what principle would prohibit a particular school from taking the position that based on its own sociological studies, or indeed based solely on its own racial demographics, the level of diversity it believes necessary to reap the educational benefits of diversity must include not less than 50% “underrepresented minority” students? Indeed, what principle would prohibit a second school from making the “educational judgment” that the maximum educational benefits cannot be achieved unless it enrolls at least 95% white and Asian-American students? See Harvard Amicus Brief in Grutter, supra note 71. May the first school suspend admissions requirements for “underrepresented minority” applicants to ensure they make up at least half the class, and in the process reject undeniably more

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303. This is precisely the argument the law school made (though nowhere was it proven that if race were the only factor removed from the process, the following results would occur): According to the Law School’s statistical expert, eliminating race as a factor in the admissions process would dramatically lower minority admissions. He predicted, for example, that if the Law School could not consider race, underrepresented minority students would have constituted only 4% of the entering class in 2000, instead of the actual enrollment of 14.5%.

Grutter II, 288 F.3d at 737. What is most interesting from this “prediction” is the law school’s acknowledgment of the heavy weight presently given to race in its admissions. Based on this assertion, the system’s dual-track nature is unmasked.

304. See supra note 302.

305. Rites of Passage, supra note 175, at 805.

306. If “enrolling a diverse student body” is a compelling state interest, what principle would prohibit a particular school from taking the position that based on its own sociological studies, or indeed based solely on its own racial demographics, the level of diversity it believes necessary to reap the educational benefits of diversity must include not less than 50% “underrepresented minority” students? Indeed, what principle would prohibit a second school from making the “educational judgment” that the maximum educational benefits cannot be achieved unless it enrolls at least 95% white and Asian-American students? See Harvard Amicus Brief in Grutter, supra note 71. May the first school suspend admissions requirements for “underrepresented minority” applicants to ensure they make up at least half the class, and in the process reject undeniably more
that what the Court in *Bakke* held? Even were one to conclude, wrongly, that the Court did reach such a holding, should the “diversity rationale” meet the same fate as the infamous “separate but equal” doctrine of *Plessy v. Ferguson*?¹⁰⁷

**VII. WHERE DOES THE SUPREME COURT (AND THE NATION) GO?**

Twenty-five years after *Bakke*, the Supreme Court is poised to decide whether the single goal of enrolling a racially and ethnically diverse class is a compelling state interest that justifies the use of race-conscious admissions policies. The Court should decline to give its imprimatur to such a gauzy, ill-defined interest for the articulate and fundamentally principled reasons set forth in the District Court’s decision and expanded upon in the Sixth Circuit’s dissent in *Grutter*. It should decline to do so because of the undeniable damage done to the purported “beneficiaries” of such policies.³⁰⁸ It is the sort of damage perfectly captured in a

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³⁰⁸. Thomas Sowell, Shelby Steele, John McWhorter, Linda Chavez, Adam Abraham, and many others have spoken and written eloquently about the damage inflicted on the “beneficiaries” of race-conscious policies. Colin Powell captures it with this simple observation: “[P]referential treatment demeans the achievements that minority Americans win by their own efforts.” *Powell*, supra note 162, at 591. These effects are also acknowledged in *Bowen & Bok*, supra note 14, at 258-65; and in a more recent study sponsored and funded by the Council of Ivy Group Presidents and the Mellon Foundation. See generally *Cole & Barber*, supra note 144. Using similar data as Bowen and Bok, Professors Cole and Barber concluded that the use of racial preferences at highly selective schools cause the following negative consequences for minority students: “In elite schools, most African Americans end up in the bottom quarter of their class, compare themselves negatively with their classmates, and develop lower levels of academic self-confidence.” *Cole & Barber*, supra note 144, at 205; see also *Bowen & Bok*, supra note 14, at 72 (confirming that most African-Americans find themselves in the bottom quarter of their respective classes at elite schools). They go on to state that “[s]ince admissions policies employing racial preferences result in [some] African Americans receiving lower GPAs than they might if they attended somewhat less selective schools, it seems to us that abandoning racial preferences would have little or no effect on outcomes such as income or prestige of occupation entered.” *Id.* at 206. Thus, like Sowell, Steele and others, Cole and Barber, who reject the hypothesis that racial diversity necessarily leads to improved educational outcomes for students, agreed that “race sensitive admissions likely have at least some negative educational consequences on those they are intended to help.” *Id.* at 344 n.25. They are joined in that assessment by a minority member of the Wisconsin State Bar Association who recently wrote the following, in opposing a recommendation (later rejected) that the Wisconsin Bar join in
comment from one of the respondents to the 1999 survey of law students at Harvard and Michigan:

One of my strongest criticisms of affirmative action policies is that the perception generally exists that minority students are admitted to the school based upon objective qualifications lesser than those of the other students and, as a result, when a student sees a minority . . ., that student assumes that the minority . . . does not belong at the school or is not as qualified, whether or not it is true. This makes for bad feelings on all sides.

It is the sort of damage Justice Powell recognized a quarter century ago: “[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”

But most importantly, the Court should reject the law school’s use of race—except to remedy identified instances of discrimination—for the simple reason that it is the right thing to do. It is right because it is unerringly consistent with the single most important principle embodied within the Declaration of Independence: “that all men are created equal.” It is right because it would faithfully adhere to Brown, the Court’s greatest decision ever rendered on race. And it is right because it will inure to the benefit of every American citizen, and to the detriment of none. Surely it is time for our Constitution to fully mature into the an amicus brief before the United States Supreme Court supporting the law school’s position:

As a minority (Hispanic and female), I am opposed to the Wisconsin Bar joining an amicus on behalf of the University of Michigan as a matter of philosophy, principle and legal interpretation of the clear legislative history of the Civil Rights Act. I practiced equal employment law in Wisconsin and served in the Civil Rights Division of the U.S. Department of Justice and as General Counsel to the U.S. Senate Judiciary Committee. I truly believe in equal opportunity without regard to race. Quotas disguised as ‘affirmative action’ are discriminatory and contradict the true principle of equality. They also undercut society’s perception of successful minorities being able to compete on an equal basis. The results are a disservice to all of us.


309. This student’s perception is, in fact, true at Michigan. See Lehman Trial, supra note 5, at 196.
310. See Grutter I, Trial Exhibit No. 178 at GO 0025.
311. Univ. of Cal. v. Bakke, 438 U.S. at 298 (citation omitted) (emphasis added).
312. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
“color-blind” instrument Justice Harlan claimed it to be over 100 years ago.313

The Supreme Court’s eventual decision in Grutter will say much about the strength of our country’s continued commitment to equal opportunity and equal treatment without regard to race. The Court in Brown left no ambiguity in its holding: “[W]e declar[e] the fundamental principle that racial discrimination in public education is unconstitutional. . . . All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.”314 Will the Court in Grutter reaffirm that principle in similarly unambiguous terms? Rather than honoring as an exception to that principle an amorphous, impossible-to-define, and at best cosmetically-created notion of “diversity,” will the Court reaffirm that what truly matters is an institution’s complete commitment to openness to all regardless of race?

There is profound guidance in the record before the Court. John Hope Franklin, the distinguished Professor Emeritus from Duke University, appeared at trial as an expert for the intervening students. During both his pre-trial and trial testimony, Professor Franklin effusively praised Bates College, a small but highly selective liberal arts college in Lewiston, Maine.315 Notwithstanding its racially homogeneous student body, Bates has, as Dr. Franklin described it, “long and distinguished lists of . . . black graduates extending back into the . . . last century.”316 It was, he agreed, “a special place” because of its tradition of being open to any student regardless of race—even though it has always had a very small African-American enrollment.317 Bates has never enjoyed the level of “diversity” Michigan asserts is fundamentally required.318

315. John Hope Franklin ascribes to Bates College a “glorious tradition of . . . standing for diversity . . . . [A] willingness to accept this as a norm.” See Franklin Deposition, supra note 163, at 66.
316. Id.
318. Of the twenty-five “Highest-Ranked Liberal Arts Colleges for the Fall of 2000,” Bates enrolled the smallest percentage of black students (seven students, constituting 1.4% of the freshman class). See Black Matriculation, supra note 138, at 19. Bates’ total underrepresented minority enrollment rarely, if ever, reaches or exceeds 4% of the student body. See, e.g., BEST COLLEGES, supra note 101, at 72.
It is this commitment to openness that is embodied in a system that zealously guards against the sorts of racial preferences the law school has granted. Such a policy would be perfectly congruent with the principle Justice Anthony Kennedy recently articulated in *Rice v. Cayetano*:

One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Justice Kennedy’s words are simple and timeless in their reach. They mirror the principle enunciated in *Brown*. They provide important guidance to the Court as it deliberates its decision in *Grutter*, as do the principles our federal government enunciated in a “Friend of the Court” brief filed over a half century ago:

> [R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an American, and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man’s skin—like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States—does not diminish or alter his legal status or constitutional rights.

319. In a related context, then-professor of law Ruth Bader Ginsburg observed that “[i]n some law schools women have become a majority in the late 1970’s, and that did not occur because of any preferential treatment. There has been only one change: The welcome sign, absent one and two generations ago, is now clearly posted.” Symposium, *The Quest for Equality*, 1979 WASH. U. L.Q. 296 (1979) (emphasis added). As Professor Franklin made clear in his testimony, the “welcome sign” has always been posted at Bates.


321. *Id.* at 517.

No. 2  

Prelude: Bakke Revisited  

Instead of engrafting race as a permanent feature of college and university admissions, it is hoped that the Court will use *Grutter* to reaffirm our government’s, and in particular our flagship public universities’, commitment to accept and embrace our ever-changing diversity without condoning the use of race to create, at best, a momentary and inevitably false version of it.  

This Nation’s institutions of higher education and all other fields should never erect barriers to prevent the participation of any citizen for reasons relating to his or her race or ethnicity. Nor should our institutions fail to take affirmative action to tear down existing barriers that frustrate full participation by every citizen, particularly where those barriers may be shown to be associated with or related to one’s race or ethnicity. Michigan’s system erects barriers based on race. Those barriers should come down. That, the Nation should hope, will be the unanimous ruling of the Supreme Court in *Grutter*.

VIII. AFTERWORD

Shelby Steele writes brilliantly and incisively on matters of race. Like Dr. Steele, no party in *Grutter* disputes the indisputable: that America was responsible for the horrific oppression of our black forebears who landed here in chains. Steele himself has argued that American slavery in particular may rank as the single most inhumane of mankind’s numerous inhumanities. But Steele’s point is not that America was not guilty of this crime—it was. Nor is his point that the scars of our racial past should be erased or forgotten—they should not.

Steele’s point is that black Americans in the latter half of the twentieth century, and all those who enter the twenty-first century, those furthest removed from the actual oppression of slavery, have won the right to equal treatment. It is a right that receives the strong support of all Americans.  

Steele notes that even though today’s white Americans are not responsible for the past, a collective guilt relating to the Nation’s

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323. This should not be viewed as an argument that race should never be used to remedy identifiable instances of racial discrimination. That is, and remains, a necessary and appropriate though narrowly proscribed use of race. See, e.g., Univ. of Cal. v. Bakke, 438 U.S. 265, 301 (1978) (referring to employment discrimination cases).

324. “[A] clear majority [of white Americans] supports not merely the importance of giving blacks fair consideration in the abstract but going the extra mile in practice to ensure they really are fairly treated.” PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 27 (1997).
history of using race against its black citizens hangs over all matters dealing with race. It is a guilt Steele often describes, and he perhaps captured it best in a recent essay. In it, Steele suggests a deeper meaning underlying the adoption of race-preference admissions policies by our nation’s colleges and universities:

American institutions must perpetually prove a negative—that they are not racist. . . . If they fail to prove the negative, they will be seen as racists. Political correctness, diversity policies, and multi-culturalism are forms of deference that give . . . institutions a way to prove the negative and win reprieve from the racist stigma.

Institutions especially must be proactive in all this. They must engineer a demonstrable racial innocence to garner enough authority for simple legitimacy in the American democracy. . . . No university today, private or public, could admit by academic merit alone if that meant no black or brown faces on campus.

Steele concludes that “Restraint should be the watchword in racial matters. We should help people who need help. There are, in fact, no races that need help; only individuals, citizens.”

Steele often makes the point when it comes to the effect these mechanisms have on those they are designed to benefit:

Double standards, preferential treatment, provisions for “cultural difference,” and various kinds of entitlements all constitute a pattern of exceptionalism that keeps blacks (and other minorities) down by tolerating weakness at every juncture where strength is expected of others.

Nowhere is this toleration of weakness more clearly codified than in the admissions policies the University of Michigan currently practices. It is here that Steele brutally reminds us that:

The most dehumanizing and defeating thing that can be done to black Americans, . . . is to lower a standard in the name of their race. Here the black is asked to accept the inferiority he resisted for

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326. Id. at 39.
327. Id. at 42 (emphasis added).
centuries, to identify with it as proof of his victimization, . . . and to use it.\textsuperscript{329}

But Steele also offers the antidote. It is remarkably simple: Demand the same high expectations from the minority applicant that are demanded of every other applicant.\textsuperscript{330} And in doing so, demonstrate the University’s “faith in [the black student’s] equal humanity, intelligence, and skill.”\textsuperscript{331} The result, according to Steele, will be self-evident: “[W]hen he meets \textit{that} expectation, his equality becomes unassailable.”\textsuperscript{332}

It will happen someday but only when the demeaning mechanisms like Michigan’s are dead and buried.

\textsuperscript{329.} \textit{Id.} at 113 (emphasis added).
\textsuperscript{330.} \textit{Id.}
\textsuperscript{331.} \textit{Id.}
\textsuperscript{332.} \textit{Id.} (emphasis added).