

H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, REGENTS OF THE
UNIVERSITY OF MICHIGAN, BOARD OF
TRUSTEES OF MICHIGAN STATE UNIVERSITY,
BOARD OF GOVERNORS OF WAYNE STATE
UNIVERSITY, MICHAEL COX, ERIC RUSSELL,
and the TRUSTEES OF any other public college or
university, community college or school district,

Defendants.

Case No. 06-15024
Hon. David M. Lawson

CONSOLIDATED CASES

This filing pertains to
ALL CASES

- and -

CHASE CANTRELL, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her Official Capacity
as Governor of the State of Michigan,

Defendant.

Case No. 06-15637
Hon. David M. Lawson

FILED

JAN - 9 2008

CLERK'S OFFICE-DETROIT-PSG
U.S. DISTRICT COURT

DECLARATION OF RICHARD H. SANDER

I, Richard H. Sander, declare as follows:

1. I have been retained (pro bono) as an expert for Defendant-Intervenor Eric Russell in *Coalition to Defend Affirmative Action v. Granholm* and *Cantrell v. Granholm*. This is the second Declaration that I have executed for filing in this case.

2. I am a professor of law at the University of California, Los Angeles. I have conducted and published extensive research on the operation and effects of racial

preference programs in higher education. I have been called to give evidence on these issues before the United States Commission on Civil Rights (June 2006) and the Regents of the University of California (January 2005). In addition, I have been qualified as an expert witness in several federal cases, including *Cloud v. Cedar Village* (Central District of California, 1992), and *Sanchez et al v. City of Santa Ana* (Central District of California, 1995).

3. In this Declaration, I address a variety of factual questions raised by the Motion For Summary Judgment filed by the Cantrell Plaintiffs, including a variety of assertions made by two of the experts who weigh in on behalf of the plaintiff's motion, Dr. Jeannie Oakes and Dr. William Bowen. Paragraphs 4-8 address factual presuppositions of the Cantrell Plaintiffs' argument. Paragraphs 9-26 address factual allegations in the Declaration of Dr. Jeannie Oakes. Paragraphs 27-39 address factual allegations in the Declaration of Dr. William Bowen.

4. The Cantrell Plaintiffs contend that "it is undisputed that the universities have long sought to achieve a diverse – including a *racially* diverse – student body" and "it is undisputed that Proposal 2 prevents the consideration of race in an admissions process that weighs myriad other non-academic factors and pertinent elements of diversity." Both of these statements imply that Michigan's universities have created highly diverse student bodies. At least for the state's most elite university, the University of Michigan, this is a very contestable claim. It is instructive to compare the University of Michigan before the passage of Proposal 2 with the University of California, which has been operating under a ban very similar to Proposal 2 for nearly a decade. National college ranking services use the prevalence of Pell Grants as an indicator of socioeconomic diversity, since Pell Grant recipients are generally from low- or moderate-income households.¹ By this measure, the University of Michigan undergraduate program has very little socioeconomic diversity; only 13-14% of its students receive Pell Grants, according to the national surveys. At most campuses of the University of California, in contrast, the proportion of students receiving Pell Grants is over 30%; at Berkeley it is 35%, and at UCLA it is 39%. The University of California also has very significant racial diversity; about 19% of its new freshmen in 2005 were members of underrepresented minorities (black, Hispanic, or American Indian), compared to about 12% in the University of Michigan's undergraduate program.

5. These statistics illustrate a very important point: the statewide prohibition on racial preferences adopted by California voters (called "Proposition 209") pushed the University of California to be more serious and multilateral in its efforts to create a diverse university environment. Following Proposition 209, admissions officers at the University of California gave much closer consideration to individual circumstances of disadvantage, including socioeconomic disadvantage. The university launched substantial outreach programs to increase applications from underrepresented

¹ Pell Grants are federal grants given to low- and moderate-income, mostly undergraduate students whose expected family contribution (EFC) to their post-secondary education falls below \$3,850, indicating limited family means.

populations. It even undertook efforts to improve K-12 education in inner cities, thus strengthening the pipeline of disadvantaged students into higher education. The University of Michigan, by contrast, appears to rely on a rather one-dimensional view of diversity that is quite ineffective in creating opportunities for students from disadvantaged backgrounds. One could infer that permitting open consideration of race in admissions enables the university to make mechanical gestures towards diversity without working hard to make the university truly diverse.

6. This last point can be seen with special clarity from data on admissions at the University of Michigan Law School (UMLS). Like many law schools, UMLS relies heavily on the Law School Admissions Test (LSAT) and undergraduate grades (UGPA) in selecting students. In an analysis I conducted with 1999 UMLS admissions data, I combined applicant LSAT scores and undergraduate grades into an index that runs from 0 to 1000, with 1000 representing a perfect LSAT score and a 4.0 UGPA. Table I, below, shows the proportion of white and black applicants admitted whose index scores fell in specific ranges.

Table 1: Comparative Admission Cohorts at Michigan Law School, 1999

Admission Rates for White Applicants		Admission Rate for Black Applicants	
Index	Proportion of Cohort Admitted	Index	Proportion of Cohort Admitted
850 and Above	97%	710 and Above	96%
830-849	91%	690-709	90%
810-829	70%	670-689	72%
790-809	44%	650-669	38%
750-789	16%	610-649	22%
710-749	5%	570-609	11%
Under 710	2%	Under 570	0%

Source: Data provided by University of Michigan Law School in *Grutter* litigation; cells of data based on UGPA and LSAT have been converted to a 0-1000 index using the formula: $(\text{LSAT}-120)*10 + (\text{UGPA} * 100)$.

7. This table illustrates three basic points:

--First, UMLS relies very heavily on LSAT/UGPA; that is why relatively small changes in index levels dramatically affect admission chances for both whites and blacks.

--Second, UMLS considers race in a rather mechanical way. It is fairly evident from the table that blacks receive the equivalent of 140 index points based on their race.

--Third, UMLS appears not to give any other "diversity" factor, like socioeconomic status, great weight to a significant number of applicants. If it did, then there would be more whites with low index scores admitted, and the school would have greater socioeconomic diversity than it does.²

8. To recap, the available evidence suggests that many components of the University of Michigan have tended to pursue a fairly one-dimensional view of diversity, focusing on race to the neglect of other forms of diversity. As a general matter it appears that the University of California, operating under a ban similar to Proposal 2, has produced undergraduate environments that have dramatically greater socioeconomic diversity than the University of Michigan while still having very significant levels of racial diversity.

9. The analysis in the Declaration of Jeannie Oakes that is attached to the Cantrell Plaintiffs' Motion For Summary Judgment is flawed in numerous respects.

10. On page 1 of her report, Dr. Oakes states that her purpose is to examine "whether the racial diversity the University of Michigan *requires* can be achieved without considering race in the admissions process." [emphasis added] Her report, however, never attempts to define what level of racial diversity is "required," or why some particular level is required. The repeated implication of her work is that any change in the status quo is a bad thing. In responding to Dr. Oakes' report, I would like to make four points: (A) It is not obvious that the "status quo" in racial diversity at the University of Michigan is a good thing. (B) The impact on minorities at the University of California of Proposition 209 (a measure very similar to Proposal 2) has been modest and in many ways positive. (C) Dr. Oakes ignores the value of other types of diversity.

² The "After the JD" study, conducted by the American Bar Foundation and other institutions, surveyed some four thousand lawyers who generally completed law school in 1999 or 2000. Respondents answered questions about their parents' education and occupations, which enables us to estimate their socioeconomic status ("SES"). The survey data shows twenty-four students in the sample who attended the University of Michigan Law School. Of the 24, 15 had SES ratings that placed them in the top 10% of the general population. 23 of the 24 Michigan graduates had at least one parent who had attended college. By way of contrast, my own law school, the University of California, Los Angeles, greatly increased its use of socioeconomic preferences after the passage of Proposition 209 in 1996. Among the 36 UCLA graduates in the After the JD data, only 14 had SES ratings that placed them in the top 10% of the general population, and for 9 of the 36, neither parent had attended college. (The difference in educational backgrounds is statistically significant.) In other words, the University of Michigan students (of all races) tended to be from very elite backgrounds; the UCLA students tended to be from much more socially diverse backgrounds.

(D) Dr. Oakes makes a fundamental error in her discussion of race-neutral admissions alternatives.

11. First, it is not obvious that the "status quo" in racial diversity at the University of Michigan is a good thing. The University of Michigan's contemporary racial diversity has been maintained by using very large admissions preferences based on race. One result of this policy has been a very large gap in the entering credentials of black and Hispanic students versus those of Asians and whites. In the 2005 entering class, for example, the median verbal SAT of black freshmen was 560, compared to 640 for whites. The median math SAT for black freshmen was 570, compared to 670 for whites. This large gap produces a similarly large gap in performance. Among University of Michigan students who matriculated in 1999, over 55% of blacks ended up with college GPAs below 3.0, compared to 23% of whites. These disparities in GPA are driven mainly by differences in admissions standards, and not by race per se.

12. It is very instructive to examine the graduation data for the University of Michigan freshmen who matriculated in 1999 (this data was produced by the university in response to the defendant's discovery request). We can scale the test scores and high school grades of each applicant on a scale of 0 to 1000. For purposes of this discussion, I will categorize student credentials as "high," "medium," and "low". Students with high credentials had index scores of 820 or higher; they easily qualified for admission to the university on the basis of their academic numbers alone. Students with medium credentials (index of 660 to 819) have respectable numbers, but probably had some other factor in their application that helped them get in (e.g., athletics, low socioeconomic status, in-state preference, race, etc.). Students with low credentials (index below 660) came in with academic numbers well below those of most of their classmates, and presumably received a very substantial preference based on some non-academic factor.

13. About one-fifth of the blacks matriculating in 1999 had high credentials, one-quarter had low credentials, and a little over half had medium credentials. The graduation outcomes of these three groups were very, very different. Among blacks with high credentials, over 73% graduated on time (in four years) and only 7% did not graduate at all. (These rates were *better* than the rates for whites with high credentials.) Among blacks with medium credentials, 49% graduated on time and 18% did not graduate at all. Among blacks with low credentials, fewer than 24% graduated on time and 47% did not graduate at all. In other words, blacks admitted with large preferences were nearly seven times as likely not to graduate as blacks with relatively high credentials.

14. It is important to note that among white freshmen matriculating the same year, only 3.3% fell in the "low credential" category (compared with one-quarter of the blacks). In other words, the data suggests to me that the university admitted many blacks whose low credentials foreshadow significant academic problems, but that the university admitted them anyway simply because they advanced the university's narrowly-defined "diversity" agenda.

15. Under these circumstances, it is obviously rational for a school (or a state) to ask whether it is really conferring a benefit on students who are receiving large, non-academic admissions preferences. Dr. Oakes' presumption that any restriction of race-based preferences is harmful to minorities is debatable at best.

16. Second, the impact on minorities at the University of California of Proposition 209 (again, a measure very similar to Proposal 2) has been modest and in many ways positive. There is no question, I believe, that the enactment of a ban on the consideration of race in admissions processes has a meaningful impact on the admissions process – indeed, that is a key goal of enacting the ban. Colleges are pushed to consider “disadvantage” in terms broader than just membership in a racial group. The University of California, in the years after Proposition 209 went into effect (starting in the 1998 undergraduate admissions cycle), took many steps to make the university more accessible to students overcoming hardship. Various colleges within the university gave more weight to socioeconomic factors (favoring students from low-income backgrounds or those whose parents had limited education), school quality (making sure that a wider range of public schools has significant admissions to the university), and overcoming individual hardships. The statistics I quoted earlier on the proportion of students receiving Pell Grants on the various UC campuses (generally over 30%), testifies to how much more successful the University of California is today compared with the University of Michigan in enrolling disadvantaged students (at Michigan, only 14% of undergraduates are Pell Grant students).

17. The question raised by Dr. Oakes is whether this shift in admissions has had a collectively harmful effect upon racial minorities in the University of California system. I think not, but at the very least this is a complex factual question.

18. First, the overall enrollment of underrepresented minorities at the University of California has grown substantially since the implementation of Proposition 209. Total UC freshmen matriculants who are black, American Indian, Latino or Chicano have gone from 4,231 in 1997 to 5,705 in 2005, according to university statistics. Overall freshmen enrollment has risen, too, but not as fast as overall underrepresented minority enrollment.³

19. Second, it is true that there has been a “reshuffling” of minorities across campuses since Proposition 209, with minority enrollment falling at the most elite UC campuses (Berkeley and UCLA) and rising at the others. This does indeed mean, as Dr.

³ These numbers differ from those cited by Dr. Oakes in part because Dr. Oakes uses 1995 as a base year for comparing the before-and-after effects of Proposition 209. This is inappropriate. Proposition 209 did not go into effect until 1998, so 1997 is the last year in which the University of California legally took race into account in admissions. Some minority enrollment figures dropped for several years before 1997, but this appears to be because the university generally imposed tighter admissions standards on all applicants; Dr. Oakes presents no evidence showing these drops were due to Proposition 209.

Oakes suggests, that a typical black or Hispanic student at UC now finds himself at a school whose students have slightly lower average SAT scores. But this also means that the typical black or Hispanic student is also at a school where his own credentials are closer to those of his classmates, and this, I would argue, is good news. At the University of California at Davis, for example, the black-white gap in credentials (using the 0-1000 scale mentioned above) fell from an average of 137 points in the 3 years before Proposition 209 (1995-97) to an average of 106 points in the two years after (1998-99). Over the same period, the black-white gap in freshmen GPAs fell from an average of .52 points to .31 points, and the proportion of black Davis freshmen dropping out fell from an average of 6% to just over 1%. Putting minority students on campuses where they are more likely to succeed academically is, at least arguably, a very good thing for those students.

20. Third, Dr. Oakes ignores the value of other types of diversity. Dr. Oakes writes as though the only type of diversity that matters is racial diversity. As I have pointed out elsewhere in this Declaration, that is an overly narrow viewpoint.

21. Fourth, Dr. Oakes makes a fundamental error in her discussion of race-neutral programs. Dr. Oakes contends (in point B2 of her argument, from pp. 10-12) that race-neutral strategies for maintaining diversity, such as the 4% plan in California or the 10% plan in Texas, will not work as well in Michigan because Michigan schools are more racially segregated than those in California and Texas. Dr. Oakes apparently does not understand that higher levels of segregation make "percent plans" *more effective*, not less effective, in maintaining racial diversity.

22. Racial preferences are used by colleges because blacks and Hispanics tend to have lower test scores, and lower grades in high school, than whites and Asians do. Thus, when race-blind academic criteria are used to examine an overall applicant pool, blacks and Hispanics are likely to be chosen in smaller proportions than whites and Asians, as are students with less affluent backgrounds, or students who attend weaker schools. If a college selects students strictly on the basis of, say, SAT scores, it is possible that nearly all admitted students will come from relatively privileged schools enrolling students with high socioeconomic status. The point of a "percent plan," such as those used by California and Texas, is to make sure that colleges select at least some students from academically weaker schools. Whether a percent plan selects a large number of underrepresented minorities depends on the degree to which the weaker schools are racially segregated. In California, segregation levels are comparatively moderate, so that many blacks and Hispanics are not concentrated in academically weak, inner-city schools, and many of those who do have white and (especially) Asian classmates. Asian students attending an inner-city school in California often end up being disproportionately clustered near the top of the class. As a result, simply admitting students in the top 4% of each high school class does not necessarily produce substantial numbers of black and Hispanic admittees.

23. In contrast, if schools are highly segregated, and black and Hispanic students tend to be concentrated in the academically weaker segregated schools, then as a practical matter a percent plan will be quite effective in admitting a disproportionate number of

otherwise underrepresented minorities. Suppose, for example, that a state university generally admits students who are among the top tenth statewide in academic measures that combine test scores, Advanced Placement courses, and grades. It also admits any student whose class rank places him in the top 5% of his high school class (i.e., it has a "5% plan"). If the high schools in a state are highly segregated, then blacks and Hispanics will almost certainly be disproportionately benefited by the 5% plan. In schools with large white or Asian enrollments, a great many of those who qualify under the 5% plan will already qualify by being in the top tenth of the statewide pool. In highly segregated black or Hispanic schools, however, many of the top students will not have qualified for the statewide pool because of low test scores or limited options for advanced coursework. A disproportionately large number of these students, therefore, are likely to qualify through the 5% plan.

24. To illustrate these points, I conducted a simple numerical simulation using actual data provided by the University of Michigan in this litigation. In a data provided during discovery, the University listed 11,551 applicants to Michigan's Letters, Sciences and Arts program who provided SAT scores and undergraduate grades. I created an index, similar to those described earlier in this affidavit, that weighed together the SAT scores and grades of each applicant. I then randomly assigned each applicant to one of fifty "high schools" (since the students were assigned randomly, the schools were fully racially integrated) and "admitted" 50% of the students at each high school, based on their index score. The results of this process, shown in the "fully integrated" columns in the tables below, lead to underrepresentation of minority applicants: blacks made up only about 1% of those admitted, and Hispanics made up about 2%.

25. I then conducted a second simulation. This time, I created fifty "segregated" schools; students were assigned to schools of roughly equal size based on their race, and then the top 50% of applicants (by index score) were admitted from each school. The results of this simulation are shown in the "completely segregated" columns below. Each group, under this approach, is admitted to the university in proportion to their numbers in the applicant pool; blacks, for example, making up 4.4% of the applicant pool, also make up 4.4% of those admitted. Note that this is more than four times the number of blacks admitted from the "fully integrated" schools. A similar, albeit less dramatic, pattern emerges for Hispanics.

Table 2. Numbers of Michigan LS&A undergrads admitted through percent plans assuming different levels of high school segregation.

Race	Applicant pool		Makeup of admitted students if college relies only on a "percent plan" and the schools are:			
			Fully integrated		Completely segregated	
	Racial Makeup	Median Index	Racial Makeup	Median Index	Racial Makeup	Median Index
Asian	2,380	830	1,387	875	1,190	890
Black	507	695	60	858	254	765
Hispanic	414	765	117	870	207	830
Native Am.	54	768	14	860	27	830
*Other	1,873	815	912	870	936	875
White	6,323	820	3,286	870	3,162	870

*Other race or no indication of race

Table 3. Data from Table 2 expressed in percentage terms.

Race	Applicant pool		Makeup of admitted students if college relies only on a "percent plan" and the schools are:			
			Fully integrated		Completely segregated	
	Racial Makeup	Median Index	Racial Makeup	Median Index	Racial Makeup	Median Index
Asian	20.6%	830	24%	875	20.6%	890
Black	4.4%	695	1%	858	4.4%	765
Hispanic	3.6%	765	2%	870	3.6%	830
Native Am.	.5%	768	.2%	860	.5%	830
*Other	16.2%	815	15.8%	870	16.2%	875
White	54.7%	820	56.9%	870	54.7%	870

*Other race or no indication of race

26. To sum up, a "percent plan" is more effective in admitting underrepresented minorities when those minorities are in a segregated school system. Thus, Dr. Oakes' argument is off by one hundred eighty degrees. A percent plan, applied to the more segregated schools of Michigan would be more effective in admitting underrepresented minorities than are the percent plans used in California or Texas.

27. Dr. Bowen's declaration makes a number of very broad claims about affirmative action, with virtually no supporting evidence. Most of these claims are very

much contested in literature, and some of them are simply wrong. Below I review his substantive claims (I have highlighted Dr. Bowen's statements in italics).

28. Bowen Paragraph 6. *"Since its inception, the consideration of race in university admissions has been an important contributor to the socioeconomic mobility and well-being of racial minorities in the United States."* There is no doubt that racial minorities have made very significant gains in the United States over the past forty years, including average levels of education, income, and occupational status. There is, however, relatively little evidence on the degree to which these gains can be attributed to race preference policies, and the little evidence that exists is quite mixed in its verdict. Consider, for example, the following:

--For African-Americans, dramatic gains in social and economic status began during World War II and the years immediately after that war. According to the Historical Statistics of the United States (1976 ed.), the median income of "Negro and other" families and unrelated individuals rose from 42% of the white figure to 62% of the white figure between 1939 and 1967 – a period when racial preferences were essentially non-existent.⁴ Progress has generally been slower over the past forty years (since the late 1960s), a period when racial preferences have been widely used. In 2005, black household income was only 63.5% of white household income.⁵ The fact that black economic progress has been slower since the onset of racial preferences proves nothing in itself, but it does illustrate the danger of simply assuming that black progress and the use of racial preferences are necessarily linked.

--Note, too, that admissions preferences in higher education began in the late 1960s, only a few years after the passage of the Civil Rights Act of 1964 (Title VI of which banned discrimination by government-supported educational institutions.) Undoubtedly, ending policies that discriminated against blacks and other nonwhites played a very important role in improving access for those groups to higher education. Since preference policies began so soon after nondiscrimination policies became the norm in the United States, it would be disingenuous to attribute general patterns of progress since the late 1960s to preference policies, without evidence showing that matters would have been different without those preference policies.

29. Bowen Paragraph 7. *"For example, race-conscious admissions programs have contributed to a great rise in the numbers of African-Americans pursuing higher education."* It is quite possible, in my view, that racial preferences by colleges and universities were helpful in the late 1960s and early 1970s in persuading many blacks that institutions which had recently been closed to them were now not only open, but welcoming. This may have contributed to the substantial rise in higher education applications and enrollments by blacks during the early 1970s. But since the mid-1970s,

⁴ See U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970*, vol. 1, p. 303.

⁵ U.S. Bureau of the Census, 2008 Statistical Abstract of the United States, Table 668.

the proportion of black high school graduates with strong credentials who seek to enter college has generally been close to, and tracked, the proportion of similar white high school graduates doing the same.

30. Research by Card & Krueger (2004) strongly suggests that Proposition 209 in California had no net impact upon the number of strong black candidates who took at least initial steps towards applying to the University of California.⁶ There is, so far as I am aware, no credible evidence that bans on the use of preferences “discourage” prospective applicants from pursuing higher education degrees when those students have strong enough credentials to secure admission without a preference.

31. On the other hand, there is a good deal of evidence suggesting that racial admissions preferences undermine the achievement of blacks while at college. Dr. Rogers Elliott of Dartmouth has published a substantial amount of data suggesting that black students interested in science are less likely to stick with science majors when they enroll in a college that has used large preferences to admit them.⁷ Drs. Stephen and Abigail Thernstrom have argued that large admissions preferences produce higher dropout rates among blacks (and the data I presented earlier on the University of Michigan strongly support that claim).⁸ It is very plausible that race-conscious admissions programs reduce, rather than increase, the number of blacks securing bachelor degrees and particularly the number of blacks securing baccalaureates in science.

32. Bowen Paragraph 8. *“Many successful African-American students would have been rejected by their alma mater under a race-neutral admissions regime.”* This statement is almost tautological: of course if a college uses racial preferences, the ending of those preferences will lead to the rejection of admittees who would have been admitted on the basis of their race under racial preferences. The interesting questions are (1) how many students who are thus rejected end up attending college anyway? and (2) are those students more likely to be successful if they attend another college without a racial preference? There is a good deal of evidence that the answer to both these questions is “yes.”

33. Bowen Paragraph 9. *“Minority students who have benefited from the consideration of race in university admissions have made a clear impact in the political and professional world. There are, for example, a growing number of African-American doctors and lawyers practicing in the United States.”* It is a much-contested issue whether current uses of racial preferences increase or diminish the number of black professionals in the United States. For example, I published an article in 2004 that

⁶ David Card and Alan Krueger, “Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas,” NBER Working Paper 10366 (2004).

⁷ Rogers Elliott et al, “The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions,” 37 *Research in Higher Education*,” 681 (1996).

⁸ Stephen and Abigail Thernstrom, “The Higher Learning,” ch. 14 in *America in Black and White* (1997).

presented a detailed simulation which suggested that racial preferences could very plausibly be reducing the number of new black attorneys in the nation.⁹ Several other scholars have published responses to this work, each suggesting a different impact preferences have on the number of new black lawyers.¹⁰

34. Bowen Paragraph 9. "*In addition, the number of African-American elected officials in this country has risen dramatically since the first race-conscious admissions programs were implemented.*" Many good things have happened since the late 1960s, but it would be absurd to suggest (without any evidence) that they were caused by the introduction of racial preferences in university admissions. I believe most political scientists would agree that the passage of the Voting Rights Act in 1965, and its extension in 1982, had a far more powerful effect upon the number of black elected officials in the United States than anything happening in higher education.

35. Bowen Paragraph 10. "*My research with Derek Bok also shows that race-conscious admissions programs have had an important impact upon economic outcomes for students, including per capita earnings.*" This is a highly-contested finding. The question here is whether a student raises his earning potential simply by attending a more elite school, even if he is likely to have lower grades in the more competitive environment at the elite school. Dr. Bowen and Mr. Bok did present evidence in their book, *The Shape of the River*, that elite students earned more when one controlled for other characteristics (see pp. 395-96). But Stacy Dale and Alan Krueger, both distinguished social scientists, reanalyzed the same datasets that Bowen & Bok used, and adopted a more sophisticated methodology. They examined pairs of students who were accepted to the same pair of schools (e.g., Boston College and Harvard), but made different choices about which ones to attend – one going to the more elite school, and one attending the less elite school.¹¹ The advantage of this method is that we know that the student attending the less elite school *could* have gone to the more elite school, and thus is reliably comparable to the other member of his pair. Dale & Krueger found no earnings premium for the students attending more elite schools; in some models, the more elite students fared worse in long-term earnings. My own work, using methods more like those in *Shape of the River* but looking at lawyers rather than college graduates, finds that students receiving large preferences tend to have lower earnings than students attending less elite schools but receiving higher grades.¹²

⁹ Sander, "A Systemic Analysis of Affirmative Action in American Law Schools," 57 *Stanford Law Review* 367, 468-478 (2004).

¹⁰ See, e.g., Ian Ayres and Richard Brooks, "Does Affirmative Action Reduce the Number of Black Lawyers," 57 *Stanford Law Review* 1807 (2005).

¹¹ Stacy Dale & Alan Kreuger, Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables, 117 *Quarterly Journal of Economics* 1491 (2002).

¹² Richard Sander, "A Systemic Analysis of Affirmative Action in American Law Schools," 57 *Stanford Law Review* 367, 454-468 (2004).

36. Bowen Paragraph 11. *"The available evidence indicates that race-neutral alternatives are unlikely to be as effective as race-conscious admissions in enrolling a diverse student body."* This conclusion entirely depends on one's definition of "diversity." As Dr. Bowen's work (and those of others) has shown, most elite public and private universities, while pursuing aggressive racial preferences, have largely neglected socioeconomic diversity. Carnevale and Rosc (2004) document that elite colleges and universities draw only one-tenth of their students from the bottom half of the American economic spectrum. As I discussed earlier, the University of California has dramatically greater socioeconomic diversity than the University of Michigan while maintaining very substantial racial diversity.

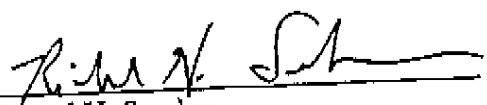
37. Bowen Paragraph 12. *"In particular, income-based strategies are unlikely to be good substitutes for race-conscious admissions policies. Although African-Americans, Latinos and Native Americans are overrepresented in the country's poor population, the great majority of that population is still white. Children from poor African-American and Latino families make up less than half of all poor children."* The factual statements in this paragraph are simply wrong. According to the authoritative Statistical Abstract of the United States 2004-2005 (124th ed.), there were just over 12.1 million children in the United States living below the poverty line in 2002. Of these, over 3.6 million were black and nearly 3.8 million were Hispanic. Though there is a little bit of overlap between these two groups, black and Hispanic children together constituted a majority of all poor children. My own analysis of the American Community Survey data (compiled by the US Census) for 2005 shows black and Hispanic children made up 57% of all poor children.

38. Similarly, it is not true that "the great majority" of the poor population is white, unless one counts Hispanics as "white", which Dr. Bowen's statement clearly does not. According to my analysis of 2005 ACS data, non-Hispanic whites made up less than 46% of the poverty population.

39. Bowen Paragraph 13. *"Thus, according to my analysis published in Equity and Excellence, moving from a race-conscious admissions policy to a class-based one would substantially reduce the minority enrollments at selective institutions, and severely impair current efforts to achieve racial diversity."* Dr. Bowen is, of course, accurately describing his own book's conclusion. But, like Dr. Oakes, Dr. Bowen's conclusions ignore three important observations. First, relying predominantly on racial preferences to "diversify" a university typically leads to large credential gaps between minorities and whites at the university, with consequent harmful effects to the minorities. Second, the use of alternatives to race-conscious preferences at the University of California has produced a very high level of socioeconomic diversity and still very substantial racial diversity. Third, changes in policies that produce large increases in socioeconomic diversity but only moderate declines in racial diversity are, very plausibly, positive both for the diversity climate of a university and for the ultimate outcomes of minority candidates in their course of study, graduation rates, and career success.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of January, 2008.


Richard H. Sander