



*Policy Information Perspective*

# **Affirmative Action and Diversity:**

*The Beginning of the End?  
Or the End of the Beginning?*

*by Mark R. Killenbeck*



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## PREFACE

It has been eight years since the Federal Court of Appeals' decision in *Hopwood v. Texas*. That case began the recent round of assaults on affirmative action in college and university admissions and started its ascent to becoming the largest issue in American higher education in the later half of the 1990s and the initial years of the present decade. It became the preeminent issue when voters in California and Washington altered, through public referendums, the practices of their public universities, and the champions of those referendums threatened to extend their campaigns to more states.

It was the steadfast conviction of the University of Michigan in defending its undergraduate and Law School admissions policies that arrested the decline of college and university authority over admissions practices. While leadership and conviction were essential elements, it was the University's argument and evidence that diversity was an indispensable educational value that ultimately prevailed. Last year, the nation watched and waited as the Supreme Court conducted its review. In the end, the fragility of affirmative action was never more apparent than in a divided decision that left college and university leaders, faculty, students and prospective students, and plaintiffs and defendants alike continuing the discourse toward understanding the Court's decision.

How much of a victory has the Court rendered for affirmative action? What criteria and practices may colleges and universities legally employ in the admissions process? What did the Court conclude about the educational value of diversity? What type of educational research will be influential in future legal challenges? Did the Court establish a schedule for future considerations of its decisions? And what principles should colleges and universities follow in this new era of affirmative action?

These are complex questions and to help lead the conversation we turned to Mark Killenbeck, the Wylie H. Davis Distinguished Professor of Law at the University of Arkansas. Mark is one of the nation's leading legal scholars, and in this Policy Information Perspective he provides an eloquent and balanced articulation of the contemporary challenge. He interprets the overall decisions of the Court as well as some of the written expressions of individual Justices. Professor Killenbeck offers some guiding principles for colleges and universities to follow as they re-engineer their admissions programs to pursue diverse student bodies. Professor Killenbeck advances our understanding of both what went awry to lead to the past decade of adversity, and the prospects for affirmative action in admissions in the future. I expect his perspective to make a positive contribution toward elevating the quality of discourse and practice.

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## INTRODUCTION

### *Is diversity a compelling educational interest?*

For several years, in the wake of the United States Supreme Court's landmark *Bakke* decision,<sup>1</sup> a sizable and influential segment of the higher education community has maintained vigorously that it is. These individuals and institutions believe that a racially, ethnically, and socially diverse student body is the sine qua non of excellence, an essential means by which each participant in the educational process will maximize educational attainment and personal and social development.

The force of these beliefs is such that the importance of diversity has become an article of faith in the higher education community. Unfortunately, many institutions and degree programs, in particular those that wish to remain selective, find it difficult at best to achieve the diversity they seek through the normal admissions process. This is especially the case when the goal is racial or ethnic diversity, given an historic and continuing inability on the part of many individuals from what are now characterized as "underrepresented groups" to achieve the standardized test scores and grade point averages required for routine admission to elite institutions and selective graduate and professional degree programs. As a result, the argument on behalf of diversity inevitably in-

cludes a corollary, the assumption that it is not simply necessary but educationally appropriate to use affirmative admissions systems, within which group identity becomes an important, perhaps even a dispositive consideration in the admissions decision.

These views, while pervasive, are not unanimous. A persistent and vocal minority have disputed vigorously both the premise and the policies it engenders, maintaining that the affirmative consideration of group identity violates both the academic norm and the principles for which this nation stands. Their protests have largely fallen on deaf ears within the higher education establishment. But these individuals and groups have experienced a degree of success in both the courts and the body politic that has confounded diversity's supporters and given hope to its opponents. In March 1996, for example, a panel of the United States Court of Appeals for the Fifth Circuit sent shock waves through higher education when it held, in *Hopwood v. Texas*,<sup>2</sup> both that the *Bakke* decision was not binding and that diversity was not a compelling educational interest. In California, in turn, the political process yielded a similar result with the passage of Proposition 209, which declared that "[t]he state shall not discriminate against,

<sup>1</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>2</sup> 78 F.3d 932 (5th Cir. 1996), *reh'g denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

or grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>3</sup>

These and similar developments were viewed with deep alarm by those who believe that a diverse student body is important and that affirmative action is necessary to attain it. They treat any departure from the diversity norm as threatening a return to a segregated higher education system within which the nation’s racial and ethnic minorities would again be denied critical opportunities for advancement. But these successful assaults on affirmative action have also had the salutary effect of sharpening the debate and focusing attention on the need to consider carefully both the rationales for and consequences of the quest for diversity. Ironically, the success diversity’s opponents have enjoyed has forced its supporters to rethink in critical ways their strategy as they defend the admissions schemes in which they have invested so much psychic and educational capital.

As has so often been the case, the various threads of this contentious debate converged at the Supreme Court of the United States,

which arguably resolved the threshold legal question on June 23, 2003. Writing for what was admittedly a bare majority in *Grutter v. Bollinger*, one of two decisions involving affirmative admissions programs at the University of Michigan, Justice O’Connor announced that the higher education community does indeed have “a compelling interest in attaining a diverse student body.”<sup>4</sup> The nation’s colleges and universities—both public and private<sup>5</sup>—may accordingly take the group identity of an individual into account when they make the decision to admit or reject an application, provided they undertake “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>6</sup>

Supporters of affirmative action were ecstatic. *Grutter* and its companion case, *Gratz v. Bollinger*,<sup>7</sup> represented, in the words of the *Joint Statement by National Higher Education Leaders*, a significant victory, one that would “enable our institutions. . . to be welcoming places to students of all races and walks of life. . . .”<sup>8</sup> University of Michigan President Mary Sue Coleman praised a “resounding affirmation” of the principle of diversity “that

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<sup>3</sup> Cal. Const. art. I, § 31(a). A similar state ban is in effect in Washington. Wash. Code Ann. § 49.60.1 (West 1999). Since these mandates represent voluntary decisions by the people of these states to bar affirmative action, they remain valid even though the Supreme Court has now held that such programs do not necessarily violate the United States Constitution.

<sup>4</sup> *Grutter v. Bollinger*, 123 S. Ct. 2323, 2339 (2003).

<sup>5</sup> The Michigan cases obviously involved public institutions, and the legal focus was the Fourteenth Amendment, which governs only public actors. The Court made it clear, however, that the analysis is the same under Title VI of the Civil Rights Act, which does apply to private actors. *Id.* at 2347.

<sup>6</sup> *Id.* at 2343.

<sup>7</sup> *Id.* at 2411. *Grutter* focused on the program at Michigan’s Law School, while *Gratz* dealt with that in place at its College of Literature, Science, and the Arts.

<sup>8</sup> American Council on Education, *Joint Statement by National Higher Education Leaders on Today’s Decision by the U.S. Supreme Court in Gratz v. Bollinger and Grutter v. Bollinger* [Press release], June 23, 2003.

will be heard across the land, from our college classrooms to our corporate boardrooms.”<sup>9</sup> Critics in turn both castigated the Court and vowed to continue their legal assaults on preferences. Terry Pell, President of the Center for Individual Rights, characterized the decisions as a “mixed verdict” that would in reality mark “the beginning of the end of race preferences.” In his estimation, the Court’s holding “heightens the risk for universities that want to continue to use racial preferences in college admissions,” tempting them to engage in precisely the sorts of practices that would bring these matters back into the judicial arena.<sup>10</sup>

These divergent responses reflect the very nature of this dispute, within which starkly different visions of equality compete for the moral, legal, and educational high ground in ways that all too often render the opposing parties as ships passing in the night. My own views on these matters are mixed. As I will make clear, I deeply regret that the dialogue is necessary, especially when it focuses, as is so often the case, on the educational needs and social and professional opportunities of this nation’s minority groups. And while I have at least some personal sense that diversity in the classroom can matter, I am far from convinced that the majority of institutions pursuing that goal have previously or will now in the wake of these decisions do so for the right reasons, much less in a constitutionally permissible manner.

These conflicted and conflicting impressions have led me to the conclusion that, depending on how the higher education community responds, the Michigan decisions mark either the end of the beginning or the beginning of the end. Is the debate about the value of diversity over, given the Court’s holding that it is a compelling constitutional interest? Are colleges and universities wishing to engage in affirmative action now free to concentrate on achieving that goal? Or do the details of the Court’s rulings, coupled with the tendency of many institutions to act in ways that will not pass constitutional muster, pose threats that may well spell the eventual end of affirmative admissions? In particular, does the Court’s apparent insistence that these practices must end within 25 years, if not sooner, make *Grutter* a Pyrrhic victory?

Which of these proves to be the case will depend not just on how higher education responds to these decisions, but on how the nation as a whole deals with the challenges they pose and the opportunities they present. The Court has, at least for the time being, reaffirmed the importance of diversity and authorized the use of group identity as a factor in the admissions process. But it has also carefully limited the nature and scope of such programs, requiring both that they meet appropriate constitutional standards and that they be limited in duration. The potential benefits are great for a number of groups whose members have historically been unable to

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<sup>9</sup> University of Michigan, *U.S. Supreme Court Rules on University of Michigan Cases* [Press release], June 23, 2003.

<sup>10</sup> Center for Individual Rights, *Supreme Court’s “Mixed Decision” on Racial Preferences* [Press release], June 23, 2003. The Center initiated the Michigan litigation.

avail themselves of the opportunities and benefits associated with a higher education. But so, too, are the risks for colleges and universities as they seize the opportunities presented in a political and social environment that will, I suspect, all too often continue to lead them astray.

My goal in this paper is accordingly to dissect these opinions and then identify what I believe should be the principles that must inhere to any sound affirmative admissions regime. As a law professor, much of what I have to say about these matters inevitably reflects my interest in this as a constitutional matter. But as someone with an interdisciplinary academic background and research agenda whose professional life has involved more than simply teaching and writing about the law, I hope to bring to this discussion a sense of the educational and social policies that affirmative action and diversity should reflect.

A cautionary note: Much of the discussion of affirmative action and diversity, both before and after these decisions, has tended to treat these matters as though we are talking only about the educational needs and prospects of this nation's African Americans. This reflects the perception in both the body politic and much of the higher education community that the need for affirmative admissions systems and the questions posed by them are invariably issues for which this is the only group that matters. Thus, when Justice

O'Connor began her opinion for the Court in *Grutter* with the statement that "[t]his case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful,"<sup>11</sup> the assumption was that race in that instance means African American.

But the policies at issue in the Michigan litigation were not, at least as written, that narrow. The Law School, for example, spoke of " 'many possible bases for diversity admissions,' " albeit with an emphasis on " 'one particular type of diversity,' " that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.' "<sup>12</sup>

The Michigan policies were accordingly entirely consistent with the diversity norm as properly understood, within which a potentially infinite range of personal characteristics factor into the quest to " 'achieve that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts.' "<sup>13</sup> This is as it should be, for, as I will make clear when I discuss what I characterize as "principled" affirmative action, a diversity policy cannot and should not focus on a single group, either in theory or practice. The educational values associated with diversity are not con-

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<sup>11</sup> *Grutter*, 123 S. Ct. at 2331.

<sup>12</sup> *Id.* at 2332 (quoting the Law School admissions policy).

<sup>13</sup> *Id.* (quoting the Law School admissions policy).



fined to those situations where meaningful numbers of a given minority group gain admission to our colleges and universities. This is instead a debate about educational opportunity for all individuals, and it is important to remember that the policies at issue are as much about the needs and interests of, for example, Latinos and Native Americans, as they are of African Americans.

Indeed, it is worth recalling that in the not too distant past this was also a debate about the needs and aspirations of women. And it is telling that it may, ironically, soon mutate into a dialogue about the educational prospects of men. Justice Thomas noted at least one portion of this when he discussed

the extent to which “black men are ‘underrepresented’ at the Law School” and criticized the apparent failure of the Law School to take this into account.<sup>14</sup> We have not yet reached the point where the argument about these matters has in effect come full circle. But current concerns about the failure of men to seek a college or university degree may produce a new diversity debate about the extent to which student bodies reflect a gender imbalance. If that happens, the irony posed by affirmative consideration of gender on behalf of White men will be profound. As will, I suspect, be the outrage expressed by some individuals at the very notion.

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<sup>14</sup> *Id.* at 2362 n.11 (Thomas, J., dissenting).

## THE LEGAL MATRIX

*The policies under attack in Grutter and Gratz were premised on the assumption that for the purposes of fashioning a diverse student body—and making available the educational benefits that presumably inhere in such an environment—race matters.*

Michigan asserted that the diversity it sought is integral to its educational mission, within which race and excellence were inextricably linked. And it argued that meaningful diversity could not be achieved absent the active consideration of race in the admissions process.

As least as a legal matter, these assumptions appeared to violate what has been deemed by the Court—and in most instances by civil rights advocates—to be perhaps the most fundamental guarantee in our constitutional system: the Fourteenth Amendment's promise that each individual is entitled to "the equal protection of the laws," in particular, that the color of one's skin simply cannot and should not matter when decisions allocating the benefits and burdens of daily life are made. The Constitution, the Court has emphasized, "protects persons, not groups," and all "government action based on race—a group classification long recognized to be in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."<sup>15</sup> The Court has therefore insisted that we treat all racial classifications as constitutionally suspect and assesses them within the confines of its most rigorous analytic framework, strict scrutiny. This approach re-

quires that the entity wishing to take race into account have a "compelling" reason for doing so and must employ the "least restrictive means," that is, demonstrate that there is simply no other way to attain that goal.

This is an analytic regime whose demands—and the outcomes of virtually all of the cases within which it has been applied—have led some individuals to postulate that it is "strict in theory, fatal in fact." Indeed, the strictures imposed by this legal standard played an undeniably important role in what the Court did and did not hold the first time it assessed the constitutionality of affirmative action and diversity.

Most educators have assumed since 1978 that race-based affirmative action admissions programs in higher education should be assessed within and generally were condoned by the analytic framework created by Justice Powell's *Bakke* opinion. But the *Bakke* Court was deeply divided. Five different members of the Court wrote opinions, within which a majority arguably agreed that the University of California, Davis Medical School had "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."<sup>16</sup> A different group of five, however, found that the University had failed to establish that the particular approach

<sup>15</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>16</sup> *Bakke*, 438 U.S. at 320.

it had adopted was “necessary to promote a substantial state interest.”<sup>17</sup> The common link was Justice Powell, whose opinion came to be regarded as that of the Court.

The essential consideration for Justice Powell was his belief that universities had a compelling interest in pursuing what he characterized as “genuine diversity.” In a key passage, Justice Powell declared: “It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”<sup>18</sup>

The focal point was then the notion that the pursuit of a diverse student body was an appropriate and respected academic goal. Drawing on both the academic literature and the Court’s own opinions, he declared that “our tradition and experience lend support to

the view that the contribution of diversity is substantial.”<sup>19</sup> And the linchpin in his analysis was an expectation that institutions opting to pursue diversity would in fact do so in the same way that Harvard College did, that is by simply “pay[ing] some attention to distribution among many types and categories of students.”<sup>20</sup>

I have discussed at length elsewhere whether it was appropriate to characterize Justice Powell’s *Bakke* opinion as a solo effort that could not reasonably be read as expressing the views of the Court itself.<sup>21</sup> My conclusion was and remains that one could in fact find five votes in favor of the Powell position, an exercise now made unnecessary by Justice O’Connor’s close embrace of the Powell approach in a *Grutter* opinion that commanded the votes of a clear majority of the Court. The point here is not to engage in that debate, but rather to explain why the *Bakke* decision came under sustained and increasing successful attack in a series of cases within which the fragmented nature of the Court and the superficially solitary nature of the Powell opinion were stressed and debated. In each instance, the emphasis was on the threshold question: Is diversity a compelling interest?

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 313.

<sup>20</sup> *Id.* at 316-17. It is important to note that the only support for these conclusions was the considered judgment of a wide spectrum of the higher education community about what universities should seek through their admissions programs. As I will explain, this proved to be important in subsequent litigation and is perhaps the most important difference between the Powell opinion in *Bakke* and the O’Connor opinion in *Grutter*.

<sup>21</sup> Mark R. Killenbeck, “Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action,” *California Law Review*, 87, p. 1299, 1999.

Major decisions in the federal courts of appeals went both ways. Perhaps the most telling blow was struck in *Hopwood v. Texas* by a panel of the Court of Appeals for the Fifth Circuit, which characterized Justice Powell's *Bakke* opinion as the work of a single Justice that did not command the support of a majority of the Court. Having freed itself from the strictures of *Bakke*, that panel then felt free to declare that "the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."<sup>22</sup> A panel in the Eleventh Circuit seemed to agree in *Johnson v. Board of Regents of the University of Georgia*, invalidating Georgia's program, albeit expressly declining to actually hold that diversity is, or is not, a compelling interest.<sup>23</sup> But in *Smith v. University of Washington Law School*, a panel in the Ninth Circuit did reach that question, relying on the Powell opinion as it held that "the attainment of a diverse student body 'is a constitutionally permissible goal for an institution of higher education.'"<sup>24</sup> And, in the decision ultimately reviewed by the Court, a narrow majority of the full Sixth Circuit agreed. Believing itself bound by

*Bakke*, that court held that the University of Michigan "has a compelling state interest in achieving a diverse student body."<sup>25</sup>

The Court had previously refused to enter the lists, denying review in *Hopwood*, *Smith*, and *Johnson* when one or more of the parties in those cases asked that it exercise its discretion and hear the case. But it did accept the Michigan cases, which were seen as ideal vehicles for a number of reasons.

One of those reasons might have been the one Justice O'Connor mentioned in *Grutter*: the need to resolve the conflict among the various federal courts of appeals created by divergent rulings that made such policies constitutional or unconstitutional depending not on their intrinsic legal merits, but rather on the location of the institution. But that rationale, while important, clearly was not determinative, for that conflict already existed at the point that the Court refused to hear the *Johnson* case. Rather, I believe that the critical consideration was the decision by the University of Michigan to defend its efforts vigorously and in a manner that set it apart from the other universities whose policies had been questioned.

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<sup>22</sup> *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996).

<sup>23</sup> *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001).

<sup>24</sup> *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (quoting *Bakke*).

<sup>25</sup> *Grutter v. Bollinger*, 288 F.3d 732, 742 (6th Cir. 2002). One of the curious realities of the *Grutter* and *Gratz* litigation is that both cases were argued together before the Sixth Circuit, but only one was decision was issued, that involving the Law School in *Grutter*. The Sixth Circuit never issued an opinion in *Gratz*, and that case came to the Supreme Court via the highly unusual route of the Court granting a petition for review in advance of judgment from the court below.

## THE MICHIGAN APPROACH

*In law, as in life, faith matters, but facts are often determinative.*

And one of the most significant and persistent problems in this area has been a dogged insistence by the higher education establishment that the intrinsic importance and positive impact of diversity should be taken as an article of faith. In legal terms, educators have asked judges to follow a rule and tradition of deference, within which they should respect the “professional judgment” of a “person competent, whether by education, training or experience, to make the particular decision at issue.”<sup>26</sup> In cases involving all levels of education, and in particular the actions of college and university faculty, a combination of constitutional command and respect for the realities of academic life yields a general rule: “When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”<sup>27</sup>

That rule poses a problem when the case before a court involves race, given the rigor that strict scrutiny demands when assessing a claim that race should somehow matter in spite of the equal protection guarantee. And in the specific context of affirmative action and diversity, a number of universities compounded the problem by insisting that the courts should in effect trust them to do what was right, even as they engaged in practices that could not possibly be defended as legal. In the *Hopwood* litigation, for example, the University of Texas maintained with considerable vigor that its law school admissions system was in compliance with *Bakke*, even as it did exactly what every member of the *Bakke* court said you could not do: create a dual track admissions system within which minority applicants were evaluated separately and under a different, indeed, occasionally changing set of standards.

The University of Maryland, in turn, tried to defend its Banneker scholarship program, which was available only to minority students, as an appropriate way for it to remedy the

<sup>26</sup> *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982).

<sup>27</sup> *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

current effects of its past discrimination against the African American citizens of Maryland. It took that approach because, in a separate line of cases, the Court has indicated that an entity may take race into account if it is attempting to remedy the present, pervasive effects of its own past conduct. Indeed, in one of those cases it approved a remedy that could only be described as a quota, one of the evils *Bakke* condemned.<sup>28</sup> But Maryland awarded those scholarships, in transparent violation of the justification it embraced, to anyone who was Black, regardless of which state or even, in some instances, which nation they were from.

Simply put, the conduct of many of the nation's colleges and universities had given affirmative action and diversity an image problem, one that made it at best problematic for a court to invest confidence in the arguments they were hearing when these or similar institutions appeared before them. This made one aspect of the Michigan litigation especially important, as the University early on made what may well have been the determinative decision to defend its policies not simply as the right thing to do or as consistent with accepted academic assumptions, but also as undertakings that had a substantial, positive, and documented impact on the educational experiences and outcomes of all of the students involved, regardless of race.

The catalyst for the decision to proceed in this manner may well have been a series of conferences sponsored by the Harvard Civil Rights Project. In particular, one held on May 9, 1997, brought together both leading social scientists with a special interest in exploring the impact of diversity on student outcomes and the attorneys who would represent Michigan in the lawsuits that were about to be filed. The focus at that and subsequent meetings, and in a series of studies and publications that followed, was narrow and specific: What is the evidence, and how might it best be employed to frame the issues for a confrontation that seemed virtually certain to lead to a decision by the Supreme Court?

The use of social science materials by the Court has a long, albeit occasionally controversial history. In *Brown v. Board of Education*, for example, the Court stressed that “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*,” the conclusion that “segregation of white and colored children in public schools has a detrimental effect upon the colored children” is now “amply supported by modern authority.”<sup>29</sup> Critics of *Brown* spoke out against a decision that was “based neither on the history of the [Fourteenth A]mendment nor on precise textual analysis but on” the “highly evanescent grounds” of “psychological knowledge.”<sup>30</sup> But it is clear that the Court believed

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<sup>28</sup> *United States v. Paradise*, 480 U.S. 149 (1987). In that case the Court sustained a legal remedy that, in the light of a history of invidious discrimination, imposed a “one-black-for-one-white” promotion regime for state troopers in Alabama.

<sup>29</sup> 347 U.S. 483, 494 n.11 (1954).

<sup>30</sup> Carl Brent Swisher, *The Supreme Court in Modern Role*, p. 158, New York: New York University Press, 1958.

then, and continues to assume, that social science materials can and should play an important role in its decision-making process. Indeed, this is an area where Judge Posner's observations about the limitations of constitutional theory and the "need for empirical knowledge" are especially apt, for "[t]he big problem" surrounding the debate about diversity "is not lack of theory, but lack of knowledge—lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce."<sup>31</sup>

Michigan's decision to make social science materials a centerpiece in its defense of its policies therefore served a number of important purposes. It certainly fulfilled Judge Posner's expectation that the courts would have the benefit of actual knowledge about the actual effects of a diverse learning environment. More importantly, the Michigan litigation became the catalyst for an extensive series of studies and reports on both sides of the debate. And the information generated appears to have been of considerable value, a point Justice O'Connor stressed when she

noted with approval "the expert studies and reports entered into evidence at trial" and the "numerous studies [that] show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"<sup>32</sup>

The studies accordingly served certain important instrumental purposes. They freed the majority from the burden of making their acceptance of the University's diversity rationale an exercise in pure deference.<sup>33</sup> As a result they made the case for diversity something more than a simple article of faith, one that otherwise skeptical Justices might have had difficulty accepting given higher education's prior transgressions. And they began a process that may ultimately be of extraordinary importance, albeit one that may prove to be a double-edged sword, by grounding the debate about the value of diversity in its actual impact on all participants in the educational process, rather than admittedly important but nevertheless elusive notions of equality or fairness.

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<sup>31</sup> Richard Posner, "Against Constitutional Theory," *New York University Law Review*, 73, p. 3, 1998.

<sup>32</sup> *Grutter*, 123 S. Ct. at 2340 (quoting the Brief of the American Educational Research Association).

<sup>33</sup> Justice O'Connor did, in an unfortunate passage, note the extent to which the Court had traditionally deferred to the professional judgment of educators. But, as I will stress shortly, her opinion was in fact much more searching than this brief aside implied.

## THE MICHIGAN DECISIONS

*The divisive nature of the diversity debate was on full display in the decisions of the Court.*

The majority opinion in *Grutter* commanded five votes: those of Justice O'Connor, who wrote for the Court, and of Justices Stevens, Souter, Ginsburg, and Breyer. Four members of the Court dissented: Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Consistent with prior decisions involving questions about the constitutionality of using race as a decision-making or decision-influencing criterion, the majority answered two questions. Does the use of race in postsecondary admissions constitute a compelling interest? And are the means employed by the University of Michigan Law School narrowly tailored, that is, has the Law School shown that the only way to achieve its arguably compelling objectives is to take race into account?

The answer in each instance was yes.

The first question was clearly the most important. That does not mean that the narrow tailoring inquiry is not also significant. Indeed, experience has shown that it is in fact the more difficult question as a practical matter, given the manner in which so many colleges and universities have structured and implemented their affirmative admissions programs. But if the Court had not held that the pursuit of a diverse student body was a compelling constitutional interest, the active

consideration of race in the admissions process would have been foreclosed in all but the most extreme circumstances, those instances where a specific institution was acting to remedy the current effects of its own past, intentional discrimination. It is accordingly important to understand exactly why the Court held what it did regarding the importance of diversity.

The core of the *Grutter* opinion on this point is the majority's declaration that "we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>34</sup> That is, as Justice O'Connor emphasized, the majority was willing to accept the "educational judgment" that "diversity will, in fact, yield educational benefits."<sup>35</sup> Those benefits, the Court stressed, are both "real" and "substantial." Diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"<sup>36</sup> These outcomes are in turn "both important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."<sup>37</sup> In particular, both social science evidence and the positions

<sup>34</sup> *Grutter*, 123 S. Ct. at 2337.

<sup>35</sup> *Id.* at 2339.

<sup>36</sup> *Id.* at 2339-40 (quoting the District Court).

<sup>37</sup> *Id.* at 2340 (quoting the District Court).



taken by a wide spectrum of business and military leaders, made it clear that “[t]hese benefits are not theoretical, but real.”<sup>38</sup>

Much of the emphasis in *Grutter* was then on a point I have already stressed. The Court was not simply taking at face value the supposedly good faith assertions by the college and university community that diversity is important. Justice O’Connor did in fact speak of an “educational judgment . . . to which we defer.” But the very next sentence in her opinion made the immediate and important transition to what I suspect was the crucial consideration: the fact that the University’s “assessment that diversity will, in fact, yield educational benefits is substantiated by [the University] and” the parties supporting it before the Court.<sup>39</sup> That is, the University of Michigan and a wide spectrum of educational, political, business, military, and social groups offered what the majority believed to be compelling evidence demonstrating that the benefits associated with diversity actually occur in each of the many distinctive educational environments that comprise the spectrum of postsecondary education.

The dissenting Justices did not see it this way. Justice Thomas, for example, condemned what he characterized as the majority’s “unprecedented deference to the Law School—a deference antithetical to strict scrutiny.”<sup>40</sup>

Some commentators have agreed. But it is difficult to see just what the majority could have done—other than rejecting diversity as a compelling interest—to satisfy these critics. The majority’s discussion of the issue was lengthy. And its conclusion that the benefits of diversity were “substantial . . . not theoretical but real” was supported not simply by the assurances of the University, but by an extensive body of evidence.

Michigan argued that the active consideration of race was in turn essential given its belief that it was important to enroll a “critical mass” of minority students. The assumption was that it was necessary to achieve numbers “such that underrepresented minority students do not feel isolated or like spokespersons for their race.”<sup>41</sup> But that could not be accomplished without making racial identity one factor in the admissions decision. In the case of the Law School, for example, the evidence established that “the race of the applicants [must be considered] because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores.”<sup>42</sup> The University argued, accordingly, that absent the active consideration of race as part of the admissions decision, “most of this Nation’s finest institutions [would be forced] to choose

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2356 (Thomas, J., dissenting). Justice Kennedy in turn spoke of “a review that is nothing short of perfunctory.” *Id.* at 2371 (Kennedy, J., dissenting).

<sup>41</sup> *Id.* at 2334. I characterize this as an assumption because the majority did in fact defer to a University judgment about the importance of a critical mass that was not supported by the sort of evidence offered regarding the value of diversity.

<sup>42</sup> *Id.* at 2333.

between dramatic resegregation and completely abandoning standards that have made American higher education the envy of the world.”<sup>43</sup>

As indicated, the conclusion that diversity is indeed a compelling educational interest is only a necessary first step. It was also essential for Michigan to demonstrate that it had embraced a constitutionally appropriate means toward that end. That is, the University needed to prove that “ ‘the means chosen ‘fit . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotypes.’ ”<sup>44</sup>

The majority believed that the Law School’s approach was narrowly tailored within each of the four parameters deemed necessary. The first and arguably most important of these was that it treated each applicant as an individual. The Law School, Justice O’Connor stressed, took race into account “in a flexible, nonmechanical way.”<sup>45</sup> It “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>46</sup> The Law School also met three additional requirements. It had considered and rejected various race-neutral alternatives, believing them inconsistent with its educational mis-

sion and institutional objectives. Since there was in fact an individual review of each applicant’s file, the system did not impose an “undue” burden on those nonminority applicants who were denied admission. And the Law School recognized that the policy should be limited in duration and subject to periodic review, insuring that this “deviation from the norm of equal treatment” would be “ ‘a temporary matter, a measure taken in the service of the goal of equality itself.’ ”<sup>47</sup>

This contrasted sharply with the method employed by Michigan’s College of Literature, Science, and the Arts, which used a point system to make virtually all of the critical decisions involved in deciding to accept or reject a given applicant. Writing for the majority in *Gratz*, the Chief Justice declared that “the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that [the University] claims justifies its program.”<sup>48</sup> The sheer size of the point allocation was clearly important. The Chief Justice stressed that “even if [a student’s] ‘extraordinary artistic talent’ rivaled that of Monet or Picasso, the applicant would receive, at most, five points” under the Michigan system, while

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<sup>43</sup> Brief for Respondents at 13, *Grutter v. Bollinger*, 123 S. Ct. 2323 (2003) (No. 02-241).

<sup>44</sup> *Grutter*, 123 S. Ct. at 2341 (quoting *Richmond v. J.A. Croson Co.*).

<sup>45</sup> *Id.* at 2342.

<sup>46</sup> *Id.* at 2343.

<sup>47</sup> *Id.* at 2346 (quoting *Croson*).

<sup>48</sup> *Gratz*, 123 S. Ct. at 2428.

“every single underrepresented minority applicant . . . would automatically receive 20 points [simply] for submitting an application.”<sup>49</sup>

The critical flaw was not, however, the point system itself, but rather the mind set it represented. By relying on this mechanical screening device and by loosening its strictures only in rare circumstances, Michigan created the impression that characteristics mattered more than the individual. It was accordingly the failure to provide meaningful individualized consideration that doomed the policy at issue in *Gratz*, an approach that stood in stark contrast to the one employed by the Law School.

Arguably, the victory for affirmative consideration of race in the pursuit of a diverse student body was complete. Unlike *Bakke*, a clear majority of the *Grutter* Court agreed on the core holdings, the presence of a compelling interest and approval of at least one admissions policy that met the narrow tailoring requirement.

But it is important to recognize just how narrow the holding was. Depending on how one characterizes the views of Chief Justice Rehnquist and Justice Kennedy, the vote for diversity was either 5-4 or 6-2. The Chief’s dissent focused on the narrow tailoring inquiry and is arguably silent on the diversity question. Justice Kennedy in turn seemed to accept the diversity rationale, but did so on the basis of “precedents” that allow for acceptance

of “a university’s considered judgment” and “empirical data known to us.”<sup>50</sup> These strike me as slender reeds on which to hang the conclusion that Justice Kennedy accepts fully the diversity rationale, especially in the context of a dissent that treats strict scrutiny as a “unitary formulation” and then excoriates the majority for its handling of the narrow tailoring inquiry. As a practical matter then, *Grutter* represents a triumph that could easily be reversed by retirements and the appointment of individuals who do not share, for example, either Justice O’Connor’s or Justice Stevens’ commitment to diversity.

Diversity’s champions cannot, accordingly, rest on their laurels. Indeed, more litigation is in the offing, a reality that must be taken into account even if the composition of the Court does not change. The Center for Individual Rights, which has been perhaps the most active advocate against affirmative programs and which represented the plaintiffs in the Michigan cases, has made it clear that it will monitor events at Michigan and elsewhere, testing both the continuing validity of the principles embraced in *Grutter* and the means employed to implement them. Some of these cases may well take the forms suggested by Justice Scalia in his *Grutter* dissent, where he offers a laundry list of potential claims, each of which, no matter how far-fetched, will likely materialize. And many will question attempts to apply the logic of *Grutter* in other contexts, an expansion that has al-

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<sup>49</sup> *Id.* at 2429.

<sup>50</sup> *Id.* at 2370-71 (Kennedy, J., dissenting).

ready begun as some institutions cite the diversity rationale as a predicate for scholarship programs and other initiatives outside the admissions process.

More tellingly, certain aspects of both *Grutter* and *Gratz* argue for caution. Perhaps the most important is one the majority stressed continuously: Context matters. The Court's holding is very specific and narrow: Diversity is deemed a compelling educational interest for the sole purpose of structuring admissions programs, specifically, for colleges and universities. These decisions do not, accordingly, offer a legal predicate for the affirmative use of race for any other purpose or in any other setting. Some observers disagree, finding in *Grutter* both "justification[s] for other types of race-conscious policies in higher education—such as recruitment and outreach, financial aid, and retention programs" and "a solid base on which to advance" a variety of diversity interests in areas other than higher education.<sup>51</sup> This may prove to be the case, although I am skeptical. It is always possible that *Grutter* might prove to be another *Brown*, which was on its face a holding limited to the problems posed by segregation in the nation's K-12 schools but which eventually served as the predicate for a sweeping anti-discrimination principle. But it is important to recognize that that expansion required further action and affirmation by the Court itself, as will likely be the case in the wake of any attempt to use *Grutter* as the legal predicate for race-based initiatives out-

side the narrow confines of the admissions process.

A second important aspect of the decisions is their insistence that any affirmative admissions program be narrowly tailored. An institution wishing to take race into account must do so with care, mindful of each of the four hallmarks stressed by the Court. It cannot proceed in a thoughtless or mechanical fashion, a point driven home when the Court rejected the undergraduate admissions system at issue in *Gratz*. It must rather have what I will characterize later in this paper as the courage of its convictions, the willingness to expend the time, energy, and money necessary to create an admissions program within which consideration of race is simply one facet of a truly individualized decision.

This will be especially important given the Court's acceptance of the critical mass principle, a holding that will almost certainly pose the temptation to engage in precisely the sorts of unconstitutional conduct that every member of the Court condemned. I am, for example, confident that the need for a critical mass will be used as the justification for fashioning a new generation of affirmative action policies within which bottom line numbers will matter a very great deal. This poses a major problem given the comparatively small number of truly qualified minority applicants for whose affections an expanded universe of institutions will now compete. But diversity is an appropriate goal, and a critical mass, is an appropriate component in that quest only

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<sup>51</sup> Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, p. 17-8, Cambridge, MA: The Harvard Civil Rights Project, 2003.

if each student admitted is in fact qualified. And provided further that the institution does not in fact or at least create the impression that its policy seeks the attainment of “ ‘some specified percentage of a particular group merely because of its race or ethnic origin,’ ” an approach that “would amount to outright racial balancing, which is patently unconstitutional.”<sup>52</sup>

The Court’s emphasis on context raises an additional question. One of the hallmarks of the Michigan policies was that institution’s determination to preserve its status as one of the nation’s preeminent universities. The *Grutter* majority accepted the premise that active consideration of race in the admissions process was necessary not simply because diversity was important, but also because Michigan could not preserve its elite status any other way. This provoked both Justices Scalia and Thomas to argue vigorously in dissent that the real issue was not Michigan’s quest for diversity, but rather its “interest in maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities.”<sup>53</sup>

They were, of course, correct, and Justice O’Connor and her colleagues conceded as much when they accepted the argument that certain “race neutral” approaches were inappropriate in the specific context of institutions of this nature. “[T]hese alternatives,” she

wrote, “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”<sup>54</sup> In this respect, the situation Michigan faced was indeed one of its own making.

But is that really a problem, or at least one of constitutional dimensions? If, for example, the only educational needs a public university can constitutionally serve are those of the citizens that pay the taxes that support it, then it is entirely appropriate for Justice Thomas to compare Michigan to Wayne State and conclude that “[t]he Law School’s decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.”<sup>55</sup> I doubt, however, that this matters all that much given the realities of a higher education continuum within which every institution and virtually every degree program serves a distinctive constituency and makes informed judgments regarding the characteristics required to successfully complete a course of studies. The question is not whether the University of Michigan should be “elite.” It is rather whether, having made that decision, it may take race into account when it admits students. The quarrel about whether Michigan should maintain its elite status is then one for the people of Michigan, rather than the Court.

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<sup>52</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>53</sup> *Id.* at 2349 (Scalia, J., dissenting).

<sup>54</sup> *Id.* at 2345.

<sup>55</sup> *Id.* at 2355 (Thomas, J., dissenting).

Finally, one notable aspect of the decisions, less remarked upon but potentially far more telling, is the Court's insistence that affirmative admissions programs be limited in duration. Assuming for the sake of argument that some critics are correct and that much of what happened in the Michigan cases reflected the Court's willingness to treat higher education as special, Justice O'Connor nevertheless stressed that "[w]e see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical ending point."<sup>56</sup> Noting that "[i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity" and that "[s]ince that time, the number of minority applicants with high grades and test scores has indeed increased," Justice O'Connor and her colleagues laid down the gauntlet: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>57</sup>

The full force of this passage is a matter of some dispute. For example, in an analysis published by the Harvard Civil Rights Project, a group of prominent constitutional law scholars maintain that it "should be construed as . . . expressing [the Court's] aspiration—and not its mandate—that there will be enough progress in equal educational oppor-

tunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity."<sup>58</sup> There may be some force to this argument, at least to the extent that we can be certain that 25 years represents an absolute and inflexible deadline. But there cannot and should not be any doubt about the underlying reality. Narrow tailoring clearly requires that "race-conscious admissions policies . . . be limited in time."<sup>59</sup> The clock is then ticking. And the message conveyed is telling, given the continuing existence of achievement gaps, especially for African Americans, that are both substantial and persistent.

This brief summary of these decisions and their implications is by no means intended to be exhaustive. There were six separate written opinions in *Grutter*, in particular extensive dissents by the Chief Justice and Justices Scalia, Thomas, and Kennedy. *Gratz* in turn generated seven different opinions. Justices O'Connor and Breyer parted company with the *Grutter* majority to agree with the conclusion that the undergraduate system was unconstitutional, and only Justices Stevens and Ginsburg attempted to defend that approach. The aspects of the opinions I have highlighted are, however, sufficient for these purposes, as they set up both the challenges and opportunities that lie ahead.

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<sup>56</sup> *Id.* at 2346.

<sup>57</sup> *Id.* at 2346-47.

<sup>58</sup> *Joint Statement of Constitutional Law Scholars*, p. 11., 2003.

<sup>59</sup> *Grutter*, 123 S. Ct. at 2346.

## CONTEXTS

One thing is clear in the wake of the Michigan decisions: Contexts matter.

And there are two that should guide us in a post-*Grutter* world. One is purely legal, the need to adhere to both the letter and spirit of what the Court had to say. The other, while grounded in these constitutional doctrines, is more practical: fashioning policies and procedures that are both legal and educationally sound.

The commitment to diversity and affirmative action, at least on the part of the leaders of the academy, is widespread. I, for example, have been unable to find any mainstream institution or advocacy group that does not believe that diversity is a fundamental educational value. Or, with one exception, that fails to champion, with varying degrees of vigor and openness, affirmative measures as a means of reaching that goal.<sup>60</sup> It is accordingly clear that *Grutter* and *Gratz* will have a profound impact, not simply at those institutions where overt affirmative action has been barred by judicial fiat, but potentially at every college and university in the nation.

It is nevertheless important to recognize that the subset of the academy for which an

affirmative program of the sort implemented by Michigan actually matters is arguably a small one, especially at the undergraduate level. As Bowen and Bok stressed in their extensive study, “[m]any people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them.”<sup>61</sup> Their work, and that of others who have examined the question,<sup>62</sup> shows that “the vast majority of undergraduate institutions accept all qualified candidates and thus do not award special status to any group of applicants, defined by race or on the basis of any other criterion.”<sup>63</sup>

This changes at the graduate and professional level, especially for those programs most often associated with professional success, law and medicine, where all schools are at least arguably selective. But even there the statistics can be deceiving. For example, the only major study to examine the actual impact on admissions trends in law and medicine in the wake of *Bakke* found that “the decision largely served to institutionalize existing patterns and practices. The institutions

<sup>60</sup> That exception is Texas A&M, which is described as “bucking a nationwide trend in higher education.” Michael Arnone, “Texas A&M Will Not Consider Race in Admissions Decisions, Its President Says,” *Today’s News, Chronicle of Higher Education*, December 5, 2003.

<sup>61</sup> William Bowen and Derek Bok, *The Shape of the River*, p. 15, Princeton, NJ: Princeton University Press, 1998.

<sup>62</sup> See, for example, *Diversity and College Admission in 2003: A Survey Report*, p. xi, Alexandria, VA: National Association for College Admission Counseling, 2003 (which notes that “only 33% of colleges and universities consider race or ethnicity as a factor in the admission decision”).

<sup>63</sup> Bowen and Bok, p. 282, 1998.

that had large minority enrollments [before *Bakke*] also had them [after that decision].”<sup>64</sup> In a similar vein, a number of studies and other reports have tended to show that minority enrollments in Texas and California, initially down in the wake of *Hopwood* and Proposition 209, have gradually but steadily increased back to the levels they were at prior to those bars on affirmative admissions schemes.

If then, as the *Grutter* majority stressed, context matters, it seems advisable for each individual institution to establish as a threshold matter that an affirmative admissions regime is actually necessary in the light of its characteristics and the realities of admissions decisions at that institution. Some have scoffed at this notion. But it is at the institutional level that litigation transpires, and it will be individual institutions that will have to defend what they have actually set out to do within the confines of strict scrutiny.

A second contextual reality is that *Grutter* has in effect made an individual’s racial or ethnic identity one important part of what it now means to be qualified for admission to a college or university. If, as Michigan argued and the Court accepted, diversity is an essential aspect of a complete education, then it is not simply permissible to take race into account, it is at least arguably essential to do so. The point here is not that a student cannot

receive a quality education at an institution that is either not diverse or only minimally so, a judgment one might easily make given the import of so much of the prodiversity rhetoric. It is rather that complete preparation for the experience of living in a complex and diverse society—what the Court characterized as an “increasingly global marketplace”—requires that one at some point have the benefits of “exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>65</sup>

Unfortunately, a parallel reality is that a substantial number of individuals from various identifiable groups do not have the grade point averages and standardized test scores that would qualify them for admission to many colleges and universities and in particular to the elite institutions for which affirmative action and diversity are so important. In *Grutter*, for example, the Court had before it data provided by the Association of American Law Schools, which indicated that in 2002 “there were only 75 black applicants . . . to law schools whose LSAT score (165 or above) would have placed them above the 25th percentile of the entering class at the nation’s most selective schools; by contrast, there were 5,990 white students who scored 165 or above.”<sup>66</sup> Does this mean, as the critics of diversity have argued, that a commitment to affirmative admissions inevitably means that standards must be compromised? I think not.

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<sup>64</sup> Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools*, p. 131, Ann Arbor: University of Michigan Press, 1998.

<sup>65</sup> *Grutter*, 123 S. Ct. at 2340.

<sup>66</sup> Brief of the Association of American Law Schools at 25, *Grutter v. Bollinger*, 123 S. Ct. 2323 (2003) (No. 02-241).



A compelling case can in fact be made that merit involves something more than objective qualifications. For example, as the philosopher George Sher has noted, there are both moral and nonmoral dimensions of merit.<sup>67</sup> The argument for admitting individuals based solely on objective criteria reflects a nonmoral claim, asking that we divorce individual attainments from the circumstances within which they were achieved. The case for affirmative action, in turn, is premised on the assumption that context matters very much, both in terms of assessing individual worth and in assembling a group of individuals that will reflect in an appropriate manner the full range of institutional objectives.

Universities—in particular the great universities—labor under the mandates imposed by two simultaneously contradictory yet

complementary obligations. They must, on the one hand, articulate and adhere to standards appropriate to their professed mission. For the elite institutions, this inevitably involves the assumption that rigor must prevail. At the same time, these are the institutions where potential is realized and where individuals may well be able to succeed in spite of deficits imposed by inferior schools and by individual circumstances that thwart learning. Harvard, in this respect, will always remain Harvard, just as the University of Arkansas will always remain the University of Arkansas. But assuming each institution's minimum thresholds are met, why should it be precluded from including within its student body individuals whose objective credentials belie their academic promise?

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<sup>67</sup> George Sher, *Desert*, p. 109, Princeton, NJ: Princeton University Press, 1987.

## PRINCIPLES

*What do I have in mind when I speak of what I characterize as a “principled” quest for diversity, often through the means of affirmative action?*

Clearly the diversity we seek must be much more than a simple matter of racial or ethnic preferences. It must rather value each applicant as an individual, assessing carefully a variety of factors that extend far beyond the simple confines of group identity. In particular, it must be structured and administered in ways that will guard against what I believe to be the primary danger posed by *Grutter*, the Court’s willingness to place its imprimatur on the propriety of fashioning an entering class that contains a “critical mass” of certain groups of “underrepresented” students. As will make clear, I suspect that this concession will inevitably place substantial pressures on many institutions, pressures mounted by a variety of constituencies that see the critical mass concept as an imperative rather than a goal.

I also suspect that one of the strengths of the *Grutter* mandate is also one of its weaknesses. The *Grutter* majority in effect embraced the approach taken by Justice Powell in *Bakke*, one that critics have derided as a “transparent failure” and “pure sophistry” given its emphasis on arguably making race simply one factor in a process within which race must matter if in fact diversity is to be achieved.<sup>68</sup> While less extreme in its language,

Justice Ginsburg mounted a similar critique in her *Gratz* dissent, where she argues (ironically, given many of the principles I propose), that “[i]f honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>69</sup>

Given this reality, it is entirely possible that *Grutter* will pose a new set of problems for institutions forced to wrestle with the dilemmas posed by making race simply one admissions criterion even as they seek a critical mass of racially identifiable students. The principles that follow will, I believe, help institutions navigate through that maze. Admittedly, many seem obvious. But I first developed this list because these very factors were the ones most noticeably absent from the policies and programs that generated much of the litigation that has shaped this debate.<sup>70</sup> And I return to it now in the wake of *Grutter* because both the characterizations of that opinion and the responses to it that have begun to emerge have convinced me that these principles remain important. For it is one the basis of considerations such as these that I believe the legacy of *Grutter* will be determined.

<sup>68</sup> The characterizations of *Bakke* are taken from the definitive biography of Justice Powell. See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.*, p. 484, New York: Charles Scribner’s Sons, 1994.

<sup>69</sup> *Gratz*, 123 S. Ct. at 2446 (Ginsburg, J., dissenting).

<sup>70</sup> Killenbeck, 1999.

## Honesty

The first requirement is honesty, both in terms of what we seek and how we go about it. Most critics of diversity and affirmative action maintain that affirmative admissions policies constitute stark aberrations from the norm. But affirmative action on the basis of race does not now, nor did it ever, constitute an exception to the rules in an otherwise neutral, merit-based system. Academic merit, measured solely by objective credentials, has never been the *sine qua non* of college and university admissions.

This does not mean that individual academic qualifications are not important or that the objective measures usually invoked as hallmarks of merit should play no role in the decision-making process. Most institutions, in particular those with perhaps the most fervid commitment to diversity and affirmative action, the so-called elite universities, adhere to an admissions regime within which grades and scores on standardized tests provide at least the initial foundation for their admissions decisions. These same universities, however, also routinely consider myriad other factors, many of which arguably have little to do with the actual academic competence of the individuals who exhibit them.

For example, “tips” granted to the sons and daughters of alumni are no less preferences simply because they are a long-accepted practice.<sup>71</sup> The same may be said of policies

that mandate a certain proportion of state residents in public universities, even if it makes perfect sense to reserve space in these universities for the sons and daughters of the individuals whose taxes support them. And what are we to conclude about the role of academic merit in an admissions process that year after year yields an extraordinary number of superbly talented athletes? In each instance, the granting of the preference signals a fundamental reality: Conceptions of merit are in fact fungible. As such, they reflect an appropriate ideal, rather than an immovable standard against which to assess all applications for admission.

I assume that most participants in the dialogue about affirmative action and diversity understand this. When challenged, however, many institutions and individuals tend to go into denial. The rather humorous point-counterpoint that broke out pre-*Grutter* about the educational record of the current President Bush is one example. This must end, and we must all be honest not just about how admissions decisions are made, but also about what is at issue. It is the individual who matters, and the characteristics sought can be found only by what the Court now requires: studied consideration of the full range of each applicant’s personal traits and circumstances.

This poses a profound dilemma, as any selection process that does in fact consider the entire individual will be time-consuming,

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<sup>71</sup> And as such they have become targets for advocates who criticize them as “nothing more than conservative affirmative action,” a characterization voiced about the use of such preferences at Texas A&M, which has now decided to eliminate them. See Peter Schmidt, “Texas A&M Ends Alumni-Based Preferences for Applicants, to Assure ‘Consistency’ in Admissions,” *Today’s News, Chronicle of Higher Education*, January 12, 2004.

labor-intensive, and expensive. If, for example, the Harvard approach is an exemplar of admissions practices, it is worth remembering just what that system entails: the time and energy of a substantial staff, an official admissions committee of 35, and the volunteer efforts of 5,000 alumni who conduct applicant interviews around the world.<sup>72</sup> Institutions that shy away from an admissions regime whose components reflect the seriousness of the task reveal a very great deal about the true nature of their commitment. If, however, we are honest about our objectives, and those goals involve considered decisions reflecting a desire to assemble a truly diverse student body, we must also be willing to pay the costs associated with them.

### Reasoned and Sound Policies

The realities of strict scrutiny make it essential that institutions ground their actions in fully reasoned and academically sound educational policy. In *Grutter*, for example, the Court emphasized that any program that takes race into account, or even appears to do so, must be “necessary.”<sup>73</sup> I believe that requirement can be met only when an institution fashions an affirmative admissions policy that clearly articulates the precise educational objectives it is pursuing, specifies the reasons why an affirmative admissions regime is required, and is prepared to document the posi-

tive educational outcomes that flow from its implementation.

Diversity must remain an educational, rather than a political or social goal. In *Hopwood*, for example, the University of Texas’ political agenda arguably clouded its academic judgment. The Law School clearly believed that attaining a diverse student body was a moral and educational imperative, and the admissions regime it embraced allowed it to meet these obligations. But it was also blatantly illegal. Indeed, by adopting the very approach condemned by *Bakke*—a system it in fact had previously used and had abandoned in that decision’s wake—Texas created the very strong impression that demographic results mattered more than constitutionally sound process. That was, however, precisely what Justice Powell rejected in *Bakke* and what a substantial majority of the Court, including one member of the *Grutter* majority, repudiated in *Gratz*.

The *Bakke* approach, which is now largely the *Grutter* approach, may, as many critics have noted, ultimately involve an elevation of form over substance. But form matters a great deal in a legal regime that insists on the use of the “least restrictive means.” And perceptions of fairness are absolutely essential in a public relations environment within which citizens insist on at least an appearance of propriety.

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<sup>72</sup> Bruce Weber, “Inside the Meritocracy Machine,” *N.Y. Times Magazine*, p. 44, April 28, 1996.

<sup>73</sup> *Grutter*, 123 S. Ct. at 2338.

Diversity is clearly something more than a matter of simple appearances, the “aesthetic” dimension that Justice Thomas ridiculed in his *Grutter* dissent. The case for diversity assumes that a diverse learning environment makes a difference in the quest for important, positive student outcomes. Universities wishing to pursue diversity must be prepared to bolster their case with something more than the simple assurance that they are enclaves of educators and that diversity is an accepted educational construct. They must, rather, be in a position to provide tangible evidence that their instincts are correct. The Michigan litigation now offers the benchmark for the use of such materials. But it would be a mistake to assume that we have reached the point where no further work is needed or where it is appropriate to simply rely on what Michigan has already done.

Of course, if the studies do not document actual educational benefits, we must be willing to acknowledge their implications. For if the studies do not provide sufficiently compelling evidence, we will find ourselves back at the point where the case for diversity rests on nothing more, nor less, than a value judgment. That value may, as many champions of diversity believe to be the case, reflect transcendent moral norms. But it is unwise to assume that these are the same norms shared by either the courts or a populace that have to date invested considerable faith in a series of assumptions about what the Constitution means when it declares that we are each entitled to the equal protection of the laws.

Finally, the need to press the case for diversity within accepted academic norms is especially compelling when the debate focuses, as it virtually always does, on conceptions of merit. *Grutter* now allows diversity advocates to argue that ethnic and racial identity are appropriate aspects of what an institution seeks as it assembles each entering class. But the rule articulated in that decision assumes that there are specific, individual thresholds below which an institution should not be willing to go. That is, depending on institutional mission and type, there should be a common understanding of the academic skills requisite to success, and that understanding should structure the admissions process.

### **Comprehensive Solutions**

A third requirement is that universities fashion programs that are proactive and reach across the entire social, economic, and educational spectrum. A university should not, for example, simply admit individuals in an effort to foster the benefits that diversity brings and then leave them on their own. Facilitating access is not enough. There is a substantial body of literature supporting the notion that an institutional commitment to diversity must involve something more than the attainment of appropriate admission or hiring ratios. Affirmative action is ultimately a means rather than an end, a mechanism that allows institutions of higher education to assist individuals who have particular needs and the capacity to make specific contributions to the institution and society. Accordingly, an insti-

tution that conceives of affirmative action as a simple exercise in bottom line reporting commits a profound error.

Higher education must also recognize that its obligations begin far in advance of the time that students make the decision to seek admission. Perhaps the single most important thing an institution can do is recognize that the very best affirmative actions—initiatives that will both enhance educational access and maximize individual attainment—will often take forms other than the consideration of race or ethnic identity as part of the postsecondary admissions process. For example, we have known for at least the past 30 years that “[p]ersistent poverty over generations creates a culture of survival.”<sup>74</sup> And studies verify the profound importance that health, social, and economic conditions have on individual development, both mental and physical. If, as seems undeniably the case, intelligence and adaptive behavior are strongly influenced by socioeconomic status and in particular include important prenatal dimensions, the need for intensive early medical, social, and educational support becomes compelling.

Much of the responsibility for addressing these needs is systemic. But universities, with their substantial expertise, and their expectation that faculty engage in productive, socially responsible research and service, have an obligation to develop and implement policies and

programs that address these concerns. Arguably, institutions with the immediate goal of fashioning a diverse student body have little to gain by supporting policies that distract from achieving the “right numbers.” A program that actually assists individuals in need, but does little if anything to alter actual patterns of enrollment is, accordingly, suspect, especially in an environment where the quest for a critical mass assumes major importance.

Higher education has, nevertheless, both a special opportunity and a special responsibility. In spite of decades of active intervention, substantial economic and social dislocations persist for what one might characterize as the “underclass.” While predominantly minority in character, this group is one in which the dispositive disabilities are matters of basic economic, educational, and social opportunity largely dictated by income, rather than persistent legal disqualification on the basis of race or gender. These are matters that universities can and should address through initiatives that will, over the long term, pay substantial dividends if the true objective is to foster the identification and admission of qualified individuals. Programs directed toward the amelioration of those deficits are, accordingly, at least as important as those that simply adjust admissions standards under the assumption that the only thing that matters is the admission of a critical mass.

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<sup>74</sup> Jerome Bruner, *The Relevance of Education*, p. 160, New York: Norton, 1971.

### Steadfast Adherence to Principles

There is, of course, an obvious danger posed by the requirement that a diversity initiative be articulated with clarity and tied to specific, sound educational policies. What is an institution to do when it has acted in this manner and still does not have a sufficiently diverse student body? In particular, what should it do when it has not attained a critical mass of such students? One solution might be, as has so often been the case, to continuously tweak the system. That was quite clearly what happened in *Bakke* and *Hopwood*, where both the goals and mechanics of the programs were such that an almost irresistible pressure raised the number of minority admissions to the desired threshold.

The Court arguably countenanced some adjustments of this sort by noting with apparent favor, or at least without overt condemnation, the fact that the admissions directors at the University of Michigan Law School routinely monitored entering class profiles as the admissions process unfolded. “This was done,” these individuals testified, “to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body.”<sup>75</sup> They also maintained that the Law School did not have a specific percentage target in mind, and there was no suggestion that admissions standards were compromised.

Actions of this sort nevertheless have a potentially fatally corrosive effect. At a minimum, they provide the opponents of diversity with crucial ammunition in their quest to characterize affirmative measures as quotas. More to the point, an institution that adjusts preset definitions of merit casts substantial doubt on the legitimacy of its contention that it is pursuing sound educational policies. Michigan is to be commended for refusing to travel down that path. It remains, however, a fair question to ask how many public institutions would have that strength, especially those that operate in states where the political pressures to achieve the right numbers are intense.

Ultimately, results do matter. But those results are not institutional profiles that enable a particular university to tout itself as an exemplar of the diversity ideal. The best outcomes are those attained when truly qualified students enter a university and enrich the experiences of everyone by virtue of their presence.

### Patience

In many respects, *Grutter* and *Gratz* exemplify the precept that we must on occasion be careful about what we wish for. Given a current and persistent achievement gap, it is entirely possible—indeed, in some instances I suspect it is inevitable—that admission numbers for preferred groups will fall below

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<sup>75</sup> *Grutter*, 123 S. Ct. at 2333.

whatever goals the institution sets for itself, especially given the need for a critical mass. That is, however, the price we must pay if the commitment to diversity and affirmative action is in fact a principled one, a price that will be exacted in the face of what will certainly be renewed suggestions that to act otherwise is to frustrate dreams and run the risk of “resegregation.”

This means that universities must understand the importance of the long view, even in a world within which critical mass is now an accepted construct. An appropriate admissions policy may or may not prove immediately effective. Goals may or may not be realized. It is nevertheless essential that institutions stay the course and not succumb to the temptation to compromise their academic principles for the sake of results.

Similar problems arise when institutions become inflexible in their approach. Diversity measures predicated on the sorts of considerations I have outlined may well, by sheer force of numbers, benefit a substantial number of individuals who do not reflect traditionally favored characteristics, such as race, ethnicity, or national origin. The University of Arkansas, for example, recently announced the creation of the Silas Hunt Distinguished Scholarship Program, an initiative named after the first African American to be admitted to its Law School. The avowed purpose of the program is to “strengthen campus diversity,” a construct that “will include, but . . . not [be]

limited to, membership in an underrepresented ethnic or minority group, a demonstrated interest in a field of study that does not traditionally attract members of an individual student’s ethnicity or gender, residence in underrepresented counties in the State of Arkansas, or status as a first-generation college student.”<sup>76</sup>

At least as a rhetorical matter, the Hunt Program tracks the letter and spirit of the Court’s holding in *Grutter*, albeit by extending it beyond that decision’s specific approval of race-conscious measures for the purposes of the admissions decision alone. The interesting question is how the program will be implemented. If, for example, only African American students receive the scholarships, there will be at least the inference, if not the litigable fact, that the program is unconstitutional. If, on the other hand, more than a token number of White students are beneficiaries, the political and social consequences will, I suspect, be substantial. But it is in precisely these sorts of circumstances that an institution’s commitment to principled affirmative action will be tested.

While not directly on point, in the sense that the actor in question was not a university, realities reflected in *City of Richmond v. J.A. Croson Company* provide a valuable example of just what might go wrong. In that instance, the city’s minority business enterprise program specified that exceptions could be made to the mandatory set-aside in the

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<sup>76</sup> University of Arkansas, *Silas Hunt Program Offers up to 85 Scholarships to 2004-2005 Freshmen* [Press release], October 30, 2003.



event that suitable minority contractors could not be found. The J.A. Croson Company attempted to find a qualified subcontractor. It was unable to do so. Indeed, it argued that if forced to use the one available minority subcontractor, which was not an authorized supplier for the fixtures required, the contract cost would increase substantially. The company therefore asked for an exception to both the set-aside requirement and, if necessary, the contract price.

The city refused and created the impression that race mattered above all else; more than finding a qualified subcontractor and more than conducting the city's business in a cost-sensitive manner. A similar danger lurks for institutions like Arkansas if in fact an otherwise commendable scholarship initiative belies its avowed objectives in the face of pressure, from within or without, to achieve specific racially identifiable results now.

Universities seeking to diversify their student bodies must exemplify patience. Diversity policies will survive constitutional attack

only if they can be defended as sound educational practices that operate for appropriate educational reasons. That assumption cannot prevail in an environment where results seem to matter more than adherence to principle. The traditional civil rights chant asks: "What do we want? Justice! When do we want it? Now!" Those sentiments are reappearing in the wake of *Grutter*. One national conference convened in the wake of that decision, for example, apparently centered on the theme "we can't wait."<sup>77</sup> But wait we must if the price of diversity is the abandonment of the standards for which an institution supposedly stands. It is difficult, perhaps impossible, to be patient in an environment within which disparities in opportunity and attainment are the rule, rather than the exception. But universities are best advised to refuse the siren's call where, as is so often the case, the attainment of immediate results requires that fundamental academic principles be compromised or abandoned.

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<sup>77</sup> American Council on Education, Office of Minorities in Education, *Educating All of One Nation, Addressing a National Imperative: Why We Can't Wait*, October 23-25, 2003.

## CONCLUSION

*The challenge for those shaping a new generation of affirmative action programs in the wake of Grutter and Gratz is to articulate clearly an appropriate vision of what it means to be diverse.*

And to the extent that an institution believes it necessary to use affirmative action as a means toward that end, it must adhere strictly to the professed values, forms, and procedures, regardless of consequences. As part of that process, universities must place themselves in a position where they can maintain credibly that the debate about affirmative action is in fact a debate about the nature and value of diversity as an educational construct. If they are able to do so, they will likely prevail when the inevitable legal challenges are mounted. If, on the other hand, institutions act as many have in the past, *Grutter* and *Gratz* will in effect become temptations they would have been best advised to avoid.

The debate about diversity and affirmative action must continue to be a debate about education itself, rather than about institutional prestige, political comfort, or any of the myriad other realities that have distorted and destroyed what was once an appropriate impulse. That dialogue will, I suspect, continue to be at least as contentious as the debate that preceded and shaped *Grutter* and *Gratz*. Education matters a great deal to the American people, and the passions triggered by a reformulated dialogue on diversity and critical mass will certainly run just as deep. There will,

however, be one very important difference. At least for the time being, the quest for diversity and the active consideration of race has the Court's imprimatur. That matters, and will continue to matter, provided higher education does not squander the opportunities it has now been given. The sorts of measures the Court has approved take race into account but simultaneously reach more broadly. We cannot and will not escape the shadow of group identity. But we can hopefully transform a debate that has to date been about racial politics into one that focuses on the needs of the nation and the opportunities it affords its citizens.

The most important challenges posed by *Grutter* and *Gratz* are social and political rather than educational: the need for this nation to finally and effectively guarantee to each of its citizens meaningful opportunities for a safe, healthy, and fulfilling life. In the interim, people of good will will continue to debate what these decisions mean and we should respond to them. Do *Grutter* and *Gratz* then mark the end of the beginning? Or are they the beginning of the end, the harbingers of failure? Only time, and the good faith of this nation's colleges and universities, will tell.



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