

# THE EVOLVING DIVERSITY RATIONALE IN UNIVERSITY ADMISSIONS: FROM *REGENTS V. BAKKE* TO THE UNIVERSITY OF MICHIGAN CASES

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## INTRODUCTION

Since the 1970s, Americans have wrestled with whether and how to implement affirmative action initiatives to equalize economic and educational opportunities for members of minority groups. The role of affirmative action in higher education is central to this debate. The late historian Hugh Davis Graham identified two types of affirmative action—one "soft" and the other "hard."<sup>1</sup> Under "soft" affirmative action, he placed the aggressive outreach, pressure, and lobbying tactics pursued by the Kennedy and Johnson administrations.<sup>2</sup> Under "hard" affirmative action, Graham placed minority preferences, court-ordered set asides, and hiring quotas.<sup>3</sup> Both types of affirmative action

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<sup>1</sup> See Hugh Davis Graham, *Civil Rights Policy in the Carter Presidency*, in *THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST NEW DEAL ERA* 217–18 (Gary M. Fink & Hugh Davis Graham eds., 1998).

<sup>2</sup> See *id.* at 204, 217.

<sup>3</sup> See *id.* at 217–18.

have been used in minority recruitment programs for businesses and universities.<sup>4</sup> But nonminority groups, specifically white males, have sharply criticized affirmative action programs as discriminatory.<sup>5</sup> As a result of these challenges, the Supreme Court has reviewed the constitutionality of affirmative action programs in higher education admissions in three pivotal cases: *Regents of the University of California v. Bakke*,<sup>6</sup> *Grutter v. Bollinger*,<sup>7</sup> and *Gratz v. Bollinger*.<sup>8</sup> *Bakke* provides the historical and judicial context for understanding the significance of *Grutter*, which upheld the admissions program at the University of Michigan Law School, and *Gratz*, which struck down the undergraduate admissions program at the University of Michigan's College of Literature, Science, and the Arts.

In all three cases, Ivy League and other selective institutions submitted amici curiae briefs defending the "diversity rationale."<sup>9</sup> The amicus brief submitted by Harvard and three other highly selective private universities<sup>10</sup> won a razor-thin victory in *Bakke*.<sup>11</sup> In 2002, Harvard again led a coalition of top universities<sup>12</sup> in submitting a brief in support of the University of Michigan's affirmative action admissions policies.<sup>13</sup> A large number of other colleges and universities also submitted amici curiae briefs supporting the University of Michigan.<sup>14</sup> In *Grutter*, the Court, in a 5–4 ruling, upheld the use of race as a factor in individual, holistically-based admissions decisions far more deci-

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<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (reviewing a statute that required prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to minority businesses); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (reviewing a statute that required at least 10% of federal funds granted for local public works projects to go to minority businesses); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (reviewing a university admissions plan designed to admit a class comprised of 10% Mexican-American students and 5% black students), *cert. denied*, 518 U.S. 1033 (1996).

<sup>6</sup> 438 U.S. 265 (1978).

<sup>7</sup> 539 U.S. 306 (2003).

<sup>8</sup> 539 U.S. 244 (2003).

<sup>9</sup> See, e.g., Brief of Amici Curiae Harvard University et al. at 8, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Harvard Brief] ("Selective universities across the country have built their communities mindful of the pedagogical value of multi-racial diversity in educational programs."), at [http://www.news.harvard.edu/gazette/daily/0302/pdfs/amicus\\_harvard.pdf](http://www.news.harvard.edu/gazette/daily/0302/pdfs/amicus_harvard.pdf) (last visited Nov. 16, 2004).

<sup>10</sup> Brief of Amici Curiae Columbia University et al., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) [hereinafter Columbia Brief in *Bakke*].

<sup>11</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–24 (1978) (discussing and citing the amici brief submitted by Columbia University and finding that "the interest of diversity is compelling in the context of a university's admissions program").

<sup>12</sup> In addition to Harvard, supporters of the brief included five other Ivy League institutions, the University of Chicago, and Duke University. Harvard Brief, *supra* note 9, at i.

<sup>13</sup> See *id.*

<sup>14</sup> See Briefs Filed in Support of the University of Michigan [hereinafter Amicus Briefs Summary], at [http://www.umich.edu/~urel/admissions/legal/gru\\_amicus-ussc/summary.html](http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/summary.html) (last visited Nov. 16, 2004).

sively than it had in *Bakke*.<sup>15</sup> Yet, in *Gratz*, the companion case to *Grutter*, the Court struck down Michigan's undergraduate admissions system of awarding extra points to minority applicants, finding that this system was too mechanistic.<sup>16</sup>

The diversity rationale that evolved in university admissions from the *Bakke* decision to the University of Michigan cases casts light on how Americans considered and adopted ways of bringing into the higher educational mainstream groups formerly marginalized or excluded on the basis of ethnicity and race. Justice Powell's opinion in *Bakke* (examined in Part I), which supported the use of race as one legitimate factor in admissions, opened the way for the expansion of college and university affirmative action programs. Divisions among the Justices, however, made subsequent lawsuits almost certain because of the tug of war that emerged between whites and racial minorities for admission to the most competitive private and public universities. A study of Harvard undergraduate admissions policies, discussed in Part II, reveals how one of the most prestigious private universities balanced the competing claims of the traditional white male clientele against Harvard's recognition that it must become open to a diversity of cultures, talents, and viewpoints.

The use of racial preferences in admissions came under sharp attack by the 1990s, especially after the Fifth Circuit Court of Appeals ruled in *Hopwood* that the affirmative action program at the University of Texas Law School violated the Fourteenth Amendment's equal protection clause.<sup>17</sup> This decision is discussed in Part III. Given *Hopwood's* challenge to *Bakke*, it was inevitable that the United States Supreme Court would eventually have to reconsider the legitimacy of Justice Powell's diversity rationale. Two cases challenging affirmative action at the University of Michigan, examined in Part IV, provided the Supreme Court that opportunity. The judicial outcome would have a nationwide impact on affirmative action in college admissions. To win its fight, the University of Michigan rallied support from an impressive coalition of universities, corporations, military leaders, and civil rights groups. In addition to amici curiae briefs, the University of Michigan recruited expert witnesses, notably William G. Bowen and

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<sup>15</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

<sup>16</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) ("We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.").

<sup>17</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

Derek Bok, former presidents, respectively, of Princeton and Harvard universities. Their expert opinions are discussed in Part V.

The Supreme Court split in its University of Michigan decisions. In a stronger 5-4 holding than in *Bakke*, Justice O'Connor, writing for the majority, upheld racial preferences as one factor in admissions to the University of Michigan Law School. Though the Court rejected Michigan's point system for minority undergraduates, colleges and universities generally believed that they had both a road map and a timetable—of no more than twenty-five years—to implement legitimate affirmative action programs. Nevertheless, those educational institutions continuing affirmative action are cautiously designing their programs and seeking ways to broaden the concept of diversity to include economically disadvantaged students from all cultures and races. These efforts are discussed in the concluding Part VII.

## I

### JUSTICE POWELL'S "DIVERSITY RATIONALE" AND THE IMPACT OF SPLIT VOTES IN *BAKKE*

In the late 1970s, civil rights proponents, minority groups, college and university officials, and President Jimmy Carter's administration were all deeply concerned that the Supreme Court might affirm the California Supreme Court's decision barring the use of race in admissions decisions, thereby nullifying affirmative action programs.<sup>18</sup> On June 28, 1978, however, in a 5-4 decision, Justice Powell provided the critical fifth vote in *Bakke* to reverse the California Supreme Court's injunction against the use of race in admissions decisions.<sup>19</sup> In what might be termed a politically adroit ruling, both sides of the debate received concessions. First, the Court ordered the Medical School of the University of California at Davis (U.C.-Davis) to admit Allan P. Bakke, a twice-rejected white applicant.<sup>20</sup> Second, the Court struck down the medical school's quota system, which held sixteen admis-

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<sup>18</sup> See, e.g., Steven V. Roberts, *Educators Fear a Ruling for Bakke Would Undo Minorities' Vast Gains*, N.Y. TIMES, Oct. 25, 1977, at A1.

<sup>19</sup> See *Gutierrez*, 539 U.S. at 322 ("Justice Powell provided a fifth vote [in *Bakke*] not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever.").

<sup>20</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978). The trial court agreed with Bakke that reserving sixteen spaces for minorities at U.C.-Davis's medical school amounted to a racial quota. See *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1156 (Cal. 1976). The trial court, however, did not order the medical school to admit Bakke because he could not show that he would have been admitted in the absence of the minority quota. See *id.* Under a strict scrutiny standard, however, the California Supreme Court directed that respondent be admitted to the Medical School. *Id.* at 1172. California's highest court strongly condemned the use of "racial percentages" as a "thoroughly discredited" policy, but allowed U.C.-Davis to use "flexible admission standards" such as personal interviews, recommendations, character assessment, and professional goals. *Id.* at 1171, 1166.

sions slots especially for minorities, finding such a system unconstitutional under the Equal Protection Clause.<sup>21</sup> Consequently, race could be used to tip the balance in favor of a minority applicant.<sup>22</sup> Third, citing the First Amendment's protection of academic freedom, the Court afforded colleges and universities considerable discretion to design affirmative action programs modeled on Harvard College's flexible admissions criteria.<sup>23</sup> Under Powell's "diversity rationale," schools could include race as a legitimate factor in admissions policies.<sup>24</sup>

Because five other Justices wrote opinions expressing varying degrees of agreement or disagreement with Powell's opinion, many observers criticized that *Bakke* was not "a landmark case."<sup>25</sup> Justices Brennan, White, Marshall, and Blackmun—known as the "Brennan bloc"—favored maintaining the minority admissions program at U.C.-Davis on the grounds that it was a benign racial classification to remedy past discrimination.<sup>26</sup> The Brennan bloc also did not think that the remedies had to be color-blind to be considered constitutional under the Fourteenth Amendment's Equal Protection Clause.<sup>27</sup> In addition, Justice Brennan pointed out that there was little difference between the goals of Harvard's admissions policies and those of the medical school at U.C.-Davis, except that Harvard's were less public.<sup>28</sup> Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart—the "Stevens bloc"—argued that the medical school's program was il-

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<sup>21</sup> See *Bakke*, 438 U.S. at 319–20; see also *The Year of Bakke: Excerpts from Published Commentary*, CHRON. OF HIGHER EDUC., July 3, 1978, at 36 (reprinting newspaper and journal commentaries published in response to the *Bakke* decision); Warren Weaver, Jr., *High Court Backs Some Affirmative Action by Colleges, but Orders Bakke Admitted, Victory for a White*, N.Y. TIMES, June 29, 1978, at A1, A22; *What the Court Said in Two 5-to-4 Rulings on the Bakke Case*, CHRON. OF HIGHER EDUC., July 3, 1978, at 3–12 (laying out the opinions of Justices Powell, Brennan, and Stevens in *Bakke* and printing the reactions of various civil rights activists to these decisions).

<sup>22</sup> See *Bakke*, 438 U.S. at 314 ("Ethnic diversity is only one element in a range of factors which a university may properly consider in attaining the goal of a heterogeneous student body").

<sup>23</sup> See *id.* at 312–13.

<sup>24</sup> See *id.* at 314.

<sup>25</sup> See, e.g., ALLAN P. SINDLER, *BAKKE, DEFUNIS, AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY* 318 (1978).

<sup>26</sup> See *Bakke*, 438 U.S. at 375–76 (Brennan J., concurring) ("The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination.").

<sup>27</sup> See *id.* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

<sup>28</sup> See *id.* at 379 (Brennan, J., concurring).

legal under Title VI of the Civil Rights Act of 1964.<sup>29</sup> Justices Blackmun, Marshall, and White also submitted their own opinions.<sup>30</sup>

Other commentators praised the opinion. For example, Harvard Law School professor Alan M. Dershowitz called the *Bakke* decision "an act of judicial statesmanship"<sup>31</sup> because it "neither legitimized racial quotas nor put down affirmative action programs[,] and because admissions officers would now have to "look at people as persons, not as members of a group and not as computerized ciphers."<sup>32</sup> Arnold Forster, general counsel of the Anti-Defamation League of B'nai B'rith, was "comforted that, once and for all, the United States Supreme Court has held that racial quotas are flatly illegal."<sup>33</sup> President Carter praised the Court's "historic decision" for its message that "properly tailored affirmative action plans . . . are consistent with the Civil Rights Act of 1964 and with the Constitution."<sup>34</sup>

Nonetheless, members of Carter's administration mirrored the ambivalence of the Court's 5-4 decision. For example, United States Attorney General and former Fifth Circuit Judge Griffin Bell, who publicly praised Powell's opinion as "a great gain for affirmative action,"<sup>35</sup> apparently had reservations. At a 1997 conference at the Carter Library, Bell commented that Powell had "obfuscated" the problem.<sup>36</sup> Bell believed that affirmative action programs should favor only the economic "underclass" in order to encourage their ascent into the middle class, stating that "the quicker we move to an economic test, the better off the nation will be."<sup>37</sup> Furthermore, he felt that dividing the nation into percentages or proportional representation would result in "an affirmative action program mainly for Hispanics in one part of the country and Blacks in another, or one

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<sup>29</sup> See *id.* at 408 (Stevens, Stewart, Rehnquist, JJ., with Burger, C.J., concurring in part and dissenting in part).

<sup>30</sup> See *id.* at 402 (Blackmun, J., concurring in part and dissenting in part); *id.* at 387 (Marshall, J., concurring in part and dissenting in part); *id.* at 378 (White, J., concurring in part and dissenting in part).

<sup>31</sup> Linda Greenhouse, *Bell Hails Decision*, N.Y. TIMES, June 29, 1978, at A1.

<sup>32</sup> John Herbers, *A Plateau for Minorities*, N.Y. TIMES, June 29, 1978, at A22.

<sup>33</sup> Greenhouse, *supra* note 31, at A1.

<sup>34</sup> Memorandum from President Jimmy Carter, to Heads of Executive Departments and Agencies (July 20, 1978) (located in the White House Central Files, Box HU-9, file HU 1-1 1/1/78-12/31/78 Executive, Jimmy Carter Library and Presidential Center).

<sup>35</sup> Greenhouse, *supra* note 31, at A1.

<sup>36</sup> Griffin Bell, Remarks at Panel on Affirmative Action at the Conference on the Carter Presidency: Policy Choices in the Post New Deal Era (Feb. 21, 1997); Letter from Griffin B. Bell, Senior Partner, King & Spalding, Atlanta, Georgia, to Dr. Gary M. Fink (Feb. 21, 1997) (on file with the author) [hereinafter Bell, Remarks]; see also Marcia G. Synnott, *Regents v. Bakke* (1978), the Diversity Rationale, and the Carter Administration (Feb. 21, 1997) (paper presented at the Conference on The Carter Presidency: Policy Choices in the Post New Deal Era) (on file with author) (providing a general history of *Bakke* and the Carter Administration's reactions to it).

<sup>37</sup> Letter from Griffin B. Bell, to Dr. Gary M. Fink (Feb. 21, 1997).

Rome and one Athens."<sup>38</sup> Because it was "unrealistic . . . if not unconstitutional" to presume that minority status equated with discrimination,<sup>39</sup> Bell felt that the Court needed to focus on the Fourteenth Amendment's Equal Protection Clause.<sup>40</sup>

Fourth Circuit Judge J. Harvie Wilkinson III, a former law clerk to Justice Powell, also disapproved of applying benign racial classifications to remedy past discrimination. Judge Wilkinson took issue with "Justice Blackmun's paradoxical assertion that 'to get beyond racism, we must first take account of race'" because it "seems to endorse race-based means as a first choice, not as an alternative of last resort."<sup>41</sup> Further, Wilkinson felt that continuing racial divisions and politicization seriously threatened "the concepts of nationhood and citizenship," presenting a danger "perhaps more serious than any threat the country has faced since the time of the Civil War."<sup>42</sup> He also felt that racial separatism contradicted the racially integrated society envisioned by the Supreme Court in the seminal *Brown v. Board of Education* case,<sup>43</sup> which stood "for the premise that race is not the salient characteristic of an American citizen or even a relevant characteristic for public decisionmaking at all."<sup>44</sup> Although *Brown* had not brought about "the ideal society," Wilkinson believed "that the alternative visions are . . . unbearably grim."<sup>45</sup>

## II

### HARVARD ADMISSIONS POLICIES: A PROBLEMATIC MODEL?

Joel Dreyfuss and Charles Lawrence III astutely predicted that "[n]one of America's traditional victims would be winners in the *Bakke* case."<sup>46</sup> Instead, the victors were "the country's economically and educationally privileged[,]"<sup>47</sup> institutions such as Harvard University, whose right to select their student body without outside interference was vehemently defended by alumnus Archibald Cox in his legal argu-

<sup>38</sup> See *id.*

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

<sup>40</sup> See Bell, Remarks, *supra* note 36.

<sup>41</sup> J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1013 (1995) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring)).

<sup>42</sup> *Id.* at 1007 ("If the majority cannot truly understand the plight of the minority, or if the members of one minority culture cannot really perceive what it means to belong to another, then the basic decisions of governance are suspect").

<sup>43</sup> 347 U.S. 483 (1954).

<sup>44</sup> Wilkinson, *supra* note 41, at 997-98.

<sup>45</sup> *Id.*; see also J. HARVIE WILKINSON III, FROM *Brown* to *Bakke*. The Supreme Court and School Integration, 1964-1978 (1979) (discussing Wilkinson's views of the *Brown* and *Bakke* decisions and what they mean for racial integration in the United States).

<sup>46</sup> JOEL DREYFUSS & CHARLES LAWRENCE III, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY 228 (1979).

<sup>47</sup> *Id.*

ments on behalf of the Davis Medical School.<sup>48</sup> Justice Powell's diversity rationale, substantially based on the arguments presented in the amici curiae brief submitted by Columbia, Harvard, Stanford, and the University of Pennsylvania,<sup>49</sup> proved a boon for the recruitment of black and other minority students at many of the nation's most prestigious private and flagship state universities.<sup>50</sup> In his opinion on legitimate affirmative action programs, Justice Powell praised Harvard for recruiting "not only Californians or Louisianans but also blacks and Chicanos and other minority students."<sup>51</sup> Although "race and ethnic background may be deemed a 'plus' in a particular applicant's file, . . . it does not insulate the individual from comparison with all other candidates for the available seats."<sup>52</sup> Among Harvard's flexible criteria were "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."<sup>53</sup>

While some might question Justice Powell's educational expertise because he selected "an undergraduate liberal arts college as a model for medical school admissions," he did so precisely because Harvard's admissions policy was "so vague and discretionary as to defy description."<sup>54</sup> An admissions officer may not be able to explain what combination of attributes a successful candidate should possess, "but is supposed to know a Harvard man (or, more recently, woman) when he sees one."<sup>55</sup>

Justice Powell's use of Harvard College as a model of a constitutional admissions policy was not the best choice for a number of additional reasons. First, as the nation's oldest and wealthiest university, Harvard has a unique status in American higher education, drawing applicants from among the best students of all races.<sup>56</sup> Second,

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<sup>48</sup> *Id.* at 175-89, 228.

<sup>49</sup> Columbia Brief in *Bakke*, *supra* note 10, at 27-30.

<sup>50</sup> See TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 280-81 (2004).

<sup>51</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

<sup>52</sup> *Id.* at 317.

<sup>53</sup> *Id.* Harvard and Radcliffe admitted 1,628 men and women in the class of 1982. There were no established minimums for minority groups. Approximately 307 students, or 18.9 percent, were classified as minority students: 132 blacks constituted 8.1 percent; ninety-three Asian Americans were 5.7 percent; seventy-five of Hispanic origin were 4.6 percent; and seven Native Americans were just four-tenths of one percent. See Michael Knight, *Harvard Admissions Plan Held Model of Flexibility*, N. Y. TIMES, June 29, 1978, at A23.

<sup>54</sup> Alan Dershowitz, *Powell's Beau Ideal, Could Harvard Itself Pass the Harvard Test?*, NEW REPUBLIC, July 22, 1978, at 14-17.

<sup>55</sup> *Id.*; see also SINDLER, *supra* note 25, at 268 (stating that the best way to assist minority groups was through "a combination of race neutrality and affirmative action that stay[s] well clear of outright preferential treatment").

<sup>56</sup> See MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970*, at 225-31 (1979).



Harvard can devote considerable resources to admissions decisions and can plausibly argue that it compares each applicant against every other applicant from a number of perspectives. Third, Harvard, like other prestigious universities and leading professional schools, has a stake in retaining the students it admits. Thus, Harvard provides generous financial aid packages and mentoring programs, which it is able to do because of its exceptional endowment.<sup>57</sup> Hence, there is less risk at Harvard that the students who matriculate are academically ill-equipped to remain there than exists at less prestigious institutions, which must compete for qualified black and Hispanic students in national applicant pools that are smaller than the pools of qualified white and Asian-American students.<sup>58</sup>

Fourth, Harvard's now well-documented history of blatantly anti-Semitic policies undermines the legitimacy of using Harvard's admissions policies as a model for the promotion of diversity.<sup>59</sup> In May 1939, for example, Julian Lowell Coolidge, master of Lowell House, complained to President James Bryant Conant about "the vexing question of the number of Jews in Harvard College," who were to be limited by a gentlemen's agreement to around twelve percent of the student population.<sup>60</sup> Harvard adhered to a de facto "selective" admissions policy that resulted in a Jewish quota.<sup>61</sup> When the economy forced the college to admit an additional one hundred students in July 1940, in order to reach its freshman class size of 1,100, the Admissions Committee did not admit more Jews, but rather academically weaker non-Jewish students who could pay their way.<sup>62</sup> However, President Conant hoped they would have "at least a fifty-fifty chance of being promoted to the Sophomore class."<sup>63</sup> Jewish quotas at Harvard, Yale, Princeton, and other selective private colleges began to soften

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<sup>57</sup> See Harvard's Endowment Funds, at <http://www.hno.harvard.edu/guide/finance/index.html> (last visited Nov. 16, 2004).

<sup>58</sup> Theodore Cross, *The Thernstrom Fallacy, Why Affirmative Action Is Not Possible for High Dropout Rates of African-American College Students*, J. BLACKS HIGHER EDUC., Summer 1998, at 92 tbl., 93; see Stephan Thernstrom, *The Black-White Student Mismatch Problem in University Admissions*, J. BLACKS HIGHER EDUC., Winter 1994/1995, at 62, 62-64.

<sup>59</sup> See SYNNOTT, *supra* note 56, at 85-124 (discussing the admissions policies adopted at Harvard from 1920-1950 that sifted out Jewish candidates).

<sup>60</sup> Letter from Julian L. Coolidge, Master of Lowell House, Harvard College, to James Bryant Conant, President of Harvard College (May 9, 1939) (on file with Harvard University Archives).

<sup>61</sup> See *id.*

<sup>62</sup> Letter from Richard M. Gummere, Admissions Office, Harvard College, to James B. Conant, President of Harvard College (July 22, 1940) (on file with the Harvard University Archives).

<sup>63</sup> Letter from James Bryant Conant, President of Harvard College, to Richard M. Gummere, Admissions Office, Harvard College (July 1, 1940) (on file with Harvard University Archives); see SYNNOTT, *supra* note 56, at 85-124.

after World War II, but did not begin to end until the late 1950s.<sup>64</sup> Thus, despite the suggested "neutrality" of the Harvard admissions process, Harvard has a long history of playing the "numbers game."

The care that Harvard puts into selecting a balanced and diversified freshman class is borne out by the very high graduation rates for its students, both black and white. In 1995, ninety-five percent of black students graduated, the highest rate for blacks among the most selective universities.<sup>65</sup> Because large state universities, even competitive ones, do not have the same resources to put into admissions decisions, minority graduation rates, particularly those of blacks, lag behind Harvard's. For example, black graduation rates at twenty-five flagship state universities, in states with black populations over five percent, ranged from twenty-eight to eighty-four percent.<sup>66</sup> The University of Virginia, which has a reputation similar to that of elite private universities, can boast that eighty-four percent of its black students entering between 1986 and 1989 graduated within six years; the white rate was ninety-three percent.<sup>67</sup> Harvard, though, had the highest black student yield rate—at 75.1 percent (139 students)—of the twenty-five most prestigious universities that collectively enrolled over 3,000 black freshmen in the class of 2000.<sup>68</sup>

Harvard is proud of its continuing success in socially engineering diversified and well-balanced freshman classes that few other universities can duplicate.<sup>69</sup> Indeed, President Neil Rudenstine reaffirmed the rationale for Harvard's flexible admissions policies in his Presidential Report for the years 1993–1995.<sup>70</sup> "The primary purpose of diversity in university admissions, . . . represents now, as it has since the mid-nineteenth century, positive educational values that are fundamental to the basic mission of colleges and universities."<sup>71</sup> Rejecting current arguments against affirmative action programs, Rudenstine argued

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<sup>64</sup> See Marcia G. Synnott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews?*, in *ANTI-SEMITISM AND AMERICAN HISTORY* (David A. Gerber ed., 1986).

<sup>65</sup> See *Overall Graduation Rates of African-American College Students Are on the Rise*, J. BLACKS HIGHER EDUC., Autumn 1996, at 68 tbl. [hereinafter *Overall Graduation Rates*].

<sup>66</sup> See *id.* at 69 tbl.; *Virginia is No. 1 in Black Graduation Rate*, STATE (Columbia, S.C.), Dec. 1, 1996, at A18. The University of Arkansas's black graduation rate was twenty-eight percent; its white graduation rate was forty-one percent. See *Black Graduation Rates at Liberal Arts Colleges, State Universities, and Black Colleges*, J. BLACKS HIGHER EDUC., Autumn 1996, at 69 tbl. [hereinafter *Black Graduation Rates*].

<sup>67</sup> See *Black Graduation Rates*, *supra* note 66, at 69 tbl.

<sup>68</sup> See *The Progress of Admissions of Black Students at the Nation's Highest-Ranked Colleges and Universities*, J. BLACKS HIGHER EDUC., Autumn 1996, at 6, 6 tbl.

<sup>69</sup> See, e.g., Christopher Jencks & David Riesman, *Patterns of Residential Education: A Case Study of Harvard*, in *THE AMERICAN COLLEGE: A PSYCHOLOGICAL AND SOCIAL INTERPRETATION OF THE HIGHER LEARNING 731–73* (Nevitt Sanford ed., 1962) (discussing the Harvard residential houses and their impact on Harvard undergraduates, particularly how they shape social and intellectual interactions among students).

<sup>70</sup> NEIL RUDENSTINE, *THE PRESIDENT'S REPORT 1993–1995* (1996).

<sup>71</sup> *Id.* at 44.

that, while there are "real" achievements, "they are also too recent, too fragile, and too incomplete for any relaxation of effort."<sup>72</sup>

It is also inescapable that different groups of students have attained different levels of academic readiness and competitiveness in seeking admission to the most prestigious colleges and universities.<sup>73</sup> Overall, the Harvard Admissions Committee—whose decisionmaking process has been analogized to the bidding on the floor of the commodity exchange markets<sup>74</sup>—seems to maintain a reasonably fair balance of groups.<sup>75</sup> Nevertheless, the Admissions Committee can give greater weight to legacy applicants and to such underrepresented minorities as African Americans, Hispanics, and Native Americans than it can to Asian Americans, whose numbers at the university far exceed their proportion in the nation's population.<sup>76</sup>

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<sup>72</sup> *Id.* at 48. Rudensine rejected three other arguments against affirmative action programs. He turned aside the argument that other ways and programs would be better suited to ameliorating economic and social disadvantage; he asserted that affirmative action did not seriously stigmatize minority groups when weighed against the benefits it conferred; and he rejected the argument that affirmative action was unfair when it favored the admission of seemingly weaker minority students over those with strong academic records. *See id.*

<sup>73</sup> *See* Theodore Cross & Robert Bruce Slater, *Alumni Children Admissions Preferences at Risk: The Strange Irony of How the Academic Achievements of Asians May Rescue Affirmative Action for Blacks*, J. BLACKS HIGHER EDUC., Winter 1994/1995, at 87, 89 (noting that, in relation to the total number of Asians taking the SAT, Asians are over-represented in the highest-scoring group of SAT-takers, while blacks are disproportionately under-represented).

<sup>74</sup> MORTON KELLY & PHYLLIS KELLER, *MAKING HARVARD MODERN: THE RISE OF AMERICA'S UNIVERSITY* 467 (2001).

<sup>75</sup> *See* Susie S. Chao, Admissions Officer and Assistant Director of Minority Recruitment & William R. Fitzsimmons, Dean of Admissions and Financial Aid, Statement on Asian-American Admissions at Harvard and Radcliffe (Jan. 1988).

<sup>76</sup> *See* Eloise Salholz et al., *Do Colleges Set Asian Quotas?*, NEWSWEEK, Feb. 9, 1987, at 60. Interestingly, "the tremendous success of Asian students on standardized tests may save affirmative action programs for blacks at the most selective institutions," because "[i]f SAT scores and grade point averages become the overriding consideration in admissions at . . . highly selective schools, Asians would so dominate the admission track that there would certainly be intolerable outcry from the white alumni who fund, and whose children would lose places at, these institutions." Cross & Slater, *supra* note 73, at 90. At highly ranked universities, Asians often have mean SAT scores at least fifty points higher than the mean for white students, suggesting that these universities may actively curb Asian admissions. *Id.* Despite possible efforts to limit the number of Asian students admitted, the percentage of Asians doubled between 1982 and 1992 at every Ivy League university but Columbia. *Id.* at 87–88. By 1992, Asians, who make up only 7.7 percent of the students taking the SAT, constituted more than ten percent of the student population at the most prestigious universities: Harvard, 10.8 percent; Yale, 11.4 percent; MIT, 14.6 percent; Stanford, 15.7 percent; California Institute of Technology, 15.1 percent; Columbia, 11.3 percent; University of Chicago, 11.4 percent; Brown, 12.2 percent; Northwestern, 10.9 percent; Cornell, 14 percent; and the University of California, Berkeley, 28.5 percent. *Id.* at 87 tbl. In contrast to Asian students, whose test scores routinely exceed those of their peers at selective schools, alumni children at Harvard, for example, scored thirty-five points below their class mean. *See id.* at 90. For criticism of legacy admissions policies, particularly at Harvard and Yale, see John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROB. 491, 515–16 (1993); Mark Muro, *Class Privilege: Harvard*

By carefully balancing the admission of legacies, those with special talent, and underrepresented minorities, Harvard largely shielded itself from criticism that colleges and universities used "diversity" to permit "an enormous amount of discriminatory behavior without requiring a rationale."<sup>77</sup> Abigail Thernstrom, senior fellow at the Manhattan Institute, found these seemingly endless preferences unacceptable, stating that "[n]obody would have ever objected had affirmative action been aggressive recruitment and a bit of a thumb on the scale, which is all that is done for veterans, alumni, et cetera."<sup>78</sup> Many whites and Asian Americans objected to admissions practices that excluded academically better-qualified students in order to fulfill an institution's concept of racial diversity. Others, who were not yet ready to abandon racial preferences as a means of remedying the legacy of discrimination, argued that the benefits of diversity should be defined explicitly and urged moving beyond the 1960s bipolar view of two races, black and white, to embrace a multicultural concept of American nationality.<sup>79</sup> They also called for a broader concept of "disadvantage" that could apply to all racial groups—one that would focus on income and being the first in one's family to go to college.<sup>80</sup>

### III

#### *HOPWOOD V. TEXAS: A CHALLENGE TO BAKKE?*

*Bakke* left two racial preferencing questions unanswered. First, *Bakke* failed to address the question of how long the practice of racial preferences in admissions should continue. Second, *Bakke* failed to examine how schools that lack Harvard's "social engineering" skills and resources can avoid "mismatching" students with their academic environment.<sup>81</sup>

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*and Other Elite Schools Favor Children of Alumni—and at Least One Young Alumnus Doesn't Like It*, BOSTON GLOBE, Sept. 18, 1991, at 43.

<sup>77</sup> PBS *Democracy Project: Affirmative Action: The History of an Idea* (Public Broadcasting Station, Sept. 6, 1996) (comments of Hugh Davis Graham).

<sup>78</sup> *Id.* (comments of Abigail Thernstrom).

<sup>79</sup> See Paul Brest and Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 885, 855–56 (1995) (discussing a statement by the Stanford Asian and Pacific Islander Law Students Association (APILSA) that described the Asian community as a "heterogeneous group with diverse experiences" that should receive some, rather than no, preferential consideration in admissions decisions, particularly with respect to Pacific Islanders, Filipinos, and Southeast Asians). See generally Symposium, *Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 855 (1995) (discussing options for implementing affirmative action in a multiracial society).

<sup>80</sup> See Brest & Oshige, *supra* note 79, at 855–900 (discussing class-based affirmative action).

<sup>81</sup> See Thernstrom, *supra* note 58, at 62, 62–64 (arguing that many minority students have been and are "mismatched" to the college to which they have been admitted). According to Thernstrom, fifty-seven percent of white students graduate within six years from the 301 NCAA Division I higher education institutions compared to only thirty-four percent of black students. *Id.* at 62. The gap in average SAT scores between black and white

Successful judicial challenges to racial preferences in university policies developed by the 1990s. For example, in 1994, the Fourth Circuit Court of Appeals ordered the University of Maryland to stop offering the annual thirty to forty Benjamin Banneker scholarships only to black students.<sup>82</sup> The growing backlash suggested that the California Supreme Court's proposed race-neutral alternatives to Justice Powell's "diversity rationale," particularly the creation of "aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races" and the expansion of the number of available spaces in state medical schools,<sup>83</sup> had merit. On November 5, 1996, fifty-four percent of California voters approved Proposition 209, a constitutional amendment outlawing racial, ethnic, and gender preferences "in public employment, public education or public contracting."<sup>84</sup> Proposition 209 was sponsored by the California Civil Rights Initiative, chaired by Ward Connerly, an African-American regent of the University of California.<sup>85</sup> Connerly claimed that over sixteen percent of the African-American students admitted in 1994 to the University's Berkeley campus "had been 'admitted by exception,' " having failed to fulfill the "minimum requirements."<sup>86</sup> In contrast, only one percent of Asian Americans and two percent of whites were similarly unqualified.<sup>87</sup> In 1997, the last year of affirmative action in university admissions, the University of California at Berkeley (U.C.-

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students at Harvard was only ninety-five points because of the depth and strength of its applicant pool, which "is so rich with very high-scoring black students that it can admit large numbers who are not mismatched to the institution." *Id.* at 63, 64. In contrast, large gaps between black and white graduation rates are evident at the major flagship state universities, such as the University of California at Berkeley, because 288 points separate the mean combined SAT scores of the average black and white students. *Id.* at 63. Thernstrom contends that ending "the crutch" of affirmative action could bring "some very positive results [that] might outweigh the drop in enrollments in elite institutions that would result temporarily." *Id.* at 64. *But see Editor's Comment, J. BLACKS HIGHER EDUC.*, Winter 1994/1995, at 64-65 (arguing against the mismatch hypothesis by noting that the dropout rates among black students at Harvard, Brown, and Yale are quite similar to the rates among whites and noting that dropout rate differentials elsewhere may reflect economic pressures rather than academic aptitude).

<sup>82</sup> See *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994).

<sup>83</sup> *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976).

<sup>84</sup> See Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

<sup>85</sup> See *id.*

<sup>86</sup> See George Will, *California Law Would Curb Excesses of Civil Rights Act*, STATE (Columbia, S.C.), July 14, 1996, at D2; *PBS Democracy Project*, *supra* note 77 (Comments of Ward Connerly and Abigail Thernstrom).

<sup>87</sup> See Will, *supra* note 86, at D2.

Berkeley) accepted 562 African American students.<sup>88</sup> In 1998, that number dropped to just 191.<sup>89</sup>

In the midst of these trends, racial preferences were dealt a major judicial challenge in *Hopwood v. Texas*.<sup>90</sup> In 1992, four white applicants, who had been rejected from the University of Texas Law School despite their higher grade-point averages and Law School Admission Test (LSAT) scores, sued the University of Texas system.<sup>91</sup> The plaintiffs objected to the color-coding of application forms by race; a minority subcommittee of three that considered the applications of blacks and Mexican Americans; the lower test score requirements for minority applicants; and racially segregated waiting lists.<sup>92</sup> On March 19, 1996, the Fifth Circuit unanimously ruled that the Fourteenth Amendment did not permit the University of Texas Law School to discriminate against whites and "non-preferred minorities" to increase the admission of blacks and Mexican Americans.<sup>93</sup>

In writing the decision for the three-judge panel, Judge Jerry E. Smith challenged the *Bakke* decision by arguing that the University of Texas Law School had been unable to show the necessity of remedying the present legacies of identifiable past discrimination,<sup>94</sup> one of Justice Powell's compelling state interests. Judge Smith also rejected Powell's diversity argument as establishing "a compelling interest under the Fourteenth Amendment."<sup>95</sup> Indeed, in terms of contributing "diversity of viewpoint," Cheryl Hopwood, who was denied admission despite a 3.8 grade point average, could argue that she would bring diversity as the spouse of a member of the Armed Services and as the mother of a child handicapped with cerebral palsy.<sup>96</sup> Although Judge Smith applied a strict scrutiny standard to the use of race in university admissions policies, he cited, as Justice Powell had in 1978, a variety of flexible factors that could be used in admitting students.<sup>97</sup> While some of these factors correlated with race, Smith flatly ruled out the use of race, even as a "proxy" for disadvantage.<sup>98</sup>

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<sup>88</sup> Michelle Locke, *Enrollment of Blacks at Berkeley Dropping*, BOSTON GLOBE, June 4, 2004, at A3.

<sup>89</sup> *Id.* By 2000, the number of African-American students accepted to the freshman class at U.C.-Berkeley had risen again to 338 students. *Id.*

<sup>90</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>91</sup> *Hopwood v. Texas*, 861 F. Supp. 551, 581 (W.D. Tex. 1994) ("The plaintiffs placed [a] chart in evidence to show their numerical standing above that of the majority of minorities offered admission."), *rev'd*, 78 F.3d 932 (5th Cir. 1996). For a detailed account of the *Hopwood* plaintiffs' admissions data, see *id.* at 564-67.

<sup>92</sup> *Hopwood*, 78 F.3d at 935-38.

<sup>93</sup> *Id.* at 962.

<sup>94</sup> *Id.* at 955.

<sup>95</sup> *Id.* at 944.

<sup>96</sup> *Id.* at 946-47.

<sup>97</sup> See *id.* at 946.

<sup>98</sup> See *id.*

Reactions to the Fifth Circuit's decision were mixed. Michael S. Greve, executive director of the Center for Individual Rights, which represented two of the *Hopwood* plaintiffs, applauded the court's rejection of the "middle ground" between "mild race preferences" and "quotas" that Justice Powell had sought to define in *Bakke*.<sup>99</sup> Indeed, *Bakke* had led many college officials to infer "that quotas are okay, so long as you disguise them."<sup>100</sup> *Hopwood's* importance, Greve argued, "lies in its realization that we cannot get beyond race by constantly taking it into account."<sup>101</sup>

On the other hand, Michael A. Olivas, a professor at the University of Houston Law Center, praised "Powell's carefully crafted and nuanced plurality opinion," which had constructively reassured "universities that they still had discretion and latitude in choosing from among their many applicants."<sup>102</sup> According to Professor Olivas, *Hopwood* rejected *Bakke's* nuances in favor of a "stark, almost Manichaeian" view that students are admitted either wholly on their own merits or only because of racial preferences.<sup>103</sup>

*Hopwood* foresaw widespread judicial curtailment of race-based affirmative action policies in higher education.<sup>104</sup> On July 1, 1996, however, the Supreme Court declined to review the Fifth Circuit's decision.<sup>105</sup> In December 1998, Washington became the second state to impose a voter-approved ban on racial and gender preferences in public colleges and government agencies.<sup>106</sup> Meanwhile, *Hopwood* led to a sharp decrease in minority student enrollments at Texas universities.<sup>107</sup> Whereas thirty-one African-American and forty-two Hispanic students had been among the 500 hundred students entering the University of Texas Law School in 1996-97, only three black and twenty Hispanic students joined the 1997-98 class.<sup>108</sup> Similar declines in minority student applications and enrollments occurred at the University

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<sup>99</sup> Michael S. Greve, *Ruling Out Race: A Bold Step to Make Colleges Colorblind*, CHRON. HIGHER EDUC., Mar. 29, 1996, at B2.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Michael A. Olivas, *The Decision is Flatly, Unequivocally Wrong*, CHRON. HIGHER EDUC., Mar. 29, 1996, at B3.

<sup>103</sup> *Id.*

<sup>104</sup> Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1045-46 (2002).

<sup>105</sup> See *Texas v. Hopwood*, 518 U.S. 1033 (1996).

<sup>106</sup> See Ethan Bronner, *U. of Washington Will End Race-Conscious Admissions*, N.Y. TIMES, Nov. 7, 1998, at A12; Sam Howe Varhovek & B. Drummon Ayres, Jr., *Voters Back End to State Preferences*, N.Y. TIMES, Nov. 4, 1998, at B2.

<sup>107</sup> Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L.L. REV. 381, 382 n.7 (1998).

<sup>108</sup> See *id.* (citing Peter Applebome, *Affirmative Action Ban Changes a Law School*, N.Y. TIMES, July 2, 1997, at B12).

of Houston Law Center and Texas Tech University.<sup>109</sup> Hispanic and African-American undergraduate applications to the University of Texas at Austin fell by twenty-three and twenty-six percent, respectively, despite an overall decline in admissions of only thirteen percent.<sup>110</sup> Similarly, Hispanic and African-American undergraduate applications to Texas A&M University fell by eighteen and thirty percent, respectively.<sup>111</sup>

Among the defenders of *Bakke* in the aftermath of *Hopwood* was Goodwin Liu, then clerking at the Court of Appeals for the District of Columbia.<sup>112</sup> Liu anticipated that the Supreme Court would soon have to decide "whether educational diversity is a constitutionally 'compelling' interest that justifies the use of race in university admissions."<sup>113</sup> Liu noted that most defenders of diversity relied not on constitutional jurisprudence, but on educational policy arguments, such as the argument that all students benefit from classroom interactions with those from diverse cultural, ethnic, and racial backgrounds.<sup>114</sup> Contending that in some circumstances the diversity rationale does not violate equal protection doctrine, Liu proposed "a set of evidentiary standards that a public university must meet in order to implement diversity-based affirmative action."<sup>115</sup> He emphasized that the controversy over racial preferencing involved only the most competitive twenty percent of colleges and universities, where the number of applicants far exceeds the number of available places.<sup>116</sup> Liu also emphasized that most whites denied admission were rejected in favor of other white applicants, not in favor of the comparatively small number of minorities admitted.<sup>117</sup>

#### IV

#### CHALLENGING AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN

The University of Michigan cases provided the Supreme Court with an opportunity to resolve a circuit split regarding Justice Powell's reasoning in *Bakke*. Whereas in *Hopwood* the Fifth Circuit rejected Powell's view that diversity may be "a compelling interest that justifies

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<sup>109</sup> *Id.* (citing Kate Thomas, *More 'Hopwood' Fallout*, NAT'L L.J., June 9, 1997, at A6).

<sup>110</sup> *Id.* (citing Applebome, *supra* note 108, at B12).

<sup>111</sup> *Id.* (citing A. Phillips Brooks, *Colleges' Minority Situation Awkward; A&M President Addresses*, AUSTIN-AM. STATESMAN, June 25, 1997, at B1).

<sup>112</sup> *Id.* at 381-83.

<sup>113</sup> *Id.* at 382.

<sup>114</sup> *See id.* at 382-83.

<sup>115</sup> *Id.* at 385.

<sup>116</sup> *See id.* at 382 n.5 (citing THOMAS KANE, RACIAL AND ETHNIC PREFERENCES IN COLLEGE ADMISSIONS 2 (1997) (unpublished manuscript on file with Goodwin Liu)).

<sup>117</sup> *See id.* at 422-23 n.192.



consideration of race in university admissions,"<sup>118</sup> in *Smith v. University of Washington*,<sup>119</sup> the Ninth Circuit ruled that diversity is a compelling state interest.<sup>120</sup> Meanwhile, in *Johnson v. Board of Regents of University of Georgia*,<sup>121</sup> the Eleventh Circuit ruled that an inflexible admissions policy awarding fixed numerical points to the scores of non-white applicants was not narrowly tailored to achieve student diversity.<sup>122</sup> The Eleventh Circuit declined, however, to consider whether diversity in college admissions constituted a "compelling government interest."<sup>123</sup> Rather, the court concluded that a policy giving a racial "plus" or bonus was not absolutely necessary to achieve diversity, nor did the policy meet the strict scrutiny test, especially since minority applications received a "plus" even before they were read.<sup>124</sup>

Like Allan Bakke, the three white plaintiffs in the University of Michigan cases had interesting personal stories and a strong desire to attend undergraduate or professional education at their first choice institution, the University of Michigan at Ann Arbor. Barbara Grutter, the fourth of nine children of a Protestant minister, worked her way through Michigan State University and became a computer and technology consultant for hospitals.<sup>125</sup> Wanting to become a lawyer with expertise in health care, Grutter, the mother of two children and the wife of a Ford Motor Company engineer, applied in 1996 to the law schools at the University of Michigan and Wayne State University.<sup>126</sup> She scored in the 86th percentile on the LSAT and had a 3.8 grade point average.<sup>127</sup> She believed that her life experiences set her apart from other applicants.<sup>128</sup> Nevertheless, the University of Michigan did not accept her as one of the 1,218 first-year law students it admitted

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<sup>118</sup> *Hopwood v. Texas*, 78 F.3d 932, 947 (5th Cir. 1996) ("To foster . . . diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.").

<sup>119</sup> 233 F.3d 1188 (9th Cir. 2000).

<sup>120</sup> *Id.* at 1201 ("[T]he Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.").

<sup>121</sup> 263 F.3d 1234 (11th Cir. 2001).

<sup>122</sup> *Id.* at 1245-46.

<sup>123</sup> *Id.* ("We need not, and do not, resolve in this opinion whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process.").

<sup>124</sup> *Id.*

<sup>125</sup> See Jacques Steinberg, *3 Look to College Suit to Show Their Merits*, N.Y. TIMES, Feb. 23, 2003, at 32.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

out of 3,429 applicants for 1997.<sup>129</sup> Though she was accepted at Wayne State, she chose not to attend because it offered fewer courses in her area of interest.<sup>130</sup>

In 1995, Jennifer Gratz, the daughter of a police officer and secretary living in a Detroit working-class suburb, had a 3.8 high school grade point average and an American College Test (ACT) score in the 83rd percentile. She dreamed of becoming a forensic pathologist or physician.<sup>131</sup> Patrick Hamacher of Flint, a Michigan high school varsity athlete who sang in the choir, had a 3.4 high school grade point average and an ACT score above the 90th percentile.<sup>132</sup> In 1997, when he applied to the University of Michigan to prepare for a career in medical or public administration, the university admitted 3,958 freshmen out of about 13,500 applicants.<sup>133</sup> Neither Gratz nor Hamacher was admitted to the University of Michigan at Ann Arbor.

Gratz believed that she was rejected because of a university policy that awarded 20 points out of 150 points to African Americans, Hispanics, and Native Americans.<sup>134</sup> She felt that minority students with "lesser grades, lesser test scores, [and] lesser activities" had benefited from racial preferences.<sup>135</sup> Turning down a spot on the waiting list for the Ann Arbor campus, Gratz attended the University of Michigan's Dearborn campus and earned a mathematics degree.<sup>136</sup> In 1997, she volunteered to join a suit sponsored by the Center for Individual Rights, a public policy law firm, to challenge the University of Michigan's preferences for minority applicants.<sup>137</sup> Gratz became the lead plaintiff, together with Patrick Hamacher, who earned his undergraduate degree from Michigan State University in East Lansing.<sup>138</sup> Hamacher, who took graduate courses in public administration while working in the budget office of Flint's city recreation department, felt "a wrong had occurred" because he "was never able to choose."<sup>139</sup> The lawsuit brought by Gratz and Hamacher was linked with the sepa-

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<sup>129</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 312–13. For statistical tables on law school applicants, admissions, and numbers and percentages of African Americans from 1995 to 2000, see *id.* at 383–84 (Rehnquist, J., dissenting).

<sup>130</sup> See Steinberg, *supra* note 125, at 32.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000), *rev'd*, 539 U.S. 244 (2003).

<sup>134</sup> Steinberg, *supra* note 125, at 32.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Peter Y. Hong, *Minority Admissions Policy is First to be Reviewed by Supreme Court in 25 years*, at <http://aad.english.ucsb.edu/docs/untitled-12.html> (last visited Nov. 16, 2004).

<sup>138</sup> *Id.*

<sup>139</sup> Steinberg, *supra* note 125, at 32.

rate lawsuit of Barbara Grutter against the University of Michigan Law School.<sup>140</sup>

In May 2002, the Sixth Circuit, in a 5–4 en banc decision, reversed the district court's ruling against the University of Michigan Law School's admissions system.<sup>141</sup> For Judge Friedman, who authored the district court opinion, student diversity was not a compelling government interest and, even if it were, the law school's policy was not narrowly tailored to achieve such a goal.<sup>142</sup> The majority of the Sixth Circuit disagreed, relying on *Bakke* to hold that "the Law School has a compelling state interest in achieving a diverse student body," and that the Law School's admissions policy of considering certain minorities as a "plus" was narrowly tailored to that interest.<sup>143</sup> The Center for Individual Rights filed a certiorari petition to the U.S. Supreme Court asking for a review of the Sixth Circuit's *Grutter* decision.<sup>144</sup> In response, the University of Michigan filed briefs opposing Supreme Court review.<sup>145</sup>

In *Gratz v. Bollinger*, the district court held the University of Michigan's undergraduate admissions program constitutional.<sup>146</sup> In his majority opinion, District Judge Duggan asserted that "a racially and ethnically diverse student body . . . constitutes a compelling governmental interest under strict scrutiny," and that the addition of twenty points to a minority applicant's selection index score did not cause the admissions systems to operate as a "two-track" system, which would be prohibited under *Bakke*.<sup>147</sup> Before the Sixth Circuit could decide the plaintiffs' appeal, both the Center for Individual Rights and the plaintiffs filed petitions seeking a pre-judgment writ of certiorari. As in *Grutter*, the university filed a brief opposing review.<sup>148</sup>

In December 2002, the Supreme Court granted writs of certiorari in both *Grutter* and *Gratz*.<sup>149</sup> By April 2003, sixty-seven briefs were filed

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<sup>140</sup> See *id.*

<sup>141</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), *rev'g* 137 F. Supp. 2d 821 (E.D. Mich. 2001), *aff'd* 539 U.S. 306 (2003).

<sup>142</sup> *Id.* at 849–50.

<sup>143</sup> *Grutter*, 288 F.3d at 742, 749. In his dissenting opinion, Judge Boggs cited Marcia Graham Synnott's *The Half-Opened Door*. While agreeing with the two rulings in *Bakke*, Synnott recognized that "the narrowness of the majority as well as the ambiguities in Powell's opinion have opened the courtroom door to future litigation over admissions programs that favor minority applicants." SYNNOTT, *supra* note 56, at 225–30.

<sup>144</sup> Center for Individual Rights, *Chronology of the University of Michigan Cases* [hereinafter Center for Individual Rights Timeline], at [http://www.cir-usa.org/cases/michigan\\_timeline.html](http://www.cir-usa.org/cases/michigan_timeline.html) (last visited Nov. 16, 2004).

<sup>145</sup> *Id.*

<sup>146</sup> *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 (E.D. Mich. 2000), *rev'd in part* 539 U.S. 244 (2003).

<sup>147</sup> *Id.*

<sup>148</sup> Center for Individual Rights Timeline, *supra* note 144.

<sup>149</sup> *Id.*

in support of the University of Michigan in *Grutter*, eleven in support of the petitioners, and four in support of neither party.<sup>150</sup> The student petitioners themselves recognized the educational advantages of diversity without conceding that its benefits were “a constitutionally compelling state interest.”<sup>151</sup> Siding with the petitioners, the Bush administration filed its own brief on January 16, 2003.<sup>152</sup> President Bush denounced both the awarding of twenty points to African-American, Hispanic, and Native-American applicants to the undergraduate college and the “numerical targets for incoming minority students to the law school.”<sup>153</sup> President Bush cited “race-neutral admissions policies” in California, Florida, and Texas that admitted a percentage of top students from every high school to show that “diversity can be achieved without using quotas.”<sup>154</sup>

Prior to the presentation of arguments before the Supreme Court, a broad coalition of groups began to plan public events in support of affirmative action.<sup>155</sup> Among them were members of United for Equality and Affirmative Action (UEAA), Coalition to Defend Affirmative Action & Integration and Fight for Equality By Any Means Necessary (BAMN), Law Students for Affirmative Action, and a racial cross-section of forty-one individual students.<sup>156</sup> Pledging to “Defend Affirmative Action and Save Brown v. Board of Education!,” the student intervenor-defendants in *Grutter* held a press conference outside the U.S. Supreme Court on December 2, 2002.<sup>157</sup> In January 2003, BAMN sponsored the National Civil Rights Summit and Conference at the University of Michigan, Ann Arbor.<sup>158</sup> A National Civil Rights March was held on April 1, 2003—the day the Supreme Court began its hearings—supported by civil rights activists, Jesse Jackson’s Rainbow/PUSH Coalition, and the National Organization for Women (NOW).<sup>159</sup>

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<sup>150</sup> Amicus Briefs Summary, *supra* note 14.

<sup>151</sup> See Petitioner’s Brief at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

<sup>152</sup> Brief Amicus Curiae of the United States, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

<sup>153</sup> President George W. Bush, Remarks on the Michigan Affirmative Action Case (Jan. 15, 2003), at <http://www.whitehouse.gov/news/releases/2003/01-7.html> (last visited Nov. 16, 2004).

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., Civil Rights March to the Supreme Court: Defend Affirmative Action and Save *Brown v. Board of Education* [hereinafter Civil Rights March], at <http://www.bamn.com/wdc/index.asp> (last visited Nov. 16, 2004); DAAP—Our Record of Leadership, at <http://www.umich.edu/~daap/our-record.htm> (last visited Nov. 16, 2004).

<sup>156</sup> See Civil Rights March, *supra* note 155.

<sup>157</sup> See *id.*

<sup>158</sup> DAAP—Our Record of Leadership, *supra* note 155.

<sup>159</sup> Debbi Wilgoren & Manny Fernandez, *A Defense Team of Thousands: Diverse Crowd Urges High Court to Protect Affirmative Action*, WASH. POST, Apr. 2, 2003, at B1.

To persuade the Supreme Court to uphold *Bakke's* acceptance of race as one of many factors in admissions decisions, briefs were filed by a wide range of groups, including representatives of leading business corporations, retired military leaders, including three former chairmen of the U.S. Joint Chiefs of Staff, Ivy League and other colleges and universities, law students, civil rights veterans, and American Jewish groups.<sup>160</sup> The amici curiae brief filed by Harvard, Brown, Duke, Princeton, and Yale universities, together with Dartmouth College, the University of Chicago, and the University of Pennsylvania, argued that racial diversity was an educational benefit to all students and prepared them for leadership in a multi-ethnic and multi-racial society.<sup>161</sup> Because it would be difficult, if not impossible, to show that these universities were guilty of relatively recent prior discrimination, the brief shifted the argument to emphasize the importance of developing "educational programs that are forward-looking and inclusive" and "training future leaders for a diverse and pluralistic society."<sup>162</sup> Universities could best "perform their broad educational function" if they were allowed to consider race and ethnicity on an "individualized" basis, as was permitted under *Bakke*.<sup>163</sup> Such individualized consideration was neither a quota nor a device for proportionate representation, because no slots were reserved to particular racial minorities and no one was excluded on account of their race.<sup>164</sup> The brief stated that no group, "including African Americans, has a 'right' to proportionate representation either in academia or in the professions," but "carefully tailored" efforts to include racial minorities "violates no right on the part of others and no constitutional or statutory commitment of our society."<sup>165</sup>

The brief persuasively argued that universities were in the best position to weigh the academic and personal qualifications of each applicant.<sup>166</sup> The brief also urged the Supreme Court to uphold "the judicially recognized and constitutionally grounded tradition of academic freedom, and the deeply ingrained practice of deference to educators' judgments on educational matters."<sup>167</sup> Since Harvard, Yale, and Princeton had moved to "need-blind admissions systems," focusing on economic disadvantage as a "race-neutral" means of diversification would not increase minority representation.<sup>168</sup> Admission by

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<sup>160</sup> See Amicus Briefs Summary, *supra* note 14.

<sup>161</sup> Harvard Brief, *supra* note 9.

<sup>162</sup> *Id.* at 7, 14.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* at 26–27.

<sup>165</sup> *Id.* at 27–28.

<sup>166</sup> *Id.* at 15.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 22–23.

class rank or placement in the top ten percent of a high school class was equally unsuitable for smaller, academically selective universities.<sup>169</sup> For example, Harvard College received applications from almost 2,900 high school valedictorians for the 2,066 places in its first-year class.<sup>170</sup> Universities needed to be free to consider a range of factors, none of which automatically had top priority.<sup>171</sup> In addition to economic disadvantage, universities considered “unusual athletic ability, distinctive artistic or musical talent, significant hardships that have been overcome, and familial experience with higher education as well as academic achievement and aptitude.”<sup>172</sup>

The brief rejected the petitioners’ contention “that consideration of race and ethnicity will create an ever-expanding precedent that can have no temporal stopping point and that will lead to claims by other groups—whether social, religious, or ideological—for ‘fair’ representation on our university campuses.”<sup>173</sup> While not suggesting a timetable for the end to racial preferences, the brief concluded that “even if there must be an ultimate end to the consideration of race in university admissions, it is surely premature to declare that the end is upon us.”<sup>174</sup> Although minority students made more progress than non-minority students between 1976 and 1995 in improving their average SAT scores (70–150 points at research universities and 30–130 points at liberal arts colleges), the historical legacies of discrimination “cannot be expected to play themselves out within a single generation.”<sup>175</sup>

Another group of twenty-eight prestigious private colleges and universities, including Amherst, Barnard, Bowdoin, Bryn Mawr, Colgate, Mount Holyoke, Smith, Tufts, Vassar, Wellesley, Wesleyan, and Williams, also filed an *amici curiae* brief arguing for the freedom to use race as a factor in creating a diverse student body.<sup>176</sup> These schools argued that because every applicant’s admissions folder has “multiple readers” followed by open discussion and evaluation, “a race-blind admission process” was impossible.<sup>177</sup> Keenly conscious of differences among applicants, these elite colleges sought to use that knowledge “intelligently as part of their complex weighing of multiple

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<sup>169</sup> *Id.* at 25.

<sup>170</sup> *Id.* at 24.

<sup>171</sup> *See id.* at 24–25.

<sup>172</sup> *Id.* at 21.

<sup>173</sup> *Id.* at 27.

<sup>174</sup> *Id.* at 28.

<sup>175</sup> *Id.* at 29.

<sup>176</sup> Brief of Amici Curiae Amherst College et al. at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Amherst Brief], available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-241/02-241.mer.ami.amherst.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.amherst.pdf) (last visited Nov. 16, 2004).

<sup>177</sup> *Id.* at 13.

factors that leads to judgments as to whom to admit.”<sup>178</sup> For private liberal arts colleges, adopting “mechanical formulas looking to grades, test scores, or graduation rank—would radically change the profile of each college.”<sup>179</sup> Indeed, if forced to adopt the “mechanical formulas” practiced by Florida, Texas, and California that the briefs of the United States and the petitioners suggested were suitable alternatives, the colleges feared they would end up trading “selectivity for diversity.”<sup>180</sup> The Amherst Brief contended that neither admission according to a “percentage of each high school class,” used by Texas and Florida, nor “Florida’s guarantee of placement to all students who successfully complete a two year degree at a community college” would work at a small, highly selective private college.<sup>181</sup>

Similar arguments were presented in the brief submitted by Columbia, Cornell, Georgetown, Rice, and Vanderbilt.<sup>182</sup> These five institutions took a clear position in support of the respondents, stating: “Each of the amici curiae, like virtually every university in the nation, has reached the conclusion that completely race-blind admissions practices frustrate or otherwise impede its effort to achieve a sufficient level of diversity in its student body to effectuate its academic mission.”<sup>183</sup> Agreeing with “the respondents and other amici curiae that diversity is a compelling interest under the Fourteenth Amendment and Title VI,” the brief justified “the use of ethnicity or race as one of many ‘plus’ factors to achieve educational diversity.”<sup>184</sup> Rather than repeating the arguments of the other briefs, Columbia, Cornell, Georgetown, Rice, and Vanderbilt focused on what they believed was a key issue: “[T]he need for this Court to give a high level of deference to the good faith admissions decisions of public and private universities around the nation and the unconstitutional impact on academic freedom of any ruling failing to do so.”<sup>185</sup>

Carnegie Mellon University and thirty-seven other private colleges and universities filed a separate brief supporting the respondents on the grounds of academic freedom and a “spirit of

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<sup>178</sup> *Id.* at 13–14.

<sup>179</sup> *Id.* at 14.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Brief of Amici Curiae Columbia University et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-241/02-241.mer.ami.cu.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.cu.pdf) (last visited Nov. 16, 2004).

<sup>183</sup> *Id.* at 3–4 (italics omitted).

<sup>184</sup> *Id.* at 4.

<sup>185</sup> *Id.* Justice O’Connor eventually echoed this sentiment in her opinion for the Court in *Grutter*, quoting Justice Powell in *Bakke*. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“The freedom of a university to make its judgments as to education includes the selection of its student body” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978))).

experimentation.”<sup>186</sup> Their brief argued for a reaffirmation of Justice Powell’s opinion in *Bakke* that colleges and universities could consider race as one narrowly tailored factor among other factors in an effort to achieve diversity.<sup>187</sup> The Carnegie Mellon brief added, “[t]here is no credible dispute as to the truths spoken by Justice Powell in *Bakke*—that a racially diverse student body serves and enriches the higher education of *all* students and is essential to the training of leaders for our pluralistic world.”<sup>188</sup> The brief claimed that diverse perspectives have enriched the legal profession and the courts,<sup>189</sup> as Justice O’Connor recognized in an article honoring Supreme Court Justice Thurgood Marshall.<sup>190</sup> Justice Marshall’s “special perspective,” based on his familiarity with those who had experienced racial discrimination, was a personal one, not a “‘racial’ perspective.”<sup>191</sup>

The Carnegie Mellon brief contended that “race-neutral strategies . . . could *not* work for selective private colleges and universities,” because their “limited size” rendered a “guaranteed admissions program” such as those adopted by California, Texas, and Florida, which guarantee admission to the top four, ten and twenty percent of graduating seniors within their states, “unworkable.”<sup>192</sup> In fact, the amici institutions asserted that the “race neutral” admissions programs “depend entirely upon continued segregation among the states’ high schools,” to achieve diversity.<sup>193</sup> Additionally, percentage plans may reward those students who take less demanding classes, and the plans do not differentiate between competitive high schools and those that provided academically weaker preparation.<sup>194</sup>

The Carnegie Mellon brief also rejected excessive reliance on SAT scores because of the continuing disparities between African-American and white students.<sup>195</sup> In 2002, the mean score for white students on the verbal portion of the test was ninety-seven points higher than for African-American students, while the mean score for white students on the math portion of the test was 106 points higher

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186 Brief of Amici Curiae Carnegie Mellon University et al. at 16, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516) [hereinafter Carnegie Mellon Brief], available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-241/02-241.mer.ami.cmu.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.cmu.pdf) (last visited Nov. 16, 2004).

187 *Id.* at 9.

188 *Id.* at 6.

189 *See id.*

190 Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

191 Carnegie Mellon Brief, *supra* note 186, at 8 (citing O’Connor, *supra* note 190, at 1217).

192 *Id.* at 9–10.

193 *Id.* at 12.

194 *Id.* at 13.

195 *Id.* at 14.



than for African-American students.<sup>196</sup> Only two percent of blacks scored above 650 on either the verbal or math portion of the SAT, in contrast to whites, twelve percent of whom scored above 650 on the verbal portion and fifteen percent of whom scored above 650 on the math portion.<sup>197</sup> Nevertheless, once admitted to college, many minority students prospered and contributed to their educational institution.<sup>198</sup>

## V

### THE EXPERT REPORTS OF WILLIAM G. BOWEN AND DEREK BOK

In addition to support received from amici curiae briefs, the University of Michigan recruited nine experts to buttress its argument with a series of reports, together entitled "The Compelling Need for Diversity in Higher Education."<sup>199</sup> Two of the most influential experts to submit reports were William G. Bowen, President of The Andrew W. Mellon Foundation and former president of Princeton University, and Derek Bok, Professor at Harvard University's John F. Kennedy School of Government and former president of Harvard University.<sup>200</sup> Their defenses of affirmative action drew from their book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*,<sup>201</sup> which looked at one of the first studies to provide "the empirical evidence necessary for an informed discussion" of "race-conscious admissions policies."<sup>202</sup>

In *The Shape of the River*, Bowen and Bok studied The College and Beyond Database, compiled by the Andrew W. Mellon Foundation. The database documents the college careers of more than 80,000 full-time students, 3,500 of them black, who matriculated to twenty-eight highly selective universities in 1951, 1976, and 1989.<sup>203</sup> Surveys sent to

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Introduction, in THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION 1, 2 (1999) [hereinafter The Compelling Need Reports], available at <http://www.umich.edu/~urel/admissions/research/expert/intro.html> (last visited Nov. 16, 2004).

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* at 8 (citing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

<sup>202</sup> *Id.*

<sup>203</sup> Bowen and Bok surveyed twenty-eight institutions (four public universities, thirteen private universities, seven coeducational liberal arts colleges, and four all-women's colleges): Miami University (Ohio), University of Michigan (Ann Arbor), University of North Carolina (Chapel Hill), and Pennsylvania State University; Columbia, Duke, Emory, Northwestern, University of Pennsylvania, Princeton, Rice, Stanford, Tufts, Tulane, Vanderbilt, Washington, and Yale; Denison, Hamilton, Kenyon, Oberlin, Swarthmore, Wesleyan, and Williams; and Barnard, Bryn Mawr, Smith, and Wellesley. See BOWEN & BOK, *supra* note

a select number of the students in the database regarding their post-college careers garnered an eighty percent response rate.<sup>204</sup> Bowen and Bok found that the African-American students who matriculated at universities like Harvard, Yale, and the University of Michigan had lower SAT scores, lower high school grade point averages, and graduated at a lower rate than white students. Nonetheless, these African-American students tended to be as successful as their white peers in graduate schools and in their subsequent careers. Indeed, the survey of 700 blacks admitted in 1976 with lower test scores and grades than their white counterparts demonstrated a high level of success.<sup>205</sup> Graduation rates for these minority students were as high as seventy-five percent. Almost one-third (225) earned professional degrees or doctorates and earned an average of \$71,000 a year, almost double the average for black graduates nationwide. In addition, not only were they extensively involved in civic and community activities, they were much more likely than their white counterparts to hold leadership positions in these organizations.<sup>206</sup>

Bowen and Bok did not base their argument in support of diversity in education on the need to remedy the effects of past discrimination against racial minority students, perhaps because that chapter in their own universities' history had ended by the early 1960s. Instead, they argued that creating a more diversified student body conferred both present and future benefits on white students as well as on racial minority students.<sup>207</sup> They replaced the phrase "affirmative action" with the new code words "diversity" and "fairness" and redefined the ways of measuring "merit."<sup>208</sup> In their view, universities needed to

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201, at 292 tbl.A.1. The study analyzed data collected on students who entered college in the fall of 1951, 1976, and 1989. *Id.* at 291. Because less than one percent of students who enrolled in these institutions in 1951 were minorities, the book focuses on the data from 1976 and 1989. *Id.* at 291 n.2. Spurred by both the civil rights movement and the desire to broaden their educational environments, selective colleges almost tripled their percentages of African-American students, from 2.3 percent in 1967 to 6.4 percent in 1976. *See id.* It is important to note dramatic changes to the student bodies of certain schools between data sets. For instance, of the seven "coeducational liberal arts institutions," Hamilton, Kenyon, Wesleyan, and Williams admitted only men in 1951, but were coeducational by 1989. *Id.* at 293 n.3. Similarly, four of the institutions in the "private universities" category were originally all-male—Emory, Princeton, Columbia, and Yale—but only Columbia remained all-male in 1976. *Id.*

204 *See id.* at 303.

205 *Id.* at 285.

206 *Id.* at 256–58. The question of whether the 700 rejected whites with higher scores and grades would have accomplished as much or more had they been admitted to these highly selective institutions remained unanswered. However, the chances of admissions for those rejected white applicants would only have improved by about two percent if more than half the African-American applicants admitted had been declined. *Id.* at 285.

207 *See id.* at 276–78.

208 *See id.* For a discussion of the shift in code words, see Terry H. Anderson, *The Backlash and Demise of Affirmative Action*, in *AFFIRMATIVE ACTION IN RECENT AMERICAN HISTORY* (paper presented at the Organization of American Historians, Mar. 27, 2004).

look beyond test scores and grades to include such subjective factors as an applicant's ability to contribute to the overall educational experiences of the student population and the applicant's potential for leadership after graduation.<sup>209</sup> Bowen asserted that highly selective institutions have many more qualified candidates than they can admit.<sup>210</sup> After selecting the most outstanding, many of whom have been admitted to other highly competitive institutions, admissions officers must choose the remaining members of a new freshman class "from among the large group who also have very strong qualifications, who are thought capable of doing the work and doing it well, but are not so clearly outstanding as to be placed in the very top category."<sup>211</sup> Since no "applicant has a 'right' to a place in a college or university," admissions officers operate under "an obligation to make the best possible use of the limited number of places in each entering class so as to advance as effectively as possible the broad purposes the school seeks to serve."<sup>212</sup> Although "a school should try to be fair to every applicant," fairness, Bowen implied, did not limit itself to considering only test scores and grades.<sup>213</sup>

Bowen and Bok did not believe "that admission to a selective university is a right possessed by anyone."<sup>214</sup> Since the rewards of graduating from an Ivy League college were great for both individual students and for society as a whole, admissions must be based "on the merits."<sup>215</sup> But "grades and scores predict only 15–20 percent of the variance among all students in academic performance and a smaller percentage among black students" because other factors such as "inherited ability, family circumstances, and early upbringing," as well as better teachers, also shaped achievement.<sup>216</sup> Thus, argued Bowen and Bok, "fairness" does not mean accepting all "A" students before admitting any "B" students, who may possess greater motivation and potential to contribute to a career and to society. Rather, fairness is achieved by judging each applicant "according to a consistent set of criteria that reflect the objectives of the college and university."<sup>217</sup> Race is relevant in determining which candidates "merit" admission,

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209 BOWEN & BOK, *supra* note 201, at 276–78; see also Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite College*, N.Y. TIMES, Sept. 9, 1998, at B10 (summarizing findings of the Bowen & Bok study).

210 *Expert Report of William G. Bowen*, in *The Compelling Need Reports*, *supra* note 199, at 236 [hereinafter *Bowen Export Report*].

211 *Id.*

212 *Id.*

213 *Id.* at 237; see also BOWEN & BOK, *supra* note 201, at 276–78 (redefining merit to include factors beyond grades and test scores).

214 BOWEN & BOK, *supra* 201, at 277.

215 *Id.* at 276.

216 *Id.* at 277.

217 *Id.* at 277–78.

"because taking account of race helps institutions achieve three objectives central to their mission—identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs."<sup>218</sup> Thus, the responsibility of admissions officers is to select "which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in what they have learned for the benefit of the larger society."<sup>219</sup>

Bowen's report eloquently expanded on Woodrow Wilson's vision while president of Princeton. When students exchanged views with others from all sections of the nation and from foreign countries "between the hours of 6 P.M. and 9 A.M.,"<sup>220</sup> they had "to reexamine even their most deeply held assumptions about themselves and their world."<sup>221</sup> Since proportionately fewer poor black and Hispanic children were academically qualified for the most competitive universities than poor white children (families with incomes under \$20,000), Bowen asserted that a class-based admissions policy, rather than a race-sensitive one, "would substantially reduce the minority enrollments at selective institutions" while changing dramatically their overall student profiles.<sup>222</sup> Educating a diverse student body was critical "at the highest levels of business, the professions, government, and society at large,"<sup>223</sup> because by 2030, forty percent of the American population might well be of minority heritage.<sup>224</sup> Furthermore, society as a whole benefits from a diverse educational environment. Racial interaction among students is one of the three most influential factors associated with increased acceptance of other cultures, participation in community service programs, and acceptance of responsibility in other aspects of civic life.<sup>225</sup> For Bowen, the conclusion was inescapable: "Both the growing diversity of American society and the increasing interaction with other cultures worldwide make it evident that going to school only with 'the likes of oneself' will be increasingly anachronistic."<sup>226</sup>

Bowen and Bok also rejected the stigmatization argument advanced by Stephan and Abigail Thernstrom in *America in Black and*

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<sup>218</sup> *Id.* at 278.

<sup>219</sup> *Id.* at 277.

<sup>220</sup> SYNNOTT, *supra* note 56, at 173 (citations omitted); *Bowen Expert Report*, *supra* note 210, at 3.

<sup>221</sup> *Bowen Expert Report*, *supra* note 210, at 237.

<sup>222</sup> BOWEN & BOK, *supra* note 201, at 271.

<sup>223</sup> *Bowen Expert Report*, *supra* note 210, at 241.

<sup>224</sup> BOWEN & BOK, *supra* note 201, at 11–12.

<sup>225</sup> *Id.* at 266–76.

<sup>226</sup> *Id.* at 279.

White.<sup>227</sup> Bowen and Bok's analysis of the College and Beyond data showed that far from being discouraged by academic competition with students with higher entrance test scores and grades, by 1989 black students at elite schools were nearly twice as likely to graduate (75 percent) than black students nationwide (40 percent).<sup>228</sup> Bowen and Bok also argued that under "race-neutral" admissions policies the percentage of blacks admitted to selective colleges would have dropped from about seven percent to two percent.<sup>229</sup>

In analyzing the consequences of eliminating race-sensitive admissions at law schools, Bok and Bowen relied on a study conducted by Linda F. Wightman. Wightman looked at the application and decision data of 90,335 law school applicants in the 1990-91 application year.<sup>230</sup> Wightman's study revealed that if admissions decisions in 1991 were based on undergraduate grade point average and LSAT scores, only 711 (1.6 percent of the total number of students accepted) of 3,435 blacks would have been accepted,<sup>231</sup> a number almost identical to that in 1965.<sup>232</sup> Furthermore, under the "law school grid" model, which classified the ABA-approved law schools into six clusters ranked by selectivity, black enrollment would have dropped to 0.44 percent in the most selective "Cluster 1" schools, with 30.37 percent of the 711 black applicants accepted only by the least competitive "Cluster 6" law schools.<sup>233</sup>

Bok's expert report concluded "that a university's interest in achieving diversity among its student body attaches to legal education, in ways that are largely similar to, although in some ways different from, the interest in achieving diversity in an undergraduate student body."<sup>234</sup> If racial diversity were eliminated in law school admissions, "the exclusive gateway to the American legal profession,"<sup>235</sup> the number of black students would plummet.<sup>236</sup> To counteract the fact that, in 1965, of the one percent of law students who were African-American, more than one-third were in all-black law schools, Erwin Griswold, dean of Harvard Law School, launched a special summer

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<sup>227</sup> See *id.* at 85 & n.38 (criticizing the argument in STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 388, 422 (1997)).

<sup>228</sup> *Id.* at 55-57.

<sup>229</sup> *Id.* at 51.

<sup>230</sup> See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 4 (1997).

<sup>231</sup> BOWEN & BOK, *supra* note 201, at 5, 44-45; see Wightman, *supra* note 230, at 15, 28.

<sup>232</sup> See BOWEN & BOK, *supra* note 201, at 5.

<sup>233</sup> See Wightman, *supra* note 230, at 23, 30 *tbl.*

<sup>234</sup> *Expert Report of Derek Bok*, in *The Compelling Need Reports*, *supra* note 199, at 253 [hereinafter *Bok Expert Report*].

<sup>235</sup> *Id.* at 254.

<sup>236</sup> See *id.* at 258 ("[A]n admissions policy that relied primarily on test scores would lead to the rejection of qualified minority applicants.").

program to encourage juniors from historically black colleges to apply to historically white law schools.<sup>237</sup> As other law schools followed suit, the percentage of black law students rose to 4.5 percent by 1975.<sup>238</sup>

Bok's expert report also reaffirmed *Bakke's* view that the United States needed to rely on leaders exposed to the views of its diverse population.<sup>239</sup> Bok commented that "[t]his is certainly true of the nation's lawyers," arguing that the legal profession needs minority lawyers not only to protect the rights of their own groups, but also to be able to interact with clients of diverse backgrounds.<sup>240</sup> Equally important, minority law students need to interact with white law students, because the two groups will inevitably work together after law school.<sup>241</sup>

Since the 1980s, as part of fulfilling accreditation requirements, the nation's law schools have been obligated to recruit an ethnically and racially diverse student body and to address problems of discrimination experienced by minorities.<sup>242</sup> Nonetheless, in 1990, African Americans, Asian Americans, Hispanics, and Native Americans together comprised only eight percent of American lawyers and twelve percent of law students, although they comprised nearly twenty-five percent of the national population.<sup>243</sup> For Bok, an increased number of minority lawyers ensures "greater public confidence in the fairness and integrity of the legal profession."<sup>244</sup>

The Compelling Need Reports buttressed the University of Michigan's defense of its own admissions policies. In 2003, blacks constituted 6.7 percent of the students enrolled at the University of Michigan Law School because it accepted over eighty percent of all black applicants who scored at least 155 on the LSAT.<sup>245</sup> Nationally, in the fall of 2002, only 0.8 percent of black test takers scored the median of 165 on the LSAT. In contrast, 8.3 percent of nonblack test takers scored 165 or higher, a number large enough to fill the first-year class at all of the nation's top law schools.<sup>246</sup> To achieve racial diversity in enrollment, the University of Michigan Law School re-

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<sup>237</sup> BOWEN & BOK, *supra* note 201, at 5.

<sup>238</sup> *Id.* at 7. To put this number in perspective, in the same year, the percentage of black medical students was 6.3 percent. *Id.*

<sup>239</sup> See *Bok Expert Report*, *supra* note 234, at 260.

<sup>240</sup> *Id.*

<sup>241</sup> See *id.* at 262.

<sup>242</sup> See *id.*

<sup>243</sup> *Id.* at 263 (citing DEBORAH L. RHODES, PROFESSIONAL RESPONSIBILITY 53-54 (1994)).

<sup>244</sup> *Id.*

<sup>245</sup> *What if Grutter Had Gone the Other Way?*, J. BLACKS HIGHER EDUC., Autumn 2003, at 32, 33.

<sup>246</sup> *Id.* at 32-33. If the admissions process had not been race sensitive, "it is reasonable to assume that students would [have] need[ed] an LSAT score in the range of 165 in order to have a good chance to be considered for admission." *Id.*

jected almost one-half of all white applicants who scored between 163 and 167 on the LSAT.<sup>247</sup> Without some racial preference, black law student enrollment at the University of Michigan Law School could have been just two percent in 2003.<sup>248</sup>

## VI

### THE SUPREME COURT'S SPLIT DECISIONS IN THE UNIVERSITY OF MICHIGAN CASES

On June 23, 2003, the Supreme Court issued two majority opinions in *Grutter* and *Gratz* that seemed to resolve the ambiguity created by the lack of a clear and consistent majority among *Bakke*'s six written opinions. Since 1978, "admissions committees could never be sure whether a majority of the Supreme Court had supported the argument that engineering a diverse freshman class was of compelling interest to the state."<sup>249</sup> Speaking for a 5–4 majority in *Grutter*, Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, reaffirmed Justice Powell's "tie-breaking vote"<sup>250</sup> in *Bakke* that racial diversity is a compelling state interest and that the strict scrutiny test did not restrict race-based governmental policies to remedying past discrimination.<sup>251</sup> The use of race was a permissible factor in the University of Michigan Law School's admissions decisions as long as it was part of 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>252</sup> In *Gratz*, however, Chief Justice Rehnquist, speaking for the 6–3 majority, struck down a mechanistic system of giving twenty bonus points to minority undergraduate applicants to the University of Michigan's College of Literature, Science, and the Arts, because it operated like a quota.<sup>253</sup>

In addition to holding that race may be considered in shaping a remedy for past discrimination, Justice O'Connor's majority opinion recognized that race may also be used in an inclusive way to achieve diversity that is beneficial to white and minority students alike.<sup>254</sup> However, Justice O'Connor's conception of the promotion of diversity went beyond the beneficial interaction in the classroom emphasized by Justice Powell. In holding that the University of Michigan Law

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 33.

<sup>249</sup> Jacques Steinberg, *Supreme Court: University Admissions: An Admissions Guide*, N.Y. TIMES, June 24, 2003, at A1.

<sup>250</sup> *Id.* at A23.

<sup>251</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12, 362–63 (1978)).

<sup>252</sup> *Id.* at 337.

<sup>253</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270–72 (2003).

<sup>254</sup> *Grutter*, 539 U.S. at 329–33.

School's interest in a diverse student body was a compelling interest, Justice O'Connor argued that the law school's system "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" <sup>255</sup> Among the arguments as to why "cross-racial understanding" is a compelling interest of the state, Justice O'Connor pointed out its necessity for leadership legitimacy in the eyes of the citizenry. Laws schools commonly train many of the nation's future leaders, and "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." <sup>256</sup>

In addition to holding that this understanding was a compelling interest, the *Grutter* decision also defended academic freedom as long as a university acts in good faith in establishing admissions criteria and achieving educationally beneficial racial diversity. <sup>257</sup> Race must not be used to infer inferiority or to play politics. Universities should not admit minority students by separate admissions tracks (as with the University of Texas Law School's policy, struck down in *Hopwood*) or quotas (as with the University of California at Davis Medical School's policy, struck down in *Bakke*). Additionally, Justice O'Connor expressed doubts that percentage plans or admission of top students by class rank were "race neutral," in that they might indeed prevent individual evaluations. <sup>258</sup> Moreover, plans such as those in Texas, California, and Florida were of limited value in admitting students to graduate and professional schools. <sup>259</sup> While endorsing a narrow application of race in the law school admission case, Justice O'Connor recognized the complex judgments involved in a university's admissions policy. Such policies begin with a faculty committee drafting the policy, which then must be unanimously approved by the school's faculty. <sup>260</sup> Evidently, the amici curiae briefs and the reports of Bowen

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<sup>255</sup> *Id.* at 330.

<sup>256</sup> *Id.* at 332. Justice O'Connor, quoting from *Brown v. Board of Education* acknowledged that "[t]his court had long recognized that 'education . . . is the very foundation of good citizenship.'" *Id.* at 331. In *The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from Bakke to Grutter*, Jeffrey S. Lehman emphasized the Supreme Court's use of "the government's argument" against "the Law School's policy" was "surprising." See PATRICIA GURIN ET AL., *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* 91 (2004). Lehman observed that "the majority instead used the government's argument to extend the constitutional understanding of diversity to incorporate not only a *pedagogic* interest but also an interest in *democratic legitimacy*." *Id.* The Court stated: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

<sup>257</sup> See *Grutter*, 539 U.S. at 329, 335.

<sup>258</sup> See *id.* at 340.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*



and Bok had considerable influence on Justice O'Connor's opinion and her deference to carefully developed admissions policies. In his dissent, however, Justice Scalia, focusing on implementation, raised the issue of how to measure whether an admissions committee sufficiently evaluated an applicant "as an individual."<sup>261</sup>

*Grutter* represents a victory not only for the University of Michigan, but for other universities that give some weight to race in admitting students, among other factors. Universities do not have to prove that they are seeking to remedy past institutional discrimination, rather only a broader "societal discrimination." Indeed, the decision reaches even further. While Justice O'Connor expects "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,"<sup>262</sup> the Supreme Court has indicated that its reasoning is applicable to all institutions that accept federal money. Thus, private as well as public institutions may consider race in seeking to promote racial understanding, with the goal of ending the need for such consideration and striving to implement a race-blind policy.<sup>263</sup>

In *Gratz*, Chief Justice Rehnquist's opinion was supported by Justices Scalia, Kennedy, and Thomas. Justices O'Connor and Breyer wrote concurring opinions. The majority agreed that Michigan's undergraduate admissions policy of awarding twenty out of a total of 150 points to minority applicants on the basis of race failed to meet the constitutional strict scrutiny test, which requires proof that narrowly tailored means are being employed to achieve a compelling state interest in diversity.<sup>264</sup> Consistent with *Grutter*, the *Gratz* majority required applications to be given "individualized review" so as to determine what each might contribute to the overall diversity of the first-year class.<sup>265</sup>

In her dissent, Justice Ginsburg argued that because "[t]he stain of generations of racial oppression is still visible in our society,"<sup>266</sup> the

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<sup>261</sup> See *id.* at 348–49. Justices Scalia and Thomas were the only two Justices who rejected the majority view that a diverse student body creates educational benefits that are a compelling interest. See *id.* at 395 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). They preferred overturning *Bakke*. Justice Kennedy agreed that race might be taken into account as a factor in admissions, but disagreed with its use by the law school because of a failure to apply strict scrutiny of the means used. See *id.* at 387–88 (Kennedy, J., dissenting); see also Ann D. Springer, *Affirming Diversity at Michigan*, *ACADEME*, Sept.–Oct. 2003, at 54, 54–58.

<sup>262</sup> *Grutter*, 539 U.S. at 343.

<sup>263</sup> See Springer, *supra* note 261, at 55.

<sup>264</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

<sup>265</sup> See *id.* at 274. Justices Ginsburg, Souter, and Stevens wrote dissenting opinions. See *id.* at 282 (Stevens, J., dissenting); *id.* at 291 (Souter, J., dissenting); *id.* at 298 (Ginsburg, J., dissenting).

<sup>266</sup> *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting).

Constitution must be “‘both color blind and color conscious.’”<sup>267</sup> It is not unconstitutional, she reasoned, for colleges and universities to seek to overcome the impact of the legacy of racial discrimination by developing preferences to include African-American, Hispanic, and Native-American students as long as such policies do not “unduly” impede the admission chances of the white majority.<sup>268</sup> Using the University of Michigan’s overt point system to admit a critical number of minority students was preferable, she argued, to resorting to “camouflage” or code words for family background, cultural heritage, and community associations.<sup>269</sup> “If honesty is the best policy,” said Justice Ginsburg, “surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>270</sup>

Ann Springer, associate counsel of the American Association of University Professors (AAUP), analyzed the Supreme Court’s rulings in *Grutter* and *Gratz* and observed that these opinions left what types of affirmative action plans are constitutionally acceptable “up in the air.”<sup>271</sup> She complimented the Supreme Court’s “strong endorsement” of the freedom of educators to make academic decisions, including decisions regarding affirmative action policies.<sup>272</sup> Yet, Springer faulted the Court for failing “to truly recognize systemic disparities” by not acknowledging the extent of the privilege belonging to members of the majority.<sup>273</sup> Springer found a consensus between the two majority decisions in that both Justice O’Connor and Chief Justice Rehnquist seemed to agree that racial preferences were permissible if they are part of a “‘highly individualized, holistic review of each applicant’s file.’”<sup>274</sup> Chief Justice Rehnquist emphasized, however, that the “means” be narrowly tailored to achieve a compelling state interest, a condition he did not believe was met by the admissions policies of either the law school or the undergraduate school.<sup>275</sup> Justice O’Connor argued that the law school factored in “many possible bases for diversity” and avoided the fixed percentages of a quota

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<sup>267</sup> *Id.* at 302 (Ginsburg, J., dissenting) (quoting *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

<sup>268</sup> *Id.* (Ginsburg, J., dissenting).

<sup>269</sup> *Id.* at 304 (Ginsburg, J., dissenting).

<sup>270</sup> *Id.* at 305 (Ginsburg, J., dissenting). For an analysis of the ways in which Justice Ginsburg’s dissent in *Gratz* echoes the reasoning of the *Brown* decision, see William J. Rich, *Betrayal of the Children with Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 Cornell L. Rev. 419 (2005).

<sup>271</sup> See Springer, *supra* note 261, at 57.

<sup>272</sup> *Id.* at 56.

<sup>273</sup> *Id.* at 58.

<sup>274</sup> *Id.* at 56 (quoting *Grutter v. Bollinger*, 539 U.S. 344, 309 (2003)).

<sup>275</sup> See *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

system.<sup>276</sup> She also recognized the need to admit “a critical mass” of students from historically excluded ethnic and racial groups, but noted that the law school admitted some non-minority applicants with lower academic ratings than racial minority applicants because they contributed to diversity on other grounds.<sup>277</sup> Neither Justice found the undergraduate admissions point system acceptable.<sup>278</sup>

Legal challenges to affirmative action from white students are expected to continue—even though, as Goodwin Liu has observed, white students’ greatest competitors for access to the most selective colleges are other white students, some of whom are admitted with lower scores than the students citing affirmative action as the reason for their rejection.<sup>279</sup> If elite colleges did not engage in affirmative action, most white applicants would increase their chances of admissions by only one-fifth of a percent.<sup>280</sup> Nevertheless, despite continuing debates about the rulings in *Grutter* and *Gratz*, former Dartmouth College president James O. Freedman commented that the Supreme Court had finally provided a viable “road map” for colleges and universities to follow in devising constitutionally permissible race-conscious admissions policies.<sup>281</sup>

## VII

### THE AFTERMATH: UNIVERSITIES CAUTIOUSLY CONTINUE AFFIRMATIVE ACTION ADMISSIONS POLICIES

Less than a month after the *Grutter* and *Gratz* decisions, officials from forty-eight leading private and public universities attended a conference sponsored by Harvard University’s Civil Rights Project and the University of Michigan to discuss their admissions policies in light of the Supreme Court rulings.<sup>282</sup> At the conference, university officials discussed which minority recruiting procedures were permissible under *Bakke*, *Gratz*, and *Grutter*.<sup>283</sup> The participants acknowledged that affirmative action remained vulnerable to both political and judi-

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<sup>276</sup> Springer, *supra* note 261, at 56–57.

<sup>277</sup> *Id.* at 56.

<sup>278</sup> See *Gratz*, 539 U.S. at 275, 280 (O’Connor, J., concurring); Springer, *supra* note 261, at 55.

<sup>279</sup> Liu, *supra* note 107, at 422–23; see also Goodwin Liu, Essay, *The Myth and Math of Affirmative Action*, WASH. POST, Apr. 14, 2002, at B1, B4 (adapted from Liu, *supra* note 104, at 1046–50, 1103–04).

<sup>280</sup> Liu, *supra* note 279, at B1. Liu viewed the majority opinion in *Grutter* as reaffirming the *Brown* decision. See Goodwin Liu, *Down the road from U-M, A Remarkable Step for America*, HOLLAND SENTINEL, June 30, 2003, available at [http://www.thehollandsentinel.net/stories/063003/opi\\_063003019.shtml](http://www.thehollandsentinel.net/stories/063003/opi_063003019.shtml) (last visited Nov. 16, 2004).

<sup>281</sup> Steinberg, *supra* note 249, at A1.

<sup>282</sup> See Patrick Healy, *College Leaders Share Affirmative Action Ideas at Harvard*, BOSTON GLOBE, July 17, 2003, at A17.

<sup>283</sup> See *id.*

cial challenges and that achieving Justice O'Connor's challenge of implementing race-blind admissions in twenty-five years would require broad institutional and social changes.<sup>284</sup>

Highly selective private universities are skillful, however, in distinguishing their affirmative action programs from those practiced by large public universities with vast numbers of applicants.<sup>285</sup> By recruiting academically qualified minority students through mailings and school visits, Ivy League institutions can count factors other than grades and SAT scores, and do not need quotas or reserved places for minority students.<sup>286</sup> Flexibility in evaluating "merit" is essential, since it is difficult to measure which eighteen-year-old students are likely to achieve the greatest success in life.<sup>287</sup> Well-staffed admissions offices consider both the individuality of each applicant and the mix of students from diverse backgrounds.<sup>288</sup> Among the factors to which private universities give extra weight or "pluses" are outstanding personal talents, race, unusual work or service experience, leadership, maturity, compassion, ability to overcome disadvantages, and ability to interact with others from diverse backgrounds.<sup>289</sup> Because elite private universities have the resources to evaluate applicants holistically, courts will likely accord such universities the freedom to exercise considerable discretion in reviewing their applicants.

Moreover, very few rejected applicants could bring a legal challenge against the Ivy League and other selective colleges because, as Justice Ginsburg recognized in her dissent in *Gratz*, sophisticated admissions officers avoid point systems, thereby shielding the process from scrutiny.<sup>290</sup> Another deterrent is the vast financial resources and influential alumni of elite private institutions, a number of whom are prominent attorneys.<sup>291</sup> Although for the first time the Supreme Court indicated that its rulings applied to "every institution that accepts any federal money," the current Justices—with the possible exception of Justices Scalia and Thomas—probably lack the desire to treat private institutions as state actors strictly subjected to the Four-

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<sup>284</sup> See *id.*

<sup>285</sup> See David Czuchlewski, *Court Rulings Prompt University to Assess Affirmative Action Policy*, DAILY PRINCETONIAN, Apr. 16, 1996, at 1 (suggesting that Princeton was not worried about the legal impact of potential Supreme Court cases on its affirmative action program, but that the university might change its policy to reflect an updated societal view of affirmative action).

<sup>286</sup> *Id.* at 7.

<sup>287</sup> *Id.* at 7–8.

<sup>288</sup> *Id.* at 7.

<sup>289</sup> *Id.* at 5, 7.

<sup>290</sup> *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).

<sup>291</sup> Theodore Cross, *Why the Opponents of Racial Preferences Haven't Taken America's Private Universities to Court*, J. BLACKS HIGHER EDUC., Summer 1999, at 106–10.

teenth Amendment's equal protection clause and Title VI of the 1964 Civil Rights Act.<sup>292</sup>

Since *Grutter* and *Gratz*, enrollment of African-American students has held steady or improved at universities with affirmative action policies.<sup>293</sup> As of the fall of 2003, the eight highest-ranked universities, not including the Ivy League, with the largest enrollments of black undergraduates were: UNC-Chapel Hill (11.1 percent), Duke University (10.4 percent), Emory University (9.3 percent), Stanford University (8.8 percent), Tulane University (8.8 percent), University of Virginia (8.7 percent), Washington University (8.4 percent), and the University of Florida (8.3 percent).<sup>294</sup> Among the Ivy League, Princeton enrolled the highest percentage of black undergraduates (8.2 percent), followed by Yale (7.9 percent), Columbia (7.0 percent), the University of Pennsylvania (6.6 percent), Harvard (6.4 percent), Dartmouth (6.1 percent), Brown (5.9 percent), and Cornell (4.7 percent).<sup>295</sup> In 2003, the University of Michigan's undergraduate student body was 8.1 percent black.<sup>296</sup>

After the Supreme Court struck down its system of awarding points to minority undergraduate applicants, President Mary Sue Coleman wanted the University of Michigan to emphasize a broader concept of "diverse diversity" that moved beyond racial differences to include socioeconomic status, family background, and personal characteristics.<sup>297</sup> The university drafted a new, eighteen-page application form that asked personal questions such as whether the applicant's parents and grandparents attended college and whether the applicant helped to support his or her family.<sup>298</sup> Only about twenty percent of the university's 25,000 undergraduates came from a family whose income was under \$50,000.<sup>299</sup> President Coleman, whose own father had been born in Kentucky's coal mining region, wanted to recruit students from similar roots.<sup>300</sup> She stated that a "student from the hills of Kentucky would be quite interesting and different [at the University of Michigan]."<sup>301</sup> The new diversity at the University of Michigan emphasized cultural and socio-economic factors as well as race.

<sup>292</sup> *Id.* at 107; see Springer, *supra* note 261, at 55.

<sup>293</sup> *Leaders and Laggards: Rankings of Black Enrollments at the Nation's 50 Highest-Ranked Universities*, J. BLACKS HIGHER EDUC., Autumn 2003, at 76.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> Keith Naughton, *A New Campus Crusader*, NEWSWEEK, Dec. 29, 2003/Jan. 5, 2004, at 78.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

As a result of *Grutter*, on November 24, 2003, Rice University and the University of Texas announced plans to include ethnicity and race among the factors in admissions decisions.<sup>302</sup> Rice University planned to implement the policy in the fall of 2004 because the "race-neutral means" applied since 1996 had not "yielded the level of diversity, including racial and ethnic diversity, to achieve Rice's educational goals."<sup>303</sup> According to University of Texas President Larry Faulkner, since diversity is "central to this university's primary mission of educating leaders for the future," it would include a racial factor in the fall of 2005, while keeping its top ten percent rule that admitted seventy percent of the freshmen in 2003.<sup>304</sup>

Small increases in minority freshmen enrollment occurred in the fall of 2004 at the University of Texas at Austin and at Texas A&M.<sup>305</sup> Though Texas A&M could have reinstated affirmative action after *Grutter* overturned *Hopwood*, instead it decided to end affirmative action in December 2003.<sup>306</sup> Then, in January 2004, the university abolished preferential admissions for children of alumni, thus appeasing the Texas legislators, congressmen, and various community groups, who had denounced the university's decision to end its affirmative action program.<sup>307</sup> President Robert M. Gates stated that, in addition to more vigorous recruiting efforts in minority areas, the university would promote diversity by weighing criteria such as life experiences, hardships, and leadership qualities.<sup>308</sup> Those efforts paid off. In the fall of 2004, Texas A&M admitted 277 more minority freshmen and 114 fewer whites.<sup>309</sup>

In Georgia, which is twenty-nine percent African-American, affirmative action ended at public universities in 2001 after the Eleventh Circuit ruled it unconstitutional for the University of Georgia to award bonus points in admissions decisions and race-based scholarships.<sup>310</sup> As a result, the percentage of black students at the University of Geor-

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<sup>302</sup> Todd Ackerman, *Texas Colleges Use Race in Admissions: Rice, University of Texas to Use Ethnicity as Factor in Fall 2004*, ANN ARBOR NEWS, Nov. 25, 2003, at A4.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*; see Cyndee-Nga Trinh & Tessa Moll, *Race-Based Admission Decisions Pass First-Year Mark*, DAILY TEXAN, June 23, 2004, at 1.

<sup>305</sup> Victoria Rossi & Hallie Pratt, *Minority Enrollment Sees Small Jump*, DAILY TEXAN, Sept. 24, 2004, at 1.

<sup>306</sup> See Greg Winter, *Texas A&M Ban on "Legacies" Fuels Debate on Admissions*, N.Y. TIMES, Jan. 13, 2004, at A16.

<sup>307</sup> *Id.* In 2002 and 2003, Texas A&M admitted over 300 white students largely because of their alumni connections, a number nearly equal to the black students admitted in the same years. *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Rossi & Pratt, *supra* note 305, at 1.

<sup>310</sup> *Johnson v. Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

gia dropped to 5.5 percent from the 6.2 percent it had been in 1988.<sup>311</sup>

In California, on the other hand, minority applications began to rise at some state institutions, although they had declined system wide as a result of Proposition 209.<sup>312</sup> By the fall of 2003, the acceptance rate among blacks at the University of California at Berkeley was 18.9 percent, compared to an overall acceptance rate of 23.9 percent, and black students constituted 4.1 percent of the freshman class.<sup>313</sup> The University of California at Los Angeles accepted black students at a rate of 18.3 percent, compared to an overall acceptance rate of 24.1 percent, and black students comprised 4.0 percent of the first-year class.<sup>314</sup> As of June 2004, however, only ninety-eight African Americans had registered for the incoming first-year class—only 2.5 percent of the projected 3,821 students.<sup>315</sup>

Cost is also a factor in designing and implementing minority recruiting programs. While many colleges and universities seem committed to preferring race as one of several factors in admissions decisions, implementing “holistic review” may require a costly expansion of admissions staff.<sup>316</sup> In addition, some colleges and universities have either cancelled or opened to white students their summer and orientation programs and financial aid packages that were previously aimed at assisting minority students.<sup>317</sup> Moreover, universities are under pressure to refocus the concept of diversity to address “race-neutral” economic issues that prevent many students from applying to four-year residential institutions.<sup>318</sup>

In fact, economic status, as much as race, has continued to determine access to higher education. As the federal government cuts back on its financial aid to students and states reduce their funding for public colleges and universities—which educate some eighty percent

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<sup>311</sup> *Affirmative Action Ban Hinders UGA*, ST. PETERSBURG TIMES, June 6, 2003, available at [http://www.sptimes.com/2003/06/06/worldandnation/Affirmative\\_Action\\_ba.shtml](http://www.sptimes.com/2003/06/06/worldandnation/Affirmative_Action_ba.shtml) (last visited Nov. 16, 2004); Nina Brook, *College Admissions Need Continued Benefit of Affirmative Action*, STATE (Columbia, S.C.), June 30, 2003, at A12.

<sup>312</sup> Ethan Bonner, *Black and Hispanic Admissions Off Sharply at U. of California*, N.Y. TIMES, Apr. 1, 1998, at A1; William H. Honan, *Minority Applications Rise at California, Easing Fears*, N.Y. TIMES, Jan. 29, 1998, at A20.

<sup>313</sup> *Table on Admission of African Americans at the Highest-Ranked Universities*, J. BLACKS HIGHER EDUC., Autumn 2003, at 8.

<sup>314</sup> *Id.*

<sup>315</sup> Ronald Cruz, *Chancellor Must Boost Minority Enrollment*, DAILY CALIFORNIAN, Aug. 31, 2004, at <http://www.dailycal.org/article.php?id=15909> (last visited Nov. 16, 2004); Michelle Locke, *Enrollment of Blacks at Berkeley Dropping*, BOSTON GLOBE, June 4, 2004, at A3.

<sup>316</sup> Wendy McElroy, *Affirmation Action on Decline*, at <http://www.enterstageright.com/archive/articles/0704/0704aadec.htm> (last visited Nov. 16, 2004).

<sup>317</sup> Justin Pope, *Colleges Still Cautious About Affirmative Action*, STATE (Columbia, SC), June 21, 2004, at A4.

<sup>318</sup> *Id.*

of students—lower-income Americans will find it increasingly difficult to educate their children.<sup>319</sup> Since 2001, twenty-seven states have reduced their higher education appropriations, forcing four-year public colleges and universities to raise tuition fees to an average of \$10,636 per year—an increase of eighty-five percent in a decade.<sup>320</sup> Even as families in the middle- and upper-middle income ranges absorb the higher tuitions, the poorest families are not able to absorb these tuition costs, which have risen from sixty-four percent of their 1993 income to seventy-one percent in 2001.<sup>321</sup> The Pell Grant, which initially paid eighty-four percent of a public four-year institution's expenses for students whose families earned less than \$15,000 a year, now pays only thirty-nine percent, or \$4,050 a year.<sup>322</sup> At the same time, public institutions have sought to enroll more tuition-reduced "merit" students and to recruit additional tuition-paying out-of-state students.<sup>323</sup> As one journalist describes, "the cost crisis is resegregating higher education, not by color but by class."<sup>324</sup> In 1973, "40.5 percent of the students receiving Pell grants for the needy attended four-year public schools," but only 31 percent of recipients attended such schools in 2001.<sup>325</sup> Economic status also affects the age at which students receive a degree. Whereas about 51.4 percent of children from families earning more than \$85,000 a year have a college degree by their twenty-fourth birthday, only 4.5 percent of children from families earning under \$35,000 can say the same.<sup>326</sup>

To assist students from low-income families of all races, the University of North Carolina at Chapel Hill announced in September 2003 that its Carolina Covenant program would provide tuition grants to pay all expenses of students from families at or below 150 percent of the federal poverty level.<sup>327</sup> In exchange for working ten to twelve hours a week at a campus job, the students are able to graduate without debt.<sup>328</sup> Since the family assets of black students in the state, some 1,750 of whom attend UNC, are, on average, only 10 percent that of white family assets, black students will likely receive a larger percentage of the benefits from this program.<sup>329</sup>

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319 Jane Bryant Quinn, *Colleges' New Tuition Crisis*, NEWSWEEK, Feb. 2, 2004, at 49.

320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 *The Carolina Covenant: Chapel Hill Announces a Low-Income Student Aid Plan That Could Change Public Higher Education in America*, J. BLACKS HIGHER EDUC., Autumn 2003, at 39.

328 *Id.*

329 *Id.*



Recently, Ivy League colleges have also adopted need-blind admissions and increased student financial aid to help students pay tuition costs that have soared to between \$30,000 and \$40,000 per year. For example, in response to its need-blind policy adopted for the class of 2007, Brown University received a higher number of applications from students of color and from lower-income families than it previously had.<sup>330</sup> From a pool of 15,153 applicants, Brown accepted almost 2,300 (about fifteen percent) for 1,400 places, thirty-five percent of whom were minorities. Asian Americans were the largest group (sixteen percent), followed by African Americans (ten percent), Latino Americans (nine percent), and Native Americans (under one percent).<sup>331</sup> About sixteen percent did not identify ethnicity, which may augur a future trend.<sup>332</sup> Alumni children held steady at seven percent.<sup>333</sup> Harvard has also expanded its total undergraduate aid program to just under \$110 million in 2003–04 and reduced the average amount of debt of graduates to \$8,800.<sup>334</sup> Its undergraduate scholarship budget will be increased to almost \$80 million.<sup>335</sup> The new financial package offered to students entering the class of 2008 resulted in almost an eighty percent yield among those from low or medium income families.<sup>336</sup> In his address to the American Council on Education, Harvard University President Lawrence H. Summers stated that Harvard would no longer require a contribution from parents who earned under \$40,000 per year and would reduce the amount for parents earning between \$40,000 and \$60,000.<sup>337</sup> Nonetheless, the average family income of scholarship recipients was \$88,000.<sup>338</sup>

Harvard's aggressive recruiting of qualified ethnic and racial minority students achieved increased diversification in the class of 2008 as compared to the class of 2007: 19.7 percent Asian-American students (eighteen percent for the class of 2007); 9.2 percent African-American students (8.8 percent for 2007); 8.9 percent Latino students (eight percent for 2007); and 1.1 percent Native Americans (0.8 per-

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<sup>330</sup> Kristen Cole, *Acceptance Letters Go Out to Class of 2007*, Mar. 31, 2003, available at [http://www.brown.edu/Administration/George\\_Street\\_Journal/vol27/27GSJ23a.html](http://www.brown.edu/Administration/George_Street_Journal/vol27/27GSJ23a.html) (last visited Nov. 16, 2004); *Twelve-Year Enrollment Trends for Black Freshmen at Ivy League Colleges*, J. BLACKS HIGHER EDUC., Autumn 2003, at 10.

<sup>331</sup> *Id.*

<sup>332</sup> *See id.*

<sup>333</sup> *Id.*

<sup>334</sup> Harvard Announces New Initiative Aimed at Economic Barriers to College, Harvard University Office of News and Public Affairs, Feb. 28, 2004, at <http://www.news.harvard.edu/press/pressdoc/pr-040227-econ.html> (last visited Nov. 16, 2004).

<sup>335</sup> *Id.*

<sup>336</sup> *College's New Financial Aid Initiative Keeps Yield Near 80%*, HARV. UNIV. GAZETTE, May 20, 2004, at 3.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

cent for 2007).<sup>339</sup> Nevertheless, the mixed message about affirmative action under *Bakke* and *Grutter* may be found in a comment by Henry Louis Gates Jr., chair of Harvard's African and African American Studies Department: "The black kids who come to Harvard or Yale are middle class. Nobody else gets through."<sup>340</sup>

Looking back at *Grutter*, William G. Bowen acknowledged that colleges and universities had "dodged" the bullet that might have barred all consideration of race in admissions decisions.<sup>341</sup> However, Bowen emphasized that the persistent "preparation gap" among minority students will continue to affect their academic performance.<sup>342</sup> As a result, no one should assume "that the need for race-sensitive admissions will end within 25 years simply as a result of trends and policies already in place."<sup>343</sup> Bowen urged "the most 'privileged' colleges and universities to consider moving beyond 'need-blind' admissions and giving a positive boost to the admissions chances of well-qualified candidates from poor families and from families with no college-going history."<sup>344</sup> Such a boost would be equivalent to "putting a 'legacy thumb' on the scale" or even "substituting some of these candidates for recruited athletes."<sup>345</sup> The nation's "'unlovely racial history'" remains a burden on all Americans,<sup>346</sup> requiring consideration "of race, in sensible ways," even as "we work to reduce the need for racial preferences."<sup>347</sup> The promise of *Grutter*, as the promise of *Brown* and *Bakke* before it, is to "sustain 'a culture of hope,'" in which "possibilities and dreams" are without limit.<sup>348</sup>

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<sup>339</sup> *Id.*; see also Marcia G. Synnott, *Affirmative Action at Harvard, Yale, and Princeton, 1960s to 2000* (paper presented at a panel on University Admissions Policies and the Supreme Court: From Desegregation to Affirmative Action to the End of Racial Preferences at the Organization of American Historians, Mar. 27, 2004) (on file with author).

<sup>340</sup> *Pell Grant Count Puts Most Ivy League Schools Near the Bottom in Percentage of Low-Income Students*, J. BLACKS HIGHER EDUC., Autumn 2003, at 122.

<sup>341</sup> William G. Bowen, *Grutter: Where Do We Go From Here?: The Impact of the Supreme Court Decisions in the University of Michigan Affirmative Action Cases*, J. BLACKS HIGHER EDUC., Summer 2004, at 76.

<sup>342</sup> *Id.* at 79 (italics omitted).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 80.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 81.

<sup>348</sup> *Id.*