

The Story of *Grutter v. Bollinger*: Affirmative Action Wins

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In 1996, at the age of forty-three, Barbara Grutter decided a career change was in order. She applied to a nearby law school, the University of Michigan Law School, with the hopes of becoming a health care attorney. A white woman, she had graduated from Michigan State University eighteen years before with a 3.81 grade point average. She was raising two sons (then seven and ten) and running her own small business as a health care information technology consultant in Plymouth, Michigan.² She had recently scored a 161 on the LSAT, placing her in the 86th percentile. Grutter made it onto the Michigan waiting list, but not its classrooms. The rejection initially surprised her, but her surprise turned to “dismay” when she recalled a recent article in a Detroit newspaper.³ The article indicated that minorities admitted to Michigan had lower test scores and grades than admitted whites. Believing Michigan Law School had discriminated against her on the basis of her race, she eventually agreed to become the name plaintiff in a suit brought by the Center for Individual Rights (“CIR”) against the law school’s race conscious admission policies.

CIR was engaged in a well-financed litigation strategy to have Justice Lewis Powell’s opinion in *Bakke v. Regents of University of California* declared legally wrong.⁴ That opinion had endorsed diversity as a reason for states to engage in racial preferences in university admissions. When CIR filed suit on behalf of Grutter, its goal seemed in sight. It had already won a significant victory in a similar case filed on behalf of Cheryl Hopwood, a white woman denied admission to The University of Texas School of Law. CIR had also recently filed two other similar suits on behalf of other white women: Katuria Smith’s suit against the University of Washington Law School and Jennifer Gratz’s suit against the University of Michigan College of Literature, Science, and the Arts.

¹Thanks to Marvin Krislov, Miranda Massie, Michael Olivas, Wilson Parker, Mike Selmi, and Ted Shaw for their many very helpful comments. I would especially like to thank Barbara Grutter for all her time and effort in commenting on this book chapter. All errors, of course, are my own.

²Email message from Barbara Grutter to author (June 14, 2006).

³Id.; Mark Clayton, *The Woman Behind the Law School Admissions Suit*, Christian Science Monitor, April 3, 2001, at 14.

⁴438 U.S. 265 (1978).

Public opinion appeared to favor CIR's goal as well. In November 1996 voters in California had passed Proposition 209, which broadly prohibited race conscious activity by the state. Two years later, voters in Washington would pass a similar measure. CIR seemed unstoppable: both the judiciary and voters appeared on its side. Affirmative action supporters were clearly losing public opinion and in the courts.

Yet, the tide came to favor affirmative action. In *Grutter v. Bollinger*, the Supreme Court affirmed that diversity could be a legally legitimate rationale for affirmative action, and validated Michigan's approach to deciding who gets admitted to the law school.⁵ Further, state law prohibitions on race-based affirmative action have come to a standstill. Here I tell the story of what ended up stopping CIR and how and why affirmative action survived – at least for now. The story takes us not just to why Grutter never attended law school, but also to the students who benefited from race-conscious admissions. On a larger scale, the story is one of diversity gathering public support, and the Supreme Court constitutionalizing that public acceptance and allowing voluntary integration. Yet, the story also raises the possibility that diversity's survival will prove transitory.

Race-Based Affirmative Action in Higher Education: The Beginnings

College admissions has rarely been just about meeting objective qualifications.⁶ Harvard, for example, adopted in 1905 the College Entrance Examination Board to open admissions beyond those attending Eastern prep schools. By 1922 Harvard alumni and administrators feared, however, that admissions had gotten too open for one group in particular – Jews. The objective test had given Jews more than a fifth of the seats in Harvard's freshman class, and Harvard, like Yale and Princeton, feared a "Hebrew Invasion." Harvard President A. Lawrence Lowell tried, unsuccessfully, to limit Jews to 15% of the enrollment through an explicit quota. Instead, the three colleges decided to define merit as more than a test score and turned to test the "character" of applicants. Now personal essays and interviews were required, and applications were asked about "'Race and Color,' 'Religious Preference,' 'Maiden Name of Mother,' 'Birthplace of Father,' and 'What change, if any, has been made since birth in your own name or that of your father? (Explain fully).'"⁷ These very effective anti-Jewish policies eventually gave way at the Ivy Leagues in the 1960s.

What remained, however, was the notion that admission could mean more than test scores. Some schools, but not all, used that idea in the 1960s to expand their student body to groups historically under-represented. Schools began an explicit quest to increase their enrollment of African Americans and, to a lesser extent, Asian Americans, Latinos, and Native Americans. To admit students from these groups, the schools decreased the importance of test

⁵539 U.S. 306 (2003).

⁶See generally Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 77-136 (2005); Malcolm Gladwell, *Getting In: The social logic of Ivy League admissions*, *The New Yorker*, Oct. 10, 2005, at 80-86.

⁷See Gladwell, *supra* note 6, at 82.

scores, prep school attendance, and financial need – thereby allowing minority students to gain admission. The colleges opened up admissions mainly in the name of increasing “Negro leadership,” but also to compensate for past, societal injustices to the groups and to foster institutional diversity.⁸ The methods were relatively successful. Only around 200 African Americans enrolled in historically white law schools in 1964; that number increased to 1,700 by 1973.⁹

Other schools at the time, particularly Southern ones, took a quite different approach to minority enrollment: they admitted African American students only under court order. For example, rather than enrolling both African American and white school children in the same school, Prince Edwards County, Virginia ordered its schools closed. The schools remained closed for five years, until the Supreme Court ordered them re-opened.¹⁰ Matters were equally problematic at the college level. It took not only a court order but 23,000 soldiers (three times the population of Oxford), including the Marines and Air Force, to enroll James Meredith at Ole Miss – and at a cost of two lives.¹¹ The school was far from pleased with the order to admit Meredith, and responded with racially neutral admission standards designed to forestall minority enrollment.¹²

These two different approaches to minority enrollment – one struggling against it, the other struggling for it – were legally connected by the Fourteenth Amendment and the Civil Rights Act of 1964, both of which prohibit discrimination on the basis of race and ethnicity. If schools could not refuse admission because of the race of the student – a principle of *Brown v. Board of Education* – could the schools consider race to admit a minority student into a historically white institution? In other words, did *Brown*’s principles also mean that voluntary affirmative action plans to increase minority enrollment were as unconstitutional as schools reserved solely for white students?

In 1974 Allan Bakke prominently brought that issue to the courts. He sued the University of California Medical School at Davis (“Davis”) in state court, after he was twice rejected and a sympathetic admissions officer told him of a special admissions program for minority students. Davis specifically set aside 16 of its 100 admissions slots for African Americans, Asian Americans, Latinos, and Native Americans, a set aside reflecting California’s minority population. The thirty-four-year-old white man of Norwegian ancestry initially won his lawsuit in the California state courts. The Supreme Court took the case and attracted national attention and a then recording breaking number of 57 amici briefs. The overwhelming majority were on

⁸ See Karabel, *supra* note 6, at 408; Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. Chi. Legal F. 11, 24.

⁹ Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367, 379 (2004).

¹⁰ *Griffin v. Sch. Bd. of Prince Edward Co.*, 377 U.S. 218 (1964).

¹¹ See Taylor Branch, *Parting the Waters: America in the King Years 1954-63*, at 634-72 (1988).

¹² See Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. Colo. L. Rev. 1065, 1100-02 (1997) (noting that after Meredith applied, Ole Miss began requiring an ACT score for the first time and that after Meredith was ordered admitted, the school began requiring a minimum ACT score set to exclude almost all minority applicants).

the side of Davis.

The Supreme Court Justices had a harder time reaching a majority. Justice Powell announced the judgment of the Court, but he wrote only for himself. Justice Powell concurred with four justices that Bakke should be admitted and that Davis' practices were an unconstitutional quota. Yet, he also agreed with four other justices that race could be a factor in admissions. Four justices of the Court's liberal wing (Justices Blackmun, Brennan, Marshall, and White) concluded that race can be considered to redress the societal discrimination that had depressed the number of minority doctors. Justice Powell rejected, with almost no analysis, that societal discrimination could legally justify any race conscious activity. Instead, Justice Powell concluded that race could be a "plus" factor if the school was seeking diversity to improve educational learning.¹³ As an example, he pointed to the Harvard College Admissions Program, which allowed race to be a "plus" factor in a system with individual review and no racial set aside of admission slots.

Most colleges were relieved with *Bakke's* holding that race could be a factor in admissions, even in the absence of a majority opinion explaining when race could be considered. The question became on what basis, and most went with Justice Powell's diversity justification. Thus began what Professor Sanford Levinson has called a game of "Simon Says," where colleges and universities would take into account race in deciding who got admitted and who didn't and would claim diversity as their legal justification.¹⁴ In doing so, affirmative action continued, but it became disconnected from any notion of rectifying societal discrimination or the history of racial discrimination.¹⁵ Affirmative action's focused on benefiting the historically white institution instead.

Michigan's Affirmative Action History

Michigan Law School has a history of enrolling African-Americans and has never excluded them from admission. Its first African American student enrolled in 1868; its first Mexican American, 1894. In 1966, it joined other schools seeking to increase its African American enrollment. It was soon second only to Harvard in number of African American law students. In 1991, however, newly appointed Dean Lee Bollinger recognized that the law school's practices made it legally vulnerable. He appointed a faculty committee to devise an affirmative action policy consistent with Justice Powell's *Bakke* opinion. Committee members included Ted Shaw, a faculty member with substantial civil rights experience as a former lawyer

¹³438 U.S. 265, 314, 319-20 (1978) (opinion of Powell, J.).

¹⁴Sanford Levinson, *Diversity*, U. Pa. J. Con. L. 573, 578 (2000) (referenced in Justice Kennedy's dissenting opinion in *Grutter*, 539 U.S. at 393); see also Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861, 861 (2002) ("It is striking that a word which a generation ago carried no particular moral weight and had, at most, a modestly benign connotation, should in this generation have become the most fiercely contested word in American higher education."). Yet, schools themselves brought the idea to Justice Powell's attention. See *Bakke*, 438 U.S. at 311-18 (opinion of Powell, J.) (noting that Davis defended its program, in part, on the grounds of diversity and that the Harvard Plan valued diversity as well).

¹⁵See Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 Geo. L.J. 981, 1002 (1999).

with the NAACP Legal and Educational Fund (“LDF”).

In 1992, the law school faculty unanimously approved the committee’s proposal. The law school receives around 3,500 applications for approximately 350 slots, with about 1,300 offers extended each year. The policy stated that only qualified students could be admitted, but left a great deal of flexibility in admissions decisions. Each application would get individual review, with LSAT and undergraduate GPAs the general measure of expected student success. The policy emphasized a commitment to all types of diversity, but specifically emphasized “the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”¹⁶ It did not grant preference to other minority groups such as Asian-Americans or those of Middle-Eastern descent. For the purposes of simplicity, this chapter refers to the minority applicants benefiting from the policy as “minority applicants.”

The policy asserted that diversity would improve learning for all students. Students from a variety of backgrounds, including racial identity, the policy explained, “are particularly likely to have experiences and perspectives of special importance to our mission.”¹⁷ To achieve this, the law school sought to enroll “a ‘critical mass’ of minority students.”¹⁸ The law school omitted, at the instance of Shaw, any reference to a prior written commitment to a minority enrollment of 10-12%, and ended a separate “special admissions program” to increase minority enrollment. In sum, the law school’s policy mirrored the approach of Justice Powell in *Bakke*. The policy emphasized not societal concerns but classroom learning; the school used no numerical goal; and applicants all received the same individual review.

CIR’s Bakke Quest

With time, Justice Powell’s *Bakke* solo opinion grew more vulnerable. The Supreme Court in the late 1980s and early 1990s issued a series of opinions restricting governments’ authority to consider race for the purpose of benefiting minorities.¹⁹ Justice Sandra Day O’Connor, for example, wrote for the majority that race conscious activity is “‘simply too pernicious to permit any but the most exact connection between justification and classification.’”²⁰

The most prominent group litigating the legality of race conscious admission in schools

¹⁶*Grutter*, 539 U.S. at 306.

¹⁷*Grutter v. Bollinger*, 288 F.3d 732, 737 (6th Cir.) (en banc) (quoting law school’s policy), *aff’d*, 539 U.S. 306 (2003).

¹⁸*Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev’d*, 288 F.3d 732 (6th Cir.) (en banc), *aff’d*, 539 U.S. 306 (2003).

¹⁹*See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Richmond v. Croson*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

²⁰*Adarand*, 515 U.S. at 220 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

was CIR.²¹ Starting in 1989, CIR sought to limit governmental interference with individual rights. Its telephone message declared it was “bringing lawsuits for a better America.”²² Foundations lined up with money, including Richard Mellon Scaife’s Carthage Fund, Lynde and Harry Bradley Fund, Smith Richardson Foundation, and John M. Olin Foundation. Corporations provided money as well, including Archer-Daniels-Midland Co., Chevron USA Inc., Pfizer Inc., and Philip Morris Co.

CIR chose its cases well, and it won a series of challenges, particularly in *Hopwood v. Texas*. On behalf of Cheryl J. Hopwood, CIR sued The University of Texas School of Law for the school’s race-based admissions practices. In 1996 a Fifth Circuit panel held that race could never be a factor in admissions decisions and that Justice Powell’s *Bakke* opinion had been effectively overruled by subsequent Supreme Court precedent. The opinion was sweeping in its analysis, going so far as to declare that considering race “is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”²³ With the en banc Fifth Circuit and Supreme Court refusing to review the decision, the opinion bound the states of Louisiana, Mississippi, and Texas to race neutral admissions. Georgia voluntarily abided by the *Hopwood*. CIR co-founder Michael Greve predicted that within ten years or so “*Hopwood* will be remembered as the beginning of the end of affirmative action higher education.”²⁴

Mere months after the panel decision in *Hopwood*, California voters passed Proposition 209, the California Civil Rights Initiative, with 54% of the vote. Proposition 209 declared that the State of California “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.”²⁵ This followed an earlier vote of the Board of Regents of the University of California to prohibit the consideration of race, religion, sex, color, ethnicity, or national origin in university admissions.

Proposition 209 and *Hopwood* were just a beginning. Washington state citizens passed their own Civil Rights Initiative in 1998, which mirrored the language of Proposition 209, with 58% of the vote. A similar attempt was made in Houston in 1997, but the Houston City Council changed the language of the initiative to be pro-affirmative action. Fifty-five percent of the voters rejected it. Florida Governor Jeb Bush pre-empted an attempt for an anti-affirmative action ballot initiative on the November 2000 ballot with the One Florida Initiative. Its Talented 20 Plan guaranteed college admission to students graduating in the top 20% of their high school class and eliminated race-based college admissions. (California and Texas had already implemented similar percent plans for their public undergraduate programs after they were prohibited from race-based admissions.)

²¹This telling of the story behind *Grutter v. Bollinger* relies heavily on Greg Stohr, *A Black and White Case: How Affirmative Action Survived Its Greatest Legal Challenge* (2004).

²²Paul Burka, *Law’s New Icon: Cheryl Hopwood: She fought affirmative action at the University of Texas – and won*, Tex. Monthly, Nov. 30, 1999, at 113.

²³*Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996).

²⁴Michael S. Greve, *Hopwood and Its Consequences*, 17 Pace L. Rev. 1, 3 (1996).

²⁵CAL. CONST. ART. I, § 31(a) (2003).

On the litigation front, the strength of the *Hopwood* victory generated much interest in – and telephone calls to – CIR. University of Michigan philosophy professor Carl Cohen, a civil libertarian and former head of the local ACLU chapter, was particularly interested in *Hopwood*. In 1995, he had written a ten-page report titled “Racial Discrimination in Admissions at The University of Michigan” on undergraduate admissions. Cohen published the report in *Commentary*, a monthly magazine of the American Jewish Committee, and Michigan newspapers publicized his findings. He had also testified before a state legislative subcommittee on a bill to end affirmative action in Michigan.

After *Hopwood*, Michigan state representatives contacted CIR about Cohen’s report. The lawmakers promised to find potential plaintiffs if CIR would sue the University of Michigan over its race conscious admissions practices. CIR expressed interest, and the state representatives issued an open call on May 1, 1997 for people who believed they were denied admission or a scholarship at Michigan because of a racial preference.

CIR co-founder Michael McDonald and Minneapolis attorney Kirk Kolbo interviewed six of the 200 people who responded at a hotel near the Detroit airport. Barbara Grutter was one of the six, and fit one criterion – that the named plaintiffs include white women so the case wouldn’t just be about “angry white men”²⁶ Grutter had also been accepted at Wayne State University Law School in Detroit (where she had been offered an unsolicited scholarship), but she found the school to be a poor fit with her desire to be a health law lawyer. She had not attended law school, and felt a strong responsibility to challenge the law school’s use of racial preferences because of her earlier experiences with sexist behavior and her values as a parent.²⁷

She certainly had diversity factors: “She is one of nine children, the daughter of an itinerant, financially struggling Protestant minister. She worked in an inner-city clinic for two years to save money for community college. She didn’t have a college counselor in high school, hadn’t heard of such things as SAT prep classes – or even the SAT college-admissions test.”²⁸ Although she eventually made her way into a four-year college and a 3.81 GPA, she was also one of the few women graduating with a Bachelor of Science in 1978.²⁹ Since then she had had significant corporate and small business experience. Michigan General Counsel Marvin Krislov later admitted that those qualities “absolutely qualif[y] for consideration in bringing diversity

²⁶See Stohr, *supra* note 21, at 49 (quoting McDonald).

²⁷As she explained later to Michigan undergraduates, “I had struggled with sexist behavior far too long to simply turn around and meekly accept discrimination on yet another basis. That is not progress!” Barbara Grutter, Speech at Race & Admissions Class, University of Michigan Residential College (Oct. 27, 2005) (copy on file with author). Her role as a parent was also critical in her decision to lend her name and time to the lawsuit – she “was most concerned by what I would teach them [her children] if I did nothing in the face of a formal policy of discrimination by a public institution.” *Id.*

²⁸June Kronholz, *Does a White Mom Add Diversity?*, Wall St. J., June 25, 2003, at B3. The plaintiff in the Texas Law School affirmative action case, *Hopwood v. Texas*, also had diversity factors that were not highlighted in her application. See Olivas, *supra* note 12, at 1111 n. 218.

²⁹Email message from Barbara Grutter to author (June 14, 2006).

attributes,” but that Grutter’s application omitted many of them.³⁰ Grutter explains later that she “did not think it would be appropriate, 18 years later, to build my law school application around whining about those difficulties; the facts were indeed there for anyone to see.”³¹ CIR took the case against the law school, and Grutter was chosen as the sole named plaintiff.

The Intervenors’ Claims

Michigan had decided to mount a vigorous, multi-faceted defense of its admissions policy. The university turned not only to top notch legal talent (both internally and externally), but also undertook studies to substantiate the educational benefits of diversity and sought widespread support outside Ann Arbor, as discussed *infra*. The intervenors’ claims expanded the defense even further.

Shaw, now back with LDF after his stint as a Michigan law professor, represented proposed intervenors in the undergraduate lawsuit. He planned to argue in the undergraduate suit that the affirmative action programs could be legally supported as an attempt to redress past discrimination by the University of Michigan. For example, the school had a history of intentionally segregating dorms. Not surprisingly, the defendants themselves were not planning on making this argument, and Shaw knew that the strict limits on this justification for race conscious activity would severely limit its chances of success. Yet, the history of discrimination would provide a necessary context, he believed, for the university’s program.

The judge was unlikely to let more than one group intervene on the defendants’ side in the undergraduate case, and Shaw could probably not represent anyone in the law school case given his participation in the drafting of the law school policy. That left the law school case open for intervention. Miranda Massie, a recent graduate from New York University Law School and an attorney with a small civil rights firm in Detroit, saw the lawsuits as an avenue to start a “new” civil rights movement seeking equality. Shanta Driver – co-chair of BAMN, a pro-affirmative action activist group³² – gave Massie the idea of seeking intervention in *Grutter*, a topic Massie had not studied in law school.³³ Massie decided to pursue intervention, but in two ways different from Shaw. First, Massie sought a broader range of intervenors than Shaw, who represented seventeen African American and Latino high school students from Michigan and a nonprofit group of prospective Michigan students and their families in his intervention motion. Massie and Driver found forty-one African American and white students from both high schools and colleges in California, Michigan, and Texas. Massie filed a motion to intervene on behalf of these individuals and three pro-affirmative action student organizations, including BAMN. Second, Massie wanted to do more than make legal arguments in a court of law. The case was for more than that, for “inspiring, galvanizing, and mobilizing a new generation of civil rights

³⁰Kronholz, *supra* note 28, at B3.

³¹Email message from Barbara Grutter to author (Aug. 21, 2006).

³²BAMN’s full name is currently Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary.

³³Email message from Miranda Massie to author (Sept. 7, 2006).

activists and leaders”³⁴ Her goals for the lawsuit were ambitious: “We sought to make this case a referendum on racism and race in American, on racial equality and inequality in America.”³⁵

One *Grutter* intervenor was Agnes Aleobua. She attended a downtown Detroit magnet high school, Cass Technical, as a high school junior when Massie visited her school for potential intervenors. Aleobua was in the top fifth of her class, with extracurricular activities and student leadership roles, and a 26 ACT score.

Intervention had been denied in *Hopwood*, but was allowed in *Gratz* and *Grutter*. A divided Sixth Circuit panel reversed the district courts’ denial of intervention.³⁶ By definition, the granting of intervention expanded the suits beyond a debate about diversity. Validity of test scores, current racial disparities, and the history of discrimination were now at issue. The suits, already expensive, became more costly and time consuming to both sides.

The District Courts: The First Split Double Header

Gratz and *Grutter* were assigned to different judges, despite an attempt by the *Grutter* defendants to switch to the *Gratz* judge.³⁷ The undergraduate suit was heard by Judge Patrick Duggan, nominated by President Ronald Reagan and a 1958 graduate of the University of Detroit Law School. District Court Judge Bernard Friedman decided the *Grutter* case. Also nominated to the bench by President Reagan, Friedman was a Detroit native and 1968 graduate of Detroit College of Law.

The undergraduate system was heard first. Starting in 1999, Michigan’s undergraduate program, for which it received over 13,000 applications for about 4,000 slots, had admitted freshman under a 150-point system. One hundred points guaranteed admission, but admissions counselors could “flag” for additional review certain applications. Applicants scored twenty points for being a member of an under-represented racial minority, but also received points for being a legacy or from graduating from a high school with high average SAT scores. Within a month of a summary judgment hearing in *Gratz*, Judge Duggan upheld the 1999 system under Justice Powell’s opinion in *Bakke*.³⁸ He subsequently rejected the *Gratz* intervenor’s claim that remedying past discrimination could legally justify the defendants’ affirmative action plan.

The law school case took more time. Judge Friedman set an evidentiary hearing after hearing arguments on summary judgment. Minneapolis attorney Kolbo tried the case for CIR. He was a close law school friend of CIR co-founder McDonald, and Michigan attorneys willing

³⁴Miranda Massie, *Representing the Student Intervenors in Grutter*, *Jurist Online Symposium* (Sept. 5, 2002) (available at <<<http://jurist.law.pitt.edu/forum/symposium-aa/massie-printer.php>>>).

³⁵Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, 15 Berkeley La Raza L.J. 109, 110 (2004).

³⁶*Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (consolidated appeal with *Gratz*).

³⁷Judge Friedman alleged procedural irregularities in how other members of the district court handled the defendants’ motion to consolidate the cases before Judge Duggan. See Stohr, *supra* note 21, at 95-100.

³⁸*Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *rev’d in part*, 539 U.S. 244 (2003).

to take on University of Michigan had proven difficult to find. Kolbo carefully focused his case. He did not take a position on whether or how to use the LSAT, and he presented no testimony on the value of diversity. Instead he attacked Michigan's use of diversity as being "so broad, so undefined, so amorphous that it simply cannot . . . ever be a compelling governmental interest."³⁹ He likened the law school's use of diversity as effectively operating as a quota because it permitted double standards. He called three witnesses. Allan Stillwagon, a former Michigan law school admissions director, testified that the faculty had set a 10-12% goal for minority enrollment in an earlier affirmative action policy. Current admissions director Erica Munzel testified that race was a factor in admissions.

Lastly, Kinley Larntz, a University of Minnesota emeritus professor, presented statistical evidence that the district court found particularly persuasive. Larntz testified that minority applicants had a large advantage in admissions when comparing LSAT scores and undergraduate GPAs. He put together two primary types of evidence to demonstrate that benefit. One was a series of graphs detailing the rates of applications and admissions rates by LSAT and undergraduate GPAs and by race. That evidence indicated, for example, that for those with Grutter's scores – undergraduate GPAs of 3.75 and above, and LSATs of 161 - 163 – the 1995 admission rate for minority applicants was 100%: three out of three, while the rate for other applicants was 9%: 13 out of 138. The second were the relative odds of acceptance, which measured the likelihood particular racial groups would be admitted given a particular LSAT and undergraduate GPA as compared to whites with similar scores. The analysis also indicated that minority groups had much higher chances of admission, given similar scores, than did white applicants. From this, Larntz testified that race was more than a factor, but effectively operated as a quota. This placed the law school's program outside of *Bakke*, argued Kolbo. While fully prepared to testify,⁴⁰ Grutter herself did not testify. No Michigan law school professor had offered to testify for plaintiff either.

John Payton, an attorney with an elite Washington, DC law firm and impeccable credentials, represented the law school. He focused on the value of diversity in the classroom. He presented four witnesses on the value of diversity in the classroom: Bollinger, former law school dean and then university president; Michigan law professor Richard Lempert, the chairman of the committee that drafted the policy; Jeff Lehman, then dean of the law school; and Kent Syverud, a former Michigan law school professor and then dean of Vanderbilt Law School. On cross-examination, Kolko attempted to elicit a precise percentage that would reflect the "critical mass" of minority enrollment that the law school sought with its admissions policies, but no law school witness would do so.

Payton also presented statistical evidence by Stephen Raudenbush, a professor of education at the University of Michigan. Raudenbush testified that plaintiff's expert Larntz erred in his analyses. For example, Raudenbush explained that in many categories of scores race had no impact, as all or none of the applicants were admitted. Only in the close cases, where Larntz

³⁹See Stohr, *supra* note 21, at 153.

⁴⁰Email message from Barbara Grutter to author (Aug. 21, 2006).

focused, did race matter. The statistician agreed with Larntz that race does make a difference – that is the intended result of the affirmative action program – but disagreed as to its degree. Raudenbush also concluded that a race-blind system would reduce minority enrollment considerably, from 14.5% to 4%.

With eight days of evidence, Massie’s presentation of the intervenors’ case took more than half of the trial time. Four minority students recounted at length their personal experiences with racism and segregated education. Experts testified on the history of segregation, the continuing significance of racism, the racial biases in LSAT, and the causes of an achievement gap between minority and white students. Noted historian John Hope Franklin was the most famous trial witness. His five-hour testimony chronicled the history of American racism, including his own personal experiences, but his support of affirmative action was mixed.⁴¹

In response, Judge Friedman issued a ninety-page opinion rejecting all of the university’s and intervenors’ respective cases and adopting the plaintiff’s characterization of the law school’s policies. He characterized the law school as “plac[ing] a very heavy emphasis” on race and having a target range of 10-17% minority enrollment.⁴² In addition, he agreed with the Fifth Circuit in *Hopwood* that Justice Powell’s *Bakke* opinion was not the prevailing standard. He faulted diversity on its terms, reasoning that racial diversity differs from the viewpoint diversity the law school’s policy heralds. He recognized the societal and educational benefits of diversity, but concluded that they fell short of a legal justification. Further, even if diversity could be a compelling governmental interest, the law school’s program was not narrowly tailored. Judge Friedman held the intervenors’ evidence on past and continuing societal discrimination legally unpersuasive as well.

In sum, the district courts were, to use Justice Scalia’s phrase, the first “split double header.”⁴³ Judge Duggan had declared the undergraduate admissions policies constitutional and Justice Powell’s *Bakke* opinion good law, with Judge Friedman taking the opposite positions in the law school case.

A Seventh Inning Stretch: The Sixth Circuit Weighs In

The Michigan cases next made their way to the Sixth Circuit. Since the Fifth Circuit’s opinion in *Hopwood*, a circuit split had developed. The Ninth Circuit in the University of Washington case had deemed diversity a legally legitimate goal, but one now prohibited in Washington by its Civil Rights Initiative.⁴⁴ The Eleventh Circuit, in a non-CIR case, assumed the legitimacy of diversity for the purposes of the opinion, but held the University of Georgia’s

⁴¹For example, on cross-examination, Franklin agreed that he does “not support the admission of less qualified minority applicants over more qualified Asian or white applicants.” Stohr, *supra* note 21, at 163.

⁴²*Grutter*, 137 F. Supp. 2d at 840.

⁴³*Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

⁴⁴Wash. Rev. Code sec. §49.60.400 (2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000).

admissions policies at the undergraduate school not narrowly tailored.⁴⁵ The First and Fourth Circuits, in cases involving K-12 education, had taken similar approaches as the Eleventh Circuit – assuming the legal validity of diversity, but holding a lack of narrow tailoring.⁴⁶

The Sixth Circuit granted petitions for initial *en banc* hearings in *Grutter* and *Gratz*, thus foregoing a panel decision.⁴⁷ In *Grutter*, the Sixth Circuit split on a five-to-four vote, upholding the law school's program and reversing the district court. The majority, per Chief Judge Boyce F. Martin, held Justice Powell's opinion in *Bakke* to be good law until the Supreme Court instructs otherwise, and the law school's practices to be akin to the Justice Powell-approved Harvard Plan. The majority allowed that race and ethnicity are "'plus' factors, [which] play an important role in some admissions decisions."⁴⁸ Given that the law school had admitted to no fixed enrollment goal and that minorities and non-minorities were evaluated under the same system, the majority held that the school's practices were narrowly tailored as well.

Judge Boggs wrote the primary dissent. He found the case far from close: "the constitutional justifications offered for this practice would not pass even the slightest scrutiny."⁴⁹ He faulted diversity as a general manner (arguing that "the Law School grants preference to race, not as a proxy for a unique set of experiences, but as *a proxy for race itself*"),⁵⁰ and the law school's use of race specifically (deeming the impact of race in admissions decisions as "shocking").⁵¹ One dissenter, Judge Gilman, did not join Judge Boggs' dissent, writing instead on his own why the law school's program was not narrowly tailored and not reaching the legality of diversity.

The Sixth Circuit largely ignored the intervenors' arguments of societal discrimination

⁴⁵Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001); see also Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (holding race-based scholarship program unconstitutional).

⁴⁶See Eisenberg v. Montgomery County Public Schs., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (per curiam); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); see also Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (upholding voluntary transfer program designed to reduce the racial isolation of Rochester and the surrounding suburban school districts); Hunter v. Regents of the Univ. of Ca., UCLA's Graduate School of Education, 190 F.3d 1061, 1063 (9th Cir. 1999) (upholding the constitutionality of a race conscious admissions program for a "laboratory" elementary school operated with a stated justification of researching to learn how to improve "the quality of education in urban public schools").

⁴⁷Two Sixth Circuit judges strongly objected to the timing of the circulation of the petition for initial *en banc* hearings (which effectively excluded the participation of two judges who took senior status) and the assignment of judges in the foregone panel. See *Grutter*, 288 F.3d at 810-814 (Boggs, J., dissenting) (the "Procedural Appendix" to Judge Boggs' dissent, which was joined by Judge Batchelder). This in turn drew the objections of four judges to the accuracy and public nature of the complaints. See *id.* at 752-58 (Moore, J., concurring) (joined by Daughtrey, Cole, and Clay, J.J.) (opining that "Judge Boggs and those joining his opinion have done a grave harm not only to themselves, but to this court and even to the Nation as a whole"); *id.* at 772-73 (Clay, J., concurring) (joined by Daughtrey, Moore, and Cole, J.J.) (deeming "the dissent's procedural attack [as] an embarrassing and incomprehensible attack on the integrity of the Chief Judge and this Court as a whole").

⁴⁸*Grutter*, 288 F.3d at 748.

⁴⁹*Id.* at 773 (Boggs, J., dissenting).

⁵⁰*Id.* at 792 (Boggs, J., dissenting).

⁵¹*Id.* at 794 (Boggs, J., dissenting).

and of bias in LSAT and undergraduate GPA scores. Nor did any judge have anything to say about Massie's 50,000 petition signatures, including Michigan President Bollinger's and some members of Congress, affirming a commitment to *Brown v. Board of Education*, which she had presented at the beginning of her oral argument.

In the undergraduate case, the Sixth Circuit held an initial en banc hearing, but no opinion was ever forthcoming. Reportedly, the Sixth Circuit had voted five-to-four to uphold the undergraduate program as well, but Chief Judge Martin, who assigned himself the majority opinion, eventually came to doubt its legality.⁵² He never circulated a draft to the members of the court.

CIR had already appealed the law school case, and both sides agreed to ask the Supreme Court to grant *certiorari* before judgment in the undergraduate case (Michigan's request was conditioned, however, on *certiorari* being granted in the law school case). Supreme Court granted petitions for *certiorari* from plaintiffs and defendants, although not the separate petition from the *Gratz* intervenors. (The *Grutter* intervenors did not separately petition the Sixth Circuit's decision for review – the appellate court having upheld the law school's practices – but still supported the plaintiff's petition for *certiorari*). Although the intervenors could file papers with the Supreme Court as a party, but were afforded no argument time. The Court was interested solely in the diversity justification.

The Amici Mascots

For the Michigan defendants, litigating the case was much more than a contest of legal arguments, but also a search for public support.⁵³ In 1997, while awaiting the expected filing of the *Grutter* complaint, Michigan President Bollinger hosted a conference call with more than a dozen corporate and university leaders, asking them to publicize their commitment to affirmative action. Until the university secured the public backing of one its most famous graduates, former President Gerald R. Ford, however, that aid was slow in coming.

Bollinger approached President Ford, a 1935 B.A. Michigan graduate and Wolverine football player in 1998. Ford agreed to write an op-ed piece for the Sunday *New York Times*. The article, entitled "Inclusive America, Under Attack," was firm in its support of affirmative action in general and the school's affirmative action program in particular. He told the story of when Georgia Tech refused to play the Michigan Wolverines if Michigan player Willis Ward, an African American, took the field. Ward sat out the game, although his teammates had offered to refuse to suit-up without him. Reflecting on this event, Ford advised: "I don't want future college students to suffer the cultural and social impoverishment that afflicted my generation . . . [D]o we really want to risk turning back the clock to an era when the Willis Wards were penalized for the color of their skin, their economic standing or national ancestry?"⁵⁴ For

⁵²See Stohr, *supra* note 21, at 214.

⁵³For a thorough look at the amicus filings, see Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. Pa. L. Rev. 347, 366-372 (2003).

⁵⁴Gerald Ford, *Inclusive America, Under Attack*, *N.Y. Times.*, Aug. 8, 1999, § 4, at 15.

President Ford, affirmative action expressed racial justice.

The next year, General Motors (“GM”), headquartered in Detroit, also offered its public support to the university, after intense Michigan lobbying. Harry Pearce, General Motor Corporation’s vice chairman, thought affirmative action reflected moral and good business sense given the increasingly diverse customer base. After a meeting with Bollinger and Michigan General Counsel Krislov, he agreed to file an amicus brief with the district court and recruit other companies to file a separate Fortune 500 brief.

President Ford and GM were just the beginning. By the time the Supreme Court had accepted review of the case, the *Grutter* defendants had secured the most ever amicus briefs submitted on one side – eighty-three amici on behalf of over three hundred organizations. Almost a hundred colleges, universities, and educational associations filed briefs supporting Michigan, as did one hundred and twenty-four members of the House, thirteen senators, and twenty-three states. The Fortune 500 Supreme Court amicus brief included sixty-five companies, with GM submitting its own brief. In addition, seventeen media companies, the AFL-CIO, eleven Indian Tribes, and eight Jewish groups (including the American Jewish Committee, which had opposed the Davis program challenged in *Bakke*) filed amici briefs. Law students numbering 13,922 submitted their own eight-page brief.

Only nineteen amicus briefs supported CIR, and none by any educational institution, major business, or member of Congress. Only one State – Florida – filed on the side of plaintiffs, but even that brief accepted the value of diversity. As noted by Professor Neal Devins, “when compared to other controversial social issues (abortion or religion in the schools), the absence of important, powerful voices on one side of the issue seems especially stark.”⁵⁵

Two briefs stand out as particularly important. One was the brief of retired military officers. That brief came about after a meeting between Bollinger and Jim Cannon, chairman of the U.S. Naval Academy’s Board of Visitors. The Naval Academy had long sought a racially diverse class for the purposes of producing better leaders and improving enlisted morale and discipline. The military had refused to file a brief supporting affirmative action, but Cannon and others were able to secure the support of retired military officers on an amicus brief on Michigan’s side in *Gratz* and *Grutter*. (President Ford, as former commander-in-chief, refused to sign.) Using public records, the brief contended that West Point, the Naval Academy, and Air Force Academy all used race-conscious policies, with numerical targets for enrollments documented for the Naval Academy and West Point. The retired officers defined such practices as a “military necessity.”⁵⁶ They validated the need for diversity and argued that only race conscious activity would do: “Today, there is no race-neutral alternative that will fulfill the military’s, and thus the nation’s, compelling national security need for a cohesive military led by a diverse officer corps of highest quality to serve and protect the country.”⁵⁷

⁵⁵See Devins, *supra* note 53, at 370.

⁵⁶Consolidated Brief of Lt. Gen. Julius W. Becton, et. al, *Grutter v. Bollinger*, 2003 WL 1787554, *17 (Feb. 21, 2003).

⁵⁷*Id.* at *9-10.

The second was that filed by the Bush Justice Department. The United States, which had filed nothing before the Sixth Circuit, had little choice but to voice an opinion before the Supreme Court. (The Clinton Justice Department had filed a brief supporting the University's position at the district court level.) Solicitor General Theodore B. Olson had helped CIR in *Hopwood*, most notably by successfully arguing the plaintiff's case before the Fifth Circuit. His draft of the United States' briefs in *Gratz* and *Grutter* mirrored that of the Fifth Circuit in *Hopwood* and CIR's position in *Gratz* and *Grutter*: race should never be considered and Justice Powell's *Bakke* opinion was not controlling. The White House rejected the proposed briefs, and instead took a compromise position. White House Counsel Alberto Gonzales, Secretary of State Colin Powell, and National Security Adviser Condoleezza Rice were instrumental in getting the Bush administration to offer some support for affirmative action.⁵⁸ Ironically, Trent Lott also had a role in getting the Bush Administration to a compromise position. Senate Majority Leader Lott had made racially insensitive remarks in December 2002 to great public outcry, and a month later when *amicus* filings were due, "there was little question that the Lott imbroglio helped push the administration towards its middle ground position."⁵⁹

Critically, the United States' brief recognized the value of diversity, although it did not conclude whether diversity was a compelling governmental interest.⁶⁰ It relegated to a footnote Justice Powell's *Bakke* opinion, offering that the Supreme Court need not decide whether the opinion was still good law.⁶¹ Instead it argued that the law school and undergraduate programs were both unconstitutional quotas and would fail narrow tailoring. Diversity, it argued, could be achieved through race neutral approaches such as the percent plans operating in California, Florida, and Texas. (The brief neglected to mention how the percent plans could be applied to a post-baccalaureate program such as a law school, and failed to mention that the plans had been used only for state undergraduate programs.) As the Supreme Court prepared for oral arguments, it was presented with almost universal acclaim for diversity itself, from the White House, Congress, retired military officers, states, schools, media, and big business. Diversity was the status quo, and no prominent voice disagreed with its value.

Final Score: Diversity Wins 6 - 2 and 5 - 4

As was true with the Sixth Circuit argument, affirmative action supporters held marches and rallies the day of the Supreme Court argument. BAMN's Driver organized and personally help finance the buses that brought thousands to march and rally in favor of affirmative action. Inside the Supreme Court Courtroom, one brief in particular garnered intense questioning – that by the retired military officers. The United States had begun Operation Iraqi Freedom just days

⁵⁸See Devins, *supra* note 53, at 372 & n.117.

⁵⁹See *id.* at 372.

⁶⁰Brief of United States, *Grutter v. Bollinger*, 2003 WL 176635, *8 (Jan. 17, 2003) (starting its summary of argument with "[e]nsuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective.").

⁶¹*Id.* at *12 n.4.

before oral argument, and the Justices asked about the military brief at length.⁶²

The Michigan defendants and their *amici* were not disappointed by the Supreme Court's opinion in *Grutter*. Diversity won in theory and in practice: a majority of Justices held diversity to be a compelling governmental interest and the law school's use of diversity to be constitutional. In *Grutter*, six Justices deemed diversity a compelling governmental interest, and only two (Justices Thomas and Scalia) specifically disagreed. Surprisingly, Chief Justice Rehnquist voiced no view on whether diversity could ever be a compelling governmental interest. On the fundamental legal question, Michigan won, with a vote of six to two in diversity's favor.

Five justices validated the law school's practices to create diversity, and four strongly disapproved them. That outcome narrows diversity's utility, as did the undergraduate case, which held the undergraduate point system unconstitutional. Justices Breyer and O'Connor, who had voted to uphold the law school's practices, joined the six-to-three majority in *Gratz* to declare the undergraduate system unconstitutional. *Grutter* still leaves, however, ample room for other educators to consider race in higher education and stay within constitutional boundaries.

Diversity in Theory: Compelling Governmental Interest

Justice O'Connor authored the majority opinion in *Grutter*; it was her first time to vote in favor of race conscious activity. Justices Breyer, Ginsburg, Stevens, and Souter joined her opinion. She began in *Grutter* by noting her respect for the law school. Her first sentence states the issue of the case, mentioning the law school, but not Barbara Grutter. Her second sentence tells her readers that "[t]he Law School ranks among the Nation's top law schools."⁶³ How a school's ranking is relevant to the plight of Grutter or to the constitutionality of race conscious decision making is far from clear. But the beginning signals the tenor of the opinion: one of esteem for Michigan Law School, and ultimately one of cooperation rather than oversight. Tellingly, Barbara Grutter is mentioned by name only once in the majority opinion. Thereafter, she is called "Petitioner," with the Michigan defendants almost always referenced as the "Law School."⁶⁴

Rather than finding a technical validity to Justice Powell's *Bakke* opinion, the majority analyzes the issue anew and makes an explicit endorsement of racial diversity. In declaring diversity a compelling governmental interest, Justice O'Connor turns legal analysis largely aside. She spends only a few paragraphs to repeat standard Equal Protection analysis. The heart of the opinion is not a construction or deconstruction of the Equal Protection Clause.

Instead, the analysis really begins when Justice O'Connor offers a non-Equal Protection principle: "[t]he Law School's educational judgment that such diversity is essential to its

⁶²Thanks to UM General Counsel Marvin Krislov for bringing this to my attention.

⁶³*Grutter*, 539 U.S. at 313.

⁶⁴*Id.* at 316.

education mission is one to which we defer.”⁶⁵ That declaration – the first sentence after the majority states its conclusion that diversity can be a compelling governmental interest – is a driving force in the majority’s analysis. This deference means the majority accepts the defendant’s story more than questions it, and effectively ensures its constitutionality.

The majority pays little attention to the situation faced by Grutter – that as an individual she would have been treated differently if she were of a different race. The opinion states that “the diffusion of knowledge and opportunity through public institutions of higher education must be *accessible to all individuals regardless of race or ethnicity*.”⁶⁶ The implication of this statement is not, however, race neutral admissions; the emphasis is on being “accessible” not “regardless of race or ethnicity.” The opinion turns immediately to announce the importance of integration: “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.”⁶⁷ How Grutter is treated to achieve this integration is given little appreciation. The majority deemed her position generally acceptable because all persons have the opportunity to take advantage of parts of the law school’s multi-faceted diversity policy.

The conclusions in the majority opinion are inconceivable without deference to Michigan Law School, but also without the widespread amici support. The majority references extensively the briefs of other educators, big businesses, and particularly that of the military.

All this allows the majority to accept benefits of diversity as “substantial.”⁶⁸ Diversity, according to the majority, promotes classroom learning, but also serves businesses, the military, and society as a whole. In this sense, the majority goes beyond Justice Powell’s support of diversity, which was largely internal to the classroom setting.

Nor will the law school’s practices lead to the stereotypes O’Connor has faulted other race conscious activity for creating.⁶⁹ Its quest for a “critical mass” instead “diminish[es] the force of such stereotypes.”⁷⁰

A Sixth Justice agreed that diversity could be a compelling governmental interest: Justice Kennedy. He accepted the validity of Justice Powell’s *Bakke* opinion with little

⁶⁵*Id.* at 328.

⁶⁶*Id.* at 331 (emphasis added).

⁶⁷*Id.* at 332.

⁶⁸*Id.* at 330.

⁶⁹*See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1990) (O’Connor, J., writing the majority opinion) (“It [racial redistricting] reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.”); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O’Connor, J., dissenting) (“Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation’s widely shared commitment to evaluating individuals upon their individual merit.”).

⁷⁰*Grutter*, 539 U.S. at 333.

discussion, and dissented for other reasons.

Justices Scalia and Thomas strongly disagreed. Justice Scalia's opinion argued that the definition of diversity is too broad.⁷¹ He posits that the educational benefits of diversity are "the same lesson taught to . . . people three feet shorter and twenty years younger . . . in institutions ranging from Boy Scout troops to public-school kindergartens."⁷² Justice Thomas belittles the goal of educational diversity. He characterizes it as merely "'aesthetic.' That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them."⁷³ Justice Thomas argues, from both a constitutional and a public policy stance, that African-Americans would be better off without the quest of historically white institutions to become more racially diverse. Justice Thomas also notes the limited nature of diversity in improving the status of African Americans. He reasons that diversity does little for the many African-Americans who are "too poor or too uneducated to participate in elite higher education and [diversity] therefore presents only an illusory solution to the challenges facing our Nation."⁷⁴ He allows that diversity means that "the aestheticists will never address the real problems facing 'underrepresented minorities,' instead continuing their social experiments on other people's children."⁷⁵

Diversity in Practice: Narrow Tailoring

Five Justices held that the law school's practices were narrowly tailored to diversity. By validating the law school's approach, the majority revealed a new line-up card for constitutional race conscious decision making for the purpose of diversity. The approach can be expensive, but is largely replicable in any merit-based admissions program, and perhaps elsewhere as well. Given the weight the law school placed on race, *Grutter* leaves ample room for other educators to consider race within constitutional boundaries.

First, a school should never state a fixed number for its use of diversity; this would likely be an unconstitutional quota. While schools can seek a "critical mass" of students, that goal should result in a range of enrollment percentages. The law school, for example, enrolled minorities in a range from 13.5% to 20.1% during the years in question, and no one confessed to having a precise numerical goal. The fact that narrower ranges existed in different time periods – as Justice Kennedy noted in his opinion – does not create an impermissible quota.

Second, each application should receive individual review to ascertain "all the ways an applicant might contribute to a diverse educational environment."⁷⁶ In making that individual

⁷¹*Id.* at 347 (Scalia, J., concurring in part and dissenting in part) ("If properly considered an 'educational benefit' at all, it is surely not one that is either uniquely relevant to law school or uniquely 'teachable' in a formal educational setting.").

⁷²*Id.*

⁷³*Id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

⁷⁴*Id.*

⁷⁵*Id.* at 372 (Thomas, J., concurring in part and dissenting in part).

⁷⁶*Id.* at 337.

review, officials can make race a “plus” factor, but must also “meaningfully consider” non-racial diversity factors.⁷⁷ This process will likely result in admitting non-minorities with lower scores than minority admittees, as was true for Michigan Law School.

Third, the individual review cannot include a point system, as the undergraduate school used. While Justices Ginsburg and Souter argued in their *Gratz* dissent that the point system made explicit what was implicit in the law school program, the majority of the Court found the point system to be an unconstitutional difference.

Fourth, race conscious admissions practices must be terminated “as soon as practicable,”⁷⁸ a rather ambiguous standard. Twenty-five years after *Bakke*, Justice O’Connor writes that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved now.”⁷⁹ Justice O’Connor does not explain why diversity has an expiration date, or how racial preferences will become unnecessary in 2027, but the statement gains the approval of Justices Scalia and Thomas.

Once these four factors are present, the race conscious decision-making for the purpose of diversity is likely to be validated – so long as the school is entitled to the deference afforded to Michigan Law School. The rest of the majority’s opinion on narrowly tailoring discusses what is *not* required. Race neutral alternatives that would negatively affect the quality of students – such as a lottery or lowering of admission standards – need not be considered, as Justices Scalia and Thomas strongly advocated. Using “daily reports” to track the racial and ethnic enrollment in an incoming class is acceptable so long as admissions personnel state, as they did in *Grutter*, that these reports do not influence their use of race but are used only to fulfill the goal of a critical mass. Further, it is perfectly acceptable to have different definitions of “critical mass” for different groups. Chief Justice Rehnquist noted, for example, that Native Americans are enrolled at much lower numbers than African-Americans. The range of Native American admittees was from 13 to 19, compared to a range of 91 to 108 for African-Americans

Admission percentages can also closely track application percentages without indicating an unconstitutional quota. Chief Justice Rehnquist apparently composed his own charts of the statistical evidence to demonstrate that admission rates of racial ethnic groups closely mirror their application rates over time. For example, the percentage of Hispanic applicants in 1995 was 5.1%, with their admission rate at 5.0%. He demonstrated similarly tight correlations for African-Americans, Latinos, and Native Americans from 1995 to 2000. Justice Kennedy argues forcefully that this evidence indicates a quota, a characterization that the other dissenting Justices avoid all together. The majority responded that admission rates differ from enrollment rates. The *enrollment* rates are what matter for the majority, not the admission rates that Chief Justice Rehnquist presents, and the enrollment rates differ more from year to year. The majority takes this approach even though schools have more control over their admission rates than their

⁷⁷*Id.* at 338; *see also id.* (“What is more, the Law School actually gives substantial weight to diversity factors besides race.”).

⁷⁸*Id.* at 343.

⁷⁹*Id.*

enrollment rates.

Strict Scrutiny Weakens Diversity

The dissenting Justices fault the rigor of the majority's strict scrutiny analysis. Justice Scalia, for example, scorns the majority's approach, calling it "challeng[ing] even for the most gullible mind."⁸⁰ The majority admits that its application of strict scrutiny is different, but maintains it is following *Adarand*'s admonishment that strict scrutiny consider context. Given that "universities occupy a special niche in our constitutional tradition," the majority concludes that deference to the law school is warranted.⁸¹

In doing so, Court has clearly signaled a deferential version of strict scrutiny for universities when they engage in racial decision making for the purpose of creating diversity.⁸² This has meant a "cost benefit" balancing test that considers the benefits and harms of affirmative action.⁸³ That analysis focuses not on how applicants benefit, or don't benefit, from affirmative action, but on society as a whole. Neither are Equal Protection principles prominent in defining the societal benefits of affirmative action. Instead the majority turns to the defendants and amici briefs by governments, educators, companies, and the military in articulating the social benefits of affirmative action. The Court defines diversity not as one of its own constitutional principles, but as a worthwhile principle belonging to others that wins the Court's compliant endorsement.

In doing so, the Court divorces diversity from any connection to individual or group legal rights.⁸⁴ This may have been necessary to get Supreme Court validation, but it necessarily weakens the prescriptive force of diversity. A choice is allowed, but so long as the choice is akin to that of Michigan Law School's, no one's rights are implicated in making that choice. In short, the deferential strict scrutiny allows other schools to make similar choices to Michigan Law School's, but affords no one any positive rights.

In addition, the choice of voluntary integration may not last. Diversity is validated based on pedagogy and expected social outcomes, but pedagogy can change and expected social outcomes can be proven false.⁸⁵ Further, the Court expects that a need for voluntary affirmative

⁸⁰*Id.* at 347 (Scalia, J., concurring in part and dissenting in part); *see also id.* at 350 (Thomas, J., concurring in part and dissenting in part) (deeming "unprecedented [the] deference that Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny'"); *id.* at 380 (Rehnquist, C.J., dissenting) (faulting the majority's "unprecedented" deference"); *id.* at 388 (Kennedy, J., dissenting) (declaring the majority's approach not strict scrutiny and "nothing short of perfunctory").

⁸¹*Id.* at 329.

⁸²*See, e.g.,* Jack Balkin, Plessy, Brown, and Grutter: A Play In Three Acts, 26 Cardozo L. Rev. 1689, 1724 (2005) ("The fact that the Court engages in this sort of deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims.").

⁸³*See* Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 Tul. L. Rev. 1941 (2004); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997).

⁸⁴*See* Rachel Moran, *Of Doubt and Diversity*, 67 Ohio L.J. 201, 226 (2006).

⁸⁵*Id.*

action will last no more than twenty-five years.⁸⁶ Constitutional principles typically do not expire with time; their shelf life is timeless.⁸⁷ Yet, the Court tells schools from the outset to expect diversity's demise.

Diversity Weakens Integration

As compared to school desegregation, diversity seeks a weak version of integration. The *Grutter* majority clearly supports the idea of integration, and links diversity to the benefits of integration. For example, the majority states the value of integrated schools: "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."⁸⁸

Yet, the meaning of integration through diversity, unlike school desegregation jurisprudence, is not transformative. No mandate is issued for racial balancing, or even for a great increase in minority enrollment in historically white schools. Instead, historically white institutions are allowed to use diversity so that they are not all-white or almost all-white. Some minorities are thus admitted, but typically not as many to reflect the minority population. Because of this, diversity will likely not be a backdoor attempt to fulfill school desegregation's unfulfilled promise of not have a "'white' school or 'Negro' school, but just schools."⁸⁹ In other words, schools will likely keep a racial identity with diversity.

Indeed, the decision largely validates the status quo and accepts the majority of views expressed to it. By contrast, *Brown I* was clearly intended to change society. The most difficult issue underlying affirmative action – how to redress the uneven playing field – is omitted from discussion all together. The majority posits that "race unfortunately still matters," but without examining the difficult issue of why this might be so and what it might tell us about the need for affirmative action.⁹⁰

In short, the use of diversity is entirely moderate – it is not to remedy societal discrimination, nor does it offer a different standard for benign discrimination. It strives not necessarily to offer further improvement of race relations or to integrate further historically white schools, but to sustain the current approach and allow choice. While *Brown II* was greeted with

⁸⁶See generally Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 Houston L. Rev. 1 (2006); Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 Ohio L.J. 83 (2006).

⁸⁷Similarly, constitutional principles are typically afforded an immediate remedy when violated, but an exception was made in *Brown II*. There the Court held that the remedy need not come at once, but "with all deliberate speed." *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

⁸⁸*Grutter*, 539 U.S. at 332-33.

⁸⁹*Green v. County Sch. Bd.*, 391 U.S. 430, 442 (1968).

⁹⁰*Grutter*, 539 U.S. at 333; see also *id.* at 338 ("By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful members on criteria that ignore those experiences.").

Massive Resistance and signaled a radical transformation in education, *Grutter* puts race in higher education in a holding pattern, one that is to last presumably until 2027.

A Post-Grutter Report

In many ways, *Gratz* and *Grutter* brought clarity to what schools can and cannot do in the name of diversity. Schools that used point systems for admissions before the Michigan cases – such as the University of Massachusetts at Amherst, University of Michigan, and Ohio State – have changed their systems to ones that include individual review and other more flexible practices. The University of Texas, the defendant in *Hopwood*, has returned to race-conscious admissions, but the state legislature has kept the Top Ten Percent Plan for undergraduate admissions. Texas A&M, on the other hand, has remained race neutral, but has eliminated its legacy preferences.⁹¹

In California and Washington, the changes are more subtle. In 2001, the Regents of the University of California voted unanimously to repeal its prohibition on race-based admissions. Proposition 209 remains in effect, however, so explicit race conscious admissions are still unlawful. California universities have engaged, however, in other ways to increase their minority enrollment, ways that are more implicit in their race consciousness. For example, the University of California, Los Angeles (“UCLA”) provides extra points in the admissions process for students who have participated in outreach programs for low-performing high schools or have personal challenges, low income, or attended a low-performing high school, or are first-generation college.⁹² The law school at UCLA has started a Critical Race Studies program, and its minority enrollment has increased.⁹³ The University of California counts scores on SAT II’s in Spanish, including the scores of Spanish-speaking students.⁹⁴ The State of Washington faces a similar situation, as its Civil Rights Initiative continues to restrict the use of race. The University of Washington no longer prefers applicants who are African American or Latino, but does “favor[] applicants from ‘diverse backgrounds’ who are ‘persevering against substantial obstacles such as prejudice or discrimination.’”⁹⁵

Intervenor Erika Dowdell, who testified in *Grutter* at the district court hearing as an African American junior at the University of Michigan, was admitted to UCLA School of Law

⁹¹Daniel Golden, *No More Boost for ‘Legacies’ at Texas A & M*, Wall St. J., Jan. 13, 2004, at B1. The school’s original plan was race neutral on its face, but included a preference for legacy. After public criticism from Texas legislators, Texas A & M faculty, and others, the school dropped the legacy preference. See Todd Ackerman, *Legislators Slam A & M Over Legacy Admissions*, Hous. Chron., Jan. 4, 2004, at A1. The University of Texas never had legacy preferences in admissions.

⁹²Daniel Golden, *Extra Credit To Get into UCLA, It Helps to Face ‘Life Challenges,’* Wall St. J., July 12, 2002, at A1.

⁹³Daniel Golden, *Case Study: School Find Ways to Achieve Diversity Without Key Tool*, Wall St. J., June 20, 2003, at A1.

⁹⁴Daniel Golden, *Admission: Possible: Language Test Gives Hispanic Students a Leg Up in California*, Wall St. J., June 26, 2001, at A1.

⁹⁵Daniel Golden, *Case Study: Schools Find Ways to Achieve Diversity Without Key Tool*, Wall St. J., June 20, 2003, at A1.

(but not Michigan Law School), with the expectation of studying in the Critical Race Studies program.⁹⁶ There she won second place in the 2004 Black Law School Students Association - Western Region Moot Court Competition⁹⁷ and received the San Francisco School Desegregation Summer Fellowship.⁹⁸ She is presently working at the Los Angeles Public Defender's Office.

Intervenor Agnes Aleogua was a high school junior when Massie visited her downtown Detroit magnet school for potential intervenors. She eventually received an on-the-spot offer of admission to the University of Michigan after an interview with a university admissions officer at her high school. She graduated with a Bachelor of Arts in Education, and is a social studies teacher in Miami as part of the Teach for America program.⁹⁹

Barbara Grutter never attended law school. She has deemed *Grutter* as “neither wise nor just”¹⁰⁰ and has continued to promote public discussion of affirmative action preferences as president of Toward A Fair Michigan (“TAFM”). Grutter describes TAFM as a “non-profit, non-partisan education organization, which, amongst other things, sponsors debates (providing both pro and con speakers) to promote an informed citizenry in support of the best public decision” on affirmative action preferences.¹⁰¹

In newspaper interviews, she has emphasized the lessons she has taught her children from her role as named plaintiff: “I had always taught (my kids) discrimination was wrong and the law protects them from that. I could have been angry and bitter – or whine about it – or I could do something positive. I viewed filing a lawsuit as a positive thing.”¹⁰²

CIR has no pending cases challenging affirmative action in education, but has continued to challenge racial preferences in other areas, namely government contracting and federal employment. Another group, Center for Equal Opportunity, has filed complaints with the Department of Education challenging how schools have considered race after *Grutter*.¹⁰³ A Michigan Civil Rights Initiative, modeled on its California counterpart, goes to the Michigan voters on the November 2006 ballot. And the Supreme Court – with two new members since it decided *Grutter* – has accepted review of two cases on the *Grutter*'s applicability to K-12

⁹⁶*Id.*

⁹⁷See Brett Cook, *UCLA Docket Article* (Spring 2004) (available at <<http://www.law.ucla.edu/moot/awards/awards_BLSA.htm>>).

⁹⁸*UCLA Alumni Magazine* (Winter 2004) (available at <<www.law.ucla.edu/docs/alummagwint2004.students.pdf>>).

⁹⁹Seth Lewis, *Recruited to Teach for America*, *The Miami Herald*, March 26, 2006.

¹⁰⁰Barbara Grutter, *Making Progress: A Response to Michigan GOP Chair Betsy DeVos*, *National Review*, Aug. 19, 2003 (available at <<<http://www.nationalreview.com/comment/comment-grutter081903.asp>>>).

¹⁰¹Email message from Barbara Grutter to author (May 23, 2006).

¹⁰²Clayton, *supra* note 3.

¹⁰³See Moran, *supra* note 84, at 231-32.

schools.¹⁰⁴ How Chief Justice John Roberts and Justice Samuel Alito will react to diversity and its uses is unknown. BAMN is organizing another March on Washington on the day of the oral argument.

In short, the story of affirmative action seems to be one that will never end.

¹⁰⁴See *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc) (holding diversity to be a compelling governmental interest in K-12 setting and that having race be a tie-breaker for high school admissions is narrowly tailored), *cert. granted*, 126 S. Ct. 2351 (2006); *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004) (holding “maintaining racially integrated schools” as a compelling governmental interest, deeming the use of a goal of each schools having between a 15% and 50% African-American enrollment not a quota in practice with race in a few instances tipping the balance, but not affirming the use of separate admission lists by race and gender at some schools), *aff’d*, 416 F.3d 513 (6th Cir. 2005) (per curiam), *cert. granted*, 126 S. Ct. 2351 (2006); see also *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (en banc) (upholding race-based transfer as a part of voluntary desegregation plan and diversity as a compelling governmental interest in K-12 schools). But see *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246 (5th Cir. 2005) (deeming a goal of 50/50 +/- 15% a quota, and different racial admissions scores not narrowly tailored; leaving open the question of whether diversity a compelling governmental interest at K-12 level). See generally Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid after Grutter and Zelman*, 14 S. Cal. Interdisc. L.J. 237 (2005) (examining the constitutionality of race-based financial aid); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio L.J. 304 (2006) (articulating what questions to ask about the constitutionality of voluntary K-12 integration plans and contending that such plans can be constitutional); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 Wm. & Mary L. Rev. 1691, 1705-39 (2004) (analyzing the role of local control in school desegregation and its connection with *Grutter*’s deference).