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UNDERSTANDING THE UNITED STATES SUPREME COURT'S  
AFFIRMATIVE ACTION JURISPRUDENCE

With Special Emphasis on This Year's University of Michigan Cases  
And What The Future Holds for Higher Education

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A. A BRIEF BIBLIOGRAPHY ON AFFIRMATIVE ACTION IN HIGHER  
EDUCATION

*Some Good Introductory Reading on Affirmative Action in Higher Education:*

Bowen, William & Bok, Derek, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998). A book that significantly changed the social and legal debate over affirmative action when it was published five years ago, the Bowen-Bok book reports on the results of a thirty-year longitudinal study of minority matriculants at elite colleges and universities. A carefully researched, meticulously reasoned case for the continued value of racial diversity in college and university admissions. (The book is discussed in detail on pages 17-19 of this outline.)

Caplan, Lincoln, UP AGAINST THE LAW: AFFIRMATIVE ACTION AND THE SUPREME COURT (1997). This short (73-page) book by a leading legal correspondent analyzes twenty years' worth of Supreme Court decisions on affirmative action. The book starts with the 1978 *Bakke* ruling and ends with the Court's refusal to hear the *Hopwood* appeal in 1996. An excellent introduction for non-lawyers to the legal terminology of affirmative action jurisprudence.

Fetter, Jean H., Chapter 5 (“Affirmative Action”) in *QUESTIONS AND ADMISSIONS: REFLECTIONS ON 100,000 ADMISSIONS DECISIONS AT STANFORD* (1995). Written by the long-time Dean of Undergraduate Admissions at one of the nation’s most selective universities, this book in its chapter on affirmative action systematically analyzes the most provocative points made by proponents and opponents of affirmative action in higher education. An excellent introduction to the difficult philosophical and policy questions at the heart of the contemporary debate on affirmative action in admissions.

*Two Excellent Web Sites:*

University of Michigan, *Information on Admissions Lawsuits* ([www.umich.edu/~urel/admissions](http://www.umich.edu/~urel/admissions)). This is your one-stop shopping locale for information on the two affirmative action cases decided by the United States Supreme Court earlier this year, *Grutter v. Bollinger* (the law school admission case), and *Gratz v. Bollinger* (the undergraduate admission case). The University of Michigan was the defendant in both cases (the “Bollinger” in the case names is former University of Michigan President Lee Bollinger, now President of Columbia University). The University of Michigan has placed on this Web site a collection of court pleadings, newspaper clips, statements, and other materials designed to provide journalists and scholars with information on the lawsuits. With a couple of mouse clicks you can navigate to the full-text decisions of the two Supreme Court cases. Also of interest are the reports of expert witnesses who prepared testimony in defense of the university’s affirmative action plans. Among those whose testimony is reproduced on the Web site are William Bowen and Derek Bok (co-authors of *THE SHAPE OF THE RIVER*), Professor Thomas Sugrue of the University of Pennsylvania, Professor Patricia Gurin of the University of Michigan, and Professor Eric Foner of Columbia University. These expert reports constitute an extraordinary treasure trove of material on the “diversity” rationale, probably the most useful collection of material available in one place anywhere.

The Civil Rights Project, Harvard University ([www.civilrightsproject.harvard.edu](http://www.civilrightsproject.harvard.edu)). Professor Gary Orfield is one of the nation’s leading scholars on equal opportunity in elementary, secondary, and post-secondary education. His Civil Rights Project has published several books, monographs, and statistical studies on school desegregation and related subjects. Just a few months ago the Project prepared a lucid analysis of the two Supreme Court affirmative action decisions. That report, titled *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, can be downloaded from the project’s Web site.

## B. AFFIRMATIVE ACTION: LEGAL PRINCIPLES

- (1) *The issue in a nutshell*: By “affirmative action,” I mean race-based preferences in admission and financial aid. I do not mean affirmative action on other bases (gender, disability, etc.), or non-preferential affirmative action programs such as augmented recruiting and outreach efforts. Nor do I cover in this outline (except near the end) another category of affirmative action: preferential hiring programs for faculty and staff. An affirmative action program, in the narrow sense in which the term is used in this outline (and the narrow sense in which the term has become highly charged politically and emotionally in the higher education community), is a program that gives a preference to minority applicants for admission solely on the basis of their race.<sup>1</sup>

It is an unavoidable fact of life in contemporary American higher education that, without racial preferences, racial diversity would suffer at selective colleges and universities. But preferences are legally problematic. In a prescient passage anticipating much of today's debate over preferential affirmative action programs, Justice Powell in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), observed:

[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. ... Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making.

- (2) *Starting point for analysis: The “Strict Scrutiny” standard*. Under the Fourteenth Amendment to the U.S. Constitution and Title VI of the 1964 Civil Rights Act, universities are prohibited from discriminating on the basis of race, color, or national origin in the operation of their programs and activities. In a series of decisions over the past thirty years, the Supreme Court has placed a heavy burden on institutions whose affirmative action programs are challenged. Such programs, the Court has ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof—the so-called “strict scrutiny” standard—when they are challenged on constitutional or Title VI grounds.

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<sup>1</sup> For those interested in a non-technical definition of affirmative action, I like this one: “Affirmative action consists of institutionalized policies, procedures, and programs designed and implemented to ensure the eradication of past negative actions through which certain citizens were denied equal opportunity for full participation and success in all U.S. societal institutions. Affirmative action is an intentional good-faith effort to reverse the ills of the past.” Harold Cheatham, *CULTURAL PLURALISM ON CAMPUS* 11 (1991), *quoted in* Yollander Hardaway, *Affirmative Action: Does the Fifth Circuit's Hopwood Ruling Place Affirmative Action on Shaky Grounds?*, 83 ED. L. RPTR. 1089, 1090 (1998).

Under the “strict scrutiny” standard, a program that relies on race-based preferences is illegal unless the institution can demonstrate that:

- The program serves a *compelling institutional interest*, and
- The program is *narrowly tailored* to further that compelling interest.

(3) *Compelling institutional interest.*

(a) Starting with *Bakke* in 1978 and with consistency since then, the courts have recognized two and only two justifications for affirmative action programs that are suitably compelling to satisfy the first prong of the two-part “strict scrutiny” test:

- (i) *Remedying the present effects of past discrimination* (the so-called “*remedial justification*”). If unlawful discrimination against an identified minority group actually occurred (for example, if the institution had a written policy excluding members of a particular race from applying), then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination.
- (ii) *Diversity*. An affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body.

(b) Before turning to a discussion of these two compelling institutional interests, it is worth pausing to consider the large number of purportedly “compelling” justifications for affirmative action that have been offered by colleges and universities over the years only to be rejected by the courts. In *Hopwood v. Texas*, 861 F. Supp. 551 (W. D. Tex. 1994), *rev'd and remanded*, 78 F. 3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), the admissions committee at the University of Texas Law School asserted that its affirmative action program was designed to serve five compelling purposes: diversity; remedying the present effects of decades of formal discrimination against African-American and Hispanic candidates for admission; and three others:

- “[P]roviding a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans”;
- “To achieve compliance with the American Bar Association and the [Association of American] Law Schools standards of commitment to pluralistic diversity in the law school's student population”; and

- To honor the terms of a consent decree entered against the State of Texas in 1983 in a longstanding enforcement action brought by the United States Department of Education's Office for Civil Rights to desegregate the dual public higher education system in Texas.

*Hopwood, supra*, 861 F. Supp. at 570. The trial court in *Hopwood*, citing *Bakke*, rejected those three purported justifications: “Although all are important and laudable goals, the law school’s efforts, to be consistent with the [Constitution], must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices.” *Id.*<sup>2</sup>

- (c) *Remedying the present effects of past discrimination.* To paraphrase the Supreme Court's holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989): if a university establishes its former participation in a systematic program of racial exclusion by making “some showing of prior discrimination,” then the university may legally take “affirmative steps to dismantle such a system.” But that standard comes with a warning: courts are required to make “searching judicial inquiry into the justification for such race-based measures... [and to] identify that discrimination... with some specificity before they may use race-conscious relief.”

An institution satisfies that heightened standard of evidentiary proof by invoking “judicial, legislative, or administrative findings of constitutional or statutory violations....” *Croson, supra*, 488 U.S. at 497. In some states, predominantly southern and border states that operated legally segregated, dual systems of public higher education in the 1960s and 1970s,<sup>3</sup> public institutions of higher education can satisfy that burden by pointing to judicial and administrative determinations that their

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<sup>2</sup> I cannot resist reflecting on the irony of the court's ruling that *compliance with an OCR consent decree* is an insufficiently compelling justification for an affirmative action program. In the 1970s and '80s, many state universities, including the University of Texas, were either sued by the Department of Health, Education and Welfare or subjected to administrative enforcement proceedings in a coordinated federal effort to dismantle segregated higher education systems. Many of the affirmative action programs that were subsequently challenged in reverse-discrimination lawsuits—including the admissions program in *Hopwood*—were instituted in response to intense federal advocacy for those programs.

<sup>3</sup> Nineteen states are covered by so-called *Adams* decrees, named after the lawsuit filed by the U.S. Department of Health, Education, and Welfare shortly after the enactment of Title VI in 1964. See *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F. 2d 1159 (D.C. Cir. 1973) (en banc). In *Adams* and successor cases, HEW obtained judicial orders requiring states to dismantle racially separate higher education systems. As part of court-approved desegregation plans, HEW's Office for Civil Rights insisted upon the remedial measures—affirmative action plans in admission, race-restricted financial aid programs—that later came under attack in reverse-discrimination lawsuits such as *Hopwood*.

state higher education systems formally operated dual higher education systems that were racially segregated by operation of state law.

For private institutions and institutions outside the south, the chances of sustaining an affirmative action program in the admissions office by pointing to the compelling interest in remedying the present effects of past discrimination are dubious to say the least. *See generally* A. Baida, *Not All Minority Scholarships Are Created Equal: Why Some May Be More Constitutional Than Others*, 18 J. COL. & UNIV. L. 333, 342-49 (1992).

- (d) *Diversity*. The starting point for analysis is Justice Powell's detailed treatment of the issue in *Bakke*. “[T]he attainment of a diverse student body,” he wrote, “... clearly is a constitutionally permissible goal for an institution of higher education.” Quoting from two of the Court's landmark decisions on academic freedom, Justice Powell observed that “... [i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.... The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. ... [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” 438 U.S. at 311-313, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Justice Powell's opinion cites and quotes from an extraordinary essay written in 1977 by Princeton President William Bowen entitled “Admissions and the Relevance of Race.” A quarter-century later, this essay remains one of the most lucid descriptions ever written of the pedagogical underpinnings for the ideal of diversity in American higher education. From that essay:

[T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. ... In a residential college setting, in particular, a great deal of learning occurs informally[,] ... through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ... People do not learn very much when they are surrounded only by the likes of themselves.

It follows that if, say, two thousand individuals are to be offered places in an entering undergraduate class, the task of the Admission Office is not simply to decide which applicants offer the strongest credentials as separate candidates for

the college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment. ...

In the nature of things it is hard to know how, and when, and even if, this informal “learning through diversity” actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.

It is of course true—and it should be recognized—that the presence on campus of students of different races sometimes results in tensions and even in hostility. But it is also true that acknowledging this reality, and learning to cope with it, can be profoundly educational. In this as in other respects, we often learn at least as much from our bad days as from our good days. ...

These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society—indeed our world—is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. One of the special advantages of a residential college is that it provides unusually good opportunities to learn about other people and their perspectives—better opportunities than many will ever know again. If people of different races are not able to learn together in this kind of setting, and to learn about each other as they study common subjects, share experiences, and debate the most fundamental questions, we shall have lost an important opportunity to contribute to a healthier society .... [Pp. 426-29.]

Affirmative action critics, not surprisingly, disagree about the educational and social value of diversity. From Shelby Steele's book *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990), pp. 115-16:

*Diversity* is a term that applies democratic principles to races and cultures rather than to citizens, despite the fact that there is nothing to indicate that real diversity is the same thing as proportionate representation. Too often the results of this on campuses ... has been a democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not yet been achieved in reality. Here again, racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that covers

the blemish of disparity—a full six years after admission, only about 26 percent of black students graduate from college. ...

I think that one of the most troubling effects of racial preferences for blacks is the kind of demoralization, or put another way, an enlargement of self-doubt. Under affirmative action the quality that earns us preferential treatment is an implied inferiority. However this inferiority is explained—and it is easily enough explained by the myriad deprivations that grew out of oppression—it is still inferiority. There are explanations, and then there is the fact. And the fact must be borne by the individual as a condition apart from the explanation, apart even from the fact that others like himself also bear this condition. In integrated situations where blacks must compete with whites who may be better prepared, these explanations may quickly wear thin and expose the individual to racial as well as personal self-doubt.

- (4) ***“Narrowly tailored.”*** The second part of the two-part “strict scrutiny” standard requires the university to prove that its affirmative action program has been designed and implemented in the narrowest way possible consistent with the compelling purposes the program is designed to serve. The program cannot be broader, more encompassing, or more ambitious than the minimum required to achieve its goal; otherwise, say the courts, the legal rights of innocent third parties may be trampled.

The first part of the two-part “strict scrutiny” test—articulating the “compelling institutional interest” served by affirmative action—focuses on the lofty objectives of affirmative action. The second part—whether the program is “narrowly tailored”—focuses on the nitty-gritty details of specific affirmative action programs.

In practical terms, the second part of the “strict scrutiny” test requires the university to make the following showings with respect to the *mechanical details* of its affirmative action program:

- (a) The institution must show that it considered and rejected *alternative program designs* with a narrower focus. Justice Powell's opinion in *Bakke* is again instructive. The affirmative action program used by the admissions office at U.C. Davis Medical School was a thinly veiled quota program, under which a specific number of seats in the entering class was rigidly reserved for minority applicants. Justice Powell accepted the notion that a race-conscious affirmative action program *of some sort* was warranted by the goal of achieving a racially diverse class, then asked whether a quota program was “the only effective means” of achieving diversity. No, he concluded:

[T]he nature of the state interest that would justify consideration of race or ethnic background ... is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected

ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. [The University's] special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [438 U.S. at 315.]

Justice Powell then turned to “[t]he experience of other university admissions programs,” which demonstrate that race can be taken into account without “assigning ... a fixed number of places to a minority group.....” His opinion quotes at length from a description of the affirmative action program utilized by the undergraduate admissions office at Harvard College. The complete written description of the Harvard program is appended to the Powell opinion. Under the Harvard program, as paraphrased by Justice Powell in the most widely quoted paragraph in his opinion:

... [R]ace or ethnic background may be deemed a “plus” in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [438 U.S. at 316, 317.]

In sum: Justice Powell's opinion, and in particular his endorsement of the Harvard model of affirmative action, were interpreted by the lower federal courts to mean that *the use of numerical quotas is absolutely, unambiguously prohibited*. An affirmative action program that reserves seats for minorities will never pass legal muster. Even the use of flexible goals raises potential problems if the record shows that the goals are reached so regularly and so immutably that they function as the equivalent of quotas.

- (b) The institution implements the program for *a limited period of time* (in other words, the program must “sunset” after a certain number of years). Affirmative action is supposed to be a means to an end, namely inclusiveness without regard to non-performance-related criteria such as race. The university can partially protect itself against legal attack, therefore, if it (i) specifically recites that the affirmative action

program is not indefinite in duration, and (ii) regularly reviews the program, adjusts its operations, and evaluates its efficacy.

(c) *The program does not unreasonably diminish the rights of third parties.* An affirmative action program must be designed to ensure that every applicant's file is compared to every other applicant's file. Courts have uniformly invalidated programs that exhibit any of the following features:

- The files of all minority applicants are placed in a single batch or pool;
- The admissions committee uses a separate subcommittee to review minority files only;
- The admissions committee employs separate admissions standards for minority and non-minority applicants.

These prohibited practices have one common characteristic: they bifurcate the admissions process by creating a discrete “path” for consideration or evaluation of minority applicants. One of the strong themes to emerge from affirmative action jurisprudence during the last decade is that the qualifications of every applicant, regardless of race, must be evaluated against the qualifications of every other applicant to ensure that race, in and of itself, is not the sole determinant in the admission process. Any departure from that principle—any suggestion that minority applicants benefit from a standard or procedure not provided routinely to the applicant pool as a whole—imperils the program.

(5) *Conclusion.*

- (a) To withstand legal scrutiny, admission programs operated by universities must be supported by a compelling justification. Given the state of the law today, it is next to impossible for a university to sustain that burden by relying on the so-called *remedial* justification for affirmative action. *Fostering student-body diversity* is the only avenue that offers much chance of withstanding judicial assault. Universities seeking to justify their affirmative action programs on other grounds have been singularly unsuccessful over the years.
- (b) If the program is warranted by a compelling institutional justification, it still must be narrowly tailored to serve that justification without trammeling the rights in uninvolved third parties. This means as a practical matter that (i) quotas are absolutely taboo, (ii) programs should not be perpetual and should be reevaluated periodically, and (iii) admissions offices should not use discrete tracks or paths for minority applications.

## C. THE 1990s AND THE GRADUAL EROSION OF THE “DIVERSITY” RATIONALE

### (1) *The attack on affirmative action in the courts.*

- (a) *The Hopwood Decision.* The 1996 decision of the Fifth Circuit Court of Appeals in *Hopwood v. Texas*, 78 F. 3d 932, *cert. denied*, 518 U.S. 1033 (1996), marked a startling departure in affirmative action law. Like Alan Bakke before her, Cheryl Hopwood was a white applicant denied admission to a state-supported professional school—the law school at the University of Texas. Hopwood’s undergraduate grade-point average and standardized test scores were higher than those of African-American and Mexican-American applicants whom the law school accepted under its race-based affirmative action program. Hopwood and other unsuccessful white applicants sued for reverse discrimination. At trial, the judge found that the law school’s affirmative action program was necessary both to remedy present effects of decades of formal discrimination against minorities and to foster diversity in the law school’s student body. The trial court held that Texas’s affirmative action plan was in most respects narrowly tailored to serve those compelling interests, although the court ruled that the use of a separate subcommittee to evaluate minority applicants was unconstitutional and ordered the State of Texas to pay Hopwood one dollar in nominal damages.

Hopwood appealed. The Fifth Circuit decision, rendered March 18, 1996, sent shock waves through the higher education community. The court reversed the trial court and held that the University of Texas Law School violated the law by using an affirmative action program that relied *even in part* on race as an admission criterion. The court took the unusual step of suggesting that Justice Powell’s decision in *Bakke* was no longer controlling law (due to the accretion of anti-affirmative-action Supreme Court decisions over the last decade), and that, with *Bakke* essentially overruled, diversity was no longer a sufficiently compelling justification for race-based affirmative action.

- (b) *The Boston Latin Decision.* The Boston Latin School was one of three public high schools in the city of Boston to which students applied by taking a written examination. The 90 available openings in the ninth-grade class were divided into two groups of 45 seats. One group of 45 was selected strictly on the basis of examination score and junior high school grade point average. The other 45 seats were allocated on the basis of “flexible racial/ethnic guidelines,” using a procedure that essentially strove to admit students in designated racial groups (black, Hispanic, Asian, and Native American) in proportion to their representation in the qualified applicant pool. Sarah Wessman, a white applicant, was passed over for admission in favor of minority candidates with lower test scores and GPAs, and she sued.

In a lengthy opinion, the First Circuit Court of Appeals ruled that Boston Latin’s admission procedure was not *narrowly tailored* and therefore violated the civil rights of white applicants by discriminating against them on the basis of their race.

*Wessman v. Gittens*, 160 F. 3d 790 (1<sup>st</sup> Cir. 1998). The court went to considerable pains *not* to denigrate diversity as a potentially compelling justification for race-conscious affirmative action:

In considering whether other governmental interests, beyond the need to heal the vestiges of past discrimination, may be sufficiently compelling to justify race-based initiatives, courts occasionally mention “diversity.” At first blush, it appears that a negative consensus may be emerging on this point [citing, among other cases, *Hopwood*]. ... [But] [w]e think that any such consensus is more apparent than real. ... It may be that the Hopwood panel is correct and that, were the [Supreme] Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. *It has not done so yet, however*, and we are not prepared to make such a declaration in the absence of a clear signal that we should. ... [W]e assume arguendo—but we do not decide—that Bakke remains good law and that some iterations of “diversity” might be sufficiently compelling, in specific circumstances, to justify race-conscious actions. [160 F. 3d at 795, 796 (emphasis added).]

But, continued the court in the most important part of its decision, *proof* of the educational value of diversity was not proffered by the Boston School Committee in this case. Instead, the School Committee offered only “generalities” and “abstractions” about the essential link between diversity and the modern learning experience. *Id.* at 797. “The School Committee has provided absolutely no competent evidence that the proportional representation promoted by the Policy is in any way tied to the vigorous exchange of ideas ... [or] students’ capacity and willingness to learn. To the contrary, the School Committee relies only on broad generalizations by a few witnesses, which, in the absence of solid and compelling evidence, constitute no more than rank speculation.” *Id.* at 799-800.

- (c) *Post-Hopwood Litigation*. Several lawsuits filed by affirmative action opponents sought to broaden the scope of the *Hopwood* holding and invite long-awaited Supreme Court review.
- (i) *The University of Georgia Litigation*. In March, 1997, a group of unsuccessful white applicants for admission to the University of Georgia filed suit on the ground that the university’s “dual track” admission system—utilized since 1990 but replaced in 1995 by a different system—discriminated against them on the basis of their race. Under the system in use between 1990 and 1995, black applicants received automatic admission if they achieved a combined score of 800 on the SAT coupled with a 2.0 high school grade point average; white applicants were admitted automatically only upon achieving an SAT score of 980 and a 2.5 high-school GPA. In early 1999, the trial judge ruled in the plaintiffs’ favor and invalidated the (already replaced) affirmative action plan that had been in effect between 1990 and 1995. The judge’s ruling was

based on the relatively narrow ground that the university, by operating a “dual track” program, had not operated its program in a fashion that was *narrowly tailored* to serve the institution’s interest in diversity. Even so, the judge grumbled and betrayed considerable skepticism about the continued vitality of the diversity rationale:

Although the Court recognizes the theoretical benefit of an educational setting which is open to a diverse collection of viewpoints, it is not convinced that these benefits—furthered here only in an abstract sense—justify outright discriminatory admission practices which cause concrete constitutional injuries.

*Wooden v. Board of Regents of the University System of Georgia*, 32 F. Supp. 2d 1370, 1380 (S.D. Ga. 1999).

Six months later, in July, 1999, the same trial judge issued a second decision in the University of Georgia litigation. The plaintiff in the second case had applied in 1997 under the admission program that replaced the one discontinued in 1995, and that plaintiff, too, had not been admitted. The judge dismissed the plaintiff’s lawsuit on narrow technical grounds related to the plaintiff’s standing to bring the suit, but in the process issued a blistering attack on the diversity rationale, leaving no doubt that he viewed diversity as less than a compelling justification for race-conscious affirmative action. Calling diversity “amorphous” and asserting that affirmative action “stigmatizes . . . non-white students for the sake of a largely symbolic racial preference,” the judge criticized the university for “fail[ing] to meaningfully show how [affirmative action] actually fosters educational benefits.” *Tracy v. Board of Regents of the University System of Georgia*, 59 F. Supp. 2d 1314, 1322, 1323 (S.D. Ga. July 6, 1999), *aff’d in part and rev’d in part sub nom. Wooden v. Board of Regents of the University System of Georgia*, 247 F. 3d 1262 (11<sup>th</sup> Cir. 2001).

Courageously, the President of the University of Georgia, Dr. Michael Adams, announced at the beginning of the 1999-2000 school year that the admissions office would continue to use race as a factor in admitting up to 20 percent of the university’s freshman class. “I believe that all of us have a responsibility to deal with the legacy of segregation as an issue in both academe and government,” Dr. Adams was quoted as saying in a speech that received a standing ovation from faculty members, administrators and students. “My commitment to providing opportunity to all is fundamental, and under my leadership the University of Georgia will remain committed to this basic right.” *University Stands Firm in Using Race in Admissions*, N. Y. TIMES, October 1, 1999, page A14.

- (ii) At almost the same time, the same lawyers who represented the plaintiffs in *Hopwood* filed another lawsuit against the University of Washington Law School. In their lawsuit, they alleged that differential admission standards for white and minority applicants violated the constitutional and statutory rights of whites. Their challenge was rejected in 2000 by a unanimous panel of the Ninth Circuit Court of Appeals:

We are well aware of the fact that much has happened since Bakke was handed down. Since that time, the Court has not looked upon race-based factors with much favor. Still, it has not returned to the area of university admissions, and has not indicated that Justice Powell's approach has lost its vitality in that unique niche of our society. As we see it, regardless of what we think the Supreme Court might do, we must let it decide. ...

We, therefore, leave it to the Supreme Court to declare that the Bakke rationale regarding university admissions policies has become moribund, if it has. We will not. For now, therefore, it ineluctably follows that the 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.

*Smith v. University of Washington Law School*, 233 F. 3d 1188, 1200-01 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

- (iii) In 1997, the lawyers behind *Hopwood* filed two more lawsuits, both against the University of Michigan. One challenged the affirmative action plan used by the law school admissions office, and the other challenged affirmative action in undergraduate admissions. Those are the lawsuits that were finally decided by the Supreme Court earlier this year.

(2) ***The assault on affirmative action in California's public institutions of higher education.*** Two major developments roiled the college and university community in California in the 1990s.

- (a) In July, 1995, a closely divided University of California Board of Regents voted to end racial preferences in hiring, contracting, and admissions at the University of California. *University of California Ends Race-Based Hirings, Admissions*, CHRON. OF HIGHER ED., July 28, 1995, page A26. The vote came one month after California Governor Pete Wilson—then a candidate for the Republican Presidential nomination—issued an executive order that ended race-based affirmative action in state hiring and contracting programs.

(b) In November, 1996, the voters of California approved Proposition 209, a state ballot referendum that amends the state constitution to prohibit the use of race-based or sex-based preferences by state and local government agencies, including the University of California, the California State University System, and California's enormous community college system.<sup>4</sup> Almost immediately, the American Civil Liberties Union and other proponents of affirmative action brought suit and obtained a temporary restraining order prohibiting the University of California System from taking any anti-affirmative-action measures purportedly necessitated by the enactment of Proposition 209. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996). In January, 1997, officials at the University of California announced that they would continue to consider race and ethnicity in making admissions decisions for the Classes of '01 at all UC campuses pending the outcome of the ACLU challenge to Proposition 209. *With Suits Pending, U. of Cal. to Consider Race in Admissions*, CHRON. OF HIGHER ED., January 10, 1997, page A30.

But a few months later, the Ninth Circuit lifted the temporary restraining order and held that Proposition 209 was constitutional and enforceable. *Coalition for Economic Equity v. Wilson*, 110 F. 3d 1431 (9th Cir. 1997). In August, 1997, just as the new

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<sup>4</sup> The text of Proposition 209 reads in pertinent part as follows:

“(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

...

“(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

“(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain any federal program, where ineligibility would result in a loss of federal funds to the state.

“(f) For the purposes of this section, 'state' shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.”

The text of Proposition 209 and interpretive information on its effect and significance are available from two on-line sources. One is the official Web page of the California Civil Rights Initiative, the organization that sponsored Proposition 209. Its page can be found at [www.publicaffairsweb.com/ccri](http://www.publicaffairsweb.com/ccri). The other is the Web page of Californians for Justice, one of many grass-roots organizations that opposed Proposition 209. Its page can be found at [www.igc.apc.org/cfj](http://www.igc.apc.org/cfj).

academic year was beginning, the foes of Proposition 209 filed an emergency motion to stay the Ninth Circuit mandate pending petition to the Supreme Court, but that request was denied on August 26, 1997. *Coalition for Economic Equity v. Wilson*, 122 F. 3d 718 (9th Cir. 1997). In the 1997-98 admission cycle, the university selected entering freshman classes without regard to race and ethnicity. The predictable result: admitted minority students dropped 55 percent at the Berkeley campus, 36 percent at the Los Angeles campus, and 19 to 36 percent on other campuses.<sup>5</sup> *Berkeley and UCLA See Sharp Drops in Acceptance of Black and Hispanic Applicants*, CHRON. OF HIGHER ED., April 10, 1998, page A43; *Minority Admissions Fall on 3 U. of California Campuses*, CHRON. OF HIGHER ED., March 27, 1998, page A41.

- (3) ***The assault on affirmative action in Texas and adjoining states.*** The Fifth Circuit decision in *Hopwood* led to confusion among colleges and universities in the three-state area comprising that Circuit (Texas, Louisiana, and Mississippi).

On February 5, 1997, the Attorney General of Texas, Dan Morales, issued a letter opinion to the Chancellor of the University of Houston System in which he advised that, in light of *Hopwood*'s rejection of the diversity rationale, any consideration of race or ethnicity by colleges and universities was unlawful in the absence of evidence of present effects of past *de jure* race discrimination. General Morales's opinion predictably cast a pall over a wide range of affirmative action plans in colleges and universities in those states. *Texas Attorney General Bars Affirmative Action at Colleges*, CHRON. OF HIGHER ED., February 14, 1997, page A32.

On March 24, 1997, Norma Cantú, Assistant Secretary for Civil Rights in the United States Department of Education, wrote to General Morales and suggested that his interpretation of *Hopwood* was too broad: "We believe that the *Hopwood* decision is limited to its facts .... [*Hopwood*] concerned the University of Texas Law School's affirmative action program, and should not be used to invalidate the affirmative action admission program[s] used by [other institutions] to assist in creating a diverse student enrollment for educational purposes."

Ms. Cantú's letter prompted expressions of disagreement from legal analysts in Texas and predictable ridicule from the law firm that represented the plaintiffs in *Hopwood*. "In studying both the Fifth Circuit opinion and the Attorney General's advisory opinion, I think [*Hopwood*] has a broader application than simply at the law school at U.T.-Austin," said Ray Farabee, General Counsel of the University of Texas System. Added Michael Greve, executive director of the law firm representing the *Hopwood* plaintiffs: "If Ms.

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<sup>5</sup> "Minority" encompasses African-American, Hispanic-American, and Native American applicants. The number of Asian-American admittees rose slightly at Berkeley and remained the same on other UC campuses.

Cantú were in the private sector and wrote a letter like that to one of her clients, there is ironclad cause for legal malpractice.” (Both quotations are from *Texas Colleges Need Not Follow Ruling on Affirmative Action, U.S. Official Says*, CHRON. OF HIGHER ED., March 28, 1997, page A41.)

When the furor did not die down, the Department of Education reversed itself. In a letter to Texas State Senator Rodney Ellis written April 11, Ms. Cantú wrote that, absent further review, *Hopwood* prohibited race-conscious affirmative action for the purpose of fostering student body diversity. *In Shift, U.S. Tells Texas It Can't Ignore Court Ruling Barring Bias in College Admissions*, N.Y. TIMES, April 15, 1997, p. A20.

(4) **Summary:**

- (a) The diversity rationale is effectively the only rationale a college or university can use to satisfy the first prong of strict scrutiny—and, at least prior to the University of Michigan decisions, the diversity rationale was hanging by a thread, endorsed by only one Supreme Court Justice in the *Bakke* case.
- (b) It is clearly not enough for proponents of affirmative action to rely on unsupported assertions that diversity serves positive educational purposes. Judges are quick to dismiss such assertions as abstractions. Judges want “compelling evidence,” in the words of the court in *Wessman v. Gittens*, 160 F. 3d 790, 800 (1<sup>st</sup> Cir. 1998), not “rank speculation.” The bar has been raised. The onus is on the institutional defenders of affirmative action to prove convincingly – to skeptical judges – that diversity is essential to the achievement of higher education’s mission.

#### D. SOCIAL SCIENCE RESPONDS

- (1) ***Diversity resurrected? The Bowen-Bok book.*** In September, 1998, Princeton University Press published THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS. The book, written by former Princeton President William G. Bowen and former Harvard President Derek Bok, was immediately hailed by scholars, commentators, and reviewers: “With its rich database and carefully calibrated tone, the study will most likely lead the charge in a liberal counteroffensive to recast the debate over affirmative action ....” Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite Colleges*, N. Y. TIMES, September 9, 1998.

The book is essentially a longitudinal study of three cohorts of college matriculants, one entering college in 1951, one in 1976, and one in 1989. Altogether, the study tracked more than 80,000 undergraduate students at 28 of the nation’s most selective colleges and

universities.<sup>6</sup> The book uses statistics, economics, and sociology in an effort to develop a quantifiable factual basis for measuring the societal effects of affirmative action in admission to elite colleges and universities. The authors used their formidable database to pose and analyze the most vexing questions surrounding the use of affirmative action by admissions offices:

- (a) *Do students benefit from attending an institution with a racially diverse student body?* “The ultimate test of diversity as an educational policy ... is ... what students think of their total experience after traveling the sometimes bumpy road toward greater tolerance and understanding. ... Of the many thousands of former matriculants who responded to our survey, the vast majority believe that going to college with a diverse body of fellow students made a valuable contribution to their education and personal development. There is overwhelming support for the proposition that the progress made over the last thirty years in achieving greater diversity is to be prized, not devalued.” (Page 255.)
- (b) *Does society benefit?* One of the study’s most compelling findings is that affirmative action in college admission—which is still barely two generations old in the United States—has already contributed to the emergence of a stable African-American middle class. “By any standard, ... the achievements of the black matriculants [in the study] have been impressive.” (Page 258.) Income levels, college graduation rates, percentages with advanced degrees, and other measures of academic and professional success are equivalent for black and white matriculants.
- (c) *Does affirmative action stigmatize its intended beneficiaries?* No, concludes the Bowen-Bok study. There is no evidence that minority students admitted through affirmative action programs graduate at different rates, perform differently than non-minorities in graduate school, or have job histories that are perceptibly different.
- (d) *Is affirmative action fair to non-minorities?*

[E]ven if white students filled all the places created by reducing black enrollment, the overall white probability of admission would rise by only one and one-half percentage points, from 25 percent to roughly 26.5 percent. Thus, nearly as many white applicants—including an appreciable number of valedictorians and other highly talented people—would still have been disappointed. [One educator]

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<sup>6</sup> Students came from eleven private liberal-arts colleges (Barnard, Bryn Mawr, Denison, Hamilton, Kenyon, Oberlin, Smith, Swarthmore, Wellesley, Wesleyan, and Williams) and seventeen public and private research universities (Columbia, Duke, Emory, Miami of Ohio, Michigan, North Carolina, Northwestern, Penn, Penn State, Princeton, Rice, Stanford, Tufts, Tulane, Vanderbilt, Washington University St. Louis, and Yale).

has used the analogy of handicapped parking spaces: “Eliminating the reserved space would have only a minuscule effect on parking options for non-disabled drivers. But the sight of the open space will frustrate many passing motorists who are looking for a space. Many are likely to believe that they would now be parked if the space were not reserved.” [Pages 36-37.]

(2) *The Harvard-Michigan Law School study, 1999*. Gary Orfield’s Civil Rights Project at Harvard undertook an unprecedented examination of student attitudes toward diversity. The task he and his collaborator, Dean Whitla, set for themselves was to determine whether “interracial campuses produce new patterns of discussion and learning.” Using Gallop Poll surveys, Orfield and Whitla posed a series of questions to law students at Harvard and Michigan about classroom and social interactions across racial lines. Almost two thousand students responded to the survey. Among the survey’s principal findings:

- (a) Students from the most segregated high-school and college backgrounds were, surprisingly, white students. Almost half the white students came from “highly segregated” educational backgrounds; almost no blacks and Latinos did.
- (b) In many different ways, the study showed that the way students think about problems in the law school classroom are substantially and materially affected through interactions with students of different ethnicity. Here, for example, are two of the pivotal findings from the study:

When asked to make an overall assessment of whether diversity was a positive or negative element in their total educational experience, the result was overwhelmingly positive. Eighty-nine percent of Harvard students and 91% of Michigan students reported a positive impact, the large majority reporting a strongly positive impact. One student explained: "Being confronted with opinions from different socio-economic and ethnic realms forces you to develop logical bases for the opinions you have and to discard those not based on such logic. You simply are forced to think more critically about your opinions when you know that people with differing opinions are going to ask you to explain yourself." Less than 1% of the students at each school reported a negative impact and less than a tenth felt that there was no impact. In public opinion research it is very rare to find majorities of this size on any controversial issue.

Table 12

"Do you consider having students of different races and ethnicities to be a positive or negative element of your educational experience?" (in %)

	Clearly Positive	Moderately Positive	No Impact	Moderately Negative	Clearly Negative
Harvard Students	69.3	19.9	9.7	0.6	0.2
Michigan Students	73.5	17.0	8.6	0.2	0.2

Understanding the nature of law requires understanding the social and economic conditions in which law is applied. Many laws and court decisions rest on assumptions about such conditions and in many instances it is necessary to understand such conditions (and the differing views about them) in order to evaluate court decisions, statutes, and legal doctrines. Some law school students come to law school with substantial undergraduate training or practical experience on such issues. Others do not. Often these issues are not addressed substantively in law teaching, which tends to be much more about the principles and precedents or deductive models concerning points of law than about the underlying social realities. Educational experiences in discussions that enable students to understand these issues better may be of great value in understanding legal issues and representing clients.

Table 18

"Have discussions with students of different racial and ethnic backgrounds changed your view of conditions in various social and economic institutions?" (in %)

	A Great Deal	Substantially	Significantly	Little	Not at All
Harvard Students	25.1	30.8	22.5	13.7	7.6
Michigan Students	32.0	33.8	19.1	8.9	5.9

(c) Voluntary social segregation remains a major concern of non-minority students:

A number of students, particularly at Harvard Law School, pointed to self-segregation as a barrier to stronger interaction. In spite of the reports of a great many interracial friendships and interactions of many sorts, some felt that there were still social barriers and believed that the law school should provide more leadership on that issue. In spite of some "enormously gratifying experiences" one student said that "Harvard Law School has also been the place where I have seen the most racial segregation in comparison to any place that I have been. I find that very odd." A student who thought "diversity is incredibly important," noted that, "as an undergraduate at Stanford... relations across racial boundaries were not perfect, but were far better than at Harvard Law School. I think the reason for this was simply that there were more minority students at Stanford...."

(d) Orfield and Whitla concluded:

It is clear from this survey ... that large majorities [of law school students] have experienced powerful educational experiences from interaction with students of other races. Although the plurality of students believe that not enough has been done to realize these potentials fully, there are many contacts and friendships that have formed across racial and ethnic lines. White students appear to have a

particularly enriching experience, since they are by far the most likely to have grown up with little interracial contact. The values affirmed by Justice Powell and by the Harvard admissions officials cited in the *Bakke* decision appear to be operating in the lives of law students today. It is regrettable that the scholarly world has been so slow in studying these changes. Nevertheless, this data clearly affirms the judgements of the courts and the leaders of legal education 35 years ago when they embarked on policies that led to the diversity that most of today's students find so profitable to their legal education and to understanding critical dimensions of their profession.

- (3) ***An aside: Is there an effective surrogate for race?*** Some widely respected observers have urged that we should abandon explicit reliance on race as a “plus” factor in the admission process and rely instead on so-called “correlatives.” See, for example, Hugh B. Price, *Fortifying the Case for Diversity and Affirmative Action*, CHRON. OF HIGHER ED., May 22, 1998, page B4; Donald M. Stewart, *Affirmative Action and the SAT*, TRUSTEESHIP, May, 1998, page 36.

But research conducted by the Harvard Graduate School of Education challenges the notion that the substitution of race-neutral *surrogates*—*e.g.*, “economically disadvantaged background,” “first-generation college,” etc.—for overt racial criteria can serve the objectives of race-conscious affirmative action without creating legal exposure. In fact, given the demographic reality of this country, where the large majority of people living below the poverty line are white, reliance on race-neutral surrogates inevitably benefit whites more than minorities. The result is diluted racial diversity—preferable to no diversity, perhaps, but not what overt reliance on race is capable of producing. “When race-conscious admissions policies are outlawed, the easiest alternative for colleges seeking to admit significant numbers of minorities is to target high-poverty, low-achieving schools, because very few whites attend such schools. But the students from these schools will also be the least likely to succeed in college. It is extremely difficult to identify, using only nonracial criteria, those African-American and Latino applicants most likely to succeed in a selective college, because they are often middle-class students attending more competitive, less impoverished schools.” Gary Orfield, *Campus Resegregation and Its Alternatives*, reprinted at [www.law.harvard.edu/civilrights/publications/chilling/orfield.html](http://www.law.harvard.edu/civilrights/publications/chilling/orfield.html).

- (4) ***The Texas experiment.*** In 1997, partly in reaction to the *Hopwood* decision, the Texas legislature passed a law guaranteeing admission to the University of Texas for all high school seniors in Texas whose grade-point averages placed them in the top ten percent of their class. The state law “open[ed] a door for black and Hispanic students by exploiting the *de facto* segregation in [Texas] schools,” many of which enroll close to 100 percent minority students. *Admission Law Changes the Equations for Students and Colleges in Texas*, CHRON. OF HIGHER ED., April 3, 1998, page A29. The number of admitted minority students increased slightly at the University of Texas in the first year after the Texas plan was implemented. But the new admission policy has created other problems.

Some critics wonder whether diversity is served if the state's most prestigious public university admits students who may not be academically prepared; are we substituting a retention problem for today's admission problem, wonders one high school guidance counselor in a predominantly black inner-city high school in Texas? There is also the palpable risk of suburban white backlash:

The reality, of course, is that new admissions policies create new sets of winners and losers. In Texas, this latest plan may leave many white applicants angry once the admission cycle ends. Some of those at the super-competitive Highland Park High School, just north of downtown Dallas, feel that the policy is unfair because it treats all schools the same, even though top seniors there are better prepared than many top seniors elsewhere. [CHRON. OF HIGHER ED., April 3, 1998, page A29.]

Notwithstanding these reservations, "[e]lite public universities across the country are watching Texas to see if it has found a way to foster diversity in the post-affirmative-action climate produced by [*Hopwood*]." *Id.* In 1999, for example, the University of California adopted a plan to admit automatically the top 4 per cent of seniors from each high school there. See Sarah Hebel, *In Michigan and Many Other States, "Percent Plans" Could Undermine Diversity*, CHRON. OF HIGHER ED., March 21, 2003, page A26.

## **E. WHERE WE ARE TODAY: THE SUPREME COURT'S DECISIONS IN *GRUTTER* AND *GRATZ***

- (1) *The facts in Grutter (the law school case)*. From *Grutter v. Bollinger*, 123 S. Ct. 2325, 2331-33 (2003):

The [University of Michigan] Law School ... receives more than 3,500 applications each year for a class of around 350 students. ... The hallmark of [its admissions] policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of

recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions to the character of the Law School."

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, ... Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), [and other defendants].... Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment [and] Title VI of the Civil Rights Act of 1964.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race.

- (2) ***The facts in Gratz (the undergraduate case).*** The facts in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), are difficult to summarize because the process used by the University of Michigan's Office of Undergraduate Admissions changed in significant respects from year to year. But here are its essential characteristics:
  - (a) For each applicant for admission, the admissions office calculated an index score based on both objective factors (high school grades, standardized test scores, in-state residence) and subjective factors (strength of curriculum, "unusual circumstances"). The maximum index score was 150 points.

(b) Applicants with scores of 100 or more were automatically admitted; applicants scoring 74 or below were automatically turned down; and applicants with scores between 75 and 99 were assessed by a special committee.

(c) Minority applicants received two benefits not accorded non-minorities: (1) their index scores were automatically increased 20 points, and (2) their files could be flagged and referred to the special committee even if their index scores were below the 75-point threshold.

**(3) *How the Justices voted in Grutter:***

(a) Five Justices voted to uphold the University of Michigan Law School's affirmative action plan:

- Justice Sandra Day O'Connor (who wrote the majority opinion)
- Justice John Paul Stevens
- Justice David Souter
- Justice Ruth Bader Ginsburg
- Justice Steven Breyer

(b) Four Justices voted to strike down the plan:

- Chief Justice William Rehnquist
- Justice Clarence Thomas
- Justice Antonin Scalia
- Justice Anthony Kennedy

**(4) *How the Justices voted in Gratz:***

(a) Six Justices voted to strike down the University of Michigan's undergraduate affirmative action plan:

- Chief Justice Rehnquist (who wrote the majority opinion)
- Justice O'Connor
- Justice Scalia
- Justice Thomas
- Justice Kennedy
- Justice Breyer

(b) Three Justices voted to uphold the undergraduate plan:

- Justice Stevens

- Justice Souter
- Justice Ginsburg

(5) ***Justice O'Connor's majority opinion in Grutter:***

- (a) *Diversity as a “compelling” institutional interest.* Justice O'Connor first dispelled any uncertainty about the continued vitality of Justice Powell's *Bakke* framework:

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent ...

[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions. [123 S. Ct. at 2337.]

- (b) *Why diversity is compelling: reasons advanced by the University of Michigan.*

[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds. [*Id.* at 2339-40, with internal quotation marks omitted.]

- (c) *Why diversity is compelling: reasons advanced by friends of the court.*

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “based on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.” Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges

and universities. At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” (Emphasis in original.) To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.” (Emphasis in original.) We agree that “it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” [*Id.* at 2340, with some internal quotation marks omitted.]

(d) *Narrow tailoring:*

- *Absolutely nothing that smells like a quota under any circumstances.*

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants. Instead, a university may consider race or ethnicity only as a “plus” in a particular applicant’s file, without insulating the individual from comparison with all other candidates for the available seats. In other words, an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [*Id.* at 2342, with internal quotation marks and citations omitted.]

- *“Holistic,” file-by-file review. No separate tracks, separate admissions subcommittees, differentiated cut-off indices, or other devices that divide the application pool into two sub-pools, one minority, one not.*

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. . . . [T]he Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity. Like the Harvard plan [discussed by Justice Powell in *Bakke*], the Law School’s admissions policy is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration,

although not necessarily according them the same weight. [*Id.* at 2343, with some quotation marks and citations omitted.]

- *No need to exhaust every conceivable less-sweeping alternative.*

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. [*Id.* at 2344-45, with citations omitted.]

- *Sunset—within 25 years.*

[R]ace-conscious admissions policies must be limited in time. ... In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. ...

The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. ...

We take the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. [*Id.* at 2346-47, with quotations and citations omitted.]

- (e) *Deference to “complex educational judgments” made by universities:*

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today

is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. [*Id.* at 2339.]

(6) ***Justice Thomas's "Do nothing with us!" dissent in Grutter:***

(a) *The dissent.*

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

“In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury.” *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original). . . .

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. . . .

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

[Id. at 2350, 2362.]

- (b) *The critique of the dissent.* From Alan B. Krueger, *Economic Scene: The Supreme Court Finds the “Mushball Middle” on Affirmative Action*, N. Y. TIMES, July 24, 2003, page C2:

Instead of drawing on systematic evidence on the effect of affirmative action on students after they leave school, or on how the vast majority of minorities admitted to elite colleges actually viewed their college experience, Justice Thomas’s opinion relied on introspection, selective anecdotes and the assertion that “no social science has disproved” his view that affirmative action is harmful.

“Somehow, someday, social scientists should say clearly to judges, even to Clarence Thomas, that evidence matters,” said William G. Bowen, president of the Andrew W. Mellon Foundation and co-author of “The Shape of the River” (Princeton University Press, 1998). In that book, Mr. Bowen and his co-author, Derek Curtis Bok, a former president of Harvard University, found that the more selective the college that black students attended, the more likely they were to graduate and earn an advanced degree, the more satisfied they were with their college experience, and the more successful they were later in life.

Moreover, these findings held for black students at the lower end of the College Board[’s] distribution as well as those at the higher end, which is significant because those at the lower end were more likely to have been admitted to the elite schools because race was taken into account as a background characteristic along with other factors.

... [T]he evidence certainly does not suggest that attending top colleges harms minority students.

- (7) *Justice Scalia’s “blueprint” dissent in Grutter.* “[Justice] Scalia openly invited affirmative action foes to keep suing, as his dissenting opinion in the law school case included a catalog of ways to challenge ... [affirmative action] programs.” Steven Lubet, *Michigan Ruling No Decisive Victory for Affirmative Action*, CHICAGO SUN-TIMES, June 25, 2003, page 47.

From Justice Scalia’s dissent in *Grutter*:

... [F]uture lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant as an individual, and sufficiently avoids separate admissions tracks to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a good faith effort and has so zealously pursued its critical mass as to make it an unconstitutional *de facto* quota system, rather than merely a permissible goal. Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in

*Grutter*; and while the opinion accords “a degree of deference to a university’s academic decisions,” deference does not imply abandonment or abdication of judicial review. Still other suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution’s racial preferences have gone below or above the mystical *Grutter*-approved “critical mass.” Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution’s composition of its generic minority “critical mass.” I do not look forward to any of these cases.

[Id. at 2349-50, with some internal quotation marks and citations omitted.]

## F. WHERE WE’LL BE TOMORROW: THE IMPACT OF *GRUTTER* AND *GRATZ* ON AMERICAN HIGHER EDUCATION

- (1) *The cases remove uncertainty—and there was a great deal of it before June—about the continued vitality of Justice Powell’s reasoning in Bakke.* It is now crystal clear that fostering student body diversity is a goal sufficiently compelling to satisfy the first prong of “strict scrutiny” analysis. As stated succinctly in a report prepared for the Harvard Civil Rights Project a few weeks after the Supreme Court issued its decisions in *Grutter* and *Gratz*:

[T]he Supreme Court’s decisions ... allow selective colleges and universities throughout the country to employ race in admissions. The decisions reject the absolute race-blind approach to higher education admissions advanced by the *Grutter* and *Gratz* plaintiffs and by the U.S. government and others as *amici curiae*. The Court’s decisions also effectively overrule major portions of the 1996 ruling of the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*, and will allow colleges and universities in the states of Texas, Louisiana, and Mississippi to use race-conscious admissions policies designed to advance diversity. State universities in California, Washington, and Florida are still prohibited under their state laws from employing race-conscious admissions policies; however, private universities in those states can employ properly designed race-conscious policies consistent with their obligations under Title VI of the Civil Rights Act of 1964 and other federal laws.

The Civil Rights Project, Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* (July, 2003), available online at

[www.civilrightsproject.harvard.edu/policy/legal\\_docs/Diversity\\_%20Reaffirmed.pdf](http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf)  
[cited below as “*Reaffirming Diversity*”].

(2) ***We have a clearer idea what questions colleges should ask themselves as part of the “narrowing tailoring” analysis.***

- (a) Holistic review—each candidate individually assessed in comparison to every other candidate. No separate admissions pools, separate committees, separate processes, distinct cut-off numbers, or differentiated threshold scores.
- (b) Quotas are absolutely, categorically taboo. But (and this is an important refinement of the *Bakke* analysis), numerical goals are permissible in order to ensure that minority students are admitted in sufficient numbers to establish a “critical mass” of underrepresented students. Using a candidate’s race as a “plus” factor and assigning points to candidates who are members of underrepresented minorities do not transform a numerical goal into a quota.
- (c) Consideration of “workable race-neutral alternatives that will achieve the diversity the university seeks.” *Grutter*, 123 S. Ct. at 2345. But the consideration of alternatives doesn’t mean that the institution has to exhaust every possible alternative; it means simply that it must make a good-faith, documented effort to weigh viable options and support its conclusion that the most effective way of achieving its goal of diversity is through the adoption of a race-conscious affirmative action plan.
- (d) No undue burden on non-minority candidates for admission. This has always been the least understood dimension of narrow tailoring. Here’s how the Harvard Civil Liberties Project explains it:

... [N]o student involved in a truly competitive admissions process has a right or an entitlement to admission to a selective school. As the *Grutter* Court notes, a fair and flexible admissions *process* that considers both non-racial and racial factors will allow non-minorities to be competitive with minorities, and will therefore not impose an undue burden.

*Reaffirming Diversity* 10 (emphasis in the original).

- (e) Sunset. “Although an institution may have a permanent interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits. ... [F]ixed or absolute time limits are not mandated. According to the *Grutter* Court, a durational requirement can be satisfied by sunset provisions or by periodic reviews to determine whether a race-conscious policy is still needed to achieve student body diversity.” *Reaffirming Diversity* 11.

- (3) ***Perhaps the most significant question of all for proponents of affirmative action: how broadly do the Grutter and Gratz holdings sweep?*** Do they support race-conscious affirmative action outside the context of admission to selective college and university academic programs? What about race-restricted financial aid? Elementary and secondary education? Employment? All have been the objects of litigation by affirmative action foes in the past.

While it's too early to tell at this stage what the lower federal courts may do with the language and reasoning of *Grutter* and *Gratz*, some commentators have observed that Justice O'Connor, writing for a majority in *Grutter*, used (deliberately?) expansive language that could easily be transposed to other contexts. Justice O'Connor proclaimed that "[c]ontext matters" in affirmative action cases. *Grutter*, 123 S. Ct. at 2338. One of the benefits of student-body diversity identified by Justice O'Connor is the development of a diverse and integrated leadership that can serve the needs of government, the business community, and even the military in 21<sup>st</sup>-century America. It's only a short step from that statement to the endorsement of race-conscious affirmative action programs to promote diversity in the work force. *See Reaffirming Diversity* 24-25.

- (4) ***A last, reflective, cautious word.*** From Martin Michaelson, *Affirmative Action: What's Next?—The Court's Pronouncements Are More Dramatic and Subtle Than the Headlines*, CHRON. OF HIGHER ED., July 18, 2003, page B11:

[The decisions in the two Michigan cases reflect] a deep skepticism that affirmative action, in practice, is fair. No justice embraced the view that four held in *Bakke* (a view that Michigan did not argue for) that societal discrimination justifies race-conscious admissions. The court's attitude that affirmative action is a kind of exceptionalism—to be strictly scrutinized and not overindulged—will challenge higher education.

Justice O'Connor's defensive tone in *Grutter* is telling, as she depicts hurdles that institutions will face in using race-conscious policies. As she characterized it, the law-school policy is acceptable because it: focuses on "academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them'"; "requires admissions officers to evaluate each applicant based on all the information in the file"; "does not restrict the types of diversity contributions eligible for 'substantial weight'"; "does not define diversity solely in terms of racial and ethnic status"; does not "seek to admit any particular number or percentage of underrepresented minority students"; and often admits nonminority applicants whose grades and test scores are lower than those of rejected minority applicants. Underscoring his acute discomfort with the decision, Justice Kennedy, in dissent, pointed to the "safeguard [of] rigorous judicial review" of affirmative action, which, he said, the *Grutter* majority failed to give. That the court expects institutions to cease diversity-enhancing race-conscious affirmative action 25 years from now is of a piece with that exceptionalist view. Durational limits are

conventional and sensible where affirmative action is taken to remedy discrimination; remediation is by nature temporal. A time limit does not, however, well fit enhancing diversity, which administers not a remedy but an inherent academic value.

For years, colleges and universities have approached legal exposure from their affirmative-action policies with a thoughtful, if unaccustomed, tolerance of risk. At many institutions, the Michigan decisions compound the risk-management dimensions of the issue. No single administrative template for admissions will resolve the matter satisfactorily for all institutions, nor even for many, if any, institutions that have multiple admissions programs. Some institutions will be advised that they can successfully defend at least some of their admissions practices. Other institutions will be advised to the contrary. To the extent that institutions adopt advice to invest more resources in making admissions decisions, there will be significant budgetary implications. Highly selective public universities are likely to face political controversy whichever way they turn. Institutions, public or private, will need to contend with edgy internal constituencies if they change admissions practices, and possibly if they don't.

With such considerations in mind, some of those in charge at colleges and universities understandably will want to believe that the Michigan decisions are broadly permissive. The major risk now for higher education is that the yellow light the Supreme Court lit on June 23 will be mistaken for green.