

Thoughts on *Grutter v. Bollinger* and *Gratz v. Bollinger* as Law and as Practical Politics

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Media pundits ordinarily love drama. But when they hit the airwaves just minutes after the announcement of the twin decisions on race-based admissions at the University of Michigan—*Gratz v. Bollinger*¹ and *Grutter v. Bollinger*²—their tone was surprisingly muted. The peculiar split judgments—one victory for the plaintiff and one for the University—were made to seem almost inevitable. The Supreme Court only did what it had to do—or so the pundits seemed to be suggesting.

Two very different explanations for the decisions were commonly offered—one legal and one political. The first, favored by legal commentators, emphasized that the decisions were simply a faithful application of already existing law, notably *Regents of the University of California v. Bakke*.³ The implication here was that considerations outside of legal doctrine had little or nothing to do with the result. The second, favored by political commentators, emphasized practical considerations over legal precedent. Under this view, the Court was simply being politically pragmatic. Recognizing the difficulties inherent in prohibiting widely popular affirmative action programs, it issued opinions that, while giving a nod in the direction of those who oppose race-based admissions, essentially allowed the policies to continue. Here, the implication was just the opposite: if already-existing legal doctrine had been standing in the Court's way, the Court would have had to ignore it—or sweep it away.

It is impossible to know for sure how the individual Justices

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1. *Gratz v. Bollinger*, 539 U.S. 244 (2003).
2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
3. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

perceived their roles in deciding *Grutter* and *Gratz*. For that, one would need to be privy to their private thoughts, not simply their written opinions. But however they perceived their roles—follower of precedent, political pragmatist or, more likely, a combination of the two—the opinions are seriously flawed and hardly inevitable.

Up until the time of the *Grutter* and *Gratz* decisions, accepted legal doctrine had required the most compelling of circumstances before a racially discriminatory law could be upheld. In place of that doctrine, the *Gratz* decision substituted the disturbing notion that courts should defer to the wisdom and expertise of state authorities—the very authorities that the Equal Protection Clause requires them to police—in evaluating race-based admissions policies. Nothing in *Bakke* required—or even permitted—such a course. It is simply a mistake to view these cases as faithfully applying already existing doctrine.

It would be just as mistaken, however, to see the results as an exercise in political pragmatism. Isolated as they are, the Justices could easily get the misimpression that race-based admissions procedures are successful policies that enjoy considerable support. But it would be exactly that—a misimpression; if members of the Court in any way pulled their punches on account of that misimpression, an error was made. They were given an opportunity to ease the educational establishment out of a tragically misguided policy that just happened to be unconstitutional as well, thereby making it possible to focus attention on newer and more promising educational reforms. The opportunity was lost. It is not clear when, if at all, it will return.

I. THE UNIVERSITY OF MICHIGAN CASES:
GRATZ V. BOLLINGER AND *GRUTTER V. BOLLINGER*

For those who read about the Court's decisions in the newspapers or heard about them on television or radio, the battle over race-based admissions policies may have appeared to end in a tie score. While the Court upheld the University of Michigan Law School's admissions scheme in *Grutter*,⁴ it condemned as unconstitutional the University of Michigan's undergraduate policy in the companion case of *Gratz*.⁵

It would be easy for the casual reader or listener to get the impression that the Court simply split the difference between supporters and opponents of race-based admissions policies and that both sides must have received about half of what they wanted. Appearances, however,

4. *Grutter*, 539 U.S. at 343–44.

5. *Gratz*, 539 U.S. at 275–76.

can be misleading. In fact, *Grutter* was a huge loss for those who favor race neutrality. *Gratz*, on the other hand, will likely turn out to be an insignificant victory. Any university whose current race-based policy would be banned by *Gratz* can, without too much trouble, remodel its policy in the style approved by *Grutter* and achieve precisely the same results.⁶ Of course, implementing a new *Grutter*-style program will cost time and money that the university would surely prefer to spend elsewhere,⁷ but the difference between the two policies would be entirely a matter of form rather than function. Any university that wants a race-based admissions policy can have one if it is willing to pay the price, and almost all are.

A. *Gratz v. Bollinger*

The plaintiffs in the *Gratz* case were Jennifer Gratz and Patrick Hamacher, both Michigan residents and both white.⁸ Gratz had been an excellent student at her high school in the Detroit suburb of Southgate, earning a 3.765 GPA while serving as a math tutor, athlete, cheerleader, and student government representative. Her ACT scores put her in the eighty-third percentile. When she applied for admission to the freshman class of 1995,⁹ she was first wait-listed and subsequently denied admission, despite a finding by the admissions office that she was well-qualified.¹⁰ Hamacher, a Lansing native, had excellent ACT scores in the eighty-ninth percentile and a respectable GPA of 3.373, despite having worked several part-time jobs in high school and participating as a varsity athlete.¹¹ When he applied for admission to the freshman class of 1996,¹² like Gratz, he was wait-listed, “because, though his ‘academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission,’” and he was ultimately

6. In her dissent in *Gratz*, Justice Ginsburg appeared to acknowledge this when she wrote that the decision will cause colleges and universities to “resort to camouflage.” *Id.* at 304-05 (Ginsburg, J., dissenting). See *infra* notes 44-45 and accompanying text (discussing Justice Ginsburg’s dissenting opinion in *Gratz*).

7. While the institutions themselves would surely prefer to spend the money elsewhere (if institutions could have such views), it is entirely possible that college administrators who are hired to staff the admissions offices in order to comply with *Gratz* are very happy that the institution is spending the money where it is.

8. *Gratz*, 539 U.S. at 244.

9. *Victims of Affirmative Action at Michigan*, available at http://www.cir-usa.org/cases/michigan_client_bios.html (last revised October 23, 2001) (Center for Individual Rights, Washington, D.C.).

10. *Gratz*, 539 U.S. at 251.

11. *Victims of Affirmative Action*, *supra* note 9.

12. *Victims of Affirmative Action*, *supra* note 9.

rejected.¹³

It was undisputed that the University of Michigan's College of Literature, Science and the Arts ("LSA") admitted "virtually every qualified . . . applicant" who was African-American, Hispanic or American Indian;¹⁴ hence, Gratz and Hamacher would almost certainly have been admitted had they been members of one of those racial groups. Indeed, given their academic credentials, there is excellent reason to suspect that they would have been admitted if LSA had only practiced race-neutral admissions policies. Unfortunately, we will never know for sure, since LSA was anything but race neutral.¹⁵

LSA's admissions officers considered a number of factors in making admissions decisions,¹⁶ but race was a prominent one.¹⁷ LSA awarded twenty bonus points (out of one hundred necessary for guaranteed admittance) to all African-American, Hispanic, and American Indian applicants.¹⁸ Individual socio-economic status played no role here. Minority applicants could be, and frequently were, the offspring of affluent and well-educated parents. The son or daughter of a black investment banker, brain surgeon or corporate lawyer would receive the twenty bonus points despite that privileged background.

The effect of receiving those points was enormous—the equivalent of raising the applicant's high school grade point average by one entire letter grade. All other things being equal, a student who earned straight Bs in high school would be treated as if he had earned straight As if he happened to be from a desirable racial group. His skin color would leapfrog him ahead of thousands of applicants with better academic credentials, including Gratz and Hamacher. Another way to look at the effect of the extra points is in terms of the SAT: under the LSA policy, the twenty points given to African American, Hispanic, and American Indian students was worth more than a perfect score on the SAT I

13. *Gratz*, 539 U.S. at 251 (quoting Appendix to Petition for Certiorari at 109a (internal quotation marks omitted)).

14. *Id.* at 254.

15. *See Hopwood v. Texas*, 78 F.3d 932, 956-57 (2000) (holding that in such a situation the burden is on the defendant to prove that the decision would have been the same even in the absence of discriminatory intent); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (requiring the same burden of the defendant as in *Hopwood*).

16. *See Gratz*, 539 U.S. at 253 (noting that such factors include high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership).

17. *See id.* at 253-54 (explaining that the University's Office of Undergraduate Admissions considered African-Americans, Hispanics, and American Indians to be "underrepresented minorities").

18. *Id.* at 255.

(verbal and math combined).¹⁹

Gratz and Hamacher brought a class action suit in the United States District Court for the Eastern District of Michigan.²⁰ After the class action was certified, the case came before Judge Patrick J. Duggan on cross motions for summary judgment.²¹ Judge Duggan decided that, while certain aspects of the LSA's past admissions policies had run afoul of *Bakke*, the LSA's then-current policies did not run afoul of *Bakke* and that the LSA's racial point system was narrowly tailored to serve the compelling governmental interest of maintaining a racially and ethnically diverse student body.²² The Supreme Court granted certiorari while interlocutory cross appeals in the Sixth Circuit were pending.²³

The Supreme Court's decision was split in the way that has become customary in the context of racial discrimination. Chief Justice Rehnquist wrote the majority opinion in which Justices Kennedy, O'Connor, Scalia, and Thomas concurred.²⁴ Justice Breyer concurred in the judgment, and Justices Ginsburg, Souter, and Stevens dissented.²⁵

In a narrowly written opinion, the majority held that the point system embodied in the LSA policy did indeed run afoul of the Equal Protection Clause regardless of the compelling nature of the LSA's purpose in admitting a diverse student body.²⁶ Chief Justice Rehnquist wrote:

The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example [in *Bakke*], where the race of a "particular black applicant" could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making the "factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant.²⁷

In other words, even assuming that Justice Powell's opinion in *Bakke*

19. Brief for Petitioners at 25, *Gratz*, 539 U.S. 244 (No. 02516).

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

21. *Gratz*, 122 F. Supp. 2d at 836.

22. *Id.*

23. *Gratz*, 122 F. Supp. 2d at 811, *cert. granted*, 537 U.S. 1044 (2002) (No. 02-516); *Gratz*, 277 F.3d 803 (6th Cir. 2001) (granting petition for en banc review).

24. *Gratz*, 539 U.S. at 247.

25. *Id.*

26. *Id.* at 275–76.

27. *Id.* at 271–72 (citations omitted).

was binding upon the Court, it required that LSA's admissions procedure be overturned on the ground that the weight attached to the race factor was too great. Judge Duggan's decision granting the University's motion for summary judgment with respect to liability was thus reversed and the case was remanded for further proceedings on the issue of attorneys' fees.²⁸

B. Grutter v. Bollinger

Barbara Grutter was what some people refer to today as a "non-traditional student." Forty-something years old and the mother of two, she operated a small healthcare consulting business in Plymouth, Michigan.²⁹ She was attracted to the University of Michigan Law School because of its law and public health program and applied for admission to the Law School with a college GPA of 3.8 and an LSAT score of 161.³⁰ While she was initially placed on the waiting list, her application was ultimately rejected.³¹ She brought suit in December of 1997, in the United States District Court for the Eastern District of Michigan.³²

The Law School processed substantially fewer applications than the LSA—around 3,500 a year to fill a class of approximately 350.³³ The Law School therefore had no need for a crude point system like that used by the LSA. It claimed instead that its decisions were based on a nuanced evaluation of the whole person in which race was, among many others, a minor consideration.³⁴ In the end, however, the results demonstrated that the law school's excessive concern with race was every bit as over the top as the LSA's; the gap between the credentials of admitted minority students and rejected non-minority students was every bit as wide. According to Judge Bernard Friedman, who presided over the *Grutter* district court trial, there was "mathematically irrefutable proof that race [was] indeed an enormously important factor," and he found the Law School's policies to be unconstitutional.³⁵ The United States Court of Appeals for the Sixth Circuit, sitting *en*

28. *Id.* at 275–76.

29. Eric Slater, *Supreme Court Rulings: Day of Celebration in Michigan City Center of Debate; Students at Ann Arbor University Laud Supreme Court's Ruling Upholding Law School's Affirmative Action Policy*, L.A. TIMES, June 24, 2003, at A1.

30. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

31. *Id.*

32. *Id.* at 316–17.

33. *Id.* at 312–13.

34. *Id.* at 314–15.

35. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 841, 872 (E.D. Mich. 2001), *rev'd in part, vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd* 539 U.S. 306 (2003).

banc, reversed, holding that securing the educational benefits of a diverse student body was a compelling purpose and that the Law School's admissions policies were narrowly tailored to achieve that end.³⁶ The Supreme Court granted Grutter's petition for certiorari.³⁷

Drawing a distinction between *Grutter* and *Gratz* is not easy, and indeed only two of the nine Justices—Justices O'Connor and Breyer—attempted to do so. Four—Justices Kennedy, Rehnquist, Scalia, and Thomas—concluded that both policies were unconstitutional; three—Justices Ginsburg, Souter and Stevens—took the position that both were constitutional.

One might have expected Chief Justice Rehnquist's majority opinion in *Gratz* to be applicable here as well. Just as "the LSA's automatic distribution of 20 points" had "the effect of making the 'factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant" in *Gratz*, the Law School's admissions policy in practice ensured that any minimally qualified underrepresented minority applicant would be admitted to the study of law.³⁸ But Justice O'Connor's majority opinion affirming the Sixth Circuit decision in *Grutter* does not even address itself to Chief Justice Rehnquist's point. It is as if the two opinions are talking past each other.

Justice O'Connor conceded, as she had to, that the law school policy was racially discriminatory and hence must be subjected to strict scrutiny.³⁹ Earlier case law pointed out the incoherence of a strict scrutiny doctrine that applies to minorities and not to the "majority" when the majority is made up of racial and ethnic minorities itself, many of which have their own long history of maltreatment. Those cases thus foreclosed the possibility that the Court would simply refuse to find the doctrine, which in this instance would be used to guarantee the rights of groups like Asians,⁴⁰ applicable.⁴¹ Justice O'Connor,

36. *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002), *aff'd* 539 U.S. 306 (2003). *See id.* at 773, 810 (Boggs, J. dissenting) (discussing judicial intrigue in connection with the case).

37. *Grutter v. Bollinger*, 537 U.S. 1043 (2002).

38. *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003).

39. *Id.* at 326.

40. *See Miller v. Johnson*, 515 U.S. 900, 904–05 (1995) (applying strict scrutiny to a Georgia redistricting plan intended to increase the number of "majority-minority" voting districts and holding the plan unconstitutional); *Shaw v. Reno*, 509 U.S. 630, 650 (1993) (calling that position that strict scrutiny applies regardless of which racial or ethnic group is burden "clear"); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) that the "'guarantee of equal protection cannot mean one thing when applied to one individual and something else again when applied to a person of another color'"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (stating that "[t]he Court has recognized that that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to

however, held that the Law School policy should be upheld on the ground that it is narrowly tailored to serve the compelling interest of “attaining a diverse student body.”⁴² Rather than emphasize the enormous weight attached to race as a factor by the Law School, she emphasized the notion that no particular numerical value had been assigned to race.⁴³

To those who oppose such policies, Justice O’Connor seemed to be sending the following message to the educational establishment:

Go ahead and discriminate as the law school does. Despite what we said in *Gratz*, it doesn’t matter if you weigh race so heavily that it is decisive in virtually every case. Just don’t use a point system that makes it obvious precisely who would have been admitted and who would have been excluded had race-neutral admissions policies been employed.

If this message was not intended by Justice O’Connor, however, it was nevertheless heard by the other Justices. Justice Ginsburg, in her dissent in *Gratz*, noted the combined effect of the *Grutter* and *Gratz* cases would only be to drive racial preferences underground and argued for candor:

[O]ne can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. . . . If honesty is the best policy, surely Michigan’s . . . fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.⁴⁴

Justice Ginsburg took the position, of course, that it was *Grutter* and not *Gratz* that was decided correctly and that LSA should be permitted to award students from the preferred minorities twenty bonus points. But she was correct about two important things: (1) the *Grutter* and *Gratz* cases are in substance indistinguishable from each other; and (2) in the end, it will be the permissive *Grutter* decision and not the

governmental discrimination”).

41. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (striking down a law that discriminated against Chinese immigrant business owners); David Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 217–69 (1999) (detailing the evolving treatment and protection courts gave to Chinese immigrants).

42. *Grutter*, 539 U.S. at 328.

43. See *Grutter*, 539 U.S. at 334 (noting that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks).

44. *Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting).

restrictive *Gratz* decision that will have a profound effect upon higher education: *Gratz* is an obstacle that can be overcome with a few “winks, nods and disguises.”⁴⁵

II. THE MICHIGAN CASES AS LAW: WERE THE RESULTS IN *GRUTTER* AND *GRATZ* SIMPLY A FAITHFUL APPLICATION OF ALREADY EXISTING LAW?

Justice O’Connor explicitly stated that the majority in *Grutter* had found it unnecessary to decide whether the famous swing opinion of Justice Powell in *Bakke* was binding upon them. Since they had independently arrived at what they believed to be Justice Powell’s view, any concern over stare decisis was superfluous; they were prepared to follow the decision voluntarily.

But the impressions left by this line of reasoning—that the Court has simply duplicated the results that would have been required by the *Bakke* case, albeit by independent reasoning—are false. *Grutter*, at least, is not in harmony with Justice Powell’s opinion in *Bakke*. Instead, the decision is a marked departure not only from *Bakke*, but also from equal protection jurisprudence generally. *Grutter* makes new law.

A. *Early Supreme Court Cases Dealing with Race-Based Admissions: DeFunis v. Odegaard and Regents of the University of California v. Bakke*

Up until last year, *Bakke*⁴⁶ was the premier Supreme Court case to have addressed race-based admissions policies in higher education. Allan Bakke, however, was not the first to challenge such policies before the Court. Credit there goes to Marco DeFunis, an Italian-American from Washington state who was denied admission to the University of Washington Law School in 1971.⁴⁷ After initially accepting the case on certiorari, the Court avoided decision by declaring the case moot and vacating the decision of the Supreme Court of Washington that had favored the law school.⁴⁸

45. *Id.* (Ginsburg, J., dissenting).

46. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

47. *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (per curiam). In his dissent, Justice Douglas discusses both *Johnson v. Wilmer* and *Johnson v. Comm. on Examinations*. *Id.* at 343 n.22 (Douglas, J., dissenting). See *Johnson v. Wilmer*, 415 U.S. 911 (1974) (denying certiorari in case involving racial preferences on bar examination); *Johnson v. Comm. on Examinations*, 407 U.S. 915 (1972) (denying certiorari in same dispute as *Johnson v. Wilmer*).

48. *DeFunis*, 416 U.S. at 319–20. *DeFunis* would not be the last time the Court would deftly sidestep this issue. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (relying on *Bakke* to reject plaintiff’s claims against the Law School); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (holding that the University of Texas School of Law’s admission policy violated the Equal Protection Clauses of the Fifth and Fourteenth Amendments).

DeFunis's mootness problem stemmed from the lower court order he had secured requiring the law school to admit him while the case was pending.⁴⁹ By the time the case reached the United States Supreme Court, he was preparing to graduate, thus providing the Court with the option (but not the duty) to decline to decide the case. Liberal icon Justice William O. Douglas took the opportunity to file a vigorous dissent to the Court's decision to dismiss the case. In it, he upheld the traditionally liberal view (now regarded as conservative) that race is simply an improper basis upon which to make admissions decisions at a state university:

There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.⁵⁰

Shortly after *DeFunis* was dismissed, the *Bakke* case—second in time, but first in historic significance—began making its way through the courts, thus proving that if Justice Douglas was concerned that the issue would escape the Court's jurisdiction for any significant length of time, he need not have been. The controversy over race-based admissions was not going to go away, and over thirty years later, it still has not.

Allan Bakke was the son of a mailman and a schoolteacher.⁵¹ After serving in Vietnam as a medic, he applied to the University of California at Davis Medical School for the entering class of 1973.⁵² At age thirty-two, he worried that he would be penalized of account of his age.⁵³ In the end, however, he concluded, no doubt correctly, that it was more likely that his race that was decisive.

At the time, the Medical School had a two-track admissions system.⁵⁴ The first eighty-four out of a hundred seats in the class were given to the most desirable applicants regardless of race, ethnicity or other

49. See *DeFunis v. Odegaard*, 507 P.2d 1169, 1177 n.6 (Wash. 1973) (finding, unlike the United States Supreme Court, that although the plaintiff had already been admitted into the Law School in September 1971, the issue was moot).

50. *DeFunis*, 416 U.S. at 320, 336–37 (Douglas, J. dissenting). Interestingly, Douglas was not the only eminent jurist with a reputation for being decidedly left of center to weigh in passionately against modern race-based admissions. See *infra* notes 74–77 and accompanying text (discussing how the California Supreme Court upheld the then liberal view of Appellate Justice Mosk's rationale in *Bakke*).

51. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276 (1978).

52. *Id.* at 276.

53. *Id.*

54. *Id.* at 272–74.

disadvantage.⁵⁵ The remaining sixteen seats were reserved for the special admissions program.⁵⁶

The medical school did not define what constituted “disadvantage” for purposes of its special admissions program.⁵⁷ Everything was at the discretion of the chairman of the special admissions task force who, in theory, made his decision on a case-by-case basis.⁵⁸ In practice, however, it was impossible for white applicants to qualify under the special admission program (and Bakke himself did not apply).⁵⁹ Of the sixty-three students who were admitted through the special admissions process between 1971 and 1974, all were members of racial minorities—twenty-one African Americans, thirty Mexican Americans, and twelve Asian-Americans.⁶⁰ White applicants were thus eligible only for the eighty-four seats in the regular admissions program. Bakke narrowly missed being offered one of those seats in the 1973 class.⁶¹

The gap in academic credentials created by the two-track system was disturbingly wide.

55. *Id.* at 275–76.

56. *Id.* The total number of disadvantaged applicants in the class would ordinarily be higher, since some disadvantaged applicants would gain admission through the regular admissions process. Between 1971 and 1974, for example, there were forty-four regular admittees who were minority members—one African-American, six Mexican Americans, and thirty-seven Asians. *Id.* This resulted in an average class containing almost 25% minority students.

57. *Id.* at 274–75.

58. *See id.* at 274 (noting that the chairman had discretion to place applicants on a waiting list); *see also id.* at 275 n.4 (listing other attributes considered by the chairman in deciding who should be placed on the waiting list).

59. Seventy-three whites applied for disadvantaged status in 1973. *Id.* at 275 n.5. In 1974, the number had increased to 172. *Id.* For whites, applying for disadvantaged status was a waste of time as not one was ever offered admission through the special process. *Id.* at 275–76. This appears to have been the conscious policy of Davis. The Davis application forms were not designed to elicit the kind of information that would be useful in making an intelligent case-by-case judgment about the candidates’ degree of disadvantage. The forms did not even require disclosure of financial information. It was evidently assumed that race would be the dispositive factor in all or nearly all cases. Further, in 1974, the policy limiting the category of “disadvantaged” to racial minorities was made explicit. *Id.* at 276.

60. *Id.* at 275.

61. *See id.* at 276 (noting that Bakke received a score of 468 out of a possible 500 and noting that the cut-off score at that point in the admissions process was 420).

In 1973, the average MCAT scores for regular admittees and special admittees were as follows:⁶²

| <u>Category</u> | <u>Regular</u> | <u>Special</u> |
|---------------------|-----------------------------|-----------------------------|
| Science | 83 rd percentile | 35 th percentile |
| Verbal | 81 st percentile | 46 th percentile |
| Quantitative | 76 th percentile | 24 th percentile |
| General Information | 69 th percentile | 33 rd percentile |

Similarly, in 1973, overall undergraduate GPAs averaged 3.49 for regular admittees and 2.88 for special admittees.⁶³ In 1974, the regular admittees had an overall undergraduate GPA of 3.29 and their special admittee counterparts had an average of 2.62.⁶⁴ The science undergraduate GPAs—usually considered the most important aspect of a medical school student’s undergraduate record—averaged 3.51 for regular admittees and 2.62 for special admittees.⁶⁵ The gap widened slightly in 1974 as regular admittees averaged 3.36 and specials fell to an average of 2.42.⁶⁶ All of this is in contrast to Bakke’s own scores, which were as follows: 97th percentile (Science), 96th percentile (Verbal), 94th percentile (Quantitative), and 72nd percentile (General Information).⁶⁷ His undergraduate GPA was 3.46 and his undergraduate science GPA was 3.44.⁶⁸

Shortly after his rejection from the University, Bakke wrote a letter to the Admissions Committee Chairman, pleading for reconsideration. “I want to study medicine more than anything else in the world,” he wrote. That letter went unanswered.⁶⁹ His next letter protested Davis Medical School’s special admissions policy.⁷⁰ After unsuccessfully trying once more for admission,⁷¹ Bakke filed suit in the California Superior Court

62. *Id.* at 277 n.7.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. BERNARD SCWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 6 (1988).

70. *Bakke*, 438 U.S. at 276–77.

71. In this second effort, Bakke may have been as much a casualty of his political beliefs as

for Yolo County, which after a short trial ruled in his favor.⁷²

On appeal, the Superior Court's ruling was affirmed in an opinion authored by another liberal icon,⁷³ California Supreme Court Justice Stanley Mosk.⁷⁴ Justice Mosk articulated his rationale as follows:

To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.⁷⁵

"The safest course," he concluded, "the one most consistent with the fundamental interests of all races and with the design of the Constitution, is to hold, as we do, that the special admissions program is unconstitutional because it violates the rights guaranteed to the majority by . . . the United States Constitution."⁷⁶

By the time the case reached the United States Supreme Court, crowds of people were waiting all night for an opportunity to hear the oral argument;⁷⁷ the "press maintained a 'Bakke vigil' at the Court" in anticipation of the decision.⁷⁸ The actual decision, however, was somewhat anti-climactic. It contained no memorable language

his race. His personal interview was conducted by Dr. George Lowrey, who happened to be the chairman of the admissions committee and the recipient of Bakke's letter of protest. Unlike previous interviewers, Lowrey rated Bakke quite low and commented in his report that Bakke was "rather limited in his approach." *Id.* at 277.

72. *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1155-56 (Cal. 1976). The opinion noted that:

[t]he trial court, after considering the pleadings, the deposition [of] . . . the associate dean of student affairs and chairman of the admissions committee, and the interrogatories submitted by the parties, found that the admission program discriminated against Bakke because of his race and that he was entitled to have his application evaluated without regard to his race or the race of any other applicant.

Id. at 1156.

73. See Harriet Chang, et al., *Supreme Court Justice Dies* at 88, S.F. CHRONICLE, June 20, 2001, at A1 (calling Justice Stanley Mosk "an eloquent liberal voice on the state Supreme Court for nearly 37 years"). Indeed, Justice Mosk's credentials as a civil rights activist were impeccable. As Attorney General of California, he had persuaded the racially-exclusive Professional Golfers Association to admit black golfers. *Id.* As a judge, he outlawed restrictive racial covenants, as well as authored numerous opinions regarded as too far to the left by conservative Californians. *Id.* However, with the exception of Justice Thomas in *Grutter v. Bollinger*, 539 U.S. 306, 349-78 (2003) (Thomas, J., concurring in part and dissenting in part), no judge since Justice Douglas has made a more impassioned case for race neutrality.

74. *Bakke*, 553 P.2d at 1172.

75. *Id.* at 1171.

76. *Id.* at 1171-72.

77. Joseph D. Whitaker, *Crowd Waits All Night for Bakke Arguments*, WASH. POST, Oct. 13, 1977, at A8.

78. See Jerrold K. Footlick et al., *The Landmark Bakke Ruling*, NEWSWEEK, July 10, 1978, at 19 (detailing the *Bakke* decision and its likely consequences).

comparable to that of Justice Mosk or of Justice Douglas in *DeFunis*. Although Bakke won a seat in the Medical School class, it was not even entirely clear which side in the long run had won and which had lost.⁷⁹ Most important, there was no majority opinion in *Bakke*; there was only a judgment with no discernible value. Anyone wishing to bind future courts to *Bakke* will quickly find that there is surprisingly little adhesive there.

Bakke had claimed that the Medical School's conduct violated both Section 601 of Title VI of the Civil Rights Act of 1964⁸⁰ and the Equal Protection Clause of the United States Constitution.⁸¹ Four Justices—Burger, Rehnquist, Stevens and Stewart—agreed that the policy violated Title VI.⁸² Accordingly, they considered it unnecessary to determine whether the policy also violated the Fourteenth Amendment.⁸³ Four Justices—Blackmun, Brennan, Marshall and White—concluded that Title VI did not require anything beyond what the Constitution requires, collapsing the Title VI issue and the constitutional issues into one.⁸⁴ Regarding the constitutional issue, these Justices stated that although strict scrutiny must be applied to the Medical School policy, “race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination” would meet that standard.⁸⁵

The swing vote was therefore Justice Powell's. He agreed with the pro-Bakke wing⁸⁶ that the Medical School's admissions policy was

79. See Cynthia Gorney, *University President Calls the Decision an Overall Victory*, WASH. POST, June 29, 1978, at A28 (explaining the impact of the *Bakke* decision on professional schools).

80. 42 U.S.C. § 2000d (2002) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

81. U.S. CONST. amend. XIV, § 1.

82. *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 408–09 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

83. See *id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part) (noting that “[o]ur settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground”).

84. *Id.* at 340.

85. *Id.* at 366 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part).

86. Ordinarily in discussing a multi-opinion Supreme Court decision, one can refer to each opinion by its author or each voting bloc by the author of the opinion in which they joined. This is impossible in the case of the Brennan, White, Marshall, and Blackmun opinion in *Bakke* because the author of the opinion in which they joined is not identified except collectively. In deference to Justices Douglas and Mosk, I will refrain from calling the two voting groups in *Bakke* the “liberal wing” and the “conservative wing.” Neither will I use emotionally charged

unlawful, but he arrived at that conclusion through a different route. He agreed with the pro-Regents wing that, despite Title VI's apparent flat ban on race discrimination, Congress only meant to ban race discrimination when the Constitution would also ban it, thus making it necessary for him to address the Constitutional question.⁸⁷ He was at his most eloquent, however, when he disagreed with pro-Regents over their eagerness to approve what they apparently regarded as beneficial discrimination.⁸⁸

Justice Powell lamented that the pro-Regents wing had taken the position that the Medical School's racially discriminatory admissions policy was constitutionally justified by two findings cited in their opinion: "(i) that there has been some form of discrimination . . . by 'society at large' . . . and (ii) that 'there is reason to believe' that the disparate impact sought to be rectified by the program is the 'product' of such discrimination."⁸⁹

Such a view, he concluded, overreaches. "No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups," Justice Powell wrote. But the notion that "but for this discrimination by society at large, Bakke 'would have failed to qualify for admission,' because Negro applicants . . . would have made better scores" requires "a speculative leap"—a leap that he was not prepared to take. Unlike the members of the pro-Regents wing, he was sensitive to the expansive nature of their

terms like "pro-discrimination" and "anti-discrimination" or "pro-minority" and "anti-minority." Instead I will use "pro-Bakke" and "pro-Regents" as my shorthand terms with the caveat that these appellations are not meant to suggest that the Justices were pro-Bakke or pro-Regents in any sense other than those stated in the opinions themselves.

87. Five votes were thus mustered on the Title VI issue. Interestingly, this bears on the case of Justice Stevens. Justice Stevens has been criticized for "switching sides" in the debate over race-based admissions. See *Gratz v. Bollinger*, 539 U.S. 244, 282 (2003) (Stevens, J., dissenting) (concluding that neither petitioner had standing to seek relief on behalf of the class). Yet Justice Stevens's *Bakke* opinion concerned only one issue—the proper interpretation of Title VI—and on that issue, the Court had a 5-4 majority against his interpretation. *Bakke*, 438 U.S. at 312-13. He is entitled to treat the Court's contrary interpretation as binding on him. See EDWARD H. LEVI, INTRODUCTION TO LEGAL REASONING 1-8 (1949) (discussing judicial interpretation of precedential authority).

A year later, the Court adopted a somewhat similar interpretation of Title VII, which governs employment. See generally *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979); Bernard Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980) (discussing the significance of the five-to-two division of the *Weber* Court and its interpretation of the values underlying the 1964 Civil Rights Act).

Justice Powell reserved the question whether Title VI would have provided a private right of action for Bakke. *Bakke*, 438 U.S. at 282-83.

88. *Bakke*, 438 U.S. at 294-95 n.34.

89. *Id.* at 296-97 n.36.

argument.

[I]f it may be concluded *on this record* that each of the minority groups preferred by [the Medical School's] special program is entitled to the benefit of the presumption," he stated, "it would seem difficult to determine that any of the dozens of the minority groups that have suffered 'societal discrimination' cannot also claim it, in any area of social intercourse.⁹⁰

Why not preferences for the Chinese, the Irish, French Canadians, Germans, Italians, Catholics, Jews, Mormons, homosexuals, and the disabled? And why just preferences in medical school admissions? Why not preferences in government jobs, government contracts, income taxes, property taxes, use of parks, and eligibility for the draft?

Justice Powell further concluded that even if entitlement to a remedy for societal discrimination could be made out, it would not permit the Medical School to impose the costs of that remedy on the Allan Bakkes of the world. As he put it:

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.

"To hold otherwise," he stated, "would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."⁹¹

Justice Powell was not speaking for the Court here. The pro-Regents wing disagreed. The pro-*Bakke* wing had avoided the issue by basing its decision on Title VI rather than the Constitution, and while there may be strong reason to suspect that some of the pro-*Bakke* Justices might be sympathetic to his view, there is certainly nothing in the opinion that makes this explicit.⁹² The full Court acknowledged that Justice Powell's opinion was not the Court's opinion by stating that Justice Powell "announced the Court's judgment and filed an opinion expressing his views of the case."

Even less was Justice Powell writing on behalf of the Court when he went on in dicta to endorse the so-called "diversity rationale" as a

90. *Id.* (emphasis in original).

91. *Id.* at 310.

92. Later decisions of the Court, such as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), may be read as evidence of the pro-*Bakke* views.

potential compelling purpose. At the time, he did not analyze the issue at length. Instead, Justice Powell staked out a position that even if the purpose of diversity was compelling, the Davis special admissions policy was nevertheless unconstitutional because its separate tracks did not allow a particular applicant's "potential contribution to diversity" to be assessed "without the factor of race being decisive."⁹³ Justice Powell fully understood that concern for diversity could not be driving the Davis policy. Unless other species of diversity—"exceptional personal talents, unique work or service experience . . . or other qualifications deemed important"—were also included and given actual consideration, a special admissions policy would have to be found to be in violation of the law.⁹⁴

Justice Powell's suggestion that some racially-discriminatory admissions policies—notably Harvard's⁹⁵—may be permissible insofar as the policies' purpose is to "obtain the educational benefits that flow from an ethnically diverse student body"⁹⁶ was not joined by any

93. *Bakke*, 438 U.S. at 317. Justice Powell focuses in on the fact that the Medical School had a specific number of seats set aside for racial minorities and made strong efforts to fill them, while little effort went into finding students who would contribute to diversity in other ways. How would the admissions officers know in any given year that the best prospects for a diverse student body would be racial minorities? Maybe a former Soviet dissident would apply this year, or a seventh generation member of the Flying Wallendas, or a disabled veteran wounded in the line of duty will apply. Why have a separate process with sixteen reserved seats if the goal is to create a diverse student body for the benefit of all? A true diversity policy would be flexible and fluid. And, because true diversity can be achieved in so many different ways, a true diversity policy would tend to only give slight advantages for candidates who contribute to diversity. Why should Davis admit Harvard's proverbial Idaho farm boy with MCATs in the 50th percentile and a college GPA of 3.2—considerably below its usual cut-off—when it can admit a farm girl from an Israeli kibbutz with MCATs in the 89th percentile and a college GPA of 3.5? If it does, doesn't that suggest that something other than the pursuit of diversity is going on?

94. *Id.*

95. Justice Powell's use of Harvard University as his model was unfortunate. He was evidently unaware of the historic origins of Harvard's interest in diversity. More than eighty years ago, Ivy League universities complained of being overrun with Jewish students. The problem—if one can call it that—was that Jewish students tended to do quite well on the college boards, so well that it was difficult to turn them away without displaying obvious bigotry. A more subtle strategy had to be developed. And it was. Harvard, Yale and other elite universities announced that they were not interested in test-taking grinds; they wanted well-rounded students of good character instead, preferably from many parts of the country. Some administrators were not the least shy about admitting that this change was the result of what they called the "Jewish problem." "To prevent a dangerous increase in the proportion of Jews," Harvard President A. Lawrence Lowell wrote, admissions decisions should be based on "a personal estimate of character on the part of the Admissions authorities." See generally MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970* (1979) (discussing the history of the Jewish quota system in higher education).

96. *Bakke*, 438 U.S. at 306. As a private institution, Harvard was subject to this analysis only through Title VI.

Justice. The pro-Bakke wing explicitly rebuked him for this digression.⁹⁷ And the pro-Regents wing's willingness to endorse the so-called Harvard plan was qualified: "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."⁹⁸ That is no endorsement at all, since they had already concluded that the elimination of the lingering effects of past-discrimination was sufficient in itself to justify race-based admissions.

In *Marks v. United States*,⁹⁹ the Supreme Court noted that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹⁰⁰ Ultimately, Justice Powell and the pro-Regents wing agreed only in the abstract—that there may be circumstances under which a college or university could properly consider race and that, insofar as the California Supreme Court's judgment could be interpreted to forbid such considerations in all contexts, it should be reversed.¹⁰¹ The *Grutter* Court was therefore

97. See *id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part) ("It is . . . perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.")

98. *Id.* at 326 n.1 (Brennan, J., dissenting). Justice Powell never commented on whether a preferential admissions policy motivated by a desire to obtain the educational benefits of diversity (a purpose he endorsed) and a desire to remedy the general effects of past societal discrimination (a purpose he rejected) could withstand scrutiny.

99. *Marks v. United States*, 430 U.S. 188 (1977).

100. *Id.* at 193.

101. Justice Stevens demonstrated quite convincingly in his opinion for the pro-*Bakke* wing that the California Supreme Court's judgment had not prohibited Davis from considering race under any circumstance anyway, and hence the issue was not properly before the Court. The *Bakke* case was brought by Bakke in his individual capacity, not as a class representative. In the California Superior Court for Yolo County, Judge Manker had issued a judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;
2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;
3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article I, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. sec. 2000d];
4. That plaintiff have and recover his court costs herein in the sum of \$217.35.' App. To Pet for Cert. 120a.

correct to shy away from treating the Justice Powell opinion's diversity rationale, as if it has value as precedent.¹⁰² The more interesting issue is whether Justice O'Connor and the other members of the *Grutter* majority were correct that their opinion reached essentially the same conclusions as Justice Powell.¹⁰³

B. *The Michigan Cases and Bakke*

Those who oppose race-based admissions policies do not usually look fondly upon Justice Powell's opinion in *Bakke*. But even if it had been regarded as somehow binding in *Grutter* and *Gratz*, it would not have required (or permitted) the Court to uphold the policies at issue in those cases. In both *Grutter* and *Gratz*, the record shows that, like the

Bakke v. Regents of the Univ. of Cal., No. 31287 (Yolo Co. Sup. Ct). Judge Manker considered Paragraph 2 to be necessary, because he believed that Bakke had not carried his burden of proving that he would have been admitted but for Davis Medical School's illegal admissions policy. He therefore believed that he could not order that Bakke be admitted. Bakke would have to be satisfied with an order requiring the school to consider his application without reference to his race or to anyone else's race. It does not appear that Paragraph 2 was intended to forbid Davis from considering race under any circumstance. The word "his" appears to refer to Bakke each time it is used. Rather, Judge Manker's intent appears to be to forbid Davis from considering Bakke's race or any other applicant's race in passing on Bakke's application for admission. The reference to "any other applicant" is used to prevent the situation in which Davis can claim that it did not consider Bakke's race in evaluating his application, but it did consider the race of other applicants in deciding to give African-American and Hispanic applicants priority over him. In any event, this part of the trial court's judgment was superseded by the California Supreme Court, which held that the burden to show whether Bakke would have been granted or denied admission lay with Davis and not with Bakke—a burden that Davis conceded it could not meet. *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1172 (Cal. 1976). The California Supreme Court's judgment read:

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admissions program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted. Bakke shall recover his costs on these appeals.

Id.

As a result, at the time of the United States Supreme Court's decision, there was no outstanding judgment that could be interpreted to forbid Davis for considering race under any circumstances.

102. The *Grutter* Court noted that "[t]he only holding for the Court in *Bakke* was that a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'" *Grutter v. Bollinger*, 539 U.S. 306, 322-23 (2003).

103. Since neither the diversity rationale nor the remedy-for-prior-societal-discrimination rationale can properly be said to be a subset of the other and hence "narrower" than the other, neither rationale can properly be said to be the holding. *See, e.g.*, *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001) (concluding that Justice Powell's diversity rationale was not the Court's holding); *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996) (same). *But see* *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1197 (9th Cir. 2000) (recognizing Justice Powell's rationale as the Court's holding).

Bakke special admissions policy, the Michigan policies effectively shut out competition between applicants from favored races and ethnicities and those from disfavored races and ethnicities. A member of a favored racial minority who is minimally qualified is admitted; a white or Asian is unlikely to be. Chief Justice Rehnquist recognized this as a crucial similarity between the situation in *Bakke* and that in *Gratz*; the same characteristic in *Grutter* was not remarked upon. There is no reason to suspect that Justice Powell would have been hoodwinked by the law school's pretense of a single admission track given that the single track was engineered to achieve precisely the same result as a two-track system. It is disturbing and disappointing that the *Grutter* majority allowed itself to be.

The pretext of concern for diversity, however elaborate, is not the same thing as actual concern for diversity. Like the University of California, the University of Michigan was driven almost certainly more by a desire: (1) to ensure that the favored racial groups have representation at the University of Michigan and in the legal profession; and (2) to confer a benefit on members of the favored racial groups as a remedy to past societal discrimination—both motivations that Justice Powell had explicitly rejected—than by a desire to confer on all students the “educational benefits that flow from an ethnically diverse student body.”¹⁰⁴

There is no dispute that prior to the *Bakke* decision, the University of Michigan had a race-based admissions policy similar to the one in *Grutter* except that, as with the policy in *Bakke*, its purpose was explicitly “to increase the representation of minorities in the legal profession.”¹⁰⁵ That policy was conveniently transformed into a “diversity” policy after the *Bakke* decision rejected that purpose. Since then, the evidence of pretext has continued to mount with admissions officers awarding enormously large preferences and making extraordinary efforts to ensure that each favored minority group achieves “critical mass.”¹⁰⁶ The problem is that “critical mass” always

104. *Bakke*, 438 U.S. at 306.

105. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 831 (E.D. Mich. 2001).

106. The policy at issue in *Grutter* required elaborate daily reports during the admissions season that were focused more. As Judge Friedman observed, “[w]hile the first page of the report provides an overview for the total applicant pool, each of the next seven pages breaks down the information by the following racial categories: Native American, Black/African American, Caucasian/White, Mexican American, Other Hispanic, Asian American, and Puerto Rican American.” *Id.* at 832. Judge Friedman continued: “page 9 is devoted to ‘Other/Non-Citizen’ and page 10 is ‘unknown.’ The last four pages break down the applicants by gender and by their status as either Michigan or Non-Michigan residents.” *Id.* According to the admissions director, this system allowed him to keep track of the racial and ethnic composition of the class for the

turns out to be higher for African-Americans than for Mexican Americans and higher for Mexican Americans than for American Indians, making their representation in the class roughly proportional to their representation in the population at large. This is a result one would expect for a program whose aim is to ensure some measure of proportional representation or to remedy past discrimination; it is not a result one would expect if the rationale for the program is diversity for the sake of its overall educational benefits. As a result, it becomes more and more difficult to maintain that diversity has anything to do with the policy. Indeed, the very vehemence with which Michigan defended the lawsuit—many millions were invested—when other kinds of diversity could have been pursued so easily suggests that conferring benefits on members of racial minorities was an end unto itself and not simply a means to achieve educational benefits for all. Justice Powell had only a fraction of this showing of pretext, yet it was enough to convince him that the Davis special admissions policy was unconstitutional.¹⁰⁷

Why does Justice O'Connor fail to see this? The most probable explanation is that she herself is guilty of pretext. While the opinion purports to find the educational benefits of diversity a compelling purpose, it is quite clear that what actually impresses her is the argument for representation, without regard to whether the presence of minority preference beneficiaries on campus enhances the educational experience of other students by exposing them to new perspectives. She repeatedly writes in terms of the need for “openness”, “access”, and “legitimacy” in higher education and elsewhere. Evidently, Justice O'Connor takes the position that African Americans, Hispanics, American Indians, and presumably all ethnic and racial groups must be represented on campus, in the professions, and in all walks of life, because it is good and right that they should be so represented and otherwise institutions will be viewed as illegitimate.

Justice O'Connor neglected the fact that “openness” and “access” are not increased by preferential admissions standards; precisely the same number of students will have “access” to the University of Michigan

purpose of maintaining “critical mass,” which another admissions director defined as “meaningful numbers” or “meaningful representation,” such that minority students feel comfortable contributing to classroom discussion. *Id.* at 832, 834.

107. Justice Powell suggested that good faith should be “presumed in the absence of a showing to the contrary in the manner permitted by our cases.” *Bakke*, 438 U.S. 265 at 318-19 (1978). One of the cases cited by Justice Powell, *Swain v. Alabama*, 380 U.S. 202 (1965), has since been overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986). *Swain* established unusually high standards of proof for establishing that a public prosecutor used preemptory challenges to exclude minority jurors. *Swain*, 380 U.S. at 211.

whether it employs racial preferences or not.¹⁰⁸ Whether one is likely to regard these policies as evidence of openness and inclusion depends largely on whether one is “included in” or, like Jennifer Gratz, Barbara Grutter, and Patrick Hamacher, “included out.”¹⁰⁹

Justice Powell himself explicitly rejected arguments based on representation in *Bakke*:

If [the Medical School’s] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake. This the Constitution forbids.¹¹⁰

What would Justice Powell have thought the argument for legitimacy? One can only guess, but given the ramifications of such an argument, it is difficult to imagine that he would not have shrunk from it. Does Justice O’Connor really mean to suggest that a state may be authorized to discriminate on the basis of race simply on the ground that some significant portion of the population would think it terribly unfair if they did not? Could not such an argument be used to justify nearly any kind of racial discrimination that a state might adopt? Is not the prevention of popular discrimination precisely what the Equal Protection Clause is all about? For the purposes of this essay, suffice it to say that the notion that Justice O’Connor was tracking the rationale of the Justice Powell opinion in *Bakke* is false.

108. Meanwhile, Justice O’Connor undermines Justice Powell’s original vision of the educational benefits of diversity in her opinion when she admits that the Law School “does not premise [its argument] on ‘any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’ Brief for Respondent Bollinger, et al. at 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission . . .” *Grutter*, 539 U.S. at 333. Justice O’Connor was placed in the uncomfortable position of having to argue that a racially diverse student body is a compelling necessity as a means of proving to students that a racially diverse student body is not that significant after all.

109. *Grutter*, 539 U.S. at 332-33.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . 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.

Id.

110. *Bakke*, 438 U.S. at 307.

C. *The Michigan Cases and Strict Scrutiny*

The text of the Equal Protection Clause is remarkably unhelpful in resolving the issues that have come before courts. It states simply that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹¹ Since all laws make distinction among persons—even laws against murder treat murderers and non-murderers differently—it has been up to the courts to develop some reasonably coherent interpretation.

No one would claim the Court’s early efforts were a great success.¹¹² Over the years, however, the Court developed constitutional doctrines that seem to work tolerably well. In a nutshell, laws that make distinctions based on certain “suspect” categories, most notably race, are analyzed under the “strict scrutiny” test, requiring state authorities to establish both that those laws are motivated by a “compelling governmental interest” and that the discriminatory laws are “narrowly tailored” to achieve that purpose.¹¹³ Laws that make distinctions based on categories that are not suspect, on the other hand, are subjected only to a test of rationality. Put differently, the Court will bend over backwards to *strike down* a law that draws distinctions based on race, but it will bend over backwards to *uphold* a law if it draws a distinction on some basis that has not been historically abused the way race has.¹¹⁴ It is no exaggeration to call this hornbook law.¹¹⁵

Law professors like to make fun of such rules. It may rightly be maintained that no two judges on the bench have precisely the same understanding of the contours of the doctrine. Results yielded by the

111. U.S. CONST. AMEND. XIV, § 1.

112. These include, of course, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944).

113. *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Though the specific terms “narrowly tailored” and “compelling interest” has been standardized recently, the Court has described its careful evaluation of racial classifications as “strict scrutiny” since at least 1942. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

114. At least one classification—gender—is said to fall into an intermediate category under which the Court subjects the law to a heightened scrutiny, but not as searching as the strict scrutiny test. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that to withstand a constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives). For the most part, however, we are dealing with a two-tiered test, which demands that the Court put a very firm thumb on one side of the scale or the other.

115. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 639 (6th ed. 2000) (noting that under the rational relationship test, a court should not strike down the law if the government can provide an arguable basis for creating such a classification, whereas under the strict scrutiny test, the government will need to show a compelling or overriding end to support a classification, and any “permissible government purpose” will not be accepted as sufficient).

application of the doctrine will vary with the level of abstraction with which the state's purpose has been stated even when judges are acting in good faith. Moreover, not all judges are acting with good faith. A judge who is strongly inclined to uphold a racially discriminatory law may not be deterred by strict scrutiny; a judge who is strongly inclined to strike down a law governed by the rational relation test may not be deterred by that rule's laxity. Most judges were advocates before they were judges, and a skilled advocate can always wiggle out of a rule if he or she is sufficiently motivated.

Still, there is something to these simple rules of this kind. While a determined judge can flout them, they are not always flouted, and to many judges, they provide much-appreciated guidance. The strict scrutiny standard is the receptacle into which we have poured our collective experience on issues of race: From time to time, our nation has been tempted by the path of racial discrimination. Some of those who advocate discriminatory standards have been motivated by hatred, and some have been motivated by a desire to do the right thing. Many more were animated by simple political and economic opportunism. But in almost every case, the harsh light of history has revealed the policy to be folly. The strict scrutiny test is there to remind us that there is always excellent reason to doubt the wisdom of fashionable ideas calling for race discrimination.

Just how strong a presumption does the strict scrutiny test create against racially discriminatory laws? More than thirty years ago, Professor Gerald Gunther examined cases applying the strict scrutiny test and pronounced it "'strict' in theory and fatal in fact."¹¹⁶ While on its face the test suggested the possibility that discriminatory practices might be upheld at least in rare cases, in practice, as far as Gunther had noticed, no such case had come along.¹¹⁷ Years later, however, in *Adarand Constructors, Inc. v. Peña*, Justice O'Connor announced that

116. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

117. That does not mean that no law school hypothetical that might pass the strict scrutiny test to Gunther's satisfaction can be devised. The prison race riot in which prison guards regain control and protect the safety of prisoners by quickly separating them by race into separate holding tanks is probably one. See *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (joining in affirming judgment requiring integration of prisons and jails, while asserting that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline and good order in prisons and jails"). Perhaps the reason that no actual case has come along is that nobody would think of litigating the kind of case that would pass strict scrutiny. The presumption it has traditionally carried is so great that only the kind of case upon which nearly everyone would agree on an overriding need for discrimination would satisfy it.

the Court, “wish[ed] to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”¹¹⁸ Many scholars have observed, however, that—at least until *Grutter* and *Gratz*—the Court had not relied upon this assertion to weaken the strict scrutiny test.¹¹⁹ Moreover, an examination of the case Justice O’Connor uses to support her claim demonstrates that at the time of *Adarand*, only a short distance separated her view from Gunther’s.¹²⁰ They agreed that the

118. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citation omitted). Justice O’Connor explained that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it,” which apparently implied that some forms of reverse discriminations might be permissible. *Id.* Most of Justice O’Connor’s opinion was for the Court. *See id.* at 204. The quoted portion, however, was for the Court “except insofar as it might be inconsistent with the views expressed in Justice Scalia’s concurrence. . . .” *Id.* at 204.

119. *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1117 (2001) (“Notwithstanding recent pronouncements that strict scrutiny is no longer ‘fatal in fact,’ the Supreme Court has yet to uphold a law to which it applied strict scrutiny.”).

120. Justice O’Connor cites only *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion), as an example of the Court’s upholding a race-conscious government action is the face of strict scrutiny. *Adarand Constructors, Inc.*, 515 U.S. at 237. That case grew out of underlying facts that Professor Charles Fried, Solicitor General when the case reached the Court, characterized as “horrible.” CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST-HAND ACCOUNT 117 (1991). The undisputed evidence showed that in the thirty-seven year history of the Alabama Department of Public Safety (“DPS”), “there ha[d] never been a black trooper and the only Negroes ever employed by the department ha[d] been nonmerit system laborers.” *Paradise*, 480 U.S. at 154 (quoting *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972)). The district court found that the DPS had “engaged in a blatant and continuous pattern and practice of discrimination.” *Id.*

Over the fifteen-year course of the litigation, which included numerous consent orders, the district courts gave the DPS considerable opportunity to comply with the law. *Id.* at 153-65. When the DPS sought further relief from the district court, the district court found, however, that rather than cooperate, the DPS had, time after time, chosen a strategy of resistance and delay. *Id.* at 156. Increasingly exasperated, the district court resorted to ordering the Department to promote one black state trooper for every white it promoted until such time as it developed an acceptable promotion procedure that did not discriminate against black applicants. *Id.* at 154-55. At all times, the DPS had the power to remove the racial quota by developing such a procedure. *Id.* at 155.

Most of the members of the Court appeared to agree that there could be cases in which states (or federal courts) could engage in race-based conduct despite strict scrutiny strong presumption against it. Significantly, however, they did not all agree that *Paradise* was itself such a case. *See id.* at 196-201 (Rehnquist, C.J., and White, Scalia, & O’Connor J.J., dissenting). The Court upheld the district court’s race-conscious order with only a 5-4 vote. *Id.* at 153. Justice O’Connor herself dissented, writing that the race-based order at issue “cannot survive strict scrutiny” because its purpose could be achieved in other ways. *Id.* at 199. *Paradise* was a closely decided case in which a government policy addressed extreme racial discrimination. If it was the best case that Justice O’Connor, writing in *Adarand* eight years later, could find to prove that strict scrutiny is sometimes less than fatal in the context of racial discrimination, it demonstrates just how strict the standard had been.

presumption is an extremely strong one.

In addition, they all agreed that the presumption applies regardless of whose “ox is being gored.”¹²¹ The Equal Protection Clause and strict scrutiny analysis are not merely there to protect one racial group; they are there to protect everyone.¹²²

But when it came time to decide *Grutter* and *Gratz*, all of this evaporated. All nine members of the Court agreed¹²³—indeed even the University of Michigan agreed¹²⁴—that the strict scrutiny test must be applied to the University’s race-based admissions policies. But the strict scrutiny test that was applied was a mere shadow of that which applied in *Gunther*’s time or even as recently as *Miller*, *Shaw*, *Croson*, and *Wygant*. Justice O’Connor, in writing for the majority, did not purport to be exercising her own independent judgment when she held that the University of Michigan had a compelling governmental interest. Instead, she held that it was appropriate to give “a degree of deference” to the University.¹²⁵

Giving deference to state authorities is about as far as one can get from the spirit of strict scrutiny. Instead of placing a very firm thumb on the scale *against* race discrimination, the Court puts its thumb on the scale *in favor* of it and of the very state officials who devised it. In doing so, the Court was all thumbs. It is literally hornbook law that state officials are not entitled to deference.¹²⁶ Just as it is no exaggeration to call the strict scrutiny text hornbook law, it is no exaggeration to call it hornbook law that state officials are not entitled to deference.

The ramifications of the majority’s opinion are extraordinary. If deference should be accorded to the University of Michigan’s discriminatory policies, then presumably any university’s discriminatory policies should be accorded deference.¹²⁷ The Court can

121. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (1975).

122. *See supra* note 95 and accompanying text (arguing that the Constitution forbids the preference of any one group on the basis of race alone).

123. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

124. Brief for Respondent at 31, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

125. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“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.”).

126. *See NOWAK & ROTUNDA, supra* note 115, at 639 (“[The strict scrutiny test] means that the Justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end”).

127. For that matter, if deference to state educational authorities is appropriate, why not deference to other state functions in which state authorities can rightly be presumed to be more

hardly pick and choose. Why then, for example, should the Court have not accorded deference to the University of Texas Law School in *Sweatt v. Painter*?¹²⁸ There is no reason to believe that the university authorities would have fallen silent when asked to explain the reason for the law school's racially exclusive admissions policy. And what about deference to the Board of Education of Topeka, Kansas? In *Brown v. Board of Education*,¹²⁹ the Board representatives were fully prepared to give the opinion that the separation of the races in the Topeka public schools promoted better learning. Fortunately, the *Sweatt* and the *Brown* Courts then knew that deference to state authorities would be inappropriate. They rightly insisted on strict proof of necessity, and when they did not get it, they decided the cases for the plaintiffs.

Every one of the post-*Brown* equal protection cases involving race must have been decided otherwise if the courts had been required to defer to state arguments. The defenders of Jim Crow may not have been persuasive, but they were not tongue-tied. If they had asserted that they felt compelled to segregate blacks from whites because on the whole, most folks prefer it that way and that in the long run separating the races would promote better race relations, the logic of the *Grutter* opinion would require deference.

The introduction of the concept of deference to state authorities, if taken seriously by the Court in the future, would mean the end of any true strict scrutiny standard. One cannot simultaneously maintain a presumption in favor of and against a racially discriminatory policy. It is one or the other.

III. THE UNIVERSITY OF MICHIGAN CASES AS PRACTICAL POLITICS: ARE *GRUTTER* AND *GRATZ* AN EXERCISE IN POLITICAL PRAGMATISM?

Shortly after the *Grutter* and *Gratz* cases were decided, Linda Greenhouse of the *New York Times* reported that “the broad societal

expert than federal authorities—like family law issues? For example, in *Loving v. Virginia*, 388 U.S. 1 (1967), does anyone imagine that the Commonwealth of Virginia would have been unable to come up with some glib “compelling purpose” for anti-miscegenation laws, which, if the courts were required to give deference to, would have required that those laws be upheld? Try this one: the Commonwealth is concerned that popular sentiment is strongly against racially-mixed marriages and that therefore if such marriages nevertheless occur, the innocent children that issue from those marriages will be punished and maltreated; it considers the danger serious and regards and regards itself as compelled to take action. Such a rationale would not convince many people today and obviously did not convince the Court in 1967, but if deference had been required back then, it would not have mattered if the Court had not been fully persuaded. The State would be entitled to the benefit of any doubt.

128. *Sweatt v. Painter*, 339 U.S. 629 (1950).

129. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

consensus in favor of affirmative action in higher education” was “clearly critical to [Justice O’Connor’s] conclusion. . . .”¹³⁰ Greenhouse may well be right. In reading the majority opinion in *Grutter*, it is difficult to avoid the suspicion that the decisions were motivated in significant part by a kind of political pragmatism: Public opinion strongly favored race-based admissions, and the Court felt obliged to defer in some way to that judgment, traditional requirements of strict scrutiny notwithstanding.¹³¹

The image of Justice O’Connor as a practical-minded jurist who is reluctant to push hard against the tide of public opinion may well be one of which Justice O’Connor, the only Supreme Court Justice to have served as a state legislator, would approve.¹³² Just prior to the release of the Michigan opinions, Justice O’Connor wrote that “change, when it comes, stems principally from attitudinal shifts in the population at large” and that “[r]are indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus.”¹³³ It is but a short distance from such a statement to a normative conclusion—Courts should defer in certain cases to public opinion—and then to Greenhouse’s descriptive statement—Justice O’Connor did in fact defer to her perception of public opinion in the *Grutter* case.

No doubt there are those who would argue that a court of law should *never* allow itself to be driven by the vagaries of public opinion. But while the image of a court constantly buffeted about by the winds of public opinion is unattractive, surely it is a mistake to put the argument in such stark terms. When Alexander Hamilton referred to the judiciary as the “least dangerous” branch with “no influence over either the sword or the purse,”¹³⁴ he stated a fact of which all wise jurists are exquisitely aware. Courts must “ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”¹³⁵ In turn, in a constitutional democracy, the executive arm must ultimately depend on the aid of public opinion. Consequently, just as a court must sometimes

130. Linda Greenhouse, *The Supreme Court: The Justices; Context and the Court*, N.Y. TIMES, June 25, 2003, at A1.

131. Looking at the issue from that perspective, one might not be troubled by the lack of logical consistency between *Grutter* and *Gratz*. In politics, sometimes prudence rather than principle must win the day.

132. *See id.* (inferring that Justice O’Connor, a former state legislator, allowed politics and public opinion to influence the Court’s decision in *Gratz*).

133. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (2003).

134. THE FEDERALIST NO. 78 (Alexander Hamilton).

135. *Id.*

restrain itself from picking unnecessary fights with the executive and the legislative branches, it must sometimes restrain itself in dealing with the public, addressing issues that it would have preferred to avoid, or avoiding issues it would have preferred to address, but for the weight of public opinion. Sometimes it may even be appropriate to defer to public opinion in deciding issues before the court.

But there are limits. The very purpose of an independent judiciary is to stand up to the power of the President, the power of Congress, and yes, the power of the People. It is a responsibility that is not to be shirked, even when it calls upon a court to decide an issue in a way that is at odds with public opinion. Almost everyone agrees that a judge must be both principled and practical, and both resolute and restrained. What we disagree about is when and where a court should insist on principle and when and where it should restrain itself. At what point has principle been taken too far? When is restraint just a cover for cowardice?¹³⁶

All of this is remarkably beside the point, however, for if the failure to apply true strict scrutiny in *Grutter* is a bow to public opinion, it is a misguided one. The truth is there are few issues upon which Americans are any more clear-minded and unified: Americans oppose admissions policies that give applicants an advantage based on skin color, no matter what racial group is advantaged or disadvantaged.¹³⁷ No amount of spin from the chattering classes will change that.¹³⁸

Dr. Paul Sniderman and Dr. Thomas Piazza, co-authors of *The Scar of Race* and leading experts on public opinion, state that the racial preference agenda “is controversial precisely because most Americans do *not* disagree about it.”¹³⁹ Over the past decades, their opposition has

136. Fortunately, these difficult questions are beyond the scope of this essay, which argues that the traditional requirements of strict scrutiny, public opinion, and other non-traditional considerations were not in conflict with each other. They all pointed towards holding both Michigan policies unlawful.

137. See *supra* notes 126-35 and accompanying text (discussing the consistent and unwavering American public opinion against race-based admissions policies).

138. The *Grutter* case may be the first occasion in history in which the Court has upheld the constitutionality of a racially discriminatory law or public policy that most people oppose. See Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. ON LEGIS. 217-18 (2003) (noting that the Court’s traditional role has been and should be to pull the American people from the brink when they are tempted to engage in race discrimination, not to help push them into race discrimination of which they disapprove).

139. PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 130 (1993) [hereinafter *THE SCAR OF RACE*]. According to the authors, “The distribution of public opinion on . . . affirmative action . . . is unmistakable . . . [T]here is scarcely any support . . . among whites.” *Id.* Even support among African Americans is lower than many suppose. According to one poll cited

been consistent,¹⁴⁰ unyielding,¹⁴¹ and from all corners of society.¹⁴² A Gallup poll released just a day after the Court's decisions illustrates this. While a bare plurality of forty-nine percent broadly supported the abstract concept of "affirmative action," respondents made a clear distinction between affirmative action and preferential standards.¹⁴³ Sixty-nine percent said that college applicants "should be admitted

by the authors, African-Americans were "split right down the middle on affirmative action." *Id.*

140. A poll taken by Yankelovich, Skelly & White shortly before the judgment in *Bakke* was announced asked registered voters the following question:

The Supreme Court is about to rule on the *Bakke* case which will decide whether or not a university can favor the applications of minority students and/or women over other students in order to meet affirmative action goals. If you were on the Supreme Court and had to rule on the *Bakke* case, would you vote in favor of the principle of affirmative action which would allow universities to favor the applications of minority and disadvantaged students over others, or would you vote against it?

Telephone Survey of Registered Voters by Yankelovich, Shelly & White, *Public Opinion On-line* (Roper Center at University of Connecticut), available at <http://www.lexis.com> (Apr. 8, 1989). Seventy-five percent of the respondents said that they would vote against it; only twenty-five percent said that they would vote in favor of it. *Id.* See also PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 28-30 (1997) [hereinafter *REACHING BEYOND RACE*] (stating that according to their polling research "white attitudes have not changed a whit" between 1986 and 1994, despite changes in the economy).

141. One might argue that whites' views of race-based admissions would soften considerably if they understood that the failure to give preferences to underrepresented minorities would result in substantially fewer members of those groups at elite colleges and universities. Sniderman and Piazza's evidence, however, suggests otherwise. Poll respondents who opposed racial quotas in higher education were asked if their views would change "if it mean[t] that hardly any blacks would be able to go to the best colleges and universities." *THE SCAR OF RACE*, *supra* note 107, at 145. While some did indeed change their answers, most did not. The authors found that "[t]he positions white Americans take on affirmative action are markedly firmer, less malleable than the positions they take on more traditional forms of government assistance for the disadvantaged." *Id.*

142. These views do not appear to be fueled in any significant part by ill will. One study has shown that the correlation between racial intolerance and opposition to racial preferences is quite low. *REACHING BEYOND RACE*, *supra* note 108, at 18-22. Among whites found to be in the top one percent in prejudice against blacks, the opposition to racial preferences in hiring (more than ninety percent) and to racial quotas in college admissions (almost ninety percent) was overwhelming. *Id.* at 20. Among the group found to be in the top one percent in racial tolerance, however, opposition was still very high. *Id.* Approximately eighty percent opposed preferential treatment in hiring, and more than sixty percent opposed quotas in college admissions. *Id.* "[T]he fundamental fact," according to the authors, "is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it." *Id.* at 22.

143. Affirmative action can mean many things to many people. Included within its meaning would be such non-controversial programs as: (a) outreach programs designed to ensure that all persons, regardless of race, sex, or ethnicity, are aware of the opportunities available to them; (b) efforts to ensure that admission standards (or hiring and promotion standards) are appropriate to the task of identifying the best prospects and do not impose inappropriate burdens on particular groups; and (c) efforts to ensure that all employees and students understand what kind of conduct is necessary to provide a welcoming environment for members of all races, ethnicities and both sexes.

solely on the basis of merit, even if that results in few minority students being admitted.”¹⁴⁴ Only twenty-seven percent took the position that an applicant’s race should be taken into consideration “even if that means admitting some minority students who otherwise would not be admitted.”¹⁴⁵ A similar poll conducted recently by the *Washington Post* showed that ninety-four percent of Whites and eighty-six percent of African Americans agreed that hiring, promotions, and college admissions should be based “strictly on merit and qualifications other than race/ethnicity.”¹⁴⁶ There are few issues that deserve the name “issue” on which any more consensus can be found.

Two arguments can be made in response. First, one might reply that it is not the opinions of average citizens to which the Court should defer, but rather the opinions of those who are most knowledgeable about the problem. Contrary to popular belief, however, those who are most knowledgeable about race-based preferences in higher education—college and university faculty members at universities that employ such preferences—join with the general public in opposing them.¹⁴⁷ They have seen these policies at work and despite campus pressures for political correctness, when asked by confidential pollsters, a large majority reply that they do not support them. Moreover, that opposition is not new; it has been consistent over the decades.¹⁴⁸ The

144. David W. Moore, *Public: Only Merit Should Count in College Decisions*, Gallup Poll News Service, available at <http://www.gallup.com/content/login.aspx?ci=8689> (June 24, 2003) (subscription needed).

145. *Id.*

146. WASH. POST, *Race and Ethnicity in 2001: Attitudes, Perceptions, and Experiences* 22, available at <http://www.kff.org/kaiserpolls/3143-index.cfm> (August 2001).

147. In a 1996 nationwide study of full-time faculty members at public and private colleges and universities, the Roper Center for Public Opinion Research found that racial, ethnic and gender admissions preferences are quite unpopular. Among those who knew their institution’s policy on admissions, sixty percent reported that their institutions had either formal or informal policies giving preferential treatment to applicants based on race, sex, or ethnicity. When asked whether their institutions *should* grant preferences to one applicant over another for admission on the basis of race, sex, or ethnicity, fifty-seven percent responded “no,” thirty-two percent responded “yes,” and eleven percent did not know or declined to state. Interestingly, the only group to support preferences in that survey was college and university administrators—the group responsible for filing most of the pro-Michigan amicus briefs in *Grutter* and *Gratz*. See Roper Center for Public Opinion Research, National Faculty Survey Regarding the Use of Sexual and Racial Preferences in Higher Education (1996), available at <http://www.nas.org/reports/roper/exsum.htm> (Last Updated September 1999) (finding that racial, ethnic and gender admissions preferences garner little support).

148. See Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233, 1233 (1988) (reporting that during the period from 1969 to 1975, when affirmative action significantly increased the representation of women and minorities in law schools and on law faculties, professors and graduate students in all disciplines overwhelmingly opposed affirmative action

only academic group to favor race-based admissions appears to be college and university administrators. Unfortunately, this is precisely the group that purports to speak on behalf of higher education, and that fact may go a long way towards explaining the Michigan cases. If the members of the *Grutter* majority were indeed influenced by the unanimity of opinion in higher education in favor of race-based admissions, they were simply duped.

Second, one might argue that even if most people (and most experts) oppose race-based admissions, sometimes the opinions of a passionate few must be deferred to for the sake of public peace and harmony. Such an argument begins to shade off uncomfortably from one for judicial restraint to one for judicial cowardice. More important, however, the experience of California and Washington State—the two states that have had voter initiatives on the ballot prohibiting race-based admissions policies—demonstrates that any concern for lost peace and harmony is unfounded. Both initiatives—California’s Proposition 209¹⁴⁹ and Washington State’s nearly identical Initiative 200¹⁵⁰—passed by substantial margins, the former by 54.6% of the vote¹⁵¹ and the latter by 58.2%.¹⁵² Contrary to the expectations of some, the sky did not fall. Not everyone was pleased, of course,¹⁵³ but the much-

programs involving preferential treatment).

149. CAL. CONST. art. 1, § 31 (amended 1996).

150. WASH. REV. CODE § 49.60.400 (2002).

151. According to the official count of the California Secretary of State, Proposition 209 passed by a vote of 5,268,462 to 4,388,733. See Cal. Sec. of State, 1996 General Election Returns for Propositions, at <http://Vote96.ss.ca.gov/Vote96/html/vote/prop/page.961218083528.html> (last visited June 15, 2004).

Support for Proposition 209 came from some of the most unlikely places. Berkeley’s student newspaper, the *Daily Californian*, gave Proposition 209 one of its most simple and passionate endorsements. “Race-based affirmative action is wrong,” the Board of Editors wrote, “because it discriminates on the basis of race.” Editorial, DAILY CALIFORNIAN, Nov. 4, 1996, at 7. The student newspaper at the Berkeley campus was not alone among student newspapers at the University of California to endorse Proposition 209. Farther south, the San Diego campus’s *Guardian* editors wrote: “Our Constitution guarantees equality of opportunity, not equality of results.” Editorial, UCSD GUARDIAN, Nov. 4, 1996, at 6.

152. According to the official count of the Washington Secretary of State, 1,099,410 votes (58.22%) were cast in favor of Initiative 200 and 788,930 (41.77%) were cast against. Wash. Sec. of State, Official Results of the 1998 General Election—Summary Report, at http://www.secstate.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=&p=&p2=&y=&c3= (last visited July 25, 2004).

153. Immediately after the Proposition 209 election, at the University of California’s Berkeley campus, twenty individuals, mostly students, seized the Campanile Tower chanting, “[y]ou see democracy, we see hypocrisy.” Five of the protesters chained themselves to the railing on the observation deck and had to be extricated with bolt cutters. *Twenty-Three Arrested in Berkeley Protest: UC All-Nighter, Lawsuits for Both Sides Are Part of Battle’s New Phase: Prop. 209 Rages On*, S.F. EXAMINER, Nov. 7, 1996, at A1 (S.F. EXAMINER archives from June 1, 2003); Amy Wallace & Diana Marcun, *Prop. 209 Foes Seize Building at UC Riverside Protests: Police*

promised refusals to comply never materialized. Life went on;¹⁵⁴ even state college and university administrators adopted a policy of tentative cooperation.¹⁵⁵

No one would argue that compliance with Proposition 209 and Initiative 200 has been total. Some state and local governmental entities have engaged in clear and unequivocal violations.¹⁵⁶ But that kind of violation has not been the rule. Much more common have been good faith disagreements about the appropriate interpretation of the initiatives, the kind one would have to expect in the aftermath of a significant change in the law or its interpretation.¹⁵⁷ Proposition 209

Arrest Twenty, L.A. TIMES, Nov. 12, 1996, at A3 (reporting on the protests that took place at University of California Riverside's campus, where students chained doors from the inside and disrupted university business for six hours).

154. The litigation against Proposition 209, while vexatious from the standpoint of those who supported the initiative, was resolved in Proposition 209's favor in just ten months. See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431, 1448 (9th Cir. 1997) (holding that due to the unlikelihood of success on the merits of their equal protection claims, plaintiffs were not entitled to an injunction). No litigation was filed in connection with Washington States's I-200.

155. Much more significant than the protests was University of California President Richard Atkinson's order instructing university officials to comply with the law. See Letter from Richard C. Atkinson to the University Community, Re: Passage of Proposition 209 (Nov. 6, 1996) available at <http://www.ucop.edu/ucophome/commserv/press/rcalet.htm> (stating that "[t]he voters have approved Proposition 209 and the University of California will comply with the law").

156. See Samuel Autman, *Grant Program at UCSD Breaks Ban on Racial Preferences*, SAN DIEGO UNION-TRIB., July 21, 2001, at A1 (reporting that University of California officials declared a scholarship implemented by UCSD as violating the affirmative action ban by awarding scholarships of \$5,000 solely to African-Americans, Latinos, and Indians, but not to Caucasians).

157. Perhaps the best example of a gray-area issue created by the passage of Proposition 209 and Initiative 200 is the so-called "four percent solution" used by the University of California. Under this plan, the top four percent of graduates at each California high school are eligible to attend a University of California system campus, regardless of other factors, such as their SAT scores, letters of recommendation and extracurricular activities. See Siobhan Gorman, *The 4 Percent Solution*, 31 NAT'L L. J. 774 (March 20, 1999) (describing the plan).

Some, including the United States as amicus curiae in the *Gratz* case, have praised such plans as a "race-neutral alternative" to racial preferences. See Brief of Amicus Curiae United States at 17, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (noting that race-neutral percentage plans in Texas, Florida and California have increased minority enrollment). Others, however, have criticized the plans as legal shams, including Justice Ginsburg, who in her dissenting opinion to *Gratz*, called them "disingenuous." See Brief of Amicus Curiae United States at 17, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (noting that race-neutral percentage plans in Texas, Florida and California have increased minority enrollment). While these plans clearly confer benefits (as well as burdens) on students of many races, not just members of underrepresented minority members, they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system," she wrote—hence their controversial legal status. Brief for Respondents at 44, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

In part because of that controversial legal status, no one should look at the percentage plans as a perfect solution to the problem of racial preferences. Even among those who question their legality, however, they are usually regarded as a substantial improvement over explicit racial preferences. Perhaps the case for judicial restraint would have been stronger here than it was in

and Initiative 200 did not resolve all issues of law regarding state-sponsored preferential treatment based on race in California and Washington State, just as the *Grutter* and *Gratz* cases would not have resolved all issues that relate to race-based admissions policies had both cases been resolved in favor of the plaintiffs. Anyone who took the position prior to the *Grutter* and *Gratz* decisions (specifically, the position that the Court should act with prudence and not decide the cases in a way that would require that colleges and universities immediately make sweeping changes to the way they do business) could take comfort in the fact that no opinion the Court could have written, no matter how favorable to the plaintiffs, would have been truly sweeping. It is in the nature of this area of public policy that it is incremental; the implications of decisions usually take years to work themselves out. California and Washington State prove that this process can be undertaken with success.

Moreover, they prove it should be undertaken and that if the Court's consideration of practicalities was appropriate in this case, perhaps the Justices should have considered this one as well: There is a reason that a majority of academics at universities that practice race-based admissions do not favor those policies. These policies create greater problems than they solve, putting minority students in academic settings in which their academic credentials forecast—often correctly—they will do poorly. Meanwhile, little is done to the kindergarten through twelfth grade level to correct the problems that led to the pressure for preferential treatment in the first place; preferences paper over the inadequacies of their academic preparation.

Even Derek Bok and William Bowen, former presidents of Harvard and Princeton, respectively, and architects of the race-based admissions policies at those institutions, concede that poor performance of students who are the beneficiaries of preferential treatment is a serious problem. “[C]ollege grades [for affirmative action students] present a . . . sobering picture,” they wrote.¹⁵⁸ “The grades earned by African American students at the [schools we studied] often reflect their struggles to succeed academically in highly competitive academic

Gratz and Grutter. It's a shame that Justice Ginsburg went out of her way to express her opinion on the issue prematurely.

See also John Leo, *Jeb Bush's College Try*, U.S. NEWS & WORLD REPORT 15 (April 17, 2000) (describing a similar twenty percent plan in Florida); Jim Yardley, *Desperately Seeking Diversity: The 10 Percent Solution*, U.S. NEWS & WORLD REPORT (April 14, 2002) (describing a similar ten percent plan in Texas).

158. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 72 (1998).

settings.”¹⁵⁹

Bowen and Bok understate the problem. Take, for example, the University of California at San Diego (“UCSD”). Prior to the passage of Proposition 209, UCSD admissions officers routinely added 300 bonus points (equivalent to 300 points on the combined SAT) to the admissions scores of African-American students. This virtually guaranteed problems. In the year before Proposition 209’s implementation, only one African-American student had a freshman year GPA of 3.5 or better—a single African-American honor student in a freshman class of 3,268. In contrast, twenty percent of White students had an honors-level GPA.¹⁶⁰

This was emphatically not because there were no African-American students capable of doing first-rate work at UCSD. The evidence shows, however, that rather than attending UCSD, many of those students were at Harvard, Stanford, or Berkeley, where they often were not doing honors work.¹⁶¹ The most vicious of racists could not have devised a better scheme to create the nationwide illusion that few African-Americans could excel.

Fortunately, change came quickly under Proposition 209. By ensuring that African-American students would be admitted only to those schools at which their entering credentials match those of white and Asian students, Proposition 209 ensured that African-American students’ academic performance would improve greatly. In the first year of its implementation, the performance of African-Americans at UCSD took an astonishing turn for the better. A full twenty percent were honor students. That exceeded the sixteen percent rate for Asian students and came extremely close the twenty-two percent rate for Whites in the same year.¹⁶² Suddenly, African-American students were winners at UCSD.¹⁶³

159. *Id.*

160. UNIV. OF CAL.-SAN DIEGO, ACADEMIC PERFORMANCE REPORT 4, Table 1 (1999) [hereinafter ACADEMIC PERFORMANCE REPORT].

161. See BOWEN & BOK, *supra* note 158, at 72.

162. ACADEMIC PERFORMANCE REPORT, *supra* note 160, at 4.

163. UCSD’s internal academic performance report on the 1998–99 school year announced that, while overall performance remained static, “underrepresented students admitted to UC-San Diego in 1998 substantially outperformed their 1997 counterparts” and the “majority/minority performance gap observed in past studies was narrowed considerably.” ACADEMIC PERFORMANCE REPORT, *supra* note 160 at 1. “Narrowed” was, in fact, an understatement. The report found that, unlike previous years, “no substantial GPA differences based on race-ethnicity” existed in the 1998-99 school year. *Id.* A discreet footnote made it clear that the report’s authors understood exactly how this happened: 1998 was the first year of color-blind admissions at UCSD. See *id.* at 1 n.1.

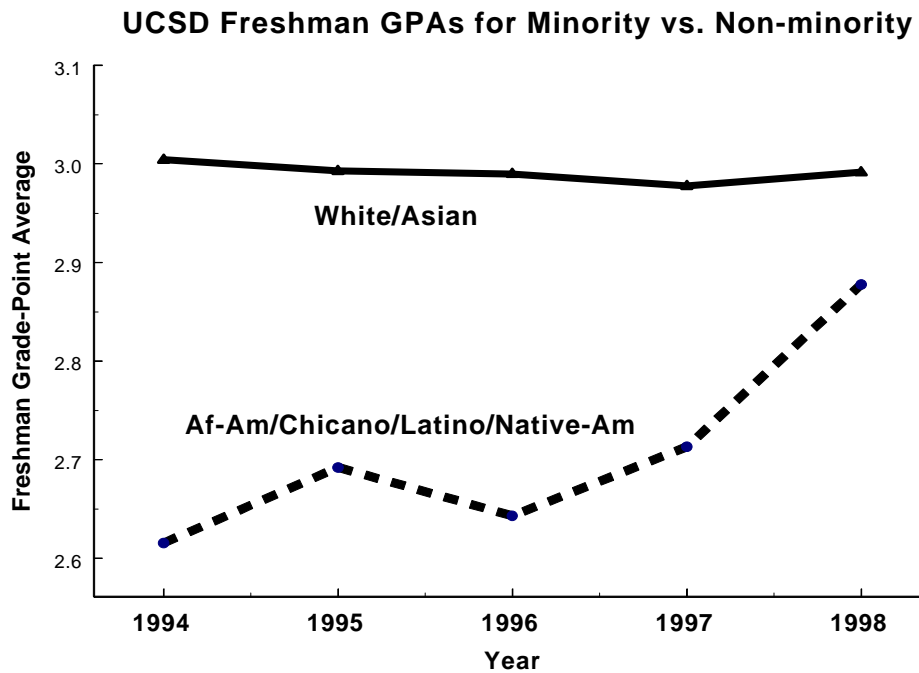
The term coined for the phenomenon involved is “cascading.”¹⁶⁴ Essentially, many of the minority students who would have attended Berkeley back in the days of overt preferences were now attending UCLA or UCSD on the strength of their own academic record. In turn, students who previously might have attended UCLA or UCSD had been admitted to somewhat less competitive campuses of the UC system such as Davis, Irvine, Santa Cruz or Riverside. Had the *Grutter* case been decided in favor of the plaintiff, presumably this process would be underway now across the nation, giving previously out-matched students a chance to succeed.

At UCSD, the benefits of cascading matter most at the bottom of the class. Academic failure is an extremely unfortunate event; it can sour a student on education entirely. By ensuring that no student has two strikes against him (his high school record and his standardized test score) even before entering the college of his choice, Proposition 209 helped to prevent failure. Prior to its implementation, fifteen percent of black students and seventeen percent of American Indian students were in academic jeopardy (defined as a GPA of less than 2.0), while only four percent of white students were. The year after Proposition 209’s implementation, the minority failure rate declined to six percent.¹⁶⁵ As the chart below demonstrates, average GPAs of the various minority groups also all but converged.¹⁶⁶

164. See, e.g., Karen Tumulty, *Julius Speaker? Uh-Oh, Newt Gingrich Is In Trouble Again, and Guess Which Friend Has That Lean and Hungry Look*, TIME, June 30, 1997, at 33 (using the term “cascade effect” to describe racial shifts from competitive to less competitive universities).

165. ACADEMIC PERFORMANCE REPORT, supra note 160 at 4, tbl. 1.

166. *Id.*



This is an achievement which, contrary to popular belief, was not accomplished by shutting African-American students out of UCSD. UCSD had twelve fewer African-American freshmen in the first year of Proposition 209's implementation, forced as it was to reject students who did not meet the academic standards of the rest of the class. However, the class also had seven fewer African-American students with a failing GPA at the end of the first year. Further, those twelve students probably attended a school where their chances of success were greater.¹⁶⁷ They and their fellow minority students who did attend UCSD received a good education free of the stigma that their academic credentials would not have entitled them to admission but for their skin color.

Meanwhile, Proposition 209's mandatory race neutrality has further benefited minorities (and others) by focusing attention where it belongs: on educational experimentation and innovation at the kindergarten through twelfth grade levels. Rather than allow racial preferences in higher education to paper over deficiencies that start early, the program has stripped away these preferences in California.

167. *Id.*

Prior to Proposition 209, remarkably little focused energy was directed at educational innovations that might close the academic credentials between the races, and hence make racial preferences unnecessary. Among the intellectual elite, there was even a misguided school of thought that sought to downplay not just grades and other standards of academic performance, but also standards of any kind.¹⁶⁸ Proposition 209, however, worked to stimulate experimentation and innovation. At UCSD, for example, an on-campus charter school was founded to serve low-income students.¹⁶⁹ According to *The Chronicle of Higher Education*, “[t]he idea for the Preuss School sprang from the furor that followed the vote of the University of California System’s Board of Regents in 1995 to ban consideration of race in decisions on admissions. . . . California voters a year later had approved Proposition 209. . . .”¹⁷⁰ “We came to the opinion that we have to be more invasive,” said Cecil Lytle, a UCSD provost, outspoken opponent of Proposition 209 and leader in the push to create the Preuss School.¹⁷¹ “Until you affect what happens between 8 and 3 o’clock, you’re just tinkering toward utopia.”¹⁷²

IV. CONCLUSION

Grutter and *Gratz* are an irreconcilable odd couple. While *Gratz* may appear upon first glance to take away from colleges the authority to engage in race-based admissions, *Grutter* puts that authority back into their hands. Taken together, they constitute a serious loss for those who oppose race-based admissions—a group that constitutes the large majority of Americans.

Such a result was not mandated by *Bakke*, which instead had refused to endorse a policy (like those in *Grutter* and *Gratz*) effectively insulating the most minimally qualified minority members from

168. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 35–36 (1987) (arguing that any gender distinctions made are already affirmatively compensated in society). Professor Richard Delgado argued: “Any society’s elite class will deem what they do well as constitutive of merit, thus assuring that their own positions become even more secure.” Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 *GEO. L.J.* 1711, 1718 (1995). Columbia University’s Patricia Williams argued that words like “qualified” are mere “con words, shiny mirror words that work to dazzle the eye” and are not indicative of anything substantive or real. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 103 (1991).

169. Julianne Basinger, *Colleges Experiment with Charter Schools*, *CHRON. OF HIGHER EDUC.*, Oct. 29, 1999, at A51.

170. *Id.*

171. *Id.*

172. *Id.*

competition with members of other races. Indeed, application of the Court's traditional strict scrutiny analysis would have led to a result more favorable to the plaintiffs. Only by insisting on deference to state education officials—a strange requirement in view of the history and purpose of strict scrutiny—did the Court arrive at the conclusion it did.

Even more important, the result was not mandated by practical prudence and other policy considerations, which fairly considered might well weigh in the opposite direction. If political practicality was the sole criterion, many options were available, any one of which would have been superior to the option taken. The Court could have declared race-based admissions policies used to pursue diversity to be unlawful, but left the door ajar for race-neutral alternatives such as percentage plans despite whatever doubts the Justices might have had. The Court could have declared a more limited (and more ambiguous) prohibition of race-based admissions policies where race is found to be “an enormously important factor,”¹⁷³ leaving open the question of whether small preferences might be permissible. Instead, the Court chose to allow colleges and universities to implement racial preferences of any size so long as they hire a sufficient number of file readers (whose jobs will then depend on the continuation of the institution's diversity policy) to make it possible to achieve diversity without mathematical formulae. Such an approach is the worst of all possible worlds. It leaves in place a policy that all but guarantees business as usual at the kindergarten through twelfth grade levels.

“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” Justice O'Connor optimistically stated in her opinion for the majority in *Grutter*.¹⁷⁴ The *Grutter* opinion, however, does nothing to encourage that day to come. To the contrary, by removing any fear on the part of colleges and universities that race-based admissions will be found unlawful, it virtually ensures that the day will be indefinitely delayed.

173. See *supra* note 27 and accompanying text (quoting the district court ruling in *Grutter* where the Court found that the Law School's policies were unconstitutional when race was proven to be an important factor in the admissions decisions).

174. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).