Chapter Seven
The Sixth Circuit

Chief Judge Boyce F. Martin, Jr., could have joined the judicial debate over race preferences and college admissions with an opinion that probed both undergraduate and law school practices at the University of Michigan against the equal protection standard of the Fifth Amendment. He could have meticulously reviewed the evidence gathered or acknowledged, including recent Supreme Court pronouncements, the supporting study undertaken by Patricia Gurin, its critique elaborated by amici and opposing counsel. He might have staked out new ground, as the appellate court had done in *Hopwood*, or stuck doggedly to the law as had Judge Stanley Marcus in *Johnson*. Instead, Judge Martin did none of these things. He merely declared, at the urging of Michigan, that the court was bound by the decision in the interstate pornography case *Marks v. United States*.[1] *Marks* had, in turn, interpreted the Court's holding in a case involving the famous bawdy tale by John Cleland, *Memoirs of a*

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

Woman of Pleasure, in the case of *Memoirs v. Massachusetts*.[2] The question in *Marks* was which Supreme Court pronouncement controlled the definition of obscenity when no previous definition had commanded a five-vote majority. In *Memoirs*, three justices, led by the irrepressible William Brennan, held that for a work to be obscene it must be "utterly without redeeming social value."[3] Justice Potter Stewart declared the novel not obscene because it was not hard-core pornography, while Justices Black and Douglas—absolutists on the First Amendment—held that any restriction on the printed word violated its terms.[4] In *Marks*, the Court embraced the Brennan standard, holding 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 judgment on the narrowest of grounds."[5] To Judge Martin and the four Sixth Circuit jurists who agreed with him, this meant that Justice Powell's *Bakke* views were still the law of the land and that diversity was a compelling state need that could be reflected in race-conscious admissions practices. The slender majority then proceeded to accept every material Michigan statement, from the lack of efficacy of race-neutral policies to the absence of any fixed number or percentage of minorities considered each year. The court thus reversed the decision of District Court Judge Friedman and declared the law school practice legally identical to the Harvard Plan outlined by Powell. The Sixth Circuit would also later hold the undergraduate admissions program legal, but not until the

2. *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966).
3. *Id.* at 427.
4. *Id.* at 433.
5. *Marks*, 430 U.S. at 193.

Supreme Court had already taken jurisdiction and the parties had briefed and argued their case.

Had this been all, the Sixth Circuit ruling would hardly be worth a mention. However, a passionate concurrence by Judge Eric Lee Clay, an erudite dissent by Judge Danny Boggs, and a testy exchange initiated by Boggs over what he charged was Martin's irregular procedural handling of the case designed to keep control in Martin's own hands with the result to be determined by those sympathetic to affirmative action, all combined to make the proceedings of some interest.

Judge Clay stated:

> [It is] insulting to African Americans, or to any race or ethnicity that has known oppression and discrimination the likes of which slavery embodies, to think that a generation enjoying the end product of a life of affluence has forgotten or cannot relate the enormous personal sacrifice made by their family members and ancestors not all that long ago in order to make the end possible. We are only a generation removed from legally enforced segregation and the many denials embraced by the practice. Further, it is naïve to think that simply because a black person earns good money, resides in a fashionable apartment and shops at stores that cater to the rich, his or her life has been devoid of brushes with insult and discrimination that establish a common experiential bond among people of color. A well-dressed black woman of wealthy means shopping at Neiman Marcus or in an affluent shopping center may well be treated with the same suspect eye and bigotry as the poorly dressed black woman of limited means shopping at Target.[6]

The clear thrust of Clay's argument—even if he didn't say so in so many words—is that race is a proxy for experience

6. *Grutter*, 288 F.3d at 732, 764.

and that a university like Michigan is correct to award preferences to minority students. Judge Boggs's grudging offer in dissent to stipulate that race *does* matter "constitutes a thinly veiled offer of dubious sincerity, to say the least,"[7] particularly for those who have read the rest of Boggs's decision.

Clay then emulated what had become a favorite tactic of race preference apologists, going back at least to *The Shape of the River*—pushing the notion that whites are not hurt by the preferences granted to minorities. Bowen and Bok had suggested that eliminating affirmative action at the twenty-eight selective schools they examined would have increased the percentage of white undergraduate applicant acceptances from 25 percent to 26.5 percent. Judge Clay offered this bit of shocking information: "The Mellon Foundation, which sponsored the study, provided me with additional data to calculate the admission rates by SAT score. If the schools in the Bowen/Bok sample had admitted applicants with similar SAT scores at the same rate regardless of race, the chance of admission for white applicants would have increased by one percentage point or less at scores of 1300 and above, by three to four percentage points at scores from 1150 to 1299, and by four to seven percentage points at scores below 1150."[8]

This was shocking to begin with because it is both odd and unethical for Judge Clay to have scampered outside the voluminous record of the case for his own private evidentiary service, compliments of the Mellon Foundation. Suppose that in the appeal from a murder conviction Judge Clay had written, "The prosecution claim of supporting DNA evidence is phony. At my request, the XYZ Laboratory ran its own analysis of the defendant's DNA and compared it to the evi-

7. *Id.* at 765.
8. *Id.* at 767.

dence acquired at the crime scene. XYZ found no match." Pretty shabby behavior, most would agree, and no less shabby in the Michigan case.

Nor are the Mellon/Clay figures particularly persuasive. For one thing, the Constitution does not deal in group rights but in individual rights. It is no more acceptable to trample the rights of a single person than it is a larger group. One suspects that if Judge Clay were to discover that the Detroit police were giving backroom beatings to 1 percent of black suspects accused of stealing $1,100, 3 to 4 percent accused of stealing $1,200, and 4 to 7 percent accused of stealing more than $1,300, he'd be pretty upset. Conveniently, too, the Bok/Mellon/Clay figures ignore the existence of Asian Americans who, no less than whites, are victims of Michigan's academic race preferences and who are no less entitled to Constitutional protection. Also, the figures are far more substantial than Judge Clay would have us believe. In the four years from 1995 to 1998, the law school admitted 183 underrepresented minorities. Assuming, as Michigan had estimated, that three out of four of these would not have gotten in on their academic merits, some 138 whites and Asian Americans were kept out over that four-year period for reasons of race. This does not even address what was going on in the undergraduate program, which handles five times the volume of law school applications. Nor does it take into account the tens of thousands of youngsters who apply to other selective colleges and universities every year. In short, the notion that African American and Hispanic students can be assisted while whites are virtually unharmed and Asian Americans functionally cease to exist is insulting. This was perhaps shown most vividly in oral argument when, in response to questions from Judge Boggs, Michigan's counsel acknowledged that had Barbara Grutter been black, she would likely have won

admission to the law school. He hastened to add, however, that a Barbara Grutter who was black "would be a different person."[9]

"This case involves a straightforward instance of racial discrimination by a state institution," began Judge Boggs in his memorable dissent.[10] He rejected the mass of circumlocutions designed to obscure this fact, recalling Orwell's complaint in *Politics and the English Language* that too often "a mass of Latin words falls upon the facts like snow, blurring the outline and covering up all the details."[11] In Grutter, the problem was not Latin words but the attempt by the law school to escape the consequences of *Bakke* by changing form, not substance. Yet the content of the policy was clear. From 1995 to 1998, the law school admitted between forty-four and forty-seven preferred minority students, 13.5 to 13.7 percent of each entering class. "For me, however, the Law School's simple avoidance of an explicit numerical target does not meet the constitutional requirements of narrow tailoring. The Law School's efforts to achieve a 'critical mass' are functionally indistinguishable from a numerical quota."[12] Moreover, the diversity rationale is spurious. In its literature, the university exalts various types of diversity, but in practice, only the narrowest kind of racial and ethnic distinctions amounts to very much. "The Law School's rhetoric implies that it is searching tirelessly for the applicant with the most unique of experiences: for example, the Mormon missionary in Uganda, the radical libertarian or Marxist, the child of subsistence farmers in Arkansas, or perhaps the professional

9. *Id.* at 775.
10. *Id.* at 773.
11. *Id.*
12. *Id.* at 789.

jazz musician. The Law School, however, never claims that there is any similarity between the preference given to those with such unique experiences and that bestowed upon those it considers 'under-represented' racial minorities."[13] In the school's literature, the unrelenting search for diversity may reward the applicant with "an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnamese boat person."[14] Such lyricism, however, usually remains on the pages of the law school's *Admissions Policies* booklet, while the admissions dean and her advisors zero in on race and ethnicity. "The figures indicate that race is worth over one full grade point of college average or at least an 11-point and 20 percentile boost on the LSAT. In effect, the Law School admits students by giving very substantial additional weight to virtually every candidate designated as an 'under-represented minority', or equivalently, by substantially discounting the credentials earned by every student who happens to fall outside the Law School's minority designation. . . . The Law School's admission practices betray its claim that it gives meaningful individual consideration to every applicant, notwithstanding their race."[15]

Judge Boggs saw a dangerous parallel between Michigan's emulation of the Harvard Plan and a Harvard Plan that had been imposed in the 1930s to limit the number of Jews attending the university so as to more accurately reflect their percentage of the population. "The reasons for the policy offered by then-President Lowell of Harvard are hauntingly similar to the rationale given here. As Lowell explained, without the

13. *Id.* at 790.
14. *Id.*
15. *Id.* at 797–798.

policies, 'Harvard would lose its character as a democratic national university drawing from all classes of the community and promoting sympathetic understanding among them.'"[16] If the grave disparities between the percentage of Jews in the population at large and their percentage of the Harvard student body could be addressed, "it would eliminate race feeling among the students, and as these students passed out into the world, eliminating it in the community."[17]

Judge Boggs also considered the public claim by veteran civil rights activist Julian Bond that racial preferences for blacks are the "just spoils of a righteous war," the long battle for African American rights in America.[18] Not so, said Boggs. If, as Lincoln wrote in his Second Inaugural Address, "society chooses that 'every drop of blood drawn by the lash shall be paid by another,' then that bill should be paid by the whole society, and by the considered alteration of our Equal Protection Clause, not by ignoring it."[19] He also recalled the pre-*Brown* plaintiff, Heman Sweatt, whom the Court ordered admitted to the University of Texas Law School after the school had first rejected him entirely and then sought to instruct him in a law school cobbled together for the sole purposes of diverting blacks from the flagship state university. "Michigan's plan does not seek diversity for education's sake. It seeks racial numbers for the sake of the comfort that those abstract numbers may bring. It does so at the expense of the real rights of real people to fair consideration. It is a long road from Heman Sweatt to Barbara Grutter. But they

16. *Id.* at 793–794.
17. *Id.*
18. *Id.* at 809.
19. *Id.*

both ended up outside a door that a government's use of racial considerations denied them a fair chance to enter."[20]

Judge Boggs added a Procedural Appendix to his dissent, accusing Chief Judge Martin, a Democrat appointee, with improperly manipulating the docket, the suggestion being that Martin sought to ensure a majority would vote to uphold Michigan's admission policies.[21] In April 2001, as the case first reached the appellate court, Judge Martin had assigned it to a three-judge panel—including himself—rather than using the more traditional random assignment methods. According to Judge Boggs, the Chief Judge also knew, but didn't inform his colleagues, that Michigan had moved to have the case heard by the entire circuit court sitting en banc. At the time, the court boasted eleven members, but Judges Norris and Suhrheinrich, both appointed by Republican presidents, were scheduled to achieve "senior status," which meant retirement from most functions, including participation in en banc arguments. In October 2001, days before the case was scheduled for argument before the three-judge panel, and long after opening briefs had been filed, the remaining six judges were informed the case would be heard en banc before a panel where six of the judges had been appointed by Democrats.

Judge Karen Nelson Moore, who voted with the majority on the merits of the case, rebuked Boggs for what she called his "inaccurate and misleading account of the procedural facts underlying the present case."[22] Her basic point was that the timing of the two judges' retirements was such that they would have been off the bench even had notice of the en banc

20. *Id.* at 810.
21. *Id.* at 811.
22. *Id.* at 753.

petition been more promptly circulated. By that time, however, tempers were frayed. Judge Clay, for example, concurring with the majority opinion, said he found it necessary to write separately "for the purpose of speaking to the misrepresentations made by Judge Boggs in his dissenting opinion which unjustifiably distort and seek to cast doubt on the majority opinion."[23]

The allegation of misconduct soon became the subject of a complaint filed by the activist group Judicial Watch and its president, Thomas Fitton.[24] In May 2003, Acting Chief Judge Alice M. Batchelder ruled that Judge Martin had failed to follow his own established rules both in assigning the three-judge case to himself and, later, by failing to inform colleagues of the en banc petition in a timely fashion. According to Judge Batchelder, Martin's actions "raise an inference that wrongdoing has occurred."[25] Without minimizing the seriousness of Martin's judicial tricks, it is reasonable to assume that however the Sixth Circuit had ruled, the case would speedily have made its way to the Supreme Court given the importance of the subject and the split among several judicial circuits.

For his part, Judge Boggs's opinion was written with the self-confidence of one drawn by the wake of prevailing Supreme Court precedent, particularly as articulated by Justice Sandra Day O'Connor. Boggs cited Justice O'Connor in *Croson*: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority

23. *Id.* at 758.

24. Letter from Thomas Fitton, president of Judicial Watch, to circuit executive of the Sixth Circuit (Jan. 30, 2003). *See* Jodi S. Cohen, *Judicial Bias Alleged in U-M Case*, DETROIT NEWS, Mar. 30, 2003.

25. Cohen, *Judicial Misconduct*, at 1A.

and lead to a politics of racial hostility."[26] Further, remedial race-conscious measures must have a "logical stopping point."[27] Finally, O'Connor had voted to overturn *Metro Broadcasting* with its diversity rationale.

It was not Judge Boggs, but rather the Center for New Black Leadership that, in its amicus brief, reminded the court of Justice O'Connor's most pointed condemnation of equating race with viewpoint. In the redistricting case *Shaw v. Reno*, she wrote that such thinking bears "an uncomfortable resemblance to apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes."[28]

Cavalier court management and the resultant majority of judicial liberals may have put Judge Boggs in the minority on Michigan on the Sixth Circuit, but there was every reason to believe he would be vindicated on appeal with Justice O'Connor writing the majority opinion.

26. *Grutter*, 288 F.3d at 787.
27. *Id.* at 793.
28. *Shaw v. Reno*, 590 U.S. 630, 647 (1993).