Chapter Nine
Decision

Nothing better presaged the outcome of the battle over Michigan's admission policies than the quality of the legal pleadings placed before the Court. In *Grutter*, the pivotal law school case, petitioner offered a competent, tightly bound statement of the law: *Bakke* is not binding because the critical section of Justice Powell's opinion certifying diversity as a compelling need was disowned by the four concurring justices who called it constitutional "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."[1] The law school admissions policies placed so much emphasis on race that its "critical mass" formulation was little more than a glorified quota. The state school had failed to establish a compelling need for its race preference policies because recent Court decisions had suggested that the only compelling need it was prepared to recognize was to provide redress for specific past discrimination. Moreover,

1. *Bakke*, 438 U.S. at 265, 326.

Michigan's approach was not narrowly tailored because it had failed to consider race-neutral alternatives to its policies.

Lacking in the petitions and briefs filed for *Grutter* was any overarching vision of where society was going and how the case at issue would impact on it. Lacking was any critique of the goal or educational value of engineered campus diversity, though fresh material was available in the form of an attitudinal survey taken by respected public opinion analysts Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte[2] showing overwhelming campus opposition to race preferences among students, faculty, and administration, together with a correlation between the number of minorities on campus and sentiment among all three groups that race relations were poor. Two of Grutter's amici—the National Association of Scholars and the Center for Equal Opportunity—had effectively critiqued the Gurin Report purporting to show the "compelling need"[3] for campus diversity, but Grutter and her fellow victims needed their own theory of the case, and it was nowhere to be found. Not that their amici were wrong on the law or less than eloquent in their articulation of it. The Asian American Legal Foundation, for example, filed a moving brief recalling the historic discrimination to which Chinese Americans had been subjected and how many young Chinese students today are excluded from special elementary and secondary schools and programs because, as a group, they score so high on the entrance exams as to be judged insufficiently needy of the special resources offered by special schools. Now they find themselves rejected by elite universities in the name of diversity. "Social scientists may

2. Brief for the National Association of Scholars as Amicus Curiae Supporting Petitioner at 6, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

3. *Id.*

debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[4] A nice statement of what the law should be, but without the compelling sense of social urgency the Michigan amici briefs would provide.

Also absent was a sense of unity between Petitioner and her most important amicus, the U.S. government. Grutter, by implication at least, was asking the Court to reverse the *Bakke* holding by declaring the nonvalidity of diversity as a compelling state interest. But the Bush administration was unwilling to go that far.

In his January 15, 2003, statement announcing the U.S. position in the case, the president ventured teasingly near a position denouncing race preferences: "At the law school, some minority students are admitted to meet percentage targets while other applicants with higher and better scores are passed over. This means that students are being selected or rejected based primarily on the color of their skin. The motivation for such an admissions policy may be very good, but its result is discrimination and that discrimination is wrong."[5] However, the administration's position before the Court was somewhat more circumspect. Its brief was more an advertisement for the percentage plans of Texas, California, and Florida than an exposition of the law as it was or ought to be. No argument at all was made for striking down diversity as a compelling need. Rather, the Court could do

4. Brief for the Asian American Legal Foundation et al., as Amicus Curiae Supporting Petitioner at 24, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

5. *Transcript of Bush's Remarks on Affirmative Action Policies*, NEW YORK TIMES, Jan. 16, 2003, at A26.

everything by doing virtually nothing: "In the end, this case requires this Court to break no new ground to conclude that respondents' race-based admissions policy is unconstitutional. This Court has long recognized that the Equal Protection Clause outlaws quotas under any circumstances and forbids the government from employing race-based policies when race-neutral alternatives are available. Those two cardinal principles of equal protection each suffice to invalidate respondents' race-based policy."[6]

If Ms. Grutter's case turned on the willingness of five justices to entertain the three percentage plans as a viable and constitutional alternative to the race-conscious policies of Michigan, it is small wonder that the Court would back the university.

Another example of the free-form nature of the *Grutter* amici briefs occurs in the brief filed by the Center for New Black Leadership, a conservative group long associated with the antipreference cause.[7] Throughout the litigation, the issue of black-white academic achievement gap—beginning before kindergarten, accelerating through years K–12, lingering through college and graduate school—was of central concern. The Center's brief cited many of the familiar statistics. For example, 63 percent of black and 56 percent of Hispanic fourth-graders "are below the most basic proficiency levels in reading." By age 17, the black is an average of four academic years behind whites in reading, 3.4 years in mathematics, 3.3 years in writing, four years in science. In 1995, the average white score on the SAT verbal exam was 448, compared to 356 for blacks; in quantitative reasoning it was

6. Brief for the United States at 10, *Grutter*.

7. Brief for the Center for New Black Leadership as Amici Supporting Petitioner, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

498 to 388. That same year among those scoring 700–800 in verbal ability, 8,978 were white, 1,476 were Asian Americans, and 184 were black. Among those scoring 750 or over in math, 9,519 were white, 3,827 were Asian Americans, and 107 were black. Among the 734 "superstar" students named by the College Board in 1995 as advanced placement scholars, 63.1 percent were white, 29.7 percent were Asian Americans, and only two individuals were black. Since the late 1980s, the gaps have been widening.[8] Despite their familiarity, the numbers continue to shock. But what is the root cause? And what is to be done? The Center asserted that the problem lies with K–12 education and "the concentration of economically disadvantaged black and Hispanic students in defective inner-city public schools."[9] And, of course, "Racial preferences do nothing to close that gap."[10] One might suggest that percentage plans, embraced in the Center brief, do nothing to close that gap either. Since the Court had no ability to address K–12 educational deficiencies and could deal only indirectly with percentage plans, there was no real response it could make to the terrible numbers problem.

It is instructive to compare how the respondents played the numbers game in their brief.

> In 1997 when petitioner applied, there were only 67 minority applicants, compared to 1,236 white and Asian American applicants, in the LSAT range (164+) from which over 90 percent of the admitted white students was drawn. Competition for these minority applicants is extremely fierce, and the Law School cannot hope to enroll more than a few of them. In 2000, there were only 26 African-American applicants *nationwide* with at least a 3.5 GPA and a 165 on

8. *Id.* at 6.
9. *Id.*
10. *Id.*

> the LSAT compared to 3,173 whites and Asian Americans. Thus removing the race factor from admission consideration would have a devastating effect upon diversity at Michigan and other selective law schools. Unrebutted testimony at trial revealed that in one recent and typical year genuinely race-neutral admissions would have produced a class with 16 African Americans instead of the 58 who actually enrolled. Alternative systems such as a lottery for all those over some minimum LSAT score would effectively decapitate the class, removing most of the best students and—as more whites who do not now apply to the school learned about the softer standards and applied—the method would barely improve minority prospects from what they would be if an honest race-neutral system was applied.[11]

Nationwide, the effect would be identical to Michigan and disastrous for blacks. Citing a study published in a 1997 NYU *Law Review*, respondent argued that if the nation's law schools chose to maintain current academic standards but were barred from taking race into account in admissions, "the representation of African American students at the 89 most selective law schools would fall from approximately 7% now to less than 1%. Three-quarters of the African-American students who are currently admitted to accredited law schools would not be accepted *anywhere*, and 40% of those still admitted would be admitted only to schools with predominantly minority student populations."[12]

Clearly such an event would shake the landscape like a massive earthquake, confronting schools with the choice of compromising academic standards or losing nearly all their minority students. This was the best argument for declining to overrule *Bakke*, which has been the lighthouse on the

11. Respondent's Brief on the Merits, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

12. *Id.* at 37.

scene for the past twenty-five years, guiding universities through the rocky shoals of affirmative action law. Disturb it now, and imperil much in higher education that has been working well. This was a powerful argument requiring Justice O'Connor and the others to consider carefully the impact of their decision. The argument was coordinated masterfully with the interventions of amici from other sectors of society and the economy, each pleading the importance of diversity to its ability to perform its function in an evolving majority of minorities nation and the world beyond. We have already seen how the Green Brief weighed upon the justices during oral argument, as distinguished military veterans proclaimed the vital interest of their service in a diverse officer corps and the need for affirmative action in college ROTC and service academy admissions to ensure an adequate flow of such officers through the pipeline. This latest argument was the rest of the payoff from Bollinger's big theme strategy as other representatives of the "Great American Establishment" weighed in.

General Motors, the first great corporation—388,000 employees globally and annual revenues exceeding $175 billion—to enter the case, told the court it required students from elite schools able to deal confidently across great cultural divides. "A ruling proscribing the consideration of race and ethnicity in admissions decisions likely would dramatically reduce the diversity at our Nation's top institutions and thereby deprive students who will become the corps of our Nation's business elite of the interracial and multicultural interactions in an academic setting that are so integral to their acquisition of cross-cultural skills."[13]

The American Council on Education (ACE), representing

13. Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 3, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

about 1,800 colleges and universities, noted the exalted status of American institutions of higher learning on the world stage and claimed that much of this was due to the tradition of independence from government interference, particularly in areas once cited by Justice Felix Frankfurter as the "'four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[14] As to the subject at hand, "Particular deference is owed educators' judgment about education because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified. [Citation omitted] How, for example, the mix of students affects learning involves considerations educators are best equipped to gage. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, how to nurture students' capacity for moral reasoning, and other specialized knowledge in which educators are trained."[15]

The American Bar Association (ABA), representing 400,000 lawyers nationwide, noted that in 1998, African Americans and Hispanics together accounted for only 7 percent of the nation's lawyers. Only with respect to dentists (4.8 percent) and scientists (6.9 percent) was the representation sparser. A ruling against Michigan would further reduce these numbers with extremely deleterious effects. "First, diversity of the bar is essential to fulfilling the legal profession's paramount purpose of providing representation to all.

14. Brief of American Council on Education and 52 Other Higher Education Organizations as Amici Curiae in Support of Respondents at 7, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

15. *Id.* at 11.

Second, diversity is fundamental to fostering the public's perception that our legal system is fair, unbiased, and inclusive, thereby preserving and enhancing the public's trust and confidence in our system of government."[16]

Steelcase, Inc., the world's largest manufacturer of office furniture and equipment, joined with a group of giants—Dupont, Dow, Eli Lilly, Microsoft, Proctor and Gamble, to name a handful—urging affirmation of the Sixth Circuit decision.[17] The common theme was similar to that articulated by General Motors: Corporate America is committed to a management that reflects, values, and implements the kind of diversity that has become an integral part of the corporate culture. Future corporate leadership is recruited from highly selective schools, such as Michigan. Deprive African Americans and other minorities of the opportunity to attend elite schools, and you deprive them of the chance to fully participate in the economy of today and tomorrow, while also depriving business of the benefits of the participation of minorities in management.

The argument is porous in the extreme. First and foremost, given the fact that Michigan's fate hinged on the willingness of the Court to sustain Justice Powell's opinion in *Bakke*, in arguing the need to sustain or increase the number of minorities in elite schools and professions, the school and its amici were running into the teeth of an argument Powell had rejected, saying that an interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" represented an

16. Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 6, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

17. Brief of 65 Leading American Businesses as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

unlawful interest in racial balancing.[18] Even had the question been an open one, the link between affirmative action and black economic advancement is, as even adherents of affirmative action concede, more an article of faith than a product of evidence. Further, apart from those minorities who need no affirmative action to succeed, there are few examples of blacks rising to the top of the corporate or professional world. Nor did any of the amici make a case as to why blacks and other favored minorities graduating from higher positions in not quite so selective schools could not contribute the same diversity of thought and experience as they could graduating from the bottom percentiles of more elite universities. Even at the great universities, one could readily defend the proposition that sixteen fully qualified blacks in a law school class would do more to destroy stereotypes and erase prejudice than would be the case by adding forty-two affirmative action–admitted students, using their race as both a sword and a shield against classmates who know they would not be at Michigan had racial preferences not intervened in the admissions process. Finally, one must question the justification for race preferences based on the globalization of the economy. Clearly, it is advantageous to have people at corporate headquarters familiar with the customs and traditions of overseas societies. But a look at the nation's major trading partners shows China, Japan, Taiwan, as well as several other Asian states, Canada, Mexico, Central and South America, and Europe. Of citizens with ethnic ties to these places, affirmative action on university campuses discriminates *against* all except Mexican Americans. Even island Puerto Ricans fail to pass Michigan's ethnic preference litmus test, though it's hard to say why their contribution to diversity would be

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

less than a former resident of San Juan now living in New York, Chicago, or Grand Rapids. Still, there was no doubt that Bollinger's strategic decision to sell *Bakke* as a doctrine long and fully internalized by progressive society proved a stroke of genius. With the Center for Individual Rights and its team narrowly focused on legal principles, which, however sound, had never been unconditionally embraced by the Court, Michigan's ability to preempt the sociological case would prove decisive.

Waiting for the Court

The author visited the Ann Arbor campus as the Supreme Court term was nearing its end with a decision expected any day. Several interviews had been suggested by the public affairs department, others came about through the author's own contacts.

In early summer, the law school was holding classes, and the campus churned with more student life than would be true at most universities. Law professors involved in the litigation were confident but not smug. They felt the school's admissions practice was close enough to the Harvard Plan endorsed by Justice Powell in *Bakke* to win sanction unless the Court chose to reverse *Bakke*, something not even the solicitor general had urged. Moreover, their sociological evidence had been effectively unrebutted, with the exception of some amici attacks on the Gurin Report. No one said so in so many words, but there was the impression that the undergraduate admissions procedure, with its automatic twenty-point bonus, had become something of a sacrificial lamb. The lawyers could defend the practice because the volume of undergraduate decisions was so many times that of the law school that a shorthand system could be justified. But they

could also see a "swing justice" finding one plan consistent with *Bakke* and the other, not—a result they could easily live with. Bringing a system into compliance with a judicially sanctioned procedure was not all that difficult. Adjusting to a decision banning race-conscious decisions except to remedy past discrimination would be a serious burden. They believed the university is a progressive institution in a progressive state. True, residential discrimination has a long history in the area. Racial antagonisms surfaced in the unionization period of the 1930s, in the Southern black migration to jobs on the assembly lines during and after World War II, and in the urban riots of the 1960s. There had been opposition to busing for purposes of school integration during the 1970s. However, the stratification of Michigan society was more industrial than racial, and there had never been a period of de jure segregation.

The center of campus, known as the Diag, is where many of the pro-affirmative action rallies were held since the lawsuits were filed in 1997. Often the organizers were the Coalition to Defend Affirmative Action by Any Means Necessary (BAMN)—the term "by any means necessary" borrowed from the call to action by Malcom X. A conservative graduate recalled that the speakers rarely addressed the benefits of diversity. Rather, race preferences were sold as a matter of justice to atone for centuries of injustice. He said his former journal, *The Review*, covered a number of such rallies. One, dated October 11–25, 2000, reported on a Diag rally where the speaker called CIR "wrong" and "racist" for leading the pack against race preferences. Another heralded the cause as "equality, and to restart the civil rights movement."[19] Before long, the same rally had moved to touch other high visibility

19. Ryan Painter, *Who Are the Real Racists?* 20 MICH. REV., Oct. 10, 2000.

issues—campus rape, sexual harassment, even advice for blacks on the curriculum. Choose only courses from the Comprehensive Studies Program, the speaker urged, recommending a basic curriculum long on social and political subjects. Engineering and other more technical areas were not recommended because "[a] minority cannot go to the others and do well." A single "student mother" also spoke at the rally. She said the CIR agenda includes preventing women "from suing rappers [*sic*] and defending sexual harassment." The conservative recommended that the author visit the student union "where the tables are self-segregated."[20] However, the summer crowd was too light to prove or disprove the self-segregation charge.

A black student, who had been recommended by the university administration as a smart and articulate young man, returned the author's message. A recent graduate, he was now returning to work on a masters degree in sociology. He was tackling a tough issue in his studies—the gap between blacks and whites in educational achievement. He said that his thesis will declare the problem to be "structural." The student expounded on his thesis:

> It is not due to any genetic disability of black people. Nor is the essential cause environmental—single parenthood, high crime areas, inadequate schools, and the like, though obviously any of these conditions can influence the performance of affected students. Instead the cause is white prejudice. It cuts across all income levels and school racial compositions. Teachers and school administrators are simply prejudiced against black students. They steer them into the least challenging academic programs. Once that sort of tracking occurs, the process is reinforcing. With white children racing ahead on academic tracks, the black kids are

20. *Id.*

left behind. The gap between them increases with the years. The prejudice goes even further. A white student who misbehaves is assumed to have a treatable problem. A black student who misbehaves is thought to be incorrigible. They give up on him. The school—if he is allowed to remain in it—becomes for him nothing more than a custodial institution.

Why don't more black parents insist their sons and daughters be placed on the faster track, complete with AP courses?

Because they are too respectful of authority. Studies show black parents have far more respect for educators than white parents do. When they are told something about their children, they believe it. It's true no matter what the school. I went to a prestigious New England prep school. My parents are middle class. And do you know, all my teachers thought I was there to play football. They couldn't imagine me being serious about books. In fact, I felt so beaten down, my studies suffered. They thought I had a learning disability. My parents nearly pulled me out of school before I told them I could do the work. Then when I told my advisor I wanted to apply to Michigan, they said, "No, don't do it. You may get in, but you'll never be able to keep up with the work there."

Did you find the same attitude when you arrived?

Yes, it's systemic.

Does it have anything to do with affirmative action?

Maybe, but it begins at birth and ends at death. Affirmative action doesn't cause the attitudes that start before school and accompany you through college. In fact, affirmative action is the first chance you have to be treated as an equal after experiencing the downside of being black all your life. It is not a gift bestowed on us by white people. It is a small down payment on justice. We should take advantage of it without apology.

Are you glad you came to Michigan?

> It was the best decision of my life. It put the resources of a great university at my disposal. I can look at all the people who doubted I could do it and show them that I know that they know why they doubted me.

The black law student, whose friend, a white professor, acquainted the author with a letter from the student discussing his situation, was two-thirds through his first year of law school when a colleague urged him to apply for the *Law Review*, the prestigious journal of legal analysis that is considered a ticket to jobs clerking for important judges or working for the best and the brightest law firms. In most cases, only those at the upper reaches of each class are invited to compete, and only those whose ability to research and write in the scholarly but fluent manner of legal scholarship make the final cut. However, the student soon discovered that under the *Law Review*'s affirmative action program, black competitors did not have to come from the upper reaches of the class as long as their grades were not "below a threshold to be determined by the Editor-in-Chief and the Managing Editor." Nor did their legal writing have to be distinguished, merely above "a zero on the Writing Competition." Affronted by the potential stigma of being judged an affirmative action *Law Review* member, the student declined to check the "Black" box on his application. On the basis of merit, he was invited to compete and awarded a place on the review. Still he was not mollified. For all the benefits of giving minorities a chance, increasing the number of black voices in legal literature, and providing an opportunity for those whose real abilities were repressed by prior discrimination, he urged that the policy should be changed. Minorities who were given their places through affirmative action "have a dubious cre-

dential in the struggle for competitive employment." Minority *Law Review* students also "face subtle and explicit doubt in the eyes of non-Review students" and hostility from those white students who applied but were not accepted. Those minorities who declined to enter through affirmative action channels face a particular irony in that "we are as qualified as white members but nobody knows it." The student added: "Personally, I am tired of having my achievements doubted." When he gained acceptance to the UM Law School, many thought he owed his acceptance to being black. "Finally, with the *Law Review*, I thought I could attain recognition for my merit rather than my color. Unfortunately, my membership is tainted." The letter to his professor friend was written in 1992. More than a decade later, the *Law Review* affirmative action policy persists.

Justice O'Connor's Day

On June 23, 2003, Justice O'Connor delivered the opinion of the Court in *Grutter v. Bollinger*, the law school case. After a summary of the facts, Justice O'Connor reviewed, at some length, Justice Powell's *Bakke* opinion, particularly his holding that race can be "a single though important element" in the consideration of the contribution an applicant might make to the university community. While declining to apply the *Marks v. United States* precedent, which would have bound the court to the Powell opinion on the theory that it was the narrowest, she nonetheless effusively endorsed the substance of Powell's views, including his central holding "that student body diversity is a compelling state interest that can justify the use of race in university admissions."[21] Given

21. *Grutter v. Bollinger*, 123 S. Ct. 2325, at 2337 (2003).

the equivocal nature of the Bush administration's intervention and its contagious influence upon the presentation of Grutter's argument, it is hard to see how a majority could have wound up anywhere else on that question.

What about earlier O'Connor pronouncements in *Metro Broadcasting*, *Croson*, and *Adarand* suggesting, as directly as the English language can, that only prior discrimination and not diversity can provide a compelling interest sufficient to constitute a compelling need? Cutely, Justice O'Connor conceded that her own prior words might create that impression, "[b]ut we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[22] In other words, We said it, but we didn't mean it. Or at least, we didn't hold it, and we are thus not bound by it.

The next chunk of the decision serves as a monument to the success of Bollinger's strategy of mobilizing the educational, business, legal, even military establishments behind affirmative action. Paying little heed to her own past reasoning, O'Connor always found her way back to the position of society's elites. Indifferent as she had been during her years on the Court to the prerogatives of lower courts and other branches of government, in *Grutter*, she displayed unusual obedience to the whims of Big Education and its myriad allies.

"The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer," she wrote. "The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into

22. *Id.* at 2339.

account complex educational judgments in an area that lies primarily within the expertise of the university."[23] Also within the school's prerogative was the size of the minority force needed to achieve the intended benefits. If the school defined that size as a "critical mass," so be it. Both Michigan's own studies and the briefs of the amici show that in terms of students, substantial diversity "promotes learning outcomes and 'better prepares students for an increasingly diverse workforce and society and better prepares them as professionals' (citation omitted)."[24]

O'Connor continued: "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."[25] The identical perspective was offered by former senior members of the uniformed and civilian defense establishment who offered that a racially diverse officer corps "is essential to the military's ability to fulfill its mission to provide national security."[26] For all these reasons, O'Connor reasoned, "Effective participation by members of all racial and ethnic groups is essential if the dream of one Nation, indivisible is to be realized."[27]

Next, Justice O'Connor turned to the special role that universities in general and law schools in particular play as a training ground for the nation's political leadership. More than half the country's governors, half its senators, and a third of its House of Representatives come from the legal profession. "A handful of these schools account for 25 of the 100

23. *Id.*
24. *Id.* at 2340.
25. *Id.*
26. *Id.*
27. *Id.* at 2341.

United States Senators, 74 United States Court of Appeals judges, and nearly 200 of the more than 600 United States District Court judges."[28] To support the proposition that the "right" law schools make all the difference, Justice O'Connor cited the 1950 case of *Sweatt v. Painter*,[29] involving a black man excluded from the University of Texas Law School—the only public law school in the state—solely on the basis of race. When the Court ruled that Sweatt could not be denied an education by the state, Texas opened a second, and second-rate, law school exclusively for blacks with neither a library nor its own faculty. This action was overturned when the Court, which compared the status, resources, faculty, and alumni network of the two schools, concluded that separate but equal was in this case not equal at all. The *Sweatt* case is a far cry from *Grutter v. Bollinger*, where whites were excluded to make room for less-qualified blacks; where plaintiff was asking, as had Mr. Sweatt, that race be excluded as a factor in admission; and where a "second-tier" law school, such as Detroit's Wayne State, may have a much more aggressive network inside Michigan than the University of Michigan, which sends three-quarters of its graduating class to practice in other states.

It is also not at all clear that the same advantages that accrue to graduates of elite universities would be present if the superstructure of merit supporting each edifice were to be structurally compromised, particularly as regards the beneficiaries of that compromise. Institutional decisions, especially with respect to state universities, enjoy a presumption of fairness, which may be critical to their continued generous public backing.

28. *Id.*
29. *Sweatt v. Painter*, 339 U.S. 629 (1950).

On the issue of narrow tailoring, Powell's guidance was tricky and obtuse—the sort of judicial circumlocution that might have been the stuff of comedy had anyone understood it well enough to laugh. To pass constitutional scrutiny, Powell wrote, and O'Connor recalled, a system "cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants."[30] Race can be a "plus" in a particular applicant's file, but not so as to "insulate the individual from comparison with all other candidates for the available seats."[31] The program, therefore, must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[32]

If Powell's artful construction means anything, it means that individuals may have their race or ethnicity considered, sometimes heavily so, in terms of their ability to contribute to the diversity of campus viewpoint and experience. For this to evolve into a scheme to accumulate a "critical mass" of a handful of favored minorities—most of them individuals from comfortable backgrounds and with academic credentials a standard deviation or more below the mean of admitted whites and Asians—is to ridicule the principle of stare decisis while purporting to endorse it. But this is just what Justice O'Connor did, with the benediction, "We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan."[33] According to O'Connor, the program

30. *Bakke*, 438 U.S. at 316.
31. *Id.* at 317.
32. *Id.*
33. *Grutter*, 123 S. Ct. at 2342.

appears to be "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[34]

Justice O'Connor was more convincing in rejecting the suggestion that Michigan's plan must fail because the Law School failed to seriously consider race-neutral alternatives. "We disagree," she wrote. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[35] The Bush administration brief was not persuasive in demanding consideration of the percentage plans of Texas, Florida, and California. According to O'Connor, "The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[36] Here the Court was only half right. Percentage plans only work, if at all, for undergraduate admissions, and, unless seriously doctored, they can result in a far less academically qualified class. On the other hand, the Court was hardly in a position to fret about the lack of real diversity epitomized by percentage plans given the artificial diversity in Michigan's admission schemes.

Justice O'Connor was clearly bothered by the timeless

34. *Id.* at 2343.
35. *Id.* at 2344.
36. *Id.* at 2345.

quality of the plan that she had approved. Indeed, far more than remedies for past discrimination, the pursuit of diversity is, by definition, a perpetual interest that must be satisfied by race preferences in admissions until such time as the gap in academic credentials narrows substantially. Limiting the remedy to a period of years would thus have been self-defeating. Therefore, Justice O'Connor, noting that twenty-five years had passed since the *Bakke* ruling, chose to close the body of her opinion with a more ambiguous declaration: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[37]

"Critical Mass"

Neither in brief nor in argument had the law school explained why the "critical mass" of African Americans was so much higher than that of Hispanics and so vastly much higher than Native Americans. This disparity was an important point. After all, if the purpose of achieving that critical mass was to avoid feelings of isolation among minorities, or to avoid making them feel as though they have to be spokespersons for their race, or to achieve the positive benefits of student interaction, it stands to reason that the numbers of admitted blacks, Hispanics, and Native Americans ought to be pretty much alike.

Chief Justice Rehnquist, writing for the four dissenting justices, charged that the majority's failure to explore the disparity between word and deed was inexcusable: "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in

37. *Id.* at 2347.

its deference."[38] Reviewing application and admissions figures for 1995 through 2000, Justice Rehnquist produced charts showing that the percentage of blacks in the applicant pool, which ran from 7.1 percent to 9.4 percent, was substantially mirrored by the percentage of blacks among those admitted (7.3 percent to 9.7 percent). For Hispanics and Native Americans, the trends were virtually identical. Hispanics ranged from 3.8 to 5.0 percent of the applicant pool and 4.2 to 5.1 percent of those admitted; Native Americans, from 0.7 to 1.1 percent of the pool, and 1.0 to 1.6 percent of those admitted.[39] The law school's disparate treatment of these minority group applicants "demonstrate[s] that its alleged goal of 'critical mass' is simply a sham," wrote Rehnquist. "The Law School has managed its admissions program, not to achieve a 'critical mass,' but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'"[40]

It is noteworthy that Rehnquist based his dissent not on the obsolescence of the *Bakke* standards but on their violation. Justice Kennedy, whose lonely dissenting opinion was nonetheless important because he is closer to the center of the Court on affirmative action issues than anyone save Justice O'Connor, was even more emphatic in endorsing the continuing viability of *Bakke*. "The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own

38. *Id.* at 2366.
39. *Id.* at 2368.
40. *Id.* at 2369.

controlling precedents."[41] The majority confused deference to a university's empirically supported judgment that racial and ethnic diversity contributes to the educational environment with deference to the means the university used to achieve that goal. The search for a so-called critical mass "is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[42] Deferring to such practices, stated Kennedy, carries grave dangers: "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."[43]

Finally, Justice Kennedy had the temerity to expose the dirty little secret of campus diversity: In the words of Yale Law School professor Peter Schuck, many professors who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."[44] More will be said on this subject in the final chapter. Suffice it to say that the typical affirmative action advocate favors the policy as a means of redressing nearly four centuries of indignity heaped upon black men and women. However, because the Supreme Court has foreclosed that route to remedial action, pro-affirmative action advocates have reached for diversity as a substitute. "This is not to suggest the faculties at Michigan and other law schools do not pursue aspirations they consider laudable and consistent

41. *Id.* at 2370.
42. *Id.* at 2371.
43. *Id.*
44. *Id.* at 2372.

with our constitutional traditions," Justice Kennedy wrote. "It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision making."[45]

The dissent of Justice Thomas, joined by Justice Scalia, has won praise even from his ideological critics, and deservedly so. In terms of intellectual passion, legal weight, and precision of argument, it stands alone among the day's opinions. In an age less burdened by political correctness and conformity, Thomas might well be recognized as a great black intellectual. Today, the voices of victimization, the excuse-mongers, the seekers of special treatment have read this fiercely independent thinker not only out of the debate, but also out of the race.

Thomas began by citing Frederick Douglass's injunction that what the Negro needs "is not benevolence, not pity, not sympathy, but simply *justice.*"[46] He then took dead aim at Michigan's elitist admissions policy, which necessitated special treatment for the preferred minorities selected for their contribution to the classroom "aesthetic," even though "[r]acial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy."[47] Thomas then forcefully presented the case that Michigan had no compelling interest in maintaining any public law school, let alone an elite one. Several states—Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island—maintain no accredited public law schools at all. In fact, only California, Texas, and Virginia maintain elite law schools on a par with Michigan. Further, although the University of Michigan grad-

45. *Id.*
46. *Id.* at 2350.
47. *Id.*

uates about 30 percent of the in-state law school graduates each year, only 6 percent of the state bar-takers are Michigan alumni. This is because only about 27 percent of each year's class is from the state and only 16 percent of the law school's graduates stay in Michigan to practice.[48] This is a powerful set of numbers, and it makes it hard to imagine any compelling interest on the part of Michigan in supplying Chicago, New York, and Los Angeles with lawyers. Moreover, the law school's claim of its need to discriminate is entitled to no judicial weight under strict scrutiny standards. Indeed, the entire First Amendment rationale for admissions discrimination, defined first in *Bakke* and applauded by Justice O'Connor, is misplaced because no case relied on as precedent by the Court allowed the assertion of one constitutional right to trample another.

Thomas chose to accept O'Connor's twenty-five-year projection as a hard deadline for phasing out racial preferences, but his notions of justice were not soothed. "For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. . . . It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to 'do nothing with us!' and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated."[49]

In his short dissent, Justice Scalia, joined by Justice Thomas, was characteristically sarcastic. The decision, he warned, would prove contagious. Private employers could now be praised, rather than criticized, "if they also 'teach'

48. *Id.* at 2354.
49. *Id.* at 2350.

good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring."[50] He predicted new lawsuits would erupt over particulars of the decision, parenthetically adding, "Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies."[51]

The *Gratz* decision, written by Chief Justice Rehnquist, struck down the undergraduate admissions practice of awarding 20 points out of the 100 needed to guarantee admission for membership in a preferred minority group.[52] The Court held that the rigid practice was not narrowly tailored under Justice Powell's *Bakke* standard, which purported to demand the individualized consideration of race, along with other factors, in seeking a diverse class. Of course, Powell had also appended the Harvard Plan to his opinion, which underlines the importance of having sufficient numbers of minorities on campus to become a factor in the institutionalization of diversity. Having voted against *Bakke* in 1978, the Chief Justice was now employing it as the standard against which race-conscious admissions procedures must be judged. In a case that began amid great hopes by conservatives to see *Bakke* overturned, only Justices Thomas and Scalia seemed prepared to go in that direction. Justice O'Connor joined the majority opinion and also wrote a sep-

50. *Id.* at 2349.
51. *Id.* at 2350.
52. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

arate concurring opinion that was something of a victory lap at the time. Noting that the University of Michigan remains free to modify its system, she declared the current system to be "a nonindividualized, mechanical one" and thus outside the bounds of *Bakke*.[53]

O'Connor's long judicial journey on affirmative action, through union contracts and compensatory hiring schemes, broadcast licensing and government contracting preferences, had brought her and the Court back very close to where things were when she first took her place on the bench. As University of Michigan officials gave gleeful media interviews on the steps outside, those who believed O'Connor had been leading the Court from the shadows of racial stereotyping to the sunlight of equal protection were bitterly disappointed.

53. *Id.* at 2433.