Chapter Ten
After Michigan

On August 23, 2003, the University of Michigan announced it had adopted a new process for undergraduate admissions to replace the one that had been disallowed by the Supreme Court in *Gratz v. Bollinger*. Henceforth, there would be no point system, no fixed advantage applicable to each and every member of a preferred minority. Instead race would be one of many factors considered in an admissions process that will be "flexible, holistic and individualized." The school hired more than a dozen new readers to review applications and make a recommendation regarding the disposition of each one. A professional admissions counselor would then conduct a "blind reading" of the application and make his or her own recommendation.[1] The complete file would then be sent to a senior level manager in the office of university admissions. If there were disagreement over the case, the file would go to an admissions review committee for further consideration. The task of

1. University of Michigan Undergraduate Admissions Application, Guidelines and Process 2003–2004 (Regents of the University of Michigan).

assessing each applicant in this holistic manner would be facilitated by new essay questions designed to give the applicant more of an opportunity to describe his or her own special traits and influences. "Race will," in the words of an accompanying handout, "be only one of many additional factors taken into consideration during the review process, as will socioeconomic factors, geography, and special or unique experiences, skills and talents."[2] Not until at least the fall of 2004 will observers be able to begin to assess whether the new procedures provide a different outcome from that experienced under the outlawed system, namely the acceptance of every minority applicant minimally qualified to pursue the school's academic program. "I believe the new system will allow us to continue enrolling a student body that is both academically excellent and diverse in many ways," said Mary Sue Coleman, Bollinger's successor as university president.[3]

Striking by its absence from the new policy was any reference to the "critical mass" standard approved by the Court in *Grutter*, the companion law school case. This may be because the school has finally absorbed *Bakke*'s essential lesson: The more vague the standard, the less likely a successful legal challenge. It may also be that the school wants to avoid what may be called "the guffaw factor," a claim so transparently calculated to comply with the letter rather than the spirit of the law that it provokes laughter in any knowledgeable audience. The reason adapting the standard approved for the law school to the university as a whole might inspire such mirth would be its underlying assumption that the number of minorities needed to overcome stereotypes

2. *Id.*
3. *Id.*

and otherwise share perceptions with classmates based on experiences unique to a race or ethnic group varies in direct proportion to the size of the class. Sixty-eight blacks in a class of 500 means 680 to a class of 5,000—a number that even newly deferential Justice O'Connor might have a hard time swallowing. Even more troublesome would be the effort to apply the critical mass shibboleth to the entire range of academic disciplines. As critics have noted, ten African American students might well enliven a law school class dealing with constitutional law, civil rights litigation, or even trial practice. Transferring this concept to mechanical engineering, business accounting, or German 101, however, is a stretch.

Michigan was not the only school reevaluating its admissions procedures. The Supreme Court decisions affected every public college and university in the country and, via the Civil Rights Act of 1964, every private school receiving federal aid. A study published in 2001 by the Center for Equal Opportunity, using data provided by forty-seven public colleges and universities, concluded that race preferences were far more widely practiced and larger than had previously been appreciated, particularly at the most selective of the schools reviewed. The combined verbal-math white-black SAT difference was, for example, 180 points at the Naval Academy, 210 points at William and Mary, 230 points at the University of Michigan, and 330 points at UC-Berkeley.[4] By summer's end, these and other schools had been huddling with each other and with representatives of the Council on Higher Education to bring their programs into line with the *Bakke-Bollinger* standards. Under a program designed with little heed to *Bakke*, which refers to race as a potential tie-

4. Lerner & Nagai, *A Critique of the Expert Report of Patricia Gurin*.

breaker between two candidates of relatively equal credentials, not as a ladder for a barely qualified student to reach the window of opportunity, those kinds of spreads might be difficult to sell. Thus, even though the Court had upheld the Michigan Law School operation, schools that had in place systems similar to those struck down by the circuit courts in Texas and Georgia could not look forward to vindication by the Supreme Court.

In a sense, the most laudable opinions in the two cases were Justice Thomas's dissent in *Grutter* and Justice Ruth Bader Ginsburg's dissent in *Gratz*. Justice Thomas saw diversity as an illegitimate justification for riding roughshod over the equal protection clause. Justice Ginsburg rejected the claim of a majority of her colleagues that the discrimination of inclusion and that of exclusion must be weighed on the same scale. Racism still exists in the country, she maintained. The deprivations born of slavery and segregation continue to haunt our nation. "[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* [citation omitted] was the same as the issue in *Brown v. Board of Education* [citation omitted] is to pretend that history never happened and that the present doesn't exist."[5] Moreover, she said, the drive within the academic community to reach out to minorities is so pervasive that attempts to limit or channel it will only bring about a situation where "institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they

5. *Gratz*, 123 S. Ct. at 2444 (2003).

submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished."[6] Justice Ginsburg was not manufacturing her examples from thin air. As she noted, in suggesting "race-neutral" alternatives to race preferences, the brief of the United States suggested schools could consider "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays."[7] Justice Ginsburg warned, "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."[8]

Many scholars—even some firm supporters of affirmative action—have been highly skeptical of the emergence of diversity as its principal vehicle in academia. For example, Dean Anthony T. Kronman of the University of Florida said of diversity, "It is striking that a word which a generation ago carried no particular moral weight and had, at most, a modestly benign connotation, should in this generation have become the most fiercely contested word in American higher education."[9] Indeed, the NAACP, which during the 1950s and 1960s urged a policy of color-blindness, opposed early efforts at preferential hiring as "a crevasse which has no bot-

6. *Id.* at 2446.
7. *Id.*
8. *Id.*
9. Anthony T. Kronman, *Is Diversity a Value in American Higher Education?* 52 FLA L REV 861 (2000).

tom."[10] Peter Schuck of Yale Law School recites only the obvious when he noted, "[M]any of 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."[11]

Professor Samuel Issacharoff of Columbia, who spent eight years defending the University of Texas affirmative action program in the *Hopwood* case, sees diversity as a poor rationale for minority preferences. He wrote: "I have now spent the majority of my professional life in the academy and I have seen the concept of diversity enshrined at the highest levels of the academic pantheon. But in the endless discussions of diversity, I have never heard the term seriously engaged on behalf of a Republican, a fundamentalist Christian, or a Muslim."[12] If diversity is the goal, then limiting it to blacks, Mexican Americans, or Puerto Ricans—as long as they don't dwell on the island itself—is a farce, the only purpose of which is to avoid judicial rejection.

Diversity, of course, became the rationale of choice for colleges because, after the Supreme Court in *Wygant* ruled out societal discrimination as a justification for race preferences, the colleges were left with either the diversity claim from *Bakke* or trying to convince federal judges that the preferences were remedies for their own past discrimination. For thirty years running, any discrimination the schools practiced was on behalf of minorities rather than against them, so it was really a choice between the fabricated diversity ration-

10. Deborah C. Malamud, *Race, Culture, and the Law: Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1674 (1997).

11. PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 160 (2003).

12. Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 11 U. CHI LEGAL F 18 (2002).

ale and nothing. In grasping at the only straw available, the academic community appropriated a policy unconstrained by time, with beneficiaries, such as Hispanics, who had no reasonable claim to compensatory relief; with no demonstrated record of accomplishing anything positive; and with a history of mischief in its impact on academic processes.

Issacharoff made several telling points regarding diversity in academia. Academic officials are granted an unparalleled license to determine how much diversity is necessary, when clearly "[e]ach additional black enrollee brings diminishing marginal returns in terms of racial diversity."[13] After the school has a minimum number of blacks on campus, which is worth more in terms of diversity—the next black, or "the first Alaskan resident, or Christian fundamentalist, or Vietnamese immigrant, or former soap opera star, etc."?[14]

Choosing students for reasons of diversity degrades rather than serves the fundamental values of academia. Derek Bok, co-author of *The Shape of the River*, the prodiversity academic manifesto, had an entirely different perspective with respect to faculty appointments when he was president of Harvard. He wrote: "If selection committees decide to pass over the ablest candidates in order to appoint a minority scholar, they can scarcely be said to be furthering the primary educational aims of the institution. On the contrary, they will generally be acting with a clear probability of diminishing the quality of teaching and research."[15]

Many academicians also take exception to the confusion between racial or ethnic diversity and viewpoint diversity.

13. *Id.* at 25.
14. *Id.*
15. DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 111 (1982).

To begin with, in the vast majority of classes—biology, civil procedure, differential calculus, for example—race and ethnicity are simply irrelevant. But what of other courses, such as constitutional law or civil rights? Writing in the Michigan *Law Review*, Terrance Sandalow recounted, "My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by a white student."[16]

Sandalow is also among a growing number of academicians who make the case that affirmative action has been a substantial contributor to the process of grade inflation, which has increasingly undercut the integrity of the college classroom. Why have the two been linked? According to Sandalow, "Liberal guilt is one reason. Another is the fear that a high failure rate would adversely affect an institution's competitive position in the intense competition to attract the most promising African-American students. But other more justifiable reasons have also played a role. Many faculty members believe that it would be ethically problematic to admit students who will do less well than their classmates, inviting them to invest a year or more of their lives and perhaps substantial sums, and then fail them out of school."[17]

16. Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1903 (1999).

17. *Id.* at 167.

Even had studies conclusively proven the linkage between the increased presence of preferred minorities on campus and positive academic outcomes, the constitutional case for diversity would still have been weak. Issacharoff came at the issue from an unorthodox but effective angle. Suppose it were shown that students learned better in a homogeneous environment because it provided fewer distractions and was less emotionally taxing. "Would any serious constitutional scholar claim that such reasoning would justify the use of racial classifications to reinforce segregation?"[18]

These were powerful arguments to be made in the courts but were, in the main, neglected by both CIR and the Justice Department. CIR put most of its stock into the claim that diversity had not been declared a compelling interest by the Court and that, in any event, it could be achieved by means more narrowly tailored than the law school's "critical mass" approach. Justice hurt the case by lauding diversity and assuring the Court that diversity could be achieved by the political hocus-pocus of percentage plans. Both established credentials as backers of plans specifically calculated to achieve racial and ethnic diversity, so long as the plans themselves were "race neutral." Given the importance of the amici briefs and their own purported compelling need for diversity, it is not obvious why the basis on which the need was asserted wasn't itself subjected to more careful scrutiny. Yes, all know the demographics of the country are changing, and yes, all are aware of the increasingly global nature of U.S. economic interests. However, there is now a vast body of literature, accumulated over forty years, of corporate diversity. Summarizing much of this literature in 1998, Katherine Y. Wil-

18. Issacharoff, *Law and Misdirection*, at 28.

liams and Charles A. O'Reilly III offered the following: "Research has documented that categorizing people into groups, even on trivial criteria, can lead members to perceive out-group members as less trustworthy, honest, and cooperative. . . . This process results in increased stereotyping, polarization and anxiety. In heterogeneous groups, these effects have been shown to lead to decreased satisfaction with the group, increased turnover, lowered levels of cohesiveness, reduced within-group communication, decreased cooperation, and higher levels of conflict."[19] The authors also stated: "Large amounts of diversity in groups may offer little in the way of added value from unique information and make group cohesion and functioning difficult."[20]

Corporations may embrace diversity out of a sense of public duty. They may advertise their diversity in markets that care deeply about such things. They may satisfy costly government oversight by developing affirmative action or diversity plans. They may make it more costly for competitors to enter the field knowing they may have to match expensive plans already in place. However, the weight of the literature is such that an amici could more credibly have argued a compelling interest in homogeneity rather than diversity. (Again, no one is recommending a reversion to the days of racial and ethnic discrimination.) The paradox could have been used to unmask the key argument of the university, because no sane person would argue that the burdens of diversity justify a policy of old-fashioned segregationist selectivity.

19. Katherine Y. Williams & Charles A. O'Reilly, *Demography and Diversity in Organizations: A Review of 40 Years of Research,* 20 RESEARCH IN ORGANIZATIONAL BEHAVIOR, 77, 84 (1998).

20. *Id.* at 90.

Black Academic Performance

The strongest case for upholding Michigan's two admissions procedures had nothing to do with the law and everything to do with inadequate academic performance by blacks in this country. By now, the statistics that once shocked have become familiar. Several of those statistics were integrated carefully into the respondents' Supreme Court brief. Others can be easily obtained. Presented as they were on behalf of Bollinger, they amount to little more than a plea for mercy because merit would cut with cruelty. Whites, for example, are fourteen times as likely as blacks to achieve the combined verbal-math score of 1300 widely regarded as a minimum for acceptance to the nation's highly selective colleges. The mean LSAT scores for Harvard and Yale students in 1995–96 was 170, a figure reached by only seventeen black students in the United States.[21] No one has as yet offered a convincing explanation for this sorry story. Income? The lowest income quartile of whites outscores the highest quartile of blacks. Unfair standardized tests? The tests overpredict the performance of blacks in college or law school. More whites take the preparatory exams? In 1996–97, 28 percent of black students took an LSAT preparation course; their median score was 141.58. However, only 31 percent of whites took a preparation course for the exam, and their median score was 152.11.[22] What about the bad schools, the inadequate K–12 schooling? Yes, many inner-city schools are bad, at least in terms of student performance and some—far fewer than

21. Respondent's Brief on the Merits at 6, *Grutter v. Bollinger* (No. 02-241), 123 S. Ct. 2325 (2003).

22. Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C.L. REV. 521, 553 (2002).

appears generally appreciated—in terms of resources. What about the blacks who attend the best suburban, or even private schools? They do better, certainly better than the inner-city blacks, but consider the case of Shaker Heights, Ohio, an upper-middle-class suburb of Cleveland. The town organized during the 1960s to establish and maintain an integrated community with top schools and other public amenities. In many respects, the community has been a relative haven for citizens who believe that, in the future, blacks and whites must live as neighbors. Yet the single intractable problem has been and remains the huge gap between black and white students from the elementary school level all the way through high school. On proficiency test scores for the year 1995, white fourth-graders scored 98 percent in math, 99 percent in reading, 95 percent in writing, and 94 percent in science. For blacks, the scores were 73 percent, 90 percent, 74 percent, and 51 percent, respectively. Among white sixth-graders, the scores were 86 percent in math, 97 percent in reading, 93 percent in writing, and 79 percent in science. For blacks, scores were 28 percent, 70 percent, 67 percent, and 21 percent, respectively. White eighth-graders scored 92 percent in math, 100 percent in reading, 93 percent in writing, and 91 percent in science. The respective black scores were 37 percent, 83 percent, 77 percent, and 48 percent. For black students, the mean SAT scores in 1996 were 485 verbal and 471 math. For whites, those scores were 600 verbal and 598 math.[23]

Both black and white parents were concerned and invited the distinguished black sociologist John U. Ogbu for an extended visit to the city and its schools. Ogbu found the

23. JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB 36 (2003).

most profound problem to be what he called "academic disengagement" by black students and, to some extent, their families. Compared with whites, blacks cared less about school, sought easier courses, did less homework, studied fewer hours, and were content to do just well enough to graduate and go onto college. Parents too were less involved with educational issues affecting their children than were white parents. Some felt the teachers were racist, others experienced a sense of low expectations, and many believed that taking advanced placement and other challenging courses was "a white thing."[24]

Now consider a University of Michigan admissions officer. He may have a number of applicants, both black and white, from Shaker Heights. That officer knows there will be a sliver of highly qualified blacks at the top of the class, and he also knows that Shaker Heights is about as good as it gets for a suburban public school district. He knows too that if he applies honest race-neutral standards, some of the blacks he turns away will wind up at other selective colleges, and he may be asked to explain why he "lost" them. Others will go to less-selective schools where they have a lesser chance of matriculating after four or even six years and a much lesser chance of going to graduate school. He is aware of the history of slavery and segregation, the centuries of Jim Crow and job discrimination, the white race riots when blacks sought to rent homes so they could work in defense plants during World War II, and the black rioting that followed Martin Luther King's murder in 1968. He also knows that in the year 2000, blacks, with 12 percent of the population, made up 48.8 percent of those arrested for murder and nonnegligent manslaughter, 53.9 percent of those arrested for robbery, and

24. *Id.* at 116.

34 percent of those arrested for aggravated assault. That same year, blacks constituted 50 percent of the two million jailed offenders. Current projections have 28 percent of black males serving time in state or federal prison during their lifetimes, compared with 4.4 percent of white males.[25] Is this officer likely to turn down the application of the "average" Shaker Heights black applicant and others like him, or is he going to find in this young student the prospect of contributing meaningfully to campus diversity at the University of Michigan? If he rejects this student and others like him, will he fuel the sense of academic disengagement among black students in Shaker Heights? Or will they slowly come to the realization that hard work, and not racial entitlement, is the way to make progress in this society? Making such a decision is a weighty burden for any school official to bear.

Moving Ahead

Those who have resisted race preferences in higher education, as in all other walks of American life, now confront the question of where to go after Michigan. The extraordinary battle waged at the direction of the university's former president Lee Bollinger reversed the march of precedent that had been gaining momentum against preferences based on race and succeeded in gaining judicial sanction for a precedent constrained by neither time nor workable standard, save—for a while anyway—the university's own discretion. Bollinger succeeded by attracting the vote of Justice Sandra Day O'Connor, who had previously been leading the judicial march in the opposite direction.

25. Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C.L. REV. 521, 556 (2002).

The first option is simply to keep fighting in the courts. Few of the selective colleges and universities practicing affirmative action have programs that perfectly reflect the guidance first offered by Justice Powell in the form of the Harvard Plan and later endorsed by Justice O'Connor. Perhaps with the right case, the Court could tighten its standards. Perhaps a case filed today would not reach the Court until personnel changes have occurred. Dogged organizations like the Center for Individual Rights and others are supposed to fight like pit bulls for the right cause, and equal protection of the law is surely a cause worth fighting for.

There are, however, serious obstacles to proceeding in this fashion. For one thing, at least six and perhaps seven justices—depending on where one places Chief Justice Rehnquist—embraced *Bakke* in one *Bollinger* case or the other. The Court will almost certainly allow the dust to settle before getting back into the arena. It is likely to be many years before certiorari is granted on another diversity case involving higher education. Also, opponents of race preferences are themselves divided over certain key issues, never a good omen in terms of launching a reenergized campaign. How important is diversity to a major university? Should a school like Michigan be forced to choose between diversity and the highest academic standards? Should states be in the business of seeking racial information in the first place? Such prominent opponents of race-conscious policies as Thomas Wood and Ward Connerly are at loggerheads over these issues. Why further stress an important alliance?

One must also be concerned about what would be won, even if a new round of lawsuits proved more successful than the last. Such a victory would undoubtedly be met—as were the "victories" in California, Texas, and Florida—by a proliferation of facially race-neutral measures designed to restore

the status quo ante before a particular program was abbreviated by referendum, statute, or executive action. The percentage plans that took hold in California, Texas, and Florida are being judged mainly by their ability to restore the minority student presence to levels enjoyed before the intervening event, what Justice Ginsburg called affirmative action through "winks, nods, and disguises."[26] This, in and of itself, is not objectionable if the minority students coming back represent a quantum leap in academic credentials over those previously admitted through affirmative action. But this is not happening because of the paucity of exceptional black students in the pipeline. Of course, at their best, the percentage plans do not reach graduate schools, which have their own forms of subterfuge. Consider the machinations of UCLA in the wake of Prop. 209. First it sought to reacquire a pre-209 minority presence by stuffing its admissions material with a ton of socioeconomic data on the student—family income, parents' education, single mother, quality of the applicant's neighborhood. Next it borrowed from India—that bastion of racial harmony—a notion called the "creamy layer" principle, trying to identify members of "castes" able to rise to the top like cream in a container of milk. UCLA has also recruited law students willing to study critical race theory, a black intellectual discipline wedded to the notion that blacks will benefit more by using political clout to get their fair share of the pot rather than by relying on the rule of law. Meanwhile, the president of the University of California at Berkeley has proposed terminating reliance on SATs, and Mexican American and other Spanish-speaking students are

26. *Gratz*, 123 S. Ct. at 2431.

seeking to have their fluency in Spanish recognized on the companion SAT 2 test.[27]

This is the predictable response of colleges and universities, perhaps aided by sympathetic legislatures to adverse court decisions. Fighting these "race-neutral" alternatives to affirmative action in the courts would require the same commitment and at least as much time as it took to strike down the assortment of segregationist dodges during the 1950s and 1960s. First came the resourceful pupil assignment plans, then the repeal of mandatory schooling legislation, then the "freedom of choice" plans, then the closing down of entire school systems, and so on. After more than a decade of "desegregation" following *Brown v. Board*, fewer than 3 percent of the black children in the states of the old Confederacy were attending integrated schools. Those who today support race preferences are as committed to their way of thinking as were the segregationists of the mid-century South. They are just as durable, and, although we may disagree with their methods, their underlying cause is infinitely more just. It is, in short, a potential court battle that will never end, that will bitterly divide antipreference forces, and that will never produce final victory or defeat. For that reason, the battle is probably not worth fighting.

A second option involves trying to achieve by referendum what was lost in the courts. Michigan would be one juicy target for a 209-type referendum. Other states may follow. The idea's strength is that it plays into the strength of public opinion, which in every reliable survey has shown itself against special preferences based on race. It is also more expeditious than a lawsuit, which takes years to fight and may wind up with a denial of certiorari. The downsides are enor-

27. Greenberg, *Affirmative Action in Higher Education*, at 521, 552.

mous, however. Such referenda are bitterly divisive. Experience in both Washington State and California makes it clear that though majorities opposed to race preferences can be mobilized for a single vote on the issue, they quickly return to their normal diffuse voting patterns, while the "losers" keep a grudge against the party they hold responsible for their defeat. For that reason, the Republican "pros" hate these referenda battles. Governor Jeb Bush's One Florida executive edict had, as its principal and successful mission, the goal of getting Ward Connerly, and the proposed referendum in his briefcase, out of his state. The referenda, also, of course, have nothing to do with the elaborate percentage plans, which could be expected to appear in the wake of a referendum or other action abolishing racial preferences. Again, the objection to such plans is not that they restore the relative racial numbers but that they do so in disguise, and also, that the relative academic credentials gap between majority and minority students has barely budged. So, in the end, race preference foes would likely be back where they started, with a fair amount of political ill will generated by their efforts. Small wonder many conservative officeholders would rather swallow preferences—disguised or otherwise—than referenda designed to shut them down.

I propose, instead, letting affirmative action go forward with one significant change and several reforms designed to ensure both transparency and "truth in packaging." Either by executive order or, if necessary, legislation, my plan would:

1. Permit all colleges and universities subject to federal jurisdiction under the equal protection clause or the Civil Rights Act to accept and enroll any number of affirmative action students they wish.
2. Require all such institutions to file with the U.S. Secretary

of Education timely and accurate records of all such admissions.

3. Maintain on "defer consideration" or waiting lists a sufficient number of applicants from nonpreferred racial or ethnic categories (mainly whites and Asian Americans) so as to be able to match the number of affirmative action enrollees on a one-for-one basis. We may call this group the "Equal Protection" list.

4. Admit and enroll in each entering class the identical number of "Equal Protection" applicants consisting of races not eligible for affirmative action as there are affirmative action admissions.

As a rule of thumb, U.S. Department of Education officials can assume that any class in which the difference in SAT (or the ACT equivalent) between blacks and Hispanics on the one hand and whites and Asian Americans on the other is 75 points or more, or high school GPA differences are 0.3 points or more, is one in which race preferences have been practiced, and, thus, ameliorative steps would be required.

This proposal takes its inspiration from an earlier generation of affirmative action cases, which tended to pay close attention to the hardship worked on innocent victims of race preferences. Admittedly, the courts in the employment cases were more protective of whites whose tenure or seniority were threatened rather than with white job applicants, but since a certain asymmetry exists between the employment and education spheres, the focus on student admissions seems appropriate. Colleges and universities would have to expand their facilities to accommodate an indeterminate number of additional students, but the additional tuition generated could ease any administrative pain. Had this proposal

been in effect during the past several years, the entire diversity charade could have been eliminated, colleges and universities could have devoted more of their time to educating their students and less to organizing their campuses along ethnic and racial lines. Also instead of battling their way to the Supreme Court and lamenting the opportunities denied, Barbara Grutter, Jennifer Gratz, and Patrick Hammacher would have been studying at the University of Michigan.