Chapter Six

The Michigan Case

On August 2, 1996, the *Detroit News* ran a short piece on the third page of its Metro section, reporting that a group of professors was trying to find out whether state colleges and universities were applying the same admissions standards to applicants regardless of race or ethnicity. The group, the Michigan Association of Scholars, was affiliated with the National Association of Scholars and, like the parent organization, had been waging an offensive against the movement for political correctness in such areas as speech codes, racial preferences, and other manifestations of the diversity mantra. Its ultimate target was the University of Michigan at Ann Arbor, simply because, despite its 60 percent undergraduate admissions rate, it was by far the most selective university in the state and maintained a number of graduate programs, like its law school, that were even more selective in picking students. The national data on minority performance on standardized tests suggested that few would be admitted to the university without substantial preferences.

Few of the state schools that the association surveyed

rushed forward with the requested information, despite the fact that at several, admissions standards were so relaxed as to border on open enrollment. For its part, the University of Michigan appeared more anxious to provide rhetoric than numbers. "What we're doing comports with the law and is appropriate," said Lisa Baker, a public affairs officer. "The best evidence of success is that we have one of the highest retention rates in the country. Around 94 to 95 percent of freshmen go on to become sophomores. Over 85 percent of all students graduate in six years. For African Americans, the rate is 70 percent, one of the highest in the country."[1]

However, procedures begun under the state's Freedom of Information Act and the intervention of four Republican state legislators opposed to race preferences soon pried the numbers loose. On June 22, 1997, the *News* published a front-page report based on a computer analysis of the statistics that the paper had acquired from the school showing that blacks, Hispanics, and Native Americans were admitted to the University of Michigan at dramatically higher rates than Caucasian and Asian students with the same grades and test scores. In 1995, for example, 78.6 percent of the so-called underrepresented minorities (African Americans, Hispanics, and Native Americans) who applied to the undergraduate program were admitted, whereas the figure for nonminorities was 69.4 percent. That same year, underrepresented minorities with a B average and SAT scores of 1000–1090 were admitted at a rate of 93.4 percent, but only 19.5 percent of whites and Asians with the same qualifications were admitted. With that same B average and a 22 or 23 ACT score, 93.7 percent of blacks and Hispanics, but only 12.7 percent of

1. Rusty Hoover, *College Admissions Officials Confused by Recent Rulings on Race*, DETROIT NEWS, Aug. 12, 1996, at C1.

whites, were admitted. With a GPA in the 3.0–3.24 range and LSAT scores ranging from 161 to 163, none of the nine Asian applicants and only two of forty-two whites were admitted, but 100 percent of the ten Hispanic Americans or blacks were admitted."[2]

The system used a grid that weighted such factors as race, history of overcoming discrimination, and economic status heavily enough to more than compensate many black and Hispanic applicants for substantially lower GPA and SAT credentials. With no apparent shame, the university publicly maintained a facade of equal treatment. For 1995, the official university catalogue declared: "[T]he University of Michigan is committed to a policy of nondiscrimination and equal opportunity for all persons regardless of race, sex, color, religion, creed, national origin or ancestry . . . in employment, educational programs and activities, and admissions."

Before long, the four legislators, David Jaye, Deborah Whyman, Gregg Kaza, and Michelle McManus, had generated legislative hearings on the University of Michigan admissions practices and were informally searching for rejected white or Asian American students willing to entertain a lawsuit. The Washington-based Center for Individual Rights (CIR), recent victors in the *Hopwood* case, decided to test not only Michigan's undergraduate admissions program but also the less formulaic but no less discriminatory law school procedure, which each year sought to achieve a "critical mass" of preferred minority students. For plaintiffs against the undergraduate program, CIR selected Jennifer Gratz and Patrick Hammacher. Gratz, a high-school cheerleader and homecoming queen who graduated fifteenth in

2. *Race and Reconciliation: What's Fair? U-M Policy Gives Minorities an Edge*, DETROIT NEWS, June 22, 1997, at A1.

her high-school class, would become the first in her family to graduate college. After being rejected by the University of Michigan-Ann Arbor, she gave up her ambition to become a doctor and enrolled at UM-Dearborn, a commuter school. As her lawsuit made its way toward the Supreme Court, Gratz graduated, got married, and went to work as a project manager and software trainer for a West Coast–based supply chain management company. "I didn't realize just how differently they treat people based on skin color until I filed the lawsuit," Gratz told the *Detroit News*.[3]

Patrick Hammacher, a white man from the predominantly black city of Flint, was recruited as Gratz' co-plaintiff. A graduate of Luke Powers Catholic High, he was wait-listed and then rejected by the University of Michigan, despite a hefty 28 on his ACT exam. He enrolled at Michigan State—which then and now accepts at least 85 percent of its applicants and thus needs no affirmative action program, graduated with a degree in public administration, and went to work as an accountant for Flint's Department of Recreation.

To challenge the law school program, CIR selected Barbara Grutter, a 47-year-old mother of teenage sons who ran a health care consultant business from her home. The daughter of a minister, Grutter had attended high school in Canada and believed she offered the law school both the diversity it advertised and the likelihood of success it sought. Despite a GPA of 3.8 at Michigan State and an LSAT score of 161, placing her in the eighty-sixth percentile, Grutter was rejected. Her academic credentials would have meant automatic acceptance for preferred minorities. In addition to feeling the lash of discrimination, Grutter took her rejection as

3. Jodi S. Cohen, *Three Lives Converge at the U.S. Supreme Court*, DETROIT NEWS, Mar. 24, 2003.

an affront to common sense, telling the *Detroit News*, "I had an application where I had demonstrated success in multiple fields. There's no question about whether I would be successful."[4]

The Long Minority Quest

The University of Michigan had dabbled with the race issue during the 1960s but had never found an academically sound way of dramatically increasing the presence of black students on campus. In 1970, a crisis forced its hand as the Black Action Movement (BAM), formed during the black power heyday of the late 1960s, threatened to shut down the campus unless its "demands" were met. As recounted by University President Robben W. Fleming, those demands included "enrolling 10 percent of the total student body from black applicants, thereby equaling the proportion of blacks in Michigan's population; recruitment of more black faculty and administrators; financial aid for black students to attend the university; further development of the Afro-American studies program; a center at which black students could congregate; and a few lesser items."[5] At the time, black enrollment was 3.5 percent. A study commissioned by Fleming concluded that with an intensive effort the percentage could be doubled within a reasonable time. The problem in going beyond that point, then as now, was that there were too few qualified blacks. Lowering the university's threshold would have meant ensuring black students' place at the bottom of the academic totem pole, perhaps to have many of them fail—"a sad end to an academic career that might have succeeded

4. *Id.*
5. ROBBEN W. FLEMING, TEMPESTS INTO RAINBOWS 207 (1996).

in a less competitive milieu."[6] Also, taking unqualified blacks would have meant penalizing whites who otherwise would have been accepted.

As BAM strike threats intensified, Fleming and his team produced a "compromise," which included a *goal* of 10 percent black students by 1973–74; tinkering with admission criteria in such a way so "that increased enrollment may be achieved *while at the same time preserving the satisfactory probability of successful completion of the educational program at the university*"; the devotion of additional funds to support enrolled blacks; recruitment of additional black faculty and staff; continuing the development of the Afro-American studies program; and development of a black students' center.[7]

BAM soon rejected the offer because the 10 percent goal was not a firm commitment, and it launched a strike under the slogan "Open It Up or Shut It Down." In response, 500 faculty members placed full-page ads in a number of regional newspapers saying, "It is time for voices to be raised against the actions of the few who are driving the university community into chaos."[8] During the next several days, however, supporters of the BAM strike stormed buildings and disrupted classes, broke furniture, threw books off library shelves, and released ammonia and stink bombs in several buildings.[9]

The strike was finally settled with BAM abandoning its demand for a guaranteed 10 percent of the class in favor of the university's aspirational approach. Looking back on the

6. *Id.* at 210–211.
7. *Id.* at 212.
8. *Id.* at 212–213.
9. *Id.* at 214.

episode a quarter-century later, Fleming said he would change little of what he did. Serious violence had been avoided, "we established much-needed programs for the advancement of black people,"[10] and the university remained in the forefront of the nation's institutions of higher learning. Yet the university also took the first major steps toward a selective lowering of academic standards, instituted racial targets, and put in place policies that would increase rather than decrease social and academic segregation. In addition, in treating the BAM demands as fit subjects for negotiation—particularly in an environment of coercion if not terror—the university, as one professor expressed to Fleming, was admitting "explicitly or implicitly that we are indeed a repressive, racist institution—but that is still a lie."[11] Editorially, the *Detroit News* seemed to summarize matters quite well: "When a great university, guilty only of excessive tolerance, goes begging on its knees for the forgiveness of arrogant radicals it's time for someone with authority and guts to step in and call a halt to the farce."[12]

Fleming made a brief, unfortunate encore as acting university president in the late 1980s after his successor, Harold Shapiro, abandoned Ann Arbor for the presidency of Princeton. Shapiro had been unable to make good on the university's commitment to boost black admissions to near 10 percent. Meanwhile, a number of racial incidents—including racial slurs directed against black students—brought a new round of BAM demonstrations and a campus visit by Jesse Jackson. Jackson engineered new commitments from Shapiro, who then left for the quieter confines of New Jersey.

10. *Id.* at 219.
11. *Id.* at 216.
12. *Id.* at 217.

Having structured a university where race influenced admissions, curriculum, living, and social facilities, Fleming and his entourage of the 1980s sought to mitigate some of the inconvenient consequences of that policy by regulating speech. With the apparent participation of several law school professors and at least the theoretical blessing of law school dean Lee Bollinger—who opined that, consistent with the First Amendment, there was much speech the university could regulate—they imposed a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment. The policy prohibited students, under threat of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, age, marital status, handicap, or Vietnam-era veteran status. A guidebook, known as the Yellow Booklet, attempted to sharpen the vague prohibitions of the policy through specific example. For instance: "A male student makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates." Other stated offenses included telling jokes about gay men or lesbians, displaying a Confederate flag on the door of your room, or two men demanding "that their roommate in the residence hall move out and be tested for AIDS."

Thus, the code provided a basis for prosecuting a student who expressed the widely shared scientific view that various types of learning abilities and emotions are sex-linked. The new code was used to prosecute a dental student who repeated something a friend had told him about minorities having difficulty with a particular second-year dental course. Another student was prosecuted for expressing the opinion that homosexuality was a disorder that could be treated by counseling, and a young male who slipped a joke under a female's door suggesting that mopping floors was a female

task was prosecuted. As noted by Jeff Jacoby in the *Boston Globe*, the code seemed calculated to prove the indictment of historian Alan Kors and civil liberties advocate Harvey Silvergate who, in *The Shadow University*, said that lively campus discourse "has been replaced by censorship, indoctrination, intimidation, official group identity and 'groupthink.'"[13] Like the "closet doves" of the Johnson administration, Bollinger—who also banned military recruiters from the law school because of their ban on gays and lesbians—would later cast himself as an inside opponent of the policy. Until what would prove a successful legal challenge found its way into federal courts, however, this scholarly champion of First Amendment rights was little more than an ornament for campus tyranny. Ultimately U.S. District Court Judge Avern Cohn threw out the code as unconstitutional.[14]

Soon afterward, the university chose a new president, James Duderstadt, a former engineering school dean and, at 6 feet, four inches, a physically imposing visionary who took the cause of diversity and turned it into a managerial cult. America, he felt, was in the process of becoming a majority minority nation where whites would no longer predominate. The university must help prepare for that day, not only by reshaping its curriculum or redoubling efforts to attract diverse groups to the campus, but also by turning itself into an engine of pervasive change. Minority faculty were to be hired whenever "targets of opportunity" appeared.[15] Need and merit scholarships were to be heavily weighted toward minorities in a way one administrator called "disproportion-

13. Jeff Jacoby, *A Harvard Candidate's Silence on Free Speech*, BOSTON GLOBE, Mar. 1, 2002, at A15.

14. *John Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

15. FREDERICK R. LYNCH, THE DIVERSITY MACHINE 281–285 (1997).

ate by design."[16] The school would undertake a vast expansion of minority recruitment. An office of minority affairs was to be created. The school would identify and support faculty, student, and staff "change agents." Multicultural education was to be enhanced. Affirmative action records were to become part of the evaluation criteria for department chairs, deans, and administrators.

Duderstadt called his creation the Michigan Mandate. Administrators hopped on board, urging all to follow the president's lead, seeking to undermine what one described as a culture that was "white-male and task oriented,"[17] with the sort of values another listed as "science-oriented, research oriented, competitive (striving to be the best in everything), elite and 'supercompetent' oriented."[18] In the words of Frederick R. Lynch, whose fine book, *The Diversity Machine*, devotes an entire chapter to the Michigan Mandate: "The Mandate and its top-down implementation reek of a high-level hubris that social change can be planned and even micromanaged."[19] Lynch noted that the Mandate left no room for such bedrock concepts of Western culture as "equality of opportunity, freedom of speech or association, capitalism, due process, individualism and individual rights, equal protection of the laws, the U.S. Constitution and universal standards or truths."[20] Lynch described an incident involving a course taught by senior sociology professor David Goldberg. In a session devoted to regression analysis, Goldberg sought to illustrate how such variables as education, age, class, and marital status could reduce *broad* apparent disparities in the

16. *Id.* at 288.
17. *Id.*
18. *Id.*
19. *Id.* at 282.
20. *Id.* at 314.

earnings of men and women, thus undermining the simplistic male exploitation models many of the students had carried into the classroom. Radical students not even in the course filed a formal grievance against Goldberg, charging him with racial and sexual harassment. While the specific complaints were dismissed as unsubstantiated, Goldberg's department chair did remove him from teaching all required courses.[21]

By the mid-1990s, the Mandate, in its cruder forms, was running out of steam. The Gingrich Revolution—itself less an augur of profound change than it seemed at the time—brought to power a Republican Congress less sympathetic to political correctness and the type of social innovation making its run on campuses like Michigan. The *Hopwood* case cast a long shadow over race preference policies in university admissions, as did the decision by the California Board of Regents to end such preferences, a decision soon underlined by California's electorate in passing Proposition 209. The conservative student publication, *Michigan Review*, regularly critiqued the Mandate, a battle many carried on even after graduation. Jeff Muir, a former *Review* staff writer, complained that the university had been admitting blacks and Hispanics who were poorly qualified to compete and that this was reflected in poor academic performance and lower graduation rates. Muir charged that Duderstadt's program had been at least partly responsible for a drop in Michigan's selectivity ranking by *U.S. News and World Report* and a drop in the university's overall ranking to the mid-twenties.[22]

Still, the university and its constituents pressed on. "We've admitted we're a racist institution," affirmative

21. *Id.* at 298.
22. *Id.* at 299.

action officer Zaida Giraldo told Lynch. "Minorities have sought a comfort level in self-segregation, and now we're working on curriculum reform."[23] Asked by the *Chronicle of Higher Education* how his school would respond to a *Hopwood*-style lawsuit, Duderstadt replied, "We will continue to do this until the Supreme Court says we can't any more. . . . If certain avenues are shut off, we'll try to find other ways to get the same results."[24] By the time the university and law school suits were filed in October and December 1997, respectively, however, Duderstadt had retired and the task of mounting a defense fell to his successor, the former law school dean Lee Bollinger.

Bollinger appreciated from the outset that the case would probably come down to the fluid vote of a single justice and that Sandra Day O'Connor had time and again invited a showing of evidence to justify affirmative action sufficient to meet the strict scrutiny standard imposed in such cases. Michigan could not permit itself to walk into a judicial haymaker as Texas had done. Instead, it must mobilize the business, professional, and educational communities nationwide who would bear witness to society's compelling need for blacks and other minorities trained at the nation's elite institutions. Moreover, it would not be enough for Justice Powell's diversity formulation to survive; it had to be brought down to the specifics of the University of Michigan, which must prove the educational benefits of diversity at this specific institution. This was where affirmative action would make its stand. No expense would be spared.

The legal team was potent, including its two principal in-house players, Jonathan Alger and Evan Caminker. Alger was

23. *Id.* at 301.
24. *Id.* at 309.

hired from the American Association of University Professors, where he had been working on an amicus brief for the university. Before that, he had been deputy civil rights counsel in the U.S. Department of Education. As deputy counsel, Alger would marshal and direct amicus support and get all relevant communities on record. Caminker, dean-elect of the law school, worked mainly on preparing theories and arguments for the law school brief. In charge of the *Gratz* case would be John Payton, a brilliant veteran civil rights lawyer, who was at that time a partner in the powerful Washington firm, Wilmer, Cutler and Pickering. Maureen Mahoney, a former clerk to Chief Justice Rehnquist and now a partner in the Washington firm of Latham and Watkins, was also a veteran Supreme Court advocate with a very good batting average; she would argue *Grutter*.

In the end, fighting the case cost the university an estimated $10 million.[25] By contrast, the university's prime adversary, the Center for Individual Rights, tapped Kirk O. Kolbo, a partner with the Minneapolis firm of Maslon Edelman Borman & Brand, but a novice in both civil rights and Supreme Court advocacy. Kolbo agreed to serve for expenses only. CIR's costs reportedly totaled about $4 million.[26]

Responsibility for providing Michigan with the evidentiary base that Bollinger thought necessary went to Professor Patricia Y. Gurin, chair of the Psychology Department. Gurin offered a report undergirding her expert testimony on the positive effects of campus racial and ethnic diversity on learning outcomes. However, she had one threshold problem:

25. Jodi Cohen, *Road to Supreme Court*, DETROIT NEWS, June 16, 2003, at B16.

26. 2002–2003 Annual Report of the Center for Individual Rights (available at www.cir-usa.org). *See* Janet Miller, *U-M Suit Cost Already $9 Million*, ANN ARBOR NEWS, Mar. 21, 2003.

Her study was based on a subset of a massive undergraduate longitudinal database for the 1985–89 period for the Cooperative Institutional Research Program (CIRP), which offered virtually no support for her conclusion. Indeed, the CIRP study found no correlation between structural diversity—the percentage of minority students on campus—and such educational outcomes as student knowledge, completion of the course of study, or performance on such post-baccalaureate exams as the LSAT, the MCAT, and the GRE.[27] Instead, Gurin offered some very weak linkage between what she called "classroom diversity" and "citizenship engagement," which were measured four and then nine years later and the latter of which included such items as hours per week spent on volunteer work, importance of participating in a community action program, and associating or making close friends with people of a different race.

Gurin's report was critiqued both by Robert Lerner and Althea K. Nagai for the Center for Equal Opportunity and by Thomas E. Wood and Malcolm J. Sherman for the National Association of Scholars.[28] Apart from the central problem of a database that disconfirms her thesis, the two critiques noted that Gurin offered a small but statistically significant relationship between what she called "classroom diversity" and so-called diversity activities, such as socializing with someone of a different race or ethnicity. Gurin's "classroom diversity" simply involved taking a course such as African American studies, something that might be done even if there were no blacks on campus. At no point did she report the

27. Expert Witness Report of Patricia Y. Gurin (available at www.umich.edu/~urel/admissions/legal/expert/gurintoc.html).

28. Lerner & Nagai, *A Critique of the Expert Report of Patricia Gurin*; Wood & Sherman, *Race and Higher Education*.

relationship between structural diversity and these positive behavioral outcomes. Further, as Lerner and Nagai noted, "Items for the four-year and then for the nine-year surveys under citizenship engagement appear to be proxies for political liberalism. There are no questions that discuss political activism that manifests a conservative tendency (e.g., attending an anti-abortion rally, the importance to you of reducing federal taxes, reducing government regulation, importance of participating in a free speech movement, attending a Second Amendment rally, or bringing a property rights case, etc.)."[29] Lerner and Nagai also inconveniently recalled that the initial study noted that the college experience "tends to make blacks more activist than when they enter, and divides the races politically, which is exacerbated by their tendency to segregate themselves."[30]

An even more devastating critique was later offered by Judge Danny Boggs of the Sixth Circuit in his powerful dissent from the appellate court's 6-5 en banc decision: "The Gurin Report is questionable science, was created expressly for litigation, and its conclusions do not even support the Law School's case."[31] For one thing, Gurin's report took no position on how much diversity is needed for benefits to kick in or increase. Moreover, it based its benefit claims on the softest data imaginable, "subjective self-reports of students and . . . low response rates to boot."[32] Also, the report did not even purport to measure any statistical link between the benefits it claimed and a more diverse student body. One small but statistically significant correlation it does provide—

29. Lerner & Nagai, at 17.
30. *Id.* at 39.
31. *Grutter v. Bollinger*, 288 F.3d 803 (6th Cir. 2002).
32. *Id.* at 804.

between taking such "classroom diversity" courses as African American history and good academic outcomes—is not related in any way to the number of minority students on campus. Why did Gurin develop proxy categories instead of the real thing? The reason for this bizarre methodology, which neither Gurin nor any other self-respecting academic would have offered as, say, a doctoral thesis, was clear to Judge Boggs: "I fear that Gurin used the proxies because a study of mere student body diversity either did not or would not produce the results that she sought."[33]

Tactically, however, the Gurin Report was a master stroke, finding its way with approval into the opinions of U.S. District Court judge Patrick J. Duggan, the Sixth Circuit majority, and Sandra Day O'Connor.

By the time of the lawsuits, both admissions processes had gone through considerable evolution. Understandably, with some 13,000 applications to consider, as opposed to some 5,000 law school applicants, the Literature, Science, and Arts (LSA) undergraduate process involved less individualistic consideration of applicants and was thus more formulaic. In 1995 and 1996, LSA used a set of grids with GPA ranges depicted on the vertical axis and ACT/SAT scores on the horizontal axis. According to Judge Duggan, "In 1995 four grids were used: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. In 1996 only two grids were used: (1) in-state and legacy applicants and (2) out-of-state applicants with non-minority applicant action codes listed in the top row of the grid's cells, and minority action codes listed in the bottom row. In 1997, the same grids as in 1996 were used. However, in 1997, the LSA

33. *Id.*

also added .5 to underrepresented minority applicants' GPA scores."[34] Stunningly, the plan included the one thing specifically ruled unconstitutional in *Bakke*, a quota. Because the class was selected on a rolling basis instead of at one fixed time, a certain number of seats were designated for such favored groups as minority candidates, athletes, and in-state students. In response to a written interrogatory, the university explained that "[t]his space is 'protected' to enable OAU [Office of University Admissions] to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system."[35] If insufficient numbers of the racially preferred were found, the protected seats could go to wait-listed or other applicants; theoretically, that could have happened at UC-Davis as well. The LSA grid system precluded consideration of whites in certain of the lower indices, but no preferred minority was ever excluded from consideration automatically.

In 1998, the LSA, apparently aware that it was headed toward legal defeat, implemented its 150-point procedure, which was in effect at the time the case reached the Supreme Court. This system awarded up to 80 points for a perfect GPA and 20 points for minority status, but only 12 points for a perfect SAT/ACT score and only 3 points for a brilliant application essay.[36] Although university officials would testify during pretrial deposition proceedings that the new procedures "change only the mechanics, not the substance" of its previous practice, Judge Duggan would, on December 13, 2000, hold the discarded procedures unconstitutional even though the new ones passed muster. Duggan found that "a

34. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) at 826.
35. *Gratz v. Bollinger*, 122 F. Supp 2d 811 (E.D. Mich. 2000) at 831.
36. *Id.*

racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny."[37] He reached this conclusion, as would the appellate and Supreme Courts, despite the utter absence of credible evidence linking racial diversity to positive educational outcomes. Judge Duggan also found the LSA system was narrowly tailored in that it provided for the competitive consideration of race consistent with Justice Powell's *Bakke* mandate. He found this despite the fact that the new procedures still produced so great an advantage for minorities that anyone in the preferred category considered "qualified" for the university—that is, someone who was a good bet not to flunk out—would nearly always win acceptance.

The law school race preference policy, which eventually would win Supreme Court approval, had its genesis in the 1960s with the nearly complete failure of minorities to gain admission through race-neutral means. In 1966, the admissions committee began giving special attention to "those who are Negroes or from disadvantaged backgrounds," and those who had made the waiting list were given preference. In 1970, the admissions dean announced he would admit enough black and Hispanic applicants "who fall below admissions standards regularly applied" to comprise 10 percent of the class.[38] In subsequent years, the law school faculty debated the issue frequently, deciding that black and Hispanic students should constitute between 10 and 12 percent of each class, the beneficiary category later expanding to American Indians and Puerto Rican Americans.

37. *Id.* at 824.
38. *Grutter*, 137 F. Supp. 2d at 831.

Allan Stillwagon, who was Director of Admissions from 1979 to 1990, testified that he lacked the discretion to disregard the numerical targets,[39] which resulted in wide disparities among regular and special admittees. In 1988, for example, those regularly admitted had a median LSAT score of 43 and a median undergraduate grade point average (UGPA) of 3.58, while beneficiaries of race preferences had a median LSAT of 34 and a median UGPA of 3.05.[40] The 1989 Law School Announcement justified the preferences: "In administering its admissions policy, the Law School recognizes the racial imbalance now existing in the legal profession and the public interest in increasing the number of lawyers from the ethnic and cultural minorities significantly underrepresented in the profession. . . . Black, Chicano, Native Americans and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities."[41]

In 1992, a law school faculty admissions committee issued a Report and Recommendations that would become the governing policy to this day. The faculty dismissed the notion that LSAT results were meaningless, indicating that they accounted for an average of 27 percent of the difference in performance among students for three of the past four classes. Further, "as the size of the differences in applicant index scores increases, the value of the index as a predictor of graded law school performance increases as well." What conclusion should be drawn from these facts? "Bluntly, the higher one's index score, the greater should be one's chances

39. *Id.* at 830.
40. *Id.* at 826.
41. *Id.* at 829.

of being admitted. The lower the score, the greater the risk the candidate poses."[42]

Individual circumstances and characteristics may justify exceptions, but representatives of preferred races or ethnic groups should be considered despite low LSATs and UGPAs, because "this may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[43] This statement represented no change in policy. For years, preferences were shown for blacks, Chicanos, Native Americans, and Puerto Ricans dwelling on the mainland. "By enrolling a 'critical mass' of minority students, we have ensured their ability to make unique contributions to the character of the Law School; the policies embodied in this document should ensure that those contributions continue in the future."[44]

The document is striking mainly in its transparent, albeit belated, attempt to reconcile existing practice with *Bakke*. Thus, whereas earlier policy statements made no mention of the academic joys of diversity, this one repeatedly sought to establish those benefits as a central objective. In addition, although an ad hoc *Bakke* majority held quotas unconstitutional, those same justices said nothing about "critical mass"—a notion more relevant to nuclear physics than law. In this case, the faculty tinkered with a concept that might provide the virtues of an outright quota system without the legal detriment. As one faculty member testified during the bench trial, "[W]e all understood the governing authority to be *Bakke*. . . . So I wanted the numbers out."[45] Yet, the law

42. *Id.*
43. *Id.* at 827.
44. *Id.*
45. Testimony of Jeffrey Lehman, Bench Trial, v. 5 p. 115 l.14 (Jan. 22, 2002) *Grutter v. Bollinger* (No. 02-241).

school admissions policy had much the same effect as the UC-Davis quota system in *Bakke*—excluding large numbers of white applicants to the benefit of preferred minorities. Over the two-year period of 1994–95, for example, among white applicants with LSAT scores between 154 and 169 and UGPAs between 3.25 and 4.0, 379 out of 1,437 were accepted. In the same ranges, 48 out of 52 blacks were accepted.[46] The plaintiff's expert witness, Dr. Kinley Larntz, a professor emeritus in the Department of Applied Statistics at the University of Minnesota, examined the admissions grid for the years 1995–2000, grouping applicants with similar LSAT and UGPA results into "cells" and then calculating the likelihood of acceptance based on race and ethnicity. He concluded that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance. Native American, African American, Mexican American, and Puerto Rican applicants in the same LSAT and GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant."[47] This interpretation was challenged only at the margins by the law school and, to all intents and purposes, was later accepted as accurate by the U.S. Supreme Court.

Faculty discussions about the 1992 document are also revealing. An earlier draft, after embracing the benefits of diversity, included the following language: "Also it is important to note that in the past we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African American, Hispanic and Native American members has been

46. *Grutter*, 137 F. Supp. 2d at 832.
47. *Id.* at 836.

between about 11% and 17% of enrollees." The language was excluded from the final draft as "too rigid," meaning it "could be misconstrued as a quota."[48]

Another faculty member proposed a 20 percent limit on "non-grid admittees" who were admitted for reasons of race, arguing that the "target range" should be spelled out "for a variety of reasons, including candor."[49] His proposal was also voted down.

These actions had the desired effect, providing school deans and lesser officials with the opportunity to defend "critical mass" without embracing quotas. On the stand, none could say what numbers constituted such a mass, though Dennis Shields, a former admissions dean, suggested that 5 percent might be too low.[50] Although daily tabulations were kept as to the number of minorities agreeing to enroll, all professed the numbers had no impact on any particular decisions. Nor did any acknowledge that the process of admission by race had the unintended effect of forcing students to regard themselves as identified primarily by race and ethnicity. This despite the formations of law student associations identified as black, Hispanic, Christian, Jewish, and even Arab.

There was one final virtue of diversity as a justification for race preferences that was well-captured by Judge Duggan in his opinion upholding the more rigid LSA program: "Furthermore, unlike the remedial setting, diversity in higher education, by its very nature, is a permanent and ongoing interest. . . . Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past

48. *Id.* at 835.
49. *Id.*
50. *Id.* at 832.

discrimination have been eradicated, the need for diversity lives on perpetually."[51]

In fairness, the Michigan leadership, at least at the outset of the litigation, believed they were fighting to retain meaningful minority representation in their school. In his testimony, law school dean Jeffrey Lehman—who has since accepted the presidency of Cornell—mentioned UC-Berkeley's Boalt Hall, which he described as a great public institution once similar in many respects to Michigan, but no longer. "Since the adoption of the Regents' policy and ultimately Proposition 209, as a voter issue in California we had seen dramatic reduction in the number of under-represented minority students at Boalt Hall. And that has persisted over time. It's fallen to what I would describe as a token level."[52] This was true of the law schools at UCLA and Texas, too. "[T]hese are very smart people. They are doing everything they can and they have not gotten beyond token levels of African-Americans at either of those schools."[53] This was a steady theme expressed by Michigan and its advocates throughout the litigation: Minority representation at the school would crash like California and Texas if race preferences were tossed out. Clearly, Lehman was correct, assuming that the law school would meekly abandon its race preference system without seeking to circumvent it. In the year 2000, for example, although 35 percent of minority law school applicants were accepted, the school estimated that in the absence of affirmative action the number would have been 10 percent—a dramatic drop.[54]

51. *Grutter*, 137 F. Supp. 2d at 824.
52. Testimony of Jeffrey Lehman, Bench Trial v. 5 p. 142 l.22.
53. *Id.*
54. *Grutter*, 137 F. Supp. 2d at 839.

The principal argument against percentage plans was offered in the companion LSA case by William G. Bowen, co-author of *The Shape of the River*. According to Bowen, the school would favor unprepared students from poor high schools who manage to finish in the top 10 percent of their class "while turning down better-prepared applicants who happen not to finish in the top tenth of their class in academically stronger schools."[55] But wouldn't these students bring precisely—and far more honestly—the very diversity of outlook and experience that Bowen and Bok so cherished as the cargo of overprivileged African American students? It seems that no one had a keener appreciation for academic merit than Bowen and Bok, at least when the subject was anything other than race preferences.

The plaintiffs and Michigan were not the only parties to the case. A group of seventeen minority students who had applied or intended to apply to the university sought to intervene as defendants, claiming they were entitled to special admissions consideration to redress the effects of both present and past discrimination. Represented by the NAACP Legal Defense Fund and its brilliant attorney Ted Shaw and supported by such academic heavyweights as the distinguished historian John Hope Franklin and Harvard's education and race specialist Gary Orfield, the group hoped to demonstrate an entitlement to special treatment based on both the lingering effects of such institutions as slavery and segregation and the residual impact of racism and discrimination in such areas as housing, employment, standardized tests, and K–12 education. They were, of course, running into the teeth of recent judicial precedent, which tended to regard past discrimination as too amorphous to support relief. Pres-

55. *Gratz*, 122 F. Supp. 2d at 830.

ent discrimination is usually treated judicially as an act against individuals who can, in most cases, be rendered whole through damages and declaratory relief. The district court's ruling against intervention was reversed on appeal.[56] The intervenors never got close to a favorable ruling on the merits and were foreclosed from arguing their case before the Supreme Court because Michigan objected to splitting their time, and the justices agreed.

On March 27, 2001, U.S. District Court Judge Bernard A. Friedman found the law school plan unconstitutional. "The evidence shows that race is not as defendants have argued merely one factor which is considered among many others in the admissions process," he declared. "Rather the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject."[57] Although critical mass had eluded precise quantification, in practice, it meant that 10–17 percent of each class would be preferred minority. Year in and year out, the preferred minorities were admitted in nearly the precise percentages as their numbers in the applicant pool. The dean and admissions director followed the progress of minority acceptances in the school's "daily admissions reports" to see how close to target the minorities were.

Judge Friedman set for himself the task of deciding whether *Bakke* stood for the proposition that diversity is a compelling interest opening the door for a narrowly tailored race-conscious admissions policy. Clearly that was Justice Powell's view, but no other justice had joined the part of his opinion in which he had articulated it. The so-called Brennan

56. *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).
57. *Grutter*, 137 F. Supp. 2d at 840.

group of Brennan, Blackmun, Marshall, and White, who joined Powell in striking down the California Supreme Court injunction against any consideration of race, never mentioned diversity in their opinion, insisting that benign discrimination calculated to address the effects of centuries of discrimination should not be subject to strict judicial scrutiny. Even so, Michigan argued that the case of *Marks v. United States* should control, because *Marks* held that where no single position commands the vote of five justices, the holding of the court should be that which rests on the narrowest of grounds. Unfortunately, wrote Judge Friedman, though the *Bakke* court had divided in three *different* ways, none was more broad or narrow than the other, and thus *Marks* could not come into play.[58] Thus, there was effectively no *Bakke* precedent, and the courts had to apply more recent Supreme Court pronouncements in such cases as *Croson* and *Adarand*. The race-conscious policies in those cases gained approval only to redress well-defined past discrimination. The court did not doubt that diversity bestows educational benefits that are both "important and laudable. Nonetheless, the fact remains that the attainment of a racially diverse class is not a compelling state interest because it was not recognized as such by *Bakke* and is not a remedy for past discrimination."[59]

Even had the school succeeded in establishing a compelling interest, the law school would have failed because "critical mass" was an amorphous concept with no time limit that effectively set aside places for preferred groups and offered no logical reason for including some and not including others. Why did the school think Puerto Ricans from New York

58. *Id.* at 844.
59. *Id.* at 850.

would contribute to diversity, while those from San Juan would not? Why were the views of Mexican Americans more pertinent than Nicaraguan Americans? Finally, the court found no exploration of race-neutral alternatives, such as "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain percentage of the top graduates from various colleges and universities are admitted."[60]

Judge Friedman had had to put his foot down to keep the case. Early in the proceedings, the university had moved to consolidate the two cases before Judge Duggan, a Democratic appointee, thus taking the case from Judge Friedman, a Republican appointee. Chief Judge Anna Diggs Taylor recused herself from considering the motion because her husband sat on the school's board of trustees. Instead of stepping back entirely and allowing a random method of selecting the judge to rule on the motion, however, she appointed two like-thinking judges who promptly declared the two suits "companion cases" suitable for Judge Duggan, despite the fact that both involved totally different admissions systems. Under Michigan law, however, the final word belonged to Judge Friedman, who tartly rejected the idea. In the end, he ruled against the law school, while Judge Duggan held for LSA in the undergraduate case. Together they found the exact opposite of how matters would be decided by the U.S. Supreme Court. This was not the last bit of procedural trickery that courts sympathetic to Michigan would engage in, though one suspects that in a case of this magnitude the only court disposition that really would matter would be that of the Supreme Court of the United States.

60. *Id.* at 852–853.