

2005

## Assessing the Impact in Grutter on the Use of Race in Law School Admissions

Philip C. Aka  
*Chicago State University*

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### Recommended Citation

Aka, Philip C. (2005) "Assessing the Impact in Grutter on the Use of Race in Law School Admissions," *California Western Law Review*: Vol. 42 : No. 1 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol42/iss1/2>

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# CALIFORNIA WESTERN LAW REVIEW

VOLUME 42

FALL 2005

NUMBER 1

## ASSESSING THE IMPACT OF THE SUPREME COURT DECISION IN *GRUTTER* ON THE USE OF RACE IN LAW SCHOOL ADMISSIONS

PHILIP C. AKA<sup>\*</sup>

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<sup>\*</sup> Professor of Political Science, Chicago State University; Vice Chair, American Bar Association Committee on International Human Rights; Member of the Illinois Bar. J.D., Temple University School of Law; LL.M. Candidate in International Human Rights Law, Indiana University School of Law, Indianapolis; Ph.D., Howard University; M.A., University of North Texas; B.A., Edinboro University of Pennsylvania. This Article incarnated as a paper in a seminar class on the legal profession taken at Indiana University School of Law in spring 2005. I thank Professor (and former Dean) James P. White for the wealth of information he shared with the class on the legal profession in America as well as his enormous zeal for teaching. The author gratefully acknowledges the thorough and conscientious editorial assistance of Karissa M. Eide and her able team on the *California Western Law Review*.

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## I. INTRODUCTION

This Article assesses the impact of the latest Supreme Court decisions on the use of affirmative action<sup>1</sup> in law school admissions. Although references are made to *Gratz v. Bollinger*<sup>2</sup> and *Grutter v. Bollinger*,<sup>3</sup> the two companion cases arising out of the University of Michigan, the main focus of the Article will be on *Grutter*. *Grutter* dealt with the use of race in law school admissions and there, in contrast to *Gratz*, the Supreme Court upheld the affirmative action program under challenge.<sup>4</sup>

The Article argues that *Grutter* was inevitable as a culmination and jellification of best practices on the use of race as a factor in admissions to law schools that has been building since the Supreme Court's decision in *Regents of the University of California v. Bakke* in

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1. Affirmative action is the use of race or gender as a factor in decisions relating to public contracting, public employment, and public education. HANES WALTON, JR. & ROBERT C. SMITH, *AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM* 217 (2d ed. 2003). Although this Article touches on the various aspects of affirmative action, its main emphasis is on *race* in relation to public education. In the past, the U.S. government has sponsored certain special relief benefits for groups in American society, such as the programs under the Freedmen's Bureau Act of 1866 during the period following the Civil War. *See id.* at 227-29. But, affirmative action, as we know it today, came into vogue beginning in the 1960s during the Johnson and Nixon presidencies when the federal government ordered these programs implemented to alleviate the lingering effects of past discrimination. *Id.* at 217-18; Nathan Glazer, *In Defense of Preference*, *NEW REPUBLIC*, Apr. 6, 1998, at 15, reprinted in *AFFIRMATIVE ACTION* 14, 15 (Bryan J. Grapes ed., 2000).

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

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

4. *Gratz*, 539 U.S. at 275 (holding that the University of Michigan's use of race in admissions violates the Equal Protection Clause of the Fourteenth Amendment); *Grutter*, 539 U.S. at 343 (holding that the University of Michigan Law School's use of race in admissions does not violate the Equal Protection Clause of the Fourteenth Amendment).

1978.<sup>5</sup> Logically, such an argument leaves little room for any analysis of impact. But, that is not the sense in which impact in this Article is used. Instead, the basis and significance of the analysis of impact here—and another argument of the Article—is that despite its inevitability as a congealment of best practices in affirmative action, *Grutter* is still momentous because public higher educational institutions<sup>6</sup> can now openly use race in their admissions decisions rather than resort, as in the past, to “winks, nods, and disguises” and related techniques to camouflage their use of race.<sup>7</sup>

The Article has five main parts, plus this introduction and a conclusion. Part II presents an overview of the *Grutter* case and a comparison of that case with its companion case *Gratz*. A look at the reactions to *Grutter*, represented in published commentaries on the case in academic and popular media, completes the discussion in Part II. Part III presents an overview of the character of minority participation in the legal profession in America, while Part IV examines the influence of race in law school admissions. Part IV also integrates extensive and critical discussion in various aspects, including the evolution of the Supreme Court’s option for the use of race as a tool of inclusiveness, the use of race in law school admissions by law schools and legal organizations, and an examination of the consequences for minority participation in legal education arising from ceasing to use race as a factor in law school admissions decisions. Parts V and VI, individually and collectively, embody the main arguments of the Article. Part V presents an understanding of *Grutter* as a culmination, exemplification, and congealment of best practices regarding the use of race in public education since *Bakke*, while Part VI analyzes the impact of *Grutter* on race-conscious programs. More specifically, Part VI advances reasons why, although arguably *Grutter* amounts to a jellifica-

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

6. Although the Equal Protection Clause binds only state-owned or public education institutions, affirmative action also applies to private universities. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2345 (2000). The Harvard Plan, the affirmative action program Justice Powell held out as a model in *Bakke*, was designed not by a public school, but rather by Harvard University, a private institution. *Bakke*, 438 U.S. at 316. Even more importantly, federal law forbids racial discrimination by institutions that receive federal funding, and most universities, public as well as private, receive such funding. 42 U.S.C. § 2000d (2000); Forde-Mazrui, *supra*, at 2345. One such federal law is Title VI of the Civil Rights Act of 1964, which provides in pertinent part: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” § 2000d.

7. *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting); see also *id.* at 304-05 (describing possible examples of the use of these underhand devices).

tion of prevailing best practices regarding the use of race, it nonetheless is so momentous as to justify an impact analysis of the kind this Article makes.

## II. *GRUTTER* v. *BOLLINGER*: GOSPEL OF NARROWLY-TAILORED USE OF RACE TO PROMOTE A COMPELLING GOVERNMENTAL INTEREST

*Grutter* is the one decision that the Supreme Court, in twenty-five years since *Bakke*, held out as a model for the constitutionally permissible use of race in the admission process to promote diversity of the student population of a public education institution.<sup>8</sup> *Grutter*, and its companion *Gratz*, involved challenges by Caucasian applicants to the affirmative action programs of the University of Michigan, a public education institution funded by the State of Michigan.<sup>9</sup> Unlike earlier challenges, such as in *Bakke*, by angry white men who believed affirmative action reversed discrimination against them,<sup>10</sup> women now join among complainants against race-conscious programs, an ironic occurrence given that affirmative action encompasses gender.<sup>11</sup> Also, studies show that white women as a group are singularly the greatest beneficiaries of preferential programs.<sup>12</sup>

As already indicated, *Grutter* involved the University of Michigan Law School's affirmative action program;<sup>13</sup> *Gratz* concerned the university's undergraduate affirmative action plan, specifically the program of the College of Literature, Science, and the Arts.<sup>14</sup> Although they may look different, standing for two diametrically opposed outcomes and propositions, some key factors link the two decisions together. In both, the Supreme Court "repudiated the argument that racial classifications are always odious [and] rejected the claim that race no longer matters."<sup>15</sup> Instead, in *Grutter*, as well as in *Gratz*, the high

8. See *Grutter*, 539 U.S. 306.

9. *Id.* at 316; *Gratz*, 539 U.S. at 251-52.

10. See *Bakke*, 438 U.S. at 265, 276-78.

11. Tracey Robinson-English, *Minority Set-Aside Programs Help Women Get a Piece of Affirmative Action*, N' DIGO (Chi.), Mar. 24-30, 2005, at 7. Women were plaintiffs in both the *Grutter* and *Gratz* cases. *Gratz*, 539 U.S. at 251; *Grutter*, 539 U.S. at 316.

12. Robinson-English, *supra* note 11, at 7 (citing a recent study showing that "[o]verall, White women are the biggest winners of affirmative action programs, claiming more than 40 percent of all managerial or professional jobs in the late 1990s . . ."); see also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 132 (1992) ("[W]hite women have benefited more . . . than have black men.").

13. *Grutter*, 539 U.S. at 311.

14. *Gratz*, 539 U.S. at 251-52.

15. Lani Guinier, *The Constitution Is Both Colorblind and Color-Conscious*, CHRON. HIGHER EDUC. (Wash., D.C.), July 4, 2003, at B11; see also *Gratz*, 539 U.S. at 298 (Ginsburg,

court gave its “imprimatur to holistic considerations of race” by universities for purposes of realizing the benefits of diversity.<sup>16</sup> Further, the two decisions “reinforce the importance of employing flexible and individualized considerations of race in admissions.”<sup>17</sup> In both, as Professor Guinier of Harvard Law School points out, the Supreme Court drew a

line[] between considerations of race that are nuanced, on one hand, and “mechanistic,” on the other. The former are permissible, the latter suspect. As long as the decision maker is “hand picking” rather than machine sorting, the decision maker is free to consider race as one of many factors in order to realize the benefits of diversity.<sup>18</sup>

### A. Overview of the Case

In *Grutter*, Barbara Grutter, a white Michigan resident with a GPA of 3.8 and an LSAT score of 161, was denied admission to the University of Michigan Law School, one of the nation’s top law schools.<sup>19</sup> She challenged the university’s admissions policy under the U.S. Constitution and federal laws, alleging that the law school discriminated against her based on her race.<sup>20</sup> She contended that “the

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J., dissenting) (“[T]he Court acknowledges [that educational institutions] are not barred from any and all consideration of race when making admissions decisions.”).

16. Guinier, *supra* note 15.

17. ERWIN CHEREMINSKY ET AL., JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS (2003), <http://www.civilrightsproject.harvard.edu/policy/court/michigansc.php>.

18. Guinier, *supra* note 15.

19. *Grutter v. Bollinger*, 539 U.S. 306, 312, 316 (2003). For more information on Barbara Grutter by the law school admissions officer who reviewed her application, see Dennis J. Shields, *A View from the Files: Law School Admissions and Affirmative Action*, 51 *DRAKE L. REV.* 731, 741-44 (2003).

20. *Grutter*, 539 U.S. at 317. Ms. Grutter claimed the law school’s admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Fourteenth Amendment provides, in part, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The pertinent federal laws Ms. Grutter claimed were violated are Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Grutter*, 539 U.S. at 317. Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2000). Title VI applies to institutions receiving federal funds, including private colleges and universities. *See id.* Section 1981(a) provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .” 42 U.S.C. § 1981(a) (2000). Section 1981 applies to public and private contracts, such as the contract that is formed when a college or university admits a student. *See Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (explaining that a contract for educational services qualifies as a contract for purposes of § 1981). It is inescapably odd for white litigants to be

Law School[’s use of] race as a ‘predominant’ factor [gave minority applicants] ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups,’” and that the law school authorities “had no compelling interest to justify their use of race in the admissions process.”<sup>21</sup>

The university’s admissions policy was based on Justice Powell’s opinion in *Bakke* and sought “to achieve student body diversity.”<sup>22</sup> Student body diversity was “not define[d] . . . ‘solely in terms of racial and ethnic status.’”<sup>23</sup> Nor did the policy “restrict the types of diversity contributions eligible for ‘substantial weight.’”<sup>24</sup> Rather, the policy

reaffirm[ed] the Law School’s longstanding commitment to “one particular type of diversity,” [namely], “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the law school’s] student body in [a critical mass or] meaningful numbers.”<sup>25</sup>

In its attempt to achieve diversity, the policy emphasized applicants’

academic ability [and] a flexible assessment of [their] talents, experiences, and potential . . . . [It] require[d] admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing [how] the applicant will contribute to the life and diversity of the Law School.<sup>26</sup>

Admissions officials also looked to the traditional factors of an “applicant’s undergraduate grade point average (GPA) and Law School

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asking for protection and benefits “enjoyed by white[s].” 42 U.S.C. § 1981(a) (2000). *But see* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that § 1981 applies to discrimination against white individuals as well as to nonwhites). As a result, the Court has explained that the provision “was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.” *Id.* at 295. Under the Supreme Court’s jurisprudence, all three provisions are coterminous. *See* *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Consequently, a use of race consistent with the Equal Protection Clause also withstands challenge under Title VI and § 1981. *See id.* In contrast, a use of race found to violate the Equal Protection Clause is also a violation of Title VI and § 1981. *Id.*

21. *Grutter*, 539 U.S. at 317 (citations omitted).

22. *Id.* at 314; *see also id.* at 313-16, 318-20 (describing the University of Michigan Law School’s admissions policy).

23. *Id.* at 316.

24. *Id.*

25. *Id.* (citations omitted).

26. *Id.* at 315.

Admission Test (LSAT) score.”<sup>27</sup> Finally, admissions officials considered “[s]o-called ‘soft’ variables’ such as ‘the enthusiasm of recommenders, the quality of the undergraduate institution [attended], the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection”<sup>28</sup> In short, “[a]s part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School [sought] to ‘enroll a “critical mass” of [under-represented] minority students”<sup>29</sup> who would contribute to its character and to the legal profession.<sup>29</sup>

The United States District Court for the Eastern District of Michigan found the law school’s use of race as an admissions factor unlawful.<sup>30</sup> The Sixth Circuit Court of Appeals, sitting *en banc*, reversed.<sup>31</sup> The Sixth Circuit ruled that diversity could be used to achieve a compelling government interest and that the law school’s use of race to promote that interest was narrowly tailored,<sup>32</sup> given that race was merely a “potential ‘plus’ factor” in admissions decision making<sup>33</sup> and because the affirmative action program under challenge was “virtually identical” to the Harvard admissions program Justice Powell endorsed and appended to his opinion in *Bakke*.<sup>34</sup>

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27. *Id.* (citation omitted).

28. *Id.* (citation omitted).

29. *Id.* at 329. “Critical mass” means that under-represented minorities are enrolled in “meaningful numbers” that promote participation in the classroom by minority groups without making them “feel isolated or like spokespersons for their race.” *Id.* at 318-19.

30. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001). The District Court did not believe diversity amounted to a compelling government interest warranting the use of race. *Id.* at 849. But assuming diversity was compelling, the use of race was not narrowly tailored to further that interest. *Id.* at 850. Why, it quizzed, did the law school fail to consider “race-neutral alternatives” such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores”? *Id.* at 853.

31. *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002).

32. *Id.* at 739, 752.

33. *Id.* at 746.

34. *Id.* at 749.



In an opinion by Justice Sandra Day O'Connor,<sup>35</sup> the Supreme Court affirmed the ruling of the court of appeals.<sup>36</sup> Two questions were presented to the Court. The first was whether student body diversity of a public higher-education institution is a compelling governmental interest that justifies the use of race in admissions decisions.<sup>37</sup> The second was whether the law school's use of race was narrowly tailored to further the interest in diversity the law school sought to achieve.<sup>38</sup> The Court answered these two questions in the affirmative,<sup>39</sup> anchoring its holdings on Justice Powell's opinion in *Bakke*.<sup>40</sup> Like Justice Powell in *Bakke*, the Court gave deference to the law school's judgment "that attain[ment] [of] a diverse student body is at the heart of [its educational] mission."<sup>41</sup> It justified that deference, among other things, on "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."<sup>42</sup>

The Court insisted that the benefits of diversity are real and substantial, not theoretical, pointing to the plentiful *amici curiae* briefs

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35. Sandra Day O'Connor (1930-), the first woman to serve on the United States Supreme Court, is a Republican appointee from Arizona and was appointed by President Ronald Reagan in 1981. THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 69, 70 (1997) (including a description of Justice O'Connor's background, voting record, and judicial philosophy). She replaced another Republican, Justice Potter Stewart. *Id.* at 70. True to the expectations of the Reagan administration, Justice O'Connor has maintained a generally conservative voting record on issues relating to civil rights and liberties. *Id.* at 69-70. Together with Justice Anthony Kennedy, Justice O'Connor is viewed as a "swing" vote whose clout on the Court, as here, carries decisive weight. Jan Crawford Greenburg, *Supreme Court Confounds Critics*, CHI. TRIB., June 29, 2003, at C1.

The conservative wing of the Court consisted of former Chief Justice William H. Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas. *Id.* This solid bloc has an antipathy to minority rights. *See id.* The moderate bloc, consisting of Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens, is larger than the conservative wing by one justice (and thus one vote). *Id.* With perhaps the exception of Justice Ginsburg, none of these moderate justices qualifies to be called a liberal, certainly not in the mold of Justices William J. Brennan, Thurgood Marshall, or William O. Douglas. *See id.* After twenty-four years on the high court, Justice O'Connor announced her retirement on July 1, 2005, pledging in a letter to President George W. Bush announcing her decision, "I will leave [the Court] with enormous respect for" its integrity "and its role under our constitutional structure." *Supreme Court Justice O'Connor Retiring*, MSNBC.COM, July 5, 2005, <http://www.msnbc.msn.com/id/8430976/page/2/print/1/displaymode/1098/>.

36. *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

37. *Id.* at 322.

38. *Id.* at 322, 339.

39. *Id.* at 343.

40. *Id.* at 322-25, 334-44.

41. *Id.* at 328-29.

42. *Id.* at 329.

filed in support of the law school.<sup>43</sup> “[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>44</sup> Going back in time to *Brown v. Board of Education* in 1954, the Court has recognized that “education . . . is the very foundation of good citizenship.”<sup>45</sup> Elite public education institutions, like the University of Michigan, form “the training ground for a large number of our Nation’s leaders.”<sup>46</sup> “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>47</sup> And, “to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>48</sup> With particular reference to law schools, “[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>49</sup>

The Court ruled that the law school does not give race too much weight or make it too decisive in decision making regarding student admissions.<sup>50</sup> Instead, its “admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”<sup>51</sup> “[T]he Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.”<sup>52</sup> The Court also said the law school’s goal of enrolling a critical mass of under-represented minorities is a “con-

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43. *Id.* at 330.

44. *Id.* at 331. Amazingly, given its opposition to race-conscious programs, the United States agrees with this position. See Brief for United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635. In its brief, quoted by the Court, the United States stated that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” *Id.* at 13. In citing this statement, Justice O’Connor pulled a clever master-stroke that reinforced her point. See *Grutter*, 539 U.S. at 331-32.

45. *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (omission in original).

46. *Id.* at 332.

47. *Id.*

48. *Id.*

49. *Id.* at 332-33.

50. *Id.* at 341.

51. *Id.* at 337.

52. *Id.* at 338.

cept . . . defined by reference to the educational benefits that diversity is designed to produce”<sup>53</sup> that does not therefore rise to unconstitutional racial balancing<sup>54</sup> or a quota.<sup>55</sup> The connection between critical mass and educational benefits of diversity is borne out by the fact “that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”<sup>56</sup> Finally, the Court determined the race-conscious program under challenge provided “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>57</sup>

In *Bakke*, Justice Powell said that given a proper case, race could form a “plus” factor used to promote diversity in a public university’s student body.<sup>58</sup> In *Grutter*, the Court found that proper case—one that withstood strict scrutiny.<sup>59</sup>

In addition to joining the majority opinion, Justice Ginsburg wrote a separate concurrence, wherein she commented on the Court’s idea of a phase-out date for affirmative action.<sup>60</sup> She said “well documented” evidence exists of discrimination and biases in many areas of American life, including access to public education, that “imped[es] realization of our highest values and ideals.”<sup>61</sup> Given these occurrences, “[f]rom today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”<sup>62</sup>

Four justices, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, each separately dissented from the judgment of the Court.<sup>63</sup> In his dissent, Chief Justice Rehnquist complained that the Court’s strict scrutiny is not strict enough; not only did the Court give unprecedented deference to the law school’s educational judg-

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53. *Id.* at 330.

54. *Id.*; *see also id.* at 336 (rebutting Chief Justice Rehnquist’s contention “that the Law School’s policy conceals an attempt to achieve racial balancing”).

55. *Id.* at 335-36.

56. *Id.* at 319-20.

57. *Id.* at 337.

58. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978).

59. *Grutter*, 539 U.S. at 343.

60. *Id.* at 346 (Ginsburg, J., concurring).

61. *Id.* at 345.

62. *Id.* at 346.

63. *See id.* at 310.

ment as to the educational benefit of a diverse student body,<sup>64</sup> but it also “casually subverted” the duration of relief, “an important component of strict scrutiny,” by accepting the law school’s “vaguest of assurances” that its affirmative action program will be impermanent.<sup>65</sup> He also opined that the law school discriminates against other underrepresented minorities (in favor of black applicants) under the guise or smokescreen of critical mass.<sup>66</sup>

In his own dissent, Justice Kennedy believed that the Court’s deference to the law school’s educational judgment is of a magnitude so inconsistent with strict scrutiny, it works an “abandonment” of the review standard.<sup>67</sup> Similar to Justice Powell in *Bakke*, if given a proper case, Justice Kennedy would have approved the use of race to promote diversity.<sup>68</sup> However, he did not believe *Grutter* was such a proper case.<sup>69</sup>

Justice Scalia contended that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”<sup>70</sup> He mockingly questioned the “educational benefit” embedded in diversity, which he said “is a lesson of life rather than law” taught to children, such as Boy Scouts and kindergartners, as opposed to “full-grown adults” at law schools.<sup>71</sup> He also questioned critical mass, which throughout his dissent, he enclosed in quotes<sup>72</sup> and alternately referred to as “mystical,”<sup>73</sup> “fabled,”<sup>74</sup> and “a sham to cover a scheme of racially proportionate admissions.”<sup>75</sup> He believed that the case raised numerous questions relating to issues like

64. *Id.* at 380 (Rehnquist, J., dissenting) (“Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”).

65. *Id.* at 387.

66. *Id.* at 379-86. For instance, the Chief Justice wrote, “[s]tripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.” *Id.* at 379.

67. *Id.* at 394 (Kennedy, J., dissenting) (“Deference is antithetical to strict scrutiny, not consistent with it.”).

68. *Id.* at 395.

69. *Id.* (“[T]hrough I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.”).

70. *Id.* at 349 (Scalia, J., concurring in part and dissenting in part).

71. *Id.* at 347.

72. *See id.* at 346-49.

73. *Id.* at 346.

74. *Id.* at 347.

75. *Id.* During oral arguments in the case, Scalia characterized critical mass as “a euphemism for a quota.” Charles Lane, *O’Connor Questions Foes of U-Michigan Policy*, WASH. POST, Apr. 2, 2003, at A1. As Justice Scalia reportedly said, “once you use the terms [sic] ‘critical mass,’ you’re in Quota Land.” *Id.*

critical mass and individualized consideration, among others, that would form the basis for future litigation.<sup>76</sup>

Justice Thomas's dissent tracked the judgment of the Court in length<sup>77</sup> and was by far the most verbose of all the dissents.<sup>78</sup> Thomas began with a quote attributed to black abolitionist Frederick Douglass, delivered in Boston in 1865, regarding *What the Black Man Wants*.<sup>79</sup> Douglass urged white people to "[d]o nothing" with blacks because "your interference is doing him positive injury."<sup>80</sup> Justice Thomas said, "[L]ike Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."<sup>81</sup> He said Douglass's message was "lost on [the] majority,"<sup>82</sup> whom he also accused of "uphold[ing] the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."<sup>83</sup> He further described the majority as unable to "commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications."<sup>84</sup> Finally, he disagreed with Powell's opinion in *Bakke*, upon which the majority based its judgment.<sup>85</sup>

Justice Thomas said the Constitution forbids racial classifications "not only because those classifications can harm favored races or are

76. *Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part and dissenting in part).

77. *Compare id.* at 349-78 (Thomas, J., concurring in part and dissenting in part) (twenty-nine pages in length), *with id.* at 311-44 (majority opinion) (thirty-two pages in length).

78. *Compare id.* at 349-78 (Thomas, J., concurring in part and dissenting in part) (twenty-nine pages in length), *with id.* at 346-49 (Scalia, J., concurring in part and dissenting in part) (three pages in length), *and id.* at 378-87 (Rehnquist, C.J., dissenting) (nine pages in length), *and id.* at 387-95 (Kennedy, J., dissenting) (eight pages in length).

79. *Id.* at 349-50 (Thomas, J., concurring in part and dissenting in part) (citing Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), in 4 *THE FREDERICK DOUGLASS PAPERS* 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

80. *Id.* at 349-50.

81. *Id.* at 350. Some analysts have criticized Justice Thomas for his reference to Douglass. *See, e.g.,* Derrick Z. Jackson, Op-Ed., *Mugging Frederick Douglass*, *BOSTON GLOBE*, July 4, 2003, at A15; Courtland Malloy, *Twisting Words in an Effort to Rewrite History*, *WASH. POST*, June 29, 2003, at C1. Douglass, who worked for black equality, wanted whites to do nothing to keep blacks in bondage and would not mind preferential programs designed to achieve that purpose. *See* Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 *How. L.J.* 499, 547-48 (2004). In contrast, Justice Thomas is no abolitionist in any sense and categorically opposes all kinds of preferential programs for blacks. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

82. *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part).

83. *Id.* at 350.

84. *Id.* at 371.

85. *Id.* at 357.

based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>86</sup> He said race-conscious programs stigmatize, claiming “[t]he majority of blacks . . . admitted to the Law School” under affirmative action “are tarred as undeserving.”<sup>87</sup> He branded Justice O’Connor’s twenty-five year expected phase-out date for affirmative action as “a 25-year license to violate the Constitution.”<sup>88</sup> He “believe[d] that the Law School’s current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.”<sup>89</sup>

Although his dissent tracked those of the other dissenters, Thomas went far beyond them and his criticism was more thorough and biting. He believed the Court deferred too much to the law school’s educational judgment.<sup>90</sup> Not only, he said, is strict scrutiny compromised,<sup>91</sup> but the program in question could never withstand strict scrutiny since the school’s claimed compelling government interest was a “fabricated” one,<sup>92</sup> designed to maintain its own elite image and status.<sup>93</sup> He questioned the interest in diversity and critical mass.<sup>94</sup> He mocked diversity alternately as “aesthetic”<sup>95</sup> and “trivial.”<sup>96</sup> Thomas called preferences not based on race, such as “legacy” preferences elite schools give to the children of alumni, “unseemly,” but believed the Constitution does not forbid them.<sup>97</sup> He claimed, however, “[w]ere this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly be-

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86. *Id.* at 353.

87. *Id.* at 373.

88. *Id.* at 370.

89. *Id.* at 351; *see also id.* at 375 (“While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now.”).

90. *Id.* at 350, 362-66.

91. *See id.* at 351-54, 357-62.

92. *Id.* at 375.

93. *See id.* at 358.

94. *Id.* at 354, 374-78.

95. *Id.* at 355 n.3 (“That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”); *see also id.* at 372 (“The Law School seeks only a façade—it is sufficient that the class looks right, even if it does not perform right.”). Justice Thomas also posited, “racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.” *Id.* at 355 n.3.

96. *Id.* at 357.

97. *Id.* at 368 (“[W]hile legacy preferences can stand under the Constitution, racial discrimination cannot.”).

come less popular.”<sup>98</sup> He was of the view that extension of special preferences for black students to law schools like Michigan gives them little incentive to prepare for and achieve high scores on the law school admissions test (LSAT).<sup>99</sup> In sum, in *Grutter*, Justice Thomas elaborated, in many words, the declamation embodied in his concurrence in *Gratz* that the Constitution “categorically” forbids racial preferences.<sup>100</sup>

### *B. The Case Compared to Gratz*

In *Gratz*, the Supreme Court invalidated the University of Michigan College of Literature, Science, and the Arts’s undergraduate admissions system that awarded twenty points in a 150-point admissions system to underrepresented minorities (African Americans, Hispanics, and Native Americans).<sup>101</sup> Like *Grutter*, the petitioners, who were two Caucasian applicants, Jennifer Gratz, a female, and Patrick Hamacher, a male, were denied admission into the program and alleged their rights to nondiscriminatory treatment were violated under the U.S. Constitution and applicable federal laws.<sup>102</sup> The petitioners contended that the university could *not* base its use of race in undergraduate admissions on diversity since, to them, diversity “is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.”<sup>103</sup> In the alternative, the petitioners contended that if “the University’s interest in diversity . . . constitute[s] a compelling state interest,” its use of race was not narrowly tailored because its undergraduate admissions guidelines “do not ‘remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*.’”<sup>104</sup> The university refuted this allegation, claiming that its “program ‘hews closely’ to both the admissions program . . . Justice Powell [described in *Bakke* and] the Harvard College admissions program that he endorsed.”<sup>105</sup>

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98. *Id.* at 368 n.10.

99. *Id.* at 377.

100. *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

101. *Id.* at 249-51, 254-55.

102. *Id.* at 251-52.

103. *Id.* at 268 (citing Brief for the Petitioners at 17, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516)).

104. *Id.* at 269 (quoting Brief for the Petitioners at 17, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516)).

105. *Id.*

In an opinion authored by Chief Justice Rehnquist,<sup>106</sup> the Court in *Gratz* sided with the petitioners.<sup>107</sup> There were two issues presented in the case. The first was whether the use of race violated the Fourteenth Amendment.<sup>108</sup> The Court ruled that it did not and that the Constitution does *not* categorically preclude the use of race, citing its opinion in *Grutter* for support.<sup>109</sup> The second issue was whether the use of race in the university's undergraduate admissions program was narrowly tailored to achieve the interest in educational diversity the university sought to achieve.<sup>110</sup> The Court found the use of race was "not narrowly tailored."<sup>111</sup> Citing Justice Powell's opinion in *Bakke*, the Court said there was no "individualized consideration" of applicants.<sup>112</sup> Instead, "[t]he only consideration that accompanies" the award of twenty points to applicants from under-represented minority groups was "a factual review of an application to determine whether an individual is a member of one of these minority groups."<sup>113</sup> The Court also said the bonus points made race a "decisive" factor rather than a "plus" factor, under the approach Justice Powell described in *Bakke*.<sup>114</sup>

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106. William H. Rehnquist (1924-2005), a Republican from Arizona, who was appointed by President Richard Nixon, joined the Court in 1971. HENSLEY ET AL., *supra* note 35, at 64. Many civil rights and liberties groups strongly opposed his confirmation by the Senate. *Id.* He eventually won confirmation by a vote of sixty-eight in favor and twenty-six against because of "his impressive academic credentials, his intellectual abilities, and his performance in the Justice Department" under Nixon. *Id.* He was appointed Chief Justice in 1986 by President Reagan. *Id.* at 63.

As a young law clerk for Justice Robert Jackson in 1954, Rehnquist wanted to maintain the separate-but-equal doctrine of *Plessy v. Ferguson*. *See id.* at 64. One analyst noted that "[h]is conservative legal and political views were well known before he came to the Court, and he has been a strong and consistent advocate of these views throughout his years on the Court." *Id.* at 63. Rehnquist did not prove wrong the apprehension by civil rights and liberties groups that he would be anti-civil rights. *See id.* at 64. To the contrary, his "voting record in civil rights and liberties cases [was] consistently conservative throughout his years on the Court." *Id.* The Chief Justice was part of a "conservative voting bloc" on the Court that included Justice Scalia and Justice Thomas. *Id.* at 65. Rehnquist had a "judicial philosophy [made up of] a hierarchy of values, . . . [which ranks] federalism [as] the highest value, [followed by] property rights [in the] second level, and individual rights occupying the lowest [rung] of his hierarchy." *Id.*

107. *Gratz*, 539 U.S. at 275.

108. *Id.* at 268.

109. *Id.*

110. *Id.* at 269.

111. *Id.* at 270.

112. *Id.* at 271. The individualized consideration Justice Powell favored in his opinion in *Bakke* was "individual qualities or experience not dependent upon race but sometimes associated with it." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978).

113. *Gratz*, 539 U.S. at 271-72.

114. *Id.* at 272.



The Court disagreed with the university's assertion that its system permitting the flagging of certain applicants for review by an admissions review committee amounted to individualized consideration.<sup>115</sup> First, Chief Justice Rehnquist stated, "the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell."<sup>116</sup> Second, what little individualized review that takes place occurs after points have been distributed to benefited groups.<sup>117</sup> Finally, the Court also disagreed with the university's contention that the large volume of applications to the undergraduate school renders impractical an admissions system not based on points, maintaining, *inter alia*, that "[n]othing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by . . . strict scrutiny."<sup>118</sup>

Justice O'Connor wrote a concurring opinion in which she maintained that the admissions policy in *Gratz* "is a nonindividualized, mechanical one" that "do[es] not provide for a meaningful individualized review of applicants."<sup>119</sup> She distinguished the race-conscious program in *Gratz* from the program the Court approved in *Grutter*.<sup>120</sup> The program in *Gratz* "ensures that the diversity contributions of applicants cannot be individually assessed."<sup>121</sup> And, it "stands in sharp contrast [to the program in *Grutter*] which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class."<sup>122</sup> Justice O'Connor shared the opinion of the Court that the committee "reviews only a portion of all of the applications [leaving t]he bulk of admissions decisions" to be based on points.<sup>123</sup> In short, she said, the

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115. See *id.* at 273-74; see also *id.* at 256-57 (describing the flagging system used by the Admissions Review Committee).

116. *Id.* at 273.

117. *Id.* at 274 n.21.

118. *Id.* at 275.

119. *Id.* at 276, 280 (O'Connor, J., concurring).

120. *Id.* at 276-77.

121. *Id.* at 279. The Chief Justice in his opinion for the Court quoted this statement approvingly in rebutting Justice Souter's contention that "applicants to the undergraduate college are [not] denied individualized consideration." *Id.* at 273 n.20 (majority opinion).

122. *Id.* at 279 (O'Connor, J., concurring).

The only potential source of individualized consideration appears to be the Admissions Review Committee. [Yet, available evidence] reveals very little about how the review committee actually functions. And what evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review.

*Id.* at 279-80.

123. *Id.* at 280.

flagging system does little “to offset the apparent absence of individualized consideration.”<sup>124</sup>

Justice Ginsburg dissented vigorously from the Court’s opinion on a multiplicity of substantive grounds.<sup>125</sup> These grounds included the application of strict scrutiny in the case;<sup>126</sup> factors that in spite of the introduction of a point-system rendered the affirmative action plan in question narrowly tailored, individualized, and therefore constitutional;<sup>127</sup> problems with so-called “race-neutral alternative[s],” such as “percentage plans” under experimentation in states like California, Florida, and Texas;<sup>128</sup> and, the necessity for full candor, not subterfuge, in affirmative action programs.<sup>129</sup>

Regarding this last issue of honesty in affirmative programs, the opinions of Justices Ginsburg and Souter are particularly important. Justice Ginsburg remarked that in removing “[t]he stain of generations of racial oppression . . . in our society,” institutions of higher learning “will seek to maintain their minority enrollment.”<sup>130</sup> The issue, she said, is “whether . . . they can do so in full candor through . . . affirmative action [programs such as] the [one] at issue” here.<sup>131</sup> Otherwise, schools may resort to all kinds of “camouflage” designed to disguise their use of race in admissions.<sup>132</sup> She expressed the view that “Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>133</sup> Responding to Chief Justice Rehnquist’s accusation that she suggested “changing the Constitution so that it conforms to the conduct of the universities,”<sup>134</sup> Justice Ginsburg maintained that, “the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.”<sup>135</sup>

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124. *Id.*

125. *See id.* at 298-305 (Ginsburg, J., dissenting).

126. *See id.* at 302-03.

127. *See id.* at 303.

128. *Id.* at 303 n.10.

129. *Id.* at 305.

130. *Id.* at 304.

131. *Id.*

132. *Id.*; *see also id.* at 304-05 (describing examples of such camouflage or underhand measures).

133. *Id.* at 305.

134. *Id.* at 275 n.22 (majority opinion).

135. *Id.* at 305 n.11 (Ginsburg, J., dissenting) (citation omitted).

In his dissent, Justice Souter contended “college admission is not [something] left entirely to inarticulate intuition,” numbers do not automatically spell denial of individualized consideration, and “[t]he college simply does by a numbered scale what the law school accomplishes [by] its ‘holistic review.’”<sup>136</sup> On the issue of candor, he was satisfied that the affirmative action plan under challenge was “forthright[] in saying just what plus factor it gives [to race]” and “states its purpose directly,” compared to so-called race-neutral alternatives like percentage plans, which are characterized by “deliberate obfuscation.”<sup>137</sup> “Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”<sup>138</sup> Therefore, Justice Souter believed Michigan needed a pat on the back, not rebuke, “for its frankness.”<sup>139</sup>

### *C. Commentaries in Academic and Popular Media on the Case*

Restrictions on affirmative action by the United States Supreme Court, and a ban on the policy by some states, may have created anxiety in pro-affirmative action quarters that the high court would use the opportunity afforded by the challenges to the University of Michigan’s affirmative action programs to declare affirmative action unconstitutional.<sup>140</sup> Whatever the reason, these cases, particularly *Grutter* upholding affirmative action, have been received with considerable applause in legal, educational, and civil rights quarters. The American Bar Association (ABA) welcomed the *Grutter* decision as a “victory for progress toward a legal profession that reflects the American soci-

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136. *Id.* at 295 (Souter, J., dissenting).

137. *Id.* at 297-98.

138. *Id.* at 298.

139. *Id.*

140. See Norma M. Riccucci, *The Immortality of Affirmative Action*, in PUBLIC PERSONNEL MANAGEMENT: CURRENT CONCERNS, FUTURE CHALLENGES 72, 73-79 (Carolyn Ban & Norma M. Riccucci eds., 3d ed. 2002). Riccucci highlighted the series of decisions by the federal courts, some of which, beginning with *City of Richmond v. Croson*, 488 U.S. 469, 505 (1989) (holding a city ordinance that required a certain percentage of contracts to be awarded to minorities violative of the Equal Protection Clause of the Fourteenth Amendment), eroded affirmative action. Riccucci, *supra*, at 73-79. Two states wherein citizens have adopted initiatives or referenda banning the use of race in education, employment, and government contracting are California and Washington. *Id.* at 79 (discussing a sample of voter referenda, concluded and still ongoing, in the United States against affirmative action). For example, the California Civil Rights Initiative (CCRI), passed in 1996, ended thirty years of affirmative action practice in the state. AFFIRMATIVE ACTION, *supra* note 1, at 6. Other states, such as Michigan, Nebraska, and Florida, are considering similar initiatives banning the use of affirmative action. Riccucci, *supra*, at 79.

ety it serves.”<sup>141</sup> The President of the Association of American Colleges and Universities (AACU) remarked, “The courts have recognized that racial inequality still disfigures our democracy and that higher education can and should play a crucial role in closing the opportunity gap.”<sup>142</sup> The National Association of Advancement of Colored People (NAACP) raved that the ruling “provided the nation with a road map on how to construct affirmative action programs in higher education.”<sup>143</sup> Last, but not least, the National Urban League hailed *Grutter* as “an historic victory for America and a reaffirmation of the nation’s commitment to equality and diversity.”<sup>144</sup>

Notable individuals who published commentaries in both popular and scholastic media that praised the decision include Professor Guinier of Harvard Law School, who called the case “a slam-dunk for affirmative action”;<sup>145</sup> legal analyst Martin Michaelson, who opined that “[n]ot since [*Brown*] 1954 . . . has the [Supreme C]ourt spoken with one voice in a major ruling that affected race and education”;<sup>146</sup>

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141. Press Release, Am. Bar Ass’n, Statement of Alfred P. Carlton, Jr., President (June 23, 2003), <http://www.abanews.org/jun03/statement062303.html>.

142. Greg Winter, *The Supreme Court: Other Campuses; Ruling Provides Relief, but Less than Hoped*, N.Y. TIMES, June 24, 2003, at A26 (quoting AACU President Carol Geary Schneider).

143. *The Thin Race Line: Court Preserves Affirmative Action in Narrow Ruling*, CHI. TRIB., June 24, 2003, at 10 (quoting NAACP President Kweisi Mfume). The NAACP was founded in 1909, “the hundredth anniversary of the birth of [President] Abraham Lincoln,” as an interracial organization “by upper-middle-class white Protestants and Jews.” WALTON & SMITH, *supra* note 1, at 95. It remained, until the 1960s, the principal civil rights protest organization. *See id.* The organization had a membership of about 450,000 people in 1700 local chapters and an annual budget of about \$11.9 million in 1995. *Id.* at 118. The NAACP Legal Defense and Educational Fund, the litigation arm of the organization, praised the case as a “defining moment.” Jan Crawford Greenburg, *Supreme Court Narrowly Upholds Affirmative Action for Diverse Student Bodies*, CHI. TRIB., June 24, 2003, at C1 (quoting Theodore Shaw, the NAACP Legal Defense and Educational Fund’s associate director-counsel).

144. *Urban League Applauds Court AA Ruling*, NEW PITTSBURGH COURIER, July 2, 2003, at A5 (quoting National Urban League President Marc Morial [hereinafter *Urban League Applauds AA Ruling*]). The organization stated, “With this decision, the court [sic] has made clear that diversity and excellence are not mutually exclusive.” *Id.* Distinguishing *Grutter* from *Gratz*, the National Urban League President noted, “[I]t is extremely important that citizens realize that the court [sic] did not reject affirmative action, it rejected Michigan’s specific scoring system.” *Id.* The Urban League is designed to promote African American economic advancement. *Id.* Founded in 1910, the organization has about 118 local affiliates in thirty-four states and the District of Columbia and boasts an annual budget estimated at \$24 million in 1995. *Id.*; WALTON & SMITH, *supra* note 1, at 117-18.

145. Guinier, *supra* note 15.

146. Martin Michaelson, *The Court’s Pronouncements Are More Dramatic and Subtle than the Headlines*, CHRON. HIGHER EDUC. (Wash., D.C.), July 18, 2003, at 11.

and university administrator M. Lee Pelton, who hailed the case as a “summer blockbuster ruling on . . . affirmative action.”<sup>147</sup>

Not all analysts who commented on the decision believed it marked an auspicious development in Supreme Court jurisprudence on affirmative action. Critics of the decision may be classified as individuals who assessed the decision as going too far and those who viewed it as not going far enough. Among the category of individuals who thought the decision went too far are Professor Shelby Steele and Ward Connerly. Steele, a black conservative, lambasted *Grutter* as “A Victory for White Guilt,” maintaining, “We deserve justices who can feel certain about the capacity of whites to be fair and the capacity of minorities to compete.”<sup>148</sup> Connerly, a black, reputed for his stout opposition to affirmative action, berated the *Grutter* ruling as a “Cloudy Vision of a Race-Free America.”<sup>149</sup>

Commentators who viewed the decision as not going far enough include distinguished educator and veteran commentator on African American affairs, Professor Ron Walters, and newspaper writer Derrick Z. Jackson. Professor Walters assessed *Grutter* merely as “a stay of execution to affirmative action.”<sup>150</sup> He stated he would “hold [his] applause - or maybe applaud lightly” and viewed any “victory dance” as premature, given that “[w]hat the court [sic] did was to constitutionalize the concept of diversity as an appropriate basis for the practice of affirmative action.”<sup>151</sup> He condemned the role of the Bush ad-

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147. M. Lee Pelton, *Affirmative Action and Democratic Vistas: After the Supreme Court Michigan Cases*, 6 PRESIDENCY 18 (Fall 2003), available at [http://www.findarticles.com/pl/articles/mi\\_qa3839/is\\_200310/ai\\_n9329676](http://www.findarticles.com/pl/articles/mi_qa3839/is_200310/ai_n9329676). Pelton is the president of Willamette University. *Id.*

148. Shelby Steele, Op-Ed., *A Victory for White Guilt*, WALL ST. J., June 26, 2003, at A16. For a discussion on the identity and ideology of the new black conservatives, see LUCIUS J. BARKER ET AL., *AFRICAN AMERICANS AND THE AMERICAN POLITICAL SYSTEM* 98-101 (4th ed. 1999). The group also includes Justice Clarence Thomas of the U.S. Supreme Court. *Id.* at 101.

149. Ward Connerly, *The Cloudy Vision of a Race-Free America*, CHRON. HIGHER EDUC. (Wash., D.C.), July 4, 2003, at B12. Connerly regrettably stated, “While I and many others viewed Michigan’s reasoning about diversity as the snow job of the century, the court [sic] saw otherwise and elevated Justice Lewis Powell’s dictum in the *Bakke* case to the law of the land.” *Id.* Connerly serves on the governing board of the University of California and is one of the architects of the CCRI, a measure approved by the voters of California in 1996, that forbids the use of race, gender, or ethnicity as criteria in state hiring and admissions to public universities. *Id.*; Riccucci, *supra* note 140, at 79.

150. Ron Walters, Op-Ed., *Affirmative Action Wins: But Which Version?*, SACRAMENTO OBSERVER, June 30, 2003, available at [http://www.sacobserver.com/community/commentary/063003/affirmative\\_action.shtml](http://www.sacobserver.com/community/commentary/063003/affirmative_action.shtml).

151. *Id.*

ministration in the Michigan cases.<sup>152</sup> Jackson opined that *Grutter* meant “affirmative action survived, but in a form more limited than ever and with [Justice Sandra Day] O’Connor setting the nation’s timer to get rid of it by 2028.”<sup>153</sup>

### III. OVERVIEW OF MINORITY PARTICIPATION IN THE LEGAL PROFESSION IN AMERICA

The story of minority participation in the American legal profession is a story of exclusion. One of the significant changes in the legal profession during the 1970s and 1980s was the “gradual and belated opening to minority lawyers and multicultural diversity.”<sup>154</sup> Before this period, minority participation in the legal profession was minimal.<sup>155</sup>

To date, the experience of blacks, as a group vastly under-represented in law school relative to their share of the population, symptomatizes the historic plight of minority lawyers.<sup>156</sup> Before the 1970s and 1980s, few white law schools admitted blacks.<sup>157</sup> As a re-

152. See Ron Walters, Editorial, *The Michigan Affirmative Action Case and Black Patriotism*, N.Y. BEACON, May 21, 2003, at 8. He berated the “crowd in the [Bush] White House” as “especially callous” and pointed to the actions of the government as “one powerful reason why” blacks generally maintain a lukewarm attitude toward the war in Iraq. *Id.*

They are not sure they are full Americans because they [are] faced with the hard evidence that while [they] always have been willing to fight and die for [America]—and to prove [themselves] worthy citizens—this country was not always willing to exhibit the full measure of devotion to [them].

*Id.*

153. Derrick Z. Jackson, Editorial, *Taking on the Bonus Points for Whites*, CHI. TRIB., June 30, 2003, at C19. Although this piece also discussed *Grutter*, its main focus, as even the article’s very caption bears out, was on *Gratz*, regarding which Jackson contended: “Getting rid of a point system may sound fine to someone who refuses to open a history book.” *Id.* “The court took away bonus points for black, brown, and red people on behalf of angry white people. But the bonus points of white privilege are still in place, unchallenged and unrelenting, no matter how angry minorities get.” *Id.*

154. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 23 (1992) [hereinafter MACCRATE REPORT]. The report is sometimes referred to as the MacCrate Report, after Robert MacCrate, who chaired the Task Force. See *id.* at v.

155. See *id.* at 23.

156. See generally Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 416 (1986) (examining black law school “enrollment patterns and explanations for [those patterns] in three periods: (1) the century following the enrollment of the first black law student in 1868; (2) the decade of substantial growth in black enrollment; and (3) the leveling off in black enrollment during the late 1970s and 1980s”). It found that even “[a]t the highest point, blacks constituted about five percent of law students,” a number, the authors, for good reason, term “minuscule.” *Id.* at 415.

157. See *id.* at 428.

sult, for a long time, the main source of black legal education was historically black law schools like Howard University Law School in Washington, D.C.; North Carolina Central University Law School, founded in 1939; and Texas Southern University, Houston, and Southern University Law School in Baton Rouge, both established in 1947.<sup>158</sup> Howard University Law School opened its doors in 1869 and until 1939 was the only substantial school in the entire country blacks could attend for legal education.<sup>159</sup> This included future Supreme Court Justice Thurgood Marshall, who was compelled to attend Howard University Law School after he was denied admission into the University of Maryland Law School in the 1940s because of his race.<sup>160</sup> As late as 1983, these four law schools “trained the majority of black lawyers.”<sup>161</sup>

In addition to not being admitted by white law schools, blacks were also “expressly excluded from membership in the [ABA].”<sup>162</sup>

158. MACCRATE REPORT, *supra* note 154, at 23.

159. *Id.*

160. Leland Ware, *Turning Back the Clock: The Assault on Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 3, 29 n.45 (1998).

161. MACCRATE REPORT, *supra* note 154, at 23.

162. Shields, *supra* note 19, at 752 n.9. Founded in 1878, the ABA is the largest national organization of attorneys in the United States. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2005-2006 iv (2005-06 ed. 2005), *available at* [www.abanet.org/legaled/standards/2005-2006standardsbook.pdf](http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf) [hereinafter STANDARDS OF PROCEDURE]; *see also* Am. Bar Ass'n, About the ABA, <http://www.abanet.org/about/home/html> (last visited Oct. 7, 2005). Seventy-five lawyers from twenty-one states and the District of Columbia attended the ABA's organizational meeting of the association in Saratoga, New York in 1878. MACCRATE REPORT, *supra* note 154, at 105-06 n.14. The meeting's principal organizer was Judge Simeon E. Baldwin of Yale Law School and later Chief Justice and Governor of Connecticut. *Id.* at 107. The ABA is “designed to raise the standards of the legal profession and to encourage professional unity.” *See* LAW SCH. ADMISSION COUNCIL, INC., THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 4 (2001 ed. 2000) [hereinafter OFFICIAL GUIDE 2001 ED.]. The organization

sponsors . . . programs dealing with legal education, law reform, judicial selection, and professional responsibility. [It] publishes the *Model Rules of Professional Conduct*, a set of regulations governing ethical standards in the practice of law. Attorneys who violate [these] standards are [then] subject to censure, suspension, or disbarment by the state bar admitting authorities.

*Id.*

One critical ABA division is the Section of Legal Education and Admissions to the Bar. *See* Am. Bar Ass'n, Section of Legal Education and Admissions to the Bar, <http://www.abanet.org/legaled> (last visited Oct. 10, 2005). The Section of Legal Education and Admissions to the Bar is the section of the ABA that works with the Law School Admission Council in preparing and publishing the *Official Guide to ABA-Approved Law Schools* released annually. LAW SCH. ADMISSION COUNCIL, INC., OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS i (2002 ed. 2001) [hereinafter OFFICIAL GUIDE 2002 ED.]. The Section originated in 1879 as the Standing Committee on Legal Education and Admissions to the Bar. STANDARDS OF PROCEDURE, *supra* note 162, at iv. It gained free-standing status as a section, the first established by the ABA, in 1893. *Id.* Since 1952, the Council of the Section of Legal

The ban remained in place until 1943 when it was formally lifted.<sup>163</sup> Even then, it took seven years, until 1950, for “the first African American lawyer [to be] admitted [in]to the Association.”<sup>164</sup> The few blacks who graduated from law school before 1943 joined the National Bar Association, the national association of black lawyers.<sup>165</sup> Since its formation in 1925, the organization “has been continuously concerned [about] the dearth of black lawyers in proportion to the [size of the] African American population.”<sup>166</sup>

To combat the exclusion of blacks from historically white law schools, beginning in the 1930s, the NAACP Legal Defense Fund, under Thurgood Marshall and others, brought suits designed to open the doors of these schools to blacks.<sup>167</sup> These discrimination cases included *Missouri ex rel. Gaines v. Canada*, which invalidated Missouri’s policy of excluding blacks from its law school and instead offering to pay for their attendance at out-of-state law schools;<sup>168</sup> and *Sweatt v. Painter*, which found that Texas’s all-black law school was

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Education and Admissions to the Bar, *not* the ABA itself, has been approved by the U.S. Department of Education as the recognized national agency for the accreditation of professional schools of law. *Id.* The ABA announced its first Standards for Legal Education in 1921. *Id.* To enforce these standards for law schools which met them, the ABA, in 1927, hired Professor H. Claude Horack of the University of Iowa College of Law as its first Advisor to the Section. *Id.* Starting with Professor Millard H. Ruud of the University of Texas, the job title changed to Consultant on Legal Education to the American Bar Association in recognition of the broader responsibilities of the position. *Id.* After Ruud, Professor (later Dean) James P. White of Indiana University School of Law, Indianapolis became the Consultant on Legal Education beginning in January 1974. *Id.* White left the position in August 2000 and was replaced by John A. Sebert who has been in office since September 1, 2000. *Id.* Sebert was a former Dean of the University of Baltimore School of Law and a former law professor at both the University of Tennessee and University of Minnesota law schools. *Id.*

163. Shields, *supra* note 19, at 752 n.9.

164. MACCRATE REPORT, *supra* note 154, at 23.

165. *Id.* at 25; *see also* Shields, *supra* note 19, at 732.

166. MACCRATE REPORT, *supra* note 154, at 25.

167. WALTON & SMITH, *supra* note 1, at 210-11, 213; *see also* Littlejohn & Rubinowitz, *supra* note 156, at 429. In its war against “separate but equal,” the NAACP adopted a two-prong strategy that initially involved an attack focused on “the absence of equality in the education of blacks.” WALTON & SMITH, *supra* note 1, at 210. Following these and other victories, the organization, after extensive study, changed its strategy and launched a direct and frontal attack on the practice of segregation symbolized by separate but equal, resulting in *Brown v. Board of Education* in 1954. *Id.* at 213. The deluge of studies chronicling the NAACP’s “fighting segregation through litigation” strategy include JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (Vintage Books ed. 1977) (1975); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

168. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938).



inherently inferior to its school for whites and ordered the admission of blacks to the white law school.<sup>169</sup> Yet, it was

not until . . . *Brown v. Board of Education* overruling the “separate but equal” doctrine, and the [series] of civil rights legislation [enacted] in the early 1960s, [that] the academic legal community [started] to give serious attention to the problem of the exclusion of blacks and other racial minorities from law schools.<sup>170</sup>

Moreover, it was not until 1964 that the Committee on Racial Discrimination of the Association of American Law Schools (AALS) could report “for the first time that no member school [stated that it] den[ie]d admission to any applicant [based] on . . . race or color.”<sup>171</sup>

Even with the AALS’s report that no member law school was discriminating, in the 1964-65 academic year, only 433 of the over 50,000 law students enrolled in predominantly white law schools were African Americans.<sup>172</sup> The overall number of blacks in ABA-accredited law schools in 1965, with a majority of black or white students, was only 700 or approximately one percent of all enrollments in J.D. programs.<sup>173</sup> The number rose to 4423, making up 4.3% of all enrollments in 1972; and 8149, comprising 6.3% of all enrollments in the 1991-92 academic year.<sup>174</sup> It took the coordinated efforts of law schools, the organized bar, and federal government agencies, all designed to increase minority enrollment, to realize the very modest progress articulated here.<sup>175</sup> One such federal agency was the Office of Economic Opportunity, which, in the late 1960s, “initiated programs of increased financial aid and remedial study.”<sup>176</sup> Beginning in the early 1970s, “the office of the ABA Consultant on Legal Education [started to] include[] in [its] Annual Review of Legal Education a survey of minority group students enrolled in J.D. programs in approved law schools.”<sup>177</sup> The Law School Admission Council (LSAC) was “[t]he first national legal education organization to gather minor-

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169. *Sweatt v. Painter*, 339 U.S. 629, 633-34, 636 (1950).

170. MACCRATE REPORT, *supra* note 154, at 23. The legislation included the Civil Rights Act of 1964, the Voting Right Acts of 1965, and the Fair Housing Act of 1968. WALTON & SMITH, *supra* note 1, at 177, 179.

171. MACCRATE REPORT, *supra* note 154, at 23. AALS was founded in 1900 with thirty-two charter member schools. *Id.* at 107. Membership is open to schools, which are required to meet certain minimum standards, rather than to individuals. *Id.*

172. *Id.* at 23-24.

173. *Id.* at 24.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

ity law school enrollment data.”<sup>178</sup> The initiative was endorsed and supported by the AALS and the Council on Legal Education Opportunity (CLEO).<sup>179</sup>

The minimal or token representation of blacks in the American legal profession also was noticeable in the number of minority individuals engaged in legal practice.<sup>180</sup> For example, in 1960, there were only 2012 black lawyers, or 0.98% of the 205,515 lawyers and judges in the United States.<sup>181</sup> By 1970, the number grew slightly to 3728, or 1.4% out of a total 272,401 lawyers and judges.<sup>182</sup> By 1980, the number of black lawyers and judges increased to 14,839 and further increased to 25,704 in 1990, totaling 2.7% and 3.3% of all American lawyers and judges, respectively.<sup>183</sup> These modest changes would not have taken place but for the “increased political activity and the dis-

178. *Id.* at 24 n.42 (quoting Millard H. Ruud). The LSAC is a nonprofit corporation founded in 1947 “to coordinate, facilitate, and enhance the law school admission process.” OFFICIAL GUIDE 2002 ED., *supra* note 162, at i. The Council “provides numerous programs and services related to legal education.” *Id.* All ABA-approved law schools are LSAC members. *Id.* With the help of the ABA, LSAC produces the *Official Guide to ABA-Approved Law Schools*. *Id.* This is a guidebook published yearly, embodying statistics on the 183 ABA-approved law schools in the country as of 2001. *Id.* It is designed “to help individuals prepare for the rigors and costs associated with attending law school.” *Id.* The 2001 guide calls itself “a resource book for individuals seeking broad information about law school in general.” OFFICIAL GUIDE 2001 ED., *supra* note 162, at i. The language “broad information about law school in general” is appropriate and revealing. As the LSAC explains, no singular guidebook

can rightly claim to be a final authority on the many questions that the law school applicant will encounter. Whether you are choosing a school, selecting courses or other activities, or investigating career opportunities, [the decision] in the final analysis, will be yours alone to make . . . Regarding various aspects of legal education, there is no single school of thought, but rather ongoing, vigorous discussion of numerous important issues.

*Id.* It warns that no singular “book or website can substitute for direct contact with admission offices, professors, students, alumni, and prelaw advisors.” OFFICIAL GUIDE 2002 ED., *supra* note 162, at i. The overriding point, as the LSAC counsels, is for law school applicants to “seek information from as many sources as possible, particularly from the law schools themselves.” OFFICIAL GUIDE 2001 ED., *supra* note 162, at i. The LSAC advises minority applicants on the imperativeness “to do sufficient research and be selective.” OFFICIAL GUIDE 2002 ED., *supra* note 162, at 24. Information contained in the guide is collected from ABA-approved schools in the fall of every year. *Id.* at i. ABA rules mandate that a law school “publish basic consumer information” and that the information “be published in a fair and accurate manner reflective of actual practice.” *Id.* (quoting STANDARDS OF PROCEDURE, *supra* note 162, § 509). “The ABA collects quantitative data as part of the accreditation process [for law schools,] using questionnaires completed annually during the fall academic semester.” *Id.*

179. MACCRATE REPORT, *supra* note 154, at 24 n.42.

180. *Id.* at 25.

181. *Id.*

182. *Id.*

183. *Id.*

mantling of racial segregation” that occurred during the decades of the 1970s and 1980s.<sup>184</sup>

Despite significant progress made over the years by law schools and the organized bar, among others, in increasing minority participation, minority groups still maintain a representation in the American legal profession at numbers well below their share of the population.<sup>185</sup> In 1990, blacks made up only 3.3% percent of all U.S. lawyers, almost nine percentage points below their share of thirty million people, or 12.1% of the population.<sup>186</sup> In 2000, ten years later, the number climbed to only 3.9% of U.S. lawyers.<sup>187</sup> In the same year, Hispanics made up an estimated 12.5% of the U.S. population but accounted for only 3.3% of U.S. lawyers, more than nine percentage points below their share of the population.<sup>188</sup> These figures stood in sharp contrast with Asians who made up 3.6% of the population but accounted for 2.3% of American lawyers (a mere 1.3% below their share of the population) and whites who made up 75.1% of the U.S. population but accounted for 89.2% of the country’s lawyers.<sup>189</sup> Whites had more lawyers than their share of the population by a substantial amount of more than fourteen percentage points.<sup>190</sup>

The *Report of the Task Force on Law Schools and the Profession*, also known as the *MacCrate Report*, assessed that “[t]he law schools and the organized bar were slow to recognize their essential role and responsibility for promoting equal justice for racial minorities.”<sup>191</sup> While barriers have been broken and exclusionary policies abandoned, “[t]he goal of equal opportunity within the [legal] profession is still a long way from realization.”<sup>192</sup> It is in this understandable vein that the *MacCrate Report* rated the diversification and opening of education to blacks and other minorities in the United States as “belated.”<sup>193</sup> Although the number of minorities in all walks of legal life, including

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184. *Id.*

185. *Id.*

186. *Id.*

187. COMM’N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, AM. BAR ASS’N, STATISTICS ABOUT MINORITIES IN THE PROFESSION FROM THE CENSUS (2005), available at [www.abanet.org/minorities/links/2000census.html](http://www.abanet.org/minorities/links/2000census.html) [hereinafter STATISTICS ABOUT MINORITIES]; see also Molly McDonough, *A Long March: Report Says the Legal Profession’s Efforts to Achieve Diversity Still Are at a Crawl*, 91 A.B.A. J. 59, 59 (2005).

188. STATISTICS ABOUT MINORITIES, *supra* note 187; see also McDonough, *supra* note 187, at 59.

189. STATISTICS ABOUT MINORITIES, *supra* note 187.

190. *See id.*

191. MACCRATE REPORT, *supra* note 154, at 27.

192. *Id.*

193. *Id.* at 23.

private practice, corporations, government service, teaching, and administration continues to grow, this is “only a beginning” that needs to be creatively built upon.<sup>194</sup>

A recent study by the ABA Commission on Racial and Ethnic Diversity in the Profession (CRED), instructively titled *Miles to Go: Progress of Minorities in the Legal Profession*, reinforces this assessment of a slow pace regarding minority participation in the American legal profession.<sup>195</sup> It reports that “[m]inorities continue to be grossly underrepresented in the top ranks of the profession, such as firm partners and corporate general counsel[s].”<sup>196</sup> Also, “progress in the profession has been especially slow for minority women.”<sup>197</sup> According to the study, the legal profession “continue[s] to trail . . . other [major] professions in terms of minority representation. . . . [M]inorities make up 20.8 percent of accountants and auditors, 24.6 percent of physicians and surgeons, and 18.2 percent of college and university teachers.”<sup>198</sup> For lawyers, the number is only 9.7 percent.<sup>199</sup> However, some statistics in the report give hope. For example, “minorities account for 20.3 percent of law students, 14.5 percent of law firm associates and 4 percent of partners.”<sup>200</sup> But, as one of the authors of the study stated, “[m]inority progress in the profession remains frustratingly low.”<sup>201</sup>

To improve minority participation in the legal profession, “[t]he report urge[d] law schools to develop holistic approaches to admissions” and not to over-rely on the law school admission test (LSAT) scores, which it said “are a ‘weak predictor’ of success [in law school] and put minorities at a disadvantage.”<sup>202</sup> It counseled law firms and other legal employers to “include diversity in their business plans” and for the lawyers who run the firms to enforce those plans.<sup>203</sup> It also “recommend[ed] more systematic research to better measure patterns

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194. *Id.* at 26-27.

195. McDonough, *supra* note 187.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* (quoting Professor Elizabeth Chambliss of the New York Law School in Manhattan). Part of the reason is that minority enrollment in law schools may have leveled out. *Id.* “Minority enrollment actually dropped slightly, from 20.6 percent of all law students in 2001-02 to 20.3 percent in 2003-04 . . . .” *Id.*

202. *Id.*

203. *Id.*

of diversity within the profession.”<sup>204</sup> The chair of CRED observed, “The elections of Robert J. Grey Jr. and Dennis W. Archer as the first two African-Americans to serve as ABA president are notable,” but at the same time he worried

that lawyers will celebrate these achievements without also recognizing that much still needs to be done [before] the legal profession . . . achieve[s] full diversity.

‘People think it’s time to relax,’ [he said]. ‘[But] we can’t let up. We’ve got to continue the drumbeat . . . . Those victories show us what can be done, not the measure of what has been done.’<sup>205</sup>

The authors of the report indicated that “[a]t some level, lawyers must make a personal commitment to greater diversity in the profession through mentoring and other activities . . . . ‘All of us as lawyers need to look at it and ask what can we do to make a difference.’”<sup>206</sup>

#### IV. INFLUENCE OF RACE IN LAW SCHOOL ADMISSIONS IN AMERICA

“[L]aw schools are the gateway to the legal profession.”<sup>207</sup> In the American education system, they are indispensable purveyors of “minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.”<sup>208</sup> The exclusion of blacks and other minorities from American legal education in the past, resulting in their vast under-representation relative to their share of the population,<sup>209</sup> dictated that race had to be taken into account in law school admissions decision making.

##### *A. The Supreme Court: From Correction of Black Exclusion to an Option for the Use of Race in Admissions Decisions as a Tool of Inclusiveness*

With its rulings in the past, the Supreme Court contributed to black exclusion and segregation.<sup>210</sup> Possibly for this reason, the Court

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204. *Id.*

205. *Id.* (quoting Lawrence R. Baca, chair of the ABA Commission on Racial and Ethnic Diversity in the Profession) (second omission in original).

206. *Id.* (quoting Lawrence R. Baca, chair of the ABA Commission on Racial and Ethnic Diversity in the Profession).

207. STANDARDS OF PROCEDURE, *supra* note 162, at viii.

208. *Id.*

209. See STATISTICS ABOUT MINORITIES, *supra* note 187.

210. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 548 (1896) (announcing the “separate but equal” doctrine); The Civil Rights Cases, 109 U.S. 3, 9-10, 32 (1883) (invalidating the Sec-

recognized early in the game that race could be a factor in admissions decisions. In *Brown*, issued in 1954, the Supreme Court ruled that “segregat[ing] . . . children in public schools solely [based on their] race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive[d minority] children of . . . equal educational opportunities,” contrary to the Equal Protection Clause of the Fourteenth Amendment.<sup>211</sup> The decision abolished the “separate but equal” doctrine in *Plessy* and desegregated the public school system.<sup>212</sup> In a companion case involving the District of Columbia, the Court ruled that “[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”<sup>213</sup> The Court reached its decision in *Brown* unanimously with no justice dissenting.<sup>214</sup> Insightful analysis on “public education in the light of its full development and its present place in American life throughout the Nation” informed the holding in *Brown*.<sup>215</sup> The Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.<sup>216</sup>

Several key cases, most of them directly related to the law school context, led up to *Brown*. In *Missouri ex rel. Gaines v. Canada*, the Court ruled that equal protection under the Constitution mandated Missouri to provide separate but equal legal education facilities for

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and Civil Rights Act of 1875 which made it a federal crime to deny blacks full enjoyment of public accommodation); *Scott v. Sandford*, 60 U.S. 393, 406, 428 (1856) (holding that black slaves were not citizens of the United States and holding that the Missouri Compromise, which banned slavery in parts of the United States, was unconstitutional).

211. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954).

212. *Id.* at 495.

213. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

214. *See Brown*, 347 U.S. at 483.

215. *Id.* at 492-93.

216. *Id.* at 493.

blacks.<sup>217</sup> Since Missouri could not provide separate but equal legal education for Gaines, a black applicant who was refused admission to the University of Missouri Law School because of his race, Missouri had to admit him to the University of Missouri Law School.<sup>218</sup> The Court found untenable Missouri's defense that it would pay Gaines's tuition to an out-of-state law school pending the establishment of a separate law school for blacks.<sup>219</sup>

In *Sweatt v. Painter*, the University of Texas Law School (UTLS) denied Marion Sweatt, a black applicant, admission to the law school based on his race.<sup>220</sup> During Sweatt's lawsuit to gain admission to UTLS, Texas hastily constructed an alleged separate but equal law school for blacks.<sup>221</sup> In a unanimous opinion by Chief Justice Vinson, the Court found no "substantial equality in the educational opportunities" Texas offered to black law students, compared to the opportunities it provided to whites, and ruled that Sweatt must be admitted into the UTLS.<sup>222</sup>

The case involved a challenge to a provision of the Texas Constitution that allowed the University of Texas to be reserved for white students.<sup>223</sup> Besides listing the many tangible and intangible features which importantly distinguished the UTLS from the hastily set-up law school for blacks, the Court also advised that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts."<sup>224</sup> It noted, obviously regrettably, that the newly established law school for blacks "excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar."<sup>225</sup>

In *Sipuel v. Board of Regents of University of Oklahoma*, decided two years before *Sweatt*, the Supreme Court ruled that the State of Oklahoma must provide legal education for the petitioner, a black woman, "in conformity with the equal protection clause . . . and pro-

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217. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337, 351 (1938).

218. *Id.* at 352.

219. *Id.* at 351-52.

220. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

221. *Id.* at 632-33.

222. *Id.* at 633, 636.

223. *Id.* at 631 n.1.

224. *Id.* at 632-34.

225. *Id.* at 634.

vide it as soon as it does for applicants of any other group.”<sup>226</sup> Finally, in *McLaurin v. Oklahoma State Regents for Higher Education*, a black student was admitted to the University of Oklahoma Graduate School of Education, but was required to sit in a roped-off section away from white students and in a separate area of the library and cafeteria.<sup>227</sup> In a decision, again authored by Chief Justice Vinson, the Supreme Court found that the “restrictions impair[ed] . . . [the petitioner’s] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>228</sup>

Although these cases were part of the NAACP’s “fighting segregation through litigation” plan of attack, designed to combat the exclusion of blacks from predominantly white law schools,<sup>229</sup> the Supreme Court deserves credit for the rulings. The NAACP and black civil rights activists brought the cases, but the opinions themselves were handed down by the Court, not by these activists.

Most recently in *Grutter*, the Supreme Court re-embraced the rule of inclusiveness it laid down in *Brown* to the effect that educational “opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>230</sup> The Court said, “Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>231</sup> Justice O’Connor, who authored the opinion of the Court, contended that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>232</sup> For support, she cleverly cited the concession of the U.S. government, embodied in its amicus brief opposing race-conscious programs, that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objec-

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226. *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 632-33 (1948) (per curiam).

227. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 639-40 (1950). The University admitted McLaurin while his suit was pending. *Id.* at 640.

228. *Id.* at 641.

229. WALTON & SMITH, *supra* note 1, at 213.

230. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

231. *Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003).

232. *Id.* at 331.



tive.”<sup>233</sup> She also cited the *Brown* proposition that education is “the very foundation of good citizenship”<sup>234</sup> and argued that elite public educational institutions like the University of Michigan form “the training ground for a large number of our Nation’s leaders.”<sup>235</sup> She maintained that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized;”<sup>236</sup> adding that “to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>237</sup>

From the position that segregation and exclusion violated constitutional provisions of equal protection, the Supreme Court moved in due course to embrace support for race-conscious programs as an indispensable tool for inclusiveness. This was the situation in *Regents of the University of California v. Bakke*, as well as in the two Michigan cases. In *Bakke*, the Court upheld affirmative action under the Fourteenth Amendment, but struck down its operation by the University of California because the university maintained a set-aside program that the Court found to be an unconstitutional quota.<sup>238</sup> As Justice O’Connor clarified in *Grutter*, a quarter century later, “[t]he only holding for the Court in *Bakke* was that a ‘State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.’”<sup>239</sup> *Bakke* stood for the famous proposition embodied in the opinion of Justice Powell, that race could be used as a “plus” factor among other factors, rather than as a sole criterion, to promote diversity of a public school student body.<sup>240</sup> In *Bakke*, five Justices, including Justice Powell, accepted the use of race in admissions decisions.<sup>241</sup> By the time of the Michigan cases in 2003, the number grew

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233. *Id.* at 331-32 (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

234. *Id.* at 331 (quoting *Brown*, 347 U.S. at 493).

235. *Id.* at 332.

236. *Id.*

237. *Id.*

238. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978).

239. *Grutter*, 539 U.S. at 322-23 (quoting *Bakke*, 438 U.S. at 320).

240. *See Bakke*, 438 U.S. at 317-18.

241. *Id.* at 268. In addition to Justice Powell, the four Justices that would uphold the use of race were Justices Blackmun, Brennan, Marshall, and White. *Id.* These four Justices would have upheld the affirmative action plan under challenge against all attack on the ground that the government can use race “to remedy disadvantages cast on minorities by past racial prejudice.” *Id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Four other Justices, Chief Justice Burger and Jus-

to seven. With the exception of Justice Scalia and Justice Thomas, all members of the Rehnquist Court, including the Chief Justice himself, supported the use of race to promote diversity as long as the use of race met strict scrutiny.<sup>242</sup>

### *B. The Use of Race in Law School Admissions Decisions by Law Schools and Legal Organizations*

As one commentator points out, “[m]ost Americans detest racial and ethnic preferences. People (we think) should advance on individual effort and merit. But most Americans also don’t want a closed society and recognize that past discrimination, particularly slavery and segregation, leave a heavy legacy.”<sup>243</sup> Those “most Americans,” besides the Supreme Court, who recognize that past discrimination leaves a heavy legacy, and therefore approve of the use of race in law school admissions decisions, include law schools and legal organizations.

Law schools consider applicants as individuals,<sup>244</sup> but they also take into account the ethnic and racial backgrounds of those individuals.<sup>245</sup> Put differently, law schools consider all aspects of a candidate’s application, including racial background.<sup>246</sup> The LSAC, the or-

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tices Rehnquist, Stevens, and Stewart, would not uphold the program, not on constitutional grounds, but, intriguingly, rather based on the ground only that it violated Title VI of the Civil Rights Act of 1964. *Id.* at 408, 421 (Stevens, J., concurring in the judgment in part and dissenting in part). *Bakke* produced six separate opinions, none of which commanded a majority of the Court. *See id.* at 268 (majority opinion). Justice Powell provided a fifth vote both for invalidating the special admissions program under review and for taking race into account in admissions decisions to promote diversity. *See id.* at 319-20.

242. *See Grutter*, 539 U.S. at 343 (holding that the University of Michigan Law School’s use of race in admissions was admissible; the majority opinion was joined by Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer); *see also id.* at 387 (Kennedy, J., dissenting) (agreeing with Justice Powell’s opinion in *Bakke* allowing the use of race in admissions decisions but dissenting from the majority’s application of strict scrutiny); *id.* at 386 (Rehnquist, C.J., dissenting) (maintaining that the use of race in admissions decisions must meet strict scrutiny which the University of Michigan Law School’s plan failed to do); *id.* at 349 (Scalia, J., concurring in part and dissenting in part) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”); *id.* at 350 (Thomas, J., concurring in part and dissenting in part) (arguing that the use of race in admissions decisions is unconstitutional racial discrimination).

243. Robert Samuelson, *Solving ‘Affirmative Ambiguity’: Despite Its Flaws, Affirmative Action Remains One of the Crude Devices by Which America Tries to Be More Open*, *CHI. TRIB.*, June 20, 2003, at C25. Samuelson commented that “[d]espite its many flaws, affirmative action remains one of the crude devices by which America tries to become more open.” *Id.*

244. *See OFFICIAL GUIDE 2002 ED.*, *supra* note 162, at 10.

245. *Id.*

246. *See id.*

ganization charged with responsibility for coordinating law school admissions,<sup>247</sup> includes “ethnic/racial background” along with “individual character and personality” among the criteria that may be considered by law school admission committees.<sup>248</sup> LSAC advises minority applicants, “It is to your advantage to include information on your racial or ethnic identity (even if not requested on the application); such information helps to present a complete picture of you.”<sup>249</sup> The list of factors the LSAC indicates that law schools consider also includes difficulties an individual faced and overcame to reach law school, including socioeconomic circumstances.<sup>250</sup> As the LSAC guidebook for 2002 states, “Law schools want diverse, interesting classes, representative of a variety of backgrounds.”<sup>251</sup> A rewarding legal education is one where the student is challenged by classmates.<sup>252</sup> The guidebook also explains that diversity is an important aspect of a student’s law school educational experience because “differences among students will expose [the individual] to various points of view.”<sup>253</sup> Diversity is not limited to the student body, but rather also encompasses law faculty.<sup>254</sup> The guidebook explains that a diverse faculty “will have various points of view and experiences . . . [that] enrich [students’] legal education, broaden [their] . . . point[s] of view, and help prepare [them] for the variety of clients [they] will work with after [they leave] law school.”<sup>255</sup>

Given this strong commitment to diversity, it is not surprising that an important recent study by a top employee of the LSAC, looking at data for law school applications and admissions in the 1990-91 academic year, found “widespread use of affirmative action admission practices in legal education.”<sup>256</sup> Further support for the use of race in

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247. *Id.* at i.

248. *Id.* at 10.

249. *Id.* at 24. *See also id.* at 25-34 (including key facts for minority law school applicants in the guide’s discussion on “Opportunities in Law for Minority Men and Women”).

250. *Id.* at 10.

251. *Id.* at 12.

252. *Id.* at 20.

253. *Id.*

254. *Id.* at 21.

255. *Id.*

256. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 12 (1997). Professor Wightman was Vice President for Testing, Operations, and Research at the LSAC when the research for this Article was conducted. *Id.* at 1 n.a. The opinions expressed in the piece customarily were said to be those of the author and do not necessarily reflect those of the LSAC. *Id.* However, the piece extensively cited several previous research studies dating back to 1990 that the author conducted for the LSAC. *See id.* at 5 n.11, 13 n.30, 24 n.51, 30 nn.63-64.

admissions decisions is evidenced by the *amici curiae* briefs filed on behalf of the university. For example, the American Law Deans Association authored a brief supporting the University of Michigan Law School in the *Grutter* case.<sup>257</sup> Additional supporters included the AALS,<sup>258</sup> Society of American Law Teachers,<sup>259</sup> and the Clinical Legal Education Association.<sup>260</sup> Law schools which submitted briefs supporting the use of race in law school admissions included Arizona State University College of Law,<sup>261</sup> Howard University,<sup>262</sup> and Indiana University.<sup>263</sup>

Along with law schools, the ABA supports the use of race in decision making relating to admissions into law schools.<sup>264</sup> To rectify past exclusion and ameliorate the vast under-representation of blacks and other minorities that has come to bedevil U.S. legal education, this premier national organization of lawyers has, since 1980, adopted a policy requiring law schools to provide equal opportunities to minorities.<sup>265</sup> Together with the AALS, the ABA also has “a law school standard [that] call[s] for specific commitments to provide full opportunities [in legal education] for . . . minorit[ies].”<sup>266</sup> As part of this commitment to the use of race in law school admissions, the ABA Section of Legal Education and Admissions to the Bar indicated that “an approved law school must provide an opportunity for its students

257. Brief for American Law Deans Association as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399070. The Association was represented by Douglas Laycock. *Id.*

258. Brief for Association of American Law Schools as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399076. The organization was represented by Pamela S. Karlan. *Id.*

259. Brief for Society of American Law Teachers as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399060. The organization was represented by Michael Selmi. *Id.*

260. Brief for Clinical Legal Education Association as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 536754. The organization was represented by Timothy A. Nelsen. *Id.*

261. Brief for the Arizona State University College of Law as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398328. The law school was represented by Ralph S. Spritzer and Paul Bender. *Id.*

262. Brief for Howard University as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 367213. The university was represented by Janell M. Byrd. *Id.*

263. Brief for Indiana University as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2002 U.S. Briefs 241. The university was represented by James Fitzpatrick, Lauren K. Robel, and Jeffrey Evans Stake. *Id.*

264. See Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2002 U.S. Briefs 241 [hereinafter ABA Brief].

265. *Id.* at 2; see also STANDARDS OF PROCEDURE, *supra* note 162, at 24.

266. OFFICIAL GUIDE 2002 ED., *supra* note 162, at 24.

to study in a diverse educational environment.”<sup>267</sup> The ABA does not support abandoning race and ethnicity in law school admissions decisions and maintains that abandoning race would result in decreased access by blacks and other minorities to legal education.<sup>268</sup> The organization was among the groups that submitted friend-of-the-court briefs supporting the University of Michigan Law School race-conscious program in *Grutter*.<sup>269</sup>

Last, but not least, of the legal organizations supporting the use of race in law school admissions is the LSAC.<sup>270</sup> The organization presented an *amicus curiae* brief supporting affirmative action and the University of Michigan Law School’s program in *Grutter*.<sup>271</sup> LSAC assessed that “[a]lthough minority participation in law school and the legal profession has increased over the last three decades,” individual law schools and legal organizations can do more “to attract minorit[ies] . . . to the profession” and to counteract “the historic shortage of minority lawyers.”<sup>272</sup> It opined, “The legal profession is cognizant of the minority exclusion and underrepresentation that has historically pervaded American society.”<sup>273</sup> It stated, “The legal system . . . greatly values and benefits from multicultural perspectives, [and that it] acknowledges the importance of diverse legal representation.”<sup>274</sup> To promote its commitment to the use of race in law school admissions, the LSAC formed the Minority Affairs Committee that has spent over “\$3 million on projects designed to increase the number of minorit[ies] . . . who attend law schools.”<sup>275</sup> In its zeal to increase minority participation in American legal education, the LSAC

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267. STANDARDS OF PROCEDURE, *supra* note 162, at viii.

268. ABA Brief, *supra* note 264, at 20.

269. *Id.* The organization was represented by A. P. Carlton. *Id.* Non-national or regional legal groups which submitted briefs supporting affirmative action and the University of Michigan Law School’s program included the Black Women Lawyers Association of Greater Chicago, Inc., represented by Sharon E. Jones, Brief for the Black Women Lawyers Association of Greater Chicago, Inc. as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2002 U.S. Briefs 241, and the Boston Bar Association, represented by Thomas E. Dwyer, Jr., Brief of the Boston Bar Association et al. as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2002 U.S. Briefs 241.

270. Brief for the Law School Admission Council as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399229. LSAC was represented by Walter Dellinger. *Id.*

271. *Id.*

272. OFFICIAL GUIDE 2002 ED., *supra* note 162, at 24.

273. *Id.*

274. *Id.*

275. *Id.*

reminds minority persons to realize “that law can be a rewarding and fulfilling career.”<sup>276</sup>

*C. World Without Race: Consequences for Minority Participation in Legal Education Arising from Abandonment of Race in Law School Admissions Decisions*

A counterintuitive way to look at the role of race in law school admissions decisions is to consider the consequences of its abolition or abandonment as a factor in decisions on minority enrollment in law schools. The consequences will be direly hurtful for minorities.<sup>277</sup> This is an issue that from the very inception of the “affirmative action debate” has engaged the thoughts of scholars.<sup>278</sup> In an article published in 1970, Professor Clyde W. Summers attempted to show how preferential admissions constituted “an unreal solution” to the real problem of what to do about increasing minority presence in the American legal profession.<sup>279</sup> Summers argued that a policy based on race does not substantially increase the total number of minority law students.<sup>280</sup> Summers maintained that race-based programs simply shift minority students from those law schools popularly perceived as less prestigious to those perceived as more prestigious.<sup>281</sup> “[E]ach law school, by its preferential admission, simply takes minority students away from other schools whose admission standards are further down the scale.”<sup>282</sup> He contended that minority applicants, who were admitted to one or more highly selective schools as a result of preferential admission decisions, most likely would have gained admission to a less selective school without the need for affirmative action programs.<sup>283</sup>

A systematic analysis of empirical data by Professor Linda F. Wightman could not find any support for Summers’s hypothesis.<sup>284</sup> Professor Wightman’s study appeared in the aftermath of the Fifth Circuit Court of Appeals’ decision in *Hopwood v. Texas*, which struck down the affirmative action program of the University of Texas at

276. *See id.*

277. *See, e.g.,* Wightman, *supra* note 256, at 15-16.

278. *See generally* THE AFFIRMATIVE ACTION DEBATE (George E. Curry ed., 1996).

279. Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 377 (1970).

280. *Id.* at 384.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See* Wightman, *supra* note 256, at 22-23.

Austin and questioned Justice Powell's opinion in *Bakke*.<sup>285</sup> Wightman found that the use of race increased access for minority applicants, rather than simply shifting minority applicants from less prestigious schools to more prestigious schools, as Summers claimed.<sup>286</sup> Black applicants, she found, are the group most severely affected by an abandonment of race.<sup>287</sup> "Among the 3435 black applicants who were accepted to at least one law school to which they applied, only 687 would have been accepted if the LSAT/UGPA-combined model had been used as the sole means of making admission decisions."<sup>288</sup> Wightman also found that access declined significantly and dramatically when the use of race was abandoned.<sup>289</sup> These results led her to conclude that "the impact of either of the tested models on the ethnic diversity of the admitted students would be devastating."<sup>290</sup>

In sum, the data presented in the Wightman "study provide bleak prospects for continued ethnic diversity in legal education if admission decisions depend on a model defined exclusively by LSAT score and UGPA or, by extension, an admission practice that yields results that parallel those predicted by a LSAT/UGPA model."<sup>291</sup> Independent studies from states like California, which has, by law, abolished the use of race in admissions decisions in public institutions, corroborate Professor Wightman's findings.<sup>292</sup> Without using race as a factor in admissions decisions, leading educational institutions, funded by taxpayers, such as the University of Michigan involved in the *Grutter* and *Gratz* cases, would be all-white.<sup>293</sup> "Of the 828 students admitted to the . . . University of California at Berkeley [Law School] in 1997, only fifteen were black."<sup>294</sup> This number contrasted dramatically with the seventy-five black students admitted in 1996, prior to the imple-

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285. *Hopwood v. Texas*, 78 F.3d 932, 944, 962 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

286. Wightman, *supra* note 256, at 15-16. *Contra* Summers, *supra* note 279, at 384. Wightman studied minority groups including blacks, American Indians, Asian Americans, Hispanics, Mexican Americans, and Puerto Ricans. Wightman, *supra* note 256, at 15. Summers looked at minority students, "defined as Negroes, Chicanos, Indians and Puerto Ricans." Summers, *supra* note 279, at 377.

287. Wightman, *supra* note 256, at 16.

288. *Id.* at 15. UGPA stands for undergraduate grade point average. *Id.* at 2.

289. *Id.* at 15-16.

290. *Id.* at 15.

291. *Id.* at 53.

292. Theodore Cross & Robert Bruce Slater, *Special Report: Why the End of Affirmative Action Would Exclude All but a Very Few Blacks from America's Leading Universities and Graduate Schools*, 17 J. BLACKS HIGHER EDUC. 8, 14 (1997).

293. *See id.* at 14-15.

294. AFFIRMATIVE ACTION, *supra* note 140, at 7.

mentation of the California Civil Rights Initiative forbidding the use of racial preferences in public education.<sup>295</sup> In *Grutter*, the testimony of the University of Michigan Law School's expert, Dr. Stephen Raudenbush, painted a similarly negative picture regarding the predicted effect of eliminating race as a factor in the law school's admissions process.<sup>296</sup> Raudenbush believed "a race-blind admissions system would have a 'very dramatic,' negative effect on . . . minority admissions."<sup>297</sup> For example, he explained, "in 2000, 35 percent of underrepresented minority applicants were admitted."<sup>298</sup> If race were removed as a factor, "only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent."<sup>299</sup> Given these dire statistics, it is not difficult to see why the law school adopted a policy of enrolling a critical mass or meaningful number of minority students.<sup>300</sup>

Professor Wightman also discussed the ineffectiveness of using non-racial factors, such as socioeconomic status, as a surrogate for race in an attempt to achieve diversity.<sup>301</sup> She warned about "the negative consequences [that flow from] misuse or overuse of the [LSAT] in the admission process."<sup>302</sup> LSAT scores can predict success in the first year of law school, but the use of the test for broader purposes can damage its validity.<sup>303</sup> "[A] test that does a very good job of measuring a narrow, albeit important, range of acquired academic skills cannot serve as a sole determinant in the allocation of limited educational opportunity."<sup>304</sup> She believed "[n]either LSAC, as the developer of the LSAT, nor the law schools, as users of the scores and gatekeepers of the profession, should tolerate such abuse."<sup>305</sup> "[I]nappropriate use of those measures [can] result[] not only in a loss of validity but [also] systematic and predictable discriminatory selection in our nation's law schools."<sup>306</sup>

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295. *Id.* at 6-7.

296. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

297. *Id.*

298. *Id.*

299. *Id.* (citation omitted).

300. *See id.* at 316.

301. Wightman, *supra* note 256, at 39-45.

302. *Id.* at 30.

303. *Id.*

304. *Id.* at 30-31.

305. *Id.* at 53.

306. *Id.* Professors Littlejohn and Rubinowitz give a similarly negative assessment of the LSAT on the admission chances of black law school applicants. Littlejohn & Rubinowitz,



The records of negative effects for minorities, actual and projected, arising from ceasing to use race as a factor in admissions to law and other professional schools, have led former staunch opponents of race-conscious programs, like Harvard sociologist Nathan Glazer, to tone down or even completely rethink their oppositions to affirmative action.<sup>307</sup> Professor Glazer warns that “an insistence on color-blindness [will] effective[ly] exclu[de] . . . African Americans from positions of influence, wealth, and power.”<sup>308</sup> He states that “[a]ffirmative action [gives] African American students . . . access to prestigious universities [like] Harvard and Berkeley, . . . long [the] gateways to positions of power and influence in America[.]”<sup>309</sup>

If test scores and grades alone were used to determine admission to top level universities, the percentage of African Americans attending major colleges or universities would drop from six percent to less than two percent. Denying African American students access to top tier universities would undermine the value of inclusion that is vital to American democracy and send a message of despair to blacks.<sup>310</sup>

These words mark a major turnaround for a scholar who, in 1975, in the days before white male complaints about reverse discrimination came into vogue, authored a critique of racial preferences likening affirmative action to affirmative discrimination.<sup>311</sup>

In addition to its now undisputedly negative consequences, cessation of race also is pointless for society because the use of race hurts whites little, but entails destructive consequences for blacks. An important recent work by two former Ivy League university presidents, which studied the impact of race in college admissions, revealed that if affirmative action were eliminated at five elite schools, the admis-

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*supra* note 156, at 427. In their study of black enrollment in law schools, they assessed that “[t]he evolution of the LSAT from a threshold to a relative measure led to law schools’ disproportionate rejection of Black applicants.” *Id.*; see also *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1972) (Douglas, J. dissenting). Justice Douglas believed the LSAT works against a racially neutral admission system because it is racially biased in favor of white applicants. See *id.* at 334 (“[M]inorities have cultural backgrounds that are vastly different from the dominant Caucasian. . . . [And they] come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.”). He stated that the abolition of the LSAT would be a good “start” in the design of a racially neutral admission regime. *Id.* at 340.

307. Glazer, *supra* note 1, at 15; see also NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1997).

308. Glazer, *supra* note 1, at 15.

309. *Id.* at 14.

310. *Id.*

311. See NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975).

sion probability for white applicants at those schools would rise only to 26.5% from 25%.<sup>312</sup> Black applicants would be the ones that feel more of the pain numerically, in that the 1.5% admissions gain for whites would come at a cost equaling about half of the elite colleges' black students.<sup>313</sup>

Individuals and groups who argue for entronement of color-blindness in decisions relating to admissions in law and other professional schools point to the declining significance of race, among other reasons.<sup>314</sup> But as one analyst thoughtfully points out, "[t]he declining significance of race is not the same as the utter insignificance of race. Few whites would be willing to be black."<sup>315</sup> Stated differently, "favoritism for white people in the United States is such a strong, inviolable part of our country that for African Americans to have a fair chance, they have to be actively considered."<sup>316</sup> America gains little in a highly competitive global economy where a major portion of the population is excluded unfairly, supposedly based on merit. The use of race is an important means today for promoting the active consideration of blacks and other minorities for places in law schools.<sup>317</sup> Even conservative politicians and office holders opposed to affirmative action in public decision making allow some room for the use of race. Such is the disposition of some members of the Rehnquist Court, including Justice O'Connor, author of the *Grutter* decision, and former Chief Justice Rehnquist.<sup>318</sup> The position of President George W. Bush on affirmative action also bears out this disposition. The President says he prefers "race-neutral approaches" and his Justice Department filed briefs in the two Michigan cases "urging the Supreme Court to strike down the school's race-conscious admissions policies," alleging that they were "disguised quotas."<sup>319</sup> Yet the Presi-

312. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 36 (1998).

313. *Id.* at 35.

314. *See, e.g.*, FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 135 (2002).

315. *Id.*

316. *AFFIRMATIVE ACTION*, *supra* note 140, at 7 (quoting Professor Paul Butler of George Washington University Law School).

317. *Id.*

318. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the majority opinion written by Justice O'Connor upholding the University of Michigan Law School's use of race in admissions); *see also id.* at 386 (Rehnquist, C.J., dissenting) (maintaining that the use of race in admissions decisions must meet strict scrutiny, which the University of Michigan Law School's plan failed to do).

319. Bob Kemper, *Democrats Hope Court Rulings Bruise Bush*, CHI. TRIB., June 24, 2003, at C17; *see also* Brief for United States as Amicus Curiae Supporting Petitioner at 9, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635; Brief for United

dent “said he supports ‘affirmative access,’ which he defines as increasing access for minorities without using quotas.”<sup>320</sup> A measure short of quotas of the kind the President advocates, designed consciously to expand access to minorities, *cannot* be race-neutral.<sup>321</sup>

#### V. *GRUTTER* AS CULMINATION AND CONGEALMENT OF BEST PRACTICES IN AFFIRMATIVE ACTION IN PUBLIC EDUCATION SINCE *BAKKE*

*Grutter* was inevitable as a culmination and congealment of best practices on the use of race as a factor in admissions to law schools that has been building since *Bakke*. Two important aspects mark this inevitability. The first is that the decision presents the Supreme Court’s idea, a long time in the making, of what constitutes a proper constitutional formula on the application of race in decision making relating to admissions decision of public education institutions. The second is a message relating to the Court’s understanding of the imperativeness of diversity in American life. Each of these two points is discussed in turn.

First, in *Grutter*, the Supreme Court presented to the nation a formula that it considered acceptable under the Constitution for the application of race in decision making relating to admissions in public education institutions.<sup>322</sup> After helping to bring “separate but equal” to an end, it took awhile before the Court embraced affirmative action as a tool of inclusiveness and reparation for past discrimination against minorities in American society. For example, in 1974 a dispute arose involving a race-conscious program at the University of Washington Law School on which the high court refused to substantively rule.<sup>323</sup> In *Bakke*, the Court recognized affirmative action as a principle that can be consistent with the Equal Protection Clause of

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States as Amicus Curiae Supporting Petitioner, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 151258.

320. Kemper, *supra* note 319.

321. See *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) (calling the so-called race-neutral plans of the kind practiced in states such as Texas, California, and Florida “disingenuous, [given that] they unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system”) (citation omitted).

322. *Grutter*, 539 U.S. at 343.

323. *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (dismissing the case as moot on the ground that DeFunis, who had attended the law school while the case was in the courts, was about to graduate). Four Justices, Justices Brennan, Douglas, Marshall, and White, dissented from the judgment. *Id.* at 320, 348. They asserted that the Court should have given the case full consideration and warned that the controversy would inevitably wind its way back to the Court. *Id.* at 350. Justice Douglas also wrote a separate opinion in which he reached the merits. *Id.* at 320 (Douglas, J., dissenting).

the U.S. Constitution. However, it could not find the program under challenge constitutionally permissible because, in its view, the program used a quota.<sup>324</sup> In the aftermath of *Bakke*, the Court grew conservative in its composition and, consistent with the mood of the period, equally averse to race-conscious preferential programs. The hostility to race-conscious programs extended to lower federal courts, some of which, like the Fifth Circuit Court of Appeals in *Hopwood v. Texas*, came to question the precedential standing or authority of Justice Powell's opinion in *Bakke*.<sup>325</sup> In *Grutter*, a quarter century after *Bakke*, the Court finally stopped the legal and constitutional bleeding by not only declaring affirmative action constitutional, but also by finding an actual affirmative action plan that meets the constitutional billing—one that both made race a “plus” factor and was properly individualized, consistent with the counsel of Justice Powell.<sup>326</sup> Additionally, to avoid any doubt, in striking down the race-conscious program in *Gratz*, the Court illustrated what a constitutionally race-conscious program may *not* look like.<sup>327</sup>

Since the 1980s when law schools started to commit themselves to diversifying their student body in an attempt to increase minority participation in the legal profession, diversity has been an important value in consideration for admission into law schools.<sup>328</sup> Many law schools adopt admissions policies similar to the University of Michigan Law School's program the Court approved in *Grutter*.<sup>329</sup> It is possible that in upholding the race-conscious program in *Grutter*, while striking down the one in *Gratz*, the Court sent the message that it is more willing to use race to promote diversity in professional schools than in undergraduate, non-professional settings. Whatever the reason, it is not accidental that the program the Court found acceptable in *Grutter* was a plan developed by a law school. The authorities of the University of Michigan indicated, defending the race-conscious pro-

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324. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 378-79 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

325. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

326. *See Grutter*, 539 U.S. at 343.

327. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

328. *See* ABA Brief, *supra* note 264, at 2; *see also* OFFICIAL GUIDE 2002 ED., *supra* note 162, at 10 (stating that one of the factors that law schools may consider in admissions is ethnic or racial background).

329. Greenburg, *supra* note 143. “Most schools do what the [University of Michigan] Law School does.” *Id.* (quoting John Yoo, a former official in the Bush administration and former official of the American Enterprise Institute, now a law professor at the University of Chicago Law School).

gram under challenge in *Grutter*, that they based their admissions policy on Justice Powell's opinion in *Bakke*, including the Harvard admissions plan Powell appended to his opinion.<sup>330</sup> As Professor Klarman concluded, "Race-based affirmative action in university admissions is likely to be with us for many years to come."<sup>331</sup> This, without doubt, includes admissions into law schools. For as Justice Ginsburg eloquently opined in her dissent in *Gratz*, in removing "[t]he stain of generations of racial oppression . . . in our society," institutions of higher learning "will seek to maintain their minority enrollment."<sup>332</sup> With or without *Grutter*, university admissions officers would include race as a factor in making admissions decisions.<sup>333</sup> The real question then becomes whether they do so through fully disclosed race-conscious programs, or through "camouflage[s]" like "winks, nods, and disguises" designed to conceal the use of race.<sup>334</sup>

A second sense which makes *Grutter* inevitable as a culmination and congealment of best practices in the use of race relates to the message the decision sends about diversity. Courts play a critical role in society "in 'consolidating cultural [norms],' legitimizing them and translating [those norms] into 'binding legal principle[s].'"<sup>335</sup> This is especially so with a national high court like the United States Supreme Court.<sup>336</sup> As Professor Klarman points out, "*Grutter* reveals how deeply entrenched the notion that all of our social, political, and economic institutions should 'look like America' has become. Justice O'Connor's conservative commitment to preserving the status quo trumped her ideological aversion to race-conscious government remedies."<sup>337</sup> Public administration scholar Norma Riccucci, in a salient piece published in 2002 before the issuance of the Michigan cases, re-

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330. *Grutter*, 539 U.S. at 314, 335.

331. Michael Klarman, *Are Landmark Court Decisions All that Important?*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 8, 2003, at B10.

332. *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting).

333. See Klarman, *supra* note 331 ("University admissions officers will naturally be relieved that the court [sic] has permitted them to do openly what they would otherwise have been inclined to do clandestinely.")

334. *Gratz*, 539 U.S. at 304-05 (Ginsburg, J., dissenting). Accused by the Chief Justice that she suggests "changing the Constitution so that it conforms to the conduct of the universities," Justice Ginsburg fired back that "the Constitution, properly interpreted, permits government officials to respond *openly* to the continuing importance of race" and, particularly, that "[a]mong constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it." *Id.* at 305 n.11 (emphasis added) (citation omitted).

335. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1 (quoting Professor Paul Gewirtz of Yale Law School).

336. See *id.*

337. Klarman, *supra* note 331.

inforced this point about diversity. Professor Riccucci pronounced “the Immortality of Affirmative Action.”<sup>338</sup> Despite the regressive rulings of the courts on the policy and the numerous voter initiatives across the United States banning the use of race, she said, “public- and private-sector employers continue to rely on affirmative action as well as other programs and techniques in an effort to prevent employment discrimination or to create greater *diversity* in their workplaces.”<sup>339</sup> She ended on the important note of prediction that “affirmative action may be around for a long time, or at least until it is truly no longer needed, that is, when discriminatory practices cease to exist and when diverse workforces become the norm in this nation.”<sup>340</sup> Although her essay focused on the use of race in employment hiring, her insight sheds useful light on the issue here.

## VI. IMPACT OF THE *GRUTTER* DECISION ON RACE-CONSCIOUS PROGRAMS

In their dissents in *Gratz*, Justices Ginsburg and Souter dwelt on the necessity for candor, not subterfuge, regarding application of race in admissions to public education institutions.<sup>341</sup> In the aftermath of *Grutter*, public education institutions could be “tempted to back away from affirmative action to avoid lawsuits.”<sup>342</sup> Following *Hopwood v. Texas*, some colleges and universities adopted “disingenuous wink-and-nod practices designed to [overcome] the . . . prohibition . . . [against] racial and ethnic preferences” that the decision imposed on schools.<sup>343</sup> The momentousness of the Michigan cases, particularly *Grutter*, lies in the fact that public universities and colleges are no longer compelled to resort to underhand practices when using race in their admissions policies. The two decisions “left room for the nation’s public universities—and by extension other public and private institutions—to seek ways to take race into account.”<sup>344</sup> Higher education institutions, public and private, can now use race openly—though “not too openly, given *Gratz*.”<sup>345</sup>

338. Riccucci, *supra* note 140, at 72.

339. *Id.* at 81 (emphasis added).

340. *Id.*

341. *Gratz v. Bollinger*, 539 U.S. 244, 297-98 (2003) (Souter, J., dissenting); *id.* at 304-05 (Ginsburg, J., dissenting).

342. *Affirmative Action Fight Far from over, Urban League Panelists Say*, BLACK ISSUES HIGHER EDUC., Aug. 28, 2003, at 10.

343. Peter H. Schuck, *Affirmative Action Is Poor Public Policy*, CHRON. HIGHER EDUC. (Wash., D.C.), May 2, 2003, at B10.

344. *The Thin Race Line*, *supra* note 143.

345. Klarman, *supra* note 331. Some commentators worry whether individualized review is possible with huge multiversities, like New York University, with tens of thousands of new applications annually. *Contra* Diane C. Yu, *A Boost for Diversity—and America*, N.Y.

Consistent with this sentiment, educators and university administrators all across the land have indicated that the rulings afforded them discretion to “weigh[] race as one of many factors in admission[]” decisions.<sup>346</sup> Among these educational leaders is Carol Geary Schneider, President of the Association of American Colleges and Universities, whose accurate assessment of the Michigan cases is that “[t]he courts have recognized that racial inequality still disfigures our democracy and that higher education can and should play a crucial role in closing the opportunity gap.”<sup>347</sup> Though speaking in a different context, one analyst makes precisely the same point, when he points out that interjecting race as a factor in admissions decisions “compel[s] us to realize that merit comes in many forms, and the distribution of rewards can be made more just.”<sup>348</sup>

## VII. CONCLUSION

This Article assessed the impact of the Supreme Court’s decision in *Grutter* on the use of race in law school admissions. It presents one understanding of the decision as a jellification of best practices in law school admissions that has been culminating in the twenty-five years since *Bakke* in 1978, but at the same time also argues that the decision is momentous in that law schools can now apply race as a factor in admissions decisions with little fear of litigation. The Article addi-

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DAILY NEWS, June 25, 2003. On the other hand, some university officials believe such individualized review is possible. *Id.* Legal educator Professor Guinier appears to share the same view, but also advises:

Where the crush of applicants overwhelms the universities’ administrative capacities, large undergraduate institutions might do well to consider a program like a percentage plan . . . one like that of the University of Texas at Austin . . . . The plan has the virtue of recognizing the importance of racial, geographic, and socioeconomic diversity.

Given the court’s imprimatur to holistic considerations of race, it should be possible now to fine-tune admissions programs further to create a pool of qualified students based on high-school rank and then encourage individualized assessments within that pool. In addition, special outreach and targeted financial aid can help reinforce commitments to racial, geographic, and socioeconomic diversity.

Guinier, *supra* note 15. But the Supreme Court had problems with these plans, stating that they have little relevance in graduate and professional schools and they may preclude individualized assessment. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003) (responding to the *amicus curiae* brief filed by the United States government). Justice Ginsburg, in her dissent, said these plans are race-conscious and that calling them “‘race-neutral’ [is] disingenuous.” *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting). The genius of Professor Guinier’s suggestion lies in her marriage of devices (individualized review and percentage plans) that others—including the Supreme Court—would regard as mutually exclusive.

346. Winter, *supra* note 142.

347. *Id.*

348. Wu, *supra* note 315, at 151.

tionally embodies extensive discussions on the *Grutter* case and its relationship to *Gratz*, the nature of minority participation in American legal education, and the influence of race in law school admissions.



