

STETSON UNIVERSITY COLLEGE OF LAW
27TH ANNUAL CONFERENCE ON LAW AND HIGHER EDUCATION
Clearwater Beach, Florida
February 18-22, 2006

**DIVERSITY AND INCLUSION: POLICY,
PRACTICE, AND LEGAL IMPLICATIONS**

SUPREME COURT AFFIRMATIVE ACTION JURISPRUDENCE
WITH SPECIAL EMPHASIS ON PROVOCATIVE QUESTIONS RAISED OR LEFT UNANSWERED BY
THE 2003 UNIVERSITY OF MICHIGAN CASES

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[This outline is adapted from materials first prepared for the annual meeting and professional conference of the Law School Admission Council in June, 2005, and is reproduced with the gracious permission of the LSAC. The author wishes to thank LSAC Corporate Counsel Joan E. Van Tol for her assistance with this outline.]

A. A QUICK REVIEW OF FUNDAMENTAL PRECEPTS

- (1) *The issue in a nutshell*: It is an unavoidable fact of life in contemporary American higher education that, without racial preferences, racial diversity would suffer at selective colleges and universities. But preferences are legally and equitably problematic. Courts are skeptical about them, and have fashioned a jurisprudential doctrine—the doctrine of “strict scrutiny”—that puts them in a sorely disfavored light. In a prescient passage anticipating today’s debate over affirmative action programs, Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), observed:

[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. ... Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making.

- (2) ***Starting point for analysis: The “strict scrutiny” standard.*** As a matter of constitutional and statutory law, law school admissions offices are prohibited from discriminating on the basis of race, color, or national origin in the operation of their programs and activities. In a series of decisions over the past thirty years, the Supreme Court has placed a heavy burden on institutions whose affirmative action programs are challenged. Such programs, the Court has ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof—the so-called “**strict scrutiny**” standard—when they are challenged on constitutional grounds or under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

Under the “strict scrutiny” standard, a program that relies on race-based preferences is illegal unless the institution can demonstrate that:

- **The program serves a *compelling institutional interest*, and**
- **The program is *narrowly tailored* to further that compelling interest.**

- (3) ***The first prong of strict scrutiny analysis: “compelling institutional interest.”***

- (a) Starting with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and with consistency since then, only two justifications for affirmative action programs have been determined by the courts to be sufficiently compelling to satisfy the first prong of the two-part “strict scrutiny” test:
- (i) ***Remedying the present effects of past discrimination*** (the so-called “*remedial justification*”). If unlawful discrimination against an identified minority group actually occurred (for example, if the institution had a written policy excluding members of a particular race from applying), then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination.
 - (ii) ***Diversity***. An affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body.

The first compelling justification for race-based affirmative action: remedying the present effects of past discrimination. I’m making a long story short here, but for private institutions and institutions outside the south the chances of sustaining an affirmative action program in the admissions office by pointing to the compelling interest in remedying the present effects of past discrimination are dubious to say the least. See generally Andrew Baida, *Not All Minority Scholarships Are Created Equal: Why Some May Be More Constitutional Than Others*, 18 J. COL. & UNIV. L. 333, 342-

49 (1992). For all intents and purposes, and for virtually all colleges and universities in the United States, there is effectively only one justification for affirmative action that is sufficiently compelling to satisfy the first prong of strict scrutiny:

- (b) *The second (but, for practical purposes, only) compelling justification for race-based affirmative action: diversity.* From Justice O'Connor's majority opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), comes this simple declaration:

[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions. [539 U.S. at 330.]

- (4) ***The second prong of strict scrutiny analysis: "narrowly tailored."*** The second part of the "strict scrutiny" standard requires the law school to prove that its affirmative action program has been designed and implemented in the narrowest way possible consistent with the compelling purposes the program is designed to serve. The program cannot be broader, more encompassing, or more ambitious than the minimum required to achieve its goal; otherwise, say the courts, the legal rights of third parties may be trampled.

The first part of the two-part "strict scrutiny" test—articulating the "compelling institutional interest" served by affirmative action—focuses on the lofty objectives of affirmative action. The second part—whether the program is "narrowly tailored"—focuses on the nitty-gritty details of specific affirmative action programs.

In practical terms, the second part of the "strict scrutiny" test requires the admissions office to make several showings about the design and structure of its affirmative action program:

- (a) *No quotas.* The admissions office cannot adopt any plan that operates as or looks like or resembles a quota. *The use of numerical quotas is absolutely, unambiguously prohibited.* An affirmative action program that reserves seats for minorities will never pass legal muster. Even flexible goals raise potential problems if the goals are reached so regularly that they are the equivalent of quotas.
- (b) The institution must show that it has implemented the program for *a limited period of time* (in other words, the program must "sunset" after a certain number of years). A law school can partially protect itself against legal attack if it (i) specifically recites that its affirmative action program is not indefinite in duration, and (ii) regularly reviews the program, adjusts its operations, and evaluates its efficacy.
- (c) *The program does not unreasonably diminish the rights of third parties.* An affirmative action program must be designed to ensure that every applicant's file is compared to every other applicant's file. Courts have uniformly invalidated programs that exhibit any of the following features:

- The files of all minority applicants are placed in a single batch or pool;
- The admissions committee uses a separate subcommittee to review minority files only;
- The admissions committee employs distinct and different admissions standards for minority and non-minority applicants.

These prohibited practices have one common characteristic: they bifurcate the admissions process by creating a discrete path or track for the evaluation of minority applicants. One of the strong themes to emerge from affirmative action jurisprudence during the last decade is that the qualifications of every applicant, regardless of race, must be evaluated against the qualifications of every other applicant to ensure that race, in and of itself, is not the determinant in the admission process.

(5) *Conclusion.*

- (a) **To withstand legal scrutiny, admission programs operated by universities must be supported by a compelling justification. Given the state of the law today, it is next to impossible for a university to sustain that burden by relying on the so-called remedial justification for affirmative action. *Fostering student-body diversity* is the only avenue that offers any chance of withstanding judicial assault. Universities seeking to justify their affirmative action programs on other grounds have been singularly unsuccessful over the years.**
- (b) **If the program is warranted by a compelling institutional justification, it still must be narrowly tailored to serve that justification without trammeling the rights in uninvolved third parties. This means as a practical matter that (i) quotas are absolutely taboo, (ii) programs should not be perpetual and should be reevaluated periodically, and (iii) admissions offices should not use discrete tracks or paths for minority applications.**

B. GRUTTER (THE 2003 UNIVERSITY OF MICHIGAN LAW SCHOOL DECISION)

(1) *The facts.* From *Grutter v. Bollinger*, 539 U.S. 306, 323-25 (2003):

The [University of Michigan] Law School ... receives more than 3,500 applications each year for a class of around 350 students. ... The hallmark of [its admissions] policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires 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 the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "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 our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions to the character of the Law School."

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, ... Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), [and other defendants]... Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment [and] Title VI of the Civil Rights Act of 1964.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." Petitioner requested compensatory and punitive damages, an order requiring

the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race.

- (2) ***How the Justices voted.*** By a vote of 5 to 4, the Supreme Court upheld the University of Michigan Law School's affirmative action plan.

Voting to uphold the Law School plan:

Sandra Day O'Connor (who wrote the majority opinion)
John Paul Stevens
David Souter
Ruth Bader Ginsburg
Steven Breyer

Voting to strike it down:

William Rehnquist
Clarence Thomas
Antonin Scalia
Anthony Kennedy

- (3) ***Justice O'Connor's majority opinion:***

- (a) *Diversity as a "compelling" institutional interest.* Justice O'Connor first dispelled any uncertainty about the continued vitality of Justice Powell's *Bakke* framework:

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent ... [T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions. [539 U.S. at 330.]

Significantly, *seven other Justices concurred with Justice O'Connor with respect to this portion of her opinion*; only Justice Thomas dissented.

- (b) *Why diversity is compelling: reasons advanced by the University of Michigan.*

[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds. [*Id.* at 333, with internal quotation marks omitted.]

- (c) *Why diversity is compelling: reasons advanced by friends of the court.*

. ... [S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. . . . At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." (Emphasis in original.) . . . We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." [*Id.* at 333-34, with some internal quotation marks omitted.]

(d) *Narrow tailoring:*

- *Absolutely nothing that smells like a quota under any circumstances.*

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants. Instead, a university may consider race or ethnicity only as a "plus" in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats. In other words, an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [*Id.* at 336, with internal quotation marks and citations omitted.]

- *But a "critical mass" of minority students is not the functional equivalent of a quota.* In a portion of her opinion that drew praise from the higher education community but veiled scorn from dissenting members of the Court, Justice O'Connor endorsed the University of Michigan's argument that an admissions policy designed to ensure a "critical mass" of underrepresented minority students—even one that uses "daily reports" to make sure that minorities are being admitted in numbers sufficient to ensure a "critical mass"—is not the functional equivalent of a quota policy:

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course some relationship between numbers and achieving the benefits to be derived from a

diverse student body, and between numbers and providing a reasonable environment for those students admitted. Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota. [*Id.* at 337, with internal quotation marks and citations omitted.]

Justice O'Connor didn't indicate what she meant by "critical mass" other than to quote (in a manner that doesn't suggest disapproval) the trial testimony of a Michigan admissions officer that it meant "meaningful numbers" or "meaningful representation" or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." (*Id.* at 326.)

- *"Holistic," file-by-file review. No separate tracks, separate admissions subcommittees, differentiated cut-off indices, or other devices that divide the application pool into two sub-pools, one minority, one not.*

Here, the Law School engages in 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. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. ... [T]he Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan [discussed by Justice Powell in *Bakke*], the Law School's admissions policy is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [*Id.* at 338, with some quotation marks and citations omitted.]

- *No need to exhaust every conceivable less-sweeping alternative.*

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. [*Id.* at 339, with citations omitted.]

- *Sunset—within 25 years.*

[R]ace-conscious admissions policies must be limited in time. ... In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to

determine whether racial preferences are still necessary to achieve student body diversity. ...

The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. ...

We take the Law School at its word that it ... will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. [*Id.* at 341-42, with quotations and citations omitted.]

- (e) *Deference to “complex educational judgments” made by universities* (an important and much-quoted portion of Justice O’Connor’s opinion for the Court):

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits. [*Id.* at 332.]

- (4) *Justice Thomas’s “Do nothing with us!” dissent:*

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today’s majority:

“In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing

him positive injury.” *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original).

...The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. ...

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

[*Id.* at 346, 360.]

- (5) *Justice Scalia’s “blueprint” dissent.* “[Justice] Scalia openly invited affirmative action foes to keep suing, as his dissenting opinion in the law school case included a catalog of ways to challenge ... [affirmative action] programs.” Steven Lubet, *Michigan Ruling No Decisive Victory for Affirmative Action*, CHICAGO SUN-TIMES, June 25, 2003, page 47.

From Justice Scalia’s dissent in *Grutter*:

... [F]uture lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant as an individual, and sufficiently avoids separate admissions tracks to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a good faith effort and has so zealously pursued its critical mass as to make it an unconstitutional *de facto* quota system, rather than merely a permissible goal. Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords “a degree of deference to a university’s academic decisions,” deference does not imply abandonment or abdication of

judicial review.) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. [*Id.* at 345-46, with some internal quotation marks and citations omitted.]

- (6) For space reasons, this outline does not deal with five other significant affirmative action cases. One, *Gratz v. Bollinger*, 539 U.S. 244 (2003), companion case to *Grutter* decided the same day, the Supreme Court invalidated the affirmative action program operated by the undergraduate admissions office at the University of Michigan on the ground that the program was not narrowly tailored.

Eighteen months after the Supreme Court decisions in *Grutter* and *Gratz*, the 9th Circuit Court of Appeals in *Smith v. University of Washington*, 392 F. 3d 367 (2004), upheld the validity of the affirmative action program at the University of Washington School of Law. *Smith* is interesting reading because it represents a useful, instructive application of *Grutter* principles to a set of common admission practices not addressed in *Grutter*.

Mention will be made briefly of three post-*Grutter* decisions, all involving elementary and secondary schools rather than institutions of higher education:

- (a) In *Comfort v. Lynn School District*, 418 F. 3d 1 (1st Cir.) (en banc), *cert. denied*, 126 S. Ct. 798 (2005), the court sustained a school district's voluntary racial-balancing plan against an attack brought by the parents of white schoolchildren who were not allowed to transfer to the public schools of their choice. "Until recently, there was some question as to whether diversity could constitute a compelling interest in the educational context. The Supreme Court has now answered that question in the affirmative, holding in *Grutter* that a law school's interest in obtaining the educational benefits that flow from a diverse student body was compelling enough to justify the narrowly tailored use of race in admissions." 418 F. 3d at 27-28 (citation omitted).
- (b) A different federal appellate court reached the same conclusion in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F. 3d 1162 (9th Cir. 2005) (en banc). "We read *Grutter* ... to recognize that racial diversity, not some proxy for it, is valuable in and of itself. ... In short, the District has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to

those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits of such diversity unique to the public secondary school context.” *Id.* at 1177 (citation omitted).

- (c) In *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F. 3d 1025 (9th Cir. 2005), the same court that decided the *Parents Involved* case just a few months later held that a preference program for native Hawaiian applicants to a private secondary school amounted to an unlawful racial preference that violated the civil rights of non-minority applicants. The court discounted *Grutter* by characterizing it as a case involving admission to a publicly supported university.

C. THREE INTERESTING QUESTIONS LEFT OPEN BY (OR NOT ADDRESSED IN) *GRUTTER*

(1) *The concept of “critical mass.” Where did it come from? What does it mean?*

- (a) Justice O’Connor accepted the University of Michigan Law School’s argument that its “goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.” *Grutter*, 539 U.S. at 337. She provided no amplification, no case citation, and little clarification of what she (or Michigan) meant by the elusive phrase “critical mass.”

The law school admission policy at issue in *Grutter* was adopted in 1992. It contained this paragraph, which as far as I have been able to discover is the first reference to “critical mass” anywhere in the record in *Grutter*:

Over the last two decades, the law school has made special efforts to increase the numbers of [minority] students in the school. We believe that the racial and ethnic diversity that has resulted has made the University of Michigan Law School a better law school than it could possibly have been otherwise. By enrolling a “critical mass” of minority students, we have ensured their ability to make unique contributions to the character of the Law School; the policies embodied in this document should ensure that those contributions continue in the future. [University of Michigan Law School, *Report and Recommendations of the Admissions Committee*, www.umich.edu/~urel/admissions/press/pkit/law_admiss_policy.pdf.]

- (b) It comes as a revelation when one reviews the enormous record in *Grutter* and *Gratz* to see how superficially the parties and the various friends of the court developed the critical-mass argument. It finds its clearest explication in two places:¹

¹ My thanks to Jonathan R. Alger, now Vice President and General Counsel at Rutgers University and until 2004 the University of Michigan’s Assistant General Counsel, for his help in pinpointing these materials.

- The amicus brief submitted by the American Educational Research Association and other organizations, in particular a citation-heavy section titled “‘Critical Mass’ is a Flexible Concept Designed to Prevent Tokenism and Stereotyping” (www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/AERA-gru.pdf);
- The widely cited expert report by Professor Patricia Gurin prepared for the *Gratz-Grutter* litigation, and in particular a section titled “Adequate Representation” in Appendix B (*The Impact of Structural Diversity, Classroom Diversity, and Informal Interactional Diversity on Education: Social Science Research Evidence*, www.umich.edu/~urel/admissions/research/expert/gurinapb.html).

In the sections that follow, I rely on theories and citations provided in the AERA brief and the Gurin report, although, truth be told, my analysis may be more detailed than what you’ll find in either of those sources.

- (c) *Antecedents*: Scholars trace the notion of critical mass to the pathbreaking research of the great Harvard psychologist Gordon Allport more than half a century ago. His extraordinary book *THE NATURE OF PREJUDICE* (1954) represented one of the earliest attempts to analyze the social interactions between what Professor Allport labeled “in-groups” and “out-groups.” An in-group, not to put too fine a point on it, is a group that defines itself—by virtue of shared familial, national, religious, racial, sexual, or other characteristics—as a cohesive group to which non-group members aspire (or are perceived to aspire) to join for social reasons. (*THE NATURE OF PREJUDICE* 37.) Professor Allport devotes the principal part of his book to the elucidation of what he terms “the group-norm theory of prejudice.” Under that theory, in-groups distinguish themselves from out-groups by developing characteristic “codes” and “beliefs,” not only about their *own* members but also about out-group members who are definitionally assumed *not* to possess those characteristics. (Page 39.) “[M]any people ... define their loyalties in terms of the other side of the fence. They think a great deal about out-groups, worry about them, and feel under strain. To reject out-groups is for them a salient need. For them an ethnocentric orientation is important.” (Page 48.) From the need to reject out-groups arises *prejudice*, which Professor Allport defines as “an attitude of favor or disfavor ... related to an overgeneralized (and therefore erroneous) belief.” (Page 13.)

We thus arrive at what is, for our purposes, the most important question. How can enlightened in-group members combat prejudice? The process starts, he believes, with the elemental concept of *contact*. And not just any kind of contact. Not casual contact. Not episodic contact. Professor Allport espouses enriched contact—contact that is frequent, lasts for a long time, involves a significant number (one is tempted to say a *critical mass*) of people, and takes a variety of forms. (Page 261-81.) “Prejudice,” he concludes, “may be reduced by equal status contact between majority

and minority groups in the pursuit of common goals.” (Page 281, with emphasis added.)

(d) *What purposes are served by having a critical mass of underrepresented students?* In the 1980s and '90s, research started to focus on that topic. Much of the research focused on the negative—in other words, on the harm caused to members of underrepresented groups by having too few of them, rather than on the benefits (for minorities and non-minorities too) of achieving critical mass.

- A study conducted by UCLA sociology professor Walter R. Allen in 1992 concluded that rates of academic success for African-American undergraduate students were adversely affected by “feelings of alienation, sensed hostility, racial discrimination, and lack of integration,” and could be ameliorated by ensuring “an extensive network of friends”—findings that persuaded the author to advocate the admission of larger numbers of minority students in order to foster a sense of community and belonging. *The Color of Success: African-American College Students Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUCATIONAL REV. 26, 39, 40 (1992).
- From *The University of Michigan Law School Black Law Students Alliance Statement on Affirmative Action*, 4 MICH. J. RACE & LAW 189, 190, 192 (1998):

... Affirmative action helps create the critical mass of diverse students necessary to provide minority applicants with a sense not only that they will receive support in the institution’s environment, but also that it is committed to their education and well being. Creating this critical mass also actualizes the institution’s recognition that understanding and communicating with persons of different racial backgrounds is an essential aspect of the education to be received by all of its members. ...

A critical mass of such students is necessary for two reasons: (1) such a critical mass provides exposure to majority students of a broad range of experience they otherwise would not likely encounter, and (2) exposure to talented minority students will enable others to see members of these groups as individuals.

(e) In the early 1990s, the concept of critical mass surfaced when the time period’s most important affirmative action case—*Hopwood v. Texas*, 78 F. 3d 932 (5th Cir.), *cert. denied sub nom. Thurgood Marshall Legal Society v. Hopwood*, 518 U.S. 1033 (1996)—approached the trial stage. Critical mass was discussed in the testimony of two of the University of Texas’s expert witnesses, although not in detail.

- (i) On May 12, 1994, Lee Bollinger, then dean of the University of Michigan Law School (and later, as we know, the lead defendant in *Grutter*), gave

deposition testimony in *Hopwood*. Dean Bollinger was asked to state his “critical mass theory” and responded haltingly:

I think it stems from the fact that there is within the United States, within our society, what it means to be black is in part to identify as a black member of society and that has all kinds of reasons behind it, partly due to the discriminatory treatment toward blacks as a group historically but also because of the cultural—distinctive cultural traditions of blacks which I think are quite independent, at least they seem to me to be independent of the history of racial discrimination.

Kumar Percy, ed., *HOPWOOD v. TEXAS LITIGATION DOCUMENTS* (published by William S. Hein & Co., Inc. in 2002), Vol. 16, Bollinger Dep., pp. 35-36.

- (ii) Another expert, Stanford Law School Dean Paul Brest, testified at trial and offered a short but lucid definition of the term in response to a question from the University of Texas’s lawyer:

Q. You spoke a couple of times with reference to the term “critical mass.” What do you mean by that, sir?

A. It’s been our experience, and I’ve been at the law school from a time when we had a program that admitted one or two or three minority students a year to the current program where we have between 20 and 30 percent of the student body minority students—there’s a sense that in order for students to prosper, to feel comfortable and to make the kind of contribution that they make to the law school’s educational mission, that there need to be enough of them to feel that this is their place, that they don’t feel an isolated minority in the law school.

Id., Vol. 22, Direct Examination of Paul Brest, p. 21.

And that was pretty much it for critical mass in *Hopwood*—no citations to scholarly literature, no survey results, no longitudinal studies, and none of the kinds of research support we saw a half-dozen years later when a larger and better prepared cast of experts made the legal and theoretical case for diversity in *Grutter* and *Gratz*.

- (f) Three concluding and not altogether uplifting thoughts on critical mass:
- There seems to be startlingly little *affirmative* support in the literature for the notion of critical mass. We understand at some level why it’s unhealthy *not* to enroll a critical mass of underrepresented students; but the research says little about the beneficial impacts of having a critical nucleus of African-American or Latino or other minority students. The higher education community could

profitably devote some attention to that largely ignored topic now that the concept of critical mass has received such prominence in Justice O'Connor's opinion in *Grutter*.

- We shouldn't brush off one of the criticisms leveled by Chief Justice Rehnquist in his dissenting opinion in *Grutter*: if race-conscious affirmative action is predicated on the notion that it's desirable to have a critical mass of under-represented class members among matriculated students, then shouldn't the *number* that constitutes a critical mass be the same from minority group to minority group? If it's necessary that eight percent of the student body be African American because that's the percentage that constitutes a critical mass, then why is it necessary to admit a class that's only four percent Latino? Why is the Latino critical mass half the size of the African-American critical mass? Why is the Native American critical mass one-sixth the size of the African American critical mass and one-third the size of the Latino critical mass?

Here's how the Chief Justice expressed the thought in his *Grutter* dissent:

... From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. ... [O]ne would have to believe that the objectives of "critical mass" ... are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But [Michigan officials] offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups. [Id. at 365-66.]

There may well be lucid reasons why the size of the requisite critical mass should vary from minority to minority—reasons based, for example, on historical and experiential differences among racial and ethnic groups, the different kinds of legal and practical racism they face, and cultural differences—but so far sociologists and ethnographers haven't done a convincing job of articulating those reasons.²

² In his *Hopwood* deposition, Dean Bollinger was asked, "Is there a different critical mass for different minorities?" His response: "Yes. I think there is. And I think it has to do with the, again with the sense of
[Footnote continued on next page.]

- Call me myopic, but I'm concerned about the similarity between an admissions program that uses critical mass theory to justify the use of race as one of many factors in admission (permissible under *Grutter*) and a quota or set-aside program (which has been clearly unlawful ever since *Bakke*). Distinguishing critical mass from a quota can involve some rhetorical sleight of hand. During the trial phase of the *Grutter* case, one University of Michigan Law School admissions committee member testified that "critical mass lies somewhere between 11% and 17% of the entire class." *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E. D. Mich. 2001). The number of admitted minority students fluctuated in a strikingly narrow range in the four-year period prior to the filing of the lawsuit—between 13.5 percent and 13.7 percent of the entering class. *Grutter v. Bollinger*, 288 F. 3d 732, 801 (6th Cir. 2002) (Boggs, J., dissenting). From the decision of the trial judge in *Grutter*:

... [B]y using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school has made the current admissions policy practically indistinguishable from a quota system. ... While the law school has not set aside a fixed number of seats for underrepresented minority students, as did the medical school in *Bakke*, there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure. ... [T]he fact of the matter is that approximately 10% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. The practical effect of the law school's policy is indistinguishable from a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. [137 F. Supp. 2d at 850-51.]

- (2) ***Where will we, and where must we, find ourselves in twenty-five years?*** Let's examine Justice O'Connor's "sunset" language again (page 15 of this outline): "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. *We expect that 25 years from now, the use of racial preferences will no longer be necessary* to further the interest approved today. [539 U.S. at 341-42, with emphasis added.]

What does that cryptic language mean? It's phrased in the language of *dictum*, not holding "*we expect*," not "*we hold*" or "*we decide*"). One reporter referred to it as

identification and with the sense of the psychological sense of what it means to be a member of that minority community within a larger community that is quite different, so of course in my view, of course it makes a very great difference which group you are a member of." Kumar Percy, ed., *HOPWOOD v. TEXAS* LITIGATION DOCUMENTS (published by William S. Hein & Co., Inc. in 2002), Vol. 16, *Bollinger Dep.*, p. 36.

“Justice O’Connor’s soft deadline” in an article that appeared the day after *Gratz* and *Grutter* were decided. *And see* Joel L. Selig, *The Michigan Affirmative Action Cases: Justice O’Connor, Bakke Redux, and the Mice that Roared But Did Not Prevail*, 76 *TEMPLE L. REV.* 579, 592-93 (2003):

It would be passing strange if Justice O’Connor’s stated “expectation” were regarded as a holding. The number of years—twenty-five—is completely arbitrary There was obviously no evidentiary basis for the Court to identify twenty-five years (as opposed to ten or fifty) as the appropriate endpoint for the Law School’s (or any other educational institution’s) consideration of race in its admissions process. Even if there were such an evidentiary foundation, any question of incorporating it into the judgment in the case before the Court would be for the district court to decide in the first instance, not for the Supreme Court to announce by ipse dixit. ... And in the realm of prognostication, it is worth remembering that in *Bakke*, decided in 1978, Justice Blackmun expressed the “hope” that “within a decade at the most” affirmative action programs would become unnecessary relics of the past; but he went on to say that “the story of *Brown v. Board of Education* ... , decided almost a quarter of a century ago, suggests that that hope is a slim one.”

In truth, Justice O’Connor’s stated expectation that twenty-five more years will be enough may be nothing more than a rhetorical sop to opponents of affirmative action. If so, it is questionable whether it belongs in the opinion of the Court. If her stated expectation is more than such a throwaway—if it is intended to have any operative precedential significance—then it may be viewed as an example of the legislative nature of some of Justice O’Connor’s jurisprudence. In either case, it seems both unnecessary and unwarranted. [Footnotes and citations omitted.]

- (a) What exactly is higher education expected to achieve by the year 2028? Is Justice O’Connor suggesting that, 25 years (today, 23 years) from now, it will be *impossible* for an institution to show that its affirmative action program is narrowly tailored to foster student-body diversity if race is used as any kind of factor at all in the admissions process? This is how Justice Thomas, in dissent, construes her remark: “I agree with the Court’s *holding* that racial discrimination in higher education admissions *will be illegal* in 25 years.” *Grutter*, 539 U.S. at 346-47 (emphasis added). But it’s worth noting that although two of the other dissenting justices—Rehnquist and Kennedy—express discomfort with Justice O’Connor’s 25-year rule, neither endorses Justice Thomas’s absolutist interpretation of it. At most, that interpretation appears to have attracted only two votes, Justice Thomas’s own and that of fellow dissenter Justice Scalia. A more reasoned interpretation of Justice O’Connor’s cryptic paragraph is that 25 years from now it will be harder than it is today—but not necessarily impossible—to show that a race-conscious affirmative action program

satisfies strict scrutiny. What *kind* of showing an institution would be required to make at that point is left entirely unilluminated.

- (b) Can it be done? Can existing affirmative action programs, together with other approaches to the recruitment and retention of diverse classes of matriculating students, render race-conscious affirmative action obsolete by the year 2028?

While it is of course next to impossible to answer that question today, two lines of scholarly analysis suggest reasons to be pessimistic:

- First, sociologists and economists have developed a considerable body of support for the contention that the country's largest ethnic and racial populations are not assimilating at rates comparable to rates of assimilation for other populations in the 19th and early 20th centuries. Almost sixty years ago, the sociologist E.W. Eckart produced pioneering research showing that rates of African American assimilation were lower by several orders of magnitude than rates of Irish, Italian and German assimilation during the early decades of the 20th century. Eckart advanced the startling conclusion that it would take 6,000 years for African Americans effectively to disappear as a separate American racial group. E.W. Eckart, *How Many Negroes "Pass"?*, 52 AM. J. OF SOCIOLOGY 498, 500 (1947). Since then, others have documented the extremely low rate (by historic standards) of assimilation of African Americans and Latino Americans. *See, e.g.*, Douglas S. Massey & Nancy A. Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians*, 52 AM. SOCIOLOGICAL REV. 802, 814 (1987); Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1933 (2001). By the year 2028, then, the degree to which our nation's two largest racial groups will still be perceived as separate and identifiable is likely to be imperceptibly diminished—if diminished at all—from what it is today.
- New economic research demonstrates that intergenerational income disparities are taking longer to disappear than economists believed a decade ago.³ In a newspaper article that appeared about a month after the decisions in *Gratz* and *Grutter*, Princeton University economist and NEW YORK TIMES columnist Alan Krueger posed an interesting question: if we know what the income gap between similarly educated black and white workers was when affirmative action started in the 1960s, and if we can track how much of that gap disappeared over the last two generations, then how many additional generations will it take to eliminate the gap entirely? The answer is that it will almost certainly take more than one

³ I won't try to explain the econometrics underlying this conclusion. Interested readers should start with Bhashkar Mazumder, *Earnings Mobility in the US: A New Look at Intergenerational Inequality* (Federal Reserve Bank of Chicago, December, 2001), available online at www.chicagofed.org/publications/workingpapers/papers/wp2001-18.pdf.

generation (the time between now and 2028), because the gap has proven more intractable than we suspected. From Alan B. Krueger, *Economic Scene: The Supreme Court Finds the “Mushball Middle” on Affirmative Action*, N.Y. TIMES, July 24, 2003:

How likely is it that racial gaps will be substantially eroded in 25 years, so that the use of racial preferences is no longer desirable? Is the year 2028 a logical endpoint for special efforts to ensure that underrepresented minority groups are given a fair chance in admissions or employment, or will the vestiges of past discrimination and unequal treatment still largely be with us then? ...

Although a definitive answer is impossible, estimates of the extent of income mobility from fathers to sons provide a rough forecast. Studies find that 40 to 60 percent of the gap in earnings between a particular individual and the average worker is closed from one generation to the next. ... In 1969, the average 30- to 39-year-old black male worker—who had attended separate and unequal schools and entered the labor force before the Civil Rights Act of 1964 barred discrimination—earned 37 percent less than the average white worker. This gap was mainly because of the legacy of discrimination.

If—and it is only a hypothetical if—the depressed income of black workers is not prevented from regressing to the mean because of subsequent discrimination, then the gap would be expected to close to 15 to 22 percent for the next generation, and to 6 to 13 percent when members of the third generation reach their 30’s, around a quarter century from now. ...

In other words: under the most optimistic of scenarios, there will be a gap—in all likelihood, a substantial gap—between the earnings of black workers and white workers 25 years from now. Would the existence of such a gap be sufficient to convince the 2028 version of the Supreme Court that race-conscious affirmative action is still an acceptable form of remediation?

- (3) ***Is there an effective surrogate for race?*** Could an institution insulate itself from all the potential legal exposure that comes with using race as an admissions criterion and instead substitute a race-neutral *surrogate*—e.g., “economically disadvantaged background,” “first-generation college,” etc.—that has some relationship to race but isn’t explicitly race-based?

Some widely respected observers have urged that we should abandon explicit reliance on race as a “plus” factor in the admission process and rely instead on so-called “correlatives.” See, for example, Hugh B. Price, *Fortifying the Case for Diversity and Affirmative Action*, CHRON. OF HIGHER ED., May 22, 1998, page B4; Donald M. Stewart, *Affirmative Action and the SAT*, TRUSTEESHIP, May, 1998, page 36. One persistent voice

for the substitution of “race-neutral” bases of admission is the United States Department of Education, which last year issued a lengthy report titled *Achieving Diversity: Race-Neutral Alternatives in American Education*. That report, available on the Department’s Web site at www.ed.gov/news/pressreleases/2004/03/03262004a.html, describes itself as an effort to “provide institutions with a ‘toolbox’ containing an array of workable race-neutral alternatives” to the kind of affirmative action program upheld by the Supreme Court in *Grutter*.

But research conducted by the Harvard Graduate School of Education challenges the notion that the substitution of correlatives for overt racial criteria can effectively foster racial diversity in a manner that avoids legal exposure. In fact, given the demographic reality of this country, where the large majority of people living below the poverty line are white, reliance on race-neutral surrogates inevitably benefits whites more than minorities. The result is diluted racial diversity—preferable to no diversity, perhaps, but not what overt reliance on race is capable of producing. And a byproduct, as many scholars have observed, is the substitution of a *retention* problem for today’s *recruitment and admission* problem. “When race-conscious admissions policies are outlawed, the easiest alternative for colleges seeking to admit significant numbers of minorities is to target high-poverty, low-achieving schools, because very few whites attend such schools. But the students from these schools will also be the least likely to succeed in college. It is extremely difficult to identify, using only nonracial criteria, those African-American and Latino applicants most likely to succeed in a selective college, because they are often middle-class students attending more competitive, less impoverished schools.” Gary Orfield, *Campus Resegregation and Its Alternatives*, in Gary Orfield & Edward Miller, *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* ch.1 (2001), available online at www.civilrightsproject.harvard.edu/research/books/call_chillingintro.php?-Page=2.

What about so-called “percent plans”? Three of the nation’s largest and most racially diverse states—California, Texas and Florida—have all adopted plans that in one form or another guarantee admission to the top few percent of each state’s high school graduating class. Proponents of percent plans (the United States Department of Education foremost among them) argue that automatic admission based on class rank would maintain significant levels of racial diversity, promote socioeconomic diversity, and insulate institutions from reverse discrimination lawsuits. But one recent study of percentage plans suggests they don’t promote racial diversity as efficiently as the kinds of race-based affirmative action plans upheld by the Supreme Court in *Bakke* and *Grutter*. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences* 59-60 (2003), a report of the Harvard Civil Rights Project (available online at <http://www.civilrightsproject.harvard.edu/research/affirmative-action/tristate.pdf>).

Finally, there are already clear signs that the same critics of affirmative action now arguing that percent plans are viable alternatives in their campaigns to outlaw affirmative

action will next target percent plans and their supportive outreach and aid components. Roger Clegg, general counsel of the anti-affirmative-action Center for Equal Opportunity, has been quoted as saying that percent plans “make no sense as a matter of policy” and raise constitutional and statutory problems. Ronald Roach, *Class-Based Affirmative Action: Battle Over Race-Conscious Approaches Pushes Idea to the Surface*, 20 BLACK ISSUES IN HIGHER ED. 22 (2003). Percent plans do not necessarily offer safe harbor for institutions wishing to immunize themselves from litigation or political attack.