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America Stands for Diversity

The University of Michigan and an unprecedented coalition of academic, business, civic, and professional groups are celebrating the landmark decisions of the U.S. Supreme Court in the Michigan affirmative action cases.[1] The University's six-year fight to preserve its First Amendment right to create a diverse student body has wrought an important victory for equal educational opportunity, as the U.S. Supreme Court affirmed its 1978 decision in *Regents of the University of California v Bakke*.[2]

As I wrote in the March issue of the *Bar Journal,* the stakes are huge in the battle over affirmative action.[3] The often rancorous debate regarding the constitutionality and fairness of the University of Michigan's admissions policies reflects the myriad of conflicting judicial opinions in the Fifth Circuit, Sixth Circuit, and Ninth Circuit Courts of Appeals.[4] The competing arguments and the resulting Supreme Court decisions in *Gratz v Bollinger* and *Grutter v Bollinger* were front-page news across the nation.

As expected, my March article sparked a similar debate in the pages of the *Bar Journal,* and three writers have disputed some or all of my arguments in support of affirmative action in the ensuing months. The *Journal* welcomed these competing points of view, as it should have, and I hope those writers and all of our readers feel that the Bar's treatment of this important issue has been fair.

Unfortunately, only one of the responses to the March article seriously discussed the facts in the cases.[5] Chetly Zarko, in his Speaking Out editorial, demonstrated that he had thoroughly researched the issues. Although he ultimately opposed the use of race in college admissions, he made it clear that "a vast array of arbitrary preferences [in admissions] negatively impact minorities and other individuals," and he noted the indifference of the plaintiffs' representatives to these problems.

I agree with Mr. Zarko that, in order to remedy the inequities in American education, "we need to repair the entire K–12 educational system, with a focus on those in economically depressed situations." I am compelled to argue, however, that this would not go far enough, fast enough. If we are to achieve our great nation's true potential, we have to open the portals of opportunity for those who traditionally have been disenfranchised from the American dream. The gates of elite colleges like the University of Michigan must swing wide for people of all racial and ethnic backgrounds, both to enhance the edifying nature of student life for all who enter, and to remedy the injustices that have created obstacles for people of color for generations.

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We are all familiar with Justice Lewis Powell's pronouncement in his plurality opinion in *Bakke* that public universities may use race as one of many admissions factors in pursuit of diverse student bodies. His delicate balancing of interests bore wonderful fruit: At highly selective schools like the University of Michigan, young people of all hues and ancestries learned how to talk to each other, to work together, and to question stereotypes that previously appeared to be axiomatic. Skeptics repeatedly questioned the benefits and the binding nature of the Powell opinion, however, and in *Hopwood v Texas,*[6] the Center for Individual Rights persuaded the Fifth Circuit Court of Appeals that Supreme Court decisions in government contracting and licensing cases since *Bakke* had established that the *Bakke* plurality opinion no longer bound the federal courts, giving new life to a national anti-affirmative action movement.

Fortunately, through the efforts of the University of Michigan and the large pro-diversity coalition in the Michigan cases, a series of federal court decisions, including in the Sixth Circuit Court of Appeals,[7] preserved the University of Michigan's diversity program while the cases were on appeal. The split of authority in the federal circuits made it inevitable that the Supreme Court would take up the critical constitutional issues raised in these cases.

The Supreme Court hearing on April 1 produced an electric atmosphere: chanting demonstrators ringed the Court building as University leaders, Members of Congress, and distinguished political and civil rights lawyers and activists in the courtroom listened to every word from the Justices and the presenting counsel with rapt attention. For weeks afterward, pundits waxed endlessly about the Justices' questions and motives, and

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their potential influences on the eagerly anticipated results.

Justice Sandra Day O'Connor's well prepared, searching inquiries of both petitioners and respondents at oral argument foreshadowed her thoughtful majority opinion in *Grutter* and her narrow concurrence in *Gratz.* She opined in *Grutter* that the University of Michigan Law School may promote diversity in admissions through "consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'competes with all other qualified applicants.'"[8] She reached her conclusion that a narrowly tailored affirmative action admissions plan is permissible to achieve the compelling governmental interest in diversity on the basis of overwhelming expert evidence presented by the University demonstrating the educational benefits of such plans, and in light of the record number of amicus curiae briefs asserting the need to prepare all students for an increasingly diverse workplace and society.[9] Justice O'Connor wrote:

> *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 military 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 principal mission to provide national security."*[10]

The resounding nature of the victory for educational diversity was not immediately apparent from media reports. Many commentators initially referred to the Supreme Court's holdings in the Michigan cases as a "split decision" because a 6–3 majority held that certain aspects of Michigan's undergraduate admissions plan were not sufficiently narrowly tailored to survive constitutional scrutiny. Although there was an outright victory for the University only in the Law School case, Chief Justice William Rehnquist acknowledged in his majority opinion in *Gratz* that *Grutter*'s holding on law school diversity applies to the undergraduate admissions program as well.[11] University of Michigan leaders have said that they will modify the undergraduate plan as needed to comply with the Court's decisions, vowing that they will use the Law School plan as a model as they exercise the University's academic freedom under the First Amendment to maintain a diverse undergraduate student body for the benefit of all students, consistent with the *Grutter* opinion.

Today, for the first time since *Bakke* was decided, we can say that a solid majority of the Supreme Court recognizes society's compelling interest in diversity, and the need for affirmative action to provide better educational opportunities for all students. The battle is not over, as the opponents of affirmative action have already announced a petition drive to ban affirmative action in Michigan. If successful here, they will, no doubt, promote similar initiatives in other states. Let us hope the cynics are wrong when they calculate that the majority will vote to suppress the inclusion of minorities in the mainstream of American society, further dividing our nation at a time when unity, tolerance of diversity, and equality of opportunity are so important to our national security and our continued development as a great nation.

Let us prove that today's America stands for diversity, for the benefit of all.✦

FOOTNOTES

1. *Gratz, et al. v Bollinger, et al.,* 539 US ___ (2003), is the undergraduate case, and *Grutter v Bollinger et al.,* 539 US ___ (2003) is the law school case.
2. 438 US 265 (1978).
3. As I knew would be the case when I began naming names of Michigan lawyers who worked on these cases in the March article, I left out some very important contributors to the University's defense of affirmative action. I hope that Elizabeth Barry and Charlotte Johnson of the University of Michigan will forgive me.
4. See, *Hopwood v University of Texas,* 236 F3d 1061 (CA 5, 2000); *Grutter,* supra; and *Smith v University of Washington,* 233 F3d 1188 (CA 9, 2001).
5. The other writers largely relied on platitudes without any discussion of the real-world issues facing the parties and the court in the Michigan cases. One writer went so far as to quote Justice Thurgood Marshall's opinion decrying racial discrimination in *Brown v Board of Education,* 347 US 483 (1954), without any analysis of the vastly different circumstances presented in the two cases. It is abundantly clear that Justice Marshall supported affirmative action. In *Bakke* he wrote:

   > It is because of a legacy of unequal treatment that we must now permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors of those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

   438 US at 401–02. Like Justice Marshall, Justice Sandra Day O'Connor distinguishes between racial classifications that exclude non-favored racial and ethnic groups and those that promote inclusion of all groups. *Grutter,* supra, at 35.

   Contrary to Vahe Tazian's argument, it is inaccurate to call the University of Michigan's diversity plan "race preferences" because there is no preference for any particular race, but rather a program designed to enhance educational values by including all racial and ethnic groups in the University's student body. Critics of affirmative action apparently use this "preference" terminology to promote the specious proposition that Michigan's program "prefers" students of color over white students, which is not the case. The University is overwhelmingly composed of white students, who, like the small cadre of their colleagues of color, are eminently qualified to be there. The proponents of affirmative action, who come from all racial and ethnic backgrounds, do not object to the predominant presence of white students; we merely seek, as the University does, to level the playing field so that all young people have the opportunity to contribute to and benefit from the rich learning environment at the University.
6. 236 F3d 1061 (CA 5, 2000).
7. *Grutter v Bollinger,* 288 F3d 732, 746, 749 (CA 6, 2002).
8. *Grutter,* slip opinion at 49, quoting *Johnson v Transportation Agency,* 480 US 616, 638 (1987).
9. Id., at 40.
10. Id., at 41.
11. *Gratz,* supra, slip opinion, p 20.